

ISLAND COUNTY PROSECUTING ATTORNEY
GREGORY M. BANKS

Eric M. Ohme, *Chief Criminal Deputy*
Dalton Lee Pence, *Chief Civil Deputy*

Deputy Prosecutors
Michael W. Safstrom
Ian G. Michels-Slettvet
Tamara R. Fundrella
Elizabeth A. Dasse
Sarah M. Doar
Felicity A. M. Chamberlain

Jennifer Wallace, *Office Administrator*

MEMORANDUM

TO: Det. Dan Connick, WSP
Hon. Tim Callison, Mayor of Langley

CC: Det. Sgt. Mike Marken, WSP
Mark Brown, Island County Sheriff

FROM: Greg Banks 

DATE: May 15, 2018

RE: Investigation of Langley Police Chief Dave Marks

.....

I have reviewed your investigation into the alleged actions of Langley Chief of Police, Dave Marks. Your referral did not recommend a specific charge. I treated it as a referral for consideration of a charge of assault in the fourth degree, in violation of RCW 9A.36.041. Other charges may have been encompassed by the alleged conduct of Chief Marks, but my decision would not have been different. Assault in the fourth degree is the crime that most closely describes the alleged conduct.

It is highly unusual that I would devote a six-page memorandum to explain my charging decision on a gross misdemeanor – even one involving a police officer. But this case is unusual in that it involves the Chief of Police. I believe that you and the public deserve a thorough explanation.

For the reasons set forth below, I have concluded that it is not appropriate to charge Chief Marks with any crime arising out of his conduct. This was not an easy decision. Chief Marks' behavior was, even if only negligent, disturbing and well below the bar we set for professional police officers in our community.

FACTS AND PROCEDURAL HISTORY

On November 20, 2017, Chief Marks was dispatched to investigate a criminal trespass complaint involving 31-year-old Camren Procopio. Mr. Procopio had been issued a "Trespass Admonishment" by the management of the Star Store in March, 2015. As a result, his alleged presence at the Star Store would constitute the gross misdemeanor of criminal trespass in the first degree. RCW 9A.52.070.

ISLAND COUNTY PROSECUTING ATTORNEY'S OFFICE

LAW & JUSTICE CENTER

PHYSICAL: 101 NE SIXTH STREET, SUITE 200; MAILING: PO BOX 5000, COUPEVILLE, WASHINGTON 98239

Main extension: (360) 679-7363 / from South Whidbey: 321-5111, ext. 7363 / from Camano Island: 629-4522, ext. 7363

Fax (360) 679-7393 / ICProsecutor@co.island.wa.us

According to two employees at the Star Store, Mr. Procopio had entered the store and was looking around. One employee called the police, as she had been instructed to do, and the other engaged with Mr. Procopio, advising him that he needed to leave the store. The employee made several requests, and reported: "He did then leave. I walked him out. He picked up his bags that he had stashed [outside the store] and headed east down the alley." The other employee reported to dispatchers that Mr. Procopio headed towards the bank on the corner of 2nd and Anthes, and that he was using a cane to walk.

Chief Marks arrived at the store shortly afterward, determined that Mr. Procopio had violated the trespass notice, and set out to find him. Chief Marks radioed a request for backup, and Sheriff's Deputy Brewer met Chief Marks in the vicinity of the public restrooms near Anthes Avenue. Mr. Procopio was alone, seated on a bench nearby.

Mr. Procopio has a history of arrests that are generally acknowledged to stem from his obvious mental illness and cognitive impairments. Mr. Procopio has been found mentally incompetent to stand trial by doctors at Western State Hospital for a previous charge in 2015, and was confined to that hospital for a period of months.

As Chief Marks and Deputy Brewer approached Mr. Procopio, the Chief ordered Procopio to show his hands. Mr. Procopio complied. As they got nearer, Chief Marks advised Procopio that he was under arrest. It is permissible to arrest a person for the crime of criminal trespass, even when not committed in the presence of the officer, but it is far more common for police to simply issue a paper citation without a custodial arrest.

Deputy Brewer told WSP detectives that Chief Marks' tone was very aggressive with Procopio from the outset. Deputy Brewer described Procopio as being in a "daze." The Chief ordered Procopio to stand up, and he did so. Deputy Brewer recalled that Procopio was mumbling.

Chief Marks commanded Procopio to turn around and put his hands behind his back. Langley Officer Shoudy checked into duty and arrived to assist at that time. Both officers indicated that Procopio complied with the Chief's orders, but that Procopio was moving and reacting slowly, as he often did. Chief Marks placed one of Procopio's hands in handcuffs. According to the other officers, Procopio slightly dropped his other arm as he turned and tried to explain that he could not stand up straight without his cane. The officers stated that Chief Marks grabbed Procopio's arm and put it in a "straight wrist twist lock" and applied handcuffs to his second wrist. Both officers stated that Procopio was not resisting in any way. They told me that they saw no need to use a pain compliance hold to secure him in handcuffs. They noted that Procopio's arms were "relaxed."

