

NO. 35837-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL M. KOLESNIK,

Appellant.

BRIEF OF APPELLANT

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DIVISION II
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ASSIGNMENT OF ERROR

Assignment of Error

1. Trial counsel's failure to object when the state elicited propensity opinion evidence that the defendant was the type of person who would commit a crime such as the one charged violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

2. The trial court erred when it imposed an exceptional sentence based upon a finding that the defendant knew the victim was a police officer because the more specific crime of third degree assault applied.

3. The trial court erred when it imposed an exceptional sentence based upon a finding that the defendant knew the victim was a police officer because the legislature did not intend RCW 9.94A.535(3)(v) to apply to assaults against police officers.

4. The trial court erred when it imposed an exceptional sentence that was clearly excessive.

5. The trial court erred when it imposed community custody conditions not authorized by the legislature.

Issues Pertaining to Assignment of Error

1. Does a trial counsel's failure to object when the state elicits propensity opinion evidence that the defendant was the type of person who would commit a crime such as the one charged violate the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when the jury would have acquitted but for this evidence?

2. Does a trial court err when it imposes an exceptional sentence based upon a finding that the defendant knew the victim was a police officer when that finding constitutes a more specific offense?

3. Does a trial court err if it imposes an exceptional sentence based upon a finding that the legislature did not intend to be used as an aggravating factor for the specific crime charged?

4. Does a trial court err if it imposes an exceptional sentence that is clearly excessive?

5. Does a trial court err if it imposes community custody conditions not authorized by the legislature?

STATEMENT OF THE CASE

Factual History

On December 13, 2005, at about 8:30 in the morning Robert Stover was standing near his pickup, which was parked in front of the shopping center at 5000 East 4th Plain in Vancouver, Washington. RP 113. As Mr. Stover smoked a cigarette the defendant Michael Kolesnik walked up asked a number of somewhat confusing questions as well as making some bizarre statements. RP 114. Although the defendant did not make any verbal or physical threats, Mr. Stover none the less thought the defendant's conduct sufficiently troubling that he called "911" to report that the defendant might be under the influence of drugs and might need assistance. RP 115-118.

Within a few minutes of this call, Officer Greg Zimmerman of the Vancouver Police Department responded to the call. RP 51. He was wearing his regular uniform and he drove a marked patrol car. RP 52. As Officer Zimmerman drove up to the shopping center he saw the defendant talking on a payphone in front of a breeze way between an Albertson's grocery store and some other smaller businesses. RP 51. The defendant fit the description provided by Mr. Stover. RP 54. After parking his vehicle Officer Zimmerman approached the defendant and asked how he was doing. RP 53-54. He also asked the defendant to turn around so the officer could frisk him for weapons. RP 56. Up to this point Officer Zimmerman had no reason to

believe that the defendant had been engaged in any criminal conduct. RP 85. In fact, he later testified that had the defendant refused to answer and walked off he would have taken no action against him. *Id.*

After the defendant turned around and just before Officer Zimmerman began the weapon's check, the defendant took off running toward the breeze way with the officer chasing behind. RP 57. After running only a short distance the defendant tripped and fell, and Officer Zimmerman came up behind him and put his knee on the defendant's back in order to restrain him. The defendant responded by struggling to get away. RP 58. At one point the defendant got himself turned onto his back with the officer straddling him. RP 60. As he did so, Officer Zimmerman saw something long and thin in the defendant's right hand and felt some blows to the left side of his head. RP 63. At about this point another officer arrived on the scene and Officer Zimmerman saw the defendant make a gesture with his righthand as if discarding something. RP 65.

When the second officer ran up he pulled out his taser and threatened to shoot the defendant, who quit struggling and allowed Officer Zimmerman to put handcuffs on him and place him face down on the concrete walkway. RP 122-123. At the defendant's request the second officer put a glove he found next to the defendant under the defendant's head. RP 165-166. After the defendant was in restraints, the second officer noticed that Officer

Zimmerman was bleeding from the left side of his head. RP 11, 130. Within a few more minutes a number of other officers arrived. RP 159-161. They found the defendant face down on the concrete of the breeze way handcuffed from behind with his head on a glove. RP 163. They also found a second glove, the defendant's wallet and car keys close by on the walkway, along with a screwdriver a little ways away by the wall of one of the businesses. RP 127, 258. All during this time the defendant made a number of obnoxious and profane comments directed at the officers. RP 136-137, 166-167. He also claimed that Officer Zimmerman had "jumped him." RP 136-137.

