Document: C.R.S. 18-3-203

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Colorado Revised Statutes Annotated Title 18. Criminal Code (Arts. 1 — 26) Article 3. Offenses Against the Person (Pts. 1 — 6) Part 2. Assaults (§§ 18-3-201 — 18-3-209)

18-3-203. Assault in the second degree.

(1) A person commits the crime of assault in the second degree if:

(a) Repealed.

(b) With intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon; or

(c) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, emergency medical care provider, or emergency medical service provider from performing a lawful duty, he or she intentionally causes bodily injury to any person; or

(c.5) With intent to prevent one whom he or she knows, or should know, to be a peace officer, firefighter, or emergency medical service provider from performing a lawful duty, he or she intentionally causes serious bodily injury to any person; or

(d) He recklessly causes serious bodily injury to another person by means of a deadly weapon; or

(e) For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness, or other physical or mental impairment or injury to another person by administering to him, without his consent, a drug, substance, or preparation capable of producing the intended harm; or

(f) While lawfully confined or in custody, he or she knowingly and violently applies physical force against the person of a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, or a judge of a court of competent jurisdiction, or an officer of said court, or, while lawfully confined or in custody as a result of being charged with or convicted of a crime or as a result of being charged as a delinquent child or adjudicated as a delinquent child, he or she knowingly and violently applies physical force against a person engaged in the performance of his or her

duties while employed by or under contract with a detention facility, as defined in section 18-8-203 (3), or while employed by the division in the department of human services responsible for youth services

and who is a youth services counselor or is in the youth services worker classification series, and the person committing the offense knows or reasonably should know that the victim is a peace officer, firefighter, or emergency medical service provider engaged in the performance of his or her duties, or a judge of a court of competent jurisdiction, or an officer of said court, or a person engaged in the performance of his or her duties while employed by or under contract with a detention facility or while employed by the division in the department of human services responsible for youth services. A sentence imposed pursuant to this paragraph (f) shall be served in the department of corrections and shall run consecutively with any sentences being served by the offender; except that, if the offense is committed against a person employed by the division in the department of human services responsible for youth services, the court may grant probation or a suspended sentence in whole or in part, and the sentence may run concurrently or consecutively with any sentences being served. A person who participates in a work release program, a furlough, or any other similar authorized supervised or unsupervised absence from a detention facility, as defined in section 18-8-203 (3), and who is required to report back to the detention facility at a specified time is deemed to be in custody.

(f.5)

(I) While lawfully confined in a detention facility within this state, a person with intent to infect, injure, harm, harass, annoy, threaten, or alarm a person in a detention facility whom the actor knows or reasonably should know to be an employee of a detention facility, causes such employee to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic, caustic, or hazardous material by any means, including but not limited to throwing, tossing, or expelling such fluid or material.

(II) Repealed.

(III)

(A) As used in this paragraph (f.5), "detention facility" means any building, structure, enclosure, vehicle, institution, or place, whether permanent or temporary, fixed or mobile, where persons are or may be lawfully held in custody or confinement under the authority of the state of Colorado or any political subdivision of the state of Colorado.

(B) As used in this paragraph (f.5), "employee of a detention facility" includes employees of the department of corrections, employees of any agency or person operating a detention facility, law enforcement personnel, and any other persons who are present in or in the vicinity of a detention facility and are performing services for a detention facility. "Employee of a detention facility" does not include a person lawfully confined in a detention facility.

(g) With intent to cause bodily injury to another person, he or she causes serious bodily injury to that person or another; or

(h) With intent to infect, injure, or harm another person whom the actor knows or reasonably should know to be engaged in the performance of his or her duties as a peace officer, a firefighter, an emergency medical care provider, or an emergency medical service provider, he or she causes such person to come into contact with blood, seminal fluid, urine, feces, saliva, mucus, vomit, or any toxic,

caustic, or hazardous material by any means, including by throwing, tossing, or expelling such fluid or material; or

(i) With the intent to cause bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes bodily injury.

(2)

(a) If assault in the second degree is committed under circumstances where the act causing the injury is performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the person causing the injury sufficiently to excite an irresistible passion in a reasonable person, and without an interval between the provocation and the injury sufficient for the voice of reason and humanity to be heard, it is a class 6 felony.

(b) If assault in the second degree is committed without the circumstances provided in paragraph (a) of this subsection (2), it is a class 4 felony.

(b.5) Assault in the second degree by any person under subsection (1) of this section without the circumstances provided in paragraph (a) of this subsection (2) is a class 3 felony if the person who is assaulted, other than a participant in the crime, suffered serious bodily injury during the commission or attempted commission of or flight from the commission or attempted commission of murder, robbery, arson, burglary, escape, kidnapping in the first degree, sexual assault, sexual assault in the first or second degree as such offenses existed prior to July 1, 2000, or class 3 felony sexual assault on a child.

(c)

(I) If a defendant is convicted of assault in the second degree pursuant to paragraph (c.5) of subsection (1) of this section or paragraph (b.5) of this subsection (2), except with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406. A defendant convicted of assault in the second degree pursuant to paragraph (b.5) of this subsection (2) with respect to sexual assault or sexual assault in the first degree as it existed prior to July 1, 2000, shall be sentenced in accordance with section 18-1.3-401 (8)(e) or (8)(e.5).

(II) If a defendant is convicted of assault in the second degree pursuant to paragraph (b), (c), (d), or (g) of subsection (1) of this section, the court shall sentence the offender in accordance with section 18-1.3-406; except that, notwithstanding the provisions of section 18-1.3-406, the court is not required to sentence the defendant to the department of corrections for a mandatory term of incarceration.

(d) For purposes of determining sudden heat of passion pursuant to subsection (2)(a) of this section, a defendant's act does not constitute an act performed upon a sudden heat of passion if it results solely from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.

(3) Repealed.

