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Court of Appeals
Division III
State of Washington
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STATE OF WASHINGTON
5/21/2024
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Case #: 1030894

NO. 39307-1-III (consolidated with 39308-1-III)

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

KOLTEN ANDREW DEAN SMITH,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

RULES AND REGULATIONS

OTHER AUTHORITIES

1. IDENTITY OF PETITIONER

KOLTEN ANDREW DEAN SMITH requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Smith seeks review of an unpublished Decision of Division III of the Court of Appeals dated May 16, 2024. (Appendix "A" 1-10)

3. ISSUES PRESENTED FOR REVIEW

A. Is the Court of Appeals decision contrary to *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000), as well as its own decisions in *State v. Marcum*, 116 Wn. App. 526, 66 P.3d 690 (2003) and *State v. Level*, 19 Wn. App. 2d 56, 493 P.3d 1230 (2021)? *See*: RAP 13.4 (b)(1) and (2).

4. STATEMENT OF THE CASE

Kolten Andrew Dean Smith was charged with multiple offenses under separate Informations in Stevens County Superior Court. Following his convictions in the respective cases he appealed to Division III. Division III consolidated his cases under Cause Nos. 39307-1-III and 39308-9-III.

The respective Informations charged Mr. Smith with unlawful possession of a firearm second degree.

Count 2 of Cause No. 21 1 00085 33 states, in part:

> By way of this Information, the Prosecuting Attorney accuses you of the crime of **Unlawful Possession of a Firearm in the Second Degree**, Count 2, which is a violation of RCW 9.41.040 (2) (a)(i) and (b), … in that the said Kolten Andrew Dean Smith in the County of Stevens, State of Washington, on or about April 1, 2021, having previously been convicted … in this State or elsewhere of any felony … did unlawfully own, have in his possession or control, a firearm, to-wit: a .357 caliber revolver….

Count 1 of Cause No. 21 1 00227 33 states, in part:

> By way of this Information, the Prosecuting Attorney accuses you of the crime of **Unlawful Possession of a Firearm in the Second Degree**, Count 1, which is a violation of RCW 9.41.040 (2) (a)(i) and (b), … in that the said Kolten Andrew Dean Smith in the County of Stevens, State of Washington, on or about October 28, 2021, having previously been convicted … in this State or elsewhere of any felony … did unlawfully own, have in his possession or control, a firearm, to-wit: a .45 caliber pistol….

The pertinent facts in Cause No. 21 1 00085 33 are that the firearm was found under the driver's seat of the car. Mr. Smith was driving. He was alone in the car. His cousin testified to placing the gun under the seat. (RP 177, ll. 8-12; RP 356, ll. 3-5; RP 357, ll. 2-25)

The underlying facts in Cause No. 21 1 00227 33 are that the gun was on Mr. Smith's person. (RP 788, ll. 6-23)

Neither of the charging documents contained the essential element of "knowledge." Const. art I, § 22 requires that all essential elements of an offense be included in the charging document.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

"There are two elements of the crime of unlawful possession of a firearm: (1) the person knowingly possesses a firearm (2) after he has been previously convicted of a serious offense." *State v. Nielsen*, 14 Wn. App. 2d 446, 452, 471 P.3d 257 (2020).

Mr. Smith recognizes that his challenge to the respective Informations comes under the auspices of *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

> Under the first prong of *Kjorsvik*, the State may not substitute the inquiry on the adequacy of the charges with a review akin to harmless error. *The State cannot rely on trial testimony, jury instructions, or the failure to request a bill of particulars to cure a charging deficiency*, *State v. Holt*, 104 Wn.2d 315, 32-22, 704 P.2d 1189 (1985)…. The State bears the responsibility of notifying the defendant of the particular facts supporting the criminal accusation.

State v. Hugdahl, 195 Wn. 2d 319, 328, 458 P.3d 760 (2020). (Emphasis supplied.)

Mr. Smith asserts that neither charging document contains the necessary language, or any facts, that would allow the knowledge element to be inferred.

