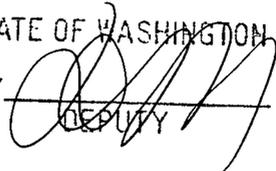


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 43692-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

SYLVIO ALBERT BRAVETTI
Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable CHRISTOPHER WICKHAM, Judge
Cause No. 11-1-01553-3

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

I.

1. The trial court erred in suppressing much of the evidence of Mr. Sylvio Bravetti's knowledge of the propensity for violence, possessed by his son Michael, the alleged victim, when all of the evidence comprised of things know to the Defendant prior to this incident and all of it was relevant to the issue of whether a firearm constituted a reasonable amount fo force.

2. The trial court erred in refusing to reconsider the pre-trial order suppressing much of the evidence of Michael Bravetti's violence, when he opened the door by making an issue of his allegations that he was abused by the defendant.

3. The Defendant's due process rights to effective assistance of counsel were violated when the Defense Counsel failed to object to evidence of Mr. Sylvio Bravetti's general abuse, the follow up questions designed to elicit from Ms. Kathy Bravetti that she was a whore, not objecting to evidence of a protection order being allowed to be dismissed and not putting actual evidence on, during the motions in limine.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court erred in suppressing evidence of Michael Bravetti's past violence and threats when the Defendant was putting forth a lawful use of force defense, and thus necessitating that the jury put itself in the position of the Defendant, in evaluating whether his decision to use force

and the amount of force was reasonable.

2. Whether the trial court erred in suppressing evidence of acts of violence that Mr. Bravetti was aware of but not personally observing, based on the hearsay rule.

3. Whether the court erred in suppressing evidence based on ER 403, when the court initially used the test of the probative value being outweighed by the prejudice and the continuation of that analysis by the trial court.

4. Whether the court erred in suppressing evidence of violence that involved persons other than Mr. Sylvio Bravetti, when such evidence was known to the Defendant at the time of the incident and went towards his belief that employing the firearm was a reasonable step to protect himself.

5. Whether an objection should have been made to the introduction of gang evidence, when there was no weighing of the evidence under ER 404(b) or ER 402, the evidence involved hearsay and speculation.

C. STATEMENT OF THE CASE

The Appellant, hereinafter referred to as the Defendant was charged with one count of Assault in the First Degree, while armed with a firearm . The allegations were that he drew a firearm on his adult son, Michael Bravetti. The defense was lawful use of force, by self defense.

May 7, 2012 Hearing

Prior to trial, the parties made motions to either admit of exclude

evidence. The issues were put before the court by the State's motion in limine, (CP Pages 14 through 28), and the Defendant's motion to admit evidence, (CP Pages 21 through 36). (RP Pages 4 and 5). The hearing occurred on May 7, 2012. (RP Page 1). The parties did not rely on evidence at that hearing and relied on their submissions. (RP Pages 1 through 64). The Defendant through one of his attorneys, left the option to produce evidence, if the court felt the need to hear it and was told by the court that it was up to the parties, not the court to determine how to present the case. (RP Pages 8 and 7). The State sought to exclude evidence of the victim's 2005 arrest for domestic violence and treatment, evidence of his character, and evidence of the Defendant's disciplining of his son. (RP Page 14). The defense was seeking evidence of past acts to show the Defendant's state of mind at the time of the incident. The defense told the court that this would be a case of self defense. (RP Page 15). The Court told the defense to state the specific evidence that Mr. Sylvio Bravetti was seeking to have admitted. (RP Page 16). The defense stated with the 2005 arrest, the incidents of threats against Ms. Ruth Bravetti, ex-wife of the Defendant and mother of Michael Bravetti, violence by Michael Bravetti against his mother, including severely scratching his mother, an assault by Michael Bravetti on the Defendant, when Michael was sixteen years old, and communications by Ruth Bravetti that she was still afraid of her son. (RP Pages 15 through 21).

The “kitchen island incident” was brought up next along with one of Michael Bravetti’s girlfriend’s blood on the windshield of a car, pleadings brought up in the parenting plan case involving Michael Bravetti’s son and another girlfriend, including the taunts by Michael to the Defendant. After listing the evidence, the court asked the State to respond. ((RP Page 23). The State claimed in argument that the defense theory was that Mr. Bravetti’s right to present evidence trumped the evidence rules and cited ER 803. The State also discussed relevance. She proceeded with her argument. (RP Pages 26 through 29). The prosecutor brought up that much of what Mr. Bravetti intended to use was not from first hand knowledge. (RP Page 35). She sent on to argue that evidence of Michael Bravetti raping one of his girlfriend’s was too remote and prejudicial and did not lend itself to a reasonable fear that he would kill the Defendant. (RP Page 36). She further discussed the “kitchen island incident” and said that all it dealt with was Michael Bravetti chasing his father around the island shouting obscenities at him.

