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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

Q.S.J.-T.,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 18-8-00771-0  
The Honorable Gretchen Leanderson, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

## TABLE OF CONTENTS

<b>I.</b>	<b>ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>II.</b>	<b>ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
<b>III.</b>	<b>STATEMENT OF THE CASE.....</b>	<b>2</b>
<b>IV.</b>	<b>ARGUMENT &amp; AUTHORITIES .....</b>	<b>8</b>
<b>V.</b>	<b>CONCLUSION .....</b>	<b>11</b>

## TABLE OF AUTHORITIES

### CASES

<i>City of Tacoma v. Luvone</i> , 118 Wn.2d 826, 827 P.2d 1374 (1992) .....	8
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) .....	8
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) .....	8
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984) .....	10
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978) .....	8
<i>State v. Cantu</i> , 156 Wn.2d 819, 132 P.3d 725 (2006) .....	9, 11
<i>State v. Fleming</i> , 83 Wn. App. 209, 912 P.2d 1076 (1996) .....	8
<i>State v. Read</i> , 147 Wn.2d 238, 53 P.3d 26 (2002) .....	8-9
<i>State v. Tyler</i> , 138 Wn. App. 120, 155 P.3d 1002 (2007) .....	10
<i>State v. Walden</i> , 131 Wn.2d 469, 932 P.2d 1237 (1997) .....	10

### OTHER AUTHORITIES

RCW 9A.36.04 .....	9-10
U.S. Const. amend. 14 .....	8

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it stated in written Finding of Fact 13 that it “does not find self-defense to be a credible defense and finds the respondent to have been the aggressor.” (CP 9)
2. The trial court improperly shifted the burden of proof to the defense when it stated in written Finding of Fact 13 that it “does not find self-defense to be a credible defense[.]” (CP 9)
3. The trial court improperly shifted the burden of proof to the defense, and relieved the State of its constitutional burden of proof, when it convicted Q.S.J.-T. of fourth degree assault after finding that she did not present “credible evidence” of self-defense.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Was the burden of proof improperly shifted to the defense, and was the State relieved of its constitutional burden of proof, when the court convicted Q.S.J.-T. of fourth degree assault after finding that she did not present “credible evidence” of self-defense? (Assignments of Error 1, 2 & 3)

### **III. STATEMENT OF THE CASE**

This case involves an incident between neighbors who live on a block of South 45<sup>th</sup> Street in Tacoma. (RP 9, 10, 23, 33, 93) The street is narrow, like an alley, and there are apartment buildings and a row of townhouses along the street. (RP 10, 62, 64-65; Exh. 4, 5) The front of the townhouses face 45<sup>th</sup> Street, and their driveways open directly onto the street. (RP 10, 34, 89, 90; Exh. 4, 5)

The residents of the townhouses, including Sara McCombs, Daniel Johnston, and Timothy and Heather Laidlaw, often allow their children to play, skate, and bike in the street while the adults socialize. (RP 10, 34) When a car comes down the street, one of the adults generally steps out into the street to be sure the driver will see the children and will slow down to allow the children to move out of the way. (RP64-65, 90-91, 92)

But cars frequently speed down 45<sup>th</sup> Street. (RP 11-12, 64) McCombs has contacted the police on several occasions to complain and request that the city install a speed limit sign or speed bumps. (RP 12-13, 113-14) She was told that she should record license plates of speeding cars and report them by calling a special phone number, and eventually the city might take action. (RP 12-

13, 113-14) McCombs has called the number seven or eight times to report speeding vehicles. (RP 118)

When the neighbors are outside, they will yell at or motion to speeding drivers to slow down. (RP 12) Usually the drivers do slow down or stop until the children move, then drive away without incident. (RP 12, 59, 92) However, on August 3, 2018, an interaction between the townhouse neighbors and a speeding driver resulted in a heated confrontation. (RP

That evening, the townhouse neighbors were socializing and barbecuing in front of their homes, while their children and dogs played in the street. (RP 9-10, 33, 35, 63, 89-90) A car driven by Qiutricha Jackson, who lives down the block from the townhouses, turned onto 45<sup>th</sup> Street at a high rate of speed. (RP 11, 14, 35, 64, 93-94) Timothy Laidlaw stepped into the roadway so that the car would slow down and the children could move out of the way. (RP 35, 36, 93) The car slowed down but, according to McCombs and Laidlaw, Jackson immediately “gunned it” and sped away as soon as the children were out of the way. (RP 37, 93)

A short time later, Jackson drove back down the street from her house, again at a high rate of speed according to the townhouse neighbors. (RP 14, 64, 94-95) This time, McCombs

stepped out into the middle of the street and yelled and motioned for Jackson to slow down. (RP 14-15, 43, 64, 95-96, 97, 100)

