

**NO. 41803-7-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TROY DAVID SCHOENBEIN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan E. Chushcoff

No. 10-1-00558-9

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly refuse a jury instruction on self-defense where there was no evidence to support such an instruction?
2. Did defendant fail to satisfy his burden in proving that his 365-day punishment did not comport with Article one, Section 14 of the Washington State Constitution?
3. Did the trial court properly sentence defendant to 365 days in custody for a gross misdemeanor conviction?
4. Did the trial court properly impose restitution where it found a causal connection between the defendant's criminal assault and the victim's injuries?

B. STATEMENT OF THE CASE.

1. Procedure

On February 5, 2010, the Pierce County Prosecutor's Office ("State") charged appellant, Troy David Schoenbein ("defendant"), with one count of assault in the first degree. CP 1-2. The State later amended the information to correct the statutory reference. CP 76; RP 156-58.

The Honorable Bryan E. Chushcoff heard pretrial motions on November 18, 2010. RP 4. The court empanelled a jury on November 30,

2010, and the jury began hearing testimony on December 2, 2010. RP 158, 184.

When the court asked for objections and exceptions to its proposed instructions, the State objected to the giving of an instruction on the inferior degree offense of assault in the fourth degree. CP 71 (Instruction 14); RP 1214. The court found that the facts of the case supported a lesser-included instruction and overruled the State's objection. RP 1215. Defendant took exception to the court's failure to instruct on self-defense; the court found that there was insufficient evidence to support a self-defense instruction. RP 1216–17.

The jury found defendant not guilty of assault in the first degree, but found him guilty of the lesser degree offense of assault in the fourth degree. CP 74–75; RP 1306–07. The court sentenced defendant to 365 days of custody. CP 87–91; RP 1345.

On February 18, 2011, the court heard a defense motion to reconsider defendant's sentence. RP 1353–1406. The defense argued that the sentence was too harsh for a gross misdemeanor. RP 1360–62. The defense argued that the jury's decision, finding defendant guilty of fourth degree assault instead of first degree assault, necessarily inferred that defendant did not commit a severe eye injury sustained by the victim. RP 1360–62. The court denied the motion and reaffirmed defendant's

sentence, reasoning that there was no way to determine exactly why the jury convicted defendant of the lesser charge. CP 98; RP 1390.

Defendant's restitution hearing occurred on June 10, 2011. 6/10/2011 RP 4–28.<sup>1</sup> The trial court ordered \$12,500.57 in restitution. 6/10/2011 RP 16.

This appeal timely follows. CP 99–104.

## 2. Facts

On January 8, 2010, defendant and his neighbor, Frank Matesa, testified that they were involved in a physical dispute with each other in the street outside of their homes. RP 789–813, 1104–07. The altercation ended with Mr. Matesa sustaining a severe eye injury, which ultimately required the surgical removal of his eye. RP 486–90, 729, 831. Leading up to the assault, both defendant and Mr. Matesa acknowledged that they had engaged in several disputes over the course of a decade. RP 773–83, 1091–97, 1138–44.

Mr. Matesa testified that he was returning from his girlfriend's house when he drove past defendant's property. RP 703–04, 787. At the same time, defendant was backing out of his driveway and failed to see

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<sup>1</sup> The restitution hearing's transcript is separately paginated from the verbatim report of proceedings. The State will reference the hearing as "6/10/2011 RP" throughout its brief.

Mr. Matesa. RP 789, 793. Defendant's brother had parked his truck on the side of the road, thus obstructing both Mr. Matesa and defendant's view between defendant's driveway and the street. RP 788–89, 793. Defendant narrowly missed colliding into Mr. Matesa's vehicle. RP 789, 794.

Mr. Matesa swerved to the side of the road and got out to inspect his car. RP 796. By this time, defendant had also pulled out and parked on the side of the road. RP 796. After checking his vehicle, Mr. Matesa began walking toward defendant, who was still sitting in his car, and the two men exchanged words of frustration. RP 796, 800, 1081. The accounts vary as to what happened next.

Mr. Matesa testified that defendant said, "Do you want a piece of me?" before getting out of his car and striking Mr. Matesa in the chest and knocking him to the ground. RP 797, 800–05. While on the ground, Mr. Matesa said that he was "kicked around" multiple times. RP 812–13. He also stated that at some point during the assault, his eye was "knocked out like a grape." RP 808, 811.

Defendant testified that after getting out of his vehicle, Mr. Matesa started hitting him. RP 1104. Defendant said that he only attempted to block Mr. Matesa's punches and never responded with any punches or kicks of his own. RP 1104–05. Defendant's brother testified similarly, except he saw nothing after Mr. Matesa's alleged initial punch at his

brother. RP 1040. Defendant testified that Matt Doffing, a family friend, entered the scuffle and punched Mr. Matesa several times. RP 1105–06. Defendant also testified that he stopped his friend from hitting Mr. Matesa further, and apologized for almost hitting Mr. Matesa’s car. RP 1106–07.

Mr. Doffing testified that he saw Mr. Matesa attack defendant. RP 294–95. He testified that although he saw defendant try to defend himself, he never saw defendant succeed in hitting Mr. Matesa. RP 301–02. Mr. Doffing stated that after yelling at Mr. Matesa to stop, he punched Mr. Matesa multiple times on the side of his head. RP 305, 307, 311.

Mr. Matesa repeatedly denied that his injuries were caused by Mr. Doffing, insisting it was the defendant. RP 813.

After the assault, defendant, his brother, and Mr. Doffing immediately left the scene. RP 346–47, 1009, 1053–54. Mr. Matesa testified that he went into his home, waited for his girlfriend to arrive, and asked her to take him to the hospital. RP 820–22. After a short investigation, detectives arrested defendant a month later. RP 578.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING DEFENDANT'S INSTRUCTION ON SELF-DEFENSE BECAUSE IT WAS NOT SUPPORTED BY THE EVIDENCE.

