63869-6

NO. 63869-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH NJONGE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether Njonge waived his claim that the public was excluded from a portion of voir dire because he did not raise the issue below and the exclusion of the public is not established in the record.

2. Whether Njonge has failed to establish a violation of his right to a public trial because the courtroom was not closed.

3. Whether exclusion of a television camera crew from voir dire was within the trial court's discretion.

4. Whether the trial court properly exercised its discretion in admitting evidence of other acts of Njonge concerning the victim, Jane Britt, and her husband, a patient at the nursing home where Njonge worked, as evidence of motive for the murder.

5. Whether the trial court properly exercised its discretion in allowing impeachment of Njonge's testimony with evidence of Njonge's thefts from other patients at the nursing home where he worked.

6. Whether Njonge waived an objection to the form of rebuttal evidence from Sandra Colvin because he did not object to her testimony in the trial court.

7. Whether Njonge waived his objection to the form of rebuttal evidence from Sarah Crass because he did not object on that basis in the trial court.

8. Whether Njonge has failed to establish ineffective assistance of counsel in the failure to object to the form of portions of the rebuttal testimony of Sarah Crass and Sandra Colvin.

9. Whether the absence of any error at trial renders the cumulative error doctrine irrelevant in this case.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Joseph Njonge, was charged with premeditated murder in the first degree. CP 1-4. Njonge was tried in King County Superior Court, the Honorable Laura Middaugh presiding. 1RP 1.[1] A jury found Njonge guilty of murder in the second degree. CP 65. The court sentenced Njonge to 200 months in prison, which was a standard range sentence. CP 69-73.

2. SUBSTANTIVE FACTS

The murdered body of Jane Britt was found in the locked trunk of her own car on March 19, 2008, in the parking lot of the Garden Terrace

[1] The verbatim report of proceedings will be referred to in this brief as follows: 1RP: June 2, 2009; 2RP: June 3, 2009; 3RP: June 4, 2009 – pretrials and voir dire; 4RP: June 4, 2009 – trial testimony; 5RP: June 8, 2009; 6RP: June 9, 2009; 7RP: June 10, 2009; 8RP: June 11, 2009; 9RP: June 15, 2009; 10RP: July 20, 2009.

nursing home. 5RP 17-18, 29. She had suffered multiple blunt blows to her head, face, and neck and was killed by being strangled with a ligature; her neck was broken during the attack. 6RP 30-36, 41, 49-52, 74-75. Injuries to her face indicated that a ligature also was applied to her mouth at some point. 6RP 37, 41-43. The injuries to her body indicated that she struggled with her attacker: there were scratches and bruises on her hands and wrists, her left knee was injured, and her fingernails were bloody, broken, and torn. 6RP 51, 53-57; 7RP 79.

Fingernail clippings were collected from Jane Britt's hands and were tested for DNA. 6RP 20; 7RP 47, 61-65, 110-28. The clippings from her left and right hand were separately tested. 7RP 123. Two DNA profiles emerged in both samples: Britt's and a full male DNA profile matching that of Joseph Njonge, to a probability of 1 in 19 quadrillion. 7RP 127-28, 132-33, 137-41. The amount of DNA that was the male profile was quite significant, more than would be present as a result of casual contact, including touching or hugging another person. 7RP 128-30, 145-50.

Jane Britt was a 75-year-old woman whose husband was a patient in the Azalea Unit at Garden Terrace. 4RP 16, 19; 5RP 52, 55, 168. She visited her husband, Frank Britt, daily. 4RP 20; 5RP 76. Frank Britt suffered from Parkinson's disease and cognitive problems. 4RP 20; 5RP

55-56. The last time Jane Britt was seen alive (by anyone who admitted it) was when she left Garden Terrace about 6:30 p.m. on March 18, 2008, after visiting her husband. 5RP 127, 151-52.

Njonge was a 24-year-old nursing assistant who worked evening shift at Garden Terrace, usually assigned to the Azalea Unit. 5RP 117; 8RP 54-57, 122. He normally had responsibility for the care of Frank Britt, among other patients. 5RP 120. Njonge worked March 18, 2008, from 2:30 to 10:30 p.m. and was assigned to care for Frank Britt that evening. 5RP 81, 120, 125; 8RP 64. Staff typically have two shorter breaks and a 30-minute lunch break during each shift. 5RP 82, 121-22.

A small piece of plastic was on Jane Britt's face when her body was found. 6RP 30, 45, 150; 7RP 56, 79. It appeared to be from a thin sheet of plastic. 6RP 30. The material appeared consistent with the plastic trash bags used in Garden Terrace in March 2008 and available in the housekeeping supply area of that facility. 7RP 56, 58-60.

The nurse working on the Azalea Unit the evening of the murder was Sandra Colvin. 5RP 109-10. She supervised the nursing assistants, including Njonge. 5RP 110, 117. There were times that evening when she did not see Njonge on the unit; he made himself scarce that night—she saw him less than she typically would have. 5RP 121-22, 125. Njonge, usually friendly, seemed distant. 5RP 124. After the murder, Colvin

noticed that there was a change in Njonge's clothing: he previously wore short sleeves but changed to wearing long-sleeved shirts under his scrubs. 5RP 130-31. Activities coordinator Christina Galletes also noticed that Njonge began to wear long sleeves under his uniform after the murder. 6RP 125.

