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Court of Appeals  
Division II  
State of Washington

**NO. 50196-1-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**TERRENCE LAVERY,**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Christopher X. Melly, Judge

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**BRIEF OF APPELLANT**

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### **A. ASSIGNMENTS OF ERROR**

1. Mr. Lavery's convictions for assault in the third degree, as charged in Count I and Count II, must be dismissed for violation of his right to equal protection as he should have been charged under the concurrent specific statute charging custodial assault.

2. The trial court erred in failing to reduce Mr. Lavery's community custody so as not to exceed the 60 month statutory maximum sentence.

### **B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. A criminal defendant's constitutional right to equal protection and principles of statutory construction require that where a general statute and a concurrent specific statute prohibit the same conduct, the defendant can be charged only under the specific statute. Here, Mr. Lavery was charged under the general statute of assault in the third degree on a law enforcement officer rather than the specific statute of custodial assault. Must this Court reverse his convictions for assault in the third degree for violation of his constitutional right to equal protection?

2. When combined, the sentenced imposed plus the community custody obligation cannot exceed the statutory maximum sentence. Mr. Lavery's statutory maximum is 60 months yet the court imposed a 56 month standard range plus 12 months of community custody. Must Mr.

Lavery's case be remanded to limit the community custody so as not to exceed the statutory maximum sentence?

### **C. STATEMENT OF THE CASE**

Stephen Monger and Jacob Martin work as corrections officers at Clallam Bay Corrections Center. RP 106-07, 135. On August 19, 2013, they were tasked with taking meals to inmates housed in the Intensive Management Unit (IMU). RP 107, 137. They walked up to Mr. Lavery's cell and told him to move back so they could safely open his "cuff port" and provide a food tray. RP 107. Mr. Lavery declined to move away from the door so the officers moved to another cell. RP 107-08.

The two corrections officers were providing a meal tray to another inmate's cell when they felt themselves splashed with liquid on their pants, shirts, and arms. RP 108, 141, 144. Simultaneously, they both heard a voice they recognized as Mr. Lavery's say, "How you like that piss punk." RP 108, 139. Corrections Officer Monger also noticed splashed liquid on the floor. RP 126.

Given the layout of the cells, both Corrections Officer Monger and Corrections Officer Martin believed the only possible place the liquid could have come from was Mr. Lavery's cell. RP 109, 126, 147. They believed the wet substance was thrown out of the cell's mail slot. RP 109, 139.

Corrections Officer Martin thought the liquid splashed on him smelled a little funny but he could not tell if it was a yellowish color. RP 133. Neither corrections officer felt harmed but both were offended by the thought they had been splashed with what Mr. Lavery purported was urine. RP 126, 140.

The Clallam County Sheriff's Department investigated the incident. RP 148. Both corrections officers removed their uniforms and provided them to the Sheriff's Office as evidence. RP 140, 149. The Sheriff's Office sent the uniforms to the Washington State Patrol Crime Lab for testing but the Sheriff's Office never received test results. RP 149.

On February 29, 2016, the Clallam County Prosecutor's Office filed an information charging Mr. Lavery with two counts of Assault of a Law Enforcement Officer in the Third Degree. Specifically,

On or about the 19<sup>th</sup> day of August 2013, in the County of Clallam, State of Washington, the above-named Defendant did intentionally assault 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, to wit: Clallam Bay Corrections Officer Stephen Monger<sup>1</sup> [Jacob Martin<sup>2</sup>]; contrary to Revised Code of Washington 9A.36.031(1)(g).

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<sup>1</sup> Count I

<sup>2</sup> Count II – note that the Information incorrectly lists the two separate counts as “Count I.”

CP 56-57.

At trial, the court instructed the jury on the elements of third degree assault on a law enforcement officer in keeping with the Information. CP 34-35.

To convict the defendant of Count 1, the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19<sup>th</sup> day of August, 2013, the defendant assaulted Stephen Monger;

(2) That at the time of the assault, Stephen Monger was a law enforcement officer or other employee of a law enforcement agency performing his official duties; and

(3) That any of these acts occurred in the State of Washington.

CP 34 (Instruction 7).

The court provided the jury with an identical instruction on Corrections Officer Martin. CP 35 (Instruction 8).

At the state's request, the court also instructed the jury, "The Washington State Department of Corrections is a law enforcement agency, and a Penal Corrections Officer is a law enforcement officer." CP 39 (Instruction 12).

