

LEXSTAT CAL PEN CODE § 240

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THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND  
CH. 12 OF THE 2008 REGULAR SESSION APPROVED 4/29/08

PENAL CODE  
Part 1. Of Crimes and Punishments  
Title 8. Of Crimes Against the Person  
Chapter 9. Assault and Battery

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*Cal Pen Code § 240 (2007)*

**§ 240. Assault defined**

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

**HISTORY:**

Enacted 1872.

**NOTES:**

**Historical Derivation:**

Crimes and Punishment Act § 49 (Stats 1850 ch 99 § 49), as amended Stats 1856 ch 139 § 5.

**Cross References:**

"Battery": *Pen C § 242.*

Assault with deadly weapon: *Pen C § 245.*

Right to use force to prevent personal injury: *CC § 50.*

Interference with initiative, referendum and recall: *Elec C §§ 18630, 18631.*

**Collateral References:**

*Cal Forms Pl & Practice (Matthew Bender) ch 58 "Assault and Battery".*

*Cal Forms Pl & Practice (Matthew Bender) ch 59 "Assemblies, Meetings, and Demonstrations".*

5 Witkin Summary (10th ed) Torts §§ 381, 385.

*Cal. Legal Forms, (Matthew Bender) §§ 104.11[1], 104.110.*

Judicial Council of California Civil Jury Instructions, *CACI Nos. 3106-3108* (Matthew Bender).

Cal Jur 3d (Rev) Assault and Other Wilful Torts §§ 20, 22, Criminal Law §§ 529 et seq.

*Cal Criminal Defense Prac., ch 142, "Crimes Against the Person".*

See Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender)

### **Forms:**

Suggested form is set out below, following notes of decisions.

### **Law Review Articles:**

Assault with unloaded gun. *1 Cal LR 62.*

Prosecution for assault. *25 Cal LR 459.*

Technical assault and battery by physician. *33 Cal LR 248.*

Liability for "ghost surgery". *43 Dicta No. 8, p. 9.*

Marital violence: the legal solutions. *23 Hast LJ 259.*

Assault-related conduct under the proposed California Criminal Code. *25 Hast LJ 657.*

Attempted assault. *14 Santa Clara Law 83.*

Invasions of the person. *6 Stan LR 719.*

Criminal attempt and related problems. *2 UCLA LR 319.*

### **Attorney General's Opinions:**

Communicating the words "I am going to kill the governor" to the governor or a member of his staff may violate *Penal Code*, §§ 71, 653m, 518, 240, or 422 if all of the elements of any such crimes are present. Under *Penal Code*, § 71, a threat is not "directly communicated" to a public officer where it is received by a secretary or other employee of the officer and turned over to the police without reaching the public officer. *63 Ops. Cal. Atty. Gen. 6.*

**Annotations:**

Indecent proposal to woman as assault. 12 ALR2d 971.

Use of set gun, trap, or similar device on defendant's own property. 44 ALR2d 383.

Attempt to commit assault as criminal offense. 79 ALR2d 597.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries. 87 ALR2d 926.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for assault. 98 ALR2d 195.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide. 1 ALR3d 571.

Unintentional killing of or injury to third person during attempted self-defense. 55 ALR3d 620.

Withdrawal after provocation of conflict, as reviving right of self-defense. 55 ALR3d 1000.

Consent as defense to charge of criminal assault and battery. 58 ALR3d 662.

Assault on attorney as contempt. 61 ALR3d 500.

Assault and battery: Sexual nature of physical contact as aggravating offense. 63 ALR3d 225.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute. 89 ALR3d 1026.

Single act affecting multiple victims as constituting multiple assaults or homicides. 8 ALR4th 960.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault. 24 ALR4th 243.

Attempt to commit assault as criminal offense. 93 ALR5th 683.

