

NO. 45260-0-II

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

STATE OF WASHINGTON, Respondent

v.

MICHAEL DON OLMSTED, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00226-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. RESPONSE TO SUPPLEMENTAL ASSIGNMENT OF ERROR..	1
B. CONCLUSION	6

TABLE OF AUTHORITIES

Cases

State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995) 3
State v. Chaten, 84 Wn.App. 85, 925 P.2d 631 (1996)..... 4
State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972) 3
State v. Taylor, 140 Wn.2d 229, 996 P.2d 571 (2000) 4
State v. Webb, 183 Wn.App. 242, 333 P.3d 470 (2014) 1, 2, 4, 5
State v. Winings, 126 Wn.App. 75, 107 P.3d 141 (2005) 4
United States v. Rizzo, 409 F.2d 400, *cert. denied* 396 U.S. 911,
90 S.Ct. 226 (1969)..... 3

Statutes

RCW 9A.36.020(1)(b) 2
RCW 9A.36.021..... 2, 3, 4, 5

A. **RESPONSE TO SUPPLEMENTAL ASSIGNMENT OF ERROR**

Counsel for Mr. Olmsted has filed a supplemental brief claiming that she was unaware of new case law that, had she been keeping current, would have informed her that Mr. Olmsted's prior conviction for assault in the second degree was constitutionally invalid on its face.¹ Thus, Olmsted claims his prior conviction for assault in the second degree from 1994 should not have been included in his offender score or used as a strike offense. But Olmsted misreads this Court's holding in *State v. Webb*, 183 Wn.App. 242, 333 P.3d 470 (2014).

In *Webb*, this Court held that the trial court had improperly included in an offender score an assault in the second degree conviction from 1992. The conviction was improperly included, according to the Court, because the conviction was constitutionally invalid on its face and because the conviction was unconstitutional due to the plea not having been knowingly, intelligently, and voluntarily entered. This was so, according to this Court, because the defendant was charged and convicted under an expired statute. In 1992, it was no longer the case that a person

¹ The analysis used to determine facial constitutional invalidity differs from that used to determine whether a judgment is valid on its face.

was guilty of assault in the second degree when he knowingly inflicted grievous bodily harm upon another, and RCW 9A.36.020(1)(b) had expired. *Webb* at 250. A new statute replaced RCW 9A.36.020. The new statute was RCW 9A.36.021, and it provided, under subsection (a), that a person was guilty of assault in the second degree if he intentionally assaulted another and thereby recklessly inflicts substantial bodily injury. See Appendix A. The *Webb* Court was particularly concerned with the fact that grievous bodily harm was broader than substantially bodily harm. *Webb* at 249. The difference in the elements between knowingly inflicting grievous bodily harm and recklessly inflicting substantial bodily harm, as well as the reference in both the information and the judgment and sentence to an expired statute, rendered Webb's prior conviction unconstitutionally invalid on its face. In the view of the Court, it also rendered his prior plea to the 1992 assault allegation not intelligently, knowingly, or voluntarily made because Webb did not have adequate notice or understanding of the charge against him (based on the different elements and the citation to an expired statute).

Olmsted relies entirely on *Webb* in this assignment of error. In so doing, he overlooks the fact that Mr. Webb was charged with actual battery, whereas Olmsted was charged with assaulting another with a

deadly weapon. Olmsted, in other words, was charged with the common law-derived method of assaulting another by doing an act with the intent to create a reasonable apprehension of harm in the mind of his victim, by use of a deadly weapon. See *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (“Because ‘assault’ is not defined in the statute, courts resort to the common law for definitions.”) (Internal citations omitted). See also *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972), quoting *United States v. Rizzo*, 409 F.2d 400, 403, *cert. denied* 396 U.S. 911, 90 S.Ct. 226 (1969) (“[A]n assault is ‘committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.’”)

In 1994, the assault in the second degree statute read:

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

...

(c) Assaults another with a deadly weapon.

RCW 9A.36.021(1)(c) (1994 ed.). See Appendix.

