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SUPREME COURT NO. 102491-6

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

PAUL DESCHAMPS,
Petitioner.

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 57072-6-II
Mason County No. 19-1-00237-23

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, PAUL DESCHAMPS, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Deschamps seeks review of the September 19, 2023, unpublished decision of Division Two of the Court of Appeals affirming his conviction.

C. ISSUES PRESENTED FOR REVIEW

1. Deschamps was charged with second degree assault, and the case proceeded to bench trial. Where the trial court entered no finding that his actions caused the alleged victim to fear bodily injury, and the evidence would not support such a finding, must the conviction be reversed and the charge dismissed?

2. Do the issues Deschamps raised issues in his Statement of Additional Grounds for Review require reversal?

D. STATEMENT OF THE CASE

On July 2, 2019, the Mason County Prosecuting Attorney charged Paul Deschamps with second degree assault, alleging he intentionally assaulted Russel Solomon with a deadly weapon. CP 1-3; RCW 9A.36.021(1). Deschamps waived his right to a jury, and the case proceeded to a bench trial before the honorable Monty Cobb. CP 8.

It was undisputed that on June 29, 2019, Solomon had been driving past Deschamps's house to and from the house of his neighbor, Mike Goodman. 2RP¹ 19, 21, 39, 53-54, 180. Deschamps was irritated by the noise of Solomon's vehicle and tried to get him to slow down, leaving a voicemail on Goodman's phone complaining about the noise. 2RP 107, 185. After Goodman played the voicemail for Solomon, Solomon drove his car onto Deschamps's driveway while Deschamps was sitting

¹ The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—8/25/21; 2RP—4/21/22, 4/22/22 and 6/14/22; and 3RP—4/25/22.

outside. Deschamps yelled at Solomon to leave, pointed a gun at him, then turned the gun away from Solomon and fired two rounds into the ground. 2RP 30-31, 107, 193, 196. He had no intention of firing at or harming Solomon. 2RP 193, 242; CP 13.

In his testimony Solomon repeatedly tried to downplay his role in the day's events, as the court found. He claimed he drove only 5 to 10 miles per hour going past and to Deschamps's house, while the court found testimony that he was driving much faster when he went to Deschamps's property closer to the truth. 2RP 19, 21, 25, 61; CP 11. Solomon testified he pulled only a few feet into Deschamps's driveway, but the court found he was understating the extent of his encroachment, and he actually pulled 35 to 40 feet into the driveway. 2RP 26; CP 12.

The State's witnesses gave inconsistent accounts as to other crucial details as well. For instance, Solomon testified that he drove to Deschamps's house "slowly and respectfully", while Goodman testified he drove 25 to 30 miles per hour, far exceeding the 10 mph speed limit. 2RP 25, 53, 61. Goodman

claimed he saw Solomon turn into Deschamps's driveway and stop about three feet from the road and that he saw Deschamps walk to Solomon's car. 2RP 62-63. Photos and testimony from a private investigator established, however, that it was not possible to see that part of Deschamps's property from Goodman's property. 2RP 150-51; CP 11.

Solomon testified that about 15 minutes before the incident, he heard what he recognized as gunfire as he drove past Deschamps's property on his way to Goodman's house. 2RP 20-21. He was not concerned, because it is common to hear gunfire in that rural area. 2RP 22. Goodman confirmed that there was nothing unusual about hearing gunfire in the area, where target shooting is common. 2RP 53.

Goodman testified that Deschamps left a voicemail that day in response to Solomon speeding up and down the road, saying he had fired a gun to teach Solomon a lesson. 2RP 57².

² Although the Court of Appeals states that Dechamps said in a voicemail that he "fired his shotgun to teach them a lesson"

Goodman played the voicemail for Solomon, who decided to go to Deschamps's property to confront him about it. 2RP 23-24. Solomon testified that Deschamps was always saying he was going to shoot people. 2RP 24. He was not angry and didn't intend to assault Deschamps; he just wanted to talk to him. 2RP 25. He did not call the police, because he knows Deschamps, and he felt they could work it out. 2RP 26.

