

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**No. 27695-3-III**

**Respondent,**

**v.**

**DENISE M. THOMAS,**

**Appellant.**

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**Division Three**

**UNPUBLISHED OPINION**

Kulik, A.C.J. —A jury found Denise Thomas guilty of assault in the third degree. Ms. Thomas appeals, contending the trial court erred in the jury instructions by including an alternative means that was not listed in the information or, alternatively, by not giving a unanimity instruction. We agree and reverse and remand for a new trial.

**FACTS**

The factual accounts in this case differ greatly between Deputy Jeffrey Welton and Denise Thomas. Deputy Welton recounts the facts as follows. Deputy Welton was responding to a call when he drove past Ms. Thomas walking on the sidewalk. Deputy Welton thought he saw Ms. Thomas throw something at his car, but did not hear anything

hit his car. Deputy Welton turned his car around and approached Ms. Thomas who was then jogging down the middle of the road.

Twice, Deputy Welton asked Ms. Thomas to get back on the sidewalk. She refused. Deputy Welton informed Ms. Thomas she was under arrest, took hold of both her wrists behind her back, and escorted her to the sidewalk. Deputy Welton stated Ms. Thomas was not violently resisting, but she was using muscle tension and pulling away from him. While Deputy Welton was attempting to put Ms. Thomas in handcuffs, she pulled her right hand out of his grasp and flung her body around. Deputy Welton used a bar arm takedown to force Ms. Thomas to the ground. In the process of the takedown, Ms. Thomas hit her head on the sidewalk. Deputy Welton called a supervisor, Corporal Mark Fox, as well as medics, for assistance.

A citizen approached Deputy Welton to offer assistance. While Deputy Welton talked to the citizen, the deputy stated that Ms. Thomas “stood up to her feet, and kind of tried to run away,” but only got a step or two before he grabbed her shirt. Report of Proceedings (RP) at 64. Deputy Welton placed Ms. Thomas in his police car.

When the medics arrived, Deputy Welton asked Ms. Thomas to stay in the police car, but to spin herself around on the seat so she was facing outward and her feet were on the ground. Ms. Thomas turned herself on the seat so her feet were on the ground, but

then lunged out of the car and chest bumped Deputy Welton. Deputy Welton put his right hand on Ms. Thomas's head and pushed her stomach with his left hand to get her to bend over and sit back down in the car. When Ms. Thomas's bottom hit the seat, she rolled onto her back, cocked her leg back, and kicked Deputy Welton's left knee "at least twice." RP at 68. Deputy Welton's knee was raised and red shortly after being kicked, and was still sore five hours later, but did not require medical treatment.

Ms. Thomas's testimony differed from Deputy Welton's on almost every aspect of the situation. Ms. Thomas testified that she was in the middle of a run and had stopped to stretch when Deputy Welton approached her for no apparent reason. She testified that Deputy Welton was "very agitated, very angry." RP at 178. Ms. Thomas stated that she was never in the street until Deputy Welton asked her to come talk to him. Ms. Thomas denied throwing anything at Deputy Welton's car. Ms. Thomas stated she did not intentionally kick Deputy Welton. Ms. Thomas testified that when Deputy Welton maneuvered her back into the car, she lost her balance and her "leg went up and made contact with his." RP at 185.

Ms. Thomas was charged with assault in the third degree, resisting arrest, and disorderly conduct. In the assault charge, the information alleged that Ms. Thomas assaulted Deputy Welton, a law enforcement officer, performing his official duties. The

information did not list assault while resisting arrest as an alternative means of committing assault in the third degree.

Jury instruction 6 included both alternative means of resisting arrest and assaulting an officer performing official duties, stating:

A person commits the crime of assault in the third degree when he or she assaults another with intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself or another person or assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

Clerk's Papers (CP) at 36.

However, the to convict instruction mentioned only assaulting an officer performing official duties, and not resisting arrest, stating:

To convict the defendant of the crime of assault in the third degree, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about the 10<sup>th</sup> day of May, 2007 the defendant assaulted Jeff Welton;

(2) That at the time of the assault Jeff Welton was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and

(3) That these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 37.

The jury found Ms. Thomas guilty of one count of assault in the third degree and acquitted her on the disorderly conduct charge. Ms. Thomas appeals. In her statement of additional grounds, Ms. Thomas argues that she kicked Deputy Welton in self-defense, that her arrest was unlawful, her *Miranda*<sup>1</sup> rights were never read to her, and that she received ineffective assistance of counsel.

#### ANALYSIS

Criminal assault is an alternative means crime. *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). Each degree of assault has a separate statute, and each statute contains subsections which are alternative means of committing that degree of assault. *Id.* A person may be charged with one, or any number, of the statutory alternative means in the information, as long as the alternatives are not repugnant to one another. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). However, if the information charges only one alternative means of committing a crime, it is reversible error to instruct the jury on any other alternate means of committing the crime. If the court committed such an error, the defendant would be denied the opportunity to prepare a proper defense. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Here, the information charged Ms. Thomas with third degree assault, alleging that she intentionally assaulted Deputy Welton, “a law enforcement officer and who was performing his/her official duties at the time.” CP at 1. The assault charge did not contain assault while resisting arrest as an alternative means of committing third degree assault. Despite what was charged in the information, jury instruction 6 contained two alternative means of committing assault in the third degree: assault while resisting arrest and assaulting an officer performing his official duties.

“An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless.” *Bray*, 52 Wn. App. at 34-35. The to convict instruction contained only one alternative means, assaulting an officer performing his official duties, and not the resisting arrest alternative means. However, jury instruction 6 contained an alternative means that was not charged in the information. The jury could easily have been confused by jury instruction 6 because Ms. Thomas was charged separately with resisting arrest. A juror could have thought that he or she could convict Ms. Thomas of third degree assault under the resisting arrest means. Furthermore, Ms. Thomas was denied an opportunity to prepare a proper defense to assault by resisting arrest, which requires different elements than resisting arrest.

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Because jury instruction 6 listed two alternative means of committing assault in the third degree, while the information only alleged one means of committing assault, the instruction was error. The error was not harmless and, therefore, Ms. Thomas's conviction should be reversed.

We reverse and remand for a new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, A.C.J.

WE CONCUR:

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Sweeney, J.

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Brown, J.