In the 1994 conviction Olmsted now claims is unconstitutionally invalid on its face, he was charged as follows: “Michael D. Olmsted...did knowingly assault Matthew McGrady, a human being, with a deadly

weapon, to wit: a pool cue or club, in violation of RCW 9A.36.021(1)(c)...” See Exhibit 5. Olmsted, as the language shows, was charged using the correct statutory citation (unlike in *Webb*), and was charged with intentionally assaulting another with a deadly weapon. That the word “intentionally” does not appear in either the statute or the charging document is of no moment. As the Supreme Court held in *State v. Taylor*, 140 Wn.2d 229, 242, 996 P.2d 571 (2000), the allegation of intent is implicitly conveyed in a charging document that merely alleges “assault” under the plain meaning of the charge. In *Taylor*, the Court followed Division I’s analysis in *State v. Chaten*, 84 Wn.App. 85, 925 P.2d 631 (1996), in which the Court of Appeals held that “a charging document alleging assault in the second degree without expressly alleging the essential element of ‘intent’ was constitutionally sufficient, even under strict pre-verdict construction.” *Taylor* at 238, citing *Chaten* at 87.

“‘Because an assault is commonly understood as an intentional act,’ a mere allegation of assault does not, by definition, omit the element of intent.” *Taylor* at 238, quoting *Chaten* at 87. Further, this Court held in *State v. Winings*, 126 Wn.App. 75, 85, 107 P.3d 141 (2005) that a charging document contains each essential element of the crime and is

legally sufficient to charge a person with assault in the second degree when it merely says the defendant “did assault another with a deadly weapon, in violation of RCW 9A.36.021, a Class B felony.”

In this case, the charging document alleged that Olmsted intentionally assaulted Matthew McGrady with a deadly weapon (to wit, a pool cue). Exhibit 5. It also alleged that the assault was done knowingly, an element the State was not required to prove. Because one is deemed to act knowingly when one acts intentionally, this language is surplusage. And if not surplusage, the inclusion of the term “knowingly” merely added unnecessarily to the State’s burden of proof. Olmsted relieved the State of meeting this burden by pleading guilty to both knowingly and intentionally assaulting Matthew McGrady with a deadly weapon. See Exhibit 5.

Because Olmsted pleaded guilty to an existent crime, and because he pleaded guilty, and was sentenced for, intentionally assaulting Matthew McGrady with a deadly weapon (a pool cue), his prior conviction for assault in the second degree was properly included in his offender score. Olmsted’s case is nothing like the situation in *Webb*. The trial court did not err.

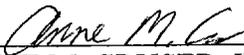
B. CONCLUSION

The trial court properly included Olmsted's 1994 conviction for assault in the second degree in his offender score and properly counted it as a strike offense.

DATED this 18th day of February, 2015.

Respectfully submitted:

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APPENDIX

- 9A.36.078 Malicious harassment—Finding.
 9A.36.080 Malicious harassment—Definition and criminal penalty.
 9A.36.083 Malicious harassment—Civil action.
 9A.36.090 Threats against governor or family.
 9A.36.100 Custodial assault.
 9A.36.120 Assault of a child in the first degree.
 9A.36.130 Assault of a child in the second degree.
 9A.36.140 Assault of a child in the third degree.

9A.36.011 Assault in the first degree. (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

- (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
 (b) Administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
 (c) Assaults another and inflicts great bodily harm.
 (2) Assault in the first degree is a class A felony. [1986 c 257 § 4.]

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

9A.36.021 Assault in the second degree. (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
 (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
 (c) Assaults another with a deadly weapon; or
 (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
 (e) With intent to inflict bodily harm, exposes or transmits human immunodeficiency virus as defined in chapter 70.24 RCW; or
 (f) With intent to commit a felony, assaults another; or
 (g) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

(2) Assault in the second degree is a class B felony. [1988 c 266 § 2; 1988 c 206 § 916; 1988 c 158 § 2; 1987 c 324 § 2; 1986 c 257 § 5.]

Reviser's note: This section was amended by 1988 c 158 § 2, 1988 c 206 § 916, and by 1988 c 266 § 2, each without reference to the other. All amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date—1988 c 266: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1988." [1988 c 266 § 3.]

Effective date—1988 c 206 §§ 916, 917: "Sections 916 and 917 of this act shall take effect July 1, 1988." [1988 c 206 § 922.]

Severability—1988 c 206: See RCW 70.24.900.

Effective date—1988 c 158: See note following RCW 9A.04.110.

