No. 39226-1-III

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

STATE OF WASHINGTON, Respondent

v.

WILLIAM HARRIS, Appellant

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

THE HONORABLE JUDGE JACKIE SHEA-BROWN

CORRECTED BRIEF OF APPELLANT

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A. The Evidence Is Insufficient To Sustain A Conviction For Assault In The Fourth Degree.

B. The Victim Penalty Assessment and DNA collection fee must be stricken.

Issues Related To Assignment Of Errors

A. Was the evidence insufficient to sustain a conviction for assault in the fourth degree, requiring vacation and dismissal with prejudice?

B. Must the Victim Penalty Assessment and DNA collection fee be stricken and refunded?

II. STATEMENT OF FACTS

Benton County prosecutors charged William Harris with one count of assault second degree, domestic violence and one count of assault fourth degree, domestic violence, a gross misdemeanor. CP 1-2. After a jury trial, Harris was found *not* guilty of assault second degree. CP

62-63. A jury found him guilty of the gross misdemeanor fourth degree assault, domestic violence. CP 64-65.

The facts presented address only those which are pertinent to the assault in the fourth-degree conviction.

William Harris ("Harris") and Juliette Baxter ("Baxter") met at church and began a relationship. Vol. 2RP 535. The day they decided to end their relationship. Baxter learned she was expecting a child. They quickly became engaged, married, and moved in together with Baxter's two sons from prior relationships. Vol. 1RP 203, 205, 210, 211. The couple often argued loudly, but there were never any physical confrontations by either party. Vol. 1RP 209,214.

When Harris learned Baxter was pregnant, he took on a second job "because he wanted to make sure that we were okay; like when I go on maternity leave, and to buy things for the baby, and to make sure we were

comfortable, and we had savings. So, he ended up getting another job…" Vol. 1RP 217.

Over the course of the pregnancy Baxter felt sick, developed high blood pressure, and ended up on bedrest. Vol. 1RP 201-202;235.

On August 26, 2021, Baxter texted and called Harris because she was angry. She had learned that a car Harris owned and wanted to sell had been towed. Vol. 1RP 222-223. Harris was working his two jobs, and on his breaks that day the couple argued via text and phone. Vol. 1RP 217, 222, 224; Vol. 2RP 541.

When he arrived home that evening, they continued arguing. Vol. 1RP 237. Vol. 2RP 542. As the disagreement escalated in harsh words and volume, Harris thought it best to remove himself from the situation. Vol. 2RP 545, 589. It was common for him to disengage from arguments and collect himself before he returned to talk with Baxter. Vol. 1RP 388.

That evening as he moved toward the door to leave the room, according to Harris, Baxter spoke another personal insult and he turned around to face her. Vol. 2RP 545. Baxter testified she said, 'This is stupid'; Harris testified she called him a "stupid motherfucker." Vol. 1RP 237; Vol. 2RP 592.

Harris moved toward Baxter and pointed his finger at her, yelling at her to not call him stupid. Vol. 1RP 237. Vol. 2RP 545. Baxter testified Harris poked her in the forehead with his finger "a hundred" times. Vol. 1RP 237-238, 240.

By contrast, Harris testified he was angry, and he pointed his finger at her, but he did not touch her. Vol. 2RP 545;597-98. Harris reported Baxter slapped his hand away, and then kicked and slapped him. Vol. 2RP 545. Despite them never having had a physical altercation, he heard her yell, "You're not gonna hit me." Vol. 2RP 546.

Baxter reported that even though Harris was *not* physically on her, she was "trying to get him off because I was concerned about the baby." Vol. 1RP 396-397. Harris tried to grab her feet to prevent her kicking him. Vol. 1RP 240-241; Vol. 2RP 546. Baxter said she got up off the bed and Harris hit her in her arm. Vol.1RP 242, 398.

Harris agreed he tried to keep Baxter from kicking him but denied hitting her arm or touching her forehead. Vol. 2RP 627-628.

Baxter's 15-year-old son heard his mother yell one time, "Don't hit me". He entered the room and saw Harris standing over his mother, who was sitting on the bed. Vol. 1RP 455,457. He did not see any physical altercation.

Harris wanted to leave the room and Baxter's son would not move out of the doorway. Vol. 2RP 641. According to Harris, Baxter got out of the bed and began

hitting him on the back of his head and across his back. Vol. 2RP 549. Harris and Baxter's son tussled and as Harris tried to leave the room, the young man was injured. Vol. 2RP 549; 642-643.