Jackson's vehicle came to a stop. (RP 15, 97) According to the townhouse neighbors, Jackson began yelling at McCombs and calling her names. (RP 15, 35, 45, 65, 100) Jackson told McCombs that the children should not be playing in the street, and accused McCombs of targeting her because she is black. (RP 16, 50, 101) According to McCombs, Jackson called her several names and used a number of expletives. (RP 102) McCombs explained that it was simply a safety issue. (RP 101, 102) According to the neighbors, McCombs remained relatively calm during this exchange. (RP 15-16)

McCombs then told Jackson that she was going to report her to the police for speeding. (RP 16, 103, 126) As she stood in front of the car to look at the license plate, Jackson's vehicle lurched forward and nearly struck McCombs. (RP 17, 35, 104) Then McCombs told Jackson that she was going to call 911. (RP 104)

Jackson's car did not have a front license plate, so McCombs began to walk towards the back of the car to get the license number from there. (RP 17, 45, 104, 105) At this point, Jackson's 17-year old daughter, Q.S.J.-T., exited from the front

passenger seat and also moved towards the back of the car. (RP 17, 18, 45, 105)

According to the neighbors, Q.S.J.-T. approached McCombs in an aggressive manner and stood directly in front of her to block her view of the license plate. (RP 18, 45, 105-06) McCombs testified that Q.S.J.-T. stood very close to her and bumped her shoulder in an aggressive way. (RP 128, 106) McCombs leaned to the side to look at the license plate. (RP 106) According to McCombs, Q.S.J.-T. swung her arm and hit her in the face with her hand. (RP 106) Johnston and Timothy Laidlaw also testified that Q.S.J.-T. hit McCombs. (RP 18, 46)

Jackson testified that she does not normally speed on 45<sup>th</sup> Street because it is partially gravel and has potholes. (RP 140) On the evening of the incident, she was out with one of her children at Chuck E. Cheese, but came home briefly to get Q.S.J.-T. (RP 142-43) Q.S.J.-T. had recently been assaulted in their home and was understandably afraid to be left alone there. (RP 143-44, 175)

Jackson testified she did not speed either time she drove down 45<sup>th</sup> Street that evening. (RP 145, 146) As they drove down the street the second time, McCombs ran towards her and yelled, "you people" drive fast and need to stop. (RP 146) Jackson was

offended by McCombs' use of the term "you people," and took it to be a racial insult. (RP 147)

Jackson testified McCombs was screaming at her, and put her hands on the car's side-view mirror and hood. (RP 147-48) Jackson rolled down the window and told McCombs to step away from her car. (RP 148) Jackson put her car into park, which caused it to lurch. (RP 148) According to Jackson, McCombs was screaming at Jackson and flailing her arms around. (RP 148-49)

Q.S.J.-T. stepped out of the car and told McCombs to get away from her mother. (RP 149, 172) Jackson testified that McCombs yelled at Q.S.J.-T. to be quiet and as a kid she should "stay in [her] place." (RP 151) Q.S.J.-T. moved towards the back of the car, but she and Jackson testified that McCombs approached her and grabbed her by the arm. (RP 50-151, 172, 173) According to Q.S.J.-T., she felt threatened and pushed against McCombs' face to move her away. (RP 151, 173-74) She did not swing at or try to punch McCombs. (RP 174)

McCombs denied grabbing, pushing or assaulting Q.S.J.-T. (RP 112, 128, 176, 181-82) McCombs testified she called 911 herself, but that was determined to be false. (RP 107, 192-93) Another neighbor called 911 and McCombs subsequently took their

phone and spoke to the operator. (CP 192-93) The State also stipulated that, contrary to McCombs' previous testimony, she was not calm during the call and was instead obviously upset and agitated. (RP 107, 192-93)

The State charged Q.S.J.-T. with one count of fourth degree assault. (CP 1) Q.S.J.-T. gave notice that she would be claiming she acted in self-defense. (CP 4) Following a bench trial, the court found Q.S.J.-T. guilty. (CP 5) In its oral ruling, the court stated:

And so I am not finding credible that the respondent is now claiming that Ms. McCombs grabbed her and that she was defending herself. That grabbing would have been the story -- would have been the story that would have been conveyed to the police on August 3rd, and it was not.

If Ms. McCombs had placed a hand on the respondent, I'm sure that Ms. Jackson would, most certainly, have told that to the police, as would the respondent have told that to the police on the day that the incident happened. But, again, that was not provided to the police.

