Supreme Court No. 94422-9
Court of Appeals No. 34721-4-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

CITY OF RICHLAND, Respondent

v.

JEFFREY SHANE LIPPERT, Petitioner

PETITION FOR REVIEW

Eric B. Eisinger, WSBA No. #34293
Bret Uhrich, WSBA No. #45595
Attorneys for Jeffrey Lippert, Petitioner

1333 Columbia Park Trail, Ste. 220
Richland, WA 99352
(509) 735-4444 – Telephone
(509) 735-7140 – Fax

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COMES NOW, petitioner Jeffrey Lippert, by and through his attorneys of record, and petitions the Court for review. This motion is brought pursuant to RAP 13.3 and is supported by the accompanying memorandum and the record herein. The Court should accept review because a substantial public interest exists in clarifying what evidence is needed to rebut the presumption that a trial court does not rely on impermissible evidence when the matter is tried to the bench as set forth in *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002). In this matter, the trial court rejected the petitioner's self-defense claim because the petitioner did not retreat from the scene of the incident, a duty which does not exist under Washington law. The trial court explicitly found petitioner's testimony less credible than complainant based on this non-existent duty.

The court of appeals concluded this error was harmless beyond a reasonable doubt because the testimony of the complainant was sufficient to support the conviction and the trial court found the complainant's testimony credible. This ruling conflicts with this Court's decision in *State v. Gower*, 179 Wn.2d 851, 856, 321 P.3d 1178, 1180 (2014). In *Gower*, this Court held:

> The *Read* presumption is, therefore, inapplicable when the judge actually considered matters which are inadmissible when making his or her findings. Thus, a defendant can rebut the presumption by showing the verdict is not supported by sufficient admissible evidence, or the trial court relied on the

> inadmissible evidence to make essential findings that it otherwise would not have made.

Id. (internal quotations and alterations omitted). Because the trial court explicitly relied on impermissible considerations and those considerations tainted the credibility finding, the error cannot be considered harmless beyond a reasonable doubt.

Additionally, the Court should accept review because the charging document sets forth charges solely under a municipal ordinance which defined domestic violence assault as "unlawful force against the family or household member of another." In other words, someone else's family member. The municipal ordinance further omitted the element that the physical force must be "harmful and offensive". These defects rendered the charging document insufficient pursuant to *State v. McCarty*, 140 Wn.2d 420, 424-425, 998 P.2d 296 (2000) and *State v. Acosta*, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984).

I. IDENTITY OF THE PETITIONER

The petitioner in this matter is Jeffrey Lippert. Jeffrey Lippert was the criminal defendant at the trial court and is the petitioner herein.

II. CITATION TO THE COURT OF APPEALS DECISION

The Washington State Court of Appeals – Division III entered an order on March 27, 2017 denying the motion to modify the commissioner's ruling terminating review. *City of Richland v. Jeffrey Lippert*, No. 34721-4.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the trial court's explicit reliance on impermissible considerations in determining witness credibility is sufficient to rebut the *Read* presumption.

B. Whether a charging document incorporating a definition of domestic violence as "unlawful force against the family or household member of another" as opposed to "unlawful force against another family or household member" and setting forth contradictory elements was sufficient in informing the petitioner of the elements of assault.

C. Whether a municipal ordinance which omits the essential element of "harmful or offense" from the definition of assault is preempted and thus unconstitutional under Washington law.

IV. STATEMENT OF THE CASE

On December 19, 2014, less than two months after a 50/50 final parenting plan was entered following a contentious nine-day bench trial, petitioner Jeffrey Lippert met his estranged wife Jennifer Lippert at a Starbucks to exchange custody of their two children. *RP at 21-24; 95.*

Jennifer approached Jeffrey while he was sitting in his truck. *RP at 100.* Jennifer testified that while arguing through the truck window, Jeffrey opened the truck door and lunged at her, resulting in her receiving a scratch

on her thumb and bruise on her arm. *RP at 42.* Jeffrey and Amanda Crook testified that Jennifer opened the door of the truck, a struggle ensued, and that Jennifer was pushed out of the truck and Jeffrey drove away. *RP at 103-06; 129-31.*

The City of Richland amended the complaint on the morning of trial to charge one count of assault as follows:

> Jeffrey Lippert did violate RMC 9.05.030 relating to SIMPLE ASSAULT – Domestic Violence in that he did then and there, without lawful authority, intentionally used or threatened to us by purposeful words or acts, unlawful physical force against the family or household member of another…

The City also charged Lippert with theft of property of which he was acquitted and is not at issue in this appeal. Jeffrey Lippert asserted self-defense and the matter was tried to the bench.

At the conclusion of trial, the trial court found Lippert guilty of assault because he failed to retreat from the scene of the incident. "I don't see a case where self-defense – it's not consistent, the actions of Mr. Lippert after what happened, could have driven away at any time, [doesn't] show me that there was any self-defense." *RP at 159.*

As part of the written findings of fact, the court stated:

> 5. The physical injuries sustained by Jennifer Lippert are convincing that an assault happened, and that Mr. Lippert assaulted Jennifer Lippert outside the vehicle. **Self-defense is not consistent with the actions of Mr. Lippert after what happened. Mr. Lippert could have driven away at any**

> **time, this also shows that there was not any self-defense.** Jennifer Lippert was credible with regards to Mr. Lippert getting out of the truck and attacking her.