Harris was very remorseful regarding Baxter's son being accidentally hurt and spoke of ending his life if he were sent to prison. Vol. 1RP 254.

Baxter called 911. Vol. 1RP 250. When officers arrived, they spoke separately to Baxter and Harris. Baxter told officers they had a verbal argument[1]. Vol. 1RP 254. Harris told the officers he and his wife had had a verbal disagreement. Vol. 2RP 655.

After speaking with Baxter and Harris, the officers left without making an arrest. Vol. 1RP 105. Nothing in the record suggests police saw any bruising or marks on Baxter's forehead or arm.

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[1] Harris was unaware of what Baxter told the officers until after they left. Vol. 1RP 255.

Harris apologized repeatedly regarding Baxter's son. Vol. 1RP 252, 458. He moved out of the home that night and continued to pay 200 dollars a week to help with Baxter's rent and to provide money to purchase items for their unborn child. Vol. 1RP 258-259; 305-306. Baxter consistently asked for extra money to purchase "big ticket" items for their unborn child. Vol. 1RP 381.

The couple exchanged a series of text messages in which Harris again expressed remorse that Baxter's son had been injured. Vol. 1RP 366-371. In none of the messages was there any allegation that Harris had poked her in the forehead or punched her in the arm. Vol. 1RP 314-316. Rather, she consistently only referred to the incident involving her son.

In late September, early October 2021, because of labor layoffs, Harris was having difficulty making payments to Baxter. Vol. 2RP 560,677. He did not have enough money to get an apartment and usually slept in

his truck or rented a hotel room to sleep between work shifts. Vol. 2RP 560.

Mr. Harris intended to pay child support of $800 a month when his child was born and intended to maintain a relationship with his child. Vol. 2RP 563,565, 675-676.

However, angry that Harris could no longer continue to help support her financially by making half of her rent payment, Baxter collected his property and put it in trash bags on the sidewalk for him to collect. Vol. 2RP 562.

After he stopped providing rent money to her and appeared to be interacting with other women, she decided he did not love her, and she was not going to "protect somebody that doesn't care about us."[2] Vol. 1RP 411, 428.

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[2] Baxter went to the police on October 10th. Harris continued to pay her small amounts of money through November 12th. Vol. 1RP 409.

Baxter became adamant she would not allow Harris to see his child being born and would not allow him to care for his child without supervision. Vol. 1RP 411, Vol. 2RP 559,560.

On October 10, 2021, she called the police to report an assault on her son. Vol. 1RP 83. She told the police she had finally convinced her son to "press charges." Vol. 1RP 435. She also said, "He's trying to take my baby[3]." Vol. 1RP 411. She said she had not reported the assault earlier because she and Harris were both worried about consequences as he was on an interstate compact probation. Vol. 1RP 251-255.

After the officer took their statements, she emailed photos to them of her son's injury from August 26, 2021. Vol.1RP 101. She also emailed screen shots of text

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[3] From the context, the statement appears to reference that Harris wanted to share joint custody of his child with Baxter.

messages between herself and Harris. Vol. 1RP 101; 377. None of the text messages referenced any physical altercation between herself and Harris.

Harris was arrested and charged on December 7, 2021. CP 2-3. After almost a year in jail, the matter proceeded to a jury trial. Vol. 1RP 76. A jury found Harris *not* guilty of assault in the second degree against Baxter's son, but guilty of assault in the fourth degree, domestic violence, against Baxter. CP 62-65.

The court imposed 364 days, which Harris had already served. 8/31/22 RP 21. Additionally, the court imposed a $500 victim penalty assessment, and a $100 DNA collection fee. 8/31/22 RP 21; CP 68. The court entered an order of indigency. CP 76. Mr. Harris made a timely appeal. CP 73-74.

III. ARGUMENT

A. The Evidence Is Insufficient To Sustain a Conviction For Assault in the Fourth Degree.

In a criminal case, the State bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *Jackson v. Virginia,* 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); U.S. Const. amend. XIV; Wash. Const. art. I §3. A defendant may challenge the sufficiency of the evidence for the first time on appeal. *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

When reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *State v. Salinas,*119 Wn.2d 192, 201, 819 P.2d 1068 (1980).

When determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt. Rather, to be sufficient, to support a jury's verdict, the State's evidence must be substantial. *State v. Fiser,*99 Wn.App. 714, 718, 995 P.2d 107 (2000),(*rev. denied,* 141 Wash.2d 1023, 10 P.3d 1074 (2000)); see also *Cox v. Polson Logging Co.,* 18 Wn.2d 49, 68, 138 P.2d 169 (1943).