**Hierarchy Notes:**

Pt. 1, Tit. 8, Ch. 9 Note

NOTES OF DECISIONS 1. In General 2. Definitions 3. Other Offenses 4. Elements 5. -Intent 6. Prosecution 7. Law Enforcement 8. Law enforcement

**1. In General**

The drawing of a pistol on another, accompanied by a threat to use it unless the other immediately leave the spot, is an assault although the pistol is not pointed at the person threatened. *People v. McMakin (1857) 8 Cal 547, 1857 Cal LEXIS 384.*

Where the attempt or actual battery, with or without a weapon, is justifiable, there is no offense. *People v. Rodrigo*

(1886) 69 Cal 601, 11 P 481, 1886 Cal LEXIS 694.

An attempt made with the victim's consent will not constitute an assault. *People v. Gordon* (1886) 70 Cal 467, 11 P 762, 1886 Cal LEXIS 820.

Assault is in itself unlawful; one person cannot assault another in self-defense, and any act done in self-defense cannot be assault. *People v. Lynch* (1894) 101 Cal 229, 35 P 860, 1894 Cal LEXIS 1013.

One who merely stands by, watching assault and even approving it, is not aiding and abetting. *People v. Luna* (1956, Cal App 2d Dist) 140 Cal App 2d 662, 295 P2d 457, 1956 Cal App LEXIS 2298.

One may be guilty of aiding and abetting assault when he serves as ally of aggressor in fight, stands by to assist, and eventually enters affray, there being concert of action and purpose. *People v. Butts* (1965, Cal App 3d Dist) 236 Cal App 2d 817, 46 Cal Rptr 362, 1965 Cal App LEXIS 879.

Under the plain language of *Pen Code*, § 240, defining an assault, what is determinative of the offense is whether the accused had the present ability to commit a violent injury, not the victim's subjective belief that he had. *People v. Mosqueda* (1970, Cal App 5th Dist) 5 Cal App 3d 540, 85 Cal Rptr 346, 1970 Cal App LEXIS 1462.

Under the rule that particular statutory provisions will prevail over general ones, the legislative intent not to punish batteries attempted without present ability to commit battery, as manifested by the requirement of such ability in *Pen C* § 240, defining criminal assault, prevails over the general criminal attempt provisions of *Pen C* § 664. *In re M.* (1973) 9 Cal 3d 517, 108 Cal Rptr 89, 510 P2d 33, 1973 Cal LEXIS 207.

Where a dentist was convicted of three misdemeanor domestic violence offenses, *Pen C* §§ 240, 242, 243, and the Board of Dental Examiners subjected his license to discipline, under *B & P C* §§ 1670, 1670.1, and 1681(a), the dentist was bound by his stipulation to an administrative discipline order, notwithstanding that his conviction was later vacated, because absent extraordinary circumstances, a licensee, like a dentist, who stipulated to a disciplinary order with a licensing agency motivated by existence of a criminal conviction, could not avoid that order just because his conviction was later vacated. *Stermer v. Board of Dental Examiners* (2002, Cal App 2d Dist) 95 Cal App 4th 128, 115 Cal Rptr 2d 294, 2002 Cal App LEXIS 159, review denied (2002) 2002 Cal. LEXIS 2249.

## 2. Definitions

The statutory definition of an assault is substantially the same as at common law. *People v. Yslas* (1865) 27 Cal 630, 1865 Cal LEXIS 70; *People v. Wells* (1904) 145 Cal 138, 78 P 470, 1904 Cal LEXIS 555.

The term "violent injury" is not synonymous with "bodily harm" but includes any wrongful act committed by means of physical force against the person of another. *People v. Bradbury* (1907) 151 Cal 675, 91 P 497, 1907 Cal LEXIS 483; *People v. Bumbaugh* (1941) 48 CA2d 791, 120 P2d 703, 1941 Cal App LEXIS 880; *Ware v. Dunn* (1947, Cal App) 80 Cal App 2d 936, 183 P2d 128, 1947 Cal App LEXIS 1415.

The term "simple assault" means the same as "assault." *People v. Egan* (1928, Cal App) 91 Cal App 44, 266 P 581, 1928 Cal App LEXIS 854.