Effective date—1987 c 324: See note following RCW 9A.04.110.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

9A.36.031 Assault in the third degree. (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

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

(b) Assaults a person employed as a transit operator or driver by a public or private transit company while that person is operating or is in control of a vehicle that is owned or operated by the transit company and that is occupied by one or more passengers; or

(c) Assaults a school bus driver employed by a school district or a private company under contract for transportation services with a school district while the driver is operating or is in control of a school bus that is occupied by one or more passengers; or

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

(e) Assaults a fire fighter or other employee of a fire department or fire protection district who was performing his or her official duties at the time of the assault; or

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

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

(2) Assault in the third degree is a class C felony. [1990 c 236 § 1; 1989 c 169 § 1; 1988 c 158 § 3; 1986 c 257 § 6.]

Effective date—1988 c 158: See note following RCW 9A.04.110.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

9A.36.041 Assault in the fourth degree. (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor. [1987 c 188 § 2; 1986 c 257 § 7.]

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

Effective date—1987 c 188: See note following RCW 9A.36.100.

Severability—1986 c 257: See note following RCW 9A.56.010.

9A.36.045 Reckless endangerment in the first degree. (Contingent expiration date.) (1) A person is guilty of reckless endangerment in the first degree when he or she recklessly discharges a firearm in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that

(10) "Indicted" and "indictment" include "informed against" and "information", and "informed against" and "information" include "indicted" and "indictment";

(11) "Judge" includes every judicial officer authorized alone or with others, to hold or preside over a court;

(12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty;

(13) "Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer;

(14) "Omission" means a failure to act;

(15) "Peace officer" means a duly appointed city, county, or state law enforcement officer;

(16) "Pecuniary benefit" means any gain or advantage in the form of money, property, commercial interest, or anything else the primary significance of which is economic gain;

(17) "Person", "he", and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;

(18) "Place of work" includes but is not limited to all the lands and other real property of a farm or ranch in the case of an actor who owns, operates, or is employed to work on such a farm or ranch;

(19) "Prison" means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest, including but not limited to any state correctional institution or any county or city jail;

(20) "Prisoner" includes any person held in custody under process of law, or under lawful arrest;

(21) "Property" means anything of value, whether tangible or intangible, real or personal;

(22) "Public servant" means any person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function;

(23) "Signature" includes any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto;

(24) "Statute" means the Constitution or an act of the legislature or initiative or referendum of this state;

(25) "Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or

(b) To cause physical damage to the property of a person other than the actor; or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships;

(26) "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail;

(27) Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular. [1988 c 158 § 1; 1987 c 324 § 1; 1986 c 257 § 3; 1975 1st ex.s. c 260 § 9A.04.110.]

Effective date—1988 c 158: "This act shall take effect July 1, 1988." [1988 c 158 § 4.]

Effective date—1987 c 324: "Section 3 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately. The remainder of this act shall take effect July 1, 1988." [1987 c 324 § 4.]

Effective date—1986 c 257 §§ 3–10: "Sections 3 through 10 of this act shall take effect on July 1, 1988." [1987 c 324 § 3; 1986 c 257 § 12.]

Severability—1986 c 257: See note following RCW 9A.56.010.

Chapter 9A.36

ASSAULT AND OTHER CRIMES INVOLVING PHYSICAL HARM

Sections

9A.36.021	Assault in the second degree.
9A.36.031	Assault in the third degree.
9A.36.100	Custodial assault.
9A.36.110	Toxic endangerment. (Expires 12/8/88 or 3/1/89.)
9A.36.111	Toxic endangerment. (Effective 3/1/89 if 1988 c 112 is approved by the voters at the November 1988 general election.)

9A.36.021 Assault in the second degree. (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

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

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

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(e) With intent to inflict bodily harm, exposes or transmits human immunodeficiency virus as defined in chapter 70.24 RCW; or

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

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

(2) Assault in the second degree is a class B felony. [1988 c 266 § 2; 1988 c 206 § 916; 1988 c 158 § 2; 1987 c 324 § 2; 1986 c 257 § 5.]

Reviser's note: This section was amended by 1988 c 158 § 2, 1988 c 206 § 916, and by 1988 c 266 § 2, each without reference to the other. All amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date—1988 c 266: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1988." [1988 c 266 § 3.]

Effective date—1988 c 206 §§ 916, 917: "Sections 916 and 917 of this act shall take effect July 1, 1988." [1988 c 206 § 922.]

Severability—1988 c 206: See RCW 70.24.900.