The Court of Appeals decision is an outlier. The decision runs counter to *State v. Anderson*, *supra*; *State v. Kjorsvik*, *supra; and State v. Hugdahl*, supra; as well as the Court of Appeals decisions in *State v. Marcum*, *supra*; and *State v. Level*, *supra*.

QUERY: Does the word "unlawful," in and of itself, supply the essential element of "knowledge" in order to sustain a conviction for unlawful possession of a firearm second degree?

ANSWER: No.

Even though the Court of Appeals decision says that the word "unlawful" is sufficient to establish the essential element of "knowledge" it is in error.

The decisions relied upon by the Court of Appeals, (*State v. Cuble*, 109 Wn. App. 362, 35 P.3d 404 (2001); *State v. Krajeski*, 104 Wn. App. 377, 16 P.3d 69 (2001); and *State v. Nieblas-Duarte*, 55 Wn. App. 376, 777 P.2d 583 (1998)), in making its determination, address Informations that used the phrase "unlawfully and feloniously." Those decisions equated that phrase to "knowledge" and have not been overturned.

State v. Taylor, 29 Wn. App.2d 319, 336 (2024) declared:

> Precedent requires the State to prove a subjective standard of "actual knowledge" whenever the State must prove the mens rea of knowledge. Washington Courts allow the jury to be instructed on a permissible presumption of actual knowledge by a finding of constructive knowledge. Despite this permissive presumption, the jury

> must still find subjective actual knowledge.

State v. Anderson, *supra*, must be followed by the appellate courts and as recognized in *State v. Marcum*, *supra*:

> The knowledge element must therefore appear in the body of the information. Or the information must include language from which the knowledge element can be inferred. *Simply to state that the offense charged is unlawful* possession is not enough.

(Emphasis supplied.)

The most recent case to address the interrelationship between the knowledge element and an Information using the word "unlawful" is found in *State v. Level*, *supra* at 63:

> The case law governing unlawful possession offenses shows the mere fact possession of a certain object is "unlawful" does not mean the possession was accompanied by a specific type of knowledge. Given the state of the law, an information's allegation that the defendant acted unlawfully is insufficient to convey an inference that the conduct was done with a mental state of knowledge. This is true even under the liberal standard of review applicable to challenges raised for the first time on appeal. [*State v. Kjorsvik*, *supra*] Thus, the inclusion of the adverb "unlawfully" in Mr. Level's amended

> information does not satisfy the requirements of sufficient notice.

The *Marcum* and *Level* cases are both Division III cases. The current decision by the Court of Appeals does not overrule either of those cases.

The phrase "unlawfully and feloniously" is not included in either of Mr. Smith's charging documents. The phrase "unlawfully and feloniously," as used by Division II in the *Krajeski* and *Cuble cases,* and Division I in *State v. Nieblas-Duarte,* 55 Wn. App. 376, 381, 777 P.2d 583 (1989) (Appendix "B", fn.5, discussing cases which equate "unlawful and felonious" to "knowledge," while distinguishing cases that declare "unlawful," in and of itself, as insufficient to meet the "knowledge" requirement) is equivalent to "knowledge."

The Court of Appeals decision does not point to a single case that indicates that the word "unlawful" is the equivalent of "knowledge." "Unlawful" means "not authorized by law, illegal." BLACKS LAW DICTIONARY (9th ed. 2009)

6. CONCLUSION

The failure of the State to include the essential element of "knowledge" in the respective Informations charging Mr. Smith with the offense of unlawful possession of a firearm second degree precludes the determinations of guilt made by the respective juries. The State violated Const. art I, § 22 insofar as the essential elements rule is concerned.

The Court of Appeals decision is in contravention of RAP 13.4 (b)(1) since it conflicts with *State v. Anderson, supra* as well as *State v. Kjorsvik, supra* and *State v. Hugdahl, supra.*

The Court of Appeals decision is also in contravention of RAP 13.4 (b)(2) by being in conflict with its own cases of *State v. Marcum, supra* and *State v. Level, supra*.

