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State of Washington  
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NO. 52207-1-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

GREGGORY ALLEN BOUCH,  
Appellant.

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

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THE HONORABLE DAVID EDWARDS, JUDGE

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BRIEF OF RESPONDENT

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## **COUNTER STATEMENT OF THE CASE**

The State charged Appellant with one count of Assault in the Third Degree pursuant to RCW 9A.36.031, which states that (1) “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.” He elected a bench trial, which was conducted in Grays Harbor Superior Court on April 20, 2018.

### **Facts**

Washington State Patrol Trooper Patrick Mariakis was on routine patrol in Grays Harbor County at about 2:00 a.m. on January 6, 2018. He was checking the rest area near Elma and drove through the back parking lot where tractor-trailers and other large vehicles typically park. VRP 7, 8. Trooper Mariakis observed a vehicle parked in a no-parking zone. He ran the plate and realized the person in the vehicle, whom he recognized from prior contacts, was Mr. Bouch. VRP 8.

Trooper Mariakis was going to make his way back to the highway when he saw another vehicle travelling the wrong way up the ramp, into

the rest area, with no headlights on. He made a u-turn and conducted a traffic stop of the vehicle. The driver was identified as Clarissa Paulson. She told Trooper Mariakis she had forgotten her phone in the bathroom, but the Trooper could clearly observe a phone on her lap. Ms. Paulson acknowledged Mr. Bouch was the person in the other vehicle at the rest stop and that he was her ex-boyfriend. Trooper Mariakis checked Ms. Paulson on his computer and learned that there was a valid protection order prohibiting Mr. Bouch from contacting her. VRP 8.

Trooper Mariakis then contacted Mr. Bouch in his vehicle. Based on his familiarity with Mr. Bouch, Trooper Mariakis told him to place his hands on the steering wheel. The Trooper opened the drivers' door, at which point Mr. Bouch began removing his hands from the wheel. Despite being given verbal commands to show his hands, Mr. Bouch kept reaching around the cabin of the vehicle. Trooper Mariakis decided to place Mr. Bouch under arrest while he was still sitting in the vehicle. Mr. Bouch tensed up and was pulling away while the Trooper was handcuffing his hands in front of his body. After a short struggle, Trooper Mariakis was able to place handcuffs on Mr. Bouch. VRP 9.

Trooper Mariakis then walked Mr. Bouch from his vehicle to the Trooper's patrol vehicle, as that is where he routinely conducts a search

incident to arrest. Trooper Mariakis explained to Mr. Bouch what was going on and why he was being placed under arrest. Mr. Bouch was “very agitated” at the time, and Trooper Mariakis sat him on his patrol vehicle push bars as he went back to retrieve rubber gloves so he could conduct the search. VRP 10.

During the search of Mr. Bouch Trooper Mariakis located a plastic baggie containing what appeared to him to be methamphetamine, which he placed on the hood of his patrol vehicle. Mr. Bouch continued to grow agitated and complained that the suspected methamphetamine was not his, and that Trooper Mariakis planted it on him. Trooper Mariakis turned to try to walk Mr. Bouch to the back of his patrol vehicle when Mr. Bouch suddenly lunged away from him. VRP 10. Trooper Mariakis learned later that the reason Mr. Bouch lunged was because he grabbed the baggie of suspected methamphetamine off the hood of the car and placed it in his mouth. VRP 11. Trooper Mariakis wrapped his arms around Mr. Bouch and they both went to the ground. VRP 10.

Once on the ground Trooper Mariakis struggled to control Mr. Bouch, who was very tense, angry, and yelling obscenities. Mr. Bouch constantly struggled to move his body and stand up. Mr. Bouch was on his stomach and Trooper Mariakis was on top of him. VRP 11. The

struggle continued for about three minutes, at which time Mr. Bouch attempted to bite the Trooper, who then punched Mr. Bouch in the head. This enabled Trooper Mariakis to regain control of Mr. Bouch until backup units could arrive, which took approximately another four minutes. VRP 12.

Elma Police Officer Sample arrived first, but because there were other hostile or potentially hostile people around, the officers waited for more backup, which arrived shortly in the form of Washington State Patrol Trooper Richardson. VRP 12 – 14. Trooper Mariakis briefed the other two officers on the situation and then they told Mr. Bouche that they were going to place the handcuffs on behind his back. VRP 14. Mr. Bouch was still irate, yelling that he was being hurt and to stop hurting him. The officers succeeded in placing the handcuffs on Mr. Bouch behind his back and attempted to start rolling him over in order to stand him up. At that moment Mr. Bouch said “I should have kicked you in the effing head,” and kicked Trooper Mariakis in the leg. VRP 15. Trooper Richardson, who was standing a foot or two away, described the same sequence of events. VRP 26, 27.

Mr. Bouch’s testimony was similar to that of Trooper Mariakis. He also admitted to eating the baggy of suspected methamphetamine, and to

saying “I should have kicked you in the fucking head,” but denied that any kick had occurred at all. VRP 30, 32.

### **RESPONSE TO ASSIGNMENTS OF ERROR**

**1. Did the trial court fail to find an essential element of the offense?**

**No. While the trial court failed to include the word “intent” or “intentional” in its findings and conclusions, evidence of Appellant’s intent is clear in the record.**

### **ARGUMENT**

#### **Standard of review.**

“In a case tried without a jury, the court shall state separately findings of fact and conclusions of law.” CrRLJ 6.1.2. These findings “must address each element of the crime separately, and each conclusion of law must be supported by a factual basis.” *State v. Heffner*, 126 Wash.App. 803, 810-811, 10 P.3d 219 (2005).

