

Senate Bill No. 533

(By Senators Miller, Jenkins, Palumbo and Wells)

[Introduced March 14, 2013; referred to the Committee on the
Judiciary.]

10 A BILL to amend and reenact §61-2-9 and §61-2-28 of the Code of
11 West Virginia, 1931, as amended, all relating generally to
12 crimes against the person; and modifying the definitions of
13 "battery" and "domestic battery" to conform with federal laws.

14 *Be it enacted by the Legislature of West Virginia:*

15 That §61-2-9 and §61-2-28 of the Code of West Virginia, 1931,
16 as amended, be amended and reenacted, all to read as follows:

17 **ARTICLE 2. CRIMES AGAINST THE PERSON.**

18 **§61-2-9. Malicious or unlawful assault; assault; battery;**
19 **penalties.**

20 (a) If any person maliciously ~~shoot~~ shoots, ~~stab~~ stabs, ~~cut~~
21 cuts or ~~wound~~ wounds any person, or by any means ~~cause~~ causes him
22 or her bodily injury with intent to maim, disfigure, disable or
23 kill, he or she ~~shall~~, except where it is otherwise provided, ~~be~~ is

1 guilty of a felony and, upon conviction, shall be ~~punished by~~
2 ~~confinement in the penitentiary~~ imprisoned in a state correctional
3 facility not less than two nor more than ten years. If ~~such the~~
4 act ~~be~~ is done unlawfully, but not maliciously, with the intent
5 aforesaid, the offender ~~shall be~~ is guilty of a felony and, upon
6 conviction, shall, ~~in the discretion of the court,~~ either be
7 ~~confined in the penitentiary~~ imprisoned in a state correctional
8 facility not less than one nor more than five years, or be confined
9 in jail not exceeding twelve months and fined not exceeding \$500.

10 (b) *Assault*. -- If any person unlawfully attempts to commit a
11 violent injury to the person of another or unlawfully commits an
12 act which places another in reasonable apprehension of immediately
13 receiving a violent injury, he or she ~~shall be~~ is guilty of a
14 misdemeanor and, upon conviction, shall be confined in jail for not
15 more than six months, or fined not more than \$100, or both ~~such~~
16 ~~fine and imprisonment~~ fined and confined.

17 (c) *Battery*. -- If any person unlawfully and intentionally
18 makes physical contact ~~of an insulting or provoking nature~~ with the
19 person of another or unlawfully and intentionally causes physical
20 harm to another person, he or she ~~shall be~~ is guilty of a
21 misdemeanor and, upon conviction, shall be confined in jail for not
22 more than twelve months, or fined not more than \$500, or both ~~such~~
23 ~~fine and imprisonment~~ fined and confined.

24 (d) Any person, convicted of a violation of subsection (b) or

1 (c) of this section who has, in the ten years prior to ~~said~~ the
2 conviction, been convicted of a violation of either subsection (b)
3 or (c) of this section where the victim was a current or former
4 spouse, current or former sexual or intimate partner, a person with
5 whom the defendant has a child in common, a person with whom the
6 defendant cohabits or has cohabited, a parent or guardian, the
7 defendant's child or ward or a member of the defendant's household
8 at the time of the offense or convicted of a violation of section
9 twenty-eight of this article or has served a period of pretrial
10 diversion for an alleged violation of subsection (b) or (c) of this
11 section or section twenty-eight of this article when the victim has
12 ~~such~~ a present or past relationship, shall upon conviction be
13 subject to the penalties set forth in section twenty-eight of this
14 article for a second, third or subsequent criminal act of domestic
15 violence offense, as appropriate.

16 **§61-2-28. Domestic violence -- Criminal acts.**

17 (a) *Domestic battery.* -- Any person who unlawfully and
18 intentionally makes physical contact ~~of an insulting or provoking~~
19 ~~nature~~ with his or her family or household member or unlawfully and
20 intentionally causes physical harm to his or her family or
21 household member, is guilty of a misdemeanor and, upon conviction
22 thereof, shall be confined in ~~a county or regional~~ jail for not
23 more than twelve months, or fined not more than \$500, or both fined
24 and confined.

1 (b) *Domestic assault.* -- Any person who unlawfully attempts to
2 commit a violent injury against his or her family or household
3 member or unlawfully commits an act which places his or her family
4 or household member in reasonable apprehension of immediately
5 receiving a violent injury, is guilty of a misdemeanor and, upon
6 conviction thereof, shall be confined in ~~a county or regional~~ jail
7 for not more than six months, or fined not more than \$100, or both
8 fined and confined.

9 (c) *Second offense.* -- Domestic assault or domestic battery.