History

Source: L. 71:R&RE, p. 420, § 1.**C.R.S. 1963:**§ 40-3-203. **L. 76, Ex. Sess.:**(1)(f) amended, p. 8, § 2, effective September 18. **L. 79:**(2) R&RE, p. 732, § 2, effective May 18. **L. 81:**(1)(f) amended and (1)(g) added, p. 973, § 7, effective July 1. **L. 86:**(1)(f) amended, p. 789, § 2, effective July 1; (2)(c) added, p. 777, § 3, effective July 1. **L. 88:**(2)(c) amended, p. 717, § 4, effective July 1. **L. 90:**(1)(f) amended, p. 992, § 2, effective April 5; (1)(f) amended, p. 986, § 9, effective April 24. **L. 91:**(2)(a) and (2)(c) amended, p. 405, § 9, effective June 6. **L. 94:**(1)(a) repealed, p. 1717, § 8, effective July 1; (1)(f) amended, p. 2655, § 138, effective July 1. **L. 95:**(1)(b) and (2)(c) amended and (2)(b.5) added, p. 1250, § 7, effective July 1. **L. 97:**(1)(f.5) added, p. 1591, § 1, effective July 1; (2)(a) amended, p. 1544, § 14, effective July 1; (1)(c) and (1)(f) amended, p. 1011, § 16, effective August 6. **L. 98:**(2)(c) amended, p. 1441, § 26, effective July 1. **L. 2000:**(1)(f) amended, p. 693, § 3, effective July 1. **L. 2002:**(2)(b.5) and (2)(c) amended, p. 757, § 2, effective July 1; (2)(c) amended, p. 1512, § 187, effective October 1. **L. 2003:**(1)(f) amended, p. 1430, § 17, effective April 29. **L. 2014:**(1)(c) and (1)(f) amended,(HB 14-1214), ch. 336, p. 1497, § 6, effective August 6. **L. 2015:**(1)(f.5)(II) repealed and (3) added,(SB 15-126), ch. 109, p. 316, § 1, effective July 1; (1)(c) and (1)(g) amended and (1)(h) added,(SB 15-067), ch. 337, p. 1366, § 2, effective September 1; (1)(c.5) added and (2)(c) amended, (HB 15-1303), ch. 211, p. 771, § 1, effective September 1. **L. 2016:**(1)(h) amended and (1)(i) added, (HB 16-1080), ch. 327, p. 1327, § 2, effective July 1; (2)(c) amended,(SB 16-102), ch. 181, p. 620, § 1, effective July 1; (3) repealed,(HB 16-1393), ch. 304, p. 1226, § 4, effective July 1. **L. 2020:**(2)(d) added,(SB 20-221), ch. 279, p. 1369, § 9, effective July 13.

Annotations

Research References & Practice Aids

Hierarchy Notes:

C.R.S. Title 18

C.R.S. Title 18, Art. 3

State Notes

Notes

Editor's note:

(1) Amendments to subsection (1)(f) in Senate Bill 90-58 and House Bill 90-1255 were harmonized. Amendments to subsection (2)(c) in House Bill 02-1046 and House Bill 02-1225 were harmonized.

(2) In People v. Slaughter, 2019 COA 27, 439 P.3d 80, the Colorado Court of Appeals found that, where the prosecution seeks to charge a defendant with strangulation under subsection (1)(i) of this section together with the crime of violence sentence enhancer under § 18-1.3-406 (2)(a)(I)(A), such charging would cause a violation of the defendant's right to equal protection of the laws, and thus would be unconstitutional.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews.

For comment, "Colorado's First Degree Assault Statute", see 65 U. Colo. L. Rev. 975 (1994).

Annotator's note.

Since § 18-3-203 is similar to former § 40-2-34, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

It is an equal protection violation to charge a defendant with strangulation under subsection (1)(i) of this section along with the crime-of-violence sentence enhancer in § 18-1.3-406 (2)(a)(I)(A).

That charging combination creates a constitutional violation because the resulting penalty would be more significant than if the defendant was charged under subsection (1)(b). In both cases, the prosecution would have to prove the strangulation involved the use of a deadly weapon, in this case the defendant's hands, so there is no meaningful distinction in the criminal conduct. But there is a significant difference in the possible penalty: A defendant charged under subsection (1)(b) could be sentenced to probation while a defendant charged under subsection (1)(i) with the crime-of-violence sentence enhancer would receive a minimum five-year prison sentence. People v. Slaughter, 2019 COA 27, 439 P.3d 80.

A defendant may not be charged with second degree assault for the same strangulation

conduct under both subsections (1)(b) and (1)(i).

These subsections carry different maximum penalties, so charging a defendant under both subsections would violate equal protection. Legislative history reveals the general assembly's intent that all manual strangulations resulting in bodily injury be charged under subsection (1)(i). People v. Lee, 2019 COA 130, 477 P.3d 732, aff'd, 2020 CO 81, 476 P.3d 351.

Second degree assault is a lesser included offense of first degree assault.

People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

But second degree assault is not a lesser included offense of second degree murder

because the mens rea for the two crimes is different. People v. Fry, 74 P.3d 360 (Colo. App. 2002), aff'd on other grounds, 92 P.3d 970 (Colo. 2004).

By establishing all of the essential elements of first degree assault, all of the essential elements of second degree assault would necessarily be proven.

People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

When the pertinent provisions of the first and second degree assault statutes are placed parallel to one another, it is obvious that the establishment of the essential elements of the greater necessarily establishes all of the elements required to prove the lesser. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

The basic element in both first and second degree assault is injury to a person's body,

the difference being one of the degree of the injury. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

The means of committing the injury under second degree assault subsection (1)(b) is identical to first degree assault.

People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

The only difference in first and second degree assault

under subsection (1)(a) of each section is that in first degree assault the serious bodily injury must be "by means of a deadly weapon", whereas under second degree assault the cause of serious bodily injury may be by any means. People v. Martinez, 189 Colo. 408, 540 P.2d 1091 (1975).

The mental state "knowingly" is implied

by the statute and is required for a conviction of second degree assault on a police officer under subsection (1)(f). People v. Hart, 658 P.2d 857 (Colo. 1983).

Application of physical force, rather than a mere attempt to apply force, is required. People v. Schoondermark, 699 P.2d 411 (Colo. 1985).

Subsection (1)(f) creates a separate and distinct offense

which turns on substantial differences which have a reasonable relationship to the persons involved and the public purposes to be achieved. People v. Gibson, 623 P.2d 391 (Colo. 1981).

The term "serious bodily injury" is not facially unconstitutionally vague.

Defendant's challenge that "serious bodily injury" included subjective undefined terms making it constitutionally infirm did not show the term was so vague that a person of ordinary intelligence must guess at its meaning and may differ as to its application. The term was also constitutional as applied to the defendant. People v. Summitt, 104 P.3d 232 (Colo. App. 2004), aff'd in part and rev'd in part on other grounds, 132 P.3d 320 (Colo. 2006).