According to Solomon, when he stopped his car in the driveway, Deschamps walked toward him with a gun in his hand, pointed toward the ground, yelling at Solomon to get off his property. 2RP 26-27. He thought Deschamps appeared drunk, and he was calling Solomon by the wrong name. 2RP 27-28. Solomon said he started to get worried when Deschamps raised the gun, but then Deschamps put the gun off to the side and fired a couple of rounds. 2RP 30-31. He testified he didn't really feel

there was no testimony about a shotgun at trial and no finding about a shotgun from the trial court. Opinion at 1.

threatened by Deschamps, he just thought he should leave. 2RP 43.

Solomon backed up quickly, running over some blackberry bushes, and drove back to Goodman's house. 2RP 31. Solomon said he thought he probably called 911, because the police were at his mother's house when he arrived. He told them Deschamps had shot at him, although he admitted at trial that Deschamps only shot into the ground. 2RP 33.

Sheriff's deputies responded to the scene and detained Deschamps. 2RP 80. He was ordered to put down the phone and drink he was holding, and Deschamps threw them to the ground. He had difficulty getting to his knees as ordered because of his age and infirmity, so a deputy approached to place him in handcuffs. 2RP 101-03.

Deputy Timothy Ripp testified that Deschamps agreed to talk, although he was more than a little intoxicated at the time. 2RP 81-82. Deschamps said a neighbor had been speeding on the road, and Deschamps yelled at him to slow down. The car then

pulled into his driveway, and words were exchanged. Then, to show the driver he meant business, Deschamps fired a round two feet from the car. When that seemed to have no effect, he fired off a second round. 2RP 84. The deputy did not ask Deschamps whether he was in fear for his life. 2RP 85, 94.

Deschamps testified that Solomon had been speeding past his house, and he called Goodman to complain about the noise. 2RP 179-80, 185. Solomon then came speeding up the road again, turned into Deschamps's driveway, and came straight at him. 2RP 186-87. On reflex, Deschamps pulled out his gun. By then, the front end of Solomon's car was at the flowerpot next to Deschamps, and Deschamps was on the hood of the car. He was afraid that if Solomon kept going, he could roll off the other side and get run over. 2RP 187.

About three weeks earlier, Deschamps had had a confrontation with Solomon, after which he told Solomon to get off his property and never come back unless invited. 2RP 189.

Solomon was not invited onto the property on June 29, 2019.
2RP 189.

Deschamps had his gun out, and he told Solomon to get off his property or he would park one in his face. He was concerned about getting knocked down, because it could paralyze him. 2RP 189-90. Deschamps did not fire his gun right away, giving Solomon the option of getting off his property first. He didn't want to shoot Solomon; he just wanted him off his property. 2RP 193. Deschamps testified the car was still running and in gear, and he felt threatened the entire time. 2RP 193-94. Solomon finally left after Deschamps fired two rounds. 2RP 196.

Once Solomon left, Deschamps went inside, drank some vodka and made himself a Bloody Mary, and called 911. 2RP 198. The operator told him to go outside, and when he did there were several law enforcement officers pointing their guns at him. 2RP 199. He did his best to cooperate, although his physical condition made it difficult to raise his hands over his head or get on his knees. 2RP 199-200. Deschamps testified he was placed

under arrest for first degree assault and told he could not plead self defense because he did not try to retreat. 2RP 200.

Deschamps testified that he did not leave a voicemail threatening to shoot anyone. 2RP 209-10. He also disputed the accuracy of the 911 recording, saying it was not his voice and that the recording had been forged by the sheriff's department. 2RP 211-12. Deschamps testified that the charge against him, and the manufactured evidence, was payback for legal action he took in 2002. 2RP 212.

Defense counsel argued in closing that when Solomon drove onto the driveway at the speed Deschamps indicated, the car he was driving was a deadly weapon, and Deschamps acted appropriately to defend himself. 2RP 244. He felt threatened, and he responded to that threat. 2RP 244. He was entitled to act on appearances in defending himself, and that's what he did. 2RP 247. Given his age, his disabilities, and his fear that any injury would be catastrophic, he believed he was in actual danger, and he took action to protect himself. 2RP 248.