After other officers arrived Officer Zimmerman went to the hospital emergency room where the treating physician found that he had suffered a number of stab wounds to the left side of his head, including a stab wound about one inch deep in his left ear canal. RP 182-184. According to the later testimony of the treating physician, the stab wounds could well have been caused by a screwdriver but were probably not caused by keys, particularly given the nature of the cuts and the depth of the wound to the ear canal. RP 190, 288. Later analysis on the keys and the screwdriver failed to uncover any blood or genetic material although the treating physician explained that given the nature of the stab wounds there would not necessarily be any transfer of blood to the instrument that caused the wound. RP 196, 286-287.

Procedural History

By information filed December 15, 2005, the Clark County Prosecutor charged the defendant Michael Vasily Kolesnik with one count of attempted second degree murder under RCW 9A.32.050(1)(a) and one count of first degree assault under RCW 9A.36.011(1)(a) in the alternative. CP 1-2. Both alternative charges included the following deadly weapon enhancement allegation:

And further, that the defendant, did commit the foregoing offense while armed with a deadly weapon as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(4), to wit: a screwdriver. [DEAD WEAP]

CP 1-2.

The prosecutor later amended the information to add the following language to each count.

The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense. RCW 9.94A.535(3)(v).

CP 24-25.

The case later came on for trial with the state calling nine witnesses, including Mr. Stover, Officer Zimmerman, the other responding officers, and the emergency room treating physician. RP 47, 93, 112, 119, 159, 179, 204, 249, 283. These witnesses testified to the facts contained in the preceding

factual history. *See* Factual History. The state also state called Margaret Dean, the medical director at Western State Hospital. RP 202. Without defense objection, Ms Dean testified that she had performed a mental evaluation on the defendant and that in her opinion the defendant suffered from antisocial personality disorder, the symptoms of which were a “lifelong pattern of being not considerate of the rights of others, not considerate of the safety of others, longstanding pattern of being irresponsible in major areas of life like keeping up with responsibilities of school work, family relationships and following and obeying the law.” RP 209-210. She also testified that the defendant was that type of person who repeatedly harms others and feels no remorse about the effects of his actions. *Id.*

Following trial the court instructed the jury on the charge of attempted second degree murder and the alternative charge of first degree assault. CP 46, 49. The court also instructed the jury on the lesser included offenses of second degree assault and third degree assault upon a law enforcement officer. CP 46, 53, 60. The court further submitted special verdicts forms. CP 81-82. The first special verdict form asked: “Was the defendant Michael Vasily Kolesnik armed with a deadly weapon at the time of the commission of the crime?” CP 81. The second special verdict form asked: “Did the defendant know that the victim of this offense was a law enforcement officer who was performing his or her official duties at the time of the offense?” CP

82.

Following argument of counsel and deliberation, the jury returned a verdict of “not guilty” on the charge of attempted first degree murder and a verdict of “guilty” on the alternative charge of first degree assault. CP 77-78. The jury also returned answers of “yes” on both of the special verdict forms. CP 81-82.

The standard range for the defendant’s crime with an offender score of two points was from 111 to 147 months in prison. CP 90. With a 24 month deadly weapon enhancement added, the total standard range was from 135 to 171 months in prison. *Id.* However, based upon the aggravating factor found by the jury, the court imposed an exceptional sentence of 240 months in prison, which was 69 months and a little over 40% over the top end of the standard range. CP 93. The court also imposed 36 to 48 months community custody along with the following community custody conditions:

- ☒ Defendant shall not possess, use or deliver drugs prohibited by the Uniform Controlled Substances Act. or any legend drugs, except by lawful prescription. The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

CP 95.

After the court signed the judgment and sentenced the defendant filed
timely notice of appeal. CP 106.

ARGUMENT

I. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED PROPENSITY OPINION EVIDENCE THAT THE DEFENDANT WAS THE TYPE OF PERSON WHO WOULD COMMIT A CRIME SUCH AS THE ONE CHARGED VIOLATED THE DEFENDANT’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object to the admission of highly prejudicial propensity evidence that was far more unfairly prejudicial than probative. The following examines the law as it relates to the admission of propensity evidence and how trial counsel’s failure to object to its introduction in the case at bar denied the defendant a fair trial and effective assistance of counsel.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472

(1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the state charged the defendant with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

In the case at bar the state called Margaret Dean, the medical director of Western State Hospital as a witness in its case in chief. Without defense objection, Ms Dean testified that she had performed a mental evaluation on the defendant and that in her opinion the defendant suffered from antisocial personality disorder, the symptoms of which were a "lifelong pattern of being not considerate of the rights of others, not considerate of the safety of others, longstanding pattern of being irresponsible in major areas of life like keeping up with responsibilities of school work, family relationships and following and obeying the law." RP 209-210. She also testified that the defendant was that type of person who repeatedly harms others and feels no remorse about the effects of his actions. *Id.*

As in *Acosta*, this evidence had little probative value but did invite the

jury to convict the defendant of the current crime based upon Ms Dean's diagnosis that the defendant was the very type of person who would commit the type of crime charged. In other words, this evidence invited the jury to convict the defendant on the current charge based upon a perceived propensity to commit similar acts.