A trial court's refusal to give a particular instruction to the jury, if based on a factual dispute, is reviewable only for an abuse of discretion.<sup>2</sup> *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). To abuse its discretion, the record must show that the trial court's discretion was predicated upon manifestly unreasonable or untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citation omitted).

A criminal defendant is entitled to a jury instruction if there is sufficient evidence to support that particular instruction. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 460–61, 6 P.3d 1150 (2000) (holding that even if the instruction is inconsistent with the defendant's theory at trial, it should be admitted so long as there is evidence to support it); *see also State v. Werner*, 170 Wn.2d 333, 336, 241 P.3d 410 (2010).

A self-defense instruction requires evidence that (1) the defendant subjectively feared that he was in imminent danger of harm; (2) this belief

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<sup>2</sup> Defendant argues that “[t]his Court reviews *de novo* a trial court’s finding that no reasonable person in [defendant]’s shoes would have acted as he acted.” Brief of Appellant at 6. However, defendant fails to specify where the trial court actually made such a finding. The trial court expressly stated that it denied the self-defense instruction because there was not a “factual basis” to support the instruction. RP 1217. Accordingly, the issue is a “factual dispute” that is reviewable only for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

was objectively reasonable; and (3) the degree of force used by defendant was reasonably necessary. See *Werner*, 170 Wn.2d at 337. The instruction is not permitted if the defendant was the aggressor. *State v. Walden*, 131 Wn.2d 469, 482, 932 P.2d 1237 (1997); *State v. George*, 161 Wn. App. 86, 96, 249 P.3d 202 (2011). If any element of the self-defense instruction is not supported by evidence, the instruction should not be presented to the jury. See *State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 799 (1979).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984) (citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967)). Only those exceptions to instructions that are *sufficiently particular* to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

In this case, defendant took exception pursuant to CrR 6.15 to the trial court's exclusion of a self-defense instruction. RP 1209–18. However, defendant's exception was not particular and did not identify what evidence supported the instruction. Defense counsel objected:

We would respectfully disagree with the Court's finding that there is insufficient evidence to provide the self-defense instruction.

While my client's testimony did not indicate that he had struck Mr. Matesa, *I think that there is some evidence* in the record to reflect that my client *may have swung* at Mr. Matesa in response to Mr. Matesa's approach of my client. I think that there is sufficient evidence to support that.

RP 1216 (emphasis added). Defense counsel neither highlighted what evidence supported this claim nor identified which witness's testimony would support the instruction. Defense counsel's exception thus amounted to nothing more than an uncorroborated assertion.

In response to the exception, the trial court properly examined each witness's account of the assault, stating:

Okay. There was evidence that Mr. Matesa approached Mr. Schoenbein in the manner that might cause Mr. Schoenbein to be concerned with being struck. There is also evidence that Mr. Matesa threw the first punch.

There is no evidence from anybody that Mr. Schoenbein actually hit him except for Mr. Matesa, of course. *By Mr. Matesa's theory, of course, Mr. Schoenbein caused all of this damage to him.*

Mr. Schoenbein himself testified that he did not—he never—that he never hit Mr. Matesa. [Defendant's brother] also said that he never saw—although there was part of this that he didn't see, what he did see, he never saw his brother strike Mr. Matesa.

Mr. Doffing testified, well, he thought that the defendant may have been trying to strike him, that he never actually saw him strike him.

RP 1216–17 (emphasis added). While the court found evidence to support that defendant might have had a reasonable belief of being harmed, the court did not find any evidence that defendant reacted by assaulting Mr. Matesa in self-defense:

I don't think that there is any evidence that the defendant—defense theory of the case is that there is evidence that he acted in self-defense. *He either didn't strike him in self-defense or he assaulted him as Mr. Matesa has described.* I don't think that there is a factual basis for it. The jury is going to find one way or the other, so I will not give the self-defense instructions.

RP 1217 (emphasis added). Because there was insufficient evidence to support the claim that defendant reacted in self-defense, the court properly exercised its discretion in refusing to give a self-defense instruction. *See Griffith*, 91 Wn.2d at 575.

On appeal, defendant argues that “Mr. Matesa testified that [defendant] struck him multiple times,” and that this testimony alone qualifies defendant for “the self-defense theory.” Brief of Appellant at 4. Admittedly, the only witness to testify that defendant actually punched and kicked Mr. Matesa was the victim himself. *See* RP 796–813. But by Mr. Matesa’s account, as the trial court correctly reasoned above, defendant was the *aggressor* by getting out of his car, yelling “Do you want a piece of mc?”—then striking Mr. Matesa in the chest and kicking him on the ground. *See* RP 800, 805–06. As the aggressor, however,

defendant cannot qualify for a self-defense instruction. *Walden*, 131 Wn.2d at 482.

Defendant's argument unduly broadens what the courts have traditionally required for a self-defense instruction; namely, some version of the story where (1) the victim was the aggressor, and (2) the defendant reacted by using force against the aggressor. Here, however, not a single witness can attest to those two facts together.

The trial court did not abuse its discretion by refusing defendant a self-defense instruction. After analyzing all of the testimony, it properly determined that there was insufficient evidence for the instruction. Accordingly, this court should affirm the trial court's holding and dismiss defendant's claim.

2. DEFENDANT FAILED TO MEET HIS BURDEN  
IN SHOWING THAT HIS SENTENCE WAS  
CRUEL UNDER ARTICLE ONE, SECTION 14  
OF THE WASHINGTON STATE  
CONSTITUTION.

Article 1, section 14 of the Washington State Constitution states that "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." This provision protects against sentences that are grossly disproportionate to the crime committed. *State v. Whitfield*, 132 Wn. App. 878, 900–01, 134 P.3d 1203 (2006). "A punishment is grossly disproportionate only if . . . the punishment is clearly arbitrary and

shocking to the sense of justice.” *Id.* at 901 (quoting *State v. Smith*, 93 Wn.3d 329, 344–45, 610 P.2d 869 (1980)).