Finding of Fact and Conclusions of Law at 4 (emphasis added).

On September 30, 2016, Lippert moved the Washington State Court of Appeals – Division III for discretionary review. In denying review, the commissioner agreed that the trial court's reliance on Lippert's failure to retreat was in error. *Comm'r Ruling, January 9, 2017, at pg. 4.* However, the commissioner ruled that the error was harmless beyond a reasonable doubt because the trial court found Jennifer Lippert's testimony to be more credible and therefore her "testimony, standing alone, supports a conclusion that Mr. Lippert did *not* act in self-defense." *Comm'r Ruling, January 9, 2017, at pg. 5.*

V. ARGUMENT

The Court should grant this petition for review because the trial court improperly considered Jeffrey Lippert's failure to retreat in determining that his testimony was not credible. This is inconsistent with the rulings of this Court and the decisions of the courts of appeals. It also raises a significant issue of public interest in clarifying what constitutes a sufficient rebuttal of the *Read* presumption in matters tried to the bench.

The Court should further grant review because the charging document purported to define domestic violence as physical force against

someone else's family member as opposed to the defendant's own family member, and because the municipal code under which Lippert was charged omits the requirement that the force be "harmful or offensive" and is thus preempted by Washington State law.

In considering whether to grant discretionary review, the Court considers the following factors:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). A case may raise a question of substantial public interest where the issue "invites unnecessary litigation on that point and creates confusion generally." *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903, 904 (2005).

The court of appeals' conclusion that the trial court's error was harmless beyond a reasonable doubt is in conflict with this Court's decision in *State v. Gower*, 179 Wn.2d 851, 321 P.3d 1178 (2014). Further, a substantial public interest exists in clarifying the contours of rebutting the *Read* presumption when the record shows that the bench considered inadmissible evidence or undertook impermissible considerations.

Regarding the sufficiency of the charging document, the City of Richland has effectively conceded that the municipal ordinance improperly defined domestic violence by amending the ordinance during the course of this appeal. The new ordinance reads as follows:

> No person may, as a family or household member, intentionally use or threaten to use by purposeful words or acts, unlawful force against another ~~the~~ family or household member ~~of another~~. RMC 9.05.030(A).

However, this does not cure the insufficient complaint which set forth both the statutory element of violence against the "family member of another" and the non-statutory element of violence against one's own family member. Concluding that the charging document was nonetheless sufficient is inconsistent with this Court's decisions in *State v. Kjovsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991) and *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900, 902 (1998), as well as the recent decision *Musacchio v. United States*, 136 S. Ct. 709 (2016).

Finally, the Court should accept review in regard to whether a municipal ordinance which omits the requirement that an assault must include "harmful or offense" contact is preempted by the Washington State definition of assault. The issue of preemption of criminal ordinances has not been addressed by this Court since *City of Seattle v. Eze*, 111 Wn.2d 22, 759 P.2d 366 (1988) which did not address omitted elements of criminal offenses. Allowing this decision to stand would create the anomalous

situation where omitting the "unlawful" element of assault would result in preemption, *see City of Pasco v. Ross*, 39 Wn. App. 480, 694 P.2d 37 (1985), but omitting the "harmful or offensive" element would not. Because this decision conflicts with a published decision of the court of appeals, this Court should accept the petition for review.

A. The Court Should Grant The Petition For Review Because The Trial Court Improperly Imposed A Duty To Retreat On Petitioner And In Doing So Explicitly Relied On This Failure To Conclude The Petitioner's Testimony Was Not Credible, Rebutting The Presumption That The Trial Court Does Not Rely On Impermissible Evidence In A Bench Trial.

The Court should grant the petition for review because the trial court improperly imposed a duty to retreat on the petitioner in rejecting his claim of self-defense. "In Washington, one who is assaulted in a place he as a right to be has no duty to retreat." *State v. Williams*, 81, Wn. App. 738, 743-744, 916 P.2d 445 (1996). As in most states, Washington law imposes no duty to retreat on one who acts in self-defense and is not the original aggressor. *Id.* at 743. Here, Lippert proceeded to trial on a claim of self-defense. All of the witnesses testified that Jennifer Lippert approached Jeffrey Lippert while he was seated in his truck. *RP at 100.* Furthermore, the trial court did not find that the no duty to retreat doctrine was inapplicable or that Jeffrey Lippert was the original aggressor.

Consequently, the trial court erred when it concluded that Lippert did not act in self-defense because he did not retreat from the scene of the incident.

