

NO. 44192-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BILLIE JO CROSS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00523-9

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE	Jodi R. Backlund Po Box 6490 Olympia, Wa 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. <i>or, if an email address appears to the right, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 15, 2013. Port Orchard, WA _____ Original e-filed at the Court of Appeals; Copy to counsel listed at left.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether, although the to-convict instruction only included one of the alternate means of third degree assault, the trial court did not err where the instruction on that means was complete?

2. Whether counsel was ineffective for making the best argument he could in light of the evidence?

3. Whether Ms. Cross fails to meet her burden of showing improper closing argument or prejudice flowing from it?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Billie Jo Cross was charged by information filed in Kitsap County Superior Court with third-degree assault. CP 1. She was found guilty by a jury. CP 6.

B. FACTS

On April 30, 2012, Kitsap County Sheriff's Deputy Eric Adams was tasked with serving civil court papers on Minor Cross. RP 16-17, 20. Mr. Cross also had two outstanding arrest warrants. RP 21. Around 8:00 p.m. Adams went to the Cross residence in Olalla to serve the warrants and the papers. RP 22. Adams was dressed in a deputy's uniform, and drove up in a marked patrol car. RP 25.

As he approached the door, Adams heard a female voice and one

or two male voices. RP 23. He knocked on the door, which was answered by Billie Jo Cross. RP 24. Adams told Ms. Cross that he had paperwork to serve on Mr. Cross. RP 24-25. She asked if she could accept it for him. RP 25. Adams explained that it had to be personal service. RP 25.

Ms. Cross called for Mr. Cross, but there was no response. RP 25. She then stated that he must have left. RP 25. She suggested that Adams come back the next day. RP 25.

Adams returned shortly after 6:00 a.m. the next day with Deputy Steven Argyle. RP 26-27, 53. Adams was concerned that there might be some resistance. RP 26. Both deputies were in uniform, and arrived in separate marked patrol cars. RP 26-27.

Ms. Cross again answered the door. RP 27. Adams told her he was there to serve civil process and showed the paperwork to her. RP 27-28. He did not mention the arrest warrant. RP 28. She yelled into the house for Mr. Cross. RP 28. She also yelled that his ex-wife was looking for more child support. RP 28. Then she told Adams that he was afraid they would arrest him on a warrant. RP 28. Adams told her he knew nothing about that. RP 28.

Mr. Cross came from the back of the residence, and Adams could see him in the living room. RP 30. Adams recognized him from a prior booking photo, and told him he had paperwork he needed to give him. RP

30. Mr. Cross came to just inside the door. RP 30. Adams was about four feet away, out on the deck. RP 30.

Adams told him “Here’s your paperwork,” and instructed him to step out onto the deck. RP 30-31. Mr. Cross did not move, so Adams again told him he needed to step outside. RP 31. Mr. Cross again did not move. RP 31.

Adams reached out to grab Mr. Cross, who slammed the door on his hand, breaking it and dislocating some tendons. RP 31, 55. Adams attempted to break the door, yelling, “You are under arrest.” RP 31. As attempted to kick in the door, Ms. Cross, who was outside on the deck, said, “You lied to me,” jumped on his back and threw her arms around his neck. RP 31-33, 55. Ms. Cross pulled at his neck, which made it difficult to get inside the house. RP 33.

Ms. Cross’s attack also aggravated a pre-existing neck injury. RP 34. Adams had discomfort in his shoulder, numbness in his arm and aching in his upper back for several weeks after. RP 34.

Argyle ran up onto the deck and grabbed her off of Adams. RP 55. After he pulled her away, Ms. Cross continued to struggle with Argyle. RP 56. She tried to get away from Argyle and get between Adams and the door. RP 56.

Argyle then attempted to arrest Ms. Cross. RP 57. She continued to struggle, and he had to wrestle her down to the ground before he could handcuff her. RP 57. Once she was restrained, she calmed down. RP 57. As he was escorting her to the patrol car, she said she had no other choice because Mr. Cross was her husband. RP 58. As a result of her actions they were unable to arrest Mr. Cross. RP 58.

