

No. 43692-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SYLVIO ALBERT BRAVETTI,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christopher Wickham, Judge  
Cause No. 11-1-01553-3

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in excluding evidence offered by the defendant that he believed was relevant to his state of mind.

2. Whether trial counsel provided ineffective assistance.

B. STATEMENT OF THE CASE.

1. Substantive facts.

A good many of the circumstances of the underlying incident, which led to Sylvio Bravetti being charged with first degree assault, or, in the alternative, second degree assault, were vehemently disputed. Essentially undisputed are the following facts.

Michael Bravetti, the victim, was the son of Sylvio and Ruth Bravetti. They had one other child, a son, Tony Bravetti, and divorced when Michael was in the third grade. RP 49-50.<sup>1</sup> Michael had a son named K. B.<sup>2</sup> RP 50. At the time of trial Michael was 36 years old, K. B. was seven, and Sylvio was 68. RP 119-20, 303. The incident occurred on October 3, 2011. RP 56.

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1 Unless otherwise noted, references to the Verbatim Report of Proceedings are to the transcript of the jury trial which took place from June 11 to June 15, 2012.

2 Because all of the members of the family have the same last name, this brief will use first names for easier reading. No disrespect is intended. The State will use the initials of the minor rather than his full name.

Sylvio suffered from a great number of physical ailments, including vertigo, prediabetes, lower back and sciatica problems, and difficulties with his knees, one of which had been replaced. RP 305.

In October of 2011, Michael and K. B. lived with, and in the home belonging to, Sylvio and his current wife, Kathy.<sup>3</sup> They had lived there for a substantial period of time. RP 121-22, 271. Michael and K. B. shared the master bedroom and its attached bathroom while Sylvio and Kathy shared the only remaining bedroom. RP 121, 124, 271. Sylvio was unemployed, Kathy worked in Tacoma, and Michael was employed by Crown Cork and Seal, working four 12-hour shifts each week. RP 120, 125-26. Michael and Sylvio did not get along and avoided each other; K. B. spent some time with Sylvio. RP 126. Michael suffered from depression and spent much of his free time, when K. B. was in school, in his room, sleeping or watching movies. RP 138.

October 3, 2011, was not a work day for Michael. RP 125. He was having difficulty getting K. B. ready for school; the child was dawdling and cried when Michael tried to dress him. Frustrated, Michael spanked K. B. on the buttocks over his underwear. He

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<sup>3</sup> At the time of trial, Kathy Bravetti had filed for dissolution of her marriage to the defendant. RP 282.

eventually dragged Kodie to the car. K. B. put on his shoes in the car and they got to school on time. RP 136-42.

At this point, the accounts of Michael and the other Bravettis differ sharply. According to Michael, after dropping K. B. off at school, he went to the mall where he remained for 30 minutes to an hour. After he left he returned a phone call he received from Ruth while he was at the mall. He drove to her house, where she told him that Sylvio was considering calling Child Protective Services (CPS) because of the way Michael had treated K. B. that morning. RP 142-44. Michael began to cry; he felt betrayed. RP 145. He testified that it was a mistake to hit his son, but it was nothing compared to what Sylvio had done to Michael when he was a child. He talked to Ruth about the things Sylvio had done to him, including that Sylvio used to say he was going to make Michael bleed. RP 145. Still crying, and without telling Ruth where he was going, Michael left and went directly home. He wanted to go to his room and did not want to talk to Sylvio. RP 146-47.

