NO. 47489-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH WHEARTY,

Appellant.

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

The Honorable James Lawler, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court's decision to exclude relevant defense evidence pertaining to a professional mixed martial arts (MMA) fight which the complaining witness participated and which occurred several days before the incident was manifestly unreasonable and based on untenable grounds.

2. By excluding evidence relevant to the appellant's theory of self-defense on the basis of hearsay, the trial court violated the appellant's constitutional right to present a defense and denied the appellant a fair trial.

3. Did trial counsel provide ineffective assistance?

4. The trial court erred by sustaining an objection regarding the arresting officer's testimony that the appellant stated that the complaining witness hit him, preventing the admission of the entirety of his statement to police at the time of his arrest.

B. SUPPLEMENTAL ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court's exclusion of relevant defense evidence based on this manifestly unreasonable belief violate appellant's constitutional right to present a defense? Assignments of Error 1 and 2.

2. Was defense counsel ineffective when he failed to cross-examine the complaining witness regarding prior inconsistent testimony of

other witnesses and regarding inconsistencies in her own testimony? Assignment of Error 3.

3. Did the trial court err when it refused to allow the appellant to cross-examine the police officer as to appellant's complete statements to the officer at the time of arrest? Assignment of Error 4.

C. STATEMENT OF THE CASE

1. Facts pertaining to additional Assignments of Error

a. Testimony by Deputy Mohr from the CrR 3.6 hearing and trial

A 3.5 hearing was held on March 4, 2014, prior to the jury trial. Report of Proceedings (RP) (3/4/15) at 24-42.[1] During the hearing, Deputy Sheriff Michael Mohr stated that on January 27, 2015 he placed Mr. Whearty under arrest for second degree assault and read Mr. Whearty his constitutional warnings. RP (3/4/15) at 26. He stated that Mr. Whearty was emotionally worked up and said that when he gave him a chance to tell "his side of the story of what happened," Mr. Whearty "just kept working himself up with screaming and crying, saying he didn't do anything." RP (3/4/15) at 30.

[1]The record of proceedings is designated as follows: RP – January 28, 2015, January 29, 2015, February 12, 2015, February 19, 2015, February 26, 2015, March 4, 2015 (CrR 3.5 suppression hearing), March 5, 2015, March 19, 2015; 1RP (jury trial); 2RP (jury trial); 3RP (jury trial); 4RP (jury trial), and April 22, 2015 (sentencing).

When asked if he had a similar conversation in the patrol car, Officer Mohr stated that in the car, he stated that Ms. Delmany "hit him." RP (3/4/15) at 30-31. During cross examination, Deputy Mohr stated that while in the car, he said "I didn't do anything" and that "Chelcie hit him and that he was going to jail. RP (3/4/15) at 35.

During the trial, however, Deputy Mohr stated that he "wanted to get his side of the story," but changed his previous testimony from the CrR 3.5 hearing. He did not say that Mr. Whearty told him that Ms. Dalmeny hit him, and an objection to the statement was sustained. RP (3/24/15) at 231, 232. At the pretrial CrR 3.5 hearing, Deputy Mohr stated in response to cross examination:

> Q: Okay. And then when you're questioning him about the injury, didn't he at one point tell you that Chelcie had hit him?
> A: Not at the time that I was at the house, no.
> Q: But later?
> A: Yes. In the vehicle ride to the jail, he said, "I didn't do anything. She hit me, and I'm going to jail." The court found that the statements made by Mr. Whearty, were admissible at trial.
>
> RP (3/4/15) at 41.

During the trial however, the Deputy limited his testimony on this point. Deputy Mohr testified that he did not ask Mr. Whearty about "his side of the story" and that he was "just screaming and crying." RP (3/24/15) at

231. When asked on cross examination if Mr. Whearty told him that Ms. Dalmeny had hit him, the State successfully objected. RP (3/24/15) at 231-32. Defense counsel tried to cross-examine Deputy Mohr about Mr. Whearty's entire statement to him about the incident, including his statement that Ms. Dalmeny had hit him. The court sustained hearsay objections by the prosecutor:

> Q: He didn't tell you she had hit him?
> Ms. Weirth: Objection, calls to hearsay.
> The Court: Sustained.
> Mr. Clark: I think it goes to impeachment, Your Honor, which is.
> . . .
>
> The Court: Not like that, it doesn't. The objection is sustained.
> Q: (by Mr. Clark): While he was in the car did Mr. Whearty express some sort of disbelief as to why he was in the car and arrested?
> Ms. Weirth: Objection; hearsay.
> The Court: Sustained.
> Mr. Clark: It's a yes or no question, Your Honor. I'm not asking him to answer what he said.
> The Court: The objection is sustained. The way that question was phrased it does ask for a specific response, so objection's sustained.