Mr. Smith respectfully requests that the Court of Appeals decision should be reversed and the case remanded with directions to dismiss the convictions for unlawful possession of a firearm second degree in the respective cases.

/

/

/

CERTIFICATE of COMPLIANCE: *I certify under penalty of perjury that this document contains 1390 words, excluding the parts of the document exempted from the word count by RAP 18.17.*

DATED this 21st day of May, 2024.

Respectfully submitted,

s/ Dennis W. Morgan_____
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APPENDIX "A"

FILED
MAY 16, 2024
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 39307-1-III
Respondent,	)	Consolidated with
	)	No. 39308-9-III
v.	)	
	)	
KOLTEN ANDREW DEAN SMITH,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

COONEY, J. — Kolten Smith was convicted of two counts of unlawful possession of a firearm in the second degree stemming from two different cases. The cases were consolidated for appeal. On appeal Mr. Smith argues that the informations were defective because they failed to allege that he "knowingly" possessed the firearms. We disagree and affirm.

BACKGROUND

Mr. Smith was charged with, among other crimes, two counts of unlawful possession of a firearm in the second degree resulting from two separate events. The cases were consolidated for purposes of this appeal. Mr. Smith had previously been convicted of a "serious offense" in the State of Washington and was therefore prohibited from possessing firearms.

UNLAWFUL POSSESSION OF THE .357 CALIBER REVOLVER
(CASE NO. 21-1-00085-33)

On April 1, 2021, Sergeant Randall Russell and Deputy Ryan Taylor were dispatched to a burglary at a home located on Buck Creek Road in Stevens County, Washington. While processing the scene, Sergeant Russell and Deputy Taylor observed a burgundy Volvo drive by toward the closed end of the road. Sergeant Russell observed that the driver of the Volvo matched the description of the burglary suspect. The driver of the vehicle turned out to be Mr. Smith. Mr. Smith was detained and a search of his vehicle yielded a .357 caliber revolver.

Mr. Smith was charged with attempted residential burglary, unlawful possession of a firearm in the second degree, possession of stolen property in the third degree, and driving while license suspended or revoked in the second degree. For the unlawful possession of a firearm charge, the information read:

> COUNT 2
>
> By way of this Information, the Prosecuting Attorney accuses you of the crime of **Unlawful Possession of a Firearm in the Second Degree**, Count 2, which is a violation of RCW 9.41.040(2)(a)(i) and (b), the maximum penalty for which is 5 yrs. imprisonment and/or $10,000 fine, plus restitution, assessments and court costs, in that the said Kolten Andrew Dean Smith in the County of Stevens, State of Washington, on or about April 1, 2021, having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession, or a domestic violence crime, or violation of the provisions of a protection order or no-contact order restraining or excluding him from a residence, did unlawfully own, have in his possession or control a firearm, to-wit: a .357 caliber revolver;

> Contrary to RCW 9.41.040(2)(a)(i) and (b), and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 7. Before the trial court, Mr. Smith did not challenge the sufficiency of the information.

Following trial, a jury acquitted Mr. Smith of the charges of possessing stolen property and residential burglary but found him guilty of the lesser included offense of criminal trespass. The jury also found Mr. Smith guilty of unlawful possession of a firearm in the second degree. The charge of driving while license suspended was dismissed on the State's motion.

UNLAWFUL POSSESSION OF THE .45 CALIBER PISTOL
(CASE NO. 21-1-00227-33)

On October 28, 2021, Deputy John Knight was dispatched to the Loon Lake Gas and Grocery to look for Mr. Smith, who had an outstanding warrant for his arrest. Deputy Knight identified Mr. Smith in the store and told him to stop. In response, Mr. Smith ran to the back exit of the store and Deputy Knight gave chase. Deputy Knight was eventually able to catch up with Mr. Smith and push him to the ground to effectuate an arrest. Once Deputy Knight gained control of Mr. Smith, he asked Mr. Smith if he had any weapons. Mr. Smith responded, "[Y]es, it's under my jacket, that's what I was trying to get to." Rep. of Proc. (RP) at 788. Deputy Knight unzipped Mr. Smith's jacket and discovered he was wearing a shoulder holster that contained a 1911 .45 caliber pistol.

