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Division II
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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. BECAUSE THE EVIDENCE DOES NOT SUPPORT A FINDING ON THE ESSENTIAL ELEMENT OF INTENT, DISMISSAL AND NOT REMAND TO ALLOW THE COURT TO SUPPLY THE OMMITTED FINDING IS THE APPROPRIATE REMEDY.

In a bench trial, 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). 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).

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.” Brief of Respondent (BOR) at 8-9. Further, the State does not dispute that the court’s oral ruling fails to make a finding on the intent element. See Brief of Appellant (BOA) at 7. The State argues the appropriate remedy is a remand to allow the court to supply the omitted finding at its discretion.

Remand is only appropriate if the omission of the finding was an inadvertent error rather than a determination that the State failed to meet its burden of proof on the element. State v. A.M., 163 Wn.App. 414, 426, 260 P.3d 229 (2011). Here the omitted finding was not inadvertent but a tacit

determination the State failed to meet its burden of proving the essential element of intent.

Intent to cause bodily harm or to create an apprehension of bodily harm is an essential element of third degree assault. 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). The State was required to prove that Trooper Mariakis had a reasonable apprehension and imminent fear of bodily injury at the time of the assault, and Bouch created that apprehension. State v. Brown, 140 Wn.2d 456, 470, 998 P.2d 321 (2000). Bodily harm “means physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a).

Evidence is only sufficient if viewed in the light most favorable to the State, it supports a rational fact finder's finding of guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here the evidence does not support a finding that Mariakis had a reasonable apprehension and imminent fear of bodily injury and Bouch created that apprehension. The conviction should be dismissed.

Although the court found Bouch kicked Trooper Mariakis it did not find in either its oral ruling or written findings of fact that Bouch had the intent cause bodily harm, create an apprehension of bodily harm or that Mariakis had a reasonable apprehension and imminent fear of bodily injury. The court's

failure to find the essential element of intent to support a third degree assault is understandable because the State failed to prove that element.

Mariakis did not testify that he feared Bouch would cause him any bodily harm. Mariakis only testified that as officer's were attempting to stand Bouch up, Bouch kicked at him and the kick struck him. RP 15. Richardson, whose testimony the court found particularly helpful (CP 8-9), merely testified that as Bouch was being rolled over he made a kicking motion. RP 26-27. Bouch, on the other hand, testified he was moving his legs because he was trying to maintain his balance and stand up. RP 32.

While in its oral ruling the court found the "kick" was offensive (RP 36) it is not reasonable to infer from that, or the evidence, that the court would have or could have found Bouch intended to cause bodily harm or to create an apprehension of bodily harm but inadvertently omitted that finding.¹ On this record, the State's evidence failed to prove that Bouch intended to cause bodily harm or to create an apprehension of bodily harm (physical pain or injury). Because the evidence was insufficient to support the requisite intent,

¹ "The difference between fourth degree assault and third degree assault is that fourth degree assault is "an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury." *State v. Tyler*, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007); See *State v. Jarvis*, 160 Wn. App. 111, 118, 246 P.3d 1280 (2011) (same). An offensive touching may suffice to support a fourth degree assault, but it does not support a third degree assault, which requires the specific intent to create an apprehension of bodily harm.

the court could not have inadvertently omitted that finding. Thus, dismissal and not remand to enter the omitted intent finding is the appropriate remedy.

2. REMAND TO STRIKE THE FILING FEE AND DNA FEE IS NECESSARY

The State concedes the trial court lacked the authority to impose the criminal filing fee and DNA fee. BOR at 13. The State is correct, and remand with instructions to the court to strike those fees is necessary.

B. CONCLUSION

For the above reasons and the reasons in Bouch's initial brief, Bouch's conviction should be reversed and the case dismissed. Alternatively, the \$200 filing fee and \$100 DNA collection fee should be stricken from the judgement and sentence.

DATED this 12 day of February 2019

Respectfully submitted,

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