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Division III  
State of Washington  
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NO. 35097-5-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

JULIAN MIGUEL JUAREZ, Appellant.

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BRIEF OF RESPONDENT

---

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**I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR**

1. Was the evidence sufficient for the jury to find all of the elements of third degree assault?
2. Is the third degree assault statute concurrent with the custodial assault statute?
3. Should this court remand for resentencing given an error in the offender score?
4. Should the State waive appellate costs in the interest of judicial economy?

**II. STATEMENT OF THE CASE**

The appellant, Julian Michael Juarez was charged with third degree assault under RCW 9A.36.031(1)(g). CP 4. Specifically, the information alleged that “On or about March 5, 2016, in the State of Washington, you intentionally assaulted Officer Garrett Goettsch, a law enforcement officer or other employee of a law enforcement agency who was performing official duties at the time of the assault.” CP 4. Juarez was tried by a jury and convicted. The conviction was based on the following facts:

Officer Goettsch has been a corrections officer with the Yakima County Jail for ten years. RP 158-9. On March 5, 2016, he was working on the south end of the fourth floor of the jail. RP 159-60. On that date, he escorted Juarez from a visiting room back to his unit, “B tank.” RP 161-2. Juarez was in the visiting room while a room inspection was

taking place. RP 162. They made it to a corridor that leads to the B tank when Juarez started calling the officer names such as “motherfucker.” RP 162. Juarez stated he was not going to move and asked why he was moving rooms. RP 163. Officer Goettsch decided he needed to put handcuffs on Juarez and take him back to the visiting room. RP 163. He told Juarez to turn around and “cuff up” and Juarez refused. RP 163. Officer Goettsch explained that it is a problem when inmates refuse orders because he can get hurt and that he must stay in control when they refuse orders. RP 163.

At this point, Officer Goettsch tried to get Juarez back into handcuffs but Juarez would pull away. Juarez started swinging and punching at Officer Goettsch and hit the officer above his left eye. RP 164. Officer Goettsch tried to chase Juarez but could not catch him. RP 164-5. Juarez swung again and made contact with the officer’s mouth. RP 165. At that point, Officer Goettsch pulled out his Taser and used it on Juarez. RP 165-6. Officer officers then showed up to assist. RP 166.

Videos and photographs of the assault were admitted at trial. *See* Exhibits 1-31.

The jury found the defendant guilty of third degree assault as charged. At sentencing, the trial court calculated the offender score to be four. CP 60-62, 99-100. The standard range was calculated as 12 months

plus one day to 16 months. *Id.* The court found that running the sentence concurrently with the prior sentence would result in the current offense going unpunished. RP 99-100. Pursuant to RCW 9.94A.535(2)(c), the court imposed an exceptional sentence. RP 61. The court sentenced Juarez to the statutory maximum, 16 months, and ran his sentence consecutive to his prior sentence in cause number 16-1-00179-39. *Id.* In the prior case, Juarez was sentenced on three felonies: assault in violation of protection order, felony protection order violation, and second degree assault. *Id.* At the prior sentencing, the court found that two of the felonies encompassed the same criminal conduct. CP 107-114. This appeal followed.

### **III. ARGUMENT**

#### **A. The evidence was sufficient for the jury to find all of the elements of third degree assault.**

Juarez claims that there is insufficient evidence of third degree assault. In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will

be upheld unless no reasonable jury could have found each element proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. *Id.* Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. *State v. Jackson*, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. *State v. Garcia*, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, Wn.2d 634, 638, 618 P.2d, 94 99 (1980).

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

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

....

(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.

WPIC 35.23.02 sets forth the three elements of third degree assault:

To convict the defendant of 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 (date), the defendant assaulted (name of person);
- (2) That at the time of the assault (name of person) was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
- (3) That any of these acts occurred in the State of Washington.

Juarez argues that there was insufficient evidence that Officer Goettsch was a law enforcement officer and that the statute is ambiguous as to whether it punishes assault against a corrections officer. Law enforcement officer is not defined in RCW 9A.36.031. However, a juror could employ his or her common sense to understand the definition from the plain language of the phrase.

