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NO. 52207-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY BOUCH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to find an essential element of the offense.
2. The trial court's findings of fact do not support its legal conclusions.
3. The trial erred in imposing the \$200 criminal filing fee and \$100 DNA fee.

Issues Pertaining to Assignment of Error

1. Appellant's defense was lack of intent. The intent to cause bodily harm or to create an apprehension of bodily harm is an essential element of third degree assault. Where following a bench trial the court failed to find appellant intended to kick the officer in either its oral or written findings should appellant's conviction be reversed, and the case dismissed?
2. Under the Supreme Court's recent decision in State v. Ramirez,¹ must the \$200 filing fee and DNA fee be stricken from the judgment and sentence?

B. STATEMENT OF THE CASE

1. Charge, Verdict, and Sentence

- The State charged Gregory Bouch with third degree assault. CP 1-
2. It alleged Bouch intentionally assaulted Trooper Patrick Mariakis, a law

¹ State v. Ramirez, ___ Wn.2d ___, ___ P.2d ___, 2018 WL 4499761 (September 20, 2018).

enforcement officer who was performing official duties at the time of the assault. Id.; RCW 9A.36.031(1(g)).

Bouch waived his right to a jury trial. CP 7. Following a bench trial, the court found Bouch guilty as charged. CP 8-9; RP 37.

The court sentenced Bouch to 9 months in jail. CP 15. The court also imposed a \$100 DNA collection fee and \$200 filing fee. CP 17.

2. Trial

On June 6, 2018 at approximately 2:00 a.m., Washington State Patrol Trooper Patrick Mariakis, stopped the car Bouch was driving after witnessing the car go the wrong way up a ramp with no lights on. RP 7-8.² In the car with Bouch was a woman. There was a no-contact order prohibiting Bouch from contact with the woman, so Mariakis decided to arrest Bouch. RP 8-9. Because Bouch was moving around the car, Mariakis handcuffed Bouch while Bouch was sitting in the car. Bouch was handcuffed with his hands in front of him. RP 9.

Mariakis then walked Bouch back to his patrol car where he searched him. Mariakis found a baggie containing what he suspected were drugs. Mariakis put the baggie on the hood of his patrol car. RP 9-10. As Mariakis tried to put Bouch into his patrol car, Bouch took the baggie and

² RP refers to the verbatim report of proceedings of the March 6, 2018 trial and April 20, 2018 sentencing hearing, which is sequentially paginated.

put it in his mouth and lunged away from Mariakis. Mariakis wrapped Bouch around the waist and they both fell to the ground. RP 9-11. Bouch ended up laying on the ground on his stomach and Mariakis was on Bouch's back. RP 11. Mariakis said Bouch tried to bite him so Mariakis hit Bouch on the side of his head. RP 12.

Other officers arrived, including Trooper Adam Richardson. They decided to roll Bouch over, stand him up, and reposition the handcuffs with Bouch's hands in the back. RP 14. Mariakis said as one of the officer's was attempting to stand Bouch up, Bouch kicked at Mariakis and told him "I should have kicked your effing head." RP 15. Mariakis said the kick struck him. RP 15. Richardson testified that as Bouch was being rolled over he made a rapid kicking motion. 26-27.

The incident was recorded on Mariakis's dash cam. The video was admitted without objection. RP 17-19; Ex. 1.

Bouch testified that he did not try to bite Mariakis. RP 29. Bouch denied he tried to kick Mariakis. RP 30. Bouch admitted he told Mariakis he "should have kicked you in the fucking head." Id. On cross examination Bouch said he was moving his legs because he was trying to maintain his balance and stand up. RP 32.

In his closing argument defense counsel noted that to convict Bouch the court had to find intent and the evidence did not establish that Bouch intended to kick to Mariakis. RP 34-35.

In its oral ruling the court stated:

And, Trooper Richardson described what he saw and said that he saw a kick. And Trooper Mariakis was equally clear that Mr. Bouch had kicked him.

The definition of assault is very broad, and it doesn't require physical injury. It's any touching that is offensive to the person being touched. And on the case of third degree assault, the person who is the recipient of the unwanted touching has to be a police officer who is in the act of performing his official duties at the time. I think that's what happened here.

RP 36.

The court entered written findings of fact and conclusions of law.

II. FINDINGS OF FACT:

1. The evidence presented in this case consisted of the testimony of Washington State Patrol (WSP) Trooper Patrick Mariakis, WSP Trooper Adam Richardson, the Defendant, and dash cam video from Trooper Mariakis' patrol vehicle depicting the events.
2. The dash cam video was not extremely clear in terms of being able to see what happened.
3. The testimony of Trooper Richardson was particularly helpful in that when he arrived on scene, he was not involved in the struggle with the Defendant and was able to observe the events without also having to contend with getting the Defendant under control.
4. Trooper Richardson testified that he clearly saw a kick on the part of the Defendant.