Chief Marks then instructed Procopio to spread his legs so the Chief could search him. Procopio again complained that he could not put weight on his right leg. Procopio's hands were secured behind his back in handcuffs. Both officers described Chief Marks as getting increasingly

frustrated. After less than a minute, Chief Marks kicked Procopio's foot or feet, causing Procopio to freefall face first on the concrete. One officer described the kick as assaultive "to a certain degree," but did not believe it was an intentional "take down." The other officer described it as a "leg sweep" on both legs, and believed it was intentional.

Both officers assisted Procopio back to his feet, and then helped him to a location where Chief Marks searched him. After the search, Chief Marks told Procopio to walk to the Chief's patrol car. Procopio complained that he could not walk without his cane, and Chief Marks ordered Procopio to walk to his car. Both officers reported that Chief Marks again applied a pain hold to Procopio's wrist, and elevated the wrist high enough behind his back that Procopio's feet were lifted off the ground. Procopio was forced to walk on his toes, and he was complaining that it hurt. At some point during the arrest, one of the officers recalled Chief Marks ordering Procopio to stop resisting. Both officers said that Procopio was compliant and not resistive throughout the entire contact.

Chief Marks then transported Procopio to the Island County Jail in Coupeville, where he was booked and held on bail. Chief Marks issued Procopio a citation for criminal trespass in the second degree, a misdemeanor offense. RCW 9A.52.080.

After the incident, Deputy Brewer contacted his superiors at the Sheriff's Office. He described the conduct he had witnessed and expressed concern that the force was not justified. His supervisors recommended that he document the incident, and forward that to the Sheriff. The Sheriff has a policy that requires deputies to report other officers whom they witness using excessive force. Deputy Brewer did so, and the Sheriff advised Mayor Callison. Mayor Callison then requested the WSP to conduct an independent investigation of the incident.

The investigation included interviews of Deputy Brewer, Officer Shoudy, and other members of the Sheriff's Office. It also included attempts to interview Mr. Procopio and Chief Marks. Mr. Procopio's responses were at times a jumble of words, and all but incoherent. It appeared that he recalled the incident, and believed his falling to the ground was "not an accident." When asked if he remembered going to the ground during the arrest, he said: "Yes I do. This was because of my abdominal mass implant. I cannot press down with my right leg. The handling of with practice still invention fourteen years or less." (sic) When asked if he thought it was an accident, Procopio said, "It was not an accident."

Chief Marks, on the advice of his attorney, refused to answer questions in this investigation. Chief Marks was apparently compelled to answer questions by others for purposes of possible employment discipline. I had my staff quarantine from me all documentation of that interview in an encrypted file. I have screened myself from considering anything Chief Marks was required to say in response to a personnel investigation, because of his constitutional rights against self-incrimination.

Chief Marks filed a preliminary and a final police report in support of the trespass charge against Mr. Procopio. Neither report made any mention of the pain compliance holds used, or the fact that he struck Mr. Procopio's leg, or the fact that Mr. Procopio freefell to the ground while handcuffed behind his back. Upon learning of the complaint filed by Deputy Brewer, and Chief Marks' failure to mention the physical altercations, I directed one of my deputies to dismiss the trespass charge against Mr. Procopio without prejudice, pending completion of this investigation.

ANALYSIS

In order to charge a person with a non-felony (and non-domestic violence) crime, prosecutors follow statutory guidelines. Those guidelines provide that no such charge should be brought unless the admissible evidence is of such convincing force that a reasonable jury would most likely unanimously find the defendant guilty beyond a reasonable doubt.

Assault in the fourth degree is a gross misdemeanor (i.e. a non-felony). It is an intentional and unlawful touching or striking of another that is harmful or offensive. In looking at Chief Marks' conduct, there are few civilian situations that compare. Here, Chief Marks had probable cause to believe Mr. Procopio had committed the crime of criminal trespass. Therefore, he had specific statutory authority to physically arrest Mr. Procopio. As a result, at each point of contact, Chief Marks had the lawful authority to use some degree of physical force on Mr. Procopio for the purpose of taking him into custody. Having that lawful authority is what sets this case apart from a civilian doing the same acts.

The questions here are whether Chief Marks used excessive force, and if so, whether the force was so excessive that it constituted an independent and unlawful criminal act. In examining the case against Chief Marks, my focus was on the kick or leg sweep that resulted in Mr. Procopio's fall.