Detective Deyo arrested Njonge on April 3, 2008, after the DNA profile under Jane Britt's fingernails was matched to Njonge's DNA profile. 5RP 173-74. When Detective Deyo arrested Njonge, he noticed what appeared to be a healing injury on Njonge's thumb and faint marks on his arm and neck. 5RP 173-76. Njonge's blood was found on bed sheets collected from his apartment the same day. 7RP 90-91, 152-53. Njonge testified that he had scraped his hand on the day of the killing, but claimed that he was injured while opening a can. 8RP 113-14.

Police repeatedly asked Njonge how his DNA could have gotten under Jane Britt's fingernails but Njonge never responded with the story he presented at trial, that she ran her hands through his hair. 8RP 179-80, 184. Njonge told police that Jane Britt had not scratched him or grabbed him. 8RP 177-78, 180-81. He told the police that Jane Britt was the person who assisted Frank Britt in the toilet that night, although at trial Njonge claimed that he and Jane Britt both were in the bathroom assisting

Frank Britt when Jane Britt ran her hands through Njonge's hair. 8RP 111, 190-91.

When police arrested Njonge, they found Frank Britt's Costco card in Njonge's wallet. 5RP 174; 7RP 88. Njonge admitted that he had taken the card without Frank Britt's permission and tried to use it. 8RP 115-16, 146-50. Njonge knew that he could have lost his job over that, but at trial minimized that risk, testifying that he might just have been suspended for a few days. 8RP 149-50.

Police discovered that in December 2007 Njonge won an employee recognition cash award. 5RP 84-86. Two nomination forms had been submitted on his behalf—the jury heard only about the form purportedly signed by Jane Britt. 1RP 8-9, 19; 5RP 85, 176-77; 7RP 18. A forensic document examiner compared the handwriting on that form with known samples of Jane Britt's handwriting and concluded that Jane Britt did not sign the form. 7RP 18-27. The person who did sign the form must have known that Jane Britt had hand tremors (caused by Parkinson's disease) because an effort was made to imitate the tremor. 4RP 21, 60; 5RP 150; 7RP 23, 32. The document examiner could not determine whether or not Njonge wrote the signature. 7RP 28. Njonge could not be eliminated as the writer and there were a number of qualities of the writing consistent with his writing. 7RP 29-35.

Earlier in March 2008, Jane Britt had complained about the badly deteriorated condition of Frank Britt's teeth. 6RP 116-17, 132-33. A Garden Terrace supervisor advised the staff, including Njonge, of that complaint. 6RP 133-35; 8RP 133.

The trial court ruled that evidence regarding Frank Britt's Costco card, the forged nomination form, and the complaint about dental care was admissible for the purpose of establishing Njonge's motive. 1RP 14-15, 18-19. The court gave the jury an instruction limiting their consideration of that evidence to that purpose. CP 51.

Njonge took a diamond ring belonging to another patient without her permission and pawned that ring. 1RP 56; 8RP 117-18, 158. Upon searching Njonge's apartment on April 3, 2008, police found a painting taken from the room of another patient without permission. 1RP 56; 7RP 90; 8RP 154. Police also found the debit card of a former patient in Njonge's wallet. 1RP 56; 8RP 116-17. The trial court ruled that these three incidents were proper subjects of impeachment if Njonge testified. 5RP 202-03.

When Njonge did testify, he had an explanation for each item of property that was found in his possession that belonged to a patient. 8RP 115-19. He admitted on cross-examination that he did not have permission to have any of the items. 8RP 146-49, 152, 154. Njonge

claimed that he found the debit card after that patient was discharged from the facility, but the patient testified that the card went missing in the middle of his month-long stay. 8RP 151; 9RP 14. Njonge had told police that he did not know anything about thefts of patients' property at Garden Terrace. 8RP 154-58. They specifically asked about missing paintings and Njonge denied any knowledge. 8RP 154-56.

Njonge claimed that he was on vacation in Oregon for five days immediately before the employee recognition award was granted. 8RP 120, 164. Employee records showed the award was given on December 7, 2008, and that Njonge had worked on December 5th and 6th; he had not been off five days in a row during the months of November or December. 9RP 36-39.

Njonge did not dispute that the DNA profile under Jane Britt's fingernails was his. Njonge testified that on March 18, 2008, he and Jane Britt were in the bathroom assisting Frank Britt at the toilet when Jane Britt scratched his scalp, with both hands. 8RP 111, 173-74. He testified that Jane Britt often scratched his head or ran both of her hands through his hair, including while they were in the facility dining room. 8RP 173. He denied killing Jane Britt. 8RP 109.

On rebuttal, Colvin, the nurse who supervised Njonge's shift, testified that she had never observed Jane Britt have physical contact with

the staff – Colvin never saw Jane Britt run her hands through any staff person's hair. 9RP 22-23. Sarah Crass, Jane Britt's granddaughter, testified that although Britt did hug family members, she did not run her hands through any family member's hair. 9RP 28. Crass testified that Jane Britt was self-conscious about her shaky hands and did not often raise up her hands in that way. 9RP 28.

C. ARGUMENT

1. THE COURTROOM WAS NOT CLOSED, SO THERE WAS NO VIOLATION OF NJONGE'S RIGHT TO A PUBLIC TRIAL.

Njonge claims for the first time on appeal that the trial court violated his right to a public trial by excluding the public during a portion of one day of voir dire and by excluding a television crew from voir dire. These claims are meritless. The record does not support Njonge's claim that the trial court closed the courtroom. Although seating was limited during one portion of voir dire relating to hardship excuses, the courtroom was not closed to the public. There is no constitutional right to televise courtroom proceedings, so prohibiting filming of voir dire was within the court's discretion.