The terms "serious bodily injury" and "bodily injury"

The terms "serious bodily injury" and "bodily injury

do not suffer from an equal protection problem, because they only overlap if serious bodily injury is given an unreasonably broad interpretation. People v. Summitt, 104 P.3d 232 (Colo. App. 2004),

aff'd in part and rev'd in part on other grounds, 132 P.3d 320 (Colo. 2006).

"Serious bodily injury" and "bodily injury" constitutionally distinguishable.

Section 18-3-202 (1)(a) and subsection (1)(a) of this section, thus, do not proscribe identical conduct and therefore do not violate equal protection. People v. Elam, 198 Colo. 170, 597 P.2d 571 (1979).

Any break or fracture is sufficient to establish "serious bodily injury".

The term "of the second or third degree" refers only to burns and not to breaks or fractures. People v. Daniels, 240 P.3d 409 (Colo. App. 2009).

"Violently applies physical force".

The phrase "violently applies physical force", in subsection (1)(f), does not connote a specific intent to inflict serious bodily injury. People v. Walker, 634 P.2d 1026 (Colo. App. 1981).

In subsection (1)(f), the mental state of "knowingly" also applies to the element of violently applying physical force. People v. Saiz, 660 P.2d 2 (Colo. App. 1982).

There is a sufficient pragmatic difference between subsection (1)(e) of the first degree assault statute and the second degree assault statute

so as not to violate the defendant's constitutional guarantee of equal protection. People v. Jackson, 194 Colo. 93, 570 P.2d 527 (1977).

Equal protection not violated by general criminal attempt statute.

There was no violation of equal protection in defendant's conviction under the specific attempt provision of second degree assault statute, despite defendant's contention that the general criminal attempt statute, § 18-2-101, proscribes the same conduct. People v. Weller, 679 P.2d 1077 (Colo. 1984).

This section does not proscribe conduct identical to § 18-3-202

and therefore does not violate equal protection. People v. Brake, 196 Colo. 575, 588 P.2d 869 (1979).

Subsection (1)(b) and § 18-2-101 (1) do not proscribe the same conduct,

and disparity in applicable punishment does not violate equal protection guarantees. People v. Marez, 916 P.2d 543 (Colo. App. 1995).

But the sentencing scheme established in subsection (2)(c) did not meet the requirements of equal protection

as applied to defendant's sentences because it mandated the imposition of a greater punishment for an attempt to cause bodily injury than for an attempt to cause serious bodily injury. People v. Marez, 916 P.2d 543 (Colo. App. 1995).

Subsection (1)(c) does not violate equal protection by punishing a person who assaults a firefighter acting as a paramedic more severely than a person who assaults a non-firefighter paramedic.

The more serious class of assault created by subsection (1)(c) is based on differences that are real and reasonably related to the purposes of the statute. People v. Montoya, 104 P.3d 303 (Colo. App. 2004).

Second degree assault on a peace officer is distinguishable from both third degree assault, as described in § 18-3-204, and resisting arrest, as described in § 18-8-103, and therefore these sections do not violate equal protection.

This section requires that the defendant act intentionally, whereas both third degree assault and resisting arrest require only that the defendant act knowingly. Further, this section requires proof that the defendant intended to prevent a police officer from performing a lawful duty, which is not required for a conviction for third degree assault. And finally, this section requires the defendant to intend to cause bodily harm, while resisting arrest requires only that the defendant use or threaten to use physical force. People v. Whatley, 10 P.3d 668 (Colo. App. 2000).

Second degree assault described under subsection (1)(d) of this section is distinguishable from vehicular assault, described in § 18-3-205, and therefore these sections do not violate equal protection.

The statutes differ in three primary ways. Second degree assault applies to a range of unspecified conduct, while vehicular assault applies narrowly to driving or operating a motor vehicle. Second degree assault can apply to acts of omission, while vehicular assault requires acts of commission. Second degree assault applies to any deadly weapon, which may include a motor vehicle, while vehicular assault requires the defendant's reckless driving or operation of a motor vehicle to have proximately caused the serious bodily injury. People v. Stewart, 55 P.3d 107 (Colo. 2002).

The general assembly is free to prescribe different punishments

for conduct prescribed to result in varying degrees of social consequences, and the distinction between this section and § 18-8-103 is not arbitrary or inadvertent. Therefore this section is not unconstitutional. People v. Wieder, 693 P.2d 1006 (Colo. App. 1984), aff'd, 722 P.2d 396 (Colo. 1986).

Conviction not reversed when first degree assault statute declared unconstitutional.

A conviction on second degree assault where defendant was charged with both first degree and second degree assault is not an inconsistent verdict requiring reversal when the first degree assault statute is later declared unconstitutional by reason of not being distinguishable from the second degree assault statute because the implicit acquittal of first degree assault is not a verdict with which the conviction can be inconsistent. People v. Trout, 198 Colo. 98, 596 P.2d 762 (1979).

Constitutionality of 1976 amendment.

Because the call of the governor generally concerned protection of police officers and others while carrying out their duties, the 1976 amendment adding the words "or in custody" to the statute governing assaults upon police officers definitely fell within the subject matter of the call and was therefor constitutional. People v. Wieder, 693 P.2d 1006 (Colo. App. 1984), aff'd, 722 P.2d 396 (Colo. 1986).

Subsection (1)(b) violates equal protection guarantees,

because a more severe sentence is imposed for an attempt to commit bodily injury than an attempt to commit serious bodily injury. People v. Duc Nguyen, 900 P.2d 37 (Colo. 1995); People v. Gallegos, 904 P.2d 486 (Colo. 1995); People v. Mitchell, 904 P.2d 486 (Colo. 1995); People v. Palmer, 944 P.2d 634 (Colo. App. 1997), aff'd in part and rev'd in part on other grounds, 964 P.2d 524 (Colo. 1998).

The only distinction between conduct proscribed under subsection (1)(a) and under subsection (1)(g) is

that subsection (1)(a) requires the intent to cause serious bodily injury whereas subsection (1)(g) requires the intent to cause only bodily injury. Subsection (2)(c), however, mandates the imposition of a more severe sentence for a crime under subsection (1)(g) than for one under subsection (1)(a). When an offender who acts with a less culpable intent may receive a greater penalty than the offender who acts with a greater culpable intent, such a statutory scheme is unreasonably structured and does not meet the requirements of equal protection, even though the two offenses

structured and does not meet the requirements of equal protection, even though the two offenses result in the same harm. Smith v. People, 852 P.2d 420 (Colo. 1993); People v. Blizzard, 852 P.2d 418 (Colo. 1993) (decided under law in effect prior to 1991 amendment).