And it's also -- and the first time that it is coming out is actually here in court. So I do not find credible the story today that Ms. McCombs grabbed respondent and that respondent was acting in self-defense by hitting her or smashing Ms. McCombs in the face.

(RP 212) In its written findings, the court states that it "does not find self-defense to be a credible defense and finds the respondent to have been the aggressor." (CP 9)

The court imposed a 30 day suspended sentence, contingent on Q.S.J.-T. enrolling in the Fresh Start Program through Tacoma Community College. (RP 224; CP 12) Q.S.J.-T. filed a timely Notice of Appeal. (CP 20)

#### **IV. ARGUMENT & AUTHORITIES**

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14.

The State bears the burden of proving every element of its case beyond a reasonable doubt, and it may not shift any part of that burden to the defendant. *Winship*, 397 U.S. at 361; *State v. Fleming*, 83 Wn. App. 209, 215, 912 P.2d 1076 (1996); *Mullaney v. Wilbur*, 421 U.S. 684, 701-02, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). As a result, the defendant has no burden to present any evidence at all. *See Fleming*, 83 Wn. App. at 215.

In a bench trial, the reviewing court presumes that a trial judge will disregard inadmissible matters when making findings, and will apply the law correctly. *See State v. Adams*, 91 Wn.2d 86, 93, 586 P.2d 1168 (1978); *State v. Read*, 147 Wn.2d 238, 245-46,

53 P.3d 26 (2002).

However, that presumption can be overcome with evidence that the trial judge misapplied the law. For example, in *State v. Cantu*, 156 Wn.2d 819, 826-27, 132 P.3d 725 (2006), the juvenile defendant was convicted of residential burglary after a bench trial. The Supreme Court first noted that a trier of fact may employ a permissive inference of intent to commit that crime whenever the evidence shows a person enters or remains unlawfully in a building. *Cantu*, 156 Wn.2d at 832 (citing RCW 9A.52.040; *State v. Grimes*, 92 Wn. App. 973, 980 n. 2, 966 P.2d 394 (1998)). But the Court reversed *Cantu*'s conviction because the judge employed a *mandatory* presumption of intent and improperly shifted the burden to disprove intent to the defense:

Due process requires the State to bear the “burden of persuasion beyond a reasonable doubt of every essential element of a crime.” A fair reading of the record leads us to conclude that the trial judge relieved the State of this burden by creating a mandatory presumption of criminal intent which *Cantu* was required to rebut. We therefore reverse the Court of Appeals, vacate the conviction without prejudice, and remand for further proceedings[.]

*Cantu*, 156 Wn.2d at 829 (citations omitted).

The State charged Q.S.J.-T. with fourth degree assault against McCombs. (CP 1) RCW 9A.36.041 defines fourth degree

assault. It provides: “A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” An 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).

Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). Once a defendant produces some evidence of self-defense, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. See *Acosta*, 101 Wn.2d at 615-16. Where the State is relieved from proving the absence of self-defense, an error of constitutional magnitude results, which may be raised for the first time on appeal. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Q.S.J.-T. and Jackson both testified that McCombs came towards Q.S.J.-T. aggressively and grabbed or pushed her, and Q.S.J.-T. testified she only pushed McCombs' face in order to move

McCombs away from her. (RP 50-151, 172, 173-74) But the court states that it “does not find self-defense to be a credible defense[.]” (CP 9) The court is clearly placing the responsibility of proving self-defense on Q.S.J.-T., rather than placing the burden to disprove self-defense on the State. The trial court thereby relieved the State of its burden of proving an essential element of the crime of fourth degree assault, and improperly shifted the burden to Q.S.J.-T. to disprove her guilt.

#### V. CONCLUSION

The trial court relieved the State of its burden of proving the absence of self-defense. This error of constitutional magnitude requires that Q.S.J.-T.’s fourth degree assault conviction be reversed and that her case be remanded for a new trial. *Cantu*, 156 Wn.2d at 829.

DATED: March 27, 2019



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STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Q.S.J.-T.

**March 27, 2019 - 3:35 PM**

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STATE OF WASHINGTON,  
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Q.S.J.-T.,  
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Appeal No. 53015-5-II

DECLARATION OF SERVICE

I, Stephanie C. Cunningham, court-appointed counsel for Appellant Q.S.J.-T., certify that I caused to be placed in the mails of the United States, first class postage pre-paid, a true and complete copy of the OPENING BRIEF OF APPELLANT and this CERTIFICATE OF MAILING, addressed to:

Q.S.J.-T.  
4319 S Puget Drive  
Tacoma, WA 98409

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: March 27, 2019



STEPHANIE C. CUNNINGHAM, WSB #26436  
Attorney for Appellant Q.S.J.-T.

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