The State acknowledged in closing argument that it had to prove not only that Deschamps acted with the intent to create fear of bodily injury, but that his actions in fact reasonably caused Solomon to fear bodily injury. 2RP 242. The court entered extensive findings of fact regarding the incident and surrounding circumstances. It entered no finding as to Solomon's state of mind, however. CP 9-14.

In its oral ruling, the court indicated that it took the varying stories and recollections into account in trying to determine what happened. It did not find either Solomon or Goodman entirely credible. 3RP 4-5. The court noted that there were three different accounts as to where the confrontation between Solomon and Deschamps took place, none of which it found to be wholly accurate. 3RP 6-7.

The court's written findings of fact include the following:

8. Solomon's initial drive to Goodman's is at around 10 mph. This is disputed but the evidence supports his initial pass down E Summer Trail at approximately this speed.

9. Solomon hears one or two gunshots while driving to Goodman's. The shots appeared to come from Deschamps' residence.

10. It is not uncommon for local residents to discharge firearms in the area and the sounds of gunfire was not initially concerning to any of the involved person[s].

11. Deschamps has a makeshift range allowing him to shoot off of or from near his front porch. He also testified he regularly shot at gophers digging in his yard or garden and would also use firearms to frighten other wildlife away from the garden. He used his range earlier on the day in question.

12. Once Solomon reached Goodman's residence, Goodman plays him one of two voicemails left by Deschamps.

13. In the first voicemail Deschamps is complaining about someone driving up and down the road in a blue four-door at 40 mph and stating he was tempted to shoot by or at them. He asks if the offending person(s) belong to Goodman.

...

15. In the second voicemail left by Deschamps, he describes how he taught Russell a lesson by putting a round by his ear.

16. Deschamps denied leaving the second voicemail, asserting it was a creation of Goodman.

17. Goodman recognized Deschamps' voice based on their prior contacts through the years and expressed no doubt it was Deschamps on the voicemails.

18. After hearing the initial voicemail Solomon returned to ask Deschamps why he was shooting at him.

19. Solomon drove back up E Summer Trail to Deschamps driveway at approximately 25-30 mph, pulling into Deschamps' driveway.

20. Deschamps' driveway is approximately 83' long. Deschamps testified he had measured his driveway with a loggers tape at that length and that distance appears consistent with the evidence photos.

21. Solomon testified he pulled a few feet into Deschamps' driveway. Goodman testified he observed Solomon pull just into the driveway, about 3', being able to see the rear of the Rio [Solomon's car] from his property. Deschamps testified Solomon came skidding up to the very end of the driveway, in between two parked vehicles and striking a flower pot. None of these scenarios are likely.

22. Given the curve in E Summer Trail Drive and the height and density of vegetation, it is unlikely that Goodman could have seen the Rio stop at the end of Deschamps' driveway unless Goodman was much closer than being on his property as he testified to. He further testified he saw Solomon back out of the driveway and head toward Lombard which is not consistent with Solomon's later testimony or the photographic evidence.

23. Deschamps' description of where the Rio came to is also not likely. He described the vehicle as skidding to a stop in between his parked vehicles yet there is no evidence of skidding in the gravel. Witness Doughty [the investigator] testified that one of the flower pots had been moved as if struck by the Rio but close examination of the evidence photos shows no movement, rather they show grass growing tight against the pots as if they have not been moved.

24. Solomon's testimony of coming in a few feet is likely closest to the truth but understated. The front of Solomon's Rio came approximately 35'-40' into Deschamps' driveway.... This distance into the driveway would also account for Solomon being able to stop the Rio without skidding.

25. Deschamps approached Solomon (who remained in the Rio) shouting at him to get off the property but calling him by the wrong name.

26. Solomon believes Deschamps is drunk and knows him to consume alcohol but still tries to engage him from the car to ask why.

27. Deschamps puts his hand on the hood of the Rio, pointing the gun at Solomon screaming at him to get out of the yard. Solomon testified the gun was about 3' away, Deschamps testified the gun was 8-12" from Solomon's face.

28. Deschamps points the gun at the ground by the drivers door and discharges two rounds.

29. Solomon backs up the Rio and exits the driveway running over some berry bushes on the corner of the driveway.

30. The berries and grass show clear signs of being run over by a vehicle leaving, not entering the driveway based on the direction the grass/berries are flattened and the angle and separation of the wheel lines leading from the gravel to E Summer Trail across the vegetation.