A criminal defendant in Washington has the right to a "speedy and public trial." WA Const. art. I, § 22. The Washington constitution also

requires that justice be administered openly. WA Const. art. I, § 10. Similar rights also are recognized under the federal constitution. U.S. Const. amend VI; Press-Enterp. Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, these constitutional rights are violated and a new trial may be required. State v. Marsh, 126 Wash. 142, 217 P. 705 (1923); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). The right to a public trial includes the process of juror selection. Presley v. Georgia, __ U.S. __, 130 S. Ct. 721, 724, __ L. Ed. 3d __ (2010); In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). A claim of violation of the right to a public trial is a question of law, reviewed de novo. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

a. Relevant Facts

The trial judge made several comments indicating that there would be limited room for spectators at the start of voir dire. The day before voir dire began, in addressing exclusion of witnesses during voir dire, the judge said "we are in very cramped quarters for jury selection, and I think about the only place for visitors to sit is going to be in a little anteroom out there...with what we are going to do about trying to get enough just to do

this in one meeting." 1RP 46. Later that day the court addressed observers:

> You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you. What we are going to do to allow people to observe is check with the fire marshall ... and make sure that we can keep those first swinging doors open. And if we can do that, then we will allow some people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that.
>
> But, otherwise, as you can see, we are already putting chairs up here to accommodate the jury. We may be able to have chairs out there; we may not. We may be able to have the doors open without chairs. We are going to find that out. The chance of all you being able to be here and observe are slim to none during the jury selection process.

1RP 105-06.

The next day, June 3, 2009, jury selection began without any discussion of how members of the public were being accommodated in the courtroom. 2RP 2-8. No objections to the accommodation of spectators were voiced by either party. 2RP 2-9. No objections were lodged by any person in the courtroom and no person in the courtroom was asked to leave. 2RP 2-9. The court clerk's minutes reflect no order excluding anyone from the courtroom. CP 93-96.

It is apparent from the record that not everyone who wished to observe was able to do so at the start of voir dire. Later the same day,

after some jurors were excused from service based on hardship, the prosecutor stated:

> Some family members who are not witnesses stuck around this morning, hoping there might be some seats later, and your bailiff informed them at lunch since some people were excused there were some. ... We tried to figure out a spot that would be in a row that basically has no jurors. So that second row over there only has Juror 30. Is that okay with the court if they are in there?

2RP 54-55. The judge responded:

> Actually, that seemed to be a better idea. We checked with the fire department. They wouldn't let us leave the doors open for visitors to come in. Let's move number 30 over next to 34, and then we can have visitors sitting in the second row there.

2RP 55. Thus, as jurors were excused for hardship, more spectators were accommodated.

The next day, June 4, 2009, a television crew apparently brought a camera into the courtroom without prior notice to the judge. 3RP 4. The following exchange occurred:

> Court: As some of you who were here know one of the TV stations wants to film the case. I have no objection to them filming but they did not ask my permission before they came into the courtroom with a camera which is bad form. They cannot film during jury selection. I told them they had to leave until after the jury selection. I would let them know when we are complete with jury selection, and they want to film opening statement. Does anyone have

any objection to that? If so voice it and discuss it. If necessary we will get the TV stations in.

Prosecutor: I do not.

Defense: No objection.

3RP 4.

b. Njonge Waived His Claim That A Public Trial Was Denied On June 3rd Because He Did Not Raise The Issue Below And Exclusion Of The Public Is Not Established In The Record.

This Court should refuse to consider the claim that exclusion of the public on June 3, 2009, the first morning of voir dire, denied Njonge a public trial, and the claim that exclusions of cameras was error, pursuant to RAP 2.5(a). A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant must show that constitutional error occurred and caused actual prejudice to his rights. Id.

Issues raised for the first time on appeal are frequently more difficult to analyze because the facts were never developed below. In State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007), for example, the Supreme Court refused to consider the constitutionality of a search where the claim was not raised in the trial court, explaining that it was impossible to assess the record when no factual record was developed.

Kirkpatrick, 160 Wn.2d at 879-81. Likewise, in State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007), the Supreme Court held that to fall within the RAP 2.5(a)(3) exception, "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." Kirkman, 159 Wn.2d at 926-27 (quoting McFarland, 127 Wn.2d at 333). In this case, the error claimed as to the first day of voir dire is not manifest because there is no record that the public was excluded from trial. The error Njonge claims as to the exclusion of cameras is not a constitutional error, as argued below, so it also was waived because it was not raised below.

Although the Supreme Court has permitted public trial claims to be raised for the first time on appeal, in each case the error was clearly "manifest." In State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), the trial court summarily granted the State's request to clear the courtroom for pretrial testimony of an undercover detective. Bone-Club, 128 Wn.2d at 256-57. In State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), the trial court sua sponte ordered that the courtroom be closed for the entire 2½ days of voir dire, excluding the defendant's family and friends. Brightman, 155 Wn.2d at 511. Likewise, in In re Pers. Restraint of Orange, supra, the trial court summarily ordered the defendant's family

and friends excluded from all voir dire proceedings. Orange, 152 Wn.2d at 801-02. And, in State v. Easterling, supra, the trial court ordered the defendant and his attorney excluded from pretrial motions. Easterling, 157 Wn.2d at 172-73.

