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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY [Signature]  
DEPUTY

NO. 39570-3-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

BOW STAR HALL,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable Richard Brosey, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The State presented insufficient evidence to support a conviction for custodial assault and resisting arrest.

2. Appellant's separate convictions for resisting arrest and custodial degree assault violated constitutional double jeopardy prohibitions.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether there was sufficient evidence to uphold appellant Bow Hall's convictions for custodial assault and resisting arrest beyond a reasonable doubt?

2. Constitutional double jeopardy prohibitions are violated where two prosecutions are the same in law and fact. Did appellant's separate prosecutions for resisting arrest and custodial assault violate double jeopardy prohibitions?

**C. STATEMENT OF THE CASE**

**1. Procedural history:**

Bow Hall was charged by amended information filed in Lewis County Superior Court with custodial assault, contrary to RCW 9A.36.100(1)(c)(i) and resisting arrest, contrary to RCW 9A.76.040. Clerk's Papers [CP] 123-24.

The court denied a defense motion to suppress pursuant to CrR 3.6 on May 29, 2009. 1Report of Proceedings [RP] at 40.<sup>1</sup> The court found that Community Correction Officers Matt Kelley and Brett Curtright were invited into a house in which Bow Hall was located by Mr. Hall's brother, that they had probable cause to arrest Mr. Hall for violations of the terms of his community custody, and that they were lawfully inside the house. 1RP at 41-44. CP 47-49. Findings and conclusions were entered June 4, 2009. CP 47-49.

Pursuant to ER 404(b), the parties stipulated that there was sufficient evidence that Mr. Hall committed three prior bad acts involving contact with Lewis County law enforcement. The court found, however, that any probative value of the contact was far outweighed by its prejudicial effect. 1RP at 50-51. Findings and conclusions were entered June 4, 2009. CP 45-46.

Mr. Hall was tried by a jury on June 4, 2009, the Honorable Richard Brosey presiding. The morning of trial the court heard a suppression motion pursuant to CrR 3.5, but granted counsel's request to conclude the testimony

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<sup>1</sup> The record consists of three volumes.  
1RP May 29, 2009, CrR 3.6 Hearing, ER 404(b) hearing, and arraignment,  
2RP June 4, 2009, jury trial,  
3RP June 24, 2009, sentencing hearing.

before the conclusion of the hearing. 2RP at 26.

The court did not give an instruction for self defense requested by defense. 2RP at 112. The court noted that there was no evidence of imminent danger of serious injury or death and that Mr. Hall did not testify that he bit Community Correction Officer Brett Curtright in self defense, and therefore did not rise to the level of self defense. 2RP at 112, 113.

The jury found Mr. Hall guilty of both offenses as charged in the amended information. CP 26, 27.

The court sentenced Mr. Hall to a standard range sentence of six months for Count I, and 365 days with 185 days suspended for Count II, to be served concurrently. CP 18; 3RP at 7.

Timely notice of appeal was filed on July 10, 2009. CP 4. This appeal follows.

**2. Substantive facts.**

Community Correction Officers [CCO] Matt Kelley and Brett Curtright went to a residence in Onalaska, Washington on April 14, 2009. 2RP at 34. They went to the house to do a “ten day home contact” for Jeff Nelson, a new offender in their caseload. 2RP at 34. CCOs are required to inspect houses of new offenders within ten days to make sure the offender is

staying at that address. 2RP at 34. In this case, Mr. Nelson was supposed to be staying in a bus located next to the house. 2RP at 35. They went to the bus but nobody was inside, so they went to the house and CCO Kelley asked for Mr. Hall, who was also supervised by CCO Kelley. 2RP at 35. The door was opened by Mr. Hall's brother, who invited the CCOs into the house. 2RP at 35. Mr. Hall was seated on a couch in the house. 2RP at 36. CCO Kelley believed that there was a warrant for Mr. Hall's arrest. 2RP at 36, 76. Mr. Hall stated that there was not a warrant. 2RP at 36. The CCOs believed that Mr. Hall was in violation of the conditions of his community custody and told him that they were taking him into custody. 2RP at 37, 38. CCO Kelley said that Mr. Hall said that he was not going to go and that they should call "real" police, and became verbally abusive to them. 2RP at 37, 38, 42. This went on for ten to fifteen minutes, at which time CCO Curtright called dispatch on his cell phone, and as he did, Mr. Hall stood up and walked past him, picked up a backpack, and said that if he was going to jail he was going to first take a shower. 2RP at 43, 44, 77, 78. CCO Curtright told him he had to remain on the couch until the sheriff arrived. 2RP at 43. He sat down for a few seconds, then stood up again and walked past him. 2RP at 43. CCO Curtright grabbed Mr. Hall's right arm and pushed him onto the couch. 2RP