III. CONCLUSIONS OF LAW:

1. The definition of Assault is very broad, included offensive touching, and does not require physical injury.
2. In the case of Assault in the Third Degree, the recipient of the touching must be a law enforcement officer who in the act of performing his official duties at the time of the assault.
3. The State has proven beyond a reasonable doubt that the Defendant kicked Trooper Mariakis, a law enforcement officer on duty at the time, on January 6, 2018 in Grays Harbor County.
4. The Defendant is guilty of Assault in the Third Degree.

CP 8-9.

C. ARGUMENT

1. THE COURT FAILED TO FIND THE ESSENTIAL ELEMENT OF INTENT.

Specific intent to cause bodily harm or to create an apprehension of bodily harm is an essential element of third degree assault. The court did not find the intent element. The absence of any finding of intent requires Bouch's conviction be reversed and the case dismissed.

The State must prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). A trial court must enter findings of fact and conclusions of law following a bench trial. CrR 6.1(d). The court must enter written findings of ultimate fact with respect to each element of the crime. State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995).

This Court's review is limited to determining whether substantial evidence supports the trial court's findings and, if so, whether the findings in turn support the conclusions of law. State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). In the absence of a finding on a factual issue the reviewing court presumes that the party with the burden of proof failed to sustain their burden on this issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Bouch was charged with violating RCW 9A.36.031(1)(g). That statute provides, in relevant part, that

(a) person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

....

(g) 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.

To commit assault, a person must have specific intent to cause bodily harm or to create an apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); State v. Williams, 159 Wn. App. 298, 307, 244 P.3d 1018, *review denied* 171 Wn.2d 1025, 257 P.3d 665 (2011) (citing Byrd). Thus, the intent to cause bodily harm or to create an apprehension of bodily harm is an essential element of third degree assault.

Bouch's defense was lack of intent. The court found the dash cam video (Ex. 1) did not clearly show what happened, and that it was therefore

relying on Richardson's testimony that he saw a kick. RP 36; CP 8-9 (finding fact 4). Neither in the court's oral or written findings does it find the essential element of specific intent to cause bodily harm or to create an apprehension of bodily harm.

In its written findings the court only found that "Trooper Richardson testified that he clearly saw a kick on the part of the Defendant." There is no finding that Bouch kicked Mariakis with the intent to cause bodily harm or to create an apprehension of bodily harm.

In its oral ruling the court does not make a finding on the intent element either. It finds that third degree assault, as charged, requires "the person who is the recipient of the unwanted touching has to be a police officer who is in the act of performing his official duties at the time." That finding only addresses the element that the person assaulted be a law enforcement officer performing his or her official duties at the time of the assault. RCW 9A.36.031(1)(g). While it found "Trooper Mariakis was equally clear that Mr. Bouch had kicked him" it makes no finding Bouch kicked Mariakis with intent to cause bodily harm or to create an apprehension of bodily harm, and it makes no finding as to Mariakis's credibility.

The court did not find Bouch kicked Mariakis with intent to cause bodily harm or to create an apprehension of bodily harm. The absence of

any finding of intent requires this Court presume the State failed to meet its burden of proof on that element. Even if that presumption did not apply, given the absence of any intent finding the court's finding of facts do not support its conclusion of law that Bouch committed the assault. Thus, Bouch's conviction should be reversed and the case dismissed.

2. THE \$200 FILING FEE AND \$100 DNA COLLECTION FEE MUST BE STRICKEN FROM BOUCH'S JUDGMENT AND SENTENCE.

In State v. Ramirez, the Supreme Court discussed and applied Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018 and applies prospectively to cases currently on appeal. Ramirez, WL 4499761 at *3, 6-8.

HB 1783 amended RCW 36.18.020(2)(h), which now states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(a) through (c), a person is "indigent" if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level.

This amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Ramirez, at *8. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. Here, the record indicates Bouch is indigent under RCW 10.101.010(3). CP 27-28 (motion and order of indigency). The court lacked authority to impose the \$200 filing fee.

RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was also amended under House Bill 1783.

The statute now provides:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction.

RCW 43.43.7541 (emphasis added.); Laws of 2018, ch. 269, § 18.

Bouch's has a criminal history that includes four felony convictions from 1991 to 2008. CP 17. Clearly, the State has previously collected his DNA. As a result, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. Thus, this Court should also strike the DNA fee under House Bill 1783 and Ramirez.

D. CONCLUSION

Bouch's conviction should be reversed and the case dismissed because the court's factual findings do not support the legal conclusion that he committed the crime. Alternately, the case should be remanded to strike the \$200 filing fee and \$100 DNA collection fee from the judgement and sentence.

DATED this 30 day of October 2018

Respectfully submitted,

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