The defense then stated its argument. (RP Pages 40 through 56). He mentioned Michael Bravetti’s threats to beat to a pulp and kill the Defendant, the savage treatment of his grandson, the fact that the Defendant knew all of the items sought to be admitted *before* this incident, and the constitutional right to present a defense. Mr. Bravetti was aware of the attack, by Michael Bravetti, against his mother with a baseball bat. (RP Page 45). Interestingly,

the court brought up the fact that the Defendant allowed Michael Bravetti to stay with him (RP Page 47), which this author finds odd, due to that being typical in domestic violence situations. The Defense argued that this all dealt with the Defendant's point of view. (RP Page 51). The Defense then concluded its argument. (52 through 56). The Court set the matter over for a decision. (RP Pages 62 and 63).

May 9, 2012 Hearing

The court reconvened on May 9, 2012. The court gave its ruling. The court excluded evidence of the Michael Bravetti's arrest in 2005. The court did so after finding that the incident did not involve the Defendant in this case, and the prejudice outweighed the probative value. (RP Page 4). Likewise, the court suppressed evidence of Michael Bravetti scratching his mother and biting her. (RP Pages 7 and 8). Again, the court found that it did not involve the Defendant and did not occur in his present. The court spoke of balancing. The court never spoke of the probative value being outweighed by the unfair prejudice, as stated in ER 403. In the same vein, the court excluded evidence about violence on the school bus and Michael Bravetti punching his brother. (RP Page 9). The "kitchen island incident" was found to be "somewhat prejudicial" but allowed in. The court allowed evidence of the Defendant's alleged comments that he would make his son Michael "bleed" and suggested a limiting instruction, even though it was excluding

much of the violent acts of Michael Bravetti that the Defendant was aware of. (RP Pages 12 through 14).

The court excluded testimony of assaults on former girlfriends of Michael Bravetti. The court found that they did not include danger to the Defendant directly and did the same weighing act as it did with the other evidence. ((RP Page 14). The court excluded evidence of threats against Michael Bravetti's mother, finding that it was reputation evidence and was not directed at the Defendant. (RP Page 16). The court was unsure of the baseball bat incident, due to there being no evidence of how long ago it occurred. The court said that it would depend and left it for a future determination. (RP Pages 16 and 17). The court allowed some evidence of the garage assault on Tony Bravetti, due to it helping to explain the corporal punishment situation. (RP Page 17). The court suppressed evidence from Family Court pleadings, saying that they were too remote and did not involve the relationship of the Defendant and Michael Bravetti. (RP Page 18).

Trial

Trial commenced on June 11, 2012, before Judge Wickham. Before the trial commenced, discussion was made of Judge Murphy's ruling. It was noted on the record that alternate findings of facts and conclusions of law were proposed and rejected by Judge Murphy. (RP Pages 13 and 14). After the jury was selected, preliminary instructions were read, by the court. (RP

Pages 21 through 25). The court then gave the jury preliminary instructions on the charge. (RP Page 26 through 32).

The first evidence presented was a 911 tape that had been redacted, to conform with the prior rulings. It was introduced through Ms. Kathleen Seeley. She was a manager overseeing the 911 center. She testified that the recording was accurate and a record of the 911 center. The tape was Exhibit 7 and was admitted. It was then played for the jury. (RP Page 33 through 40). Trial then recessed. (RP Page 41).

The following day, Exhibit 7 was corrected to be Exhibit 8. (RP Pages 44 through 46). Ms. Ruth Bravetti was then called. (RP Page 47). She identified the Defendant and verified her phone number. (RP Pages 47 and 48). She testified that she had children with the Defendant, including Michael Bravetti and maintained a good relationship with the Defendant. She also gave family background. (RP Pages 47 through 51). She then spoke about calling 911 on October 3, 2011. She was then cross examined. (RP Page 52). The next witness called was Officer Eric Lever. (RP Page 53). Among other things, he is a firearms instructor. (RP Pages 55 and 56). He went to the call on the Defendant, on October 3, 2011. (RP Page 56). He was the first officer there. He was also the lead investigator. He described the house. When he first arrived, he did come in contact with the Defendant. Both the Defendant and Michael Bravetti were detained. (RP Pages 56