As propensity evidence, this testimony was inadmissible. Under the appropriate circumstances, trial counsel's failure to object might somehow be fashioned into a tactical move. However, no such argument can rationally be made in the case at bar. In fact, the defense presented at trial was that (1) the defendant did not assault the officer with a screw driver, and (2) he did not intend to kill the officer or cause great bodily injury. Ms Dean's testimony on the defendant's propensity to commit the very type of crime charged directly refuted the defendant's two main defenses. As a result, no tactical advantage existed for the failure to object to this evidence. Thus, trial counsel's failure to object fell below the standard of a reasonably prudent attorney. In addition, this failure caused prejudice because the state's case for first degree assault, which required proof of an intent to "inflict great bodily harm." The state's strongest evidence on this critical element came from Ms Dean's testimony. Thus, absent the improper propensity evidence, it is likely that the jury would have returned a verdict of "not guilty" on the charge of first degree assault. As a result, trial counsel's failure to object denied the

defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment and the defendant is entitled to a new trial.

II. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE BASED UPON A FINDING THAT THE DEFENDANT KNEW THE VICTIM WAS A POLICE OFFICER BECAUSE THE MORE SPECIFIC CRIME OF THIRD DEGREE ASSAULT APPLIED.

When the legislature punishes the same conduct under concurrent statutes, the state may only charge the accused under the more specific of the two. *State v. Shriner*, 101 Wn.2d 576, 681 P.2d 237 (1984). For the purpose of this rule, criminal statutes are concurrent if every violation of the specific statute constitutes a violation of the general statute. *Id.* at 580. The fact that the specific statute contains elements not found in the general is irrelevant. *Id.* In *State v. Farrington*, 35 Wn.App. 799, 669 P.2d 1275 (1983), the court states this principle as follows:

Where a special statute punishes the same conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute. However, when the crimes have different elements, there is no constitutional defect. The test is whether a violation of the special statute necessarily violates the general statute.

State v. Farrington, 35 Wn.App. at 802.

In the case at bar, the state charged the defendant with the alternative crime of first degree assault under RCW 9A.36.011(1)(a) with an added

allegation that the defendant committed the crime against a police officer under RCW 9.94A.535(3)(v). The former statute states:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

RCW 9A.36.011(1)(a).

The latter statute states:

(3) Aggravating Circumstances--Considered By A Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537

. . .

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v).

This latter statute is a general provision that allows the state to add an allegation to any type of offense and thereby enhance the sentence of anyone committing crime against a law enforcement officer if (1) the offense "was committed against a law enforcement officer," (2) the law enforcement officer was "performing his or her official duties at the time of the offense,

(3) the defendant knew the victim was a law enforcement officer, and (4) the victim's status as a law enforcement officer was not otherwise an element of the offense. The error in using this enhancement in the case at bar is that when the underlying offense is assault in the first or second degree, the special allegation also defines the more specific offense of third degree assault under RCW 9A.36.031(1)(h), which provides that any person who "[a]ssaults 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" is guilty of a Class C felony. This is a mirror image of the language that the general enhancement statute uses. Thus, the trial court erred when it allowed the state to make a general enhancement addition to the original alternative charge because the conduct underlying the enhancement constitutes the more specific crime of third degree assault.

III. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE BASED UPON A FINDING THAT THE DEFENDANT KNEW THE VICTIM WAS A POLICE OFFICER BECAUSE THE LEGISLATURE DID NOT INTEND RCW 9.94A.535(3)(v) TO APPLY TO ASSAULTS AGAINST POLICE OFFICERS.

As was previously stated, under RCW 9.94A.535(3)(v) the legislature has authorized enhanced punishment for anyone committing a crime against a law enforcement officer if (1) the law enforcement officer was "performing his or her official duties at the time of the offense, (2) the defendant knew the

victim was a law enforcement officer, and (3) the victims status as a law enforcement officer was not otherwise an element of the offense. Once again, the specific language of this statute is as follows:

(3) Aggravating Circumstances--Considered By A Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537

. . .