When Michael entered the house, Sylvio was seated at the kitchen table, using a computer. RP 148, 169. They began a conversation, and Michael asked Sylvio how he could call CPS after the things he did to Michael. Michael testified that although

his voice was raised, he was not yelling. RP 170-71. Michael moved closer to Sylvio, asking him to simply admit to what he did, and touched Sylvio on the chin. Michael denied hitting, punching, slapping, calling Sylvio names, or threatening to hit or kill him. RP 182. Sylvio, still seated in the chair, pointed a gun at Michael and then stood up. The gun was about a foot from Michael's face. Michael stepped back, Sylvio stepped forward, and Sylvio pulled the trigger. The gun clicked. RP 172-75. With his left hand Michael grabbed the barrel of the gun; Sylvio still gripped the gun with his right hand. Michael hit Sylvio in the back of the head. In the struggle the two lost their balance and went to the floor, Sylvio on the bottom, with the gun underneath him, and Michael on top. RP 175-77, 179. Neither let go of the gun. Michael demanded that Sylvio release the magazine and check inside the gun for a round. Sylvio did release the magazine and the bullets fell to the floor. Michael kept his left hand on the barrel of the gun until it was completely unloaded. RP 179. Michael put the bullets in his pocket. He got up, went to Sylvio's bedroom, and checked the nightstand for another gun. Not finding one, he went to his own room. RP 180.

While in his own room, Michael heard Sylvio talking to someone and went out to the kitchen again. Sylvio was on the phone with Ruth. Michael yelled, trying to communicate with Ruth, that Sylvio had pointed a gun at him and pulled the trigger. At that time Michael saw a police car outside and left the house. RP 181-82.

Sylvio's account was much different. He testified that on the morning of October 3, 2011, he and Kathy could hear Michael yelling at K. B., K. B. crying, and the sound of spanking. When they came out of their room, K. B. was hanging onto Michael's backpack, wearing neither coat nor shoes. They got in the car and drove off. Sylvio had never seen Michael treat K. B. that way and he called Ruth. RP 326-328. There were a few calls back and forth while Sylvio and Ruth debated the best course of action. RP 330-33. They agreed that Sylvio would first talk to Michael about the morning incident with K. B. RP 332.

Ruth Bravetti testified for the defense. She said she called Michael that morning after hearing from Sylvio and consulting with Tony, telling him she wanted to talk to him about the incident that morning. RP 236-37. Michael was loud and belligerent and hung up on her. Michael then appeared at her house; when she told him

about Sylvio's concern, Michael became very angry. RP 237. He told Ruth he was going to beat his father's face to a pulp, make him bleed, and kill him. Michael then left Ruth's house in a rush. RP 239-40. Ruth immediately called Sylvio on her cell phone and repeated what Michael had said about him. RP 241. A short time later, Sylvio called Ruth, said Michael was pulling into the driveway, and he would leave the line open so Ruth could witness the beating he expected to receive from Michael. RP 242, 245-46.

Sylvio testified that before Michael arrived he had placed a 9mm gun under a manila folder on the desk so that it was not visible. RP 339. The gun was loaded with a clip containing eight bullets; it took two hands to move the slider back to chamber a round. RP 341. Sylvio said he intended to make a show of force. RP 341-42. When Michael entered the house he walked quickly and directly to Sylvio, who was sitting at a desk in the kitchen. RP 336-38. Michael was very close to, but not touching, Sylvio; he was yelling and "spitting in my face, and then he hit me." RP 343. Michael slapped him in the face, poked him, and pounded his chest. RP 343-44. Sylvio, crying, drew the gun. He had just got it out when Michael grabbed the barrel with his left hand. Sylvio was stunned because he expected Michael to back up at the sight of the

firearm. He denied pulling the trigger. RP 344-45, 351. Michael pulled on the weapon, and since Sylvio was still hanging onto it, he was pulled out of the chair. RP 345. They struggled over the gun, and because it was the only way Sylvio could think to protect the gun, he went to the floor with the gun beneath him. RP 346-47. Michael repeatedly pounded on his back and buttocks; Sylvio believed he was deliberately targeting areas that would cause Sylvio the most pain. RP 348-49. Michael loosened his grip enough to permit Sylvio to remove the clip from the gun and lock the slider in the open position. RP 349. Michael emptied the clip, got up, and went to some other part of the house. Sylvio retrieved the phone with the open line and spoke to Ruth. RP 350.

According to Sylvio, suddenly Michael was back in his face, yelling. RP 352. While he was on the phone with Ruth, Sylvio learned that the police were there, and he eventually, with great difficulty, went outside. RP 352-54.

