

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARY MARIE WESLEY,

Defendant-Appellant.

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UNPUBLISHED

March 4, 2004

No. 244556

Calhoun Circuit Court

LC No. 02-001343-FH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

COOPER, P.J. (*concurring in part and dissenting in part*).

I agree with the outcome reached by the majority in this case. I write separately, however, to iterate that assault and battery is by definition a necessarily included lesser offense of resisting and obstructing a police officer.

As noted in the majority opinion, a necessarily included lesser offense is an offense that must be committed as part of the greater offense.<sup>1</sup> In order to be convicted of resisting and obstructing a police officer, the evidence must show that the defendant either *physically opposed* a police officer or *expressed threats of physical interference*.<sup>2</sup> A battery is defined as a willful and offensive touching of another.<sup>3</sup> And an assault is simply an attempt at a battery.<sup>4</sup> Clearly, it is impossible to commit the greater offense of resisting and obstructing a police officer without engaging in an assault or battery.

Nevertheless, I do not find that this error requires reversal in the instant case. Where a preserved nonconstitutional error occurs, reversal is only warranted when it appears that the error was outcome determinative.<sup>5</sup> Here, plaintiff's awareness that it was police officers who were performing the traffic stop on her vehicle was never in dispute. Rather, the defense contended

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<sup>1</sup> *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

<sup>2</sup> *People v Vasquez*, 465 Mich 83, 99-100, 114-115; 631 NW2d 711 (2001).

<sup>3</sup> *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991); see also CJI2d 17.2.

<sup>4</sup> *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

<sup>5</sup> *People v Cornell*, 466 Mich 335, 361-364; 646 NW2d 127 (2002).

that she attempted to comply with the police officers' commands but that they did not give her enough time. On these facts, it does not appear that the trial court's failure to give the requested instructions undermined the verdict's reliability.<sup>6</sup> Accordingly, I agree with the majority that defendant's convictions for resisting and obstructing a police officer should be upheld.

/s/ Jessica R. Cooper

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<sup>6</sup> *Id.*