Mr. Lavery did not object to Instructions 7, 8, or 12. RP 158-180. The jury found Mr. Lavery guilty of both crimes. CP 23, 24. The court

sentenced Mr. Lavery to 56 concurrent months on each count plus an additional 12 months of community custody. CP 13-14. The judgment and sentence includes boilerplate language that the sentence plus the community custody cannot exceed the statutory maximum for the offenses. CP 14.

Mr. Lavery appeals his convictions and sentence. CP 8.

#### **D. ARGUMENT**

**Issue 1: Mr. Lavery’s convictions for assault in the third degree, rather than the concurrent specific offense of custodial assault, violated his constitutional right to equal protection.**

1. Where a general statute and a specific statute prohibit the same conduct, only the specific statute can be charged.

The “concurrent statute” rule of statutory construction provides that when two statutes are concurrent, a criminal defendant’s constitutional right to equal protection<sup>3</sup> dictates only the specific statute may be charged. *Busic v. United States*, 466 U.S. 398, 406, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980); *State v. Shriner*, 101 Wn.2d 576, 581, 681 P.2d 237 (1984). “Statutes are concurrent if ... ‘the general statute will be violated in each instance where the special statute has been violated.’” *State v.*

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<sup>3</sup> U.S. Const. Amend. XIV; Wash. Const. art. 1, § 12. The state and federal constitutional equal protection clauses are identically construed. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996).

*Conte*, 159 Wn.2d 797, 811, 154 P.3d 194 (2007), quoting *Shriner*, 101 Wn.2d at 580. “It is not relevant that the special statute may contain additional elements not contained in the general statute.” *Shriner*, 101 Wn.2d at 580. On appeal, the reviewing court must look at the elements of both statutes as charged and prosecuted to determine whether a person can violate the special statute without also violating the general statute. *Id.*, at 579 n.2; *State v. Karp*, 69 Wn. App. 369, 372, 374, 848 P.2d 1304 (1993).

The concurrent statute rule protects a defendant’s right to equal protection by restraining prosecutorial discretion and to give effect to legislation.

[The concurrent statute rule] protects the defendant’s constitutional right to equal protection under the law by preventing the prosecution from obtaining varying degrees of punishment while proving identical elements. Furthermore, it ensures that courts do not interpret statutes in such a way as to impliedly repeal existing legislation.

*State v. Shelby*, 61 Wn. App. 214, 219, 811 P.2d 682 (1991). Otherwise, when making a charging decision, the state could control the degree of punishment by selecting between two concurrent statutes.

[W]here 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. Thus the prosecutor has a basis distinguishing between persons who can be

charged under one or the other statute, and is not at liberty to charge under the general statute a person whose conduct brings his offense within the special statute. Under such circumstances, there is no denial of equal protection.

*State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). *See also, In re Personal Restraint of Taylor*, 105 Wn.2d 67, 70, 711 P.2d 345 (1985) (“If there was unfettered prosecutorial discretion, there would be an equal protection issue.”); *State v. Hupe*, 50 Wn. App. 277, 280, 748 P.2d 263 (1988), *overruled on other grounds in State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007) (rule protects defendant’s constitutional right to equal protection by preventing the prosecution from obtaining varying degrees of punishment while proving identical elements).

In addition, this rule is necessary to give effect to the special statute. Specific statutes include all the elements of the general statute and additional elements. If the general statute could be charged rather than the specific statute, the prosecutor would presumably elect to prosecute under the general statute only because it would be easier to prove. *State v. Danforth*, 97 Wn.2d 255, 259, 643 P.2d 882 (1982). Consequently, the prosecutor could impermissibly usurp the legislative function. *Id.*

2. Assault in the third degree of a law enforcement officer and custodial assault are concurrent statutes.

A comparison of the elements establishes that assault in the third degree of a law enforcement officer, and custodial assault as charged and prosecuted, were concurrent offenses. A person commits custodial assault when “he assaults a staff member at an adult corrections institution who was performing official duties at the time of the assault.” RCW 9A.36.100(1)(b). As instructed here, Mr. Lavery committed third degree assault of a law enforcement officer when he assaulted Stephen Monger/Jacob Martin, when Monger and Martin were law enforcement officers or other employee of a law enforcement agency who were performing his official duties in violation of RCW 9A.36.031(1)(g). CP 34, 35.