RP (3/24/15) at 231-32.

b. Testimony by Ms. Dalmeny regarding any of her children leaving the car, her injuries.

During trial, Ms. Dalmeny was asked about where she had been hit during the assault which she stated Mr. Whearty had been involved. She initially pointed to the top of her head during her testimony, however, the

following day during cross examination she said it was the back of the head, the side." RP (3/24/15) at 145. In addition, she told Deputy Mohr that he was punching her in the side of the face. RP (3/24/15) at 146.

After the fight with Mr. Whearty she drove away from the house with her children S. and O. in the car, she drove to a local general store in order call her sister. RP (3/23/15) at 71, 73. She stated that the children remained with her in the car at all times after she left the house. RP (3/23/15) at 157.

Sarah Dalmeny, Chelcie Dalmeny's sister, testified that her sister called her from the store on January 27. RP (3/24/15) at 172. She said that she was concerned about S. and O. and asked where the girls were located. RP (3/24/15) at 172. She said that Chelcie Dalmeny said that O. was in the store and that S. was in the back seat of the car. RP (3/24/15) at 172, 175. On the other hand, O. testified that she went inside and got water and a hairbrush. RP (3/24/15) at 192-93.

Counsel did not impeach Ms. Dalmeny about these inconsistencies.

c. Exclusion of evidence of Ms. Dalmeny's MMA fight in late January, 2015 relevant to Mr. Whearty's self-defense claim

Prior to trial, Mr. Whearty gave notice that he planned to argue that he acted in self-defense and that Ms. Dalmeny attacked him and that she drove

away from the scene with her children in the car while under the influence of drugs. CP 13-14. At trial, Ms. Dalmeny stated that she had an MMA fight at the Snoqualmie Casino against with Shelby Miller on January 24 or January 25, 2015. RP (3/23/15) at 46-50. She won the fight, which was her third MMA fight. RP (3/24/15) at 129-30, 256. During the fight she sustained bruises to her face and a fractured left wrist, and also sustained an injury to the front of her legs. RP (3/24/15) at 130.

Defense counsel moved to introduce a video recording of her professional casino match to support the defense theory of self-defense and to support the argument that Ms. Dalmeny "knows how to fight." RP (3/24/15) at 166. The court denied the motion, stating that because she was involved in the fight with other women where there were rules involved has nothing to do with an alleged assault where there are no rules and where she has previously sustained an injury preventing her from fighting back. RP (3/24/15) at 167-68. The court stated:

> The balancing here comes out in factor of excluding this testimony. The fact that she was involved in a competition with another woman in a fight where rules were involved has nothing to do with an alleged assault by somebody who weighs 45 pounds more than her in a situation where there are no rules, when she has an injury that prevents her from fighting back. So, no, I'm not going to allowing this.

RP (3/24/15) at 168.

The court subsequently gave the self-defense instruction for second degree assault—strangulation, as charged in Count 1, and unlawful imprisonment, as charged in Count 2. It instructed the jury that force is lawful when used by a person who reasonably believes he is about to be injured and when the force used is not more than necessary. The instruction further told the jury that the amount of force used was to be evaluated in light of all the facts and circumstances known to Mr. Whearty at the time of and prior to the incident. CP 105, 113 (Jury Instructions 12, 20). As a result of the court's rulings, however, the jury was not able to see compelling video evidence of Ms. Dalmeny's ability to fight.

D. ARGUMENT

1. THE TRIAL COURT'S EXCLUSION OF RELEVANT EVIDENCE PERTAINING TO MS. DALMENY'S MMA FIGHT DENIED WHEARTY HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

The court violated Mr. Whearty's right to present a complete defense in excluding the evidence about Ms. Dalmeny's MMA fighting skills and her professional fight, which occurred two to three days prior to the incident on January 27, 2015. The MMA fight video evidence was relevant to Mr. Whearty's self-defense theory and no compelling interest justified its

exclusion.

a. Evidence of the MMA fight was relevant to Mr. Whearty's claim of self-defense.