Fists may be a deadly weapon,

for purposes of subsection (1)(b), if in the manner they are used or intended to be used they are capable of producing death or serious bodily injury. People v. Ross, 831 P.2d 1310 (Colo. 1992).

Under subsection (1)(d), any object, including a foot, may be a deadly weapon when used to start an unbroken, foreseeable chain of events that results in serious bodily injury. The object does not have to be the direct cause of the injury.

Where defendant kicked the victim in the back, causing her to fall down a flight of stairs, it was irrelevant that her injuries were caused by the stairs rather than the defendant's foot. The defendant's foot qualified as a deadly weapon because he used it to set in motion a sequence of events causing a serious bodily injury. People v. Saleh, 45 P.3d 1272 (Colo. 2002).

Subsection (1)(f) applies to field arrest situation.

The first clause of (1)(f) which makes no reference to a detention facility employee and uses the disjunctive "or", in addition to a court of appeal's case holding that "confined" has a meaning different from and more restrictive than "custody", makes it plain that (1)(f) applies to field arrest situations as well as to detention facilities. People v. Armstrong, 720 P.2d 165 (Colo. 1986); Wieder v. People, 722 P.2d 396 (Colo. 1986).

An arrest precedes "in custody" for purposes of subsection (1)(f).

What constitutes an arrest and what constitutes in custody turn on the same standard, and it is for the trier of fact to determine whether, under the totality of the circumstances, the defendant was under arrest and thus may be guilty of second degree assault. People v. Armstrong, 720 P.2d 165 (Colo. 1986).

When defendant was charged with both resisting arrest and second degree assault, one of the factors in determining whether the defendant is guilty of one or both of the charges shall be whether the actions of the defendant, which caused injury to the officers, were continuous, stemming from his efforts to resist arrest, or whether there was a break between his actions to thwart the officers' efforts to arrest him and the actions which lead to the injury of the officers. People v. Armstrong, 720 P.2d 165 (Colo. 1986).

Once an arrest is made, a person in custody who uses violence against a peace officer commits second degree assault under subsection (1)(f). People v. Stanley, 56 P.3d 1241 (Colo. App. 2002).

The unlawfulness of a detention does not absolve a person of liability for criminal conduct committed during that detention.

People ex rel. D.S.L., 134 P.3d 522 (Colo. App. 2006).

Subsection (1)(f) is not unconstitutionally vague,

in violation of the due process clauses of the Colorado and United States Constitutions. People v. Schoondermark, 699 P.2d 411 (Colo. 1985).

Constitution proscribes retrial when conviction impliedly acquits defendant.

The double jeopardy clause proscribes retrial when a felony menacing conviction impliedly acquits the defendant of a second degree assault charge. Ortiz v. District Court, 626 P.2d 642 (Colo. 1981).

The specific intent required for second degree assault

is sufficiently distinguishable from the less culpable mental state required for third degree assault to justify a harsher penalty for the former. People v. Sparks, 914 P.2d 544 (Colo. App. 1996).

Third degree assault is lesser included offense of second degree assault.

People v. Thompson, 187 Colo. 252, 529 P.2d 1314 (1975).

Because two counts of second degree assault were premised on identical evidence, once the trial court concluded that the evidence was sufficient to submit an instruction regarding third degree assault as a lesser included offense to count one,

it was obligated to make the same conclusion with respect to the defendant's request for a lesser nonincluded instruction as to count two. People v. Castro, 952 P.2d 762 (Colo. App. 1998).

Third degree assault held to be lesser included offense.

The offense of assault in the third degree is a lesser included offense of assault in the second degree upon a peace officer. People v. Annan, 665 P.2d 629 (Colo. App. 1983).

Only difference between second and third degree assault is degree of injury.

People v. Thompson, 187 Colo. 252, 529 P.2d 1314 (1975).

Assault is lesser included offense of robbery.

Since simple assault contains no elements not contained within attempted aggravated robbery, while the latter contains more elements than the former, the former is included within the latter as a lesser offense. People v. Velasquez, 178 Colo. 264, 497 P.2d 12 (1972).

Assault with a deadly weapon is a lesser included offense of aggravated robbery and since the jury convicted the defendant of aggravated robbery, his conviction for the included offense of assault with a deadly weapon must be set aside. People v. Bugarin, 181 Colo. 62, 507 P.2d 875 (1973).

It is possible to commit an aggravated robbery without contemporaneously perpetrating a second degree assault.

People v. Grant, 40 Colo. App. 46, 571 P.2d 1111 (1977); People v. Toomer, 43 Colo. App. 182, 604 P.2d 1180 (1979).

There is no offense of attempt to commit an assault with a deadly weapon

in Colorado. Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971).

Offense of assault and battery is a matter of mixed state and local concern.

City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973).

In determining whether to accept a plea of nolo contendere,

the court must inquire of the defendant as to whether he understands the nature of the charge and its elements, and this is of utmost importance in connection with a felony assault charge with a specific intent to prevent a police officer from performing his lawful duty and to cause bodily injury. People v. Kelly, 189 Colo. 31, 536 P.2d 39 (1975).

Statement of elements of the charge of second degree assault did not give pleading defendant notice

of the true nature of the charge when, by way of further explanation, the court misstated the deadly weapon element as mere possession. People v. Cabral, 698 P.2d 234 (Colo. 1985).

Case remanded

to district court for a new preliminary hearing because district court had interrupted prior hearing before a proper determination of probable cause for second degree assault charges could be made. People v. Nygren, 696 P.2d 270 (Colo. 1985).

People v. Nygren, 696 P.2d 270 (Colo. 1985).

The word "confined" in subsection (1)(f) connotes detention in an institution.

People v. Olinger, 39 Colo. App. 491, 566 P.2d 1367 (1977) (decided under former law).

Applied

in People v. Trujillo, 190 Colo. 45, 543 P.2d 523 (1975); Miller v. District Court, 193 Colo. 404, 566 P.2d 1063 (1977); People v. Conner, 195 Colo. 525, 579 P.2d 1160 (1978); Brutcher v. District Court, 195 Colo. 579, 580 P.2d 396 (1978); People v. Kreiser, 41 Colo. App. 210, 585 P.2d 301 (1978); People v. Thompson, 197 Colo. 299, 592 P.2d 803 (1979); People v. Waggoner, 196 Colo. 578, 595 P.2d 217 (1979); Perea v. District Court, 199 Colo. 27, 604 P.2d 25 (1979); People v. Martinez, 43 Colo. App. 419, 608 P.2d 359 (1979); People v. Parsons, 199 Colo. 421, 610 P.2d 93 (1980); People v. Johnson, 644 P.2d 34 (Colo. App. 1980); People v. Tijerina, 632 P.2d 570 (Colo. 1981); Richardson v. District Court, 632 P.2d 595 (Colo. 1981); People in Interest of R.G., 630 P.2d 89 (Colo. App. 1981); People v. District Court, 652 P.2d 582 (Colo. 1982); People v. Dillon, 655 P.2d 841 (Colo. 1982); People v. Hamilton, 662 P.2d 177 (Colo. 1983); People v. Reedy, 705 P.2d 1032 (Colo. App. 1985).