In each of these cases, the constitutional violation was clear; it was "manifest." Thus, none of these cases precludes application of RAP 2.5(a) to this case, where Njonge never objected and where the alleged error is not manifest because there is no clear evidence that the public was excluded, or that the right to a public trial was prejudiced by any action of the court.

Additionally, the Supreme Court has held that a defendant who fails to object to partial closure of the courtroom waives any claim that the trial court violated the state constitution. State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). In Collins, the trial court locked the courtroom door due to overcrowding. The defendant did not object, but raised the issue on appeal. The Court held:

> Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the

> suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)

Collins, 50 Wn.2d at 748. Any limitation on the number of spectators able to observe the trial, and the exclusion of cameras from jury selection, are comparable to the discretionary decision in Collins, where failure to object was a bar to consideration of the public trial issue on appeal. Bone-Club simply illustrates that a violation of the right to public trial can be manifest error, not that any such claimed violation is always manifest error.

c. No Closure Order Was Issued By The Trial Court. Njonge Has Failed To Establish That Any Portion Of Voir Dire Was Closed To The Public.

In every courtroom closure case decided in Washington, the appellate court has reversed only upon a showing that the trial court actually issued an order closing the courtroom, or where it was clear that people were in fact excluded from the proceedings. State v. Marsh, 126 Wash. 142, 142-43, 217 P. 705 (1923); Collins, 50 Wn.2d at 745-46; Bone-Club, 128 Wn.2d at 256-57; Orange, 152 Wn.2d at 801-03; Brightman, 155 Wn.2d at 511; Easterling, 157 Wn.2d at 171-73.

The evidence here is that the trial court did not order closure of the proceedings. The court never ordered – orally or in writing, directly or indirectly – that proceedings in the courtroom be closed in any way, shape

or form. The court accommodated additional spectators as space became available in the courtroom. There is nothing in the record indicating that no spectators attended the morning of June 3, 2009, and it is clear that spectators were allowed by that afternoon. 2RP 2-8, 55. These facts strongly suggest that the court maintained the degree of openness that was possible under the circumstances.

The Ninth Circuit has held that "'[t]he denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.'" United States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003) (quoting United States v. Al Smadi, 15 F.3d 153, 155 (10th Cir. 1994) (citations omitted)).[2] That court quoted Justice Harlan's concurrence in Estes v. Texas, 381 U.S. 532, 588-89, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965):

> Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats.... A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.

Shryock, 342 F.3d at 974. The Ninth Circuit concluded that the size of the courtroom did not amount to a closure where the public was allowed to

[2] But see Walton v. Briley, 361 F.3d 431 (7th Cir. 2004) (even without court order closing courtroom, public trial violated when trial was conducted and state's case was presented after business hours in a locked courthouse).

use available seating. Id. at 974. The Third Circuit also has held that the public trial guarantee does not require that trial be held in a place big enough to accommodate every person who wants to attend. United States v. Kobli, 172 F.2d 919, 923 (3d Cir. 1949).

Further, in Collins, the Washington Supreme Court recognized that the trial court can regulate the number of spectators if a reasonable number of people are in attendance: "there can be no question of the right of a trial judge to direct that the courtroom doors be locked to prevent overcrowding...or to take such action as may be necessary to prevent any interference with orderly procedure." Collins, 50 Wn.2d at 746.

Njonge has alleged a *de facto* complete closure but the evidence does not support that claim. The trial court gave notice to observers the day before voir dire began that seating would be limited and not all observers could be accommodated. 1RP 105-06. The court indicated that it hoped to accommodate spectators in additional seating in an anteroom. 1RP 105-06. The next day the court indicated that the fire department would not permit particular doors to be left open. 2RP 55. None of these comments establish that no spectators were permitted to observe—they are equally consistent with the conclusion that seating was limited and the court was trying to accommodate as many spectators as possible.

The prosecutor's reference to people waiting to get seating also establishes only that not everyone who wished to observe was able to do so that morning. 2RP 54-55. Notably, in response to that reference, the court agreed to move potential jurors to open more seating for the public. 2RP 55.

This case is distinguishable from the complete closure of voir dire that occurred in Brightman, where the trial judge ordered all observers to be excluded from the entire voir dire process. Brightman, 155 Wn.2d at 511. The Court in Brightman distinguished Shryock, noting that there was an affirmative ruling by the trial judge in Brightman excluding observers, not simply limited seating. Brightman, 155 Wn.2d at 517.

Njonge's reliance on Presley v. Georgia, supra, is premised on the conclusion that the courtroom was closed. In Presley, the single observer was ejected from the courtroom before voir dire began and the trial court made clear that no observers would be permitted, based on the court's concern that observers would interact with jurors. Presley, 130 S. Ct. at 722. Further, Presley's counsel objected to the exclusion of the public and asked for accommodation to allow observers. Id. The summary reversal in Presley controls only the situation where the defendant has objected to exclusion of the public. State v. Bowen, No. 39096-5-II, slip op. at 2

(Wash. Ct. App. July 20, 2010); contra State v. Paumier, 155 Wn. App. 673, 230 P.3d 212 (2010).

Because the trial court did not order closure and made efforts to allow as many spectators as possible to observe the proceedings, this Court should reject Njonge's invitation to conclude that any part of voir dire was closed. The practicalities of litigation require a certain degree of flexibility in balancing the right to public trial with the need to proceed with trial, so trial judges are given wide discretion to manage their courtrooms.

d. Exclusion Of A Television Crew From Voir Dire Was Within The Discretion Of The Trial Court.