The purpose of statutory interpretation is “to determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *In re Pers. Restraint of Williams*, 121 Wn.2d 655, 663, 853 P.2d 444 (1993). When possible, courts derive legislative intent solely from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is

found, related provisions, and the statutory scheme as a whole. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010); *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Plain language that is not ambiguous does not require construction. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

The first inquiry, then is whether the plain language of RCW 36.031 is ambiguous. And in this case the plain language is not ambiguous. The term “law enforcement” is not defined so the court can rely on the common understanding or meaning of the term.

There are three cases that are helpful on this issue. In *Williams v. Dep't of Licensing*, 85 Wn. App. 271, 276, 932 P.2d 665, 667 (1997), a driver who had his license revoked contended that the Air Force security officer who stopped him at the gate to a military base was not a “law enforcement officer” or “arresting officer” under the implied consent statute. The court held that the term “law enforcement officer,” given its plain meaning, includes any officer empowered to enforce the law. *Id.* As such, the federal security officer was a “law enforcement officer” for purposes of RCW 46.20.308. *Id.*

In another case, *McLean v. Dep't of Corr.*, 37 Wn. App. 255, 680 P.2d 65, *review denied*, 101 Wn.2d 1023 (1984), this Court considered

whether the Department of Corrections was a “law enforcement agency” in an employment law context. The Department of Corrections argued that it was a “law enforcement agency” that could consider prior felony convictions over 10 years old in deciding whether to hire an applicant. *Id.* at 256. The court considered former RCW 9.94.050, which stated that “All officers and guards of state penal institutions, while acting in the supervision and transportation of prisoners, and in the apprehension of prisoners who have escaped, shall have the powers and duties of a peace officer.”<sup>1</sup> *Id.* at 257. The court also relied on Black’s Law Dictionary, which defines a law enforcement officer as one “whose duty it is to preserve the peace.” *Id.* (citing Black’s Law Dictionary 796 (5th rev. ed. 1979)). And finally, the court relied on RCW 72.09.010(1), which states:

It is the intent of the legislature to establish a comprehensive system of corrections for convicted law violators within the state of Washington to accomplish the following objectives. (1) The system should ensure the public safety. The system should be designed and managed to provide the maximum feasible safety for the persons and property of the general public, the staff, and the inmates.

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<sup>1</sup> The statute now reads as follows: “Any correctional employee, while acting in the supervision and transportation of prisoners, and in the apprehension of prisoners who have escaped, shall have the powers and duties of a peace officer.” RCW 9.94.050.

Based on its analysis, this Court concluded, “The Department [of Corrections] must enforce laws, rules and regulations within the institution so as to “preserve the peace” of staff and inmates. It is a law enforcement agency within the meaning of RCW 9.96A.030.”

Finally, our Supreme Court has held that an even off-duty police officer employed as a private security guard may be considered a law enforcement officer. In *State v. Graham*, 130 Wn.2d 711, 722, 927 P.2d 227 (1996), the Supreme Court, interpreting former RCW 9A.76.020 (obstructing public servant performing official duties), held that “...public policy is furthered by the rule that a police officer is a public servant or peace officer who has the authority to act as a police officer whenever the officer reasonably believes that a crime is committed in his or her presence, whether the officer is on or off duty.” The court indicated that “[w]hether an off-duty officer employed as a private security guard is acting in the discharge of his official duties is a question of fact that must be resolved according to the circumstances of each case.” *Id.*

In addition to caselaw, we also have a specific statute that indicates “any correctional employee, while acting in the supervision and transportation of prisoners, and in the apprehension of prisoners who have escaped, shall have the powers and duties of a peace officer.” RCW

9.94.050. A peace officer is defined in Title 9A as “a duly appointed city, county, or state law enforcement officer.” RCW 9A.04.110(15). In essence, this means that corrections employees, while engaged in certain acts, have been vested by statute with all the powers and duties of a law enforcement officer.

Although the jury was not instructed on any specific definition of law enforcement officer or law enforcement agency, and no definition was requested, a rational jury could have found all the elements of third degree assault. The facts of the case, when viewed in the light most favorable to the State, show that Officer Goettsch was “a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties.” Officer Goettsch testified that he is an employee at the Yakima County jail and that he is a corrections officer or “DOC officer.” RP 158-9. He testified that he went through training at the Washington State Criminal Justice Center. RP 158-9. He also stated that at the time of the assault he was transporting Juarez, an inmate, from a visiting room to his room within his unit. RP 161-2. In addition, Corporal Alfredo Larios testified that Officer Goettsch was a law enforcement officer. RP 141. This testimony was sufficient to prove the element that at the time of the assault he was “a law enforcement

officer or other employee of a law enforcement agency who was performing his or her official duties.”