II. ELEMENTS OF OFFENSE.

Essential elements of assault are

an unlawful attempt to commit a violent injury and the present ability to commit a violent injury, and these elements must be shown to have existed at the time in order to sustain a charge of assault. People v. Cardwell, 181 Colo. 421, 510 P.2d 317 (1973).

"Reasonable person" means an objectively reasonable individual and not a subjectively reasonable one possessing the individual defendant's personality traits or defects.

Under the circumstances, the defendant did not act as a reasonable person would in the same situation. People v. Howard, 89 P.3d 441 (Colo. App. 2003).

Defendant was unreasonable in believing that police officer was not performing lawful duty and intended to commit crime of kidnapping

when officer, in full police uniform, explained purpose of warrantless entry to check on safety of an infant at the mother's request. People v. Malczewski, 744 P.2d 62 (Colo. 1987).

A paramedic employed by the fire department is included as a "firefighter" for purposes of subsection (1)(c).

The statute is not limited to firefighters performing fire suppression functions. People v. Montoya, 104 P.3d 303 (Colo. App. 2004).

An attempt only requires some overt act beyond mere preparation.

People v. Marlott, 191 Colo. 304, 552 P.2d 491 (1976); People v. Weller, 679 P.2d 1077 (Colo. 1984).

And it need not be the last proximate act necessary to consummate a battery.

People v. Marlott, 191 Colo. 304, 552 P.2d 491 (1976).

Certain weapons are by their very design and make lethal

in nature and a trial court should rule as a matter of law that they are deadly weapons. Other instruments or things, including shoes, though perhaps not deadly weapons per se, are within the meaning of our assault with a deadly weapon statute, depending upon the nature of the instrument and the manner in which the instrument or thing is used in accomplishing the assault. Grass v. People, 172 Colo. 223, 471 P.2d 602 (1970).

In order to prove first degree assault and crime of violence

instead of second degree assault and crime of violence, an additional element must be proven -- that the use of the deadly weapon actually caused the serious bodily injury. People v. Mozee, 723 P.2d 117 (Colo. 1986).

Specific intent to do bodily injury can be inferred

from the circumstances of the case where testimony showed that the defendant stabbed victim with a hunting knife. People v. Borrego, 187 Colo. 217, 529 P.2d 639 (1974).

Requisite intent to sustain a conviction under this section may be inferred from the circumstances of the case. People v. Borrego, 187 Colo. 217, 529 P.2d 639 (1974).

Specific intent to cause bodily injury may be found from the defendant's actions and the reasonable inferences which may be drawn from the circumstances of the case. People v. White, 191 Colo. 353, 553 P.2d 68 (1976).

Where the defendant was screaming and yelling at the victim and the victim's injuries showed he was struck with a powerful force directly in the face, the evidence was sufficient to establish specific intent to cause bodily injury. People v. Ross, 819 P.2d 507 (Colo. App. 1991).

Defendant's conscious objective to cause father physical pain can be inferred from the defendant's conduct and the overall circumstances of the case where defendant had medical training and recognized that father's condition was worsening, left father bedridden for a significant length of time without proper change of clothing, toileting, or hygiene, failed to seek professional care for father, and verbally abused father, causing him to fear defendant. People v. Madison, 176 P.3d 793 (Colo. App. 2007).

Present ability must be construed in the light of the particular situation

when a person is charged with an assault. In construing the criminal assault statute, factors such as the gravity of the potential harm and the uncertainty of the result are to be included in appraising the actor's present ability. Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971).

Specific intent is an essential element of the proof

of assault to be established beyond a reasonable doubt, but this requisite specific intent may be drawn from the circumstances of the case. People v. Prante, 177 Colo. 243, 493 P.2d 1083 (1972).

Trial court did not err in declining defendant's proffered instruction

where the jury instruction given accurately informed the jury of the governing law and defendant was not impeded in his ability to convey to the jury his theory of defense. People v. Wylie, 260 P.3d 57 (Colo. App. 2010).

The mental state "intentionally" applies to each element of the offense.

For jury instructions, the best practice is to offset the mental state requirement so that it applies to all elements. Failure to do so does not constitute plain error. People v. Rivas, 77 P.3d 882 (Colo. App. 2003).

"Attempted to cause" should not be included in the jury instruction for second degree assault.

However, error was not plain error since the defendant did not contest that element at trial. People v. Rivas, 77 P.3d 882 (Colo. App. 2003).

Conviction for "second degree assault with intent to cause bodily injury" not legally sufficient.

Where the jury finds the accused guilty of "second degree assault with intent to cause bodily injury" and the verdict omits the word "serious", it is not clear from the language of the verdict whether the jury concluded that the accused, in committing the assault, had the intent to cause serious bodily injury, and, thus, is guilty of second degree assault or whether he intended to cause only bodily

injury and, thus, is guilty of third degree assault; therefore, the verdict is too uncertain to be legally sufficient. Kreiser v. People, 199 Colo. 20, 604 P.2d 27 (1979).

Subsection (1)(d) requires

that a defendant consciously disregard a substantial and unjustifiable risk that a result will occur (or that a circumstance exists), not that a defendant disregard the result that ultimately does occur. Therefore, the people did not have to prove that defendant had knowledge of the existence of the specific deadly weapon held by the victim of the assault. People v. Brown, 677 P.2d 406 (Colo. App. 1983).

Elements of subsection (1)(f).

One of the elements of assault in the second degree is that the person committing the offense knows or reasonably should know that the victim is a person engaged in the performance of duties while employed by or under contract with a detention facility. People v. Akers, 712 P.2d 1058 (Colo. App. 1985).

Because the statute includes the phrase "lawfully confined or in custody," it is not necessary that defendant be incarcerated at the time of the assault, but may merely be in the lawful custody of a peace officer. People v. Marquez-Lopez, 952 P.2d 788 (Colo. App. 1997).