31. Solomon returns to Goodman's residence and is told to leave. Solomon leaves and goes to his mother's residence and calls 911.

32. Deschamps also calls 911. At trial he denies the 911 recording is him, that it is fabricated. There is no evidence that the call is fabricated. The voice on the 911 recording is Deschamps.

...

37. Deschamps was concerned about his back as he has disc issues and at his age any injury could be debilitating. He further testified he felt threatened the whole time.

38. Deschamps asserted that he was set up as part of a broader conspiracy masterminded by the sheriff's office in retaliation for events in 2002 or thereabouts.

CP 9-13.

The court concluded that Deschamps intentionally assaulted Solomon by pointing a pistol at him and subsequently

firing two rounds into the ground and yelling at him to leave. CP 13. The court concluded that the firearm is a deadly weapon, and that Deschamps intended to intimidate or frighten Solomon, but that he did not intend to actually shoot or injure Solomon. CP 13.

The court further concluded that Deschamps' claim of self defense fails as he was never in actual peril and had no reasonable belief he would be harmed by Solomon's actions. It determined that the evidence pointed to Deschamps being the aggressor. In addition, the court concluded that Solomon's actions did not constitute malicious trespass or interference with property, but even if they did, the use of a firearm exceeds the level of force a reasonable and prudent person would use under the circumstances. CP 13.

Based on its written findings of fact and conclusions of law, the court found Deschamps guilty of second degree assault. CP 14. Deschamps appealed, arguing that the court's findings of fact do not support its conclusion that he was guilty of the charged offense. He also filed a Statement of Additional Grounds

for Review, arguing that the Mason County Sheriff's Office fabricated evidence against him. The Court of Appeals affirmed his conviction.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS' DECISION AFFIRMING THE CONVICTION, WHERE THE TRIAL COURT ENTERED NO FINDING AS TO AN ESSENTIAL ELEMENT OF THE OFFENSE, CONFLICTS WITH DECISIONS OF THIS COURT AND VIOLATES DUE PROCESS.

The State charged Deschamps with second degree assault, requiring it to prove he intentionally assaulted Solomon with a deadly weapon. RCW 9A.36.021(1); CP 1-3. The definition of assault applicable in this case is "an act done with the intent to create in another apprehension and fear of bodily injury and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." WPIC 35.50; 2RP 242 (State's closing argument setting forth the elements it was required to prove).

Thus, in order to find Deschamps guilty of second degree assault in this case, the court had to find not only that he intended to create apprehension and fear of bodily injury, but also that he in fact created in Solomon a reasonable apprehension and imminent fear of bodily injury. *See State v. Magers*, 164 Wn.2d 174, 183, 189 P.3d 126 (2008); *Matter of Arntsen*, 25 Wn. App. 2d 102, 116-17, 522 P.3d 135 (2023).

Due process requires the State to prove beyond a reasonable doubt every element of second degree assault, including the element that Descahmps in fact placed Solomon in reasonable fear of bodily injury. *See Magers*, 164 Wn.2d at 183. When a case is heard by bench trial, the superior court's findings must address each element separately, setting out the factual basis for each conclusion of law. CrR 6.1(d); *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). In addition, the findings must specifically state that an element has been met. *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003).

As the Court of Appeals recognized, the trial court entered no finding that Solomon feared bodily injury as a result of his encounter with Deschamps. CP 9-14; Opinion, at 3, 5. The Court of Appeals held, however, that the missing finding could be inferred from the evidence as to Solomon's and Deschamps' actions. Opinion, at 5. This is the wrong standard. The element must be established, either specifically or by inference, from findings made about the evidence at trial.

“Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). If the written findings of fact are incomplete or unclear, the appellate court may look to the court's oral ruling for clarification, so long as that ruling is not inconsistent with the written findings and conclusions. *State v. Bynum*, 76 Wn. App. 262, 265-66, 884 P.2d 10 (1994).

The only finding the court made regarding Solomon's state of mind at the time of the incident was that Solomon believed Deschamps was intoxicated but tried to engage with him anyway. CP 12. The court said nothing further about Solomon's state of mind in its oral ruling. 3RP 3-10. None of the findings establish that Deschamps in fact placed Solomon in reasonable fear of injury. Nor can the missing element be inferred from the court's findings.