at 44. Mr. Hall pushed him back with his legs and CCO Curtright pushed him to the ground. 2RP at 79. CCO Curtright stated that he turned him around onto his stomach and as he was trying to control his hands to put restraints on him, Mr. Hall bit his left forearm. 2RP at 46, 49, 80.

Mr. Hall testified in his own defense that he had no intention of assaulting CCO Curtright. He stated that he left the living room to go to the bathroom and that as he walked around a coffee table in the living room CCO Curtright hit him in the back and that he fell, hit the couch, bounced off it, and then hit the ground. 2RP at 95. He stated that CCO Curtright reached around and grabbed his left hand and started to put it behind his back with his knee in the small of his back. 2RP at 96. He stated that he was face down with his left hand behind his back and his airway was obstructed by CCO Curtright's forearm, so Mr. Hall bit his arm. 2RP at 96, 97.

#### **D. ARGUMENT**

1. **THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT MR. HALL WAS GUILTY OF CUSTODIAL ASSAULT AND RESISTING ARREST.**

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any

rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992).

Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928. Here, Mr. Hall was charged and convicted of custodial assault and resisting arrest. In order to sustain these convictions, the State bore the burden of proving beyond a reasonable doubt that Mr. Hall in fact intentionally assaulted CCO Curtright and intentionally pretend a peace officer from lawfully placing him under arrest. The sum of the State’s evidence on these charges is the testimony of CCO Curtright—that he was trying to restrain Hall by reaching across his face, and that as he did, he bit his left forearm. RP at 45, 49.

These facts do not support a finding beyond a reasonable doubt of the

essential element of the crime of custodial assault as set for in Instruction No. 7 that Hall intentionally assaulted CCO Curtright, and in Instruction No. 10 that Mr. Hall intentionally resisted arrest. In Instruction No. 7, the court defined assault as follows:

An assault is an intentional touching or act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an intentional striking of another person that is harmful or offensive, regardless of whether any actual physical harm is done to the other person.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 37.

While it is true that this definition does not constitute alternative means of committing assault, see *State v. Smith*, 159 Wn.2d 778, 155 P.3d 873 (2007), the State must still elicit evidence beyond a reasonable doubt of any of these three definitions of assault. Based on the evidence presented in the instant case, the State cannot do so. Similarly, the State must present evidence that Mr. Hall intentionally prevented or attempt to prevent a peace officer from lawfully arresting him. CP 40.

There is no evidence presented that Mr. Hall intentionally assaulted CCO Curtright. Rather the evidence establishes that Mr. Hall bit him while the CCO was reaching across his face because Mr. Hall could not breathe. It cannot be said that Mr. Hall intentionally bit CCO Curtright. Mr. Hall testified that he bit CCO Curtright's arm because he was obstructing his whole face, that his airway was obstructed, and that CCO Curtright "stuffed" his arm in his mouth. 2RP at 96, 97.

The totality of the evidence does not support a conclusion that Mr. Hall intentionally assaulted CCO Curtright under any of definitions of assault as set forth in Instruction No. 7, or that he resisted arrest as set forth in Instruction No. 10. Therefore, the evidence presented does not support the jury's verdict of custodial assault or resisting arrest. This Court should reverse and dismiss Mr. Hall's convictions for custodial assault and resisting arrest.

