

FILED

MAY 17 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29482-0-III

**STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III**

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL PARKS

Appellant.

**APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY**

BRIEF OF RESPONDENT

**SHAWN P. SANT
Prosecuting Attorney**

**by: Kim M. Kremer, #40724
Deputy Prosecuting Attorney**

**1016 North Fourth Avenue
Pasco, WA 99301
Phone: (509) 545-3543**

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COUNTERSTATEMENT OF ISSUES

1. **WAS THE TRIAL COURT'S VERDICT SUPPORTED BY SUBSTANTIAL EVIDENCE?**
2. **CAN A BASEBALL BAT BE A DANGEROUS WEAPON IF THE BAT DID NOT MAKE CONTACT WITH THE VICTIM**
3. **IS DISMISSAL THE PROPER REMEDY IF A TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW DO NOT ADDRESS EACH ELEMENT OF THE CRIME FOR WHICH THE RESPONDENT IS CONVICTED?**

COUNTERSTATEMENT OF THE CASE

Michael Parks appeals his juvenile adjudication for Assault in the Second Degree. His statement of the case is substantially correct as far as it goes. However, the State makes the following additions, corrections and amplifications.

Jordan Gunlock testified that on June 23, 2010, he was at home with a friend, V.G. RP 61. V.G. received a call on her cellular telephone; after the call ended, it appeared to Mr. Gunlock that V.G. "wanted to cry." RP 62. V.G. advised Mr. Gunlock that Respondent and two others were there to "check" him. Id. Respondent and his co-respondents called Mr. Gunlock outside to "get [his] check." RP 63. Mr. Parks had a baseball bat. Id. When asked what he believed would happen to him, Mr. Gunlock

testified that “it wasn’t going to be a check. [T]hey’re there to do damage[.] It wasn’t just going to be a beat down. [E]ither they were going to put me in the hospital or might’ve killed me.” RP 64. Although Respondent remained outside of Mr. Gunlock’s home throughout the incident, Mr. Gunlock testified he feared the group might enter his home. Id. This fear moved Mr. Gunlock to take a knife from the kitchen to protect himself. RP 63. When Sonia Perez, Mr. Gunlock’s mother, arrived home, she found him in a “major adrenaline rush,” and armed with a butcher knife. RP 41. Ms. Perez also positively identified the Respondent as one of the three young men in front of her house when she arrived home. RP 42, 45, 59. Ms. Perez testified that one of the three young men had something in his hands, but she did not know what it was. RP 54. Officer Zack Fairley of the Pasco Police Department testified that a full-size metal bat was removed from the passenger compartment of the vehicle in which the Respondent was apprehended shortly after the incident. RP 14, 16.

Respondent was found guilty by the bench on October 18, 2010. Respondent filed a notice of appeal on November 8, 2010. The trial court’s findings of fact and conclusions of law were also filed on that date.

Other facts will be developed from the record as they relate to individual issues.

RESPONSE TO ARGUMENT

A. STANDARD OF REVIEW

Mr. Parks states the correct standard of review. Because Mr. Parks is challenging the sufficiency of the evidence presented at trial, this court will draw “all reasonable inferences from the evidence ... in favor of the State” and interpret those inferences “most strongly against the defendant.” State v. Hovig, 149 Wn.App. 1, 8, 202 P.3d 318, 321 (2009) review denied, 166 Wn.2d 1020, 217 P.3d 335 (2009).

B. THE TRIAL COURT’S VERDICT WAS SUPPORTED BY SUFFICIENT EVIDENCE

i. Evidence Demonstrates Respondent’s Intent

“Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances.” State v. Pierre, 108 Wash. App. 378, 386, 31 P.3d 1207, 1211-12 (2001). Mr. Parks argues that there was insufficient evidence to support a finding that he intended to create a reasonable apprehension in Mr. Gunlock that he was in imminent danger of

being assaulted with a deadly weapon. The record demonstrates otherwise. Mr. Gunlock testified that Mr. Parks was outside his home with a baseball bat, “hollering ... ‘Come get your check, dude.’” RP 63. Mr. Gunlock further testified that he feared that Mr. Parks and his co-respondents were “there to do damage” which would result in him being hospitalized or killed. RP 64. Interpreting these statements in favor of the State and against the Respondent, this is sufficient evidence to establish Mr. Parks intended to create a reasonable fear in Mr. Gunlock that he was in imminent danger of being assaulted.