Effective date—1988 c 158: See note following RCW 9A.04.110.

Effective date—1987 c 324: See note following RCW 9A.04.110.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.
9A.04.110.

9A.36.031 Assault in the third degree. (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

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

(b) Assaults a person employed as a transit operator or driver by a public or private transit company while that person is operating or is in control of a vehicle owned or operated by the transit company; or

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

(d) Assaults a fire fighter or other employee of a fire department or fire protection district who was performing his or her official duties at the time of the assault; or

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

(2) Assault in the third degree is a class C felony. [1988 c 158 § 3; 1986 c 257 § 6.]

Effective date—1988 c 158: See note following RCW 9A.04.110.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

9A.36.100 Custodial assault. (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.

(2) Custodial assault is a class C felony. [1988 c 151 § 1; 1987 c 188 § 1.]

Effective date—1987 c 188: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1987." [1987 c 188 § 3.]

9A.36.110 Toxic endangerment. (Expires 12/8/88 or 3/1/89.)

(1) A person is guilty of toxic endangerment if he or she:

(a) Knowingly transports, treats, stores, handles, disposes of, or exports a hazardous substance or toxin in violation of state law; and

(b) Knows that such conduct places another person in imminent danger of death or serious bodily injury.

(2) As used in this section, "imminent danger" means that there is a substantial likelihood that harm will be experienced within a reasonable period of time if the danger is not eliminated.

(3) Toxic endangerment is a class B felony. [1987 3rd ex.s. c 2 § 34.]

Reviser's note: The expiration date for 1987 3rd ex.s. c 2, which included the section that became RCW 9A.36.110, was made contingent upon the results of the November 1988 general election. See notes following chapter 70.105B RCW digest, this volume.

Severability—Section captions—1987 3rd ex.s. c 2: See notes following RCW 70.105B.010.

Transfer of funds—Savings—Retroactivity—1987 3rd ex.s. c 2: See note following RCW 70.105B.230.

9A.36.111 Toxic endangerment. (Effective 3/1/89 if 1988 c 112 is approved by the voters at the November 1988 general election.) (1) A person is guilty of toxic endangerment if he or she:

(a) Knowingly transports, treats, stores, handles, disposes of, or exports a hazardous substance or toxin in violation of state law; and

(b) Knows that such conduct places another person in imminent danger of death or serious bodily injury.

(2) As used in this section, "imminent danger" means that there is a substantial likelihood that harm will be experienced within a reasonable period of time if the danger is not eliminated.

(3) Toxic endangerment is a class B felony. [1988 c 112 § 34.]

9A.36.020 Assault in the second degree. (Effective until July 1, 1988.) (1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he:

(a) With intent to injure, shall unlawfully administer to or cause to be taken by another, poison or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or

(b) Shall knowingly inflict grievous bodily harm upon another with or without a weapon; or

(c) Shall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm; or

(d) Shall knowingly assault another with intent to commit a felony.

(2) Assault in the second degree is a class B felony. [1979 ex.s. c 244 § 9; 1975-'76 2nd ex.s. c 38 § 5; 1975 1st ex.s. c 260 § 9A.36.020.]

Effective date—1979 ex.s. c 244: See RCW 9A.44.902.

Effective date—Severability—1975-'76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

9A.36.021 Assault in the second degree. (Effective July 1, 1988.) (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

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

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

(c) Assaults another with a deadly weapon; or

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

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

(2) Assault in the second degree is a class B felony. [1987 c 324 § 2; 1986 c 257 § 5.]

Effective date—1987 c 324: See note following RCW 9A.04.110.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

9A.36.030 Assault in the third degree. (Effective until July 1, 1988.) (1) Every person who, under circumstances not amounting to assault in either the first or second degree, shall be guilty of assault in the third degree when he:

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

(b) With criminal negligence, shall cause physical injury to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(c) Assaults a person employed as a transit operator or driver by a public or private transit company while that person is operating or is in control of a vehicle owned or operated by the transit company; or

(d) Assaults a fire fighter or other employee of a fire department or fire protection district who was performing his or her official duties at the time of the assault.

(2) Assault in the third degree is a class C felony. [1986 c 188 § 1; 1982 c 140 § 1; 1979 ex.s. c 244 § 10; 1975 1st ex.s. c 260 § 9A.36.030.]

(1987 Ed.)