Njonge claims that his right to a public trial was violated because the trial judge barred the media from voir dire. This claim should be rejected because the court did not exclude the media from voir dire, it excluded only a television film crew. There is no constitutional right to televise court proceedings. The decision to exclude a television film crew was well within the court's discretion and was not a violation of the constitutional right to a public trial.

Media representatives have the same right to attend criminal trials as any member of the public. Richmond Newspapers, Inc. v. Virginia,

448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). However, freedom of the press does not give those representatives the constitutional right to record or broadcast court proceedings. Nixon v. Warner Communications, 435 U.S. 589, 609-10, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978); Estes v. Texas, 381 U.S. 532, 539-40, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965); Conway v. United States, 852 F.2d 187 (6th Cir.), cert. denied, 488 U.S. 943 (1988).

State v. Russell, 141 Wn. App. 733, 172 P.3d 361 (2007), rev. denied, 164 Wn.2d 1020 (2008), upon which Njonge relies, does not establish any such right to televise court proceedings. The court in Russell concluded that a prohibition on photography of juvenile witnesses without their permission was not a closure of the courtroom. Russell, 141 Wn. App. at 739. Although the court analyzed the order in the context of the constitutional right to a public trial under the Washington Constitution, the court did not analyze or cite any authority for the proposition that denial of photography in the courtroom would be a violation of the constitutional right to open court proceedings, although it apparently assumed that proposition as it rejected the argument, finding that the limited order in that case was not a closure.[3] Russell, 141 Wn. App. at 737-40.

[3] The court also concluded that the trial court in Russell complied with GR 16, regarding "Courtroom Photography and Recording by the News Media," which provides for discretionary limitations on cameras in the courtroom.

Because there is no constitutional limitation on exclusion of television cameras from the courtroom, the court's exclusion of the camera crew in this case was a matter within its discretion in management of the courtroom. See State v. Collins, 50 Wn.2d at 748 (failure to object to partial closure of the courtroom waives any claim that the trial court violated the state constitution).

2. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF OTHER ACTS OF NJONGE CONCERNING JANE AND FRANK BRITT AS EVIDENCE OF MOTIVE.

Njonge claims that evidence relating to three topics was admitted in violation of ER 404(b): that Frank Britt's Costco card was in Njonge's wallet when he was arrested; that a form nominating Njonge for employee recognition contained Jane Britt's forged signature; and Jane Britt's complaint that her husband was receiving inadequate dental care. This claim should be rejected as to the complaint regarding dental care because there was no objection to that evidence on that basis. As to all three topics, the court properly found that the evidence was relevant to motive, a proper subject under the rule, and properly concluded that the relevance outweighed any minor prejudicial effect in this homicide case.

Washington's ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To admit evidence of other wrongs or acts, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

The trial court must determine on the record "whether the danger of undue prejudice substantially outweighs the probative value" of the proffered evidence. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). A danger of unfair prejudice exists if the evidence is likely to stimulate an emotional response rather than a rational decision. Id.

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. A trial court's ruling on admissibility under ER 404(b) "will not be

disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did." State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007) (citing State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

ER 404(b) specifically lists proof of motive as a permissible purpose for admitting evidence of other misconduct. Many cases have approved admission of evidence of prior bad acts as proof of motive. E.g. State v. Stenson, 132 Wn.2d 668, 698-703, 940 P.2d 1239 (1997) (in murder prosecution, details of controlling relationship with victim admissible to show motive and premeditation); State v. Terrovona, 105 Wn.2d 632, 649-50, 716 P.2d 295 (1986) (in murder prosecution, volatile relationship with victim and angry exchanges between them admissible to prove motive); State v. Giffing, 45 Wn. App. 369, 373-74, 725 P.2d 445, rev. denied, 107 Wn.2d 1015 (1986) (in murder prosecution, evidence that victim reported theft by the defendant to police relevant to motive). Further, evidence of motive is "as much a part of the substantive evidence to show premeditation as is the immediate reflective deliberation which precedes the act itself." State v. Ross, 56 Wn.2d 344, 349, 353 P.2d 885 (1960) (citing State v. Horner, 21 Wn.2d 278, 150 P.2d 690 (1944)).

The trial court in the case at bar found that all three matters challenged here, Frank Britt's Costco card in Njonge's wallet, the

employee recognition form with Jane Britt's forged signature, and Jane Britt's complaint about her husband's dental care along with admonition of Njonge about that, were relevant to proof of motive. 1RP 14-15, 18-19. The State asserted that these connections with the Britts were relevant to whether Njonge was upset with Jane Britt, or believed that she could be a threat to his job, a theory also supported by another complaint that Jane Britt made the night of the murder, about items in Frank Britt's closet that should not have been there, and by the facility policy barring employee possession of the property of any resident. CP 83-84; 1RP 6, 13-14; 8RP 145. Each of the challenged connections meets the standard for relevance, as each is a negative connection with Jane Britt, which has a tendency to make the existence of motive more probable, the definition of relevance in ER 401.

Njonge does not challenge the proof that he had the Costco card, and concedes that if he believed that Jane Britt knew that he had Frank Britt's Costco card, that would establish a motive for him to kill Jane Britt. App. Br. at 39. Possession of the card makes it more probable that he did have that motive.

As to the forged employee recognition form, Njonge does not challenge the proposition that the document was a forgery or that the forgery would be a motive for murder, at least if Jane Britt knew about it.