After Argyle freed him from Ms. Cross, Adams searched the house for Mr. Cross. He was unable to locate him. RP 34. As Adams entered the house, Argyle could see Mr. Cross running across the back yard. RP 57.

On cross-examination, Adams admitted that Ms. Cross was cooperative when he told her he was serving civil paperwork. RP 39. She did not interfere while he was presenting the civil papers. RP 41. On cross of Argyle, Ms. Cross elicited testimony that they also arrested a third individual, Ms. Cross's cousin, Trevor Milovich, who also had a warrant and was found hiding near the house. RP 59, 70. On the ride to the jail, Ms. Cross scolded Milovich because he and Mr. Cross had not taken care of their issues with the courts. RP 60.

Ms. Cross testified that she lived with her husband Minor Cross. RP 61. She stated that Adams did not tell her about the warrants when he came to the house on April 30. RP 61. Mr. Cross was out that evening.

RP 61. Her cousin Trevor Milovich, who was staying with them was there, and had not seen Mr. Cross either. RP 62.

When Mr. Cross came to the door, Ms. Cross asserted that Adams put the paperwork back in his pocket, which confused her. RP 64. When Adams started trying to break the door, Ms. Cross claimed she only grabbed for his elbow, but missed and got his vest. RP 67.

On cross, Ms. Cross admitted that she was aware Adams was there on official police business. RP 71. She was also aware that Adams was trying to arrest Mr. Cross. She claimed she was not concerned about that; she was worried about her pit bull. RP 72.

III. ARGUMENT

A. **ALTHOUGH THE TO-CONVICT INSTRUCTION ONLY INCLUDED ONE OF THE ALTERNATE MEANS OF THIRD DEGREE ASSAULT, THE TRIAL COURT DID NOT ERR WHERE THE INSTRUCTION ON THAT MEANS WAS COMPLETE.**

Ms. Cross argues that the to-convict instruction failed to include all the elements of the offense of third-degree assault. Although the to-convict instruction only included one of the alternate means of that offense, its instruction on that means was complete. Therefore no error occurred.

This Court reviews a challenge to a jury instruction de novo,

evaluating the jury instruction “in the context of the instructions as a whole.” *State v. Benn*, 120 Wn.2d 631, 654–55, 845 P.2d 289 (1993). Instructions are sufficient when, viewed as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the parties to argue their theories of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

Relying on *State v. Martin*, 69 Wn. App. 686, 849 P.2d 1289 (1993), Ms. Cross argues the inclusion of an alternate means of committing third-degree assault in the instruction defining that crime was error, even though only one means was listed in the to-convict instruction. *Martin*, however, is dissimilar to Ms. Cross’s case, however. In *Martin* the trial court gave the following definitional instruction:

“A person commits the crime of Driving While Under the Influence of Liquor when he or she drives a motor vehicle while he or she: (1) Has 0.10 grams or more of alcohol per two hundred ten liters of breath as shown by accurate analysis of his or her breath, or 0.10 percent more by weight of alcohol in his blood or her blood as shown by analysis of his or her blood; or (2) is under the influence of or affected by intoxicating liquor. The above are alternate means of committing the single crime charged. *Your determination of the defendant’s guilt or innocence may be based upon finding number (1) or finding number (2). These are alternative findings, and each of you may individually arrive at your own determination of the defendant’s guilt or innocence based on either alternate method. Jury unanimity as to mode of commission is not required.*”

State v. Martin, 69 Wn. App. 686, 688 n.1, 849 P.2d 1289 (1993)

(emphasis the Court's).

As here, in *Martin* the to-convict instruction also only included one of the alternative means. It was not the inclusion of the second means in the definitional instruction that was error, however. Rather, it was the italicized language quoted above that could have confused the jury:

Instructing the jury on the blood or breath alcohol content as an alternative means of driving while intoxicated and expressly permitting the jury to base its decision on either alternative, in the last three sentences of instruction 9, was error. ... Here, instruction 10 told the jury in order to convict Mr. Martin it must find the element “[t]hat at the time the defendant was under the influence of or affected by intoxicating liquor” proved beyond a reasonable doubt. This instruction immediately followed the challenged alternative means instruction 9. Instruction 10 is insufficient to plainly show the jury was unanimous on the “under the influence” alternative *since it conflicts with the last three sentences of instruction 9* and could have confused the jury. The error was not harmless.