Ruth testified that she was listening on the open phone line and heard banging, slapping, screaming, and Sylvio crying. She used another phone to call 911 after she heard the word "gun." RP 248. A recording of the 911 call was admitted into evidence and played to the jury. Exhibits 8 and 8A.

Officer Eric Lever of the Lacey Police Department was the first officer on the scene. He asked the dispatcher to tell the caller to tell the people in the house to come out with their hands up. They did. RP 57, 59. The officer located the gun on a table with the slide locked in the open position and the empty magazine beside it. RP 60.

## 2. Procedure.

On October 6, 2011, Sylvio Bravetti was charged by information with one count of first degree assault, domestic violence, while armed with a firearm. CP 6. On April 4, 2012, an amended information was filed charging first degree assault as before, but adding as an alternative second degree assault, domestic violence, while armed with a firearm. CP 14-15.

Before trial, both the State and the defense brought motions regarding specific evidence the parties wanted to either offer or exclude. An evidentiary hearing was held on May 7, 2012. 05/07/12 RP 3-62. No witnesses were called; both sides made an offer of proof primarily by way of written pleadings. See State's Trial Memorandum for Trial, Offer of Proof, and Motions in Limine, CP 16-29; Sylvio Bravettis' Trial Brief, CP 52-65; Defendant's Motions in Limine, CP 67-69; and Defense Motion to Admit

Evidence of State of Mind, CP 31-47. The Court issued its rulings on May 9, 2012. 05/09/12 RP 3-19. Those rulings were memorialized in written Findings of Fact and Conclusions of Law.

#### I. FINDINGS OF FACT

1. Michael Bravetti' s 2005 arrest and subsequent deferred prosecution was not for a crime that involved the defendant. The defendant had knowledge of the case.

2. Michael Bravetti may have a reputation within the Bravetti family for being grumpy, manipulative, and short-tempered.

3. As a child, Michael Bravetti may have committed certain acts against his mother, Ruth Bravetti, and some of these acts did not occur in the presence of his father, the defendant. Although the time frame of these incidents is uncertain, they occurred before Sylvio Bravetti agreed to let Michael move in with him. The defendant had knowledge of these incidents.

4. As a child, Michael Bravetti may have hit someone on the school bus and punched his little brother. The exact dates/times of these incidents is uncertain, but the defendant had knowledge of these incidents.

5. Michael Bravetti may assume a particular body posture during arguments that Defendant has observed. Other members of the family, including Ruth, Kathy, and Tony may have observed this body posture.

6. Michael Bravetti may invade other people's personal space during arguments that the Defendant has observed. Other members of the family, including Ruth, Kathy, and Tony may have observed this behavior.

7. When Michael Bravetti was 16 years old and living with the defendant, he and the defendant became involved in a physical fight with one another. This incident was observed by Tony Bravetti. Tony Bravetti separated the two.

8. Sometime during the three months prior to the charged incident, Michael Bravetti and the defendant had an altercation in the kitchen of their shared home (hereinafter "the kitchen island incident"). During this altercation, Michael Bravetti pointed his finger at the defendant and shouted obscenities. Michael Bravetti may have chased the defendant around the kitchen island. Kathy Bravetti witnessed the incident.

9. The defendant may have used corporal punishment against Michael Bravetti during Michael Bravetti's childhood.

10. Defendant may have a belief that Michael Bravetti once argued with a former girlfriend and during the argument the girlfriend's blood ended up on the windshield of Michael Bravetti's car.

11. Michael Bravetti may have "taunted" Defendant.

12. The defendant believes that Michael Bravetti may have threatened Ruth Bravetti during Michael's childhood, and may have attempted to hit her with a baseball bat.

13. Defendant may have learned information about Michael Bravetti by perusing court documents in a custody case involving Michael Bravetti and the mother of Michael Bravetti's son.

## II. CONCLUSIONS OF LAW

1. Michael Bravetti's 2005 arrest and subsequent deferred prosecution, and the facts associated with

that case, are something that Defendant knew of, but not the type of incident that suggests danger to the defendant. The probative value of this evidence is outweighed by the danger of unfair prejudice. The motion to exclude this evidence is granted.