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v).

The court's primary rule of statutory construction is to give effect to the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005). The "legislature's intent" is determined primarily from the language of the statute at question when viewed in the context of the overall legislative scheme. *Miller v. City of Tacoma*, 138 Wn.2d 318, 328, 979 P.2d 429 (1999). Thus, the court should read statutory provisions together with others "to achieve a harmonious and unified statutory scheme." *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2002). As a result, statutes relating to similar subject should be read as complementary rather than conflicting.

State v. O'Brien, 115 Wn.App. 599, 601, 63 P.3d 181 (2003).

In the case at bar the defendant argues that the enhancement language from RCW 9.94A.535(3)(v) must be read in the context of more specific provisions such as the introductory language of the lesser degree offenses of second and third degree assault. When done so, this review indicates that the legislature did not intend to allow RCW 9.94A.535(3)(v) to apply in charges of first and second degree assault.

The introductory language of the second degree assault statute states the following:

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

RCW 9A.36.021.

The introductory language of the third degree assault statute uses similar language and 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:

RCW 9A.36.031.

The language of these introductory statements of law is clear on its face. The legislature prohibits the state from obtaining second convictions for lesser degree assault violations when the state obtains a conviction for the same conduct under a higher degree statute. Absent this language it would

be possible to obtain a conviction for both first or second degree assault and third degree assault out of the same incident if the victim was a police officer in the performance of his or her official duties. The reason is that first and second degree assault charges on the one hand and third degree assault on the other hand have independent elements. Under the first degree assault statute the state has the burden of proving an intent to cause "great bodily harm" which is not required for third degree assault against a police officer, and under the third degree assault against a police officer statute the state has the burden of proving that the defendant assaulted a police officer, which is not an element of first degree assault.

Similarly, every alternative method of committing second degree assault requires an element not required for third degree assault of a police officer while not of the alternative methods of committing second degree assault require that the victim be a police officer in the performance of his or her duties. Since first and second degree assault on the one hand have elements not required for third degree assault of a police officer and since third degree assault of a police officer has an element not required for any alternative method of committing first or second degree assault, double jeopardy does not stand in the way of obtaining convictions for both crimes out of the same event. This conclusion follows the rule that if each offense requires proof of an element not required in the other and where proof of one

does not necessarily prove the other, the offenses are not the same for the purposes of double jeopardy and multiple convictions are permitted. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995). Thus, the only fact that stands in the way of the state obtaining convictions for both first degree assault and third degree assault against a person who with the intent to cause great bodily harm assaults a police officer in the performance of his or her duties is the clear introductory language of the legislature prohibiting such a result.

To interpret RCW 9.94A.535(3)(v) to allow the application of this aggravating factor to a charge of first or second degree assault would thwart the clear intent of the legislature under the first and second degree assault statutes to not allow extra punishment when the person committing the first or second degree assault also commits a third degree assault under the particular facts of the case. Thus, in order to give full effect to the intent of the legislature in both RCW 9.94A.535(3)(v) and the introductory language of both the first and second degree assault statutes, the former statute should be interpreted to preclude application of the former aggravating factor to charges of first and second degree assault. At a minimum the introductory language of both the first and second degree assault statutes makes the application of the aggravating factor found in RCW 9.94A.535(3)(v)

ambiguous in the context of an underlying charge of first or second degree assault. Thus, under the rule of lenity this court should give this statute the interpretation that favors the defendant. *State v. Jacobs, supra*.

IV. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE THAT WAS CLEARLY EXCESSIVE.

In order to obtain reversal of a sentence in excess of the standard range, the appealing party has the burden of proving either “that the reasons supplied by the sentencing judge are not supported by the record which was before the judge, or that these reasons do not justify a sentence outside the standard range for that offense . . .” RCW 9.94A.585(4). The former is a question of fact reviewed under a clearly erroneous standard. *State v. Fisher*, 108 Wn.2d 419, 739 P.2d 1117 (1987) (citing *State v. Nordby*, 106 Wn.2d 514, 723 P.2d 1117 (1980)). The latter is a question of law and should be independently reviewed by this Court. *Id.* In addition, either party may obtain reversal of a sentence outside the standard range if that sentence is either “clearly excessive or clearly too lenient.” RCW 9.94A.585(4)(b). In the case at bar, the defendant makes this latter argument that his sentence is clearly excessive.