App. Br. at 41-43. He challenges the proof of a connection between Njonge and the forgery, but that connection existed because Njonge was the employee nominated in the form and there was a monetary bonus if he received the award (he did receive that award and $100 bonus[4]), so the court's finding that each of these matters established "a definite connection between the Defendant and the victim"[5] was supported by the evidence.

The trial court did not abuse its discretion in concluding that the probative value of each of these matters was not substantially outweighed by unfair prejudice. None of the incidents involved violence or threats, the facts were not inflammatory, nor would they tend to establish that if Njonge would do those things, he would also commit this murder, the danger addressed by ER 404(b). Further the court gave the jury a limiting instruction as to this evidence, specifying that "it may be considered by you only for the purposes of motive." CP 51.

Two types of prejudice are alleged by Njonge with regard to the Costco card: that jurors might get the "misimpression that the killer robbed [Jane] Britt" and that it "made him look bad." App. Br. at 40. If the jurors believed that Njonge had the card because he robbed Jane Britt

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[4] 1RP 7-8; 5RP 84-86; 9RP 36-37.

[5] 1RP 18-19.

when he killed her, it would simply be evidence directly probative of his guilt, and not an "other act" under ER 404(b). As Jane Britt's pocket was turned out when her body was discovered, she may have been robbed by her killer. 7RP 76. Njonge's possession of the card was relevant exactly because it was stolen, or at the least a violation of facility policy, so his job could be jeopardized. No emotional response generating unfair prejudice would be caused by possession of another person's Costco card.

The only prejudice alleged by Njonge with regard to the forgery is that it "made him look petty and immoral." App. Br. at 43. As with the Costco card, the immorality of the act is what made the forgery relevant, as Njonge's job could be jeopardized as a result of it. Proper evidence need not be excluded simply because it also tends to show that the defendant committed another crime. Powell, 126 Wn.2d at 264. As to the Costco card and the forgery, there is no unfair prejudice identified that would warrant exclusion of evidence relevant to motive (and consequently to premeditation) in a murder prosecution.

As to the substandard dental care, Njonge waived any claim that the evidence was improper ER 404(b) evidence because he did not raise that objection below. Mason, 160 Wn.2d at 933. His trial brief included a section relating to ER 404(b) that did not include this matter, and it included a separate section simply arguing that evidence relating to dental

care was irrelevant. CP 8-11, 17-18. In his argument to the trial court, again he asserted only that the evidence lacked probative value. 1RP 12. The only argument in this appeal relating to this matter is that the court did not articulate a detailed balancing on the record, as required under ER 404(b)—because no ER 404(b) objection was raised below, even if this evidence might fall within ER 404(b), that error has not been preserved.

Njonge's contention that the trial court did not adequately articulate its balancing also should be rejected as to the Costco card and forged employee recognition form. The ER 404(b) analysis was set out in the defense trial brief, and articulated by the prosecutor at the beginning of the argument relating to admissibility. CP 8-9; 1RP 5-6. The defense did not challenge the facts relating to the Costco card, or that Jane Britt's name on the employee recognition form was forged. The court found both matters (as well as the dental care issue) relevant to and probative of motive. 1RP 14-15, 18-19.

The court did not specifically mention prejudice or its balancing as to the Costco card, but clearly employed that standard, as it delayed ruling on the forged document until it could review the forensic document examiner's report, saying "I can't really make a finding that it's more probative than prejudicial or vice versa until" she was informed as to the

expert testimony. 1RP 15. Only after she heard the details of the analysis and reviewed the report did she conclude that it was "more probative than prejudicial." 1RP 17-18. At the same time, the court excluded evidence relating to a second form nominating Njonge, not bearing the purported signature of Jane Britt, illustrating that the court was carefully balancing the probative value of the evidence against possible unfair prejudice. 1RP 19.

While balancing on the record is required, imperfections in the record of that balancing do not require an appellate court to conclude that the evidence was admitted in error if the record is sufficient to permit meaningful review. State v. Brockob, 159 Wn.2d 311, 348-49, 150 P.3d 59 (2006); State v. Hepton, 113 Wn. App. 673, 688, 54 P.3d 233 (2002), rev. denied, 149 Wn.2d 1018 (2003). If the trial court has identified the purpose for which the evidence is relevant, the appellate court can weigh the probative value of the evidence against possible unfair prejudice. Hepton, 113 Wn. App. at 688, citing State v. Jackson, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). The court's findings in this case, with the context of the briefing and arguments of counsel, provide a complete record for review.

Even if the court finds the record of balancing is inadequate, that error is harmless. Evidentiary errors under ER 404 are not of

constitutional magnitude, so they are harmless unless within reasonable probabilities the outcome of the trial would have been different if the error had not occurred. Jackson, 102 Wn.2d at 695. Washington courts have taken two different approaches to analyzing harmless error in failure to conduct required balancing on the record before admitting evidence: under the first, the error is harmless if the trial court would have admitted the evidence if it had properly conducted the balancing on the record; under the second, the court assumes that the evidence was improperly admitted, and determines whether the evidence affected the outcome within reasonable probabilities. State v. Russell, 104 Wn. App. 422, 434-35, 16 P.3d 664 (2001) (in context of similar balancing required before admission of ER 609(b) evidence, citing cases). Under the first test, any error in the record of balancing by the trial court in this case is harmless because it is clear that the court made its ruling knowing and applying the correct legal standard, and would make the same rulings if more details of the balancing were on the record.