Detention of a suspect for further investigation rather than arrest is sufficient to establish custody under subsection (1)(f). People v. Ortega, 899 P.2d 236 (Colo. App. 1994); People v. Marquez-Lopez, 952 P.2d 788 (Colo. App. 1997).

Formal arrest not required by subsection (1)(f); peace officer need only apply a level of physical control over the person being detained so as reasonably to ensure that the person does not leave. People v. Rawson, 97 P.3d 315 (Colo. App. 2004).

Subsection (1)(f.5) applies to an individual lawfully confined in a vehicle who is lawfully held in custody and whose victim is a law enforcement officer.

Although the language "in custody" contained in subsection (1)(f) is not included in subsection (1)(f.5), the legislature intended that the statute would apply to individuals under arrest and confined to a patrol vehicle. People v. Miller, 97 P.3d 171 (Colo. App. 2003); People v. Luna, 2013 COA 67, 410 P.3d 471.

Felony menacing is not a lesser included offense of second degree assault.

The offense of second degree assault does not establish every essential element of felony menacing and, therefore, the merger doctrine does not apply. People v. Truesdale, 804 P.2d 287 (Colo. App. 1990).

Obstruction of a peace officer under § 18-8-104 is a lesser included offense of second degree assault

under subsection (1)(c) and (1)(f) since all of the elements contained in the definition of obstruction of a peace officer would be necessarily established by the proof of the elements of second degree assault. People v. Stafford, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under § 18-8-104 was a lesser included offense of second degree assault under subsection (1)(c) was error requiring a new trial

where defendant acknowledged the officers sustained bodily injury but there was no admission that he intended to act in a manner that would cause the injury. People v. Stafford, 890 P.2d 244 (Colo. App. 1994).

Trial court's failure to instruct the jury that obstruction of a peace officer under § 18-8-104 was a lesser included offense of second degree assault under subsection (1)(f) was

error requiring a new trial

where defendant testified that the only action he volitionally took after the first officer entered the cell was to raise his arms. People v. Stafford, 890 P.2d 244 (Colo. App. 1994).

Crime of second degree assault

requires the intent to cause bodily injury to another person and causing such injury to any person by means of a deadly weapon. People v. Chavez, 730 P.2d 321 (Colo. 1986).

Second degree assault requires intentional causation of serious bodily harm, meeting the standard for violent force and making it a crime of violence

under the United States sentencing guidelines. United States v. Ontiveros, 875 F.3d 533 (10th Cir. 2017).

Second degree assault requires the use of physical force, making it a crime of violence

under the United States sentencing guidelines. United States v. Ontiveros, 875 F.3d 533 (10th Cir. 2017).

The minimum physical force required for a second degree assault conviction is violent force. The phrase "physical force" means violent force, that is, force capable of causing physical pain or injury to another person. United States v. Ontiveros, 875 F.3d 533 (10th Cir. 2017).

The term "another person" is not superfluous language, and the term is not satisfied by alleging the victim to be "any and all members of the public in [defendant's] vicinity".

There was no evidence from which a reasonable jury could find that defendant's driving jeopardized or threatened any oncoming traffic or individuals. People v. Griego, 2015 COA 31, 411 P.3d 135, aff'd, 2018 CO 5, 409 P.3d 338.

Trial court's instruction to jury that second degree assault involved force or violence as a matter of law was proper for conviction under statute prohibiting possession of weapons by previous offenders

notwithstanding fact that second degree assault could involve injury to another resulting from the administration of a drug or other substance. People v. Allaire, 843 P.2d 38 (Colo. App. 1992).

Equal protection principles are violated

by § 18-3-209 (3), which provides that persons charged with third degree assault against the elderly commit a greater classification of crime and may not raise the issue of provocation, while provocation may be raised by a person charged with second degree assault, which is classified as a lower class crime than third degree assault. People v. Suazo, 867 P.2d 161 (Colo. App. 1993) (decided under law in effect prior to 1991 amendment).

Provocation as used in this section is neither a culpable mental state

nor part of a culpable mental state. People v. Suazo, 867 P.2d 161 (Colo. App. 1993).

In addition, this section does not require that the actor know the age of the victim. People v. Suazo, 867 P.2d 161 (Colo. App. 1993).

The provocation language in subsection (2)(b) is a sentence mitigating factor that does not involve an element of the offense, give rise to an affirmative defense, or create a separate offense.

People v. Howard, 89 P.3d 441 (Colo. App. 2003).

The provocation language in subsection (2)(b) is not a sentence enhancer requiring an

Apprendi jury finding.

An Apprendi jury finding is only necessary when the determination of a fact increases the punishment beyond the range the defendant is already subject to. In the case of second degree assault, before the jury can consider the issue of provocation, they have to find the defendant guilty of second degree assault -- subjecting the defendant to a class 4 felony. At that point, the jury may consider provocation, and if they find provocation the defendant is subject to a class 6 felony. So, the factual issue of provocation decreases the punishment range making Apprendi inapplicable. People v. Howard, 89 P.3d 441 (Colo. App. 2003).

A fist is not a deadly weapon

for the purposes of subsection (1)(b). People v. Ross, 819 P.2d 507 (Colo. App. 1991).

To be a deadly weapon, an object must be used in connection with assaultive conduct directed toward an intended opponent or adversary.

People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011).

It is no defense to show that specific intent was directed at someone else

other than the victim. People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

The department of corrections cannot be the "intended victim", within the meaning of subsection (2)(a),

and therefore a trial court's refusal to allow defendant to present a provocation defense was not error. People v. Akers, 712 P.2d 1058 (Colo. App. 1985).

Under subsection (2)(a), the class of the felony may be reduced

even though the person committing the assault has still engaged in the same conduct with the same mental culpability required for conviction of second degree assault. People v. Duran, 991 P.2d 313 (Colo. App. 1999).

Extent of wound does not negate intent.

The extent of the resulting wound from stabbing by defendant does not negate the defendant's intent necessary for conviction under this section. People v. Borrego, 187 Colo. 217, 529 P.2d 639 (1974).

Requirement of custody or confinement.

When assaults on police officers occurred, the defendant's arrest was complete and he was not free to leave the presence of the officers, and thus he was in custody for purposes of the statute. People v. Weider, 693 P.2d 1006 (Colo. App. 1984), aff'd, 722 P.2d 396 (Colo. 1986).