through 59). He did a quick check of the residence to determine that no one else was in the house. Then, he did a more thorough check of the house. During that time he observed a hand gun and a magazine on the counter. The magazine was empty as well as the chamber. (RP Page 60). He had another officer take Michael Bravetti over to his car. He then had the Defendant get up and sit on a bench. (RP Page 62). He noticed that Mr. Bravetti had blood on him. (RP Page 63). Mr. Bravetti then described the altercation with the officer and relayed how it was over the disciplining of his grandson. He spoke of how he was told by Ruth Bravetti that Michael was upset and the Defendant was concerned about what would happen. At that point, the Defendant retrieved a hand gun. The Defendant hid the weapon under a folder near the laptop. It was a 9mm semiautomatic. He spoke of how Michael Bravetti came home, and started poking him in the chin and yelling at him. He then took out the handgun and pointed it at Michael Bravetti. Then they got into a fight over the gun and went to the floor. Then they “negotiated” how to make this safe. (RP Pages 64 through 66). The officer had no recollection of the Defendant telling him that Michael threatened to kill him. (RP Pages 67 and 68). The Defendant did say that he was scared of Michael Bravetti. (RP Page 68). After that, the officer spoke with Michael Bravetti. (RP Pages 68 and 69). Exhibits were then introduced and admitted. Exhibits 9, 10, 11, 12, 13, 14, 15, and 16 were photographs. They

were admitted. (RP Pages 70 through 72). Later, Exhibit 1 was offered which was the firearm. (RP Pages 77 and 78). Exhibit three, the magazine to the gun, was then offered and admitted. (RP Pages 80 through 82). Exhibit 4, which were the bullets were then offered and admitted. (RP Pages 82 through 84). After direct testimony, cross examination began. (RP Page 85) The officer observed that the Defendant had trouble standing up. He also noted that he was crying. (RP Page 86). The State next called Officer Roland Sapinoso. (RP Page 93). His involvement was listening to a recorded conversation of the Defendant. (RP Pages 95 through 99). Exhibit 6 was a recording of that call. The officer testified about how it is processed. Exhibit was then entered into evidence. (RP Pages 99 through 103). That concluded the officer's testimony and there was no cross examination. (RP Page 104).

The next witness to testify was Officer Kenneth Lundquist. (RP Page 104). His testimony surrounded the testing of weapons. He was asked to test the weapon taken in this case and described the procedure. (RP Pages 104 through 109). On cross examination, the officer agreed that a gun needed the round in the chamber to fire. (RP Pages 112 through 117). On re-cross-examination, the officer agreed that it would be a deliberate action to place a round in the chamber. (RP Page 118).

After Officer Lindquist stepped down, Michael Bravetti testified. (RP

Pages 118 through 184). He testified that he lived with the Defendant. (RP Pages 121 and 122). He testified that he did not have much of a relationship with the Defendant. (RP Page 126). He testified to two instances where he hit the Defendant. He denied ever threatening to hit him. (RP Pages 128 through 131). He then gave his version of the “kitchen island incident.” (RP Pages 133 through 135). He then moved on to the incident leading to this case on October 3, 2012. (RP Pages 136 through 184). During his testimony, he made a generalized comment about what the Defendant did to him as a child. (RP Pages 144 through 146). He did not restrict it to any particular incident. After the witness made those comments, the State requested a sidebar. (RP Page 148). During that sidebar, the Defense renewed its request to reconsider Judge Murphy’s ruling, based on the witnesses testimony of general abuse he claims to have suffered at the hands of the Defendant. The defense claimed that the witness opened the door with his testimony. He spoke of cowering as he had “always done.” He spoke about the witness claiming that what he did to his son not comparing to what the Defendant had did to him. (RP Pages 150 through 156). The court denied the motion. (RP Page 156). A limiting instruction was allowed. The limiting instruction was read to the jury. (RP Page 168). After that, the witness resumed the stand and continued his testimony. He said he put his finger under the Defendant’s chin to get the Defendant to look at him. (RP Page 173 and 174). At that

point, the Defendant pulled the gun and pointed it at his face. He heard a click. (RP Pages 174 and 175). At that point, the parties scuffled over the weapon. (RP Pages 176 and 177). During cross-examination, the witness denied making threats, denied getting angry, denied yelling, and admitted to nothing more than crying, conversing, and touching the Defendant's chin. (RP Pages 207 through 211). His story was essentially, he was calmly confronting his father about the witness' upbringing, touching his father's chin, when the Defendant suddenly pulled a gun on him. He agreed that the Defendant had health problems, including bad knees, diabetes, and back problems. (RP Pages 212 and 213). On cross-examination, he changed his story slightly and said he *thought* he heard a trigger pulled. (RP Pages 215 and 216).

On re-direct testimony, Michael Bravetti was asked about a temporary restraining order. He was allowed to testify that it had been dismissed. No objection to relevance was ever made. (RP Pages 222 and 223). Shortly after that, the State rested its case in chief. (RP Page 227).