Substantial evidence is defined as evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton,* 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

In finding substantial evidence the Court cannot rely upon guess, speculation, or conjecture. *Hutton,*7 Wn.App. at 728. Where evidence of an alleged crime is based on unsupported facts, the evidence is not substantial, rather it is a scintilla of evidence, both speculative and

conjectural. *See State v. Zamora,* 6 Wn.App.130,133, 491 P.2d 1342 (1971).

Fourth degree assault is defined as assault not amounting to assault in the first, second or third degree, or custodial assault. RCW 9A.36.041(1).

There is no statutory definition for the term "assault" and so courts rely on a common law definition. *State v. Stevens,* 158 Wn.2d at 310-311. Washington recognizes three common law definitions of assault: (1) an attempt to inflict bodily injury upon another; (2) an unlawful touching of another with criminal intent; or (3) by putting another in apprehension of harm. *State v. Walden,* 67 Wn.App. 891, 894, 841 P.2d 81 (1992).

Fourth degree assault is essentially an assault with little or no bodily harm, committed without a deadly weapon. Intent to make physical contact is implied. RCW 9A.36.041(1); *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892, 893 (2012); *State v. Walden,* 67 Wn.App. at

894; *State v. Osman,* 192 Wn.App. 355, 378, 366 P.3d 956 (2016).

Here, the jury's verdict was not supported by substantial evidence.

1. There were no witnesses to the events.

The State was required to prove Harris intended to make unwanted or offensive physical contact with Baxter. The recollections of the involved parties overlapped but were also widely divergent and disputed. What is clear, however, is both parties admitted they argued loudly and often, but there was no history of offensive or unwanted touching or hitting.

Credibility determinations are made by the trier of fact. *State v. Longuskie,* 59 Wn.App. 838, 844, 801 P.2d 1004 (1990). However, the finding must be supported by evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Bryant v. Palmer*

Coking Coal Co., 86 Wn.App.204, 210, 936 P.2d 1163 (1997).

Where, as here, there was a dispute as to whether Harris or Baxter correctly recounted the events, Washington appellate caselaw demonstrates that generally, convictions for assault in the fourth degree have at least one outside witness who can attest to the facts of the events.

In *State v. Davis,* 119 Wn.2d 657, 835 P.2d 1039 (1992), the defendant was charged with assault in the fourth degree for slapping his girlfriend. Davis admitted he hit her but claimed he did so to calm her. *Id.* at 660. Witnesses to the event testified about what they saw, and the conviction was affirmed. *Id.* 659.

In *State v. Loos,* 14 Wn.App.2d 748, 473 P.3d 1229 (2020), witnesses testified the defendant picked up a three-year-old child who was in her care and dropped him in the lake water where he “sank like a rock.” *Id.* at 753.

Although the conviction for assault in the fourth degree was vacated, it was on other grounds.

In *State v. Stevens,* 158 Wn.2d 304, 143 P.3d 817 (2006), the defendant was charged with assault in the fourth degree. Again, there was not only another witness, but a photo of the defendant engaging in an unwanted and offense touch. *Id.* at 307.

In *State v. Hummel,* 68 Wn.App. 538, 843 P.2d 1125 (1993), the Court held Hummel was entitled to a fourth-degree assault jury instruction. Witnesses testified they saw the defendant assault the victim.

In *State v. Conway,* 24 Wn.App.2d 66, 519 P.3d 257 (2022), the defendant was accused of fourth degree assault of a cab driver. The State presented evidence of a video of the assault, which was sufficient to sustain a conviction. *Id.* at 70.

In *State v. Ashcraft,* 71 Wn.App. 444, 859 P.2d 60 (1993), the defendant was accused and convicted of

assaulting a foster child. A witness testified she saw the defendant swing a shoe and a stick at the child. CPS workers, a medical doctor, and police testified about bruising on the child. *Id.* at 450.

Similarly, in *State v. Jarvis,* 160 Wn.App. 111, 246 P.3d 1280 (2011), a witness observed a special education teacher grab a special needs student and drag him across the room. *Id.* at 115-116.

And in *State v. Taylor,* 140 Wn.2d 229, 996 P.2d 571 (2000), witnesses testified they saw the defendant push a neighbor who was holding his child. They saw her both hit and kick the neighbor. *Id.* at 232.

Here, the witness to the evening's events was Baxter's son. He testified he heard his mother yell, but he did *not* see a physical confrontation. Rather, he saw Harris standing and Baxter seated on the bed.