The correct interpretation of an evidentiary rule is reviewed *de novo* as a question of law. *State v. DeVincentis,* 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court's decision to admit evidence is reviewed for an abuse of discretion only if the trial court correctly interprets the rule. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Moreover, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. *State v. Iniguez,* 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claimed denial of a constitutional right, such as the right to present a defense, is reviewed de novo. *Iniguez*, 167 Wn.2d at 280; *State v. Jones,* 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Criminal defendants have the constitutional right to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22 (amend. 10). The right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth. *State v. Maupin,* 128 Wn.2d 918, 924,

913 P.2d 808 (1996) (citing *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Although a defendant has no constitutional right to present irrelevant evidence, only minimal logical relevancy is required for evidence to be admissible. *State v. Bebb*, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)), *affirmed, State v. Bebb,* 108 Wn.2d 515, 740 P.2d 829 (1987). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling State interest in doing so. *State v. Hudlow,* 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). While a trial court has discretion in ruling on evidentiary matters, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See *State v. Crowder,* 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), *review denied,* 142 Wn.2d 1024, (2001).

b. The court's decision to exclude relevant evidence supporting Mr. Whearty's self-defense theory was based on untenable grounds.

Mr. Whearty's primary defense was that he acted in self-defense when he restrained Ms. Dalmeny after she attacked him, and that he blocked her punches. RP (3/26/15) at 482-83, 485.

A person about to be injured is legally justified in using force to prevent an offense against his person, so long as the force used is not more than necessary. RCW 9A.16.020(3). This statutory definition of self defense includes both subjective and objective components. Evidence of self-defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." *State v. Janes,* 121 Wn.2d 220, 238, 850 P.2d 495 (1993). This approach incorporates both subjective and objective characteristics. *Janes,* 121 Wn.2d at 238.

It is subjective in that the jury is "'entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act.'" *Id.* (quoting *State v. Wanrow,* 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). It is also subjective in that "the jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant." *Janes*, 121 Wn.2d at 238. The evaluation is objective in that "the jury is to use this information in determining 'what a

reasonably prudent [person] similarly situated would have done.'" *Id.* (quoting *Wanrow,* 88 Wn.2d at 236) (internal quotation marks omitted).

Because self defense includes a subjective component, the circumstances known to the defendant at the time of the incident are relevant. Accordingly, Washington cases recognize that the defendant's knowledge of the victim's reputation and past conduct may support a claim of self defense. *State v. Walker,* 136 Wn.2d 767, 774-76, 966 P.2d 883 (1998); *State v. Painter,* 27 Wn. App. 708, 620 P.2d 1001 (1980), *review denied,* 95 Wn.2d 1008 (1981). Although not admissible to establish the victim's character, evidence of the victim's specific prior conduct is admissible for the limited purpose of showing whether the defendant had a reasonable apprehension of danger. *State v. Fondren,* 41 Wn. App. 17, 25, 701 P.2d 810, *review denied,* 104 Wn.2d 1015 (1985); *State v. Walker,* 13 Wn. App. 545, 536 P.2d 657, *review denied,* 86 Wn.2d 1005 (1975); Comment, ER 404.

In this case, Mr. Whearty sought to introduce evidence of Ms. Dalmeny's recent professional MMA fight to show that she was trained in fighting and could inflict injury. Mr. Whearty was aware of the fight because he was present and served as her "corner man" during the match. Mr. Whearty's knowledge of her fighting skills impacted his belief that he needed to defend

himself and restrain Ms. Dalmeny in order to prevent further attack.

The court recognized the relevance of Ms. Dalmeny's conduct in the context of self-defense because it granted the requested instructions, but the court inexplicably refused to admit evidence of Ms. Dalmeny's specific conduct, and stated, without evidence to support its assumption, that the MMA fight was not comparable because there were rules in an MMA fight. RP (3/24/15) at 168.

c. The court's erroneous ruling prejudiced Mr. Whearty's defense and requires reversal.