The terms "violence" and "force" are synonymous when used in relation to assault and include application of force, though it entails no pain or bodily harm and leaves no mark. *People v. James* (1935, Cal App) 9 Cal App 2d 162, 48 P2d 1011, 1935 Cal App LEXIS 1273.

The word "violent" is not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person of another, and the kind of physical force is immaterial. *People v. Whalen* (1954, Cal App) 124 Cal App 2d 713, 269 P2d 181, 1954 Cal App LEXIS 1798.

"Violent injury" includes any wrongful act committed by means of physical force against person of another; kind of physical force used is immaterial. *People v. Flummerfelt* (1957, Cal App 2d Dist) 153 Cal App 2d 104, 313 P2d 912, 1957 Cal App LEXIS 1465.

Terms "violence" and "force" are synonymous when used in relation to assault, and include any application of force even though it entails no pain or bodily harm and leaves no mark. *People v. Flummerfelt* (1957, Cal App 2d Dist) 153 Cal App 2d 104, 313 P2d 912, 1957 Cal App LEXIS 1465.

Although the definition in *Pen C* § 240 of an assault refers to the attempt to commit a "violent injury" on another person, the "least touching" will suffice to constitute the requisite battery. *People v. Cavazos* (1985, Cal App 5th Dist) 172 Cal App 3d 589, 218 Cal Rptr 269, 1985 Cal App LEXIS 2546.

Where pro se plaintiff brought an action against a local housing authority alleging that because the housing authority failed to transfer her Section 8 paperwork on a timely basis, she and her children were unable to secure housing and consequently became homeless for over a year, the district court properly dismissed plaintiff's claim for assault and battery because her complaint failed to describe any conduct on the part of the housing authority that could possibly constitute an assault or battery under *Pen C* §§ 240, 242. *Burgess v. Alameda Hous. Auth.* (2004, 9th Cir Cal) 98 Fed Appx 603, 2004 US App LEXIS 8786.

In a trial for assault and battery with serious bodily injury, the trial court's aiding and abetting instruction was not rendered erroneous by the failure to define "misdemeanor assault," "felony assault," or "felony battery." The court noted that after defining the charged assault and battery under *Pen C* §§ 245, 242, and 243, the trial court instructed that those crimes were felonies; further, after instructing the jury on the principles of aiding and abetting, the trial court instructed that assault under *Pen C* § 240 was a misdemeanor and a lesser included crime of assault. *People v. Pena* (2005, Cal App 6th Dist) 128 Cal App 4th 1219, 28 Cal Rptr 3d 69, 2005 Cal App LEXIS 684, modified, rehearing denied (2005) 2005 Cal. App. LEXIS 867, review gr, unpublished (2005) 32 Cal. Rptr. 3d 2, 116 P.3d 476, 2005 Cal. LEXIS 8234, 2005 Cal. Daily Op. Service 6653, 2005 D.A.R. 9114, transferred (2007, Cal) 56 Cal Rptr 3d 474, 154 P3d 1000, 2007 Cal LEXIS 2775.

### 3. Other Offenses

Battery includes assault, being the greater of the two offenses. *People v. Helbing* (1882) 61 Cal 620, 1882 Cal LEXIS 675; *People v. McDaniels* (1902) 137 Cal 192, 69 P 1006, 1902 Cal LEXIS 525; *People v. Heise* (1933) 217 Cal 671, 20 P2d 317, 1933 Cal LEXIS 673; *People v. Mendoza* (1942, Cal App) 55 Cal App 2d 625, 131 P2d 622, 1942 Cal App LEXIS 107.

Where the evidence is sufficient to support a conviction of assault with intent to commit the infamous crime against nature, a conviction of simple assault will be upheld. *People v. Dong Pok Yip* (1912) 164 Cal 143, 127 P 1031, 1912 Cal LEXIS 320.