In *Banks*, for example, the defendant was convicted following a bench trial of unlawful possession of a firearm. The court failed to specifically address knowledge in its findings of fact and conclusions of law, and therefore did not meet the requirements of CrR 6.1(d). *Banks*, 149 Wn.2d at 43. The court did find, however, that Banks actually picked up the gun, necessitating an inference of knowledge. *Id.* at 46.

Here, on the other hand, none of the court's findings necessitate an inference that Deschamps in fact caused Solomon to fear bodily injury. In fact, the court's findings tend to show

Solomon was not afraid of Deschamps. The court found that gunfire was common in the area, as the neighbors, including Deschamps, routinely engaged in target practice. CP 10. It found that even after hearing a voicemail from Deschamps saying he had “taught [Solomon] a lesson by putting a round by his ear”, Solomon chose to drive to Deschamps’s property to confront him. CP 11. It found that Solomon saw Deschamps carrying a gun and believed he was drunk and still chose to engage him, not complying with Deschamps’s demands that he leave until Deschamps fired two rounds into the ground. CP 12.

“An inference is not reasonable if based on speculation or conjecture. When evidence is equally consistent with two hypotheses, the evidence tends to prove neither. Washington law, if not the federal constitution, demands that inferences in the criminal setting be based only on likelihood, not possibility.” *Arntsen*, 25 Wn. App. 2d at 117 (quoting *State v. Jameison*, 4 Wn. App. 2d 184, 197-98, 200, 421 P.3d 463 (2018) (internal citations omitted)). Even if the court’s findings leave room for a

possibility that Solomon was afraid, they are at least as consistent with a determination that he was not. Because the court's findings do not establish a likelihood that Deschamps placed Solomon in reasonable fear of bodily injury, they do not support an inference of the missing element.

Moreover, the evidence at trial fails to establish this necessary element. Although Solomon testified he was kind of scared because there was no windshield in his car, the court made it clear it did not find Solomon to be entirely credible. 2RP 30; 3RP 4-5. It found that Solomon understated his speed when he testified he drove "slowly and respectfully" onto Deschamps's driveway and understated his encroachment on Deschamps's property when he testified he drove only a few feet into the driveway. CP 11-12. The Court of Appeals erroneously assumed that the court accepted Solomon's testimony as proof he feared imminent bodily injury, even though the court entered no finding of fact on that element. *See* Opinion, at 4-5.

What the court did find, however, was that Solomon saw that Deschamps was drunk and holding a gun, but chose to engage with him anyway. CP 12. Solomon also said he started to worry when Deschamps held up the gun, but then Deschamps pointed it away from Solomon and fired at the ground. 2RP 30-31. Solomon testified he did not feel threatened by Deschamps, he just thought he should leave. 2RP 43. This evidence is insufficient to support a conclusion that Deschamps in fact placed Solomon in imminent fear of bodily injury. *See Arntsen*, 25 Wn. App. 2d at 117-18 (where victim in road rage incident did not think defendant would shoot her, even though he got out of his vehicle and approached her car with a rifle, evidence was insufficient to prove defendant in fact created imminent fear of bodily injury).

Because Deschamps was convicted following a bench trial, the Court of Appeals is limited to determining whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *See Homan*, 181 Wn.2d

at 105-06. It cannot make its own findings from the evidence, where the trial court omitted to find an essential element of the offense. The Court of Appeals' attempt to do so conflicts with this Court's decisions in *Homan* and *Banks*, and review should be granted. RAP 13.4(b)(1).

Because the trial court's findings of fact do not support the conclusion that Deschamps is guilty of second degree assault, Deschamps's conviction must be reversed.

2. THIS COURT SHOULD REVIEW ISSUES
RAISED IN THE STATEMENT OF
ADDITIONAL GROUNDS FOR REVIEW.

Deschamps made arguments in his statement of additional grounds for review, which the Court of Appeals rejected. Those arguments are incorporated herein by reference.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Deschamps's conviction.

I certify that this document contains 4101 words as calculated by Microsoft Word.