Reviser's note: This section was also repealed by 1986 c 257 § 9, effective July 1, 1988, without cognizance of its amendment by 1986 c 188 § 1. Later enactment, see RCW 9A.36.031.

Effective date—1979 ex.s. c 244: See RCW 9A.44.902.

9A.36.030 Assault in the third degree. [1982 c 140 § 1; 1979 ex.s. c 244 § 10; 1975 1st ex.s. c 260 § 9A.36.030.] Repealed by 1986 c 257 § 9, effective July 1, 1988.

Reviser's note: RCW 9A.36.030 was both amended and repealed during the 1986 legislative session, each without reference to the other. It will be decodified July 1, 1988, pursuant to RCW 1.12.025. See Table of Disposition of Former RCW Sections. Later enactment, see RCW 9A.36.031.

9A.36.031 Assault in the third degree. (Effective July 1, 1988.) (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

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

(b) Assaults a person employed as a transit operator or driver by a public or private transit company while that person is operating or is in control of a vehicle owned or operated by the transit company; or

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

(d) Assaults a fire fighter or other employee of a fire department or fire protection district who was performing his or her official duties at the time of the assault.

(2) Assault in the third degree is a class C felony. [1986 c 257 § 6.]

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

9A.36.040 Simple assault. (Effective until July 1, 1988.) (1) Every person who shall commit an assault or an assault and battery not amounting to assault in either the first, second, or third degree shall be guilty of simple assault.

(2) Simple assault is a gross misdemeanor. [1985 c 303 § 8; 1984 c 263 § 18; 1975 1st ex.s. c 260 § 9A.36.040.]

Effective date—Severability—1984 c 263: See RCW 26.50.901 and 26.50.902.

9A.36.041 Assault in the fourth degree. (Effective July 1, 1988.) (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor. [1987 c 188 § 2; 1986 c 257 § 7.]

Effective date—1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

Effective date—1987 c 188: See note following RCW 9A.36.100.

Severability—1986 c 257: See note following RCW 9A.56.010.

(a) Affecting the permissible use of force by a person acting under the authority of RCW 9A.16.020 or 9A.16.050; or

(b) Preventing a law enforcement agency from adopting standards pertaining to its use of deadly force that are more restrictive than this section. [1986 c 209 § 2; 1975 1st ex.s. c 260 § 9A.16.040.]

Legislative recognition: "The legislature recognizes that RCW 9A.16.040 establishes a dual standard with respect to the use of deadly force by peace officers and private citizens, and further recognizes that private citizens' permissible use of deadly force under the authority of RCW 9.01.200, 9A.16.020, or 9A.16.050 is not restricted and remains broader than the limitations imposed on peace officers." [1986 c 209 § 3.]

9A.16.100 Use of force on children—Policy—

Actions presumed unreasonable. It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive. [1986 c 149 § 1.]

Chapter 9A.36

ASSAULT AND OTHER CRIMES INVOLVING PHYSICAL HARM

Sections

9A.36.010	Repealed. (Effective July 1, 1987.)
9A.36.011	Assault in the first degree. (Effective July 1, 1987.)
9A.36.020	Repealed. (Effective July 1, 1987.)
9A.36.021	Assault in the second degree. (Effective July 1, 1987.)
9A.36.030	Assault in the third degree. (Effective until July 1, 1987.)
9A.36.031	Assault in the third degree. (Effective July 1, 1987.)
9A.36.040	Repealed. (Effective July 1, 1987.)
9A.36.041	Assault in the fourth degree. (Effective July 1, 1987.)

9A.36.010 Repealed. (Effective July 1, 1987.) See Supplementary Table of Disposition of Former RCW Sections, this volume.

[1986 RCW Supp—page 42]

9A.36.011 Assault in the first degree. (Effective July 1, 1987.) (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

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

(b) Administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony. [1986 c 257 § 4.]

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3–10: See note following RCW 9A.04.110.

9A.36.020 Repealed. (Effective July 1, 1987.) See Supplementary Table of Disposition of Former RCW Sections, this volume.

9A.36.021 Assault in the second degree. (Effective July 1, 1987.) (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

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

(b) Assaults another with a deadly weapon; or

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

(d) With intent to commit a felony, assaults another.

(2) Assault in the second degree is a class B felony. [1986 c 257 § 5.]

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 3–10: See note following RCW 9A.04.110.