As a result of the court's ruling Mr. Whearty was not able to present evidence to establish self-defense in Counts 1 and 2. As noted *supra*, it is a well-established rule in Washington that a jury must evaluate evidence of self defense from the standpoint of a reasonable person knowing all the defendant knows and seeing all the defendant sees. *Walker*, 136 Wn.2d at 776; *Janes,* 121 Wn.2d at 238 (1993); *State v. Allery,* 101 Wn.2d 591, 594, 682 P.2d 312 (1984). The subjective component of this test requires the jury to stand, as nearly as possible, in the shoes of the defendant and from that point of view judge the nature of his act. *Janes,* 121 Wn.2d at 238. Only by considering the defendant's perceptions and the circumstances surrounding the act is the jury able to make the critical determination of whether a reasonably prudent person similarly situated would have believed the defendant's act to be necessary. *Janes,* 121 Wn.2d at 239. "The subjective aspects ensure that the jury fully

understands the totality of the defendant's actions from the defendant's own perspective." *Id.*

Because of the court's erroneous ruling, Mr. Whearty was precluded from showing the jury exactly how Ms. Dalmeny looked while fighting and her ability to defeat and possibly injure an opponent, and therefore was unable to fully inform the jury of the relevant circumstances known to him at the time of the incident. Because the jury was unable to see relevant evidence of Ms. Dalmeny's fighting ability, it could not evaluate the situation from Mr. Whearty's perspective. Without knowing what he knew about Ms. Dalmeny and her ability to inflict harm, the jury could not legitimately decide if a reasonable person would have acted as he did in restraining her.

The court's erroneous ruling violated the appellant's constitutional right to present his defense. This violation is presumed prejudicial, and the State has the burden of proving the error harmless beyond a reasonable doubt. *See Maupin,* 128 Wn.2d at 929. The State cannot meet its burden in this case.

d. The error was not harmless beyond a reasonable doubt.

The denial of the right to present a defense is constitutional error. *Crane,* 476 U.S. at 690; *Jones,* 168 Wn.2d at 724. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. *State v. Miller,* 131 Wn.2d 78, 90, 929 P.2d 372 (1997).

"The presumption may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." *State v. Ashcraft,* 71 Wn. App. 444, 465, 859 P.2d 60 (1993). Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *State v. Easter,* 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The State bears the burden of proving the absence of a valid self-defense claim beyond a reasonable doubt. *State v. Acosta,* 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). The State cannot overcome its burden of overcoming a presumption of prejudice here. There was a basis for a rational trier of fact to conclude the State had failed to prove the absence of lawful self-defense beyond a reasonable doubt in Counts 1 and 2. Mr. Whearty testified to facts and circumstances that, if believed, would establish self-defense. The jury, however, determined the State proved beyond a reasonable doubt that he did not act in lawful self-defense in Count I and Count 2, but

it arrived at that conclusion without the benefit of taking into account a circumstance that contributed to Mr. Whearty's self-defense claim. Mr. Whearty's conduct would have appeared more reasonable in light of evidence that Ms. Dalmeny was a formidable fighter---good enough to win an MMA match before a paying audience.

Had the jury been able to see evidence of the MMA fight recorded just days prior to the incident, the jury would have been more likely to credit Mr. Whearty's self-defense theory. That evidence would have corroborated and supported his testimony in a case that largely turned on the credibility of his account of what happened.

In addressing constitutional error, the reviewing court decides whether the actual verdict "was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical jury faced with the same record, except for the error." *State v. Jackson,* 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999). Reversal is required because the State cannot show beyond a reasonable doubt that error in excluding the evidence could not have possibly contributed to the guilty verdict.

The court's erroneous exclusion of defense evidence cannot be

considered harmless beyond a reasonable doubt, and reversal is required.

2. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO IMPEACH THE COMPLAINING WITNESS AND ARRESTING OFFICER.

a. In the absence of a tactical justification for failing to challenge the credibility of the complaining witness with available impeachment material, counsel's performance was deficient.

Criminal defendants are entitled to the effective assistance of counsel, a right protected by both the Sixth Amendment and the Washington Constitution. *See* U.S. Const., Amends. 6 and 14; Wash. Const., Art. 1,§ 22; *Strickland v. Washington,* 466 U.S. 668, 80 L.Ed.2d 674, 685, 104 S.Ct. 2052 (1984); *see also United States v. Cronic*, 466 U.S. 648, 653-54, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984). Underthese guaranties, criminal defense counsel's performance is deficient if it fails to meet an "objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas*, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987).

On appeal, then, to sustain an ineffective assistance claim under the Sixth Amendment, a defendant must establish that his counsel's performance was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the unprofessional

errors. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Hendrickson,* 129 Wn.2d 61, 78, 917 P.2d 563 (1996); U.S. Const. Amend. 6.