An "assault" with intent to commit a crime necessarily embraces an "attempt" to commit the crime, but the "attempt" does not necessarily include an "assault." *People v. Akin* (1914, Cal App) 25 Cal App 373, 143 P 795, 1914 Cal App LEXIS 355.

Simple assault is included within assault with intent to commit robbery, and is also included within the offense of robbery. *People v. Foss* (1927, Cal App) 85 Cal App 269, 259 P 123, 1927 Cal App LEXIS 528.

Since the charge of assault with intent to rape includes the lesser offense of assault, it was within the court's power to confine the issue of guilt to such lesser offense. *People v. Egan* (1928, Cal App) 91 Cal App 44, 266 P 581, 1928 Cal App LEXIS 854.

Where jury is instructed that offense of simple assault is included in offense of assault with deadly weapon, and

that, if there was reasonable doubt whether deadly weapon was used, defendants might nevertheless be found guilty of simple assault. *People v. Lee* (1937, Cal App) 23 Cal App 2d 168, 72 P2d 572, 1937 Cal App LEXIS 627.

The difference between the offenses referred to in this section and in § 245 is that in § 245 a deadly weapon is involved. *People v. Peak* (1944, Cal App) 66 Cal App 2d 894, 153 P2d 464, 1944 Cal App LEXIS 792.

To constitute a simple assault there must be an ability and an attempt to commit the offense, while in an assault with a deadly weapon the character of the weapon and the method of its use become an essential element. *People v. Peak* (1944, Cal App) 66 Cal App 2d 894, 153 P2d 464, 1944 Cal App LEXIS 792.

While a battery cannot be committed without assaulting the victim, an assault can occur without committing a battery. *People v. McCaffrey* (1953, Cal App) 118 Cal App 2d 611, 258 P2d 557, 1953 Cal App LEXIS 1602.

Defendant who sprayed a mace-like substance in the face of a peace officer who was attempting to arrest a demonstrator was properly charged with assault against the person of a peace officer (*Pen Code*, §§ 240, 241) rather than with assault with a caustic chemical (*Pen Code*, § 244), where the evidence did not show that defendant used a "vitriol, corrosive acid, or caustic chemical" which would actually injure the flesh or disfigure the body or that he intended such a result, but showed only that defendant intended to attempt the release of a third party from an officer engaged in the performance of duty, having the ability to commit a violent injury while in the process, and where it was stipulated that the cannister used by defendant contained an oleoresin capsicum which is temporarily a strong irritant to the eyes, ears, nose, and skin; § 244 is not a more specific enunciation of the offense proscribed by §§ 240, 241, but describes a separate and distinct crime requiring the use of certain specified caustic chemicals with intent to injure the flesh or disfigure the body. *People v. Booher* (1971, Cal App 2d Dist) 18 Cal App 3d 331, 95 Cal Rptr 857, 1971 Cal App LEXIS 1388.

Defendant was properly convicted both of molesting a child under 18 years of age, in violation of *Pen C* § 647a, and of simple assault in violation of *Pen C* § 240, for one course of action against the same victim at one time. Since neither offense is a lesser one included within the other, double conviction is not prohibited, though defendant could be sentenced on only one or the other of the charges under the provision of *Pen C* § 654, that an act or omission made punishable in different ways by different provisions may be punished under either of such provisions, but in no case under more than one. *People v. Greene* (1973, Cal App 1st Dist) 34 Cal App 3d 622, 110 Cal Rptr 160, 1973 Cal App LEXIS 831.

An assault (*Pen C* § 240) is an attempt to commit a battery. Mere reckless conduct is not sufficient to constitute assault. *People v. Burres* (1980, Cal App 1st Dist) 101 Cal App 3d 341, 161 Cal Rptr 593, 1980 Cal App LEXIS 1401, overruled *People v. Colantuono* (1994) 7 Cal 4th 206, 26 Cal Rptr 2d 908, 865 P2d 704, 1994 Cal LEXIS 12.