The defense started its case by putting on Sharon Voss. She testified that Michael Bravetti was going to take Sylvio Bravetti for everything he could get. (RP Pages 228 and 229). Then, Ruth Bravetti testified. (RP Page 229). She first testified about the Defendant's medical problems. (RP Pages 230 through 232). He did have medical problems, including a knee

replacement and a horrible back problem. Sometimes he could not even walk straight up. She was paying approximately \$2,000.00 to Michael Bravetti. (RP Pages 233 and 234). There was also a loan that he is not paying her back. (RP Page 235). She was then asked about the events of October 3, 2011. She testified that the Defendant called her about Michael Bravetti's treatment of his son. She later called Michael Bravetti and he became belligerent, yelling, and hung up on her. He came over and became very angry. Michael Bravetti said, "He needs to get out of my life." (RP Pages 236 through 251). She mentioned that she was very afraid of Michael and an objection was made and sustained. (RP Page 238). She was asked to describe Michael Bravetti's demeanor and she again mentioned that she was afraid and that he was very angry. Objections were sustained and the jury instructed to disregard the answer, even though it contradicted Michael Bravetti's testimony. She later testified that he told her that he was going to make his father bleed, beat him to a pulp and kill him. He then dashed out of the house. (RP Page 239). She did tell the Defendant what transpired. The Defendant left the phone receiver off the hook and heard Michael Bravetti come and start yelling and screaming. Ruth Bravetti was not allowed to say what the Defendant was saying while he appeared to be attacked, due to an objection, based on hearsay, being made. His attorneys did not argue present sense impressions or excited utterances, even if the

statements were hearsay. (RP Page 247). She then called 911 on another phone. She agreed, on cross examination that she was on friendly terms with the Defendant. (RP Page 255).

The next witness to testify was Ms. Kathy Bravetti. (RP Pages 269 through 286). She was married to the Defendant and knew him for twenty years. She testified that she was afraid of Michael Bravetti and he hated her. He referred to her as his father's whore. She testified how she and her husband helped Michael Bravetti out financially, allowing him to stay in their rentals, then with them. Michael Bravetti was very disrespectful towards his father and made it clear that he hated his father's "effing" guts. He turned the room into a pigsty and got very aggressive with the Defendant including the kitchen island incident. Her version was much different than Michael Bravetti's version. (RP Page 274). She also contradicted him on the incident of October 3, 2011, that led to the criminal charge. She heard screaming, slapping, and her step grandson being dragged out without his shoes on or his coat. (RP Pages 269 through 278). On cross examination, the prosecutor brought up the fact that the witness cheated on her then husband, with Mr. Sylvio Bravetti. One objection was made but the prosecutor brought up the issue again, referring to the witness as a whore, without objection. Evelyn Williams then testified about her observations of Mr. Bravetti when he was arrested. (RP Pages 286 through 290).

Mr. Tony Bravetti then testified. He spoke of the garage incident, where he had to pull Michael Bravetti off of his dad. (RP 290 through 298). He was asked what did Michael Bravetti said after he was pulled off of his father. An objection was made and the response was an excited utterance. The court said it needed a foundation for an excited utterance. The witness was asked more questions and spoke of the rage Michael Bravetti was in, when he was pulled off of his father. The Objection was renewed. (RP Pages 292 and 293). Outside of the presence of the jury, the defense offered that the statement would be “Just you wait. I am going to get you with a bat while you are sleeping.” (RP Page 294). The objection, by the prosecutor, was that it was being offered for the truth of the matter asserted and not in response to a startling event. The court noted that it was not being offered to prove the truth of the matter asserted. The prosecutor also argued it was character evidence. The court sustained the objection due to the age and ER 403. (Rp Pages (296 through 298).

The next witness was the Defendant. Prior to his testimony, the defense renewed its objection to all of Judge Murphy’s ruling. (RP Pages 300 and 301). The Defendant was then called as a witness. (RP Pages 303 through 383). He discussed his poor health. (RP Pages 304 through 306). He discussed his abuse by Michael Bravetti including the assault in the garage. (RP Pages 307 through 310). He discussed the means in which