Mr. Smith was charged with unlawful possession of a firearm in the second degree, obstructing a law enforcement officer, possession of a stolen motor vehicle, three counts of possessing stolen property in the second degree, and identity theft in the second degree. For the unlawful possession of a firearm charge, the information read:

> COUNT 1
>
> By way of this Information, the Prosecuting Attorney accuses you of the crime of **Unlawful Possession of a Firearm in the Second Degree**, Count 1, the maximum penalty for which is 5 yrs. imprisonment and/or $10,000 fine, plus restitution, assessments and court costs, in that the said Kolten Andrew Dean Smith in the County of Stevens, State of Washington, on or about October 28, 2021, having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession, or a domestic violence crime, or violation of the provisions of a protection order or no-contact order restraining or excluding him / her from a residence, did unlawfully own, have in her [sic] possession or control a firearm, to-wit: a .45 caliber pistol;
>
> Contrary to RCW 9.41.040(2)(a)(i) and (b), and against the peace and dignity of the State of Washington.

CP at 413. Before the trial court, Mr. Smith did not challenge the sufficiency of the information.

Following trial, a jury found Mr. Smith guilty of unlawful possession of a firearm in the second degree, obstructing a law enforcement officer, and three counts of possession of stolen property. The jury was unable to reach a unanimous verdict on the possession of a stolen vehicle charge and the identity theft charge.

Mr. Smith appeals.

ANALYSIS

On appeal Mr. Smith argues that the informations were constitutionally defective because they failed to apprise him of the knowledge element of the crime of unlawful possession of a firearm in the second degree. We disagree.

An information is constitutionally defective if it fails to list the essential elements of the crime. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). An essential element is one whose specification is necessary to establish the illegality of the behavior charged. *Id*. Requiring the State to list the essential elements in the information protects the defendant's right to notice of the nature of the criminal accusation, guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *Id*. We review the constitutional adequacy of a charging document de novo. *State v. Goss*, 186 Wn.2d 372, 375-76, 378 P.3d 154 (2016).

A defendant may raise an objection to the charging document at any time, but there is a presumption in favor of the validity of the charging documents when the challenge is made for the first time on appeal. *State v. Canela*, 199 Wn.2d 321, 328, 505 P.3d 1166 (2022). When, as here, a charging document is challenged for the first time on appeal, we construe it liberally. *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Under the liberal standard, this court has "considerable leeway to imply the

necessary allegations from the language of the charging document." *State v. Kjorsvik*, 117 Wn.2d 93, 104, 812 P.2d 86 (1991).

We use a two-pronged test to resolve challenges to the sufficiency of the charging document: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Id.* at 105-06.

Under the first prong, we look solely to the face of the charging document. *Id.* at 106. "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." *Id.* at 109. A charging document satisfies the first prong if it includes the essential elements of the offense even if it does not contain the exact statutory language. *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). Further, missing elements may be implied if the language of the information supports such a result. *Id*. However, "[i]f the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." *State v. Campbell*, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995).

If the necessary elements are not found or fairly implied in the information, prejudice is presumed and we reverse without reaching the second prong and the question of prejudice. *Zillyette*, 178 Wn.2d at 163; *State v. Pry*, 194 Wn.2d 745, 753, 452 P.3d

536 (2019). However, if the necessary elements appear in any form in the information, or by fair construction can be found in the information, then a defendant who can demonstrate actual prejudice is entitled to have their conviction reversed. *Campbell*, 125 Wn.2d at 802.

NECESSARY ELEMENTS OF THE CRIME

RCW 9.41.040(2)(a) defines unlawful possession of a firearm in the second degree as:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, accesses, has in the person's custody, control, or possession, or receives any firearm:
>
> (i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of [a]ny . . . felony not specifically listed as prohibiting firearm possession under subsection (1) of this section.

Additionally, our Supreme Court has held that knowledge is an essential element of unlawful possession of a firearm. *State v. Anderson*, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000).