To show deficient performance, a defendant must demonstrate that his attorney in essence made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. *State v. Howland,* 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting *Strickland v. Washington,* 466 U.S. at 687). This is, admittedly, a heavy burden. *Howland,* 66 Wn. App. at 594.

The appellate courts review claims of ineffective assistance of counsel *de novo. State v. Meckelson*, 133 Wn. App. 431, 435, 135 P.3d 991 (2006). Here, the record on appeal makes clear that an error of deficient performance occurred. The State's witness Ms. Dalmeny's testimony contained inconsistencies regarding her actions and the injuries she said were inflicted by Mr. Whearty. For instance, she testified at trial that neither O. or S. got out of the car after she drove away from Mr. Whearty. RP (3/23/15) at 157. Her sister Sarah Dalmeny, however, stated that her sister told her that O. got out of the car at the Justice Store, contrary to Chelcie Dalmeny's testimony. RP (3/23/15) at 172. O. also stated that she got out of the car at the store and went

inside to buy a hairbrush.

Regarding her injuries, she initially pointed to the top of her head during her testimony, however, during cross examination she said it was the "back of the head, the side" where she was injured. RP (3/24/15) at 145. She told Deputy Mohr that he was punching her in the side of the face. RP (3/24/15) at 146.

Despite this, however, defense counsel failed to impeach Ms. Dalmeny regarding the inconsistency. Counsel's failure to impeach Ms. Dalmeny's credibility with the inconsistency was deficient performance. Such attorney performance may come in the form of sins of commission, and omission. Thus the failure to use available tools for asserting legally tenable trial rights may be deficient. See *State v. Gentry,* 125 Wn.2d 570, 646, 888 P.2d 1105 (1995). For example, a failure to object to inadmissible evidence can amount to ineffective assistance of counsel. *State v. Hendrickson,* 138 Wn. App. 827, 831, 158 P.3d 1257 (2007), affirmed, 165 Wn.2d 474 (2009).

In this case, counsel's failure to impeach Ms. Dalmeny was conduct that fell below an objective standard of reasonableness.

b. Counsel's deficient performance was not tactical and was prejudicial to the outcome of the trial.

Mr. Whearty contends that counsel's failure prejudiced him because

cross- examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Further, Mr. Whearty has a state and federal right to confrontation which included the right to meaningful cross-examination and impeachment. *State v. Darden,* 145 Wn.2d 612, 41 P.3d 1189 (2002); U.S. Const. Amend. 6; Wash. Const. Art. 1 § 22.

Because cross-examination tests perception, memory and credibility, it helps ensure the accuracy of the fact-finding process. *Darden,* 145 Wn.2d at 620; *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). And when the right is denied, the very "integrity" of the fact-finding process is called into question. *Chambers,* 410 U.S. at 295.

Where performance was deficient, to fully sustain an ineffective assistance claim, a defendant must establish a reasonable probability that the result of the trial would have been different absent the objectively deficient conduct of the proceeding by his attorney. *State v. McFarland,* 127 Wn.2d at 334-35. Importantly, a "reasonable probability" means simply "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. at 694. Here, given that Ms. Dalmeny was the State's chief if not essentially sole witness, it was unreasonable to fail to impeach her regarding

the inconsistnencies.

Counsel's deficient performance deprived Mr. Whearty of his critical trial right to effectively and fully impeach the State's chief witness, and undermines any confidence in the outcome, requiring reversal.

3. THE TRIAL COURT ERRED BY REFUSING TO ADMIT MR. WHEARTY'S COMPLETE STATEMENT TO DEPUTY MOHR

The State elicited one part of Mr. Whearty's statement and demeanor when arrested and when transported in Deputy Mohr's vehicle. RP (3/24/15) at 214-16. This included his one word answers such as "little," "big," and "huge" in response to questions about what happened during the incident, his statement that he did not cheat on Ms. Dalmeny, and the testimony that he was screaming and crying. RP (3/24/15) at 214-15. The court, however, sustained the State's objection to Mr. Whearty's full explanation to the police, including his statement to Dpuety Mohr that Ms. Dalmeny hit him. A fair and complete summary would have included Deputy Mohr's admission that Mr. Whearty told him that Ms. Dalmeny had hit him during the incident, in support of his claim of self-defense. The court erred in refusing to allow Mr. Whearty's full statements to police.

a. Mr. Whearty's statements to Deputy Mohr should have been included to give context to the State's elicited submissions and to avoid misleading the jury.