2. Michael Bravetti 's reputation in the Bravetti family referenced in finding of fact number two is generally not admissible.

3. Evidence that Michael Bravetti scratched and/or bit Ruth Bravetti is not admissible because it was not done in the presence of the defendant, is vague as to date of occurrence, and the probative value of this evidence is outweighed by the danger of unfair prejudice.

4. The evidence of Michael's alleged assault of someone on a school bus did not involve Sylvio as a victim. It is irrelevant to his state of mind and his claim of self defense. In addition the prejudicial effect of such evidence outweighs its probative value. The evidence of Michael's assault of his brother Tony is excluded because Sylvio was not the victim and therefore it is irrelevant to Sylvio' s state of mind and his claim of self defense. It is further excluded because its prejudicial value outweighs its probative value.

5. Evidence regarding Michael Bravetti's body posture during arguments with the defendant, or during arguments with other people which occurred in the presence of the defendant, may be admissible and relevant to the Defendant's state of mind at the time of the charged offense. However, remoteness in time of some arguments may be a basis for exclusion. The court is not excluding that evidence at this time.

6. Evidence that Michael Bravetti invades people's personal space may be admissible. The court is not excluding all such evidence. Repetitive evidence or

evidence regarding specific instances that occurred remotely in time to the charged offense might not be allowed.

7. Evidence of the “kitchen island incident” is generally relevant to the defendant’s state of mind and may be admissible. The court is not excluding evidence of that incident.

8. Evidence that the Defendant may have used corporal punishment against Michael Bravetti during his childhood may be admissible to explain Bravetti’s statement to his mother on the morning of October 3, 2011. This evidence should be accompanied by a limiting instruction.

9. Evidence of Michael Bravetti’s alleged crimes towards former girlfriends is not admissible because that evidence is highly prejudicial, and not the type of danger that would suggest danger to the Defendant. The court is excluding that evidence.

10. The court with regard to the proposed evidence that Michael Bravetti taunted the defendant in the past did not exclude that evidence. The trial court may rule on that evidence at trial.

11. Evidence that Michael Bravetti has threatened Ruth Bravetti will be excluded because this evidence is not probative of the issues in this case.

12. The court reserves ruling on admissibility of evidence regarding Michael Bravetti allegedly attempting to hit Ruth Bravetti with a baseball bat.

13. Individuals who have witnessed assaults between Michael Bravetti and the defendant may testify to those assaults.

14. Evidence regarding information obtained by Defendant from court pleadings in the custody case is

not admissible because the probative value of this evidence is outweighed by the danger of unfair prejudice.

15. Reputation evidence is allowed as to these aspects of Michael's character: violence, manipulation, grumpiness, losing his temper with [his] child, threats and assaults against family members.

16. Specific instances that show aspects of Michael's character, e.g. violence, manipulation, threats and assaults against family members may be allowed to show the reasonableness of Sylvio's fear of Michael on October 3, 2011. This evidence may come in through Sylvio or family members, subject to any other objections made at time of trial.

CP 251-54.

During the trial, which was before a different judge, the defense made repeated objections to these rulings and once asked the presiding judge to reconsider them. RP 34, 150-52, 156, 300.

The jury found Sylvio Bravetti not guilty of first degree assault, but guilty of second degree assault. It also found that he was armed with a firearm and that there was a family relationship. CP 217, 220-222. He was sentenced on July 17, 2012, to a standard range sentence of six months plus 36 months for the enhancements, for a total of 42 months. CP 269.

C. ARGUMENT.

1. The court correctly applied the law to the proffered evidence and did not err in excluding certain evidence regarding the victim's propensity to violence. There was no abuse of discretion.

Bravetti did not deny brandishing a firearm at his son. His sole defense at trial was that he had used lawful force in self defense. The lawful use of force is addressed in RCW 9A.16.020, which reads in pertinent part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

.....

