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Court of Appeals  
Division II  
State of Washington  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

TERRENCE LAVERY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00080-0

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the State violated Lavery's right to equal protections by charging Lavery with Assault in the Third Degree of a Law Enforcement Officer rather than Custodial Assault when the statutes involve identical degrees of punishment and are not concurrent?
2. Whether the judgment and sentence should be corrected to reduce the term of community custody so that the total confinement time and term of community custody does not exceed the statutory maximum term for the offense?

## **II. STATEMENT OF THE CASE**

On August 19, 2013, Clallam Bay Corrections Officers Stephen Monger and Jacob martin were on duty at Clallam Bay Corrections Center around 11:00 a.m. serving a meal to the inmates. RP 107, 108. Monger and Martin approached Lavery's cell in FG-9. RP 107. They told Lavery to back up so they could open the cuff port to feed Lavery but Lavery refused. RP 107.

Monger and Martin continued on to the next cell and, as they were feeding the inmate in the next cell, Monger and Martin felt a liquid substance land on their clothes and they heard Lavery yell out, "How you like that piss, punk!" RP 108, 137.

Monger stated that the liquid came out of the mail slot from Lavery's cell. RP 109. Monger felt very offended like he just had urine thrown on himself, his arm and clothes. RP 126. Martin felt embarrassed and offended as he believed that urine had just been thrown on him. RP 140. Monger and Martin immediately went to the duty office to report the incident to their sergeant. RP 109, 126. 137.

The State charged Lavery with two counts of Assault in the Third Degree – Law Enforcement Officer, contrary to RCW 9A.36.031(1)(g). CP 56–57.

### III. ARGUMENT

#### A. **EQUAL PROTECTIONS ARE NOT VIOLATED BY CHARGING ASSAULT IN THE THIRD DEGREE RATHER THAN CUSTODIAL ASSAULT BECAUSE BOTH CRIMES HAVE IDENTICAL PUNISHMENTS AND THEY ARE NOT CONCURRENT OFFENSES.**

##### 1. **The State's charging decision did not violate equal protections because the degree of punishment for Assault in the Third Degree and Custodial Assault are identical.**

“It is a fundamental principle of constitutional law that, in the administration of criminal justice, no person shall be subjected, for the same offense, to any greater or different *punishment* from that to which others may be subjected; hence, statutes that provide different degrees of punishment for different persons for the same act are unconstitutional.” *State v. Ensminger*, 77 Wn.2d 535, 536, 463 P.2d 612 (1970) (emphasis).

“[E]qual protection of the laws is denied when a prosecutor is permitted to seek varying degrees of punishment when proving identical criminal elements.” *State v. Campbell*, 103 Wn.2d 1, 25, 691 P.2d 929 (1984) (citing *State v. Zornes*, 78 Wn.2d 9, 21, 475 P.2d 109 (1970)); see also *State v. Farrington*, 35 Wn. App. 799, 801, 669 P.2d 1275 (1983) (citing *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982); *State v. Cann*, 92 Wn.2d 193, 595 P.2d 912 (1979); *State v. Walls*, 81 Wn.2d 618, 622, 503 P.2d 1068 (1972); *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970); *State v. Ensminger*, 77 Wn.2d 535, 463 P.2d 612 (1970); *State v. Burley*, 23 Wn. App. 881, 598 P.2d 428 (1979)).

Here, Custodial Assault under RCW 9A.36.100 and Assault in the Third Degree under RCW 9A.36.031(1)(g) are both class C felonies. RCW 9A.36.100(2); RCW 9A.36.031(2). Both offenses have the same seriousness classification of III under the SRA. RCW 9.94A.515. Both offenses are subject to the same sentence ranges under the sentencing grid. RCW 9.94A.510. Finally, both offenses are designated as “Crimes Against Persons” under RCW 9.94A.411 and are therefore subject to the same community custody provisions under RCW 9.94A.701(1)(a) and RCW 9.94A.702(1)(c).

Custodial Assault and Assault in the Third Degree are not subject to varying degrees of punishment. Therefore, the State did not violate Lavery’s right to equal protections by charging Lavery with Assault in the Third

Degree of a Law Enforcement Officer. This Court should affirm.

**2. Custodial Assault and Assault in the Third Degree of a Law Enforcement Officer are not concurrent offenses.**

“[N]o constitutional defect exists when the crimes which the prosecutor has discretion to charge have different elements.” *State v. Campbell*, 103 Wn.2d 1, 25, 691 P.2d 929 (1984) (citing *State v. Wanrow*, 91 Wn.2d 301, 312, 588 P.2d 1320 (1978)).

“It is a well established rule of statutory construction that “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.” *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (citing *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)).

“It is not relevant that the special statute may contain additional elements not contained in the general statute; i.e., notice. The determining factor is that the statutes are concurrent in the sense that the general statute will be violated in *each instance* where the special statute has been violated.” *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984) (emphasis added); *see also State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630 (2006) (citing *Shriner*, 101 Wn.2d at 580) (“Statutes are not concurrent unless the general statute is violated every time the special statute is violated.”).

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Assault in the Third Degree of a Law Enforcement Officer

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: .

..

(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[.]

RCW 9A.36.031(1)(g).

Custodial Assault

A person is guilty of custodial assault if that person is not guilty of an assault in the first or second degree and where the person:

(a) Assaults a full or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any juvenile corrections institution or local juvenile detention facilities who was performing official duties at the time of the assault;

(b) Assaults a full or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any adult corrections institution or local adult detention facilities who was performing official duties at the time of the assault;

(c)(i) Assaults a full or part-time community correction officer while the officer is performing official duties; or

(ii) Assaults any other full or part-time employee who is employed in a community corrections office while the employee is performing official duties; or

(d) Assaults any volunteer who was assisting a person described in (c) of this subsection at the time of the assault.