Michael Bravetti came to live at his home. (RP Pages 310 through 315). (He gave his version of the “kitchen island incident). (RP Pages 315 through 317). After discussing the school rules of the house, the Defendant discussed the incident of October 3, 2012. (RP Page 324). He testified that it was a typical hell day, with the yelling and spanking. He heard his grandson screaming and being dragged, without shirt and shoes out the door. That day was much more severe than before. (RP Pages 325 through 328). Mr. Bravetti did testify about the phone call he received from Ruth Bravetti, but did not mention the substance of the call, only his actions taken. (RP Pages 332 and 333). He did say that he was warned that he “. . . could probably expect a good beating.” An objection based on hearsay was sustained. (RP Page 333). He called Ruth Bravetti back at 11:22 to tell her that Michael Bravetti was there. (RP Page 335). The Defendant was in the kitchen when Michael Bravetti came in. He did not have to go into the kitchen to get to the master bedroom (RP Pages 337 and 338). Mr. Bravetti came straight in to the kitchen and was on top of the Defendant. He did testify that he previously put a gun near where he was sitting underneath a manilla folder. He said that he was afraid, because he wanted to live. He thought he was in for a really bad pounding. (RP Pages 339 and 340). After describing the firearm, we went back to what Michael Bravetti did. He went right up to him, pushed him in the face with an open hand, spitting on him. He was not punched but

slapped. At that point the gun came out. He spoke about how he was being punched in the chest. Michael Bravetti grabbed the gun and pulled the defendant out of the chair. At that point, the Defendant's focus became to protect the gun from Michael Bravetti. (RP Pages 343 through 346). They worked out where the Defendant would release the clip. After it was removed, Michael Bravetti laughed. (RP Pages 347 through 350). The Defendant denied ever pulling the trigger. (RP Page 351). Later, he testified that he believed that he had no choice but to defend himself. (RP Page 370). During cross examination, the prosecutor he was asked if he told the officer that he was not sure what would happen and put the gun underneath a folder. (RP Pages 378). Shortly afterwards, the defense rested. (RP Page 383).

After a rebuttal witness, the court discussed giving an assault fourth instruction. The court declined to do so. (RP Page 393). Earlier, the court expressed reservations that given that the gravamen of the charge was the pointing a firearm either and Assault 2nd Degree occurred or it did not. (RP Pages 356 through 358). After that, jury instructions and argument were made. During the argument, the prosecutor referenced the fact that Kathy Bravetti obtained an order to get Michael Bravetti out of the house, with no objection being made. (RP Page 444).

D. ARGUMENT

I.

THE TRIAL COURT ERRED IN SUPPRESSING MUCH OF THE EVIDENCE OF MR. SYLVIO BRAVETTI'S KNOWLEDGE OF THE PROPENSITY FOR VIOLENCE, POSSESSED BY HIS SON MICHAEL, THE ALLEGED VICTIM, WHEN ALL OF THE EVIDENCE COMPRISED OF THINGS KNOWN TO THE DEFENDANT PRIOR TO THIS INCIDENT AND ALL OF IT WAS RELEVANT TO THE ISSUE OF WHETHER A FIREARM CONSTITUTED A REASONABLE AMOUNT OF FORCE.

1. The trial court erred in suppressing evidence of Michael Bravetti's past violence and threats when the Defendant was putting forth a lawful use of force defense, and thus necessitating that the jury put itself in the position of the Defendant, in evaluating whether his decision to use force and the amount of force was reasonable. R.C.W. 9A.16.020 allows for the defense of lawful use of force. The relevant portions read as follows:

RCW 9A.16.020

Use of force -- When lawful.

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;

A defendant is entitled to raise self defense, if any evidence is raised showing

that it was present. The State bears the burden of proving the absence of self-defense, if the evidence is raised; a defendant is not required to prove self defense. State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984). See also State v. Bennet, 42 Wn. App. 125, 708 P.2d 1232 (1985). Additionally, there is no duty to retreat. State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003), reiterates that there is no duty to retreat.

The court in State v. Acosta, supra, looked at the legislative intent and the fact that a requirement for an assault, required acting with knowledge and using unlawful force. If a defendant was required to prove self defense, the State would be relieved of proving that a defendant acted with knowledge and that the force was unlawful. The court relied on an earlier case, involving a homicide, State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983). In that case, the Defendant was accused of murder, for stabbing someone to death. There was no dispute that he stabbed the person. Instead, the defendant, in that case, based his defense around the fact that there was bad blood between them, that he had been *told* that the one killed carried a gun, and that it appeared to the defendant that the other person appeared to be going for his gun, when he reacted by stabbing him. "In determining whether sufficient evidence has been produced to justify a jury instruction on self-defense, the trial court must apply a subjective standard and view the evidence from the defendant's point of view as conditions appeared to him or her at the time of the act." State v. Wanrow, 88 Wn.2d 221, 234-36, 559 P.2d