When determining whether a punishment is cruel, the court considers (1) the nature of the offense, (2) the legislative purpose behind the criminal statute, (3) the punishment defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction. *State v. Korum*, 157 Wn.2d 614, 640, 141 P.3d 13 (2006) (citing *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980)). It is the defendant’s burden to show that cruel punishment exists. *See Id.* at 640–41 (dismissing defendant’s claim because he failed to provide evidence for each individual factor).

A strikingly similar case to the present case is *State v. Bowen*, 51 Wn. App. 42, 751 P.2d 1226 (1988). The defendant in *Bowen* struck his wife in the face after an argument. *Id.* at 44. The wife suffered swelling and bruising around her eye. *Id.* Although the State charged Bowen with first degree assault, the jury found him guilty of the lesser-included gross misdemeanor, simple assault. *Id.* Noting the severity of the attack, the trial court sentenced Bowen to one year in jail. *Id.*

Bowen appealed the conviction, claiming it was cruel punishment to be sentenced longer for a simple assault than a felony assault. *Id.* at 44, 47–48. The court dismissed his claim because the defendant failed his burden and made “no showing” that a sentence of one year for simple assault was disproportionate to other jurisdictions. *Id.* at 48. Because the

defendant proffered no evidence that his punishment was cruel, the court held that the “[i]mposition of the statutory maximum for a gross misdemeanor does not constitute cruel and unusual punishment.” *Id.* at 48.

a. The nature of the offense

The trial court imposed a 365-day sentence for defendant’s conviction of fourth degree assault, a gross misdemeanor. RCW 9A.36.041(2). The nature of the offense is that defendant was involved in a violent physical assault that ended with the victim sustaining injuries including the loss of his eye and a bruise on his chest. RP 471, 491, 805.

Defendant argues that the punishment is cruel because the assault “caused no permanent, grievous or serious injury, just a bruise on [Mr. Matesa’s] chest.” Brief of Appellant at 10. He argues that “[t]he jury rejected the prosecutor’s proposition that [defendant] caused Mr. Matesa to lose his eye.” Brief of Appellant at 10. This is the same speculative argument that defense counsel made at trial; specifically, that by finding defendant not guilty of assault in the first degree, the jury necessarily relieved defendant of any culpability pertaining to Mr. Matesa’s eye injury. *See* RP 1371.

As properly recognized by the trial court, the reasons why the jury acquitted defendant of first degree assault and instead convicted him of fourth degree assault cannot be determined from the record. After defense counsel made the same argument above, the trial court explained:

[W]ith respect to the jury verdict, [the jury] did find Mr. Schoenbein not guilty of Count 1, which was Assault in the First Degree. Now, think about what the elements are of that offense. I'm taking this from Jury Instruction 12. In order to convict Mr. Schoenbein of that, they would have to find each of the following elements: (1) that on or about January 8, 2010, the defendant assaulted Frank Matesa; (2) that the defendant acted with an intent to inflict great bodily harm; (3) that the assault was committed with a deadly weapon or by force or means likely to produce great bodily harm or death or resulted in the infliction of great bodily harm, and that it occurred in the state of Washington.

Now, the State had to prove all four of those elements. *I think one of the things that the jury may well have done is said, they don't necessarily think that Mr. Schoenbein intended to inflict great bodily harm, but merely that's what happened.*

RP 1342–43 (emphasis added). When the defendant motioned the court to reconsider his sentence on that same premise, the trial court reiterated the point that the jury “may have found that he did not act with intent to create bodily harm . . . That’s why I say to [defense counsel], you are assuming that they found that he didn’t create the injury. I say to you, that is not born out by instructions that the jury received.” RP 1372–73.

Defendant implores the court to only consider the victim’s bruised chest and refers solely to the jury’s verdict to show that the jury rejected the evidence that defendant caused the eye injury. Brief of Appellant at 10. The verdict, however, states nothing about the jury’s determination regarding the victim’s injuries. *See* CP 74–75. Accordingly, the nature of

the offense is a gross misdemeanor assault that resulted in grievous bodily harm.<sup>3</sup>

b. The legislative purpose behind the statute.

The general purposes of any criminal offense statute are “(a) to forbid and prevent conduct that inflicts or threatens substantial harm; . . . [and] (d) to differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.” *See* RCW 9A.04.020. When addressing the degree of deference that should be given to the legislature and criminal punishment legislation, the Washington State Supreme Court held, “Legislative judgments as to punishments for criminal offenses are entitled to the *greatest possible deference* . . . .” *Korum*, 157 Wn.2d at 641 (quoting *Fain*, 94 Wn.2d at 401–02 n.7).

Assault in the fourth degree constitutes a gross misdemeanor, punishable “by the court of not more than one year . . . .” RCW 9.92.020 (2010). Washington first distinguished assault as a gross misdemeanor in 1909. *See Law of Washington*, ch. 249, S. 15, §163 (p.937) (1909). Since then, the lowest form of assault has always constituted a gross misdemeanor, punishable up to one year in jail. *See, e.g., State v. Hamilton*, 69 Wash. 561, 563, 125 P. 950 (1912); *Jeane v. Smith*, 34

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<sup>3</sup> Interestingly, even if the court disregarded the eye injury and just considered the victim’s bruised chest, the facts would more closely resemble *Bowen*, where the court affirmed a one year sentence where the victim only suffered bruising and swelling around her eye. *Bowen*, 51 Wn. App. at 44.

Wn.2d 826, 829, 210 P.2d 127 (1949) (citing Rem. Rev. Stat. § 2267). While the Sentencing Reform Act of 1981 placed substantial constraints on felony sentencing, no similar restrictions have been enacted by the legislature to restrict the sentencing for gross misdemeanors. See *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591 (2009).