9A.36.030 Assault in the third degree. (Effective until July 1, 1987.) (1) Every person who, under circumstances not amounting to assault in either the first or second degree, shall be guilty of assault in the third degree when he:

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

(b) With criminal negligence, shall cause physical injury to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(c) Assaults a person employed as a transit operator or driver by a public or private transit company while that person is operating or is in control of a vehicle owned or operated by the transit company; or

(d) Assaults a fire fighter or other employee of a fire department or fire protection district who was performing his or her official duties at the time of the assault.

(2) Assault in the third degree is a class C felony. [1986 c 188 § 1; 1982 c 140 § 1; 1979 ex.s. c 244 § 10; 1975 1st ex.s. c 260 § 9A.36.030.]

Reviser's note: This section was also repealed by 1986 c 257 § 9, effective July 1, 1987, without cognizance of its amendment by 1986 c 188 § 1. Later enactment, see RCW 9A.36.031.

Effective date—1979 ex.s. c 244: See RCW 9A.44.902.

9A.36.030 Assault in the third degree. [1982 c 140 § 1; 1979 ex.s. c 244 § 10; 1975 1st ex.s. c 260 § 9A.36.030.] Repealed by 1986 c 257 § 9, effective July 1, 1987.

Reviser's note: RCW 9A.36.030 was both amended and repealed during the 1986 legislative session, each without reference to the other.

Severability—1982 c 10: See note following RCW 6.12.100.

Severability—1981 c 138: See RCW 10.95.900.

Effective date—1981 c 136: See RCW 72.09.900.

Capital punishment—*Aggravated first degree murder: Chapter 10.95 RCW.*

9A.32.050 Murder in the second degree. (1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; or

(b) He commits or attempts to commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony. [1975-'76 2nd ex.s. c 38 § 4; 1975 1st ex.s. c 260 § 9A.32.050.]

Effective date—**Severability**—1975-'76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

9A.32.060 Manslaughter in the first degree. (1) A person is guilty of manslaughter in the first degree when:

(a) He recklessly causes the death of another person; or

(b) He intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.

(2) Manslaughter in the first degree is a class B felony. [1975 1st ex.s. c 260 § 9A.32.060.]

9A.32.070 Manslaughter in the second degree. (1) A person is guilty of manslaughter in the second degree when, with criminal negligence, he causes the death of another person.

(2) Manslaughter in the second degree is a class C felony. [1975 1st ex.s. c 260 § 9A.32.070.]

Abortion: Chapter 9.02 RCW.

Chapter 9A.36

ASSAULT AND OTHER CRIMES INVOLVING PHYSICAL HARM

Sections

9A.36.010	Assault in the first degree.
9A.36.020	Assault in the second degree.
9A.36.030	Assault in the third degree.
9A.36.040	Simple assault.
9A.36.050	Reckless endangerment.
9A.36.060	Promoting a suicide attempt.
9A.36.070	Coercion.
9A.36.080	Malicious harassment.
9A.36.090	Threats against governor or family.

9A.36.010 Assault in the first degree. (1) Every person, who with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another, shall be guilty of assault in the first degree when he:

(a) Shall assault another with a firearm or any deadly weapon or by any force or means likely to produce death; or

(b) Shall administer to or cause to be taken by another, poison or any other destructive or noxious thing so as to endanger the life of another person.

(2) Assault in the first degree is a class A felony. [1975 1st ex.s. c 260 § 9A.36.010.]

9A.36.020 Assault in the second degree. (1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he:

(a) With intent to injure, shall unlawfully administer to or cause to be taken by another, poison or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or

(b) Shall knowingly inflict grievous bodily harm upon another with or without a weapon; or

(c) Shall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm; or

(d) Shall knowingly assault another with intent to commit a felony.

(2) Assault in the second degree is a class B felony. [1979 ex.s. c 244 § 9; 1975-'76 2nd ex.s. c 38 § 5; 1975 1st ex.s. c 260 § 9A.36.020.]

Effective date—1979 ex.s. c 244: See RCW 9A.44.902.

Effective date—**Severability**—1975-'76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

9A.36.030 Assault in the third degree. (1) Every person who, under circumstances not amounting to assault in either the first or second degree, shall be guilty of assault in the third degree when he:

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

(b) With criminal negligence, shall cause physical injury to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

CLARK COUNTY PROSECUTOR

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