**2. THE SEPARATE CONVICTIONS FOR RESISTING ARREST AND CUSTODIAL ASSAULT VIOLATED CONSTITUTIONAL DOUBLE JEOPARDY PROHIBITIONS.**

The United States and Washington State constitutions protect against double jeopardy. U.S. Const. amend. V;<sup>2</sup> Wash. Const. art. 1 § 9.<sup>3</sup>

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<sup>2</sup>The Fifth Amendment provides in relevant part, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

The Double Jeopardy Clause of the Fifth Amendment offers three separate constitutional protections coextensive in Washington. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). "One aspect of double jeopardy protects a defendant from being punished multiple times for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). A conviction and sentence will violate the constitutional prohibition against double jeopardy if under the "same evidence" test, the two crimes are the same in law and fact. *Adel*, 136 Wn.2d at 632. Washington's "same evidence" test mirrors the federal "same evidence" test adopted in *Blockburger*. *Adel*, 136 Wn.2d at 632.

Application of the "same evidence" test compels the conclusion that Mr. Hall's convictions for resisting arrest and custodial assault violated double jeopardy principles. Only the custodial assault count required proof of an element not contained in the resisting arrest, namely, the alleged assault

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<sup>3</sup> Article 1, § 9 provides in relevant part, "No person shall be compelled in any criminal case to . . . be twice put in jeopardy for the same offense ."

itself. Therefore, under the *Blockburger* test, the conviction for resisting arrest violated double jeopardy principles.

Under RCW 9A.76.040(1): "A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." Custodial assault required the State to prove that Mr. Hall, "[a]ssault[ed] a full or part-time community correction officer while the officer is performing official duties." RCW 9A.36.100(1)(c)(i). Here, each of the statutory provisions does not require proof of an independent fact—both require intent to interfere with official duty. In the first it is to prevent an officer from conducting a lawful arrest, and in the latter it is to prevent a corrections officer from performing his or her duties. Assault under RCW 9A.36.100(1)(c)(i) necessarily requires an assault; resisting arrest does not. Resisting arrest requires no proof independent of that also required for an assault charge under RCW 9A.36.100(1)(c)(i). See RCW 9A.76.040(1). Here, the two offenses are the same for purposes of double jeopardy. Application of the "same evidence" test compels the conclusion that the conviction for resisting arrest and custodial assault violated double jeopardy principles. The same evidence was used to establish both charges. The evidence showed that after the community correction officers told Mr. Hall

that he was being placed under arrest Mr. Hall did not cooperate and told them to call “real” officers. After ten to fifteen minutes, he got up from the couch and began walking to another room, at which point he was pushed onto the couch, turned on his back, and CCO Curtright attempted to put him in hand restraints. In the course of doing so, Mr. Hall bit his forearm, constituting an attempt to prevent the CCO from lawfully arresting Mr. Hall and also constituting an assault. Because under the “same elements” test the offenses of which Mr. Hall was convicted are the same in law and the same in fact, reversal and dismissal is required. *Blockberger*, 284 U.S. at 304; *State v. Dixon*, 509 U.S. 688, 698, 700-01, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

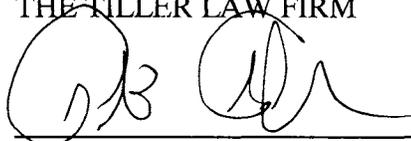
**E. CONCLUSION**

Based on the foregoing, Bow Hall respectfully requests this court to reverse and dismiss his convictions.

DATED: February 12, 2010.

Respectfully submitted,

THE TILLER LAW FIRM

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PETER B. TILLER - WSBA 20835  
Of Attorneys for Bow Hall

EXHIBIT A

STATUTES

**RCW 9A.52.025**

Residential burglary.

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

(2) Residential burglary is a class B felony. In establishing sentencing guidelines and disposition standards, the sentencing guidelines commission and the juvenile disposition standards commission shall consider residential burglary as a more serious offense than second degree burglary.

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>vs.<br><br>BOW STAR HALL,<br><br>Appellant. | COURT OF APPEALS NO.<br>39570-3-II<br><br>LEWIS COUNTY CAUSE NO.<br>09-1-00237-6<br><br>CERTIFICATE OF MAILING |
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The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were hand delivered to the Court of Appeals, Division 2, and copies were mailed by first class mail to Bow Star Hall, Appellant, and Theodore Miller, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on February 12, 2010, at the Centralia, Washington post office addressed as follows:

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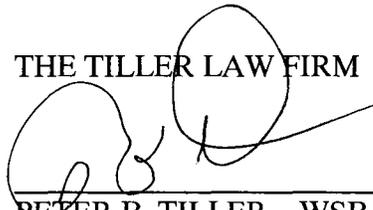
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