DATED this 19th day of October, 2023.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

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APPENDIX

September 19, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PAUL GRAGG DESCHAMPS,

Appellants.

No. 57072-6-II

UNPUBLISHED OPINION

VELJACIC, J. — Paul G. Deschamps appeals his assault in the second degree conviction following a bench trial. He argues that the trial court failed to enter findings of fact relating to reasonable apprehension and imminent fear of bodily injury. In his statement of additional grounds for review (SAG), Deschamps alleges that the Mason County Sheriff’s Office fabricated evidence against him. We affirm.

FACTS¹

Deschamps and Russell Solomon live near each other and use the same rural road. One of Solomon’s friends, Michael Goodman, lives on the same road as Deschamps. Solomon went to visit Goodman one day and drove by Deschamps’s property.

Deschamps left two voice mails on Goodman’s phone complaining about Goodman’s friends driving too fast on the road near Deschamps’s home and alleging Deschamps fired his shotgun to teach them a lesson. After Goodman played one of the voice mails for Solomon,

¹ The following facts rely, in part, on the trial court’s findings of fact, which are unchallenged and therefore verities on appeal. *State v. Meredith*, 1 Wn.3d 262, 269, 525 P.3d 584, 590 (2023).

Solomon went to Deschamps's home to confront him. Deschamps pointed a gun at Solomon's face while he sat in his car. The vehicle did not have a windshield. Deschamps then lowered the gun and fired it two times.

The State charged Deschamps with assault in the second degree under RCW 9A.36.021(c) (assault with a deadly weapon). The matter proceeded to a bench trial.

Solomon testified that after Deschamps put the gun to his face, he "got the hell out of there." Rep. of Proc. (RP) (Apr. 21, 2022) at 31. He even ran over some blackberry bushes on the way out because he "was so—nervous or scared." RP (Apr. 21, 2022) at 32. Deschamps also testified that "if somebody stuck a gun in my face and said get gone, I'd be long gone." RP (Apr. 21, 2022) at 194

In its closing remarks, the State instructed, "In order to convict [Deschamps] the State has to show that this was an act done with the intent to create in another . . . reasonable apprehension and imminent fear of bodily injury." RP (Apr. 22, 2022) at 242. There was no objection.

Following the bench trial, the trial court found that Deschamps told police "he discharged the rounds to show Solomon he meant business" and that "he fired the second round because the first one didn't seem to bother Solomon." Clerk's Papers (CP) at 13 (Finding of Fact (FF) 35).

The trial court concluded that "Deschamps intentionally assaulted [Solomon] by pointing a pistol . . . 1'-3' from Solomon's face while Solomon was seated in a stopped vehicle . . . [and by] subsequently firing two rounds into the ground just to Solomon's left all while yelling at him to leave." CP at 13 (Conclusion of Law (CL) B). The court further concluded that "Deschamps intended to intimidate or frighten Solomon by his actions." CP at 13 (CL D).

The trial court also found that Deschamps believed he was “set up” by the sheriff’s office. CP at 13 (FF 38). But the court concluded that his “assertions that his voicemails and 911 call are falsified and his claims of conspiracy are without merit.” CP at 14 (CL J).

The trial court found Deschamps guilty as charged. Deschamps appeals.

ANALYSIS

I. SUFFICIENCY OF FINDINGS OF FACT

Deschamps contends that the trial court erred by not finding that he created reasonable apprehension and imminent fear of bodily injury in its findings of fact. The State concedes that the trial court failed to make this finding, but argues that the error is harmless. We agree with the State.

A. Legal Principles

Following a bench trial, the trial court must enter findings of fact and conclusions of law. CrR 6.1(d); *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). These findings of fact and conclusions of law must address each element of the charged offense. *Banks*, 149 Wn.2d at 43. “In addition, the findings must specifically state that an element has been met.” *Id.*

The failure to make express findings that an element has been met does not automatically require remand; insufficiency of findings of fact and conclusions of law from a bench trial is subject to a harmless error analysis. *Id.* at 43-44. To address whether the omission in the findings of fact and conclusions of law is harmless, we examine “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* at 44 (internal quotation marks omitted) (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). We must determine whether “there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in

the outcome of the trial is undermined.” *Banks*, 149 Wn.2d at 44 (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

To convict Deschamps of assault in the second degree, the State had to prove Deschamps assaulted another with a deadly weapon. RCW 9A.36.021(1)(c). Because RCW 9A.36.031 does not define “assault,” assault is defined by the following common law definition: “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). For purposes of this case, the act must be done with the intent to create in another “reasonable apprehension and imminent fear of bodily injury.” RP (Apr. 21, 2023) at 242; *See State v. Johnson*, 188 Wn.2d 742, 755, 764-65, 399 P.3d 507 (2017) (instruction not objected to becomes the law of the case).