A trial court abuses its discretion if its ruling is based on an erroneous view of the law. *In re Detention of Rogers,* 117 Wn. App. 270, 274, 71 P.3d 220 (2003).

"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." ER 106.

Statements are admissible under ER 106, even if self-serving hearsay, as long as they "explain, modify, or rebut the evidence already introduced" and when they relate to the same subject matter and are relevant to the issue involved. Here, defense counsel sought to elicit his exculpatory statements on cross-examination. RP (3/24/15) at 231-33. As the pretrial court recognized, Mr. Whearty's statements to Deputy Mohr were in response to questions by the deputy about "the underlying incident." CP 18-20.

Furthermore, a statement is not hearsay when it is consistent with the declarant's testimony at trial and is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." ER 801(d)(1)(ii). Here, Mr. Whearty's statement to Deputy Mohr modified the already introduced evidence of Mr. Whearty's injury to his

forehead and the State's assertion that it was caused during the previous MMA fight and not inflicted by Ms. Dalmeny, and therefore was relevant to rebut Mr. Whearty's implied fabrication about the cause of the injury.

The issue in this case is similar to *State v. West*, 70 Wn.2d 751, 424 P.2d 1014 (1967). In that case, West was charged with robbery. Although West had given a statement to a police officer, the prosecutor avoided all mention of the statement during his direct of the officer. On cross-examination, and over the state's objection, defense counsel was allowed to elicit testimony that West told the officer he had some connection with the robbery but did not admit his entry into the building, taking money, or running from the building. On re-direct, the State elicited the balance of the conversation from the officer. West objected to the balance, arguing there had been no pretrial hearing to determine the statement's admissibility. The court rejected this argument. The held West was not at liberty to explore broad areas at will, seek to leave inferences with the jury, and then preclude the state from attempting to explain or rebut the inferences. *West*, 70 Wn.2d at 753-54.

By allowing Deputy Mohr to testify that he questioned Mr. Whearty about the incident, but excluding evidence of his complete statement to the

deputy, the court allowed the State to create the misleading impression that Mr. Whearty's injury was initially caused during the MMA fighter and was made worse when he exerted himself during the incident, or that she caused a small cut or scratch which he then made worse before police arrived. RP (3/26/15) at 472-73. The court's one-sided ruling admitting part of the testimony, but excluding Mr. Whearty's full explanation was error.

b. The unfair exclusion of Mr. Whearty's complete statement was prejudicial

The erroneous exclusion of evidence is prejudicial if, within reasonable probabilities, the verdict would have been materially affected absent the error. *State v. Brockob,* 159 Wn.2d 311, 351, 150 P.2d 59 2006). The State went to great lengths to suggest Mr. Whearty's testimony about how his forehead was injured was fabricated, and that it was in fact inflicted during his MMA fight or a cut she caused that he made worse. RP (3/26/15) at 472. Without the opportunity to cross-examine Deputy Mohr on the full context of the statements, Mr. Whearty was unfairly portrayed as a liar. The full context of his statements was necessary to fairly rebut the State's effort to imply Mr. Whearty fabricated his testimony and fabricated the extent of his injury.

Because the error was prejudicial, Mr. Whearty's convictions should be

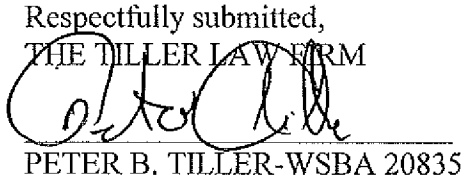
reversed and the case remanded for a new trial.

E. CONCLUSION

For the reasons stated above, the appellant respectfully requests this Court reverse his convictions.

DATED: February 5, 2016.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

The undersigned certifies that on February 5, 2016 that this Appellant's Supplemental Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copy was hand delivered to Sara Beigh and a copy was mailed to the appellant by U.S. mail, postage prepaid, to the following:

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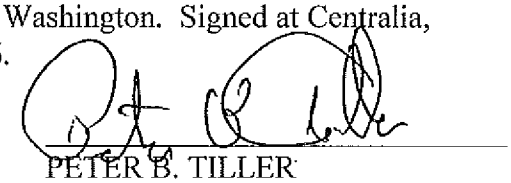
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 5, 2016.



PETER B. TILLER

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