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

The defendant has the "low burden" of presenting "some evidence" of self-defense. State v. George, 161 Wn. App. 86, 96, 249 P.3d 202 (2011). The evidence must be credible. State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997). There must be evidence that "(1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was

objectively reasonable; . . . (3) the defendant exercised no greater force than was reasonably necessary, . . . and (4) the defendant was not the aggressor. . . . “ In addition, there must be evidence that the defendant intentionally used force. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997) (internal cites omitted).

Self-defense has both a subjective and objective aspect. To determine whether a defendant has produced sufficient evidence that he was in good faith in fear of imminent danger, the court must view his actions in light of the facts and circumstances known to him. George, 161 Wn. App. at 86; State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The objective aspect of self-defense requires the court to determine what a reasonable person in that situation would have done. Threat of imminent harm does not have to be real, if a reasonable person would have believed that it was. “The importance of the objective portion of the inquiry cannot be underestimated. Absent the reference point of a reasonably prudent person, a defendant’s subjective beliefs would always justify the homicide.” Walker, 136 Wn.2d at 772.

a. Bravetti claims the court erred by conducting a balancing test rather than simply admitting every piece of evidence offered. The court was correct.

The cases cited above, and many of the ones to which Bravetti cited, concern the quantity or nature of evidence a defendant must produce to be entitled to a jury instruction on self defense. That was never an issue in Bravetti's case. The State never disputed his right to that instruction. Rather, he seems to be asserting that if Bravetti had knowledge of some bad behavior on the part of the victim, no matter how remote or how questionable the information, he was entitled to put that evidence before the jury. That is not the law.

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable to the courts of this state. Evidence which is not relevant is not admissible.

ER 402.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

"As is the case with all evidence, evidence offered by a defendant in support of a self-defense theory must be relevant."

State v. Bell, 60 Wn. App. 561, 564, 805 P.2d 815 (1991) *review*

*denied*, 116 Wn.2d 1030 (1991). A trial court has “very broad” discretion when balancing the probative value of evidence against its prejudicial effect. A ruling regarding the admissibility of evidence will not be reversed unless the court abused its discretion. *Id.* at 565. A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take, and arrives at a decision outside the range of acceptable choices. *Id.*

Bravetti argues that the court precluded him from explaining to the jury why he had reason to be fearful that the victim would seriously injure or kill him. On the contrary, the court permitted extensive evidence about prior acts of the victim. Bravetti repeatedly complains that he was not allowed to testify that, shortly before the incident, Ruth had relayed the victim’s alleged threats.

Appellant's Opening Brief at 20, 22, 24. It is true that the court sustained a hearsay objection during Bravetti's testimony, RP 333, but Ruth had already testified to that alleged threat before Bravetti took the stand. She testified that she immediately called Sylvio and relayed the threat. RP 239-41. That evidence was before the jury. Even if it were error for the court to sustain the State's hearsay objection, it would be harmless. An error must result in prejudice before it is reversible. State v. Moore, 35 Wn.2d 106, 111, 211 P.2d 172 (1949).

A review of the Findings of Fact and Conclusions of Law shows that some of Bravetti's proffered evidence was excluded, some was not. Evidence of Michael's 2005 arrest and deferred prosecution was excluded because it did not suggest danger to Sylvio, *i.e.*, it was not relevant to a defense of lawful use of force, and it was unfairly prejudicial to the State. Conclusion of Law 1, CP 252-53. Michael's reputation for violence in the community was admissible, his reputation in the family was not. Conclusions of Law 2, 15, CP 253-54. Evidence that Michael scratched or bit Ruth was excluded because it was unclear when it occurred, it was not witnessed by Sylvio, and the probative value was outweighed by the prejudicial impact of the evidence. Conclusion of Law 3, CP

253. The court could also have correctly found that biting and scratching do not reasonably cause one to fear imminent death or great bodily harm. Evidence of prior assaults on Sylvio were admissible; the court reserved ruling on the admissibility of evidence that Michael once attempted to hit Ruth with a baseball bat. Conclusions of Law 12, 13, CP 254. Sylvio did not offer at trial any testimony about a baseball bat assault on Ruth.