548 (1977). “As we stated in State v. Miller, 141 Wn. 104, 105-06, 250 P. 645 (1926): "The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, although it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves." State v. McCullum, supra. The court made clear that a critical piece of the analysis is the subjective belief of the defendant, which obviously requires knowledge of what the defendant knew or believed. “The trial court must view the evidence from the standpoint of a "reasonably prudent person who knows all the defendant knows and sees all the defendant sees.” State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005). The Brightman, supra court also discussed the requirement that the force used was reasonable necessary. See also State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2000). A victim's reputation for violence is admissible when the defendant alleges self-defense and shows that knowledge of the victim's reputation for violence contributed to his apprehension. State v. Cloud, 7 Wn. App. 211, 217, 498 P.2d. 907 (1972). See also State v. Callahan, 87 Wn. App. 925, 943 P.2d 676 (1997). In Callahan, supra, the defendant sought to admit reputation evidence of things that he was unaware of, at the time of the incident, which was not

allowed.

In applying this to the case at bar, we have a situation where the Defendant had the belief that he needed to use an extreme amount of force, namely a firearm, but was prohibited from telling the jury why he needed to do so. All of the evidence he sought to present was evidence of facts known or believed by the Defendant about Michael Bravetti. Instead of following the law requiring that the jury look at the question from the standpoint of the Defendant and knowing all he believed that he knew, the court adopted a “balanced” ruling. He was not even allowed to tell the jury that his ex-wife told him, moments before the incident that Michael Bravetti intended to kill him, due to the hearsay rule. An objection, even based on his comment that he was told to expect a good beating was sustained. This entire ruling was an absurdity. One cannot have “balance” when the issue is the use of an extreme amount of force and only being able to tell a small portion of *why* that force was believed, by the Defendant, to be necessary. It was error for the court to suppress much of this information. Given that the main issue in the trial centered on what the Defendant reasonably believed Mr. Michael Bravetti’s capacity for extreme violence was, the Defendant was denied a fair trial when the court hamstrung his ability to relay that information, due to it being “hearsay” and pertaining to others.

2. The trial court erred in suppressing evidence of acts of violence that Mr. Bravetti was aware of but not personally observing, based on the hearsay

rule. The starting point for the court's analysis, should have been what exactly hearsay is. ER 801(c) defines hearsay as: "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." If the statement is being used for some purpose, other than the truth of the matter asserted, it is not hearsay. See State v. Collins, 76 Wn. App. 502, 886 P.2d 243 (1995). As argued earlier, a jury is required to put itself in the shoes of the Defendant, when self defense is raised. In State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983), the court reiterated that the test involved what the defendant, in good faith believed. The court also took into consideration that the defendant, in that case, was *told* the decedent carried a gun.

In applying this to the case at bar, it mattered not whether Michael Bravetti told his mother that he was going to kill the Defendant or beat him. It mattered not whether the other things believed by the Defendant about Michael Bravetti, including his legal problems, his attack on his mother with a bat, his threats to kill his mother, or his domestic violence issues occurred or not. What mattered was whether the Defendant in good faith believed that these events occurred. The statements were not offered to prove the truth of the matter asserted and, therefore, were not hearsay. This case involved evidence that was suppressed, that showed Mr. Michael Bravetti to be a spoiled thug that his family was afraid of and that Sylvio Bravetti reasonably believed this to be the case. There was evidence that formed Sylvio

Bravetti's opinion that his son, Michael, was not bound by the same constraints that civilized people bind themselves to, as evidenced by information of attacking his mother with a bat, his other domestic violence and sexual assault. Yet, most of this information was not allowed into evidence. The court did not even allow evidence that he was told by Ruth Bravetti that Michael threatened to kill him. Based on this, the Defendant's defense was gutted because he could not justify why he felt that he needed to threaten the use of deadly force. The trial court abused its discretion in not admitting this evidence, which was not hearsay, and in doing so deprived Mr. Sylvio Bravetti a fair trial.

3. The court erred in suppressing evidence based on ER 403, when the court initially used the test of the probative value being outweighed by the prejudice and the continuation of that analysis by the trial court. ER 403 reads as follows: "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." "Washington cases are in agreement, stating that unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. Lockwood v. AC&S, Inc., 109 Wn.2d 235, 257, 744 P.2d 605 (1987); State v. Cameron, 100 Wn.2d 520, 529, 674 P.2d 650 (1983)." See Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994). Very

clearly, the operative word in ER 403 is “unfair.” ER 403 was intended to be used in situations where evidence would be relevant but not overly so and that the evidence would bring in facts that would encourage a jury to make its decision based on emotion instead of deliberation on the facts.