The legislature has been clear for over a century that a proportionate punishment for a gross misdemeanor is up to one year in custody. Defendant does not cite a single legal authority to the contrary. Defendant does not meet his burden in proving how his sentence does not further the aims of the legislature.

c. The punishment the defendant would have received in other jurisdictions

Defendant's comparison to California's penal code is entirely misleading. Defendant states that the California penal code defines "assault" as "willingly us[ing] force or violence upon another." Brief of Appellant at 12. This assertion is not supported by California law.

Unlike Washington, California distinguishes the crime of assault from the crime of battery. See Cal. Penal Code §240–43.<sup>4</sup> "Assault" is defined as "an unlawful *attempt*, coupled with present ability, to commit a violent injury on the person of another." Cal. Penal Code §240 (emphasis

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<sup>4</sup> The relevant portions of the California Penal Code have been attached as Appendix A.

added). As correctly identified by defendant, an assault in California is punishable up to six months in the county jail. Cal. Penal Code § 241(a).

A battery, however, is defined as “any willful and unlawful use of force or violence upon the person of another.” Cal. Penal Code §242. The statute defining the punishment for battery states that “[w]hen a battery is committed against any person *and serious bodily injury is inflicted, the battery is punishable by imprisonment in a county jail not exceeding one year* or imprisonment in the state prison for two, three, or four years.” Cal. Pen. Code §243(d). The definition and the punishment affixed to battery in California are substantially similar to the crime and punishment of a misdemeanor assault in Washington.

Defendant errs by connecting the California definition of battery with the penalty for assault. *See* Brief of Appellant at 12. Thus, defendant’s only support for his claim of “cruel” punishment is this flawed comparison to California’s penal code. Defendant did not reference any other jurisdiction that might substantiate his claim. Defendant failed to meet his burden in showing that his punishment is outside of the norm.

d. The punishment imposed for other offenses in the same jurisdiction.

A 365-day sentence for a gross misdemeanor is reasonable when compared to other gross misdemeanor convictions. *See, e.g., State v. Cross*, 156 Wn. App. 568, 234 P.3d 288 (2010) (harassment); *In re*

*Swenson*, 158 Wn. App. 812, 244 P.3d 959 (2010) (communicating with a minor for immoral purposes); *Wahleithner v. Thompson*, 134 Wn. App. 931, 143 P.3d 321 (2006) (driving under the influence and hit-and-run); *State v. Whitney*, 78 Wn. App. 506, 897 P.2d 374 (1995) (driving while license suspended); *Bowen*, 51 Wn. App. 42 (simple assault).

In *Wahleithner*, the court found that a comparison between a 365-day sentence for a gross misdemeanor and other felonies within the same jurisdiction was “of very limited utility.” 134 Wn. App. at 941. The court reasoned that along with the difficulty of comparing the two, such a comparison offered “no discussion of the likely consequences to [the defendant] had his crimes been felonies.” *Id.* at 941.

The defendant in this case, similar to the defendants in *Wahleithner* and *Bowen*, compares his gross misdemeanor sentence to the felony of assault in the third degree. Brief of Appellant a 13. This comparison is very limited in utility and overlooks each of the following consequences:<sup>5</sup>

- Confinement in prison up to the statutory maximum of five years in prison for assault in the third degree, while persons convicted of gross misdemeanors can be sentenced to a maximum of one year in the county jail. RCW 9A.20.021(1)(c).
- Future consequences for calculation of a defendant’s offender score, while gross misdemeanor offenses do not.

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<sup>5</sup> Some of these consequences were outlined by the court in *Bowen*. 51 Wn. App. at 47.

- The court has jurisdiction for a longer period to impose punishment, restitution, and community supervision than the duration for gross misdemeanor offenses.
- The \$10,000 statutory maximum monetary fine for felony assault doubles the monetary fine of assault in the fourth degree. RCW 9A.20.021(1)(c).
- The effects on defendant's civil rights, such as losing the right to vote, see Wash. Const. art. VI § 3, RCW 29A.04.079, and the right to carry a firearm, RCW 9.41.040.

Defendant further alleges that the trial court could have only imposed “zero to three months” of incarceration for the felony. Brief of Appellant at 13. But defendant's assessment is based on the premise of the standard range for a first-time felony with a *seriousness level of two*. Third degree assault is a class C felony and carries a minimum seriousness level of three.<sup>6</sup> RCW 9.94A.515.

Moreover, based on the nature of the offense and the facts of the case, the trial court determined that the maximum sentence of 365-days was proper. *See* RP 1339–45. It is likely that the trial court could have sentenced defendant well above the standard range had he been convicted of assault in the third degree (e.g., anywhere up to five years in custody). The trial court might even have had authority to extend defendant's sentence even further if any aggravating circumstances were pertinent to

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<sup>6</sup> This changes the standard range for a first time offense to one to three months. *See* RCW 9.94A.510.

defendant's assault. RCW 9.94A.535(3). For example, applicable aggravating circumstances include:

- The defendant's conduct manifested deliberate cruelty to the victim.
- The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.

RCW 9.94A.535(3).

Defendant has not demonstrated how his punishment is clearly arbitrary and shocking to the sense of justice. *Whitfield*, 132 Wn. App. at 901. He has not even proffered evidence to support each of the factors required by *Fain* and *Korum*. See *Korum*, 157 Wn.2d at 640. The court should dismiss this claim on these grounds alone. Nonetheless, his punishment appears reasonable in light of the legislative purpose underlying the offense, is comparable to the punishment he would receive in other jurisdictions, and is similar to other sentences for gross misdemeanors in Washington.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT SENTENCED DEFENDANT TO ONE YEAR IN CUSTODY FOR HIS GROSS MISDEMANER OFFENSE.