If evidence is improperly admitted under ER 404(b), the error is harmless if there is no reasonable probability that the outcome of the trial would have been different if that error had not occurred. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987) (citing State v. Robtoy, 98 Wn. 2d 30, 42, 653 P.2d 284 (1982)). The danger of admitting prior acts

of misconduct is that the jury will convict because the defendant deserves to be punished for those other bad acts, or has a propensity to commit crimes, or because it believes that because the defendant committed the other bad acts, he must have committed this one. Bowen, 48 Wn. App. 195-96. These dangers are acute when the prior acts are crimes similar to the charged crime. These dangers are not present in this case, where the prior acts involve possession of a Costco card and existence of a forged employee recognition form – those incidents are not inflammatory or violent and are not substantially likely to have swayed a jury to convict Njonge of murder because of repulsion for the prior acts.

Further, even if evidence of possession of Frank Britt's Costco card had not been admitted in the State's case-in-chief, it would have been admissible as impeachment when Njonge testified, as were his possession of the credit card, diamond ring, and painting belonging to other patients. See Section C.3., infra.

The ER 404(b) evidence relating to the Britt Costco card and the forged document played an insignificant role in relation to the guilty verdict on murder in the second degree. The central issue as to that charge was how a significant amount of Njonge's DNA got under the torn, bloody fingernails of Jane Britt's body. The evidence was overwhelming that it was the DNA of her killer, with whom she fought before she died.

Njonge testified at trial that Jane Britt scratched his head with both hands while they were together in Frank Britt's bathroom, assisting Frank Britt, but he had never mentioned that to police when he was asked repeatedly how his DNA could have gotten under Jane Britt's fingernails. 8RP 111, 179-80. Njonge also had told police that Jane Britt did not scratch, grab, or hug him. 8RP 177-83.

The story that Jane Britt scratched Njonge's head was incredible for many reasons: because it is incredible to believe that such intimate contact would have occurred between two people with only a professional relationship; because if it had occurred it would be memorable and Njonge earlier had repeatedly denied any contact; because the toileting issue was refuted by Frank Britt's medical records; and because Jane Britt did not touch staff at the nursing home and did not run her hands through the hair of even family members. 8RP 82-85, 176-84; 9RP 22-24, 28.

Njonge's testimony as a whole was incredible for many other reasons as well. He admitted that he had taken four patients' property from the facility without permission, including pawning a patient's diamond ring. 8RP 146-49, 152, 154. Before Jane Britt's death, and thus necessarily before police questioned Njonge, he had lied in separate signed declarations at Garden Terrace stating that he had no knowledge of the missing diamond ring or of the painting that was later found in his

apartment. 9RP 32-34. Regarding the painting, he declared that he "never noticed it was missing." 9RP 34. His minimizations of the theft of those items were patently ridiculous. Njonge claimed that he was on a five-day vacation immediately before the employee recognition award, including details about the return trip making him late for work the day of the award, but employment records proved he worked the two days before the award. 8RP 120, 164; 9RP 36-39.

The trial court did not abuse its discretion in admitting evidence that Frank Britt's Costco card was in Njonge's wallet when he was arrested, that a form nominating Njonge for employee recognition contained Jane Britt's forged signature, and that Jane Britt complained that her husband was receiving inadequate dental care. They were properly admitted to prove motive for the murder.

3. THE TRIAL COURT PROPERLY ALLOWED IMPEACHMENT OF NJONGE WITH EVIDENCE OF HIS THEFTS FROM OTHER RESIDENTS OF THE NURSING HOME.

Njonge claims that three acts of theft should not have been ruled admissible for impeachment under ER 608(b), asserting that theft is not relevant to veracity and that the trial court was required to find that those thefts had occurred by a preponderance of the evidence before ruling that

the impeachment was permissible. Both of these premises are legally incorrect. As a result, the arguments on appeal are without merit. All three incidents were theft under Washington law. The court did not abuse its discretion in permitting impeachment on these thefts.

a. Njonge Waived This Claimed Error By Failing To Raise It In The Trial Court.

Njonge did not object to impeachment on these three thefts on the basis that thefts are not relevant to veracity or that the incidents had not occurred. Njonge initially objected on the basis that the evidence was outside ER 609, which involves impeachment with convictions, and because there was little probative value. 1RP 56. Later he stated only "I know there was an issue, I believe, with the [608(a)] testimony, I believe the motion in limine..." without identifying any issue. 5RP 202. Finally, it is not clear that he has any objection to the court's ruling as to admissibility when the issue is raised again, although a statement that "I have no issues" may refer to the wording of a possible limiting instruction. 7RP 182. Njonge ultimately declined a limiting instruction related to this evidence. 8RP 208-10.

The initial objection and later remarks by defense counsel on the topic of ER 608 are not sufficient to preserve alleged error based on a

different ground. Mason, 160 Wn.2d at 933. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Because any error in the ruling as to proper topics for impeachment would be evidentiary error only, Njonge has waived any review of that claimed error. State v. Davis, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000).

b. Theft Is A Crime That Is Relevant To Veracity Under Washington Law.

Njonge relies on State v. Cummings, 44 Wn. App. 146, 721 P.2d 545, rev. denied, 106 Wn.2d 1017 (1986), for the proposition that theft is not relevant to veracity and so inquiry as to an act of theft is not permissible under ER 608(b).[6] In turn, Cummings relied upon State v. Harper[7], in which the Court of Appeals concluded that dishonesty was not relevant to veracity and State v. Burton[8], in which the Supreme Court had

[6] ER 608(b) provides that specific instances of misconduct of a witness other than conviction of a crime "may, in the discretion of the court, if probative of truthfulness or untruthfulness, be enquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness...."