In *State v. Krajeski* we held that the phrase "'unlawfully and feloniously'" adequately conveyed the "guilty knowledge" element of unlawful possession of a firearm. 104 Wn. App. 377, 386, 16 P.3d 69 (2001) (quoting *State v. Nieblas-Duarte*, 55 Wn. App. 376, 378, 380-82, 777 P.2d 583 (1989)). In *Krajeski*, the information stated, in part, the defendant "did *unlawfully and feloniously* own, have in his possession, or under

his control a firearm." *Id.* at 382 (emphasis added). The *Krajeski* court noted that, "It has long been the law in Washington that the phrase 'unlawfully and willfully' in an information sufficiently alleges criminal knowledge." *Id.* at 386 n.3. In *State v. Cuble* we came to the same conclusion. 109 Wn. App. 362, 367-68, 35 P.3d 404 (2001).

> Contrariwise, in *State v. Marcum*, the information accused Mr. Marcum of:
>
> COUNT I: UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, RCW 9.41.040(1)(a); . . . committed as follows, to-wit:
>
> > That [he] . . . did own or have in his/her possession or control a firearm, to-wit: [described] after having been convicted [of a serious offense]. . . .

116 Wn. App. 526, 533, 66 P.3d 690 (2003) (alterations in original). In *Marcum* we held that the information was deficient because the knowledge element did not appear "in the body of the information." *Id.* at 535. Instead, the description of the act allegedly constituting the crime stated Mr. Marcum, "'in violation of RCW 9.41.040(1)(a), did own or have in his/her possession or control a firearm.'" *Id.* There, we reasoned that the State could not "rely on the statutory language for the information because the statute is silent on knowledge as an element." *Id.* at 534-35. *Marcum* specifically distinguished the information at issue from those in *Cuble* and *Krajeski* where the knowledge element could be inferred by the phrase "'unlawfully and feloniously.'" *Id.* (quoting *Cuble*, 109 Wn. App. at 368).

Here, the informations at issue are comparable to those in *Krajeski* and *Cuble* rather than the information in *Marcum*. Both informations stated, in relevant part: "Kolten Andrew Dean Smith . . . did *unlawfully* own, have in his possession or control a firearm." CP at 7, 413 (emphasis added). The word "unlawfully" sufficiently alleged criminal knowledge.

Mr. Smith points to *State v. Level* where we held that inclusion of the word "'unlawfully'" in the information was not sufficient to allege "'knowledge.'" 19 Wn. App. 2d 56, 61-62, 493 P.3d 1230 (2021). However, *Level* is distinguishable from *Cuble* because it specifically dealt with the knowledge element of possession of stolen property, not unlawful possession of a firearm. *Id.* at 61. As the *Level* court recognized:

> [T]he adverb 'unlawfully' can convey a mental state element . . . when permitted by common sense inferences. Thus, where the mental state required for an offense is straightforward or where the facts alleged in the charge would be hard to accomplish without the defendant holding the required mental state, the requisite mental state may be inferred under a liberal standard of review.

Id. at 61-62. Thus, *Level* is unpersuasive.

In presuming the validity of the informations and in construing them liberally due to the absence of an objection below, the informations were sufficient to give Mr. Smith notice of the nature of the criminal accusations.

PREJUDICE

Mr. Smith fails to address the issue of prejudice in his briefing. Even had we decided the first issue in his favor, we would be required to affirm his convictions due to his failure to show that the imprecise language in the informations prejudiced him.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Pennell, J.

APPENDIX "B"

State v. Reynolds, 229 Or. 167, 172, 366 P.2d 524, 526 (1961).[5] Moreover, "feloniously" has been acknowledged by the Washington court to mean "'with intent to commit a crime.'" *State v. Smith*, 31 Wash. 245, 248, 71 P. 767 (1903). Indeed, the term "felonious" is legally defined as a "technical word of law [that] means done with intent to commit crime, *i.e.* criminal intent." Black's Law Dictionary 555 (5th ed. 1979). We therefore hold that because the Nieblas-Duarte information contains the phrase "unlawfully and feloniously," it conveys the knowledge element and meets constitutional criteria.