Any custodial arrest presents an officer with safety challenges, and officers are trained to use a sufficient level of force to maintain the safety of the officer, the arrestee, and bystanders. Chief Marks had prior experiences with Mr. Procopio, and believed him to be unpredictable and potentially violent. Not all officers interviewed in this investigation believed Mr. Procopio to be as dangerous as Chief Marks did. Nevertheless, the use of wrist locks (a pain-compliance technique) to secure Mr. Procopio's hands was on a continuum of force permitted for making arrests, depending on the response of the arrestee. Although it appears that only Chief Marks perceived the need to inflict pain on Mr. Procopio, it was transient pain. The holds were released once he handcuffed Procopio, and again once he reached his patrol vehicle. A trial would likely include testimony of Chief Marks' or other officers' prior experience with Mr. Procopio. In my opinion, there is very little likelihood that any jury would unanimously agree that the use of the wrist locks in handcuffing and walking Mr. Procopio to the car constituted a criminal assault.

The kicking of Mr. Procopio's leg or legs out from under him is a closer call. At the time that occurred, Mr. Procopio was handcuffed behind his back and had three officers in close

proximity. While it is possible for handcuffed persons to resist arrest and even injure police, that was highly unlikely here. Mr. Procopio was cooperative and described as being “in a daze,” rather than being aggressive or resistive.

It is necessary to search any arrestee for contraband and weapons before placing that person in a patrol car. Chief Marks had the lawful authority and the discretion to arrest Mr. Procopio. Once he decided to arrest him, it was absolutely necessary to conduct a thorough search. A proper search requires that the subject’s legs be spread a sufficient distance, both for officer safety reasons, and to facilitate the search. Here, however, Chief Marks had other less violent options than kicking his legs apart, especially considering that Mr. Procopio complained that he could not put weight on his right foot. In fact, Chief Marks eventually searched Procopio by allowing him to support his weight by leaning over a low wall.

One might argue Chief Marks only lightly tapped Mr. Procopio’s leg, and Procopio intentionally freefell to the ground face-first in response. I reject that argument. Based on the aggressive tenor of the entire contact and the observations by two officers, I conclude that it is highly unlikely that Mr. Procopio was responsible for his fall.

Chief Marks’ kick was clearly a harmful or offensive touching. The question is whether it was intentional and unlawful.

To prove a criminal assault, the State must prove beyond a reasonable doubt that Chief Marks kicked Mr. Procopio’s legs out, with the intent to harm him, and for no lawful purpose. One of the officers indicated that Marks appeared to be angry and frustrated throughout the entire contact, and just kicked too hard. The implication is that Marks let his temper get the best of him, and that he acted negligently, not intentionally. A negligent act cannot be the basis for assault in the fourth degree. The other officer reported that it was an intentional “leg sweep.” That is both significant and very concerning.

But, in a criminal case, the defendant gets the benefit of any reasonable doubt. Here, the officers’ different perceptions of that one detail would create a reasonable doubt. Even though there may be probable cause to believe Chief Marks intentionally assaulted Mr. Procopio, I find it is unlikely that a jury would be unanimously convinced beyond a reasonable doubt.

It’s not uncommon that eye witnesses have different perceptions and memories of events. It appears to me that both officers have nothing to lose or gain by shading their stories of what they witnessed. In fact, both came forward at some personal and professional risk, adding to their credibility. They are to be commended, in my view, for helping the profession police itself.

One final fact that I considered is that Mr. Procopio is unable to relate the facts of the incident in a coherent manner. He would not be a credible or helpful witness if forced to testify. But, having an “empty chair” in an assault trial such as this one, would present additional burdens for the prosecution.

It bears mentioning that the failure to provide care for the mentally ill in our community strains all of our social systems. While certainly no justification for how Mr. Procopio was treated, anyone who works in the criminal justice system knows the immense frustration of treating mental illness through incarceration therapy.

CONCLUSION

When police use excessive force, there are several responsive actions that might be taken. In the most egregious cases, where criminal intent can be proven, they may be prosecuted for crimes. But the vast majority of excessive force cases are treated as violations of civil law. They trigger lawsuits against officers and government agencies for monetary damages. Finally, there are the sanctions that may be meted out by the officers' employers. These sanctions and remedies have varying burdens of proof, with criminal prosecution carrying the highest burden, and employment sanctions the lowest.

Here, Chief Marks' conduct on November 20, 2017 was clearly below the bar of what our community expects of its law enforcement officers. Kicking the legs out from someone who is handcuffed behind the back was wrong, even if it occurred through negligence.

It is not the duty of the Island County Prosecutor to determine what employment consequences Chief Marks should suffer. Nevertheless, it seems that there should be a careful review of his actions in light of city policies, and a sanction imposed that is commensurate with the serious nature of the conduct. Because he is the top law enforcement officer in the city, the way he performs his duty has a magnified influence on the conduct of his subordinate officers. He is the face of law enforcement in Langley. Neither Chief Marks, nor those in his command, should believe for a moment that treating an arrestee like this is acceptable practice.