Bravetti seems to argue that he has the right to bring any evidence regarding any bad behavior on the part of the victim because it went to his state of mind. The courts have not so held. In Bell, the defendant was convicted of second degree murder for beating and strangling to death a man Bell claimed had touched him in a sexual manner. 60 Wn. App. at 562. He sought to admit the testimony of witnesses that the victim had a reputation in the community as a homosexual. The Court of Appeals affirmed the trial court's suppression of that evidence on the grounds that ER 404(b) required exclusion and the probative value was outweighed by the prejudicial effect. Id. at 563, 565.

A defendant may offer evidence of a victim's violent disposition, but not necessarily evidence of bad temper. In State v. Hutchinson, 135 Wn.2d 863, 959 P.2d 1061 (1998), the defendant,

who had shot and killed a deputy sheriff, wanted to introduce evidence that the deputy was intimidating and rude. That evidence was properly excluded. Id. at 886.

Bravetti argues that the court improperly excluded evidence because he had no personal knowledge of the incidents or they were too remote in time. A reading of the court's rulings shows that personal knowledge and remoteness were considerations regarding the relevance of the evidence, but it did not exclude evidence solely because the acts occurred a substantial amount of time earlier. The court permitted specific instances of Michael's character even though they were remote in time. 05/09/12 RP 6-7. Some evidence offered by the defense was so vague that the court could not make a ruling. 05/09/12 RP 8.

It was apparent during the testimony of Sylvio, RP 303-82, Ruth, RP 230-56, and Kathy Bravetti, RP 269-85, that the defense strategy was to inform the jury of every fault and misdeed of the victim, presumably in an attempt to make him so unlikeable that the jury would acquit Sylvio. These faults and misdeeds included a loan he had not repaid, RP 235, his disrespect to them and refusal to follow house rules, RP 272, his implied freeloading, RP 234, 310-12, poor housekeeping skills, RP 315, staring at them, RP 317, and

poor parenting skills, *e.g.*, 275, 326-27. Bravetti argues in his Opening Brief at 21 that the excluded evidence showed Michael to be a “spoiled thug,” of whom the family was reasonably afraid. The evidence may have showed that Michael was a spoiled thug, but it did not show that Sylvio could reasonably be in fear of his life or serious bodily injury. Michael may have been difficult and his relatives were “afraid” to deal with him, but no one is entitled to use lethal force because someone is obnoxious. All of the evidence relating to actual assaults or threats of assault was permitted, with the exception of incidents that were not adequately identified and which may have occurred when Michael was a child. CP 251-54, 05/09/12 RP 7-8. Bravetti complains that in its weighing of prejudice versus probative value the court did not use the words “unfair prejudice,” but it is quite obvious that the court was saying exactly that. Much of the evidence ruled admissible was prejudicial to the State.

Bravetti argues that it does not matter whether the incidents involving Michael actually happened, but that what matters is what Sylvio believed about them. That is true. However, as noted above, even evidence offered to support self-defense must be relevant. While a defendant claiming self-defense is entitled to

present evidence showing that he reasonably feared for his life or safety, both subjectively and objectively, he does not have the right to introduce evidence which merely smears the victim's character without supporting the conclusion that the defendant reasonably feared more than an unpleasant confrontation or minor physical contact. "But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." Justice Benjamin N. Cardozo, Snyder v. Massachusetts, 291 U. S. 97, 122 (1934).

In this case the trial court did a careful analysis of the evidence that Bravetti offered, applying the rules of evidence and weighing probative value against prejudicial effect. 05/09/12 RP. It recognized the importance of evidence showing Sylvio's state of mind, 05/09/12 RP 11, and allowing both the State and Sylvio to produce evidence regarding their relationship, specifically with regard to Sylvio's disciplining of Michael. 05/09/12/RP 12-13. The court was also concerned with bogging down the trial with tangential evidence. 05/09/12 RP 15. Evidence may be excluded if it can result in unfair prejudice, confusion of the issues, or waste of time. ER 403.