This court reviews a trial court's imposition of a sentence under an abuse of discretion standard. *State v. Derefield*, 5 Wn. App. 798, 799, 491 P.2d 694 (1971). The trial court abuses its discretion "where it can be said no reasonable man would take a view adopted by the court." *Id.*

Courts have regularly recognized that trial courts have “great discretion in imposing sentences within the statutory limits for misdemeanors and gross misdemeanors.” *See, e.g., Anderson*, 151 Wn. App. at 402. Courts may impose any sentence up to one year in jail for a gross misdemeanor. *Id.* at 402. This level of discretion is said to be “consistent with the tradition in American criminal jurisprudence affording wide latitude to sentencing judges on grounds that ‘the punishment should fit the offender and not merely the crime.’” *Id.* (quoting *State v. Herzog*, 112 Wn.2d 419, 423–24, 771 P.2d 739 (1989)).

During sentencing, the trial court reviewed the facts leading up to the assault, the severity of the victim’s injury, the animosity between the victim and defendant, and the role defendant had in the assault. RP 1339–45. The trial court found that defendant “[had] a significant part in what happened here.” RP 1345. After considering all of the important variables in the case, the trial court imposed a sentence of one year. RP 1345. When considering that Washington courts have allowed 365-day sentences for several other gross misdemeanors, including a simple, first-time assault, the defendant cannot show that no reasonable man would follow the view adopted by the court. *Derefield*, 5 Wn. App. at 799. Defendant has not cited a single legal authority where the trial court has abused its discretion in this regard.

In an attempt to show how the trial court abused its discretion, defendant relies once more on the premise that the jury necessarily relieved defendant of any culpability pertaining to the victim's eye injury. Brief of Appellant at 15. As discussed above, there is no evidence to support this claim.

4. THE TRIAL COURT PROPERLY ORDERED RESTITUTION WHERE IT DETERMINED A CAUSAL LINK EXISTED BETWEEN DEFENDANT'S CONDUCT AND THE VICTIM'S INJURIES.

Generally, the trial court's imposition of restitution will not be disturbed on appeal absent an abuse of discretion.<sup>7</sup> *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

The authority to impose restitution is statutory. *Id.* at 919. The applicable restitution statute states that “[r]estitution *shall* be ordered *whenever* the offender is convicted of an offense which results in injury to any person . . . .” RCW 9.94A.753(5) (emphasis added). The very language of statutes authorizing restitution indicates a legislative intent to

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<sup>7</sup> Defendant incorrectly argues that this court reviews a trial court's imposition of restitution de novo. Brief of Appellant at 17–18. The authority defendant cites, however, asserts no such standard. See *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005). Defendant's proposed standard is appropriate when the reviewing court is determining whether the trial court *applied* or *interpreted* the proper restitution statute. See, e.g., *State v. Johnson*, 96 Wn. App. 813, 981 P.2d 25 (1999). However, no such argument is made here.

grant broad powers of restitution. *Davison*, 116 Wn.2d at 920. The courts must interpret these statutes broadly to carry out the expressed intent of the legislature. *Id.* “Restitution is an integral part of the Washington system of criminal justice,” and the statutes indicate “a strong public policy to provide restitution *whenever* possible.” *State v. Thomas*, 138 Wn. App. 78, 82, 155 P.3d 998 (2007)) (emphasis added).

Restitution must be based on a causal relationship between the crime charged and proven and the victim’s damages. *State v. Blanchfield*, 126 Wn. App. 235, 240–41, 108 P.3d 173 (2005). The court employs a “but-for” analysis when determining whether a causal connection exists. *Id.* at 241–42. The State’s burden of proof for establishing causation for restitution purposes is “merely a preponderance of the evidence.” *Thomas*, 138 Wn. App. at 82.

The defendant in *Blanchfield*, though originally charged with second degree assault, was convicted of the lesser-included offense of fourth degree domestic violence assault. 126 Wn. App. at 237. The victim sustained a black eye, an injury to her foot, and pain in her lower back and shoulder. *Id.* at 238. The reviewing court found no abuse of discretion when the trial court ordered Blanchfield to pay for his victim’s medical expenses. *Id.* at 242.

In the present case, the trial court properly reviewed the applicable restitution statute and relevant case law prior to rendering its decision. 6/10/2011 RP 13–16. Specifically, the trial court found that “there is a causal relationship between the assault and the injury that is claimed here; therefore, restitution should be ordered. Apparently, there is no dispute to the amount.” 6/10/2011 RP 16.

The facts of the case support this finding: before confronting defendant with nearly causing a car accident, Mr. Matesa had both of his eyes intact and no bruising on his chest. After “[a] couple of boots later,” Mr. Matesa was seriously hospitalized, suffering through two different surgeries to remove his eye. 6/10/2011 RP 6. Similar to the court in *Blanchfield*, the trial court properly imposed restitution for the medical expenses incurred by Mr. Matesa’s eye injury.

Furthermore, the trial court’s imposition of restitution in this case falls squarely within the broad discretion the state legislature intended to afford the courts in administering justice. *Davison*, 116 Wn.2d at 920. Public policy condones imposing restitution on defendant because his criminal assault left the victim permanently disabled. *Thomas*, 138 Wn. App. at 82.

Finally, defendant yet again relies on his argument that he was not responsible for Mr. Matesa’s eye injury, and that his conviction of fourth degree assault does not justify the amount of restitution ordered. Brief of

Appellant at 19. Not only does this argument fail for the reasons described earlier, but the State only had to prove by a preponderance of the evidence that defendant's assault resulted in the eye injury at the restitution hearing. *Thomas*, 138 Wn. App. at 82.

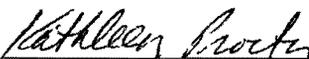
D. CONCLUSION.

