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NO. 51198-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

DANIEL WARREN SPARKS, Jr.,

Appellant.

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error .....	1
2. Issue Pertaining to Assignment of Error .....	1
C. STATEMENT OF THE CASE	
1. Factual History .....	2
2. Procedural History .....	6
D. ARGUMENT	
<b>UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND     UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT,     THIS COURT SHOULD VACATE THE DEFENDANT'S CONVICTION     FOR THIRD DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE     DOES NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT     STRUCK THE OFFICER AS ALLEGED IN THE INFORMATION</b> .....	<b>8</b>
E. CONCLUSION .....	13
F. APPENDIX	
1. Washington Constitution, Article 1, § 7 .....	14
2. United States Constitution, Fourteenth Amendment .....	14
G. AFFIRMATION OF SERVICE .....	15

## TABLE OF AUTHORITIES

Page

### *Federal Cases*

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	9
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) .....	10

### *State Cases*

<i>Puget Sound Tug &amp; Barge Co.</i> , 13 Wn.2d 485, 125 P.2d 681 (1942) ...	11
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983) .....	9
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	10
<i>State v. Johnson</i> , 12 Wn.App. 40, 527 P.2d 1324 (1974) .....	10
<i>State v. Jones</i> , 34 Wn.App. 848, 664 P.2d 12 (1983) .....	11
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972) .....	9
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973) .....	10
<i>State v. Walden</i> , 67 Wn.App. 891, 841 P.2d 81 (1992) .....	11

### *Constitutional Provisions*

Washington Constitution, Article 1, § 3 .....	9
United States Constitution, Fourteenth Amendment .....	9

## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

Substantial evidence does not support the defendant's conviction in count I for third degree assault of a police officer because the evidence seen in the light most favorable to the state fails to prove that the defendant struck the officer as alleged.

### ***Issues Pertaining to Assignment of Error***

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a defendant's conviction for third degree assault of a police officer when the evidence presented at trial, even when seen in the light most favorable to the state, fails to prove that the defendant struck the officer as alleged?

## STATEMENT OF THE CASE

### *Factual History*

At 8:53 pm on the evening of June 24, 2017, Kayla M. Sparks called 911 to report a domestic dispute at 3128 Garfield Street in Longview between herself and her husband. RP I 78-79.<sup>1</sup> Although she refused to give any details concerning what was happening, she urged the 911 dispatcher to send the police to help her extricate her children from the residence. *Id.* Four uniformed Longview Police officers responded within a few minutes with each driving a marked patrol vehicle. RP I 78-79, 100-101, 140-141, 157-158. They were: Officer Adam Surface, Officer Ralph Webb, Officer Matthew Hartley, and Officer James Bessman. *Id.* Officer Webb also had a civilian “ride along” by the name of Amy Boultinghouse in his patrol car. RP I 101-102. Ms Boultinghouse is a registered nurse. RP I 118.

Officers Surface and Webb were the first to arrive. RP I 78-79, 104-105. They found Kayla Sparks standing in the street holding her cell phone. *Id.* When the officers exited their vehicles Ms Sparks confirmed that she

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<sup>1</sup>The record on appeal includes two verbatim reports of proceedings. The transcriptionist did not continuously number them. As a result, the first volume is referred to herein as “RP I [page #]. The second is referred to herein as “RP II [page #].

was in a domestic dispute with her husband but she refused to say anything other than her request that the officers help her retrieve her children out of the house. *Id.* As the two officers were speaking with Ms. Sparks, her husband Daniel<sup>2</sup> exited the front door, and walked partway down a straight wooden ramp that lead up to the porch. RP I 81-84, 104-105. The ramp has wooden side rails made from two by fours. *Id.* He yelled at his wife “Don’t lie to them,” and then proceeded to yell obscenities at the officers while demanding that they leave. *Id.*

At this point the two officers approached Daniel, telling him to calm down and tell them what was happening. RP I 81-84, 104-108. When the officer approached Daniel turned and walked back up the ramp, apparently intent on reentering the house. *Id.* Upon seeing this the officers ordered him to stop. *Id.* When he didn’t Officer Surface grabbed Daniel’s arm and shoulder. *Id.* Daniel then resisted and Officer Surface told him he was under arrest. *Id.* As Daniel continued to resist, Office Webb also grabbed Daniel in an attempt to get handcuffs on him. RP I 104-108. During this confrontation Officer Webb was facing toward the house while Officer

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<sup>2</sup>Daniel Sparks, III, is Kayla Sparks’ husband. The defendant Daniel Sparks, Jr., is Kayla’s father-in-law and father to Daniel Sparks, III. In an attempt to avoid confusion, Daniel Sparks, III, is referred to as “Daniel” or Kayla’s husband.” The defendant Daniel Sparks, Jr., is referred to as the “defendant” or the “defendant Mr. Sparks.”