Simple assault (*Pen C* § 240) is a lesser included offense of both assault with intent to commit rape (*Pen C* § 220) and sexual battery by restraint (*Pen C* § 243.4, subd. (a)). *People v. Carapeli* (1988, Cal App 4th Dist) 201 Cal App 3d 589, 247 Cal Rptr 478, 1988 Cal App LEXIS 472.

In a juvenile proceeding, a true finding as to assault with a firearm was reversed because that charge was a necessarily-included offense of a second charge that was found true, discharging a firearm from a vehicle at a person outside the vehicle. *In re Edward G.* (2004, Cal App 5th Dist) 124 Cal App 4th 962, 21 Cal Rptr 3d 786, 2004 Cal App LEXIS 2077, overruled in part *People v. Licas* (2007, Cal) 41 Cal 4th 362, 2007 Cal LEXIS 6393.

In the penalty phase of a capital murder trial, evidence of a prior unadjudicated burglary was properly admitted in aggravation because the incident involved defendant's throwing his flashlight at a neighbor in pursuit of him, which was an assault under *Pen C* § 240. *People v. Huggins* (2006) 38 Cal 4th 175, 41 Cal Rptr 3d 593, 131 P3d 995, 2006 Cal LEXIS 4393, rehearing denied (2006) 2006 Cal. LEXIS 6329, 2006 D.A.R. 6385, cert den (2006), 127 S. Ct. 501, 166 L. Ed. 2d 374, 2006 U.S. LEXIS 8101, 75 U.S.L.W. 3233.

In the penalty phase of a capital murder trial, evidence was properly admitted that defendant threw a carton of milk and hot coffee at a prison guard because the jury could infer that he committed an assault under *Pen C § 240*; the conduct involved an implied threat of violence under *Pen C § 190.3*, factor (b). *People v. Lewis and Oliver* (2006) 39 Cal 4th 970, 47 Cal Rptr 3d 467, 140 P3d 775, 2006 Cal LEXIS 9974, modified (2006) 2006 Cal. LEXIS 13325, 2006 Cal. Daily Op. Service 10206, cert den (2007, US) 127 S Ct 2130, 167 L Ed 2d 867, 2007 US LEXIS 4584, cert den (2007, US) 127 S Ct 2130, 167 L Ed 2d 867, 2007 US LEXIS 4585.

Where the issue of whether defendant should reasonably have known that an assault and battery victim was more than 65 years old could have been the basis for a jury's verdict of acquittal on the charge of elder abuse in defendant's first trial, this verdict did not represent a factual resolution on an ultimate issue that necessarily barred retrial of defendant for aggravated battery and assault. *People v. Brown* (2006, Cal App 3d Dist) 140 Cal App 4th 76, 44 Cal Rptr 3d 289, 2006 Cal App LEXIS 835, review denied and ordered not published (2006, Cal) 2006 Cal LEXIS 10888.

#### 4. Elements

That the assailant should be at any time within striking distance is not indispensable to the commission of an assault. *People v. Yslas* (1865) 27 Cal 630, 1865 Cal LEXIS 70.

To constitute an assault the party must have the intent to strike, the ability to do so, and must make the attempt. *People v. Yslas* (1865) 27 Cal 630, 1865 Cal LEXIS 70; *People v. Dodel* (1888) 77 Cal 293, 19 P 484, 1888 Cal LEXIS 685.

An instruction that an assault to commit murder consists of an unlawful intent coupled with a present ability to kill a human being with malice aforethought was erroneous in that it omitted the essential element of attempt. *People v. Devine* (1881) 59 Cal 630, 1881 Cal LEXIS 473.

The fact that the attempt must be apparent does not mean it must be apparent to the person against whom the assault is made. *People v. Pape* (1885) 66 Cal 366, 5 P 621, 1885 Cal LEXIS 441.

There must be an unlawful attempt coupled with a present ability to accomplish the act intended, to constitute an assault. *People v. Lee Kong* (1892) 95 Cal 666, 30 P 800, 1892 Cal LEXIS 886.