The trial court properly assessed all of the evidence and determined that there was insufficient evidence to support a self-defense instruction. The court did not commit reversible error and the State respectfully requests this court to uphold defendant's conviction. Further, defendant failed to satisfy his burden in showing that his punishment is cruel under the Washington State Constitution. Based on the violent nature of the offense, the trial court properly sentenced defendant to one year in custody and ordered him to pay restitution for defendant's injuries. For the reasons

argued above, the State respectfully requests that defendant's sentence and restitution be affirmed.

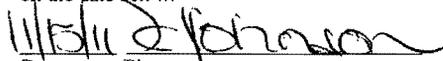
DATED: November 14, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

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Kiel Willmore  
Legal Intern

Certificate of Service:  
The undersigned certifies that on this day she delivered by <sup>certified</sup> ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

  
Date Signature

## **APPENDIX “A”**

*California Penal Code § 240-43*

## APPENDIX A

California Penal Code

### § 240. Assault defined

Assault defined. An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

### § 241. Assault; punishment

(a) An assault is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment.

(b) When an assault is committed against the person of a parking control officer engaged in the performance of his or her duties, and the person committing the offense knows or reasonably should know that the victim is a parking control officer, the assault is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment.

(c) When an assault is committed against the person of a peace officer, firefighter, emergency medical technician, mobile intensive care paramedic, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer engaged in the performance of his or her duties, or a physician or nurse engaged in rendering emergency medical care outside a hospital, clinic, or other health care facility, and the person committing the offense knows or reasonably should know that the victim is a peace officer, firefighter, emergency medical technician, mobile intensive care paramedic, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer engaged in the performance of his or her duties, or a physician or nurse engaged in rendering emergency medical care, the assault is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in the county jail not exceeding one year, or by both the fine and imprisonment.

(d) As used in this section, the following definitions apply:

(1) Peace officer means any person defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

(2) "Emergency medical technician" means a person possessing a valid course completion certificate from a program approved by the State Department of Health Services for the medical training and education of ambulance personnel, and who meets the standards of Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(3) “Mobile intensive care paramedic” refers to those persons who meet the standards set forth in Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(4) “Nurse” means a person who meets the standards of Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(5) “Lifeguard” means a person who is:

(A) Employed as a lifeguard by the state, a county, or a city, and is designated by local ordinance as a public officer who has a duty and responsibility to enforce local ordinances and misdemeanors through the issuance of citations.

(B) Wearing distinctive clothing which includes written identification of the person's status as a lifeguard and which clearly identifies the employing organization.

(6) “Process server” means any person who meets the standards or is expressly exempt from the standards set forth in Section 22350 of the Business and Professions Code.

(7) “Traffic officer” means any person employed by a county or city to monitor and enforce state laws and local ordinances relating to parking and the operation of vehicles.

(8) “Animal control officer” means any person employed by a county or city for purposes of enforcing animal control laws or regulations.

(9)(A) “Code enforcement officer” means any person who is not described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 and who is employed by any governmental subdivision, public or quasi-public corporation, public agency, public service corporation, any town, city, county, or municipal corporation, whether incorporated or chartered, that has enforcement authority for health, safety, and welfare requirements, and whose duties include enforcement of any statute, rules, regulations, or standards, and who is authorized to issue citations, or file formal complaints.

(B) “Code enforcement officer” also includes any person who is employed by the Department of Housing and Community Development who has enforcement authority for health, safety, and welfare requirements pursuant to the Employee Housing Act (Part 1 (commencing with Section 17000) of Division 13 of the Health and Safety Code); the State Housing Law (Part 1.5 (commencing with Section 17910) of Division 13 of the Health and Safety Code); the Mobilehomes-Manufactured Housing Act (Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code); the Mobilehome Parks Act (Part 2.1 (commencing with Section 18200) of Division 13 of the Health and Safety Code); and the Special Occupancy Parks Act (Part 2.3 (commencing with Section 18860) of Division 13 of the Health and Safety Code).

(10) "Parking control officer" means any person employed by a city, county, or city and county, to monitor and enforce state laws and local ordinances relating to parking.

**§ 242. Battery defined**

Battery defined. A battery is any willful and unlawful use of force or violence upon the person of another.

**§ 243. Battery; punishment**

<Section prior to amendment by Stats.2011, c. 15 (A.B.109), eff. April 4, 2011, operative no earlier than Oct. 1, 2011, and only upon the creation and funding of a community corrections grant program. See, also, section as amended by Stats.2011, c. 15 (A.B.109), eff. April 4, 2011, operative no earlier than Oct. 1, 2011, and only upon the creation and funding of a community corrections grant program.>

(a) A battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(b) When a battery is committed against the person of a peace officer, custodial officer, firefighter, emergency medical technician, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer engaged in the performance of his or her duties, whether on or off duty, including when the peace officer is in a police uniform and is concurrently performing the duties required of him or her as a peace officer while also employed in a private capacity as a part-time or casual private security guard or patrolman, or a nonsworn employee of a probation department engaged in the performance of his or her duties, whether on or off duty, or a physician or nurse engaged in rendering emergency medical care outside a hospital, clinic, or other health care facility, and the person committing the offense knows or reasonably should know that the victim is a peace officer, custodial officer, firefighter, emergency medical technician, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer engaged in the performance of his or her duties, nonsworn employee of a probation department, or a physician or nurse engaged in rendering emergency medical care, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(c)(1) When a battery is committed against a custodial officer, firefighter, emergency medical technician, lifeguard, process server, traffic officer, or animal control officer engaged in the performance of his or her duties, whether on or off duty, or a nonsworn employee of a probation department engaged in the performance of his or her duties, whether on or off duty, or a physician or nurse engaged in rendering emergency medical care outside a hospital, clinic, or other health care facility, and the person committing the offense knows or reasonably should know that the victim is a nonsworn employee of a probation department, custodial officer, firefighter,

emergency medical technician, lifeguard, process server, traffic officer, or animal control officer engaged in the performance of his or her duties, or a physician or nurse engaged in rendering emergency medical care, and an injury is inflicted on that victim, the battery is punishable by a fine of not more than two thousand dollars (\$2,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by imprisonment in the state prison for 16 months, or two or three years.