In applying this to the case at bar, it is first to note that the trial court, in its ruling on the emotions in limine, did not even use the word “unfair.” The trial court merely stated that the prejudice outweighed the probative value. All evidence is prejudicial; if it was not, it would not even be relevant. The operative words were “unfair” and “substantially outweighed.” Given that Mr. Bravetti was using a defense that admitted he pointed a weapon at his son and given that the law requires that a jury put itself in Mr. Sylvio Bravetti’s position, knowing all he knows, it was an absurdity to suppress this evidence on the grounds of ER 403. Knowing all that Mr. Bravetti knew or even believed, was exactly what the jury was required to consider. This includes the trial judge suppressing testimony of Tony Bravetti hearing Michael Bravetti threatening to attack the Defendant with a baseball bat, in his sleep. By the misuse of ER 403, the trial court erred and denied the Defendant a fair trial.

4. The court erred in suppressing evidence of violence that involved persons other than Mr. Sylvio Bravetti, when such evidence was known to the Defendant at the time of the incident and went towards his belief that employing the firearm was a reasonable step to protect himself. As stated

before, there is an objective and subjective component to determining whether self defense applies as a defense. The Court, in State v. Walker, 136 Wn.2d 767, 966 P.2d 883 (1998), went through the test. It stated: “. . . In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis. The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant.” See also State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993). Of particular note, nowhere does the court describe the subjective portion of the test as: “The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant, *if obtained through his personal knowledge and not too remote in time.*”

In applying this to the case at bar, it is of particular note that the trial court, both the judge that heard the motions in limine and the trial judge, essentially added that qualifier into the subjective part of the test. As stated earlier, the Defendant was not allowed to even let the jury know that he was told Michael Bravetti was coming over to kill him. He was not allowed to tell the jury about the extreme propensity for violence, believed, by the Defendant, to be exhibited by Michael Bravetti. All of this was necessary so that the jury could have a complete understanding of why Mr. Sylvio Bravetti

reasonably believed that threatening the use of the firearm was necessary, for his protection. By denying this evidence, the Defendant was denied a fair trial. There were other problems with the trial.

II.

THE TRIAL COURT ERRED IN REFUSING TO RECONSIDER THE PRE-TRIAL ORDER SUPPRESSING MUCH OF THE EVIDENCE OF MICHAEL BRAVETTI'S VIOLENCE, WHEN HE OPENED THE DOOR BY MAKING AN ISSUE OF HIS ALLEGATIONS THAT HE WAS ABUSED BY THE DEFENDANT.

For the reasons argued earlier, the decision of the court in the motion in limine and the refusal to reconsider the ruling was error and deprived the Defendant of a fair trial. Additionally, Mr. Michael Bravetti brought up the general fact that the Defendant had abused him as a child. Even if a pre-trial evidentiary ruling is correct, the other side can still eliminate the prohibition by "opening the door." See State, v. Miller, 66 Wn.2d 535, 403 P.2d 884 (1965) and State v. Birch, 183 Wash. 670. 49 P.2d 921 (1935).

In applying this to the case at bar, even assuming that the trial court's evidentiary ruling was a correct statement of the law, the witness, Michael Bravetti, was allowed to testify about his past abuse, in generalized terms. That clearly opened the door to bring in much of the suppressed evidence. At a minimum, the Defendant should have been allowed to bring up all of what he knew about the level of abuse, that Michael Bravetti was capable of and open the door to abuse by Michael Bravetti of abuse of family members, other than the Defendant. The jury deliberated believing that the Defendant

had abused Michael Bravetti and not knowing that much of the violence and abuse that the Defendant was aware of, at the time of the incident. It was not a model of the “balance” sought for, by the trial court. As such, the trial court committed reversible error.

III.

THE DEFENDANT'S DUE PROCESS RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHEN THE DEFENSE COUNSEL FAILED TO OBJECT TO EVIDENCE OF MR. SYLVIO BRAVETTI'S GENERAL ABUSE, THE FOLLOW UP QUESTIONS DESIGNED TO ELICIT FROM MS. KATHY BRAVETTI THAT SHE WAS A WHORE, NOT OBJECTING TO EVIDENCE OF A PROTECTION ORDER BEING ALLOWED TO BE DISMISSED AND NOT PUTTING ACTUAL EVIDENCE ON, DURING THE MOTIONS IN LIMINE.

The defendant was entitled, under the Sixth Amendment of the United States Constitution, to have effective assistance of counsel. See State v. Shilling, 77 Wn. App. 166, 889 P.2d 948 (1995), review denied 127 Wn.2d 1006, 898 P.2d 308. See also State v. Sherwood, 71 Wn. App. 481, 860 P.2d 407 (1993). The Court described the two part test which was; whether defense counsel's performance was deficient and whether the defendant was prejudiced. In that case, the lawyer interviewed one of the prospective defense witnesses and did not call him. In State v. Howland, 66 Wn. App. 586, 832 P.2d 1339 (1992), the court looked at entire record to determine ineffective assistance of counsel. Although, admittedly, defendants bear a heavy burden in prevailing on an ineffective assistance of counsel claim, it is not an impossible burden.