[7] 35 Wn. App. 855, 861, 670 P.2d 296 (1983), rev. denied, 100 Wn.2d 1035 (1984).

[8] 101 Wn.2d 1, 7, 676 P.2d 975 (1984).

held that a conviction for theft was not relevant to veracity.[9] Cummings, 44 Wn. App. at 152.

However, that holding of Burton was overruled by the Supreme Court in State v. Ray, 116 Wn.2d 531, 543-44, 806 P.2d 1220 (1991). The Court in Ray held that theft is a crime of dishonesty that is per se admissible for impeachment under ER 609(a)(2). Id. at 545. The Court noted that crimes of theft are universally regarded as reflecting adversely on a person's honesty and integrity. Id. It reasoned that the purpose of impeachment evidence is to enlighten the jury as to the credibility of a witness and that purpose is met by allowing admissibility of prior convictions involving dishonesty. Id.

As the Supreme Court has concluded that a prior conviction for theft is per se admissible as to the credibility of a witness, an act of theft is admissible for that purpose as well.

Moreover, the thefts at issue were particularly relevant to Njonge's veracity because he lied to the police about the thefts (claiming no knowledge of them) during the course of this investigation. 8RP 116-18, 151-58.

[9] The court also relied on State v. Sellers, 39 Wn. App. 799, 695 P.2d 1014, rev. denied, 103 Wn.2d 1036 (1985), which found a prior suicide attempt not relevant to veracity.

c. The Three Thefts Used As Impeachment Were Theft Under Washington Law.

Njonge offers no authority for the proposition that a party may not cross-examine as to a prior instance of misconduct under ER 608(b) unless the trial court has found by a preponderance of the evidence that the act occurred. The only requirement for questioning as to a prior instance of misconduct under 608(b) is a good faith basis for the inquiry. State v. Johnson, 90 Wn. App. 54, 71, 950 P.2d 981 (1998).

The trial court stated that she understood that there was no dispute that Njonge was in possession of the residents' property, and defense counsel did not contradict that statement. 5RP 202-04. Before the prosecutor asked any questions on the subject, Njonge testified that with respect to the diamond ring, the debit card, and the painting, he took the property from the nursing home. 8RP 116-18. After that testimony, certainly the prosecutor had a good faith basis to believe that he had committed theft of those items. Despite the rationalization of the thefts by Njonge during his testimony and the endorsement of those excuses on appeal, the taking of each item was theft under Washington law.

Njonge asserts that he found the diamond ring in a shower room at the nursing home and did not know to whom it belonged. App. Br. at 48. Even if that were true, appropriation of lost property is theft. RCW

9A.56.020(1)(c). Njonge did not inform staff at the nursing home that he had found the ring – instead, he pawned it, as he admitted at trial. 8RP 157-58. Further, after the ring went missing, employees were asked about it, and Njonge signed a declaration on March 4, 2008, stating that he knew nothing about it. 9RP 32-34.

Njonge asserts that he thought the debit card that he took had been abandoned by another patient after that patient had checked out of the facility. App. Br. at 48. However, the patient testified that the card was taken while the patient was still living at the facility, at a point when the patient began to be able to take trips outside the facility. 9RP 14.

Njonge admitted at trial that he had taken many paintings from residents' rooms without permission, including the painting police found in his apartment. 8RP 118-19, 152-54. Njonge claims on appeal that these takings were not theft because he did not intend to permanently deprive the owners of the paintings. App. Br. at 47. Intent to permanently deprive an owner of the property is not an element of theft—theft requires only intent to deprive the owner of the property. RCW 9A.56.020(1); State v. Komok, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989). Taking the paintings from the rooms in which residents were living certainly deprived them of that property. Further, after the painting went missing, employees were asked about it, and Njonge signed a declaration on March

8, 2008, stating that he knew nothing about it, more specifically, that he "never noticed it was missing." 9RP 32-34.

These acts all were theft and Njonge's lies about having knowledge of the items stolen make it quite clear that he knew it. The thefts and Njonge's lies about them were relevant to his veracity.

4. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE FORM OF REBUTTAL EVIDENCE THAT WAS PROPERLY ADMITTED.

Njonge claims that evidence that Jane Britt was not physically demonstrative with her family or with staff at the nursing home was character evidence that should have been admitted only in the form of reputation. That claimed error was waived by failure to raise it in the trial court. Defense counsel's failure to object on that basis was not deficient performance because the evidence was not character evidence and it was properly admitted to rebut Njonge's story that Jane Britt habitually ran her fingers through his hair, and scratched his head the day she was killed. The failure to object to the form of the questions also was not prejudicial, because the trial court opined that the evidence was character evidence and ruled that specific instances of conduct of the victim were admissible, so it is apparent that any objection would have been overruled. Further, Njonge does not contend that the substance of the evidence was not admissible and can only

speculate that the State would have been unable to meet any foundation requirements.

a. Njonge Waived This Claimed Error By Failing To Raise It In The Trial Court.

Njonge did not object to the rebuttal testimony of Jane Britt's granddaughter, Sarah Crass, or Njonge's coworker, Sandra Colvin, on the basis that it was character evidence or on the basis of improper foundation under ER 405. He did not object to the testimony of Colvin on any basis. 9RP 5-7. Njonge objected at trial only to the relevance and prejudicial nature of the rebuttal testimony of Crass. 9RP 5-6. That objection does not preserve alleged error based on a different ground. Mason, 160 Wn.2d at 933