Insufficiency of findings of fact and conclusions of law from a bench trial is subject to a harmless error analysis. *Id.*, 811, citing *State v. Banks*, 149 Wash.2d 38, 43, 65 P.3d 1198 (2003). In conducting a harmless error analysis in such cases, the reviewing court must determine whether the alleged error contributed, beyond a reasonable doubt, to the

verdict. *Banks* at 44, 65 P.3d 1198 (see e.g., *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002) (*Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))).

“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 Wash.2d 102, 105–06, 330 P.3d 182 (2014) (citing *State v. Stevenson*, 128 Wash. App. 179, 193, 114 P.3d 699 (2005)). “‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Id.* at 106, 330 P.3d 182. In reviewing insufficiency claims, the appellant necessarily admits the truth of the State’s evidence and all reasonable inferences drawn therefrom. *Homan*, 106 (citing *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992)). With respect to credibility determinations and evidentiary conflicts, a reviewing court “must defer to the finder of fact.” *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

**Application.**

The State concedes at the outset that the trial court’s findings of fact and conclusions of law do not comport with CrRLJ 6.1.2 in that they

omit the essential element of intent. However, it is not the case that the omission was the result of the State's failure to prove that element.

In the instant case, findings of fact and conclusions of law were entered as follows:

## 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 the 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, includes 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 is 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

Appellant states that his defense “was lack of intent.” Brief of Appellant 6. However, this is undercut by the testimony of the Defendant himself. On direct examination, the following line of questioning took place:

Q And then to you remember trying to kick at somebody’s leg as they tried to roll you over?

A No, sir, because it never happened.

Q Did your leg go toward his leg?

A No, sir.

Q What do you remember of that part of the incident?

A That part of the incident, I was pretty upset. I told him, excuse me for my words, my mouth, but I have a big mouth, and I told him I should have kicked you in the fucking head, and I just rolled over and stood up. Try to get your balance when you are cuffed. I didn’t try to kick at him. I didn’t try to kick the officer. It’s not in me.

VRP 30

And again on cross examination:

Q Now, you have also testified that the kick never happened, correct?

A Correct.

Q And your leg didn’t move?

A My legs do move, because I’m trying to stand up. Did they kick at the officer? No, they did not.

VRP 32

So while Appellant’s claimed defense was lack of intent, the actual defense put forth at trial was a general denial – that no such kick happened. This is a critical point. If Appellant had testified that there was

in fact a kicking motion that struck the officer, but that it was accidental, the defense of lack of intent would have been somewhat more compelling. Clearly, however, there would have been no intent to perform a kick that never happened. However, the overwhelming evidence from the testimony of Troopers' Mariakis and Richardson, as well as the less helpful video evidence, amply proved to the court that a kick did in fact happen. The question then is does the record, despite the lack of mention in the court's findings and conclusions, support a finding that the kick was performed *with intent*. It does.

The most persuasive piece of evidence of Appellant's intent are his own words, as testified to by both Troopers and the Appellant.

**Trooper Mariakis:**

Q And did you hear anything specifically right before the kick?

A Yes.

Q And what did you hear?

A I should have kicked you in effing head, and continued to yell obscenities non stop.

VRP 15.

**Trooper Richardson:**

Q Did you ever see a point where the defendant was rolled on to his side?

A Yes.

Q Can you describe that?

A Trooper Mariakis advised the subject that we were going to roll him up, so that we could stand him up. And, it was at this point, that as they rolled him up, the defendant made a statement that he, I believe it was something to the effect that he should have kicked him in the effing head, and then made a rapid kicking motion with his leg.

Q And did you see that kicking motion?

A Yes, I did.

Q Were you here when the video was just being played, were you reviewing it?

A Yes.

Q Does that comport with your memory of the events.

A Yes, it does. And the only thing I will say is that a video is a two-dimensional picture...but in person, when I am standing on the opposite side of the subject in the direction to which he kicked it was a very blatant kick. It's pretty obvious the difference between somebody making a rapid kicking motion with their leg, than somebody positioning their leg to attempt to stand up.

VRP 26, 27.

**Appellant:**

A There was no kicking motion. I was trying to get my balance, I am cuffed –

Q Then let me rephrase, before that portion of what's going on, do you recall what you said?

A I said I should have kicked you in the fucking head.

VRP 32

Despite Appellant's denial, the evidence in the record is clear that he did in fact kick Trooper Mariakis. The evidence is equally clear that immediately prior to doing so, Appellant taunted Trooper Mariakis by

saying “I should have kicked you in the fucking head.” This is not an accidental kick, it is intentional, and on that point the evidence was clear.

**Conclusion.**

“An error by the court in entering judgment without findings of fact and conclusions of law is remedied by subsequent entry of findings, conclusions, and judgment.” *State v. Alvarez*, 128 Wash.2d 1, 19, 904 P.2d 754 (1995).

Here, the State concedes the findings and conclusions were defective in that they did not address the essential element of “intent.” However, as that essential element was in fact proven by the State beyond a reasonable doubt at trial, this Court should remand to the trial court for subsequent entry of findings, conclusions, and judgment.

**2. Did the trial court err in imposing the \$200 criminal filing fee and \$100 DNA fee?**

**Yes.**

The State concedes the trial court lacked the authority to impose such fees and requests the Court remand to strike these fees from the Judgment and Sentence.

**CONCLUSION**

Because the trial court erred by not including the “intent” element within its findings and conclusions, and because that element was proven beyond a reasonable doubt at trial, the case should be remanded for entry of subsequent findings and conclusions. The case should also be remanded with orders to strike the \$200 filing fee and \$100 DNA fee from the Judgment and Sentence.

DATED this \_\_\_\_\_ day of February, 2019.

Respectfully Submitted,



BY: \_\_\_\_\_  
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RKP / rkp

**GRAYS HARBOR COUNTY PROSECUTOR'S OFFICE**

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