RCW 9A.36.100(1).

Here, Assault in the Third Degree of a Law Enforcement Officer under RCW 9A.36.021(1)(g) and Custodial Assault under RCW 9A.36.100

are not concurrent because not all violations of the Custodial Assault statute necessarily result in a conviction of Assault in the Third Degree of a Law Enforcement Officer.

In order to prove Assault in the Third Degree under RCW 9A.36.021(1)(g), the State was required to prove the victims were law enforcement officer or employee of a law enforcement agency performing their duties at the time of the assault. Conversely, none of the various ways to be convicted of Custodial Assault under RCW 9A.36.100 require the State to prove the victim was a “law enforcement officer” or “employee of a law enforcement agency” performing their duties at the time of the assault.

Therefore, the statutes are not concurrent because there are numerous ways of being convicted of Custodial Assault without being convicted of Assault in the Third Degree.

Citing *State v. Danforth*, Lavery argues that his equal rights were violated because the State charged him with the less demanding statute. 97 Wn.2d 255, 258, 643 P.2d 882 (1982); *see also* Appellant’s Br. at 9.

First, Lavery does not show how it is less demanding to prove that a person is a law enforcement officer or employee of a law enforcement agency than it is to prove that one is a staff member of an adult corrections center. Second, *Danforth* does not hold that the legislative function is necessarily and impermissibly usurped when the State charges a crime under a statute that

may be easier to prove than another statute which proscribes similar conduct.

Rather, the *Danforth* Court pointed out that the State was required to prove willfulness to prove Willfully Failing to Return to Work Release and there is no willful element required in order to prove in Escape in the First Degree. This is an indication that legislature created the specific statute to require that the State prove the mental element of willfulness and that by proceeding with the Escape statute instead, the State impermissibly circumvented this requirement. *Id.* at 258–59. This interpretation of legislative intent was important in *Danforth* because there are situations where a person may fail to return to work release without intent to escape.

Furthermore, the *Danforth* Court made it clear that the two crimes were concurrent and thus the State was required to proceed with the more specific statute. *Danforth*, 97 Wn.2d 258. Every instance of a violation of Willfully Failing to Return to Work Release under RCW 72.65.070 would necessarily result in a conviction for Escape in the First Degree under RCW 9A.76.110 because Escape in the First degree forbids escape from work release programs as well as from prison. *Id.*

These circumstances from *Danforth* are not applicable in the instant case with Custodial Assault and Third Degree Assault of a Law Enforcement Officer because both forms of assault require the State to prove the same level of intent and the statutes are not concurrent as argued above.

Furthermore, the distinction between the two crimes at issue lies only in the classification of the victim or protected class. Custodial Assault protects a class of persons beyond law enforcement officers including employees, vendors, or other service providers in penal institutions. This shows that the statutory intent was focused on expanding the class of protected person rather than on requiring the State prove different acts or differing levels of mens rea. *Danforth* does not apply.

Assault in the Third Degree and Custodial Assault are both class C felonies, are classified with the same seriousness level of III, and have the same standard sentence ranges. Finally, the two offenses are not concurrent. Thus, Lavery's equal protections were not violated because the State could not choose varying degrees of punishment for the same conduct by charging Lavery with Assault in the Third Degree. Therefore, Court should affirm.<sup>1</sup>

**B. THE TERM OF COMMUNITY CUSTODY  
MUST BE REDUCED BY THE COURT**

“The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.” RCW

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<sup>1</sup> The remedy for the alleged violation of equal protections is reversal of the conviction and retrial on the more specific charge. *See State v. Haley*, 39 Wn. App. 164, 172, 692 P.2d 858 (1984).

9.94A.701(9).

Here, the statutory maximum punishment for the crime of Assault in the Third Degree, a class C felony, is 60 months. RCW 9A.36.031(2); RCW 9A.20.021(1)(c). The trial court imposed a prison term of 56 months. Therefore, under RCW 9.94A.701(9), the court must reduce the term of community custody to four months. The State concedes that this case should be remanded to the trial court to correct the judgment and sentence.

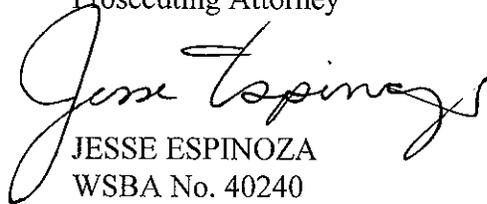
#### IV. CONCLUSION

A charge of Assault in the Third Degree rather than Custodial Assault does not violate Lavery's equal protections because the punishment is identical under both statutes. Further, the statutes are not concurrent because one may violate the Custodial Assault statute in many ways without violating the Assault in the Third Degree statute. Therefore, this Court should affirm.

The State concedes that the case should be remanded to the trial court to correct the judgment and sentence.

Respectfully submitted this 27th day of December, 2017.

MARK B. NICHOLS  
Prosecuting Attorney

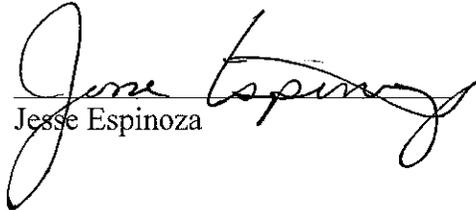


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**CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lisa E. Tabbut on December 27, 2017.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza

**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

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