Mr. Parks’ reliance on State v. Ward is misplaced. 125 Wn.App. 243, 104 P.3d 670 (2004), *abrogated on other grounds* by State v. Grier, ___ Wn.2d ___, 246 P.3d 1260, (2011). In Ward, the defendant was convicted of Assault in the Second Degree and argued his counsel was ineffective for failing to request a lesser included offense instruction for the crime of unlawful display of weapon. 125 Wn.2d at 246-48, 104 P.3d at 671-72. In determining whether a lesser included offense instruction is appropriate, the appellate court viewed the evidence presented in a manner most favorable to the appellant. Id.

The defendant in Ward testified he believed the victims were stealing his car from in front of his home and that one of the victims came toward him with a crowbar. 125 Wn.2d at 246, 104 P.3d at 671. That defendant and another defense witness testified that the Ward “told the men he had a gun, ordered them to leave his property, and then displayed the gun by opening his jacket.” 125 Wn.2d at 248, 104 P.3d at 672.

For Mr. Parks’ case to be analogous to Ward, Mr. Parks would have to have been standing on his *own* front porch holding a baseball bat when Jordan Gunlock trespassed. Mr. Parks would then have to have advised Mr. Gunlock he had a bat, and then tell Mr. Gunlock to leave. That is not what happened. Mr. Parks went to Mr. Gunlock’s house and told V.G. he was there to “check” Mr. Gunlock. He waited outside “hollering” at Mr. Gunlock to “come get [his] check” while armed with a full-size metallic baseball bat. Viewed in a light most favorable to the State, this is substantial evidence that Mr. Parks intended to create a reasonable apprehension in Mr. Gunlock that he was about to be assaulted with a deadly weapon.

ii. Testimony Establishes That Respondent Assaulted Jordan Gunlock

Washington's courts use the common law definition of assault. State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.3d 817, 821 (2006). While the actor need not intend to actually harm the victim, he or she must intend to create the apprehension of assault. Id. Mr. Parks states that the "evidence established merely that [he] was in [the victim's] yard in possession of a baseball bat." App.Br. 8. Such an inference is not supported by Mr. Gunlock's testimony.

Although Mr. Parks cites State v. Music for the proposition that he could have been convicted of *attempted* assault, that case does not support his argument. 40 Wn.App. 423, 698 P.2d 1087 (1985). There, the defendant was originally charged with Assault in the Second Degree. 40 Wn.App. at 424, 698 P.2d at 1088. He sought to withdraw a guilty plea after pleading guilty to Attempted Assault in the Second Degree. Id. The defendant argued there was no factual basis for his plea. 40 Wn.App. at 430, 698 P.2d at 1092. The evidence before the appeals court was the defendant's statement and the prosecutor's offer of proof. Id. The offer of proof "included a recitation of evidence that the defendant pointed

a pistol at [the victim] and threatened to blow his head off.” 40 Wn.App. at 431, 698 P.2d at 1092 (interior quotations removed).

What separates Music from the case at bar is testimony. Here, the trial court heard testimony from Mr. Gunlock that Mr. Parks came to his house armed with a bat and called him out. Mr. Gunlock testified of his fear that Mr. Parks and his co-respondents would injure him severely enough that he would end up in the hospital or dead. Mr. Gunlock’s mother testified that she came home and found her son “freaking out” and armed with a butcher knife. In Music, there was no victim testifying of any apprehension that Mr. Music’s actions may have may have created.