It is not essential that the victim be placed in fear to constitute the offense of assault with intent to commit sodomy. *People v. Wilson* (1897) 119 Cal 384, 51 P 639, 1897 Cal LEXIS 906.

The real function of the "present ability" element in common law assault, as incorporated in *Pen C § 240* (defining assault), is to require the perpetrator to have gone beyond the minimal steps involved in an attempt. That is, the defendant must have come closer to inflicting injury than he would have to in order to satisfy the elements of an attempt. An attempt, or the overt act which is the initial stage thereof, does not require a physical act in the way of an assault or advance upon the person of the intended victim. Therefore, since one may be guilty of an attempt to commit murder or rape, for example, without coming close enough to his intended victim to commit an assault, it follows that the attempt is a lesser included offense in a prosecution for an aggravated assault of that nature. *People v. Valdez* (1985, Cal App 2d Dist) 175 Cal App 3d 103, 220 Cal Rptr 538, 1985 Cal App LEXIS 2814.

There was no error in the trial court's use of CALCRIM No. 915 in a case of stalking and assault because it properly instructed on injury as relevant to general intent while not addressing emotional distress, which is not an element of assault under *Pen C § 240*. *People v. Ibarra* (2007, 5th Dist) 156 Cal App 4th 1174, 2007 Cal App LEXIS 1844.

#### 5. -Intent

An intent to commit violence accompanied by acts which, if not interrupted or avoided by the retreat of the other

party, would be followed by personal violence amounts to an assault. *People v. Yslas* (1865) 27 Cal 630, 1865 Cal LEXIS 70.

Specific intent is not necessary for a conviction of simple assault. *People v. Hower* (1907) 151 Cal 638, 91 P 507, 1907 Cal LEXIS 479.

The intent with which an assault is committed is exclusively for the jury to determine from all the circumstances. *People v. Singh* (1922, Cal App) 59 Cal App 64, 209 P 1013, 1922 Cal App LEXIS 112.

Intent to commit a violent injury is a necessary part of an assault. *People v. Alexander* (1940, Cal App) 41 Cal App 2d 275, 106 P2d 450, 1940 Cal App LEXIS 237, rehearing denied (1940, Cal App) 41 Cal App 2d 275, 106 P2d 916.

Criminal negligence may be shown to establish intent to commit a violent injury. *People v. Alexander* (1940, Cal App) 41 Cal App 2d 275, 106 P2d 450, 1940 Cal App LEXIS 237, rehearing denied (1940, Cal App) 41 Cal App 2d 275, 106 P2d 916.

Intent to commit violent injury on person of another may be implied from act; and it is question for trier of fact. *People v. Flummerfelt* (1957, Cal App 2d Dist) 153 Cal App 2d 104, 313 P2d 912, 1957 Cal App LEXIS 1465.

To constitute assault, there must be specific intent to commit battery, and act that is close to accomplishment and not mere preparation. *People v. Corson* (1963, Cal App 3d Dist) 221 Cal App 2d 579, 34 Cal Rptr 584, 1963 Cal App LEXIS 2188.

Assault is a specific intent crime; one could hardly "attempt" or try to "commit" an injury on the person of another if he had no intent to cause any injury to such other person. *People v. Fanning* (1968, Cal App 2d Dist) 265 Cal App 2d 729, 71 Cal Rptr 641, 1968 Cal App LEXIS 1673.

Whatever ambiguities there may be in distinguishing between specific and general intent to determine whether drunkenness constitutes a defense, an offense of the nature of assault with a deadly weapon or of a simple assault is not one which requires an intent that is susceptible to negation through a showing of voluntary intoxication. (*Disapproving People v. Fanning* (1968) 265 Cal App 2d 729, 71 Cal Rptr 641, 1968 Cal App LEXIS 1673, and any case implying the contrary.) *People v. Hood* (1969) 1 Cal 3d 444, 82 Cal Rptr 618, 462 P2d 370, 1969 Cal LEXIS 220.