Bravetti argues that the court improperly excluded evidence of acts of violence that involved other people. Appellant's Opening Brief at 23-24. This evidence was not, however, excluded because persons other than Sylvio were involved but because it was not relevant or was unfairly prejudicial. CP 252-54.

The court did not abuse its discretion. While another court might have ruled differently in specific instances, that is not the test.

2. The trial court did not err by refusing to reconsider (and presumably reverse) pretrial evidentiary rulings made by a different judge.

Bravetti argues that when Michael testified in general terms that he had suffered physical abuse at the hands of Sylvio, he opened the door to evidence of his own acts of violence that had been excluded in pretrial rulings.

The court, in its pretrial rulings, held that evidence of Sylvio's use of corporal punishment would be admissible to explain Michael's statement to his mother on the morning of October 3, 2011. It further ruled that such evidence must be accompanied by a limiting instruction. Conclusion of Law 8, CP 253. Such a limiting instruction was given to the jury. RP 168.

Bravetti argued at trial that the door was opened to admit previously excluded evidence when Michael testified that, during

the altercation in the garage when he was 16, he had cowered as he always had done. RP 130, 151. Bravetti claimed there was no way he could put into context the information he had about that incident. RP 151. But he did have the opportunity to do so. Tony testified about the incident. RP 291-92, 299. Sylvio testified about it. RP 308-10. The court did refuse to allow Tony to testify that when he pulled Michael away from Sylvio, Michael said, "Just you wait. I'm going to get you with a bat while you're sleeping." RP 294. In his pretrial motions, Bravetti did not ask to have that statement admitted, CP 33, and therefore the court did not rule on it in the Conclusions of Law. When the State objected during trial, the court sent the jury out and heard argument on the admissibility of the statement. In ruling, the trial court noted that the earlier judge had been careful to limit the collateral evidence which might confuse, mislead, or prejudice the jury. RP 297. He excluded the statement because the relevance was slight, the incident having occurred twenty years earlier when Michael was sixteen, while the prejudicial effect was great. Id. The court correctly applied the law and while another judge might have ruled differently, it cannot be said that no reasonable judge would have made the same ruling. There was no abuse of discretion.

This was not an issue of opening the door to evidence that had been excluded, nor a question of the trial judge reconsidering another judge's evidentiary ruling and overruling it. The court had ruled admissible evidence of Sylvio's corporal punishment of Michael, with a limiting instruction. Conclusion of Law 8, CP 253. The specific statement had not been raised earlier and no ruling had been made excluding it. Michael's very limited testimony about his father's physical punishment fell within the court's earlier ruling; the other evidentiary rulings made by the earlier court were made with that evidence in mind. Nothing new or unexpected was injected into the trial, and there was no question of opening doors that had not already been nailed shut by the court. There was no error.

3. Trial counsel was not ineffective.

Bravetti argues that his trial counsel was ineffective for several reasons. The State disagrees with all of them.

Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, "judicial scrutiny of counsel's performance must be highly deferential." Strickland at 689; See *also* State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Further,

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

*Strickland* at 694-95.

“The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation”, but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the

adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Strickland, 466 U.S. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697. “A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight.” Adams, 91 Wn.2d at 86 (quoting *Finer, Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077, 1080 (1973)). Ultimately, there are many different ways to approach the same case and so a lawyer is not ineffective because he or she chooses one over another. State v. Grier, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011).

It is apparent from even a cursory reading of the record that defense counsel vigorously and doggedly defended Bravetti. He is now arguing that they made mistakes; the State hazards a guess that every trial attorney makes at least one mistake in every trial. But that is not the test for ineffective assistance of counsel, set forth at length above.

Bravetti specifically objects to several actions, or lack of action, on the part of his trial counsel.

a. Counsel should have objected to evidence that Sylvio had abused Michael.