C. A BASEBALL BAT NEED NOT STRIKE A HUMAN BEING FOR IT TO BE A DEADLY WEAPON

Mr. Parks contends that there was insufficient evidence to convict him of Assault in the Second Degree because the State did not establish that he used the bat in a manner that would render it a deadly weapon. Under our law, a deadly weapon includes “any ... device [or] instrument ... which, *under the circumstances in which it is ... threatened to be used*, is readily capable of causing death or substantial bodily harm[.]” RCW

9A.04.110(6) (emphasis added). “Substantial bodily harm” is further defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]” RCW 9A.04.110(4).

Mr. Parks states that the State was required to prove that the bat “was used in a manner capable of causing substantial bodily harm.” App.Br. 10. The State concedes that is a correct statement of what the appellate court wrote in State v. Shilling, 77 Wn.App. 166, 889 P.2d 948 (1995) *review denied* 127 Wn.2d 1006, 898 P.2d 308 (1995). In Shilling, the defendant broke a bar glass over the victim’s head. 77 Wn.App. at 170, 889 P.2d at 949. That court ruled that the bar glass was a weapon because it had an “inherent capacity to cause bodily injury” and it was used in a manner that caused *substantial* bodily injury. 77 Wn.App. at 172, 889 P.2d at 951. But Shilling did not create a rule that the prosecution must prove that a device that is not a *per se* deadly weapon was used in a manner that rendered it a deadly weapon.

A baseball bat clearly has the inherent capacity to cause bodily injury. In re Francis, 170 Wn.2d 517, 521, 242 P.3d 866,

868 (2010). However, an instrument that is not a *per se* deadly weapon need not create an injury for it to be found to be a deadly weapon. State v. Hoeldt, 139 Wn.App. 225, 160 P.3d 55 (2007). The defendant in Hoeldt was convicted of Assault in the Second Degree after releasing his pit bull to attack a police detective. 139 Wn.App. at 227, 160 P.3d at 56. The dog lunged at the officer's throat and chest; before the dog made contact, the detective shot the dog. Id. Although there was no injury to the police detective, our supreme court found that a dog can be a deadly weapon as defined in RCW 9A.04.110(6).

Mr. Parks' case is analogous. Although Mr. Parks did not strike Jordan Gunlock with the baseball bat, he intended to place Mr. Gunlock in apprehension of a beating that would cause him to be hospitalized or kill him. Just as the defendant in Hoeldt used a dog in a manner designed to place the victim in immediate apprehension of an imminent assault, Mr. Parks, by his words and actions, placed Mr. Gunlock in fear of substantial bodily harm.

D. ANY DEFECT IN THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IS HARMLESS ERROR.

The trial court is required to enter written findings of fact and conclusions of law when a juvenile case is

appealed. JuCR 7.11(d). Mr. Parks contends that the trial court's findings of fact and conclusions of law are so defective that the only remedy is reversal of his conviction. That argument fails on several counts.

i. The trial court's findings are only one factor this court will consider

Mr. Parks makes the argument that because the trial court did not address each element of the crime of Assault in the Second Degree, this court must reverse his conviction. However, findings of fact do not stand alone. “[W]e do not review the court's findings of fact alone in reviewing an insufficient evidence claim. We review the entire record to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Gatlin, 158 Wn. App. 126, 130-31, 241 P.3d 443, 446 (2010). As discussed above, there was ample evidence before the trial court to support Mr. Parks' conviction. “Trial judges are presumed to know the law and to apply it in making their decisions.” Walton v. Arizona, 497 U.S. 639, 653, (1990) *overruled on other grounds* by Ring v. Arizona, 536 U.S. 584, (2002). The evidence heard by the court was sufficient for a rational trier of fact to find Mr. Parks guilty.

ii. Failure to enter findings is harmless error

The State acknowledges that the trial court's findings do not address each element of the crime of Assault in Second Degree. The test for whether an error is harmless is whether the error was "so intrinsically harmful as to require automatic reversal (*i.e.* 'affect substantial rights') without regard to its effect on the outcome." State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198,1201 (2003). In Banks, the trial court failed to enter findings of fact and conclusions of law that the defendant knowingly possessed a firearm. Id. There, as here, the appellant "was tried before an impartial judge who was required to determine guilt beyond a reasonable doubt. He had assistance of counsel." 149 Wn. 2d at 44, 65 P.3d at 1201.

