

Senate Bill No. 395

(By Senators Sypolt, Facemire, Gaunch, Prezioso, Stollings, Plymale, Palumbo and Williams)

[Introduced February 3, 2015; referred to the Committee on the Judiciary.]

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

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 2. CRIMES AGAINST THE PERSON.

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

(a) If any person maliciously shoot, stab, cut or wound any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or kill, he or she, ~~shall~~ except where it is otherwise provided, ~~be~~ is guilty of a felony and, upon conviction, shall be punished by confinement in a state correctional facility not less than two nor more than ten years. If ~~such~~ the act ~~be~~ is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and, upon conviction, shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding \$500.

(b) *Assault.* -- Any person who unlawfully attempts to ~~use physical force capable of causing physical pain or injury to~~ offensively touch the person of another or unlawfully commits an act that

1 places another in reasonable apprehension of immediately suffering physical pain or injury, ~~he or she~~
 2 is guilty of a misdemeanor and, upon conviction, shall be confined in jail for not more than six
 3 months, or fined not more than \$100, or both fined and confined.

4 (c) *Battery*. -- Any person who unlawfully and intentionally ~~makes physical contact with~~
 5 ~~force capable of causing physical pain or injury to~~ offensively touches the person of another or
 6 unlawfully and intentionally causes physical ~~pain or injury~~ harm to another person, ~~he or she~~ is guilty
 7 of a misdemeanor and, upon conviction, shall be confined in jail for not more than twelve months,
 8 or fined not more than \$500, or both fined and confined.

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

20 **§61-2-28. Domestic violence -- Criminal acts.**

21 (a) *Domestic battery*. -- Any person who unlawfully and intentionally ~~makes physical contact~~
 22 ~~force capable of causing physical pain or injury to~~ offensively touches his or her family or household
 23 member or unlawfully and intentionally causes physical harm to his or her family or household
 24 member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not
 25 more than twelve months, or fined not more than \$500, or both fined and confined.

26 (b) *Domestic assault*. -- Any person who unlawfully attempts to ~~use force capable of causing~~

1 ~~physical pain or injury against~~ offensively touch his or her family or household member or
2 unlawfully commits an act that places his or her family or household member in reasonable
3 apprehension of immediately ~~suffering physical pain or injury~~ receiving an offensive touch, is guilty
4 of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than six
5 months, or fined not more than \$100, or both fined and confined.

6 (c) *Second offense.* — Domestic assault or domestic battery.

7 A person convicted of a violation of subsection (a) of this section after having been
8 previously convicted of a violation of subsection (a) or (b) of this section, after having been
9 convicted of a violation of subsection (b) or (c), section nine of this article or subsection (a), section
10 fourteen-g of this article where the victim was his or her current or former spouse, current or former
11 sexual or intimate partner, person with whom the defendant has a child in common, person with
12 whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward
13 or a member of the defendant's household at the time of the offense or who has previously been
14 granted a period of pretrial diversion pursuant to section twenty-two, article eleven of this chapter
15 for a violation of subsection (a) or (b) of this section, or a violation of subsection (b) or (c), section
16 nine of this article or subsection (a), section fourteen-g of this article where the victim was a current
17 or former spouse, current or former sexual or intimate partner, person with whom the defendant has
18 a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian,
19 the defendant's child or ward or a member of the defendant's household at the time of the offense
20 is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not less than
21 sixty days nor more than one year, or fined not more than \$1,000, or both fined and confined.

22 A person convicted of a violation of subsection (b) of this section after having been
23 previously convicted of a violation of subsection (a) or (b) of this section, after having been
24 convicted of a violation of subsection (b) or (c), section nine of this article or subsection (a), section
25 fourteen-g of this article where the victim was a current or former spouse, current or former sexual
26 or intimate partner, person with whom the defendant has a child in common, person with whom the

1 defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member
2 of the defendant's household at the time of the offense or having previously been granted a period
3 of pretrial diversion pursuant to section twenty-two, article eleven of this chapter for a violation of
4 subsection (a) or (b) of this section or subsection (b) or (c), section nine of this article or subsection
5 (a), section fourteen-g of this article where the victim was a current or former spouse, current or
6 former sexual or intimate partner, person with whom the defendant has a child in common, person
7 with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or
8 ward or a member of the defendant's household at the time of the offense shall be confined in jail
9 for not less than thirty days nor more than six months, or fined not more than \$500, or both fined and
10 confined.

11 (d) Any person who has been convicted of a third or subsequent violation of the provisions
12 of subsection (a) or (b) of this section, a third or subsequent violation of the provisions of section
13 nine of this article or subsection (a), section fourteen-g of this article where the victim was a current
14 or former spouse, current or former sexual or intimate partner, person with whom the defendant has
15 a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian,
16 the defendant's child or ward or a member of the defendant's household at the time of the offense
17 or who has previously been granted a period of pretrial diversion pursuant to section twenty-two,
18 article eleven of this chapter for a violation of subsection (a) or (b) of this section or a violation of
19 the provisions of section nine of this article or subsection (a), section fourteen-g of this article in
20 which the victim was a current or former spouse, current or former sexual or intimate partner, person
21 with whom the defendant has a child in common, person with whom the defendant cohabits or has
22 cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's
23 household at the time of the offense, or any combination of convictions or diversions for these
24 offenses, is guilty of a felony if the offense occurs within ten years of a prior conviction of any of
25 these offenses and, upon conviction thereof, shall be confined in a state correctional facility not less
26 than one nor more than five years or fined not more than \$2,500, or both fined and confined.

1 (e) As used in this section, “family or household member” means “family or household
2 member” as defined in section two hundred four, article twenty-seven, chapter forty-eight of this
3 code.

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

6 (g) No law-enforcement officer may be subject to any civil or criminal action for false arrest
7 or unlawful detention for effecting an arrest pursuant to this section or pursuant to section one
8 thousand two, article twenty-seven, chapter forty-eight of this code.

NOTE: The purpose of this bill is to modify the definition of "battery" and "domestic battery" in order to conform with federal laws as a result of the decision in *United States v Castleman* 572 U.S. ____ (March 26, 2014). The 2014 Legislature modified the definition of "battery" and "domestic battery" in order to conform with federal laws as a result of the decision in *U.S. v. White*, 606 F.3d 144. However, the result in *White* was overruled in *Castleman*.

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