To show reasonable apprehension and imminent fear of bodily injury, “[t]he conduct must go beyond mere threats; there must be some physical action that, under all the ‘circumstances of the incident, are sufficient to induce a reasonable apprehension by the victim that physical injury is imminent.’” *State v. Miller*, 197 Wn. App. 180, 186, 387 P.3d 1135 (2016) (quoting *State v. Maurer*, 34 Wn. App. 573, 580, 663 P.2d 152 (1983)). “It is well settled in this state that second degree assault is committed when, within shooting distance, one points a loaded gun at another.” *State v. Johnson*, 29 Wn. App. 807, 816, 631 P.2d 413 (1981). This is because “apprehension . . . may be inferred to exist when a gun is pointed at someone.” *Id.*

B. Omitted Finding of Fact is Harmless Error

Here, Deschamps pointed a gun at Solomon’s face and then lowered the gun and fired it two times. Solomon testified that when Deschamps put the gun to his face, he “got the hell out of there,” running over some bushes on his way out because he was “was so—nervous or

scared.” RP (Apr. 21, 2022) at 31-32. Deschamps also testified that “if somebody stuck a gun in my face and said get gone, I’d be long gone.” RP (Apr. 21, 2022) at 194 And he testified that he fired it a second time to scare Solomon.

While the trial court did not specifically enter a finding of fact that Deschamps put Solomon in reasonable apprehension and imminent fear of bodily injury, the apprehension and imminent fear are inferred by both Deschamps’s and Solomon’s actions. This supports the trial court’s conclusions of law that “Deschamps intentionally assaulted [Solomon] by pointing a pistol [at his face and] . . . subsequently firing two rounds into the ground just to Solomon’s left all while yelling at him to leave” and that “Deschamps intended to intimidate or frighten Solomon by his actions.” CP at 13 (CL B, D). Accordingly, the omission of a finding of fact regarding reasonable apprehension and imminent fear of bodily injury is harmless error.

II. SAG

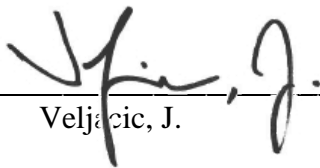
In his SAG, Deschamps contends that Mason County Sheriff’s Office fabricated evidence against him for the last 22 years. He attaches numerous documents relating to this allegation. We initially note that we will not consider documents attached to a brief that are not included in our record. RAP 10.3(a)(8).

The trial court concluded that “Deschamps’s assertions that his voicemails and 911 call are falsified and his claims of conspiracy are without merit.” CP at 14 (CL J). Deschamps does not provide any detail in his SAG regarding how the trial court erred in reaching this conclusion. Under RAP 10.10(c), SAG claims must inform us, at a minimum, of the nature and occurrence of any alleged errors. Deschamps fails to do so. Accordingly, we do not address Deschamps’s contention further.

CONCLUSION

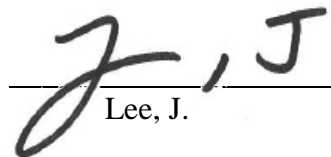
Because the trial court's omission of the element of reasonable apprehension and imminent fear of bodily injury in its findings of fact is harmless error and because Deschamps's argument in his SAG is without merit, we affirm Deschamps's assault in the second degree conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

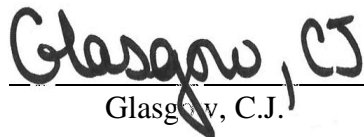


Veljacic, J.

We concur:



Lee, J.



Glasgow, C.J.

GLINSKI LAW FIRM PLLC

October 19, 2023 - 11:42 AM

Transmittal Information

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