In Harris By and Through Ramseyer v. Wood, 64 F.3d 1432 (1995), the Ninth Circuit found ineffective assistance of counsel. That case involved a Pierce County Aggravated Murder charge, where Mr. Harris had been sentenced to death. The court found in that case that the trial attorney was deficient in many ways, by not objecting, allowing his client to speak with the police, not interviewing witnesses, and only spending two hours of time with the defendant in trial.

Failure to object to evidence, or failing to raise appropriate motions may result in the courts finding that there was ineffective assistance of counsel. See State v. Graham, 78 Wn. App. 44, 896 P.2d 704 (1995). In that case the court did deny claims that there was ineffective assistance of counsel, for failing to object, because there was an insufficient showing as to the merit of the legal claims and because the evidence against the defendant was "airtight".

In State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994), the second prong of the test was satisfied by showing a reasonable probability that ineffective assistance of counsel prejudiced the defendant. See also, State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004). In that case, the defense counsel proposed defective instructions on self defense, so that a jury would have to find that the Defendant was threatened with grievous bodily harm, before he could be acquitted on a self defense theory. See also State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2005), where the Court of

Appeals, Division I, found ineffective assistance of counsel for failing to propose a lesser included instruction. In State v. BJS, 140 Wn. App. 91, 169 P.3d 34 (2007), the court found ineffective assistance of counsel for failing to correctly advise a client of his options in a juvenile case.

In determining whether the presumption that counsel is effective should be overcome in this case, there are several areas the court should examine. First, it is clear from the transcript that the defense simply argued its motion in limine. Given the significant amount of evidence that was being discussed, an offer of proof should have been made with either declarations of live testimony. In fact, the defense response was delivered shortly before the hearing and the trial judge hearing the motion did not have time to examine it, prior to the arguments being made. The defense did not continue its objection to evidence that the prosecutor sought to use, primarily to call the Defendant's wife a whore. There was one objection but no follow up. Given that there could be several reasons why Ms. Kathy Bravetti cheated on her prior husband, that evidence was highly unfairly prejudicial and allowed the jury to disregard her testimony based on an emotional response. Evidence was allowed in to show the Defendant as an abusive person, towards his son Michael Bravetti, in a trial that severely restricted the Defendant's ability to tell the jury all he knew and believed about Michael Bravetti, at the time of the incident. No objection was made to evidence of Ms. Kathy Bravetti obtaining a protection order and getting Michael Bravetti thrown out of the

house. No objection was made to the emphasis the prosecutor gave that evidence in her closing argument. While, it should be clear that, based on arguments made earlier, the defense was hamstrung in presenting the Defendant's lawful use of force defense, these omissions helped deny the Defendant a fair trial. For those reasons, as well as the reasons discussed earlier in this brief, the Defendant was denied a fair trial.

E. CONCLUSION

Therefore, for the reasons given in this brief, the trial court erred in suppressing the evidence concerning the Defendant's knowledge of past violence of Michael Bravetti. Additionally the trial court erred in continuing with that suppression when Michael Bravetti opened the door. Finally, Mr. Bravetti's right to a fair trial was denied by mistakes made by his attorneys. Accordingly, the conviction should be reversed and Mr. Bravetti, given a new trial.

DATED THIS 16 Day of December, 2012.

RESPECTFULLY SUBMITTED

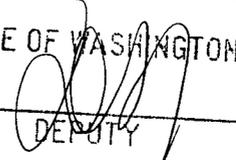


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COURT OF APPEALS
DIVISION II

2012 DEC 17 PM 3:08

STATE OF WASHINGTON

BY 
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,

Respondent/Plaintiff,

vs.

SYLVIO ALBERT BRAVETTI,

Appellant/Defendant.

NO. 43692-2-II

DECLARATION OF SERVICE

I am the Defendant's appeal attorney. I filed the notice of appeal on July 18, 2012. On December 17, 2012, I personally served a copy of the Appellant's brief on the Thurston County Prosecuting Attorney's Office, by hand delivering the same. That same day, I mailed a copy of the brief to the Appellant, at his address of, Sylvio Albert Bravetti DOC # 359431, Cedar Creek Corrections Center, P O Box 37, Littlerock WA 98556.

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


George A. Steele, on December 17, 2012,
at Shelton, Washington.

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DECLARATION OF SERVICE

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