There was also sufficient evidence of the remaining elements of third degree assault. The assault itself was caught on video cameras and testified to in detail by the State witnesses. The fact that the act occurred in the State of Washington was established by testimony that the victim was trained at the Washington State Criminal Justice Center and works for the Yakima County jail as a DOC officer for Yakima County, and testimony that the assault took place while he was working in the Yakima jail. RP 158-9. Viewing this evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements beyond a reasonable doubt.

**B. The third degree assault statute is not concurrent with the custodial assault statute.**

For the first time on appeal, Juarez argues that the State must charge an assault against a corrections officer under the statute for custodial assault based on the “general-specific rule” of statutory construction. He argues that third degree assault is the more general crime and that custodial assault is the more specific crime. Courts review the question of whether two statutes are concurrent de novo. *State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630 (2006).

It is a well-established rule of statutory construction that where a special statute punishes the same conduct that 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) (quoting *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979)). This rule gives effect to legislative intent and ensures charging decisions comport with that intent. *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d 194 (2007); *State v. Greco*, 57 Wn. App. 196, 204, 787 P.2d 940 (1990); *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982).

For statutes to implicate this statutory construction concern, the general statute must be violated every time the special statute has been violated. *Chase*, 134 Wn. App. at 800. The court must determine whether two statutes are concurrent by examining the elements of each to determine whether a person can violate the special statute without necessarily violating the general statute. *State v. Heffner*, 126 Wn. App. 803, 808, 110 P.3d 219 (2005). If a person can violate the specific statute, without violating the general statute, the statute are not concurrent. *Id.* As explained in *State v. Crider*, 72 Wn. App. 815, 818, 866 P.2d 75 (1994),

The determinative factor is whether it is possible to commit the specific crime without also committing the general crime;

not whether in a given instance both crimes are committed by the defendant's particular conduct.

Whether statutes are concurrent involves examination of the elements of the statutes, not the facts of the particular case. *State v. Ou*, 156 Wn. App. 899, 902, 234 P.3d 1186, 1188-89 (2010). In *State v. Chase*, the defendant argued the State had to charge him under the theft of rental property statute because based on the facts of the case, that statute was concurrent with the general first degree theft statute. *Id.* (citing *Chase*, 134 Wn. App. at 795). In rejecting the defendant's argument, the court held that the underlying facts in a particular case had no bearing on whether statutes were concurrent:

Chase argues that under the facts of this case, it was impossible for him to violate the first degree theft of rental property statute without violating the first degree theft statute. That may be true, but the question is whether *all* violations of the first degree theft of leased property statute are necessarily violations of the first degree theft statute. Because they are not, the statutes are not concurrent.

*Id.*

With respect to this case, the court must decide whether custodial assault, in violation of 9A.36.100 would violate RCW 9A.36.031 every single time. Custodial assault and third degree assault (under subsection

g) are both class C felonies that have the same sentencing ranges.

Custodial assault is defined as follows:

- (1) 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). The relevant subsection of the third degree assault statute, RCW 9A.36.031(1)(g), states:

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

**1. The custodial assault statute contains elements that the assault third statute does not contain.**

The custodial assault statute requires that the State prove that the person assaulted was a “full or part-time” community correction officer. The third degree assault statute contains no requirement that the victim be a “full or part time” officer. When the legislature includes elements in one statute but not in another, we can assume that the legislature chose not to include those elements. Here, RCW 9A.36.031(1) was amended to include assault of a law enforcement officer, but the requirement that the officer be “full or part time” was not included. As such, it would be possible for the State to convict someone of assault third but not custodial assault because under RCW 9A.36.031, the State does not need to prove that a police officer is “full or part time.”