Whether or not a failure to object to evidence can constitute ineffective assistance of counsel, and the case to which Bravetti cites, State v. Graham, side-steps the question, 78 Wn. App 44, 56-57, 896 P.2d 704 (1995), trial counsel did object to the evidence. Counsel brought a motion in limine to exclude any evidence of discipline except an incident with a backscratcher. CP 68-69. Michael's testimony was that he assaulted his father when he was sixteen because he was tired of getting hit, RP 130, and he was upset that Sylvio would consider calling CPS about his treatment of K. B. when Sylvio had hit Michael when he was a child. During the altercation with Sylvio on October 3, he asked Sylvio how he could

call CPS after what he did to Michael. RP 170-71. None of this violated the court's pretrial order, and a limiting instruction was given. RP 168.

At a recess during Michael's testimony, defense counsel renewed their objection to the first judge's pretrial rulings about what evidence Sylvio could offer regarding his state of mind. RP 150-51. Counsel asked the court to reconsider and overrule the earlier decision. RP 151-52. It is not clear what else counsel could have done. Michael's evidence conformed to the pretrial rulings. Objecting would have been useless, and possibly frivolous, and counsel made repeated objections to virtually all of the evidentiary rulings. Counsel were not ineffective merely because they were unsuccessful.

b. Questions about Michael calling Kathy Bravetti a whore.

Bravetti complains that trial counsel failed to object to testimony that Michael called Kathy Bravetti his father's whore. Appellant's Opening Brief at 28. It is not surprising that there was no objection, since defense counsel elicited that information from Kathy on direct examination. RP 277. The defense was portraying Michael as a mean, spiteful, and generally horrible person. There was no basis upon which to object when the State clarified that

Michael called her his father's whore because she began an affair with Sylvio at a time she was married to another man. RP 279.

Bravetti also faults his counsel for failing to follow up on that testimony and clarify the reasons Kathy cheated on her husband, but he is apparently assuming that those reasons would have reflected well on Kathy and Sylvio. There is nothing in the record to lead to that conclusion, and if counsel either knew the circumstances were not flattering to the Bravettis or was unsure what the answer would be, it was an astute move on his part to leave the subject alone.

c. Questions about Kathy's restraining order.

Bravetti claims ineffective assistance of counsel because his attorneys failed to object when Kathy testified that she obtained a protection order against Michael and that the order had later been dismissed. Appellant's Opening Brief at 28. Again, it would be odd for him to object when he elicited the testimony that she filed the restraining order. RP 278. There was no basis upon which to object when the State cross-examined Kathy about the order, eliciting testimony that she and Sylvio discussed getting such an order, and that she filed it with Family Court with the idea of having Michael and K.B. evicted from her house. RP 283-85. Kathy was

able to get into evidence the fact that Sylvio had, several years earlier, filled out the paperwork for a protection order against Michael, but apparently never followed through. RP 284. Counsel is not required to make a useless objection merely for the purpose of insulating himself from a claim of ineffective assistance of counsel.

d. Counsel failed to object to the State's closing argument.

Bravetti claims that counsel should have objected to the prosecutor emphasizing the protection order evidence in her closing. Appellant's Opening Brief at 29. It is not clear what the basis for such an objection would be. The evidence was admitted and a prosecutor may argue the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999).

e. Counsel failed to present evidence during the motions hearing.

Bravetti asserts, but does not argue, that counsel should have presented actual evidence during the motions in limine. This court may decline to review an issue for which no authority is

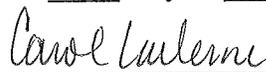
presented. State v. Gossage, 165 Wn.2d 1, 8-9, 195 P.3d 525 (2008).

Bravetti has failed to show that his counsel was constitutionally deficient. He might have preferred for his attorneys to do some things differently, and he understandably does not like the outcome of the trial, but his dissatisfaction does not equal ineffective assistance of counsel.

D. CONCLUSION.

The trial court did not abuse its discretion when making any of the challenged evidentiary rulings, nor was trial counsel ineffective. The State respectfully asks this court to affirm Bravetti's conviction.

Respectfully submitted this 5<sup>th</sup> day of February, 2012.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

# THURSTON COUNTY PROSECUTOR

February 05, 2013 - 2:01 PM

## Transmittal Letter

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