The trial court's oral ruling at the conclusion of trial indicates that Lippert's failure to retreat was a deciding factor in his conviction. Included in the oral ruling is the following statement from the court: "I don't see a case where self-defense – it's not consistent, the actions of Mr. Lippert after what happened, could have driven away at any time, don't show me that there was any self-defense." *RP at 159.* This was further incorporated into the written findings of fact and conclusions of law entered by the trial court. *Findings of Fact at 4.*

The court of appeals commissioner agreed that this was an impermissible consideration. *Comm'r Ruling, January 9, 2017, at pgs. 4-6.* However, the commissioner noted that in bench trials the conviction may be affirmed if the error was harmless beyond a reasonable doubt. *Id.* at 4-5 (*citing State v. Heffner*, 126 Wn. App. 803, 810 110 P.3d 219). In concluding that these errors were harmless beyond a reasonable doubt, the commissioner relied on the trial court's conclusion that Jennifer Lippert was the more credible witness. *Comm'r Ruling, January 9, 2017, at pg. 5.* Based on this "Ms. Lippert's testimony, standing alone, supports a conclusion Mr. Lippert did not act in self-defense." *Id.*

Proving that the error was harmless beyond a reasonable doubt is a "heavy burden" which has not been met in this case. *See State v. Stanley*, 120 Wn. App. 312, 317, 85 P.3d 395, 397 (2004). The commissioner's reliance on the credibility determination was in error because the credibility determination itself was rendered using an impermissible consideration. "In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Read*, 147 Wn.2d at 245, 53 P.3d 26, 30 (2002) (*quoting Harris v. Rivera*, 454 U.S. 339, 346 (1981)). However, this presumption is rebuttable. *Read*, 147 Wn.2d at 245.

> **The *Read* presumption is, therefore, inapplicable when the judge actually "consider[ed] matters which are inadmissible when making his [or her] findings."** *Id.* Thus, "[a] defendant can rebut the presumption by showing the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made."

State v. Gower, 179 Wn.2d 851, 856, 321 P.3d 1178, 1180 (2014) (internal citations omitted) (emphasis added). "The *Read* presumption, as our case law makes clear, depends **entirely** on our recognition that the trial judge knows the rules of evidence and will therefore discount truly inadmissible evidence when making a decision in a bench trial." *Id.* (emphasis added).

In this case, the trial court explicitly relied on impermissible considerations in making credibility determinations at trial. We know this because the trial court told us this both in its oral ruling and in its written

findings and conclusions. When the credibility determination is itself tainted, the Court cannot rely on the credibility determination to conclude the error was harmless beyond a reasonable doubt. For example, if the trial court had explicitly made a credibility determination based on the race of the witnesses, the Court could not otherwise rely on the testimony of a witness, and the finding of credibility, to conclude the error is harmless.[1]

As the Court in *Gower* made clear, when the trial court relies on impermissible considerations, the error cannot be said to be harmless beyond a reasonable doubt. Consequently, the Court should grant the petition for review.

B. The Court Should Grant The Petition For Review Because The Charging Document Insufficiently Advised The Petitioner Of The Elements of Assault By Describing Domestic Violence As An Assault Against The Family Member Of Another.

The Court should grant the petition for review because the charging document was defective in advising Lippert of the nature of the charges against him which is inconsistent with the decisions of this Court. In this matter, the amended information set forth the definition of assault in Richland Muncipal Code ("RMC") 9.05.030(A). Inexplicably, RMC

[1] While this hypothetical would certainly be an outrageous finding, Jeffrey Lippert has a due process right under the Fourteenth Amendment which is entitled to the same protection to that of a defendant entitled to equal protection under the same Amendment.

9.05.030(A) purported to define Simple Assault – Domestic Violence, as an assault upon a member of someone else's family instead of one's own.

The criminally accused has a protected right under our state and federal constitutions to be adequately informed of the nature of the charges against him. *State v. McCarty*, 140 Wn.2d 420, 424-425, 998 P.2d 296 (2000). "Every material element of the charge, along with all essential supporting facts, must be put forth with clarity." *Id.* at 425. "It is well settled that a charging document satisfies these constitutional principles only if it states all the elements of the crime charged." *Id.* "If a charging document is challenged for the first time on review, however, it will be construed liberally." *Id.*

> We have repeatedly and recently insisted that a charging document is constitutionally adequate only if all essential elements of a crime, statutory and non-statutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense.

State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177, 1180 (1995) (*citing State v. Simon*, 120 Wn.2d 196, 198, 840 P.2d 172 (1992)). When reading the information liberally, our courts employ a two-prong test under *State v. Kjovsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991): "(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he or she was actually prejudiced by the inartful language." *Id.* at 425. "If the necessary elements

are not found or fairly implied, however, we presume prejudice and reverse without reaching the question of prejudice." *Id.*

In this case, the prosecution filed an amended criminal complaint on the morning of trial. *RP at 13.* The amended complaint charged one count of Simple Assault- Domestic Violence. The amended criminal complaint charged Lippert with assault under Richland Municipal Code ("RMC") 9.05.030, and referred to the city code definition of assault as opposed to the state statute:

> Jeffrey Lippert did violate RMC 9.05.030 relating to SIMPLE ASSAULT – Domestic Violence in that he did then and there, without lawful authority, intentionally used or threatened to us by purposeful words or acts, unlawful physical force against the family or household member of another. To wit, he did intentionally use unlawful physical force against Jennifer Lippert, with who he has children in common.

It is immediately apparent that the amended complaint is self-contradictory, defining assault as physical force against the family or household member of another and then describing the purported assault as against Lippert's family member. And while this Court has thoroughly addressed that non-statutory elements become the law of the case, *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900, 902 (1998), it has never addressed when the statutory element and the non-statutory element are mutually exclusive. The reason is simple: setting forth mutually exclusive elements puts the defendant in an unwinnable situation, which is the definition of prejudice described in

Kjovsvik. Further, the Supreme Court of the United States' recent decision in *Musacchio v. United States*, 136 S. Ct. 709 (2016) does not save the City of Richland because the City chose to prove the non-statutory element over the statutory element, rendering the information insufficient regardless of *Musacchio*.