An error is harmless if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. In looking at the entire record, not just the findings, it is clear that the trial court considered all of the elements of Assault in the Second Degree. There is no indication the State was relieved of its burden to prove any element of the crime. See Id. The State's closing argument addressed each element it was

required to prove. The trial court found that Mr. Parks was outside Mr. Gunlock's home, armed with a baseball bat, and that he was there to "check" Mr. Gunlock. RP 125. A defense witness testified that Mr. Parks went to Mr. Gunlock's home with her to pick up V.G., and he did not have a bat. RP 102-03. In finding Mr. Parks guilty, the trial court rejected the defense's theory of the case that was merely present at Mr. Gunlock's home. Accepting Mr. Parks' argument that this is an error of constitutional magnitude would be tantamount to presuming the trial court did not know or follow the law.

- iii. If the findings of fact and conclusions of law are lacking, remand is the appropriate remedy

Mr. Parks argues that this court should reverse his conviction and instruct the trial court to dismiss this case with prejudice. App.Br. 11. Dismissal is an extreme remedy. State v. Iniguez, 167 Wn.2d 273, 295, 217 P.3d 768, 779 (2009) (where the court found that an eight-month delay in bringing an incarcerated defendant to trial was not of a sufficient constitutional magnitude to warrant dismissal with prejudice). His argument assumes that there was insufficient evidence to support his

conviction; however, much of his argument regarding the evidence centers on the trial court's findings and conclusions. It would be improper to dismiss this case solely because of any deficiency in those findings. St. v. Alvarez, 128 Wn.2d. 1, 904 P.2d 754 (1995).

In Alvarez, the respondent was charged with harassment. 128 Wn.2d at 10, 904 P.2d at 759. On appeal, he argued the trial court's findings of fact and conclusions of law did "not contain ultimate facts sufficient to support his conviction." Id. Our supreme court agreed that the findings of fact failed to meet the requirements because "[t]hey did not in specific words state that Appellant Alvarez by words or conduct made threats which placed his victims in reasonable fear that the threat would be carried out, a necessary element of the offense ... as charged." 128 Wn.2d at 17, 904 P.2d at 763 (interior quotations omitted). That court affirmed the Court of Appeal's ruling that the proper remedy was remand, as it was "apparent from the record that the trial court's not entering findings of *ultimate* facts was not because the State had not met its burden of proof. It was instead simply the choice of words used in the findings of fact." 128 Wn. 2d at 19, 904 P.2d at

764 (emphasis in original). There, as here, the trial court heard sufficient evidence to find the respondent guilty. Id.

iv. Dismissal with prejudice is too extreme a remedy for this type of rule violation

Mr. Parks implies that remanding this matter for entry of findings of fact and conclusions of law would violate the Double Jeopardy Clause of the United States Constitution. App.Br. 11-12. Because he was not acquitted at trial, his argument fails. Alvarez, 128 Wn.2d at 20, 904 P.2d at 764. Remand for entry of more fully descriptive findings of fact and conclusions of law would not require the trial court to hear any additional evidence. Mr. Parks has already been convicted of Assault in the Second Degree; he would suffer no prejudice by remand for entry of more complete findings of fact and conclusions of law.

CONCLUSION

On the basis of the arguments set forth above, it is respectfully requested that the juvenile adjudication of Michael Parks for Assault in the Second Degree be affirmed. If this court finds that the trial court's findings of fact and conclusions of law are not sufficient, the State requests that the matter be remanded

3635 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Cari A. Thomas

Signed and sworn to before me this 16th day of May, 2011.

Deborah S. Ford

Notary Public in and for
the State of Washington,
residing at Kennecook

My appointment expires:

May 19, 2014