Assault requires proof of an intent to commit battery (injury), and a conviction of assault may not be grounded on an intent only to frighten. *People v. Marceaux* (1970, Cal App 3d Dist) 3 Cal App 3d 613, 83 Cal Rptr 798, 1970 Cal App LEXIS 1157.

In a prosecution for assault with a deadly weapon, existence of intent to injure is a jury question. The intent may be implied from defendant's actions, that is, it may be proved circumstantially. *People v. Marceaux* (1970, Cal App 3d Dist) 3 Cal App 3d 613, 83 Cal Rptr 798, 1970 Cal App LEXIS 1157.

Assault (*Pen C § 240*) is a general intent crime that does not require that the prosecution show that a victim did not consent. The existence of a bona fide and reasonable belief by a defendant that a party impliedly consented to an assault is an affirmative defense that must be shown, if at all, by the defendant. *People v. Sanchez* (1978, Cal App Dep't Super Ct) 83 Cal App 3d Supp 1, 147 Cal Rptr 850, 1978 Cal App LEXIS 1776.

The intent necessary to commit an assault (*Pen C § 240*) is the intent to commit battery. An assault conviction cannot be grounded upon an intent only to frighten. *People v. Burres* (1980, Cal App 1st Dist) 101 Cal App 3d 341, 161 Cal Rptr 593, 1980 Cal App LEXIS 1401, overruled *People v. Colantuono* (1994) 7 Cal 4th 206, 26 Cal Rptr 2d 908, 865 P2d 704, 1994 Cal LEXIS 12.

Whether the requisite intent to commit an assault (*Pen C § 240*) existed is a question for the jury. *People v. Burres*

(1980, Cal App 1st Dist) 101 Cal App 3d 341, 161 Cal Rptr 593, 1980 Cal App LEXIS 1401, overruled *People v. Colantuono* (1994) 7 Cal 4th 206, 26 Cal Rptr 2d 908, 865 P2d 704, 1994 Cal LEXIS 12.

The crime of assault (*Pen C § 240*) does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another. *People v. Williams* (2001) 26 Cal 4th 779, 111 Cal Rptr 2d 114, 29 P3d 197, 2001 Cal LEXIS 5480, rehearing denied (2001, Cal) 2001 Cal LEXIS 6483.

In a prosecution for assault with a deadly weapon, a jury instruction that did not require proof of actual knowledge was harmless error; assault with a deadly weapon was a general intent crime, and although defendant might not have been specifically aware of the victim's presence when he fired a gun from his car, the jury could have inferred from the fact of a crowded street that defendant was aware the bullet could strike a pedestrian and a battery would directly, naturally, and probably result from his conduct. *People v. Riva* (2003, Cal App 2d Dist) 112 Cal App 4th 981, 5 Cal Rptr 3d 649, 2003 Cal App LEXIS 1581, review denied (2004) 2004 Cal. LEXIS 988.

Counsel was ineffective under *U.S. Const. amend. VI* and *Cal Const Art I, § 15* in a first degree murder case because of counsel's failure to obtain psychological evaluations regarding battered women's syndrome and duress; such testimony would have been admissible under *Ev C §§ 801, 1107* and relevant under *Ev C §§ 210, 351*, would not have violated *Pen C § 29* as long as the expert did not opine on the ultimate issue, and could have precluded a murder conviction under the natural and probable consequence theory by disproving intent to aid and abet an assault under *Pen C § 240*. *In re Nourn* (2006, Cal App 4th Dist) 145 Cal App 4th 820, 52 Cal Rptr 3d 31, 2006 Cal App LEXIS 1940, review denied and ordered not published *Nourn (Ny) on H.C.* (2007, Cal) 2007 Cal LEXIS 3587.

## 6. Prosecution

An indictment charging an assault with intent to do bodily harm upon the person of another charges only a simple assault. *People v. Martin* (1873) 47 Cal 112, 1873 Cal LEXIS 269.