Surface was facing away from the house with Daniel essentially between them. *Id.*

As the two officers were trying to put Daniel in handcuffs, Officer Surface saw the defendant Mr. Sparks walk up the ramp toward Officer Webb. RP I 85-89. Upon seeing this Officer Surface ordered the defendant to “get back or you’ll be arrested.” RP I 85-89, 101. By this time Officers Hartley and Bessman had arrived and were in the front yard. RP I 85-89, 111-114, 124-125, 140-143, 158-159. As the defendant walked up the ramp he put his hands on Officer Webb’s shoulders from behind. *Id.* Upon seeing this Officer Hartley ran up the ramp, grabbed the defendant, and threw him down the ramp and through the wooden guard rails on one side of the ramp thereby breaking them. *Id.* The defendant, who was tossed down on the ground, picked up a broken piece of two by four that had been part of the rail. RP I 128, 148. According to Officer Hartley, it appeared that the defendant was going to use the two by four as a weapon. RP I 148-153. According to the defendant and his daughter-in-law he used it as a crutch in an attempt to get back on his feet. RP II 12, 24. Eventually the defendant put down the piece of wood at his wife’s urging and Officer Hartley then placed the defendant under arrest and put him in handcuffs. RP I 152-154.

As this was going on Officer Bessman ran up the ramp and joined

Officer Surface and Officer Webb in their attempts to put Daniel in handcuffs. RP I 158-163. Once he joined the confrontation, the three officers and Daniel ended up breaking through the ramp rail on the other side from the part that was broken when Officer Hartley threw the defendant on the ground. *Id.* Once the three officers got Daniel in handcuffs and in a patrol car, they checked themselves for injuries. RP I 114-115. 165 At this point Officer Webb discovered that he had a small scalp laceration and a scratch on the back of his head and that his shoulder hurt. RP I 114-115.

Each one of the four officers as well as Amy Boultinghouse later testified to what they saw or felt when the defendant came up the ramp behind Officer Webb. RP I 88-89, 110, 124, 143-144, 162-165. Officer Surface stated that the defendant “grabbed” Officer Webb by his shoulders from behind. RP I 89-89. Officer Webb testified that he could feel somebody grab at his shoulders from behind and some kind of hit to the right side of his head although he couldn’t tell what hit him. RP I 110. Amy Boultinghouse stated that the defendant grabbed Officer Webb from behind and tried to pull him back before Officer Hartley grabbed him and threw him to the ground. RP I 124. Officer Hartley believed the defendant grabbed Officer Webb from the back with both hands trying to pull him

away. RP I 143-144. Finally, Officer Bessman also saw the defendant grab Officer Webb from behind but he did not see how Officer Webb got the small laceration or the scratch to the back of his head. RP I 162-165. For their part, the defendant and his daughter-in-law denied the defendant had even touched Officer Webb. RP II 12, 24.

### ***Procedural History***

By information filed on June 28, 2017, and amended on the day of trial, the Cowlitz County Prosecutor charged the defendant Daniel W. Sparks, Jr., with one count of third degree assault against Officer Webb, one count of third degree assault against Officer Hartley, and one count of obstructing a law enforcement officer. CP 1-3, 16-18. The case later came on for trial before a jury with the state calling each one of the four officers along with Ms. Boultinghouse as its only witnesses. RP I 67, 93, 118, 138, 156. The defense then called Kayla Sparks and the defendant Daniel Sparks, Jr., as its only witnesses. RP II 9, 20.

Following brief rebuttal testimony from Officer Webb, the court instructed the jury without objection from the defense, after which the parties presented their closing arguments. RP II 6-7, 46-58, 58-88, 88-90. During its remarks the state twice argued that the defendant was guilty of third degree assault because he had intentionally struck Officer Webb in the

head. RP II 58-76. On the first occasion the state argued as follows:

He reached for Officer Webb and in the process he hits him in the back of his head, grabs him by the shoulders and pulls back to pull him off his son. And one big piece of evidence that tells you this happened, and it didn't happen the way the Defendant said, is the fact that Officer Webb has that injury on his head. You see, struggling with a guy in front of him on this location wouldn't have scratched his head or cut his head. It corroborates the Defendant did reach him from behind as several witnesses observed and testified to. Bessman saw him reach for him; Hartley saw him on the back of him; Officer Webb unfortunately felt it; Officer Surface saw his hand on him; Amy Boultinghouse saw it.

RP II 65, lines 12-24.