(2) When the battery specified in paragraph (1) is committed against a peace officer engaged in the performance of his or her duties, whether on or off duty, including when the peace officer is in a police uniform and is concurrently performing the duties required of him or her as a peace officer while also employed in a private capacity as a part-time or casual private security guard or patrolman and the person committing the offense knows or reasonably should know that the victim is a peace officer engaged in the performance of his or her duties, the battery is punishable by a fine of not more than ten thousand dollars (\$10,000), or by imprisonment in a county jail not exceeding one year or in the state prison for 16 months, or two or three years, or by both that fine and imprisonment.

(d) When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment in the state prison for two, three, or four years.

(e)(1) When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program, as defined in Section 1203.097, or if none is available, another appropriate counseling program designated by the court. However, this provision shall not be construed as requiring a city, a county, or a city and county to provide a new program or higher level of service as contemplated by Section 6 of Article XIII B of the California Constitution.

(2) Upon conviction of a violation of this subdivision, if probation is granted, the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(A) That the defendant make payments to a battered women's shelter, up to a maximum of five thousand dollars (\$5,000).

(B) That the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.

For any order to pay a fine, make payments to a battered women's shelter, or pay restitution as a condition of probation under this subdivision, the court shall make a determination of the defendant's ability to pay. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. Where the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of this section, the community property may not be used to discharge the liability of the offending spouse for restitution to the injured spouse, required by Section 1203.04, as operative on or before August 2, 1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents, required by this section, until all separate property of the offending spouse is exhausted.

(3) Upon conviction of a violation of this subdivision, if probation is granted or the execution or imposition of the sentence is suspended and the person has been previously convicted of a violation of this subdivision and sentenced under paragraph (1), the person shall be imprisoned for not less than 48 hours in addition to the conditions in paragraph (1). However, the court, upon a showing of good cause, may elect not to impose the mandatory minimum imprisonment as required by this subdivision and may, under these circumstances, grant probation or order the suspension of the execution or imposition of the sentence.

(4) The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence so as to display society's condemnation for these crimes of violence upon victims with whom a close relationship has been formed.

(f) As used in this section:

(1) "Peace officer" means any person defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

(2) "Emergency medical technician" means a person who is either an EMT-I, EMT-II, or EMT-P (paramedic), and possesses a valid certificate or license in accordance with the standards of Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(3) "Nurse" means a person who meets the standards of Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(4) "Serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

(5) "Injury" means any physical injury which requires professional medical treatment.

(6) “Custodial officer” means any person who has the responsibilities and duties described in Section 831 and who is employed by a law enforcement agency of any city or county or who performs those duties as a volunteer.

(7) “Lifeguard” means a person defined in paragraph (5) of subdivision (c) of Section 241.

(8) “Traffic officer” means any person employed by a city, county, or city and county to monitor and enforce state laws and local ordinances relating to parking and the operation of vehicles.

(9) “Animal control officer” means any person employed by a city, county, or city and county for purposes of enforcing animal control laws or regulations.

(10) “Dating relationship” means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations.

(11)(A) “Code enforcement officer” means any person who is not described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 and who is employed by any governmental subdivision, public or quasi-public corporation, public agency, public service corporation, any town, city, county, or municipal corporation, whether incorporated or chartered, who has enforcement authority for health, safety, and welfare requirements, and whose duties include enforcement of any statute, rules, regulations, or standards, and who is authorized to issue citations, or file formal complaints.

(B) “Code enforcement officer” also includes any person who is employed by the Department of Housing and Community Development who has enforcement authority for health, safety, and welfare requirements pursuant to the Employee Housing Act (Part 1 (commencing with Section 17000) of Division 13 of the Health and Safety Code); the State Housing Law (Part 1.5 (commencing with Section 17910) of Division 13 of the Health and Safety Code); the Mobilehomes-Manufactured Housing Act (Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code); the Mobilehome Parks Act (Part 2.1 (commencing with Section 18200) of Division 13 of the Health and Safety Code); and the Special Occupancy Parks Act (Part 2.3 (commencing with Section 18860) of Division 13 of the Health and Safety Code).

(g) It is the intent of the Legislature by amendments to this section at the 1981-82 and 1983-84 Regular Sessions to abrogate the holdings in cases such as *People v. Corey*, 21 Cal. 3d 738, and *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, and to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, while wearing a police uniform as private security guards or patrolmen and to allow the exercise of peace officer powers concurrently with that employment.

**§ 243. Battery; punishment**

<Section as amended by Stats.2011, c. 15 (A.B.109), eff. April 4, 2011, operative no earlier than Oct. 1, 2011, and only upon the creation and funding of a community corrections grant program. See, also, section prior to amendment by Stats.2011, c. 15 (A.B.109), eff. April 4, 2011, operative no earlier than Oct. 1, 2011, and only upon the creation and funding of a community corrections grant program.>

(a) A battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(b) When a battery is committed against the person of a peace officer, custodial officer, firefighter, emergency medical technician, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer engaged in the performance of his or her duties, whether on or off duty, including when the peace officer is in a police uniform and is concurrently performing the duties required of him or her as a peace officer while also employed in a private capacity as a part-time or casual private security guard or patrolman, or a nonsworn employee of a probation department engaged in the performance of his or her duties, whether on or off duty, or a physician or nurse engaged in rendering emergency medical care outside a hospital, clinic, or other health care facility, and the person committing the offense knows or reasonably should know that the victim is a peace officer, custodial officer, firefighter, emergency medical technician, lifeguard, process server, traffic officer, code enforcement officer, or animal control officer engaged in the performance of his or her duties, nonsworn employee of a probation department, or a physician or nurse engaged in rendering emergency medical care, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(c)(1) When a battery is committed against a custodial officer, firefighter, emergency medical technician, lifeguard, process server, traffic officer, or animal control officer engaged in the performance of his or her duties, whether on or off duty, or a nonsworn employee of a probation department engaged in the performance of his or her duties, whether on or off duty, or a physician or nurse engaged in rendering emergency medical care outside a hospital, clinic, or other health care facility, and the person committing the offense knows or reasonably should know that the victim is a nonsworn employee of a probation department, custodial officer, firefighter, emergency medical technician, lifeguard, process server, traffic officer, or animal control officer engaged in the performance of his or her duties, or a physician or nurse engaged in rendering emergency medical care, and an injury is inflicted on that victim, the battery is punishable by a fine of not more than two thousand dollars (\$2,000), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