Self-defense in assault prosecution is question of fact and requires in actor real fear of serious bodily injury and appearance of danger of such injury which would arouse such fear in mind of reasonable man; it must appear not only that he believed himself in such peril, but that, as reasonable person, he had sufficient grounds for his belief. *People v. Rush* (1960, Cal App 2d Dist) 180 Cal App 2d 885, 4 Cal Rptr 853, 1960 Cal App LEXIS 2414.

The trial court may properly refuse to instruct the jury on simple assault where the evidence is such as to make it clear that if a defendant is guilty at all, he is guilty of a higher offense. *People v. Wells* (1970, Cal App 2d Dist) 13 Cal App 3d 265, 91 Cal Rptr 460, 1970 Cal App LEXIS 1236.

A jury found defendant guilty of assault with a deadly weapon and by means of force likely to produce great bodily injury (*Penal C § 245(a)(1)*), during the commission of which he personally inflicted great bodily injury under circumstances involving domestic violence (*Penal C § 12022.7(d)*), misdemeanor battery of a cohabitant (*Penal C § 243(e)*), and misdemeanor assault (*Penal C § 240*). Defendant was sentenced under the three strikes law, *Penal C § 667(b)-(i)*, to 25 years to life in prison. The Court of Appeal held that the trial court erred when it allowed the prosecutor to present expert testimony regarding battered women's syndrome because this testimony was irrelevant in that no evidence showed the victim in this case was a battered woman, and the evidence was highly prejudicial. Although *Ev C § 1107* permits expert testimony regarding battered women's syndrome when it is relevant, other than evidence of the present incident, there was no evidence indicating that defendant abused or behaved violently toward the victim. The expert's testimony regarding battered women's syndrome was irrelevant. Both the trial court and the prosecutor emphasized the expert's inflammatory testimony. On reviewing the whole record, it was reasonably probable that the jury would have reached a result more favorable to defendant had the court excluded the expert's testimony. *People v. Gomez* (1999, Cal App 2d Dist) 72 Cal App 4th 405, 85 Cal Rptr 2d 101, 1999 Cal App LEXIS 499, review

denied (1999) *Supreme Court Minute 09-01-1999*, 1999 Cal. LEXIS 6135, overruled in part *People v. Brown* (2004) 33 Cal 4th 892, 16 Cal Rptr 3d 447, 94 P3d 574, 2004 Cal LEXIS 7078.

When defendant, charged with violations of *Cal. Penal Code § 245(a)(1)*, was convicted of the lesser included offense of misdemeanor assault, *Cal. Penal Code § 240*, the conviction could not stand because the lesser-included offense was time-barred, and defendant did not waive a statute of limitations defense. *People v. Beasley* (2003, Cal App 2d Dist) 105 Cal App 4th 1078, 130 Cal Rptr 2d 717, 2003 Cal App LEXIS 129, rehearing denied (2003, Cal App 2d Dist) 2003 Cal App LEXIS 312.

## **7. Law Enforcement**

Where over 20 armed officers encountered a barefoot, unarmed 11-year-old boy who was not resisting them, and where the minor testified that the officers continued to keep their guns trained upon him throughout the incident and that one officer picked him up from behind by the chain of the handcuffs, the appellate court found that the minor had raised a genuine issue of material fact as to whether the officers were liable for assault and battery. *Tekle v. United States* (2006, 9th Cir Cal) 457 F3d 1088, 2006 US App LEXIS 20583.

## **8. Law enforcement**

Minor had raised a genuine issue of material fact as to whether law enforcement officers may have been liable for assault and battery where over 20 armed officers encountered a barefoot, unarmed 11-year-old boy who was not resisting them. The minor testified that the officers continued to keep their guns trained upon him throughout the incident and that one officer picked him up from behind by the chain of the handcuffs. *Tekle v. United States* (2006, CA9 Cal) 2006 US App LEXIS 32754.

## **SUGGESTED FORMS**

Allegation Charging Assault