2. The statements on the night of the alleged incident and texts after that evening demonstrate

a lack of supporting evidence for the later accusation.

On the evening of the argument, the record establishes both Baxter and Harris, independently, told police there had *not* been a physical confrontation between them.

Despite her testimony that Harris had poked in the forehead “a hundred times” in a short time period, nothing in the record demonstrates police saw marks on her forehead from being touched or that she complained of a bruise or soreness in her arm. Officers had every reason to believe she was telling the truth.

Additionally, in the post-argument text messages offered at trial, Baxter never raised an accusation that Harris had touched her forehead with his finger or hit her arm. Although she had photos of her son’s injury, there were no pictures of bruising on her arm or forehead. Rather, the texts focused solely on her son and his

injury[4]. Any remorse Harris expressed in the texts reflected sorrow that her *son* had been injured, albeit accidentally.

Baxter never asked for an apology or wrote anything to indicate Harris had touched her in a way that was offensive or unwanted.

Finally, Baxter testified she called police in October after she had finally convinced her son to tell police *he had been injured* that night. Baxter did not say she went to the police because she had been assaulted.

In context, her later story of being assaulted is not supported by substantial evidence. Where a conviction is based on insufficient evidence, it is a violation of due process. *Jackson,* 443 U.S. at 316. The conviction must be reversed and vacated, with instructions to dismiss with

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[4] Notably, the jury did not find Harris assaulted Baxter's son.

prejudice. *State v. Kirwin,* 166 Wn.App. 659, 675, 271 P.3d 310 (2012).

B. The Victim Penalty Assessment and DNA Collection Fees Must Be Stricken.

The court sentenced Harris August 31, 2022. CP 66. On July 1, 2023, the Washington State Legislature eliminated the 500-dollar victim penalty assessment for indigent persons. RCW 7.68.035(4). The amended statute requires trial courts to waive any VPA imposed before the effective date of the amendment if the offender is indigent, or on the offender's motion. RCW 7.68.035(5)(b). A person does not have the ability to pay if he is indigent as defined in RCW 10.01.160(3); RCW 7.68.035.

Reviewing Courts have held that a statute "operates prospectively when the precipitating event for its application…occurs after the effective date of the statute." *State v. Ramirez*,191 Wn.2d 732, 749, 426 P.3d 714

(2018); *State v. Blank*, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997). Where an amendment to a statute, which prohibits courts from imposing discretionary costs on a defendant, becomes effective while the matter is on direct appeal, the defendant is entitled to the benefit of the amended statute. *Ramirez*, 191 Wn.2d at 747-748; *State v. Wemhoff*, 24 Wn.App.2d 198, 202, 519 P.3d 297 (2022).

Here, the court found Mr. Harris to be indigent. The court waived discretionary costs and imposed only what were mandatory costs at the time: 500 dollars for a gross misdemeanor and a 100-dollar DNA collection fee. CP 68, 72, 76. Because the VPA law became effective before this matter became final, this Court should remand with instruction to strike the imposition of the 500-dollar penalty assessment. *Wemhoff*, 24 Wn.App.2d at 202; *Ramirez*, 191 Wn.2d at 748-49.

Similarly, the 100-Dollar DNA collection fee should be stricken. At the time of sentencing, RCW 43.43.7541 obligated the trial court to impost a 100-dollar DNA collection fee at the time of conviction if DNA had not previously been collected. The statute did not provide a waiver if the defendant was an indigent person. *State v. Lundy,* 175 Wn. App. 96, 102-103, 308 P.3d 755 (2013).

Effective July 1, 2023, the Washington State Legislature removed the fee for DNA collection authorized under RCW 43.43.7541. Laws 2023, ch. 449 §4. The change in the statute applies to Mr. Harris, whose case is pending on appeal. *State v. Ramirez*, 191 Wn.2d at 748-49. The DNA collection fee should be stricken.

IV. CONCLUSION

Based on the facts and authorities presented, Mr. Harris respectfully asks this Court to reverse and vacate his conviction and to strike the fees that were imposed,

refunding the money he has paid toward legal financial obligations.

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Respectfully re-submitted this 24th day of October 2023.

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CERTIFICATE OF SERVICE

I, Marie Trombley, certify under penalty of perjury under the laws of the State of Washington, that October 24, 2023 I electronically served, a true and correct copy of the Amended Appellant's Opening Brief to the following: Benton County Prosecuting Attorney at prosecuting@co.benton.wa.us. and to William Harris c/o marietrombley@comcast.net

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