---

[5]Cases holding sufficient indictments or informations which do not explicitly aver knowledge or intent on the ground those elements can be inferred from "feloniously," or "unlawfully and feloniously," include: *Howenstine v. United States*, 263 F. 1, 4 (9th Cir. 1920); *United States v. O'Connor*, 135 F. Supp. 590, 592-93 (D.D.C. 1955), *rev'd on other grounds*, 240 F.2d 404 (D.C. Cir. 1956); *Thomas*, 522 P.2d at 530-31; *Gallegos v. People*, 161 Colo. 158, 161, 420 P.2d 409, 410 (1966); *Thomas v. State*, 278 So. 2d 469, 471 (Miss. 1973); *State v. Ward*, 569 S.W.2d 249, 250 (Mo. Ct. App. 1978); *State v. Shedoudy*, 45 N.M. 516, 118 P.2d 280, 287 (1941); *State v. Hargon*, 2 Or. App. 553, 470 P.2d 383, 384 (1970); *Gonzales v. State*, 551 P.2d 929, 931 (Wyo. 1976); *see also People v. Willett*, 102 N.Y. 251, 6 N.E. 301, 302 (1886) (pleading alleging that defendant "'[d]id feloniously steal'" sufficient to aver criminal intent); *State v. Halpin*, 16 S.D. 170, 91 N.W. 605 (1902) (feloniously, when applied to an act, means the act was done with criminal intent). Numerous additional cases holding generally that feloniously implies criminal intent are cited in *State v. Green*, 60 Wis. 2d 570, 211 N.W.2d 634, 635-36 (1973) (Hansen, J., dissenting).

On the other hand, many courts hold that unlawfully, used alone, does not aver a mens rea element. *See, e.g., United States v. Pupo*, 841 F.2d 1235, 1238-39 (4th Cir.), *cert. denied*, ___ U.S. ___, 102 L. Ed. 2d 87, 109 S. Ct. 113 (1988); *United States v. Morrison*, 536 F.2d 286, 289 (9th Cir. 1976); *Hughes v. United States*, 338 F.2d 651, 652 (1st Cir. 1964); *State v. Parks*, 161 W. Va. 511, 243 S.E.2d 848, 850 (1978); *Embry v. State*, 229 Ind. 179, 96 N.E.2d 274, 275 (1951). Others find unlawfully or feloniously do not aver a mental state element for reasons unique to the case or jurisdiction. *E.g., State v. Schneider*, 60 Wis. 2d 563, 211 N.W.2d 630, 632-33 (1973) (under Wisconsin law, feloniously describes the gravity of a crime, it does not allege a mental state). One authority states "[a]n allegation that an act was done 'feloniously' or 'unlawfully' is not a sufficient allegation of criminal intent." 1 C. Wright, *Federal Practice* § 125, at 378-79 (2d ed. 1982). Another, noting that the cases are inconsistent, states that courts are "more willing to find certain elements alleged by implication than others", and that "the element of mens rea ordinarily will require a more explicit allegation." 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.2, at 453 (1984).

NO. 39307-1-III (consolidated with 39308-9-III)

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Plaintiff, Respondent, vs. KOLTEN ANDREW DEAN SMITH, Defendant, Appellant.	)	STEVENS COUNTY NO. 21 1 00085 33 & 21 1 00227 33 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 21st day of May, 2024, I caused a true and correct copy of the *Petition for Discretionary Review* to be served on:

COURT OF APPEALS, DIVISION III — E-FILE
Attn: Tristen Worthen, Clerk
500 N Cedar St
Spokane, WA 99201

STEVENS COUNTY PROSECUTOR'S OFFICE E-FILE
Attn: Appeals
Prosecutor.appeals@stevenscountywa.gov

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CERTIFICATE OF SERVICE

May 21, 2024 - 10:32 AM

Transmittal Information

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Superior Court Case Number:	21-1-00085-2

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