As characterized by the state, all of the elements required to prove assault of a law enforcement officer in the third degree are also elements that prove custodial assault. Because assault of a law enforcement officer in the third degree requires proof of all the elements of custodial assault, custodial assault is the more specific offense.

The Washington Supreme Court’s decision in *Danforth* is instructive. In *Danforth*, the defendants were convicted of escape in the

first degree when they failed to return to a work release center. 97 Wn.2d at 256. The Court reversed their convictions because they should have been charged under the more specific statute prohibiting a willful failure to return to a work release program. *Id.* at 257. The Court's reasoning was three-fold. First, the general statute prohibited escape from a "detention facility," the definition of which included escape from a work release facility, whereas the special statute specifically prohibited escape from a work release facility. *Id.* at 258. Second, the special statute required willful conduct, a mental intent not required by the general, in recognition of the possibility that unforeseen circumstances such as illness could prevent a person from returning to a work release facility. *Id.* Third, given that the special statute required proof of a mental intent not required by the general statute, a prosecutor cannot be allowed to impermissibly usurp the "legislative function" by proceeding under the less demanding general statute. *Id.* at 258-59.

Here, as in *Danforth*, the prosecutor should not be able to impermissibly usurp the legislative function by proceeding under the general crime of assault in the third degree on a law enforcement officer when the legislature has specifically made it a crime to assault a staff member at an adult correctional facility.

3. Mr. Lavery's convictions for assault in the third degree of a law enforcement officer must be dismissed.

Where statutes are concurrent and the defendant is convicted under a general statute rather than the specific statute, the proper remedy is dismissal of the conviction. *Danforth*, 97 Wn.2d at 257-58. Here, Mr. Lavery was convicted of the general statute of third degree assault of a law enforcement officer rather than the specific statute of custodial assault, in violation of his constitutional right to equal protection. Therefore, this Court must reverse Mr. Lavery's convictions for assault of a law enforcement officer in the third degree with instructions to dismiss. *Shriner*, 101 Wn.2d at 580; *Danforth*, 97 Wn.2d at 257-58.

**Issue 2: Mr. Lavery's case must be remanded to correct the term of community custody.**

Mr. Lavery's sentence of 56 months plus 12 months of community custody exceeds the statutory maximum. CP 12-13. RCW 9A.20.021. Remand is necessary to correct and limit the sentence to only 60 months.

This Court reviews questions involving a sentencing court's authority de novo. *State v. Mann*, 146 Wn. App. 349, 357, 189 P.3d 843 (2008). Assault in the third degree is a C felony with a 60 month statutory maximum. RCW 9A.36.031; RCW 9A.20.021(1)(c). Because assault in the third degree is a crime against a person, a person convicted of the offense

must also serve 12 months of community custody. RCW 9.94A.701(3)(a); RCW 9.94A.411(2). But the trial court may not impose a sentence of confinement and community custody that, when combined, exceeds the statutory maximum for the offense. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

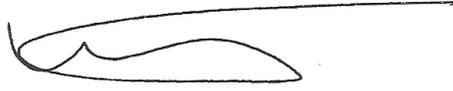
Mr. Lavery's sentence, when combined, exceeds the statutory maximum. The remedy is remand for the trial court to correct the length of community custody so as not to exceed the 60 month maximum sentence. *Boyd*, 174 Wn. 2d at 472; RCW 9.94A.710(9).

#### **E. CONCLUSION**

The state improperly charged Mr. Laverty under the general third degree assault statute rather than the concurrent specific custodial assault. Mr. Laverty requests this Court reverse and dismiss his convictions for assault in the third degree of a law enforcement officer.

Alternatively, this Court should remand the case to the trial court to resentence Mr. Lavery so his combined sentence does not exceed the 60 month statutory maximum.

Respectfully submitted October 31, 2017.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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LISA E. TABBUT/WSBA 21344  
Attorney for Terrence Lavery

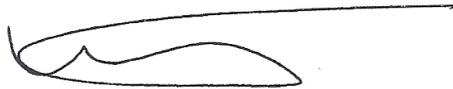
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Clallam County Prosecutor's Office, at jespinoza@co.clallam.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Terrence Lavery, DOC#764173, Monroe Correctional Complex-SOU, PO Box 777, Monroe, WA 98272.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 31, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Terrence Lavery, Appellant

**LAW OFFICE OF LISA E TABBUT**

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