A formal arrest is not always required before a person may be deemed to be in custody. What is required is that the peace officer have applied a level of physical control over the person being detained so as reasonably to ensure that the person does not leave. People v. Ortega, 899 P.2d 236 (Colo. App. 1994); People ex rel. D.S.L., 134 P.3d 522 (Colo. App. 2006).

Evidence sufficient to show specific intent.

People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

Because one of the powers exercised by defendant under father's power of attorney, dealing with personal and family maintenance, required him to maintain father's standard of living, he had a legal duty to exercise that power with due care for father's benefit.

People v. Madison, 176 P.3d 793 (Colo. App. 2007).

Although an inconsistency exists between jury verdicts for attempted first degree murder and those for first and second degree assault under the heat of passion,

the inconsistency does not require reversal because the existence or absence of heat of passion is not a necessary element of either assault charge. People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010).

Defendant can possess the intent to cause death, serious bodily harm, and bodily harm at the same time.

Therefore, jury's guilty verdicts for attempted first degree murder and first degree assault based on defendant's stabbing of one person and the jury's guilty verdicts for attempted first degree murder and second degree assault based on defendant's stabbing of a second person are not necessarily inconsistent. People v. Sanchez, 253 P.3d 1260 (Colo. App. 2010).

Evidence insufficient to support conviction for second degree assault.

There was no evidence that defendant used his car as a deadly weapon, specifically there was no evidence that defendant used his vehicle with assaultive conduct specifically directed toward the other driver. The evidence, in fact, was to the contrary that defendant attempted to avoid the other driver. People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011).

If the prosecution proves that a defendant intended to cause, and did cause, serious bodily injury to another person, the prosecution has necessarily proved

that the person intended to cause, and did cause, the lesser degree of bodily injury as well. People v. Lovato, 2014 COA 113, 357 P.3d 212.

Because second degree assault is a lesser included offense of first degree assault,

and the same evidence applied to the first and second degree assault charges, the convictions must merge into one conviction for first degree assault. People v. Lovato, 2014 COA 113, 357 P.3d 212.

III. TRIAL AND PROSECUTION.

A. Evidence.

Eyewitness testimony established use of weapon.

Where three witnesses for the people testified only that they did not see the defendant with a knife, a fourth witness testified unequivocally to possession of a knife by the defendant, and no witness of the people stated that the defendant did not have a knife, there is no internal contradiction, and the evidence of one eyewitness, if believed by the jury, is sufficient to establish that defendant had in his possession a knife and used it to inflict the wounds on the victim of the assault. People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

Evidence sufficient to sustain convictions.

People v. White, 191 Colo. 353, 553 P.2d 68 (1976); People v. Mason, 632 P.2d 616 (Colo. App. 1981).

Sufficient evidence that defendant intended to cause bodily injury

where officers present during altercation testified that during the struggle defendant was kicking at all of the officers and continued to kick during efforts to subdue him. People v. Stafford, 890 P.2d 244 (Colo. App. 1994).

Evidence sufficient to establish specific intent to cause injury.

The evidence presented at trial, considered in the light most favorable to the people, showed the defendant was oriented and had control over his body and speech. People v. Howard, 89 P.3d 441 (Colo. App. 2003).

B. Jury.

Whether defendant established heat of passion claim is issue for jury to determine.

Thompson v. Ricketts, 500 F. Supp. 688 (D. Colo. 1980).

When lesser offense submitted to jury.

Where there is no evidence of the specific intent required to determine the defendant guilty of the precise offense charged in the information, or where the evidence might be insufficient to remove the reasonable doubt which might be in the minds of the jury as to the intent, under the same evidence the defendant might be found guilty of simple assault. Barnhisel v. People, 141 Colo. 243, 347 P.2d 915 (1959).

Trial by jury of less than twelve.

A person who is charged with second degree assault, which is a class 4 felony, may elect to be tried by a jury of fewer than 12, but not less than six persons. People v. Byerley, 635 P.2d 542 (Colo. 1981).

C. Instructions.

Where it was possible for the jury to entertain a reasonable doubt

as to defendant's guilt of attempted robbery, and at the same time to be convinced by reason of defendant's admissions that he was guilty of making an assault upon the complaining witness, the evidence justified the giving of an instruction on simple assault as requested in order to submit the lesser included offense to a jury. People v. Velasquez, 177 Colo. 264, 497 P.2d 12 (1972).

Where the jury is unable to unanimously find all the elements of a particular offense,

the trial court should instruct the jury to return a guilty verdict on the lesser offense so long as the jurors agree that the defendant is guilty of each element of the lesser offense. People v. Brighi, 755 P.2d 1218 (Colo. 1988).

An optimal instruction would state that attempt requires some substantial step, or some overt act beyond mere preparation.

People v. Weller, 679 P.2d 1077 (Colo. 1984).

But court is not required to give the definition of attempt

found in the general criminal attempt statute, § 18-2-101. People v. Weller, 679 P.2d 1077 (Colo. 1984).

No plain error found

when court failed to instruct on the mental state needed to commit second degree assault. People v. Wells, 734 P.2d 655 (Colo. App. 1986).

When there is no doubt on intent, court should deny third degree assault instruction.

People v. Gibson, 623 P.2d 391 (Colo. 1981).

Where there was no evidence that the defendant's assault with a deadly weapon was made with anything less than a conscious disregard to the risk to the victim, the court did not err in refusing to instruct the jury on the lesser included offense of third degree assault. People v. Workman, 885 P.2d 298 (Colo. App. 1994).

Plain error found

when court failed to instruct the jury on the mental state needed for the act of "violently apply[ing] physical force". People v. Stafford, 890 P.2d 244 (Colo. App. 1994).

Court's use of a repealed version of the second degree assault statute in defendant's self-defense instruction was plain error.

The instruction lessened the prosecution's burden of disproving defendant's claim of self-defense. Kaufman v. People, 202 P.3d 542 (Colo. 2009).

Instruction on deadly weapons proper.

The trial court did not err in generally instructing the jury that a shoe was not in and of itself a deadly or dangerous weapon and that in determining whether an instrument, not inherently deadly or dangerous, assumes the characteristics of a deadly weapon the jury should consider the nature of the instrument or thing, the manner of its use, the location on the body of the injuries inflicted and the extent of such injuries. Grass v. People, 172 Colo. 223, 471 P.2d 602 (1970).

A defendant's learning of an injury to a close relative may create a jury question as to provocation in assault cases.

No requirement, however, exists under this section for the fact finder to determine whether a sufficient interval has passed for the "voice of reason and humanity to be heard". Although, as a matter of law, the court may find a sufficient "cooling off" period has occurred. People v. Suazo, 867 P.2d 161 (Colo. App. 1993).