Martin, 69 Wn. App. at 688-89 (emphasis added).

Here, the to-convict instruction (Instruction 7) explicitly told the jury the elements they had to unanimously find to return a guilty verdict:

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

- (1) That on or about May 1st, 2012, the defendant assaulted Eric Adams;
- (2) That at the time of the assault Eric Adams was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
- (3) That any of 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 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 50. Additionally, Instruction 9 provided in pertinent part:

Because this is a criminal case, each of you must agree for you to return a verdict.

CP 53.

Unlike in *Martin*, the jury here was not given any alternative means instruction. They were not improperly told they could find Ms. Cross guilty if some of them found that she committed acts not included in the to-convict instruction. As such, the secondary definition of third-degree assault was at worst surplus.

This case is not unlike *State v. O'Donnell*, 142 Wn. App. 314, 174 P.3d 1205 (2007). In that case, the defendant was charged with robbery, which may be committed by the alternative means of taking property “from the person of another” or “in his or her presence.” RCW 9A.56.190. The trial court failed to include the “presence” language in the to-convict instruction. The Court nevertheless rejected a claim like Ms. Cross’s:

By omitting the in the “presence” language, the court did not omit an essential element of the crime of robbery. The

court merely omitted one of the alternative means of committing the taking element. Therefore, the trial court did not err by omitting language from the “to convict” instructions.

O'Donnell, 142 Wn. App. at ¶ 23 (citation omitted).

That the parties may have discussed the other means of committing third-degree assault also does not show that the jury was confused by the instructions. To the contrary, the jurors were explicitly told to disregard any argument that did not comport with the Court’s instructions:

The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers’ statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 42.

Moreover, nothing in closing argument would have led the jurors to believe that could convict based on the alternative means not included in the to-convict. The State began its argument by reciting the to-convict nearly verbatim:

In this particular case the court has instructed you that to find the defendant guilty, you have to find that on or about May 1st, 2012, the defendant assaulted Eric Adams, and that at the time of the assault, Eric Adams was a law enforcement officer who was performing his official duties. As to the second, and it happened in the State of Washington, there is no dispute that it happened in the State of Washington.

RP 77. At no point did the prosecutor argue that they could convict Ms. Cross based on a finding that she had obstructed the service of process.

Although defense counsel mentioned the service of process language in closing, it was to point out that Ms. Cross had not interfered with the service of process. RP 84. And indeed, the evidence showed that Ms. Cross was completely cooperative with the deputies until they attempted to arrest Mr. Cross.

On rebuttal, the prosecutor argued that Ms. Cross had acted intentionally in assaulting the deputy, and that her intent was to prevent him from arresting Mr. Cross:

There's no dispute in her mind that the whole reason for the deputy being there on her front porch is because he is performing an official law enforcement function. And there's no dispute factually, legally, arguing what she is trying to do is restrain him from completing the deputy's law enforcement function, *which is the arrest of her husband.*

RP 86 (emphasis supplied); *see also* RP 87.

Finally, the State would dispute that proof that the officers were serving lawful process requires introduction of the actual warrant or other papers. *See* Brief of Appellant, at 13-14. However, since the jury was not instructed that it could convict Ms. Cross on that alternative means, the point is moot.

The only means for which the jury was instructed it could convict

Ms. Cross was that she assaulted a law enforcement officer who was performing his official duties. RCW 9.9A.36.031(1)(g). Ms. Cross does not argue that the evidence was insufficient to prove this charge. Her conviction should be affirmed.

B. COUNSEL WAS NOT INEFFECTIVE FOR MAKING THE BEST ARGUMENT HE COULD IN LIGHT OF THE EVIDENCE.

Ms. Cross next claims that counsel was ineffective for not adequately presenting evidence and argument in her defense. This claim is without merit because is contrary to the record.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must

strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Ms. Cross claims that counsel was deficient for not presenting evidence or argument that addressed the alternative means addressed in the to-convict instruction. This claim is without factual basis.