In light of this mis-definition, the City of Richland amended its assault ordinance on June 21, 2016. The ordinance now reads as follows:

> A. No person may, as a family or household member, intentionally use or threaten to use by purposeful words or acts, unlawful force against another ~~the~~ family or household member ~~of another~~. RMC 9.05.030(A).[2]

However, an amendment of the ordinance long after trial does not save this prosecution. The amended complaint filed against Lippert set forth the definition of domestic violence as against "the family member of another". This definition was insufficient in informing Lippert of the necessary elements and in compounding the error, the City of Richland put forth evidence to prove the non-statutory element instead of the statutory element. As a result, the Court should grant this petition for review as the underlying decision is inconsistent with the decisions of this Court, raises a significant question of law and affects a substantial public interest.

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[2] For the Court's reference, a copy of the June 21, 2016, City of Richland Ordinance No. 32-16 amending RMC 9.05.030(A) is attached as Appendix C.

C. The Court Should Grant This Petition For Review Because That The Richland Municipal Code Provision Charging Petitioner With Assault Is Preempted By State Law.

The Court should grant the petition for review because the City of Richland ordinance under which Lippert was charged is preempted because it omits the element of "harmful or offensive contact" from the definition of assault. Under article XI, section 11 of the Washington Constitution, "[c]ity ordinances may be enacted to prohibit conduct constituting a crime under state law as long as the state law does not, on its face, evince an intent to be exclusive." *City of Pasco v. Ross*, 39 Wn. App. 480, 694 P.2d 37 (1985). Washington's assault statutes, RCW 9A.36, are a matter of mixed local and state concern. *Id.* at 482. However, municipalities lack authority under our state constitution to enact an assault statute that is in conflict with state law. *Id.* at 484 (Pasco municipal ordinance struck down because it omitted the element that the force used to commit the crime of assault must be "unlawful"). Article XI, section 11 of the Washington Constitution reads as follows:

> Article XI, Section 11 – Police and Sanitary Regulations. Any county, city, town, or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

In *Ross*, defendant Alvin Ross was charged with use of force against another in violation of Pasco Municipal Code 9.04.030. *Ross*, 39 Wn. App.

at 481. At trial, Officer Monroe stated he saw Ross strike a woman on the cheek with his left hand causing her to fall and that she was rubbing her cheek in pain. *Id.* Ross testified and admitted that he did strike the woman's cheek, but that the contact was playful with the woman (with whom he had an ongoing relationship). *Id.* Under the Pasco ordinance, "a crime is committed under this ordinance when the defendant: (1) uses force or violence against another; (2) acts willfully; and (3) does not act in self-defense." *Id.* at 483. On appeal, Ross argued that the ordinance was unconstitutional and preempted because it failed to include the element of unlawful force. *Id.* The court agreed and reversed the conviction. *Id.* Notably, the court rejected the City's argument that "force" should be interpreted to mean "unlawful force", to avoid preemption. *Id.* at 484.

In this case, *Ross* is directly on point. Lippert was charged under former RMC 9.05.030(A), which omits that the unlawful force must be "harmful or offensive." Washington Pattern Jury Instruction 35.50 defines "assault", in part, as "an intentional touching or striking... of another person, with unlawful force, **that is harmful or offense**." 11 Wash. Prac., Pattern Jury Instr. Crim., WPIC 35.50 (3d Ed) (emphasis added). "A touching or striking... is offensive if the touching or striking... would offend an ordinary person who is not unduly sensitive." *Id.* The caselaw similarly provides that "[a] touching may be unlawful because it was neither

legally consented to nor otherwise privileged, **and was either harmful or offensive**." *State v. Thomas*, 98 Wn. App. 422, 424, 989 P.2d 612 (1999) (emphasis added).

In this case, former RMC 9.05.030(A) is in conflict with state law because it criminalizes the intentional use of unlawful physical force against another without regard to whether that force was harmful or offensive, which is an essential element. *Thomas*, 98 Wn. App. at 424; *Ross*, 39 Wn. App at 484. Moreover, based on the arguments set forth *supra*, former RMC 9.05.030(A) in effect increases the penalty for non-domestic violence assaults by treating them as a domestic violence offense.

Further, the text of the ordinance cannot be said to incorporate the common law definition of assault. First, the text of RMC 9.05.030(A) does not use the term "assault." *Cf.* RMC 9.05.030(B). Thus, there can be no incorporation of a common law definition when the word to which that definition attaches is not used. *See State v. Komok*, 113 Wn.2d 810, 783 1061 (1989) (common law definition of theft not incorporated where legislature enacted different statutory definition). Second, the unlawfulness of the force and its harmfulness or offensiveness are separate elements because unlawfulness refers to force that is not justified. *State v. Shelley*, 85 Wn. App. 24, 85 P.2d 489 (1997) (force not unlawful where consented to in a sporting event); *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624

(1999) (claim of self-defense is premised on the lawful use of force). The use of force in any given situation may be justifiable or unjustifiable. Where the use of force is unjustifiable (i.e. unlawful), it must also be harmful or offensive in order to rise to the level of a criminal assault. For this reason, the WPIC pattern jury instruction presents the unlawfulness of the force and its harmfulness or offensiveness as separate elements. Lastly, it is important to emphasize that if the incorporation of the common law definition of assault could save the ordinance here, then the ordinance in *Ross* would have also been saved. It is not possible to reconcile that the "unlawful" element of common law assault cannot be incorporated but that the "harmful or offensive" element can. The court in *Ross* declined to read the missing element of "unlawfulness" into the Pasco municipal code by referring to the common law definition of assault, and for the reasons stated in *Ross* the Court should refuse to do so here. Because the decision is in conflict with a published decision of the Court of Appeals, the Court should grant the petition for review.