As was noted in the previous argument, but for the introductory language of both the first and second degree assault statutes, a defendant who, with the intent to cause great bodily harm, assaults a police officer in

the official performance of his or her duties would be guilty of two specific crimes: first degree assault and third degree assault. Had the state been able to bring such a charge in this case, the defendant's offender score on the first degree assault charge would have either remained the same (upon a finding of same criminal conduct) or would have increased by one point (upon a finding that the first and third degree assaults were not same criminal conduct). In the former event, the court would not have been able to enhance the sentence because the enhancing fact would have been an element of the second offense of third degree assault. This follows the rule that factors which constitute elements of the crime are necessarily considered by the legislature in setting the standard range and cannot justify imposition of an exceptional sentence. *State v. Chadderton*, 119 Wn.2d 390, 832 P.2d 481 (1992). In the latter event the court would not have been able to enhance the sentence because the enhancing element would already have been considered in elevating the offender score and would thus have already been taken into account in setting the offender score. However, under the latter alternative, the increase in the offender score would have changed the standard range (with the enhancement included) from one of 135 to 171 to a range of 144 to 184. Thus, even if the legislature allowed for a separate conviction for third degree assault, thus completely accounting for the facts underlying the aggravating factor, the top end of the range would have only increased by 13

months to 184 months. The defense argues that any sentence in excess of this 184 months, which would account completely for the facts underlying the aggravating factor is clearly excessive. Thus, the trial court erred when it imposed an exceptional sentence of 240 months in prison.

V. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant argues that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the

following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar the defendant was found guilty of first degree assault. At sentencing the court imposed 240 months in prison and 36 to 48 months community custody. Under RCW 9.94A.030(41), first degree assault is "a serious violent offense," which is specifically listed as a sub-category

of “violent offenses” as defined in RCW 9.94A.030(41). As such the imposition of community custody is authorized under RCW 9.94A.715, which also controls the imposition of community custody conditions. This statute states as follows in relevant part:

(1) When a court sentences a person to the custody of the department for . . . a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

RCW 9.94A.715(1).

As RCW 9.94A.715(2)(a) states, “the conditions of community custody shall include those provided for in RCW 9.94A.700(4).” In addition, “[t]he conditions may also include those provided for in RCW 9.94A.700(5).” Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5).

Under these provisions no causal link need be established between

the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8th ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). In the case at bar the trial court imposed the following conditions among others:

- ☒ Defendant shall not possess, use or deliver drugs prohibited by the Uniform Controlled Substances Act. or any legend drugs, except by lawful prescription. The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.

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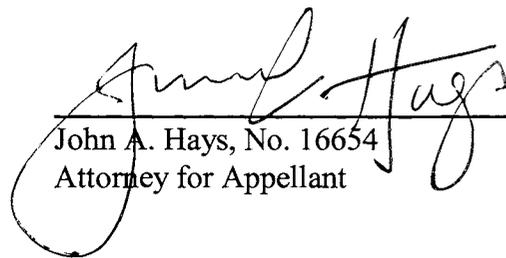
Under RCW 9.94A.700(4)(c) the court does have authority to prohibit a defendant from possessing or consuming controlled substances “except pursuant to lawfully issued prescriptions.” However, there is nothing in this section that allows the court to require that the defendant notify the department upon receiving a valid prescription for a controlled substance. Neither is there anything in this section that allows the trial court to prohibit a defendant from possessing or using “any paraphernalia that can be used for the ingestion of controlled substance” such as “pagers, cell phone, and police scanners.” Thus, the trial court exceeded its authority when it imposed the first two conditions listed above.

CONCLUSION

The defendant is entitled to a new trial based upon the fact that trial counsel's failure to object when the state elicited unfairly prejudicial propensity evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. In addition the trial court erred when it imposed an exceptional sentence based upon a fact that the legislature did not intend to be used to aggravate an assault against a police officer. In the alternative, the court erred when it imposed an exceptional sentence that was clearly excessive. Finally, the trial court erred when it imposed community custody condition not authorized by law.

DATED this 31st day of May, 2007.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 9.94A.535

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) through (6).

(1) Mitigating Circumstances--Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW

9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances--Considered By A Jury--Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in

which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who

was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

RCW 9.94A.700

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

RCW 9A.36.011

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

RCW 9A.36.021

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

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.031

(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:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a fire fighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(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; or

(h) Assaults a peace officer with a projectile stun gun; or

(i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: “Nurse” means a person licensed under chapter 18.79 RCW; “physician” means a person licensed under chapter 18.57 or 18.71 RCW; and “health care provider” means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.

(2) Assault in the third degree is a class C felony.