10 A person, convicted of a violation of subsection (a) of this
11 section after having been previously convicted of a violation of
12 subsection (a) or (b) of this section, after having been convicted
13 of a violation of subsection (b) or (c), section nine of this
14 article or subsection (a), section fourteen-g of this article where
15 the victim was his or her current or former spouse, current or
16 former sexual or intimate partner, person with whom the defendant
17 has a child in common, person with whom the defendant cohabits or
18 has cohabited, a parent or guardian, the defendant's child or ward
19 or a member of the defendant's household at the time of the offense
20 or who has previously been granted a period of pretrial diversion
21 pursuant to section twenty-two, article eleven of this chapter for
22 a violation of subsection (a) or (b) of this section, or a
23 violation of subsection (b) or (c), section nine of this article or
24 subsection (a), section fourteen-g of this article where the victim

1 was a current or former spouse, current or former sexual or
2 intimate partner, person with whom the defendant has a child in
3 common, person with whom the defendant cohabits or has cohabited,
4 a parent or guardian, the defendant's child or ward or a member of
5 the defendant's household at the time of the offense, is guilty of
6 a misdemeanor and, upon conviction thereof, shall be confined in ~~a~~
7 ~~county or regional~~ jail for not less than sixty days nor more than
8 one year, or fined not more than \$1,000, or both fined and
9 confined.

10 A person convicted of a violation of subsection (b) of this
11 section, after having been previously convicted of a violation of
12 subsection (a) or (b) of this section, after having been convicted
13 of a violation of subsection (b) or (c), section nine of this
14 article or subsection (a), section fourteen-g of this article where
15 the victim was a current or former spouse, current or former sexual
16 or intimate partner, person with whom the defendant has a child in
17 common, person with whom the defendant cohabits or has cohabited,
18 a parent or guardian, the defendant's child or ward or a member of
19 the defendant's household at the time of the offense or having
20 previously been granted a period of pretrial diversion pursuant to
21 section twenty-two, article eleven of this chapter for a violation
22 of subsection (a) or (b) of this section or subsection (b) or (c),
23 section nine of this article or subsection (a), section fourteen-g
24 of this article where the victim was a current or former spouse,

1 current or former sexual or intimate partner, person with whom the
2 defendant has a child in common, person with whom the defendant
3 cohabits or has cohabited, a parent or guardian, the defendant's
4 child or ward or a member of the defendant's household at the time
5 of the offense, shall be confined in ~~a county or regional~~ jail for
6 not less than thirty days nor more than six months, or fined not
7 more than \$500, or both fined or confined.

8 (d) Any person who has been convicted of a third or subsequent
9 violation of the provisions of subsection (a) or (b) of this
10 section, a third or subsequent violation of the provisions of
11 section nine of this article or subsection (a), section fourteen-g
12 of this article where the victim was a current or former spouse,
13 current or former sexual or intimate partner, person with whom the
14 defendant has a child in common, person with whom the defendant
15 cohabits or has cohabited, a parent or guardian, the defendant's
16 child or ward or a member of the defendant's household at the time
17 of the offense or who has previously been granted a period of
18 pretrial diversion pursuant to section twenty-two, article eleven
19 of this chapter for a violation of subsection (a) or (b) of this
20 section or a violation of the provisions of section nine of this
21 article or subsection (a), section fourteen-g of this article in
22 which the victim was a current or former spouse, current or former
23 sexual or intimate partner, person with whom the defendant has a
24 child in common, person with whom the defendant cohabits or has

1 cohabited, a parent or guardian, the defendant's child or ward or
2 a member of the defendant's household at the time of the offense,
3 or any combination of convictions or diversions for these offenses,
4 is guilty of a felony if the offense occurs within ten years of a
5 prior conviction of any of these offenses and, upon conviction
6 thereof, shall be ~~confined~~ imprisoned in a state correctional
7 facility not less than one nor more than five years or fined not
8 more than \$2,500, or both fined and imprisoned.

9 (e) As used in this section, "family or household member"
10 means "family or household member" as defined in §48-27-204 of this
11 code.

12 (f) A person charged with a violation of this section may not
13 also be charged with a violation of subsection (b) or (c), section
14 nine of this article for the same act.

15 (g) No law-enforcement officer may be subject to any civil or
16 criminal action for false arrest or unlawful detention for
17 effecting an arrest pursuant to this section or pursuant to §48-27-
18 1002.

NOTE: The purpose of this bill is to change the common law definition of battery and bring West Virginia into compliance with federal laws. This change is requested as result of *U.S. vs. White*, 606 F.3d 144. 1002 of this code.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.