(2) When the battery specified in paragraph (1) is committed against a peace officer engaged in the performance of his or her duties, whether on or off duty, including

when the peace officer is in a police uniform and is concurrently performing the duties required of him or her as a peace officer while also employed in a private capacity as a part-time or casual private security guard or patrolman and the person committing the offense knows or reasonably should know that the victim is a peace officer engaged in the performance of his or her duties, the battery is punishable by a fine of not more than ten thousand dollars (\$10,000), or by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years, or by both that fine and imprisonment.

(d) When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

(e)(1) When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program, as defined in Section 1203.097, or if none is available, another appropriate counseling program designated by the court. However, this provision shall not be construed as requiring a city, a county, or a city and county to provide a new program or higher level of service as contemplated by Section 6 of Article XIII B of the California Constitution.

(2) Upon conviction of a violation of this subdivision, if probation is granted, the conditions of probation may include, in lieu of a fine, one or both of the following requirements:

(A) That the defendant make payments to a battered women's shelter, up to a maximum of five thousand dollars (\$5,000).

(B) That the defendant reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's offense.

For any order to pay a fine, make payments to a battered women's shelter, or pay restitution as a condition of probation under this subdivision, the court shall make a determination of the defendant's ability to pay. In no event shall any order to make payments to a battered women's shelter be made if it would impair the ability of the defendant to pay direct restitution to the victim or court-ordered child support. Where the injury to a married person is caused in whole or in part by the criminal acts of his or her spouse in violation of this section, the community property may not be used to discharge the liability of the offending spouse for restitution to the injured spouse, required by Section 1203.04, as operative on or before August 2,

1995, or Section 1202.4, or to a shelter for costs with regard to the injured spouse and dependents, required by this section, until all separate property of the offending spouse is exhausted.

(3) Upon conviction of a violation of this subdivision, if probation is granted or the execution or imposition of the sentence is suspended and the person has been previously convicted of a violation of this subdivision and sentenced under paragraph (1), the person shall be imprisoned for not less than 48 hours in addition to the conditions in paragraph (1). However, the court, upon a showing of good cause, may elect not to impose the mandatory minimum imprisonment as required by this subdivision and may, under these circumstances, grant probation or order the suspension of the execution or imposition of the sentence.

(4) The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence so as to display society's condemnation for these crimes of violence upon victims with whom a close relationship has been formed.

(f) As used in this section:

(1) "Peace officer" means any person defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2.

(2) "Emergency medical technician" means a person who is either an EMT-I, EMT-II, or EMT-P (paramedic), and possesses a valid certificate or license in accordance with the standards of Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(3) "Nurse" means a person who meets the standards of Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(4) "Serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

(5) "Injury" means any physical injury which requires professional medical treatment.

(6) "Custodial officer" means any person who has the responsibilities and duties described in Section 831 and who is employed by a law enforcement agency of any city or county or who performs those duties as a volunteer.

(7) "Lifeguard" means a person defined in paragraph (5) of subdivision (c) of Section 241.

(8) "Traffic officer" means any person employed by a city, county, or city and county to monitor and enforce state laws and local ordinances relating to parking and the operation of vehicles.

(9) “Animal control officer” means any person employed by a city, county, or city and county for purposes of enforcing animal control laws or regulations.

(10) “Dating relationship” means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations.

(11)(A) “Code enforcement officer” means any person who is not described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 and who is employed by any governmental subdivision, public or quasi-public corporation, public agency, public service corporation, any town, city, county, or municipal corporation, whether incorporated or chartered, who has enforcement authority for health, safety, and welfare requirements, and whose duties include enforcement of any statute, rules, regulations, or standards, and who is authorized to issue citations, or file formal complaints.

(B) “Code enforcement officer” also includes any person who is employed by the Department of Housing and Community Development who has enforcement authority for health, safety, and welfare requirements pursuant to the Employee Housing Act (Part 1 (commencing with Section 17000) of Division 13 of the Health and Safety Code); the State Housing Law (Part 1.5 (commencing with Section 17910) of Division 13 of the Health and Safety Code); the Mobilehomes-Manufactured Housing Act (Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code); the Mobilehome Parks Act (Part 2.1 (commencing with Section 18200) of Division 13 of the Health and Safety Code); and the Special Occupancy Parks Act (Part 2.3 (commencing with Section 18860) of Division 13 of the Health and Safety Code).

(g) It is the intent of the Legislature by amendments to this section at the 1981-82 and 1983-84 Regular Sessions to abrogate the holdings in cases such as *People v. Corey*, 21 Cal. 3d 738, and *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, and to reinstate prior judicial interpretations of this section as they relate to criminal sanctions for battery on peace officers who are employed, on a part-time or casual basis, while wearing a police uniform as private security guards or patrolmen and to allow the exercise of peace officer powers concurrently with that employment.

# PIERCE COUNTY PROSECUTOR

## November 15, 2011 - 1:34 PM

### Transmittal Letter

Document Uploaded: 418037-Respondent's Brief.pdf

Case Name: State v. Troy Schoenbein

Court of Appeals Case Number: 41803-7

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

Sender Name: Heather M Johnson - Email: **hjohns2@co.pierce.wa.us**

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