VI. CONCLUSION

This Court should accept review to clarify the *Read* presumption, particularly due to the trial court's reliance on petitioner's failure to retreat from the scene of the incident, which was clear legal error. Furthermore, this Court should accept review to address the constitutionality of the City

of Richland's municipal ordinance in question, which is preempted by state law under article XI, section 11 of the Washington Constitution. Because these are significant questions of law affecting the public interest, this Court should grant the petition for review.

DATED this 21st day of April, 2017

ERIC B. EISINGER, WSBA #34293
BRET UHRICH, WSBA #45595
Attorneys for Petitioner Jeffrey Lippert

On the 21st day of April, 2017, I served a true copy of:

Petitioner's Motion for Review

by E-mail and US First Class Mail to:

Jared R. Hanson
Bell Brown & Rio, PLLC
410 N. Neel Street, Suite A
Kennewick, WA 99336
jared@bellbrownrio.com

I certify the foregoing to be true and correct under the penalty of perjury under the laws of the State of Washington.

Executed this 21st day of April, 2017, at Richland, Washington.

HOLLY R. HARRIS

APPENDIX A

The Court of Appeals
of the
State of Washington
Division III

CITY OF RICHLAND, Respondent, v. JEFFREY SHANE LIPPERT, Petitioner.	)	No. 34721-4-III COMMISSIONER'S RULING

Jeffrey Shane Lippert seeks discretionary review of the Benton County Superior Court's September 8, 2016 Order that affirmed the district court's decision he was guilty of simple assault - DV.

At a bench trial, Jennifer Lippert testified that she and Mr. Lippert have joint custody of their two children. They met at a pre-arranged location – Starbucks – on December 19, 2014, for Mr. Lippert to deliver the children to her for the week. Mr.

Lippert left the children in his vehicle and came into Starbucks by himself to ask her why he had not received the children's school pictures. When she told him he had to pick his pictures up from the school, he left and moved the truck to a different location in the parking lot. She followed him with her camcorder, but she then returned to Starbucks after she saw Mr. Lippert get the children out of his vehicle and begin walking with them toward the coffee shop. Earlier, she had reminded Mr. Lippert that the children needed their wrestling gear because she was driving them to Oregon for a tournament the next day. She testified that Mr. Lippert told her she had all the gear she was going to get. When she discovered that all the gear was not in their backpacks, she followed Mr. Lippert, who had returned to his truck. Mr. Lippert's girlfriend, Amanda Crook, was also seated in the truck at this time.

Ms. Lippert had the camcorder on as she asked Mr. Lippert for the wrestling gear through the closed window of his truck. He got out and "lunged" for her and tried to get the camcorder. RP at 32. She testified he had hold of her left arm and tried to take the camcorder out of her right hand. He finally got control of the camcorder, snapped the viewfinder off, and tossed both pieces it into his truck. His grip on her arm resulted in bruising. She called the police. When they arrived, they took a picture of a bruise that had developed under her left arm.

The police attempted unsuccessfully to contact Mr. Lippert and Ms. Crook. They left a message on Mr. Lippert's phone.

Mr. Lippert's testimony contradicted Ms. Lippert's in several areas. He stated he never moved his truck – it was in the same location throughout – and that he immediately took the children into Starbucks. He left as soon as the children were with Ms. Lippert and walked back to his truck. He got in, closed the door, and Ms. Lippert was right there saying something about the wrestling gear, all of which he stated was in the children's backpacks. However, she was so close to the vehicle that he did not believe he could safely pull away. He waited for a couple of minutes, but eventually popped the door of the truck ajar and reached for his cell phone because he realized the children were alone in Starbucks. At that moment, Ms. Lippert grabbed him. He put his hands up to protect himself, then pushed her so that he could exit the truck. He succeeded and stood outside his truck with the door open. Ms. Lippert still tried to grab him. He pushed her off and created enough space that he was able to get back into the truck and leave. He never saw a video camera. He did not call the police.

Amanda Crook agreed with Mr. Lippert's testimony in several respects. She testified that they were parked in the same location throughout the incident. Ms. Lippert followed Mr. Lippert out of Starbucks. Ms. Lippert stood right next to the door of the truck and asked for something, she did not recall what. Mr. Lippert reminded Ms. Lippert that the children were in Starbucks alone, and she responded that they would be fine. She believed Ms. Lippert opened the vehicle door, came into the truck, and put her hands on Mr. Lippert. He got out of the truck. Ms. Crooks testified that she could not

see what went on after Mr. Lippert existed the truck. Nor could she see whether Ms. Lippert had a video camera.