Trial court had no duty to provide an instruction regarding the elements of lesser, non-included offense of obstructing a peace officer.

The evidence was undisputed that defendant was in custody. There was no rational basis on which the jury could have acquitted defendant of second degree assault and convicted him of obstructing a police officer. People v. Ortega, 899 P.2d 236 (Colo. App. 1994).

Jury instruction on third degree assault as a lesser included offense of second degree assault not required

because jury could not have acquitted defendant of second degree assault but convicted him of third degree assault. Highly relevant to the determination of whether the knife defendant used was a deadly weapon was uncontroverted testimony that the knife was four to five inches long. Even if the knife blade was dull, because of its size, the jury could have reasonably concluded that it was capable of producing serious bodily injury. And because a reasonable jury could not have concluded that the knife was anything other than a deadly weapon, it could not have rationally acquitted defendant of second degree assault and convicted him of third degree assault. People v. Buell, 2017 COA 148, 442 P.3d 961, aff'd on other grounds, 2019 CO 27, 439 P.3d 857.

IV. VERDICT AND SENTENCE.

Subsection (2)(c) requires mandatory sentencing

under the provisions of § 16-11-309. The intent of the legislature was to mandate sentencing under § 16-11-309 irrespective of any allegation of a violent crime and irrespective of a specific finding by the trial court that a violent crime has been committed. People v. Terry, 791 P.2d 374 (Colo. 1990).

Thus, trial court's enhanced sentence for second degree assault with a deadly weapon was not error even though jury did not specifically find that defendant had committed a crime of violence. An offense committed under subsection (1)(b) is a per se crime of violence under subsection (2)(c) and requires enhanced sentencing under § 16-11-309 without the necessity of pleading or proving a separate crime of violence. People v. Hayward, 55 P.3d 803 (Colo. App. 2002).

Subsection (1)(b), which includes attempted assault, combined with the sentencing requirements of subsection (2)(c) violates equal protection requirements

because attempted second degree assault, when treated as a crime of violence, would carry a presumptive penalty of five to sixteen years imprisonment and attempted first degree assault would carry a presumptive penalty of two to eight years imprisonment. People v. Nguyen, 900 P.2d 37 (Colo. 1995) (decided under former subsection (1)(b) as it existed prior to amendment in 1995).

The appropriate cure for the constitutional infirmity of subsection (1)(b), consistent with legislative intent, is to strike the crime of violence sentencing as it applies to attempted second degree assault. People v. Nguyen, 900 P.2d 37 (Colo. 1995) (decided under former subsection (1)(b) as it existed prior to amendment in 1995).

A defendant who is convicted of second degree assault on a police officer is subject to the mandatory sentencing range specified for crimes of violence in § 16-11-309, due to the mandatory language of subsection (2)(c).

However, the defendant is not subject to sentencing for an extraordinary risk crime under § 18-1-105 (9.7) unless the prosecution has alleged and proved the elements of a crime of violence, as described in § 16-11-309. In sentencing the defendant, the trial court stated that it was sentencing him to a minimum mandatory sentence of five years. Since this sentence presumes application of the sentence enhancing provisions for extraordinary risk crimes, the sentence was imposed in error and the case was remanded for resentencing. People v. Banks, 9 P.3d 1125 (Colo. 2000).

Trial court did not erroneously apply the general sentence enhancer in § 18-1.3-401 (8)(a)(IV) to defendant's assault conviction under subsection (1)(f.5) of this section.

Application of the sentence enhancement provisions of § 18-1.3-401 did not have the effect of raising the class of felony for which defendant was convicted. Plus, the elemental statute under which defendant was charged did not contain specific sentencing requirements that would have superseded the provisions of the sentencing statute. People v. Wylie, 260 P.3d 57 (Colo. App. 2010).

The specific aggravator in subsection (1)(f) applies as opposed to any general aggravator found in § 18-1.3-401.

Subsection (1)(f) refers to the second degree assault on a correctional officer and contains its own aggravator. Therefore, the specific aggravator applies, not a general one. People v. Willcoxon, 80 P.3d 817 (Colo. App. 2002).

The consecutive sentencing provision in subsection (1)(f) does not apply to juveniles

who are adjudicated delinquent and sentenced to the department of human services. People ex rel. D.S.L., 134 P.3d 522 (Colo. App. 2006).

Section requires consecutive sentences

even when in custody only as a result of being charged with a crime. People v. Benavidez, 222 P.3d 391 (Colo. App. 2009).

Subsection (1)(f) requires a consecutive sentence if, at the time of sentencing, the defendant is serving any other sentence.

People v. Diaz, 2015 CO 28, 347 P.3d 621.

Third degree assault is a lesser included offense of second degree assault.

The third degree assault conviction merges into the conviction for second degree assault. People v. Howard, 89 P.3d 441 (Colo. App. 2003).

Defendant's right to be free from double jeopardy violated

when court entered convictions for subsections (1)(b) and (1)(c). Both convictions arose out of the same action. People v. Denhartog, 2019 COA 23, 452 P.3d 148.

Defendant's convictions for two separate charges of second degree assault and one charge for third degree assault were not mutually exclusive.

Convictions are mutually exclusive only when the existence of an element of one of the crimes negates the existence of an element of the other crime. Here, the three charges each required a different culpable mental state -- intentionally, recklessly, and with criminal negligence. Since the jury found the defendant guilty of the charge requiring the intentional mental state, the prosecution then necessarily proved the lower mental states of recklessly and with criminal negligence. Even if there is a logical inconsistency between any of the culpable mental states, no legal inconsistency exists, and guilty verdicts that are legally consistent are not mutually exclusive. People v. Rigsby, 2020 CO 74, 471 P.3d 1068.

Defendant's convictions for two separate charges for second degree assault were multiplicitous.

Two convictions for second degree assault based on the same conduct but different charges violates a defendant's double jeopardy rights. People v. Rigsby, 2020 CO 74, 471 P.3d 1068.

Research References & Practice Aids

Cross references:

For the legislative declaration contained in the 1994 act amending subsection (1)(f), see section 1 of chapter 345, Session Laws of Colorado 1994. For the legislative declaration contained in the 2002 act amending subsection (2)(c), see section 1 of chapter 318, Session Laws of Colorado 2002. For the legislative declaration in SB 20-221, see section 1 of chapter 279, Session Laws of Colorado 2020.

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