On the second occasion the prosecutor stated the following to the jury:

The second part of it is was it harmful or offensive. So first let's look at was it harmful? Well, in the process of doing this he strikes Officer Webb in the head, scratches him here and draws blood. While he's intentionally touching him, he cut him in the head. Who wants to be scraped in the head? Nobody. So it's harmful in that way. It's also harmful he yanks on his shoulder, and Officer Webb had pain in his shoulder after.

RP II 77, lines 12-19.

Following closing arguments in this case the jury retired for deliberation and eventually returned with verdicts of guilty on Count I (third Degree Assault against Officer Webb), not guilty on Count II (third degree assault against Officer Hartley), and guilty on Count III (obstructing a police officer). RP II 93-97; CP 46-47, SCP 1. The court later sentenced the

defendant under the first offender option on Count I and 364 days suspended on Count III. CP 50-60. The defendant filed timely notice of appeal. CP 62-73.

## ARGUMENT

**UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, THIS COURT SHOULD VACATE THE DEFENDANT'S CONVICTION FOR THIRD DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT STRUCK THE OFFICER AS ALLEGED IN THE INFORMATION.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and the United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case,

means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant in Count I with third degree assault of a police officer in violation of RCW 9A.36.031(1)(g).

This statute states:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

. . . .

(g) Assaults a law enforcement officer or other employee of a

law enforcement agency who was performing his or her official duties at the time of the assault;

RCW 9A.36.031(1)(g).

In Washington the term “assault” is defined as “an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.” *Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 505, 125 P.2d 681 (1942); *See also State v. Jones*, 34 Wn.App. 848, 850, 664 P.2d 12 (1983). It is a specific intent crime and requires proof of an intent to assault. *State v. Walden*, 67 Wn.App. 891, 841 P.2d 81 (1992). It is also defined as an intentional, offensive, unconsented touching of one person by another performed without lawful authority. *State v. Shelley*, 85 Wn.App. 24, 28-29, 929 P.2d 489 (1997).

At trial the state’s theory of the case was that the defendant committed an assault against Officer Webb by hitting him in the back of the head. The state twice argued this to the jury. On the first occasion the prosecutor argued as follows:

He reached for Officer Webb and in the process he hits him in the back of his head, grabs him by the shoulders and pulls back to pull him off his son. And one big piece of evidence that tells you this happened, and it didn’t happen the way the Defendant said, is the fact that Officer Webb has that injury on his head. You see, struggling with a guy in front of him on this location wouldn’t have

scratched his head or cut his head. It corroborates the Defendant did reach him from behind as several witnesses observed and testified to. Bessman saw him reach for him; Hartley saw him on the back of him; Officer Webb unfortunately felt it; Officer Surface saw his hand on him; Amy Boultinghouse saw it.

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RP II 77, lines 12-19.

The problem with this argument is that it is not supported by substantial evidence. Four separate witnesses testified to seeing this event happen and Officer Webb testified to experiencing although not seeing it. No a single one of the four witnesses claimed that the defendant struck Officer Webb. Rather, what they claimed they saw was the defendant put his hands on Officer Webb's shoulders and try to pull Officer Webb back. Although Officer Webb did state that he felt something on the side of his head, ultimately the injuries that the witnesses described and the state argued were cuts on the back of Officer Webb's head, not on the side.

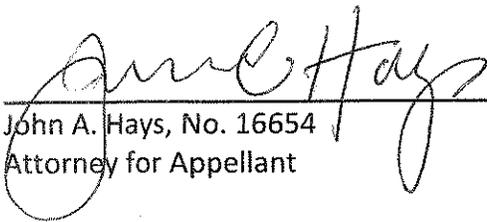
In addition, while Officer Webb did testify that his shoulder hurt after the melee was over, he did not claim that the injury came from the defendant's incidental contact with his shoulder just before Officer Hartley grabbed the defendant and threw him to the ground, breaking one of the side rails of the ramp in the process. Indeed, given the fact that Officer Webb himself ended up going through the other side rail in a pile up of three officers and one suspect, it is not difficult to determine the source of the soreness to his shoulder. Thus, in the case at bar, substantial evidence does not support the conclusion that the defendant struck Officer Webb or that the defendant's incidental contact with Officer Webb's shoulder would be offensive to "an ordinary person who is not unduly sensitive." See Instruction No. 9 defining assault. As a result, this court should reverse the defendant's conviction on Count I, leaving in place the defendant's conviction and sentence on Count III.

## CONCLUSION

Substantial evidence does not support the defendant's conviction in Count I for third degree assault of a police officer. Consequently this court should vacate that conviction and sentence, leaving in place the defendant's conviction and sentence on Count III.

DATED this 16<sup>th</sup> day of April, 2018.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,  
Respondent,

NO. 51198-3-II

vs.

AFFIRMATION  
OF SERVICE

DANIEL WARREN SPARKS, Jr.,  
Appellant.

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The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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