First, Ms. Cross fails to identify what evidence counsel failed to introduce. In any event, where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Secondly, counsel argued that throughout the contact with the deputies, Ms. Cross was cooperative. RP 81, 83. He argued, that Mr. Cross's arrest was not her concern; that she was concerned about the damage the deputy might be doing to the door. RP 82-83. Counsel

repeatedly argued about her intent:

So we are asking when you review the facts and review the testimony that you have heard, keep in mind that an element in the instructions here is the intent, what was Ms. Billie Jo Cross's intent at that time. Was she trying to stop them from arresting her husband, stop them from damaging her property? That wasn't her intent.

* * *

It was not the intent of Billie Jo Cross to stop Officer Adams from arresting her husband or doing anything else.

RP 84-85.

Further, Ms. Cross fails to prove prejudice. She herself admitted on cross-examination that she was aware Deputy Adams was there on official police business. RP 71. She was aware that Adams was trying to arrest Mr. Cross. RP 72. Both deputies testified that she jumped on Adams's back and grabbed him by the neck. It is difficult to see what else counsel could have argued under the evidence presented at trial. This claim should be rejected.

C. MS. CROSS FAILS TO MEET HER BURDEN OF SHOWING IMPROPER CLOSING ARGUMENT OR PREJUDICE FLOWING FROM IT.

Ms. Cross finally claims that the prosecutor's closing argument was improper. This claim is without merit because the argument was proper, and even if it were not, Cross fails to show that the unobjected-to comments were so flagrant and ill-intentioned that no instruction could

have cured any prejudice.

In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, ¶ 28, 278 P.3d 653 (2012). Once a defendant establishes that a prosecutor's statements are improper, the Court determines whether the defendant was prejudiced under one of two standards of review. If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Emery*, 174 Wn.2d at ¶ 37. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Id.* Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *Id.*

1. The prosecutor did not argue that it needed to convict Ms. Cross to protect the community.

Relying primarily on *State v. Ramos*, 164 Wn. App. 327, 263 P.3d 1268 (2011), Ms. Cross argues that the prosecutor committed misconduct by arguing that the "community has said we have a law about that. It's

called assault in the third degree.”

In *Ramos*, the prosecutor “improperly appeal[ed] to the passion and prejudice of the jury by arguing that he was a part of the drug world, and that the jury should convict in order to protect the community from drug dealing at Sunset Square.” *Ramos*, 164 Wn. App. at ¶ 27. The prosecutor began his closing with that theme:

This is also why we are here today, so people can go out there and buy some groceries at the Cost Cutter or go to a movie at the Sunset Square and not have to wade past the coke dealers in the parking lot. That’s why they were there, that’s why you’re here, and that’s why I’m here, to stop Mr. Ramos from continuing that line of activities. That’s what the case is about and that’s what the truth of this case is about and that’s why this is a serious case.

Ramos, 164 Wn. App. at ¶ 28. The Court noted that Ramos was charged with only one count of delivery of cocaine, and that there was no evidence that Ramos was “continuing” to engage in drug activity or drug dealing at Sunset Square. Instead the evidence showed that the police operatives were the ones who insisted that the transaction occur at Sunset Square. As such the argument had nothing to do with the evidence. *Ramos*, 164 Wn. App. at ¶ 33. It therefore was an improper argument based on “reasons unrelated to the charged crime.” *Ramos*, 164 Wn. App. at ¶ 29.

Here, Ms. Cross has taken the prosecutor’s words entirely out of context. The prosecutor was not asking the jurors to convict to “protect the community.” Rather, he was acknowledging that although in the

greater scheme of things the instant crime might be relatively minor, and although Ms. Cross might be a sympathetic defendant, *the evidence* showed that she had nevertheless broken the law and should be found guilty for her conduct:

Ms. Cross may otherwise be a very nice person. She may have been surprised being awakened that early in the morning. She never anticipated maybe that her husband was going to be arrested, but that does not entitle her to grab at, choke, and try and pull away a deputy sheriff performing his job. The community has said we have a law about that. It's called assault in the third degree. The state has given you the evidence to prove that that law has been violated, and we ask you to hold her accountable as we would any other citizen who breaks these rules.