The District Court found that Ms. Lippert was credible. The court concluded that Mr. Lippert got out of his vehicle and grabbed Ms. Lippert by the left arm forcefully enough to bruise her. The court also concluded that Mr. Lippert did not act in self-defense. It cited its finding that Mr. Lippert could have driven away when Ms. Lippert first approached, and its finding that Mr. Lippert had not reported the incident to police.

The superior court affirmed the district court.

Mr. Lippert argues that this Court should accept discretionary review based upon RAP 2.3(d)(1) (the decision conflicts with a Washington appellate court decision), and (d)(2) (the decision involves a significant question of constitutional law.) Specifically, he contends that (1) no "duty to retreat" exists in Washington, and (2) the court violated his right to remain silent when it relied upon the fact he did not report the incident to police.

1. Duty to Retreat.

The district court concluded that Mr. Lippert did not act in self-defense and cited its finding that Mr. Lippert could have driven away at any time. No duty to retreat exists if the person is in a place he has a right to be. *State v. Williams*, 81 Wn. App.738, 743-744, 916 P.2d 445 (1996).

However, as stated in *State v. Heffner*, 126 Wn. App. 803, 810, 110 P.3d 219 (2005), "findings of fact and conclusions of law from a bench trial [are] subject to a

harmless error analysis." The court determines "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* Here, the court also found that "Jennifer Lippert was credible with regards to Mr. Lippert getting out of the truck and attacking her." District Court's Conclusion of Law 5. Ms. Lippert's testimony, standing alone, supports a conclusion Mr. Lippert did *not* act in self-defense. I.e., she was outside his vehicle asking him about the wrestling gear and videoing him when he got out, grabbed her left arm, and forcibly took the video camera from her right hand. Any error associated with the court's finding that Mr. Lippert could have driven away was harmless beyond a reasonable doubt because it did not contribute to the verdict.

Nevertheless, Mr. Lippert argues that the district court's oral ruling indicated that his failure to retreat was pivotal to its decision that he did not act in self-defense. This Court has read the oral ruling and has determined that the district court based its decision to convict on Ms. Lippert's testimony that he had exited the truck and attacked her – not on the fact that Mr. Lippert had not driven away. The court stated that "I believe Jennifer Lippert's testimony that Mr. Lippert got out of the truck and attacked her." RP at 159.

2. Failure to Report.

Mr. Lippert argues that the District Court's conclusion that "[t]here's no report of assault by Mr. Lippert or Ms. Crook" violated his right to remain silent. *See State v. Keene*, 86 Wn. App. 589, 595, 938 P.2d 839 (1997). Again, any error was harmless

beyond a reasonable doubt because that finding did not contribute to the verdict. Ms. Lippert's testimony, standing alone, was sufficient to support the finding of guilt.

Mr. Lippert also argues that this Court should accept discretionary review under RAP 2.3(d)(3) (the decision involves an issue of public interest). Specifically, an appellate court should determine (3) whether a complaint that does not specifically allege that the assault was on a family member is sufficient, and (4) whether the municipal statute conflicts with state law on assault.

3. Insufficiency of the Charging Document.

Mr. Lippert asserts the amended information was insufficient because it did not allege he used unlawful force "*against the family or household member*" of another, as set forth in the Richland Municipal Code. (Emphasis added.) Richland Municipal Code 9.05.030(A) requires that the defendant act "as a family or household member."

The amended complaint, attached to Mr. Lippert's motion, alleged that "on or about the 19th day of December, 2014, in the City of Richland, county of Benton and State of Washington, Jeffery Lippert did violate RMC 9.05.030 relating to SIMPLE ASSAULT - Domestic Violence in that he did then and there, without lawful authority, intentionally used or threatened to use by purposeful words or acts, unlawful physical force against the family or household member of another. To wit; he did intentionally use unlawful physical force against Jennifer Lippert, *with whom he has children in common.*" (Emphasis added.)

This Court agrees with the prosecutor that a liberal construction of the complaint's language that referred to his and Ms. Lippert's "children in common" provided notice to Mr. Lippert that an element of the offense is that a familial relationship exists. *See State v. Kjorsvik*, 117 Wn.2d 93,1 06, 812 P.2d 86 (1991).

4. Preemption.

The City lacks authority to enact a statute that conflicts with State law. *See City of Pasco v. Ross*, 39 Wn. App. 480, 484, 694 P.2d 37 (1985). Mr. Lippert argues that the municipal code conflicts with State law because the code omits a provision that the force the defendant uses must be "harmful or offensive".

However, "[n]o Washington statute defines the term 'assault.' As a result, the courts have looked to the common law for a definition. They have arrived at a definition that contains three alternative means for committing an assault: (1) battery; (2) attempted battery; and (3) creating an apprehension of bodily harm. Under the first alternative, an assault is a touching that is either *harmful or offensive*, if it was neither legally consented to nor otherwise privileged." (Emphasis added.) 13A Wa. Prac. §305 (2016). The city code provision here is as detailed as the state statute and does not conflict with it.

In his reply brief here, Mr. Lippert attempts to distinguish the above authority on the basis that the state statute uses the term "assault," which has a common law meaning, but that term is not present in the code provision. This court is not persuaded that the distinction makes a difference. The code makes it unlawful to "intentionally use or

threaten to use by purposeful words or acts, unlawful physical force against . . . another." Just like the term "assault," use of force that is unlawful – i.e., neither legally consented to nor otherwise privileged – is also *harmful or offensive.*

Finally, Mr. Lippert contends that this Court should accept discretionary review under RAP 2.3(d)(4) (the court has far departed from the accepted and usual course of judicial proceedings). Specifically, the court's findings do not state that Mr. Lippert committed the charged offense; i.e., they do not find that he acted intentionally, used unlawful force, or that the force was harmful or offensive.