Under the custodial assault statute, a wide range of victims could be assaulted, including any full or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any adult or juvenile corrections institution or detention facility, any full or part-time community correction officer, and any full or part-time employee who is employed in a community

corrections office. RCW 9A.36.100. It also includes any volunteer assisting a full or part-time community correction officer or assisting any full or part-time employee employed in a community corrections office. *Id.* RCW 9A.36.100 became effective in 1987.

After that statute was enacted, the legislature added section (g) to the third degree assault statute, RCW 9A.36.031(1), which makes it a crime to 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.”

When charging custodial assault, under subsection (1)(c)(i) the State has to prove that the person assaulted was a “full or part time community corrections officer.” Under RCW 9A.36.031(g), the State has to prove that the officer was “a law enforcement officer or other employee of a law enforcement agency.” These are not identical elements.

In fact, under third degree assault, even an off-duty police officer employed as a private security guard could be considered a “law enforcement officer or other employee of a law enforcement agency.” *See State v. Graham*, 130 Wn.2d 711, 927 P.2d 227 (1996). In *Graham*, the court held:

In our view, public policy is furthered by the rule that a police officer is a public servant or peace officer who has the authority to act as a police officer whenever the officer reasonably believes that a crime is committed in his or her presence, whether the officer is on duty or off duty. This is particularly true when the officer is in uniform or when the officer is otherwise identified as a police officer. *State v. De Santo*, 172 N.J. Super. 27, 410 A.2d 704, 705 (Ct. App. Div. 1980) (the police uniform has the same significance to the public whether the officer is technically on or off duty); *Wilén*, 539 N.W.2d at 660. Whether an off-duty officer employed as a private security guard is acting in the discharge of his official duties is a question of fact that must be resolved according to the circumstances of each case.

This case demonstrates that the actions of the police officer and circumstances of each case are factors a jury can consider when deciding whether an officer is a “law enforcement officer” for purposes of third degree assault.

Statutes are concurrent if all of the elements to convict under the general statute are also elements that must be proved for conviction under the specific statute. *State v. Ou*, 156 Wn. App. 899, 902, 234 P.3d 1186, 1188-89 (2010). The concurrent statute rule issue exists because charging a defendant with a general statute when a concurrent statute is applicable can result in an equal protection violation. *State v. Karp*, 69 Wn. App. 369, 372, 848 P.2d 1304, 1306 (1993). The violation occurs

because the State, by selecting the crime to be charged, can obtain varying degrees of punishment while proving identical elements. *Id.* Here, there are no varying degrees of punishment. The punishment is identical. Furthermore, there are no identical elements.

In sum, it is possible to violate the custodial assault statute without violating the third degree assault statute. Again, the court looks at the statutes and the elements to determine if statutes are concurrent, not the underlying facts. The question is whether all violations of custodial assault are necessarily violations of third degree assault, and based on the elements of these two statutes, the answer is no. Thus, the statutes are not concurrent.

**C. The court should remand for resentencing given an error in the offender score.**

The trial court in this case sentenced Juarez based on an incorrect offender score of four. The correct score should have been three because in Juarez's prior case, case number 16-1-00179-39, the court found two felonies encompassed the same criminal conduct. CP 107-114. Because the State agrees that a resentencing is necessary, the State deems it unnecessary to address the following issues raised by Juarez in this appeal: 1) whether the court erred in imposing an exceptional sentence, 2) whether defense counsel was ineffective in failing to argue that two prior

convictions constituted the same course of conduct, and 3) whether the court erred in assessing legal financial costs. The State makes no concessions as to those issues. However, given that Juarez will be resentenced, he is entitled to argue the exceptional sentence and imposition of legal financial obligations at the resentencing.

**D. The State is not seeking appellate costs.**

In the interest of judicial economy, the State is not seeking appellate costs in this case.

**IV. CONCLUSION**

In conclusion, the State asks that the court affirm Appellant's conviction for third degree assault.

Respectfully submitted this 30th day of November, 2017,

s/Tamara A. Hanlon  
TAMARA A. HANLON, WSBA 28345  
Senior Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on November 30, 2017, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Jill Reuter at admin@ewalaw.com. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of November, 2017 at Yakima, Washington.

s/Tamara A. Hanlon

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**YAKIMA COUNTY PROSECUTING ATTORNEY'S OFF**

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**Transmittal Information**

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