RP 79-80.

Ms. Cross fails to show the prosecutor's argument was improper. She did not object below to this argument. Thus even if the argument were improper, she must show that it was so flagrant and ill-intentioned that an instruction could not have cured any prejudice.

Ms. Cross presents no argument on prejudice other than to claim that the argument "encouraged the jury to convict Ms. Cross to 'ameliorate society's woes.'" Brief of Appellant, at 21 (*citing Ramos*, 164 Wn. App. at 337). This is patently not the case. All the argument did was ask the jury to not base its verdict on its opinion of the circumstances of the crime or sympathy for the defendant. Ms. Cross fails to meet her burden of showing either improper argument or prejudice. This claim should be

rejected.

2. *The prosecutor did not urge the jurors to place themselves in the position of the participants.*

Ms. Cross next argues that the prosecutor improperly invited the jurors to place themselves in the shoes of the participants. She relies on *State v. Walker*, 164 Wn. App. 724, 265 P.3d 191 (2011), in support of this claim. Her reliance is misplaced. The argument was improper in *Walker* because it misstated the law of self-defense.¹ *Walker*, 164 Wn. App. at ¶¶31-32.

Here, the prosecutor was again, as with the previous comment, urging the jurors to decide the case on the *evidence and the law*, not on their personal opinions of what occurred:

Deputy Adams and Deputy Argyle were hoping to get Minor Cross to step out onto the porch where they could control him, there wouldn't be any other obstructions, they could arrest him and take him away, and they used a ruse. They are entitled to use a ruse. They were trying to use that ruse in order to get him to cooperatively step out on the porch, because they would reasonably expect he may not be happy when he finds out that we are going to take him into custody. Then, unfortunately in this case, all hell broke loose.

When the police are doing these official functions, performing their duties, it may not always look really pretty. It may look at times as if that's violent, it may at times look like that's destructive. The door is getting kicked in. And if you do not like what is happening, absolutely positively call up a law enforcement agency and

¹ The defendant in *Walker* objected on these grounds at trial. *Walker*, 164 Wn. App. at ¶ 32 n.7.

complain about it. If you really don't like it, go call a lawyer and see, is there some cause of action I can bring against law enforcement for behaving this way. But what you are not entitled to do under the law is get into a physical altercation with the officer, because down that road leads disaster.

Notice one thing that the officers never did, either one of them in this procedure. Neither one of them pulled a gun. I suppose they could have come up to the door, pulled a gun, pointed and said, "We know Minor Cross is in there. Get him out." When Minor Cross slammed the door in Deputy Adams' face, injured his hand, the deputy didn't pull out a gun and say, "You are hurting me, you are assaulting me. I am going to respond even greater." He didn't do that. When they hauled the defendant off Deputy Adams' back, Deputy Argyle didn't pull out a gun and point it at her. It was violent, yes, but it was violence within the bounds that they are authorized to do in trying to effect an arrest. If you think you can do a better job, then join up, but as the court has instructed you, when police officers are performing their duty, you can stand there and complain, you can call them names, you can write letters to their bosses or letters to the editor, you can go down to your legislature and try and get laws changed, but you do not get to physically assault and attack a police officer, because down that path leads disaster.

In this particular case the court has instructed you that to find the defendant guilty, you have to find that on or about May 1st, the defendant assaulted Eric Adams, and that at the time of the assault, Eric Adams was a law enforcement officer who was performing his official duties.

RP 75-77. At no point did the prosecutor misstate the law in this argument. Nor did he even do what Ms. Cross claims in her brief. He merely asked the jurors to disregard any distaste for what the police did and to follow the law the court had given them.

Ms. Cross again fails to show either improper argument or explain

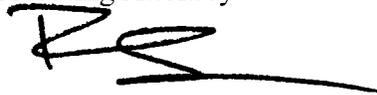
how the argument was so flagrant and ill-intentioned that a timely objection and instruction would not have cured any prejudice. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Ms. Cross's conviction and sentence should be affirmed.

DATED August 15, 2013.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'R. Hauge', with a long horizontal line extending to the right.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

August 15, 2013 - 7:29 AM

Transmittal Letter

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