The district court's conclusion of law 6 states that "[t]here is enough evidence to convince beyond a reasonable doubt that on 12/19/14 Jeffery Lippert assaulted Jennifer Lippert, his former wife, in Richland, WA, not in self-defense." Motion, Appendix A, Findings of Fact and Conclusions of Law at 4, entered March 16, 2014.

This Court has obtained the record of the district court trial from the superior court clerk. Based upon its review of that record, this Court holds that the evidence was sufficient to support the district court's conclusion that Mr. Lippert assaulted Ms. Lippert– i.e, he intentionally used unlawful force against Ms. Lippert that was harmful or offensive, as the investigating officer's picture of Ms. Lippert's arm documents, and that said force was not in self-defense.

Mr. Lippert's motion does not include argument or authority that addresses ineffective assistance of counsel, even though he identified ineffective assistance as an

issue. Therefore, this Court need not address it. *See State v. Corbett*, 158 Wn. App. 576, 586, 242 P.3d 52 (2010).

Accordingly, IT IS ORDERED, no ground exists for discretionary review, and the motion is denied.

Monica Wasson
Commissioner

FILED
MARCH 27, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

CITY OF RICHLAND, Respondent, v. JEFFREY SHANE LIPPERT, Petitioner.	)	No. 34721-4-III ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

THE COURT has considered petitioner Jeffrey Shane Lippert's motion to modify the Commissioner's Ruling of January 9, 2017, and the record and file herein;

IT IS ORDERED the motion to modify the Commissioner's Ruling is denied.

PANEL: Judges Lawrence-Berrey, Siddoway and Pennell

FOR THE COURT:

ROBERT LAWRENCE-BERREY
Acting Chief Judge

APPENDIX B

CERTIFIED TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN BENTON COUNTY DISTRICT COURT - KENNEWICK, WASHINGTON

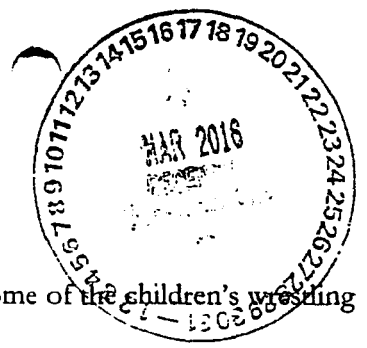
IN THE DISTRICT COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

CITY OF RICHLAND, Plaintiff, vs. JEFFREY LIPPERT, Defendant.	Cause No. 4Z1110843 FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING BENTON COUNTY DISTRICT COURT NONJURY TRIAL

On September 3, 2015 Jeffery Lippert had a nonjury trial heard by Judge Terry Tanner in Benton County District Court for cause number 4Z1110843 Simple Assault-Domestic Violence. The City of Richland was represented by Attorney Jared R. Hanson and the Defendant was represented by Attorney Alexander B. Johnson. This Court, after hearing a nonjury trial in full, hereby makes the following:

FINDINGS OF FACT

1. Jeffrey Lippert and Jennifer Lippert were previously in a marital relationship in which they had two children in common.
2. After separating Jeffrey and Jennifer shared custody of the two children. On 12/19/14 a child custody exchange was arranged to occur at Starbucks off of Gage Boulevard in Richland, WA around 6:00 P.M.
3. The children were exchanged inside of the Starbucks store. Jennifer Lippert followed



after the Defendant to his truck in an attempt to retrieve some of the children's wrestling gear.

4. The Defendant was inside his truck with his girlfriend Amanda Crook. Jennifer spoke with the Defendant through his rolled up window. The truck had been reversed into the parking space so that it may be driven forward out of the parking space.
5. Ms. Crook testified she felt like it was five minutes that Jennifer was standing at the window of the truck. During that time she felt safe. Ms. Crook testified that the truck was turned off during that period.
6. The Defendant testified that he could not safely pull out of the parking space while Jennifer was near his window talking to him.
7. The Defendant exited the truck, lunged at Jennifer, and attempted to wrestle away a camcorder Jennifer had with her to document the custody exchange and film their children's wrestling tournament.
8. The Defendant grabbed Jennifer under her left arm with his right arm. Jennifer described the grip the Defendant had on her as hard and very painful. The Defendant's left hand had a hold of and was struggling over the video camera in Jennifer's right hand.
9. During the struggle Jennifer incurred bruising on her left underarm and a scrape on her right thumb that was holding the video camera.
10. During the struggle Ms. Crook asked from the passenger seat for the Defendant to get back in the truck.
11. After the struggle over the camera ended the Defendant got back into the truck and shut the door. Jennifer Lippert testified that the Defendant took her camcorder, broke off the viewfinder, and took the camcorder with him in the truck.
12. Both the Defendant and Ms. Crook testified that there was no camcorder during the struggle and that a camcorder was never taken into the truck.
13. According to Ms. Crook, after the struggle outside the truck, after the Defendant got back in the truck, Jennifer was back in the same position at the window of the truck. The Defendant drove out of the parking space and left the area.
14. Jennifer called the police after the Defendant left. Around 7:15 Officer Ryan Miller of the Richland Police Department responded to the Starbucks. Officer Miller interviewed

Jennifer and took photos of her injuries on her thumb and underarm.

15. Officer Miller tried to contact the Defendant and Amanda Crooks by phone but was unable to contact either one of them. Officer Miller left a voicemail for the Defendant but never received a return call from the Defendant or Ms. Crook. Ms. Crook testified she received a phone call later in the evening after leaving Starbucks. It was the same number that had called the Defendant and left a voicemail. That caller was Officer Miller. Officer Miller never got in contact with the Defendant or Ms. Crook.
16. In Officer Miller's career as a police officer he estimated he has responded to a hundred, maybe more, assaults. On some of those responses the assault is still occurring when Officer Miller arrived. Officer Miller will interview parties sometimes up to an hour or two after an assault has happened. Officer Miller has watched bruises develop, swell, and change color from the time of the assault to the conclusion of his interview on many occasions.
17. A part of Officer Miller's duties are to document the injuries incurred by someone after an assault. Based on Officer Miller's training and experience, in his lay opinion, the bruising on Jennifer Lippert appeared to be fresh and not an old bruise.
18. The images of the injuries were admitted into evidence as City's 1 through 6.

CONCLUSIONS OF LAW

1. The documented injuries that Ms. Lippert suffered support her version of events. There is no evidence that Ms. Lippert feigned those injuries or did anything to create those injuries outside of contact with Mr. Lippert.
2. The Defendant's testimony was that he was pushing Ms. Lippert away but doesn't remember grabbing Ms. Lippert in the manner that would cause the injuries that were photographed. The lack of remembrance is consistent with Ms. Lippert's story that the attack took place outside of the vehicle where Ms. Crook could not see anything happen and that Mr. Lippert exerted force upon Jennifer Lippert.
3. There were no injuries documented or reported by Mr. Lippert that would say that when Ms. Lippert allegedly went into the vehicle to attack the Defendant, he didn't receive any injuries. If someone were attacked in their vehicle, they would report that to the police. There's no report of assault by Mr. Lippert or Ms. Crook.

4. The fact that the Defendant or Ms. Crook, when given the opportunity to contact law enforcement, neither one of them thought anyone was assaulted or they thought everything was okay.
5. The physical injuries sustained by Jennifer Lippert are convincing that an assault happened, and that Mr. Lippert assaulted Jennifer Lippert outside of the vehicle. Self-defense is not consistent with the actions of Mr. Lippert after what happened. Mr. Lippert could have driven away at any time, this also shows that there was not any self-defense. Jennifer Lippert was credible with regards to Mr. Lippert getting out of the truck and attacking her.
6. There is enough evidence to convince beyond a reasonable doubt that on 12/19/14 Jeffery Lippert assaulted Jennifer Lippert, his former wife, in Richland, WA, not in self-defense.
7. Jennifer Lippert may have had a camcorder with her during the custody exchange. Ms. Crook was credible with regards to the camera not being thrown into the truck after the assault. There was not enough evidence to prove beyond a reasonable doubt that Jeffery Lippert stole Jennifer Lippert's camcorder.
8. Judge Tanner imposed 364 days in jail with all 364 days suspended, a $500 fine, a $100 domestic violence fee, $200 in probation costs, and a $43 conviction filing fee. The sentence was a twenty-four month deferred sentence. The Defendant lost his right to possess firearms. The pretrial no contact order was terminated.

Dated this 16th day of March, 2016.

Judge

Presented by:

Richland City Prosecutor's Office:

By: _____
Jared Hanson
WSBA# 47891

APPENDIX C

ORDINANCE NO. 32-16

AN ORDINANCE of the City of Richland amending Title 9: Crime of the Richland Municipal Code related to Assault-Domestic Violence.

WHEREAS, the City of Richland has need, from time to time, to amend the Richland Municipal Code (RMC) to promote the health, safety, and general welfare of the citizens of the community; and

WHEREAS, the City recognizes that a scrivener's error exists in RMC 9.05.030 that must be corrected to avoid a nonsensical result in statutory construction.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Richland as follows:

Section 1. Section 9.05.030, entitled Simple assault – Domestic violence, as created by Ordinance 20-11 and subsequently amended by Ordinance 18-12, is hereby amended to read as follows:

9.05.030 Simple assault – Domestic violence.

A. No person may, as a family or household member, intentionally use or threaten to use by purposeful words or acts, unlawful physical force against another ~~the~~ family or household member ~~of another~~.

B. 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 family or household member.

C. Any defense available to a person charged with the crime of "assault in the fourth degree" under RCW 9A.36.041 shall also be a defense to the crime of simple assault under this section.

D. Any crime charged under this section shall be a gross misdemeanor.

Section 2. This ordinance shall take effect the day following its publication in the official newspaper of the City of Richland.

PASSED by the City Council of the City of Richland, at a regular meeting on the 21st day of June, 2016.

ROBERT J. THOMPSON
Mayor

ATTEST:

MARCIA HOPKINS
City Clerk

APPROVED AS TO FORM:

HEATHER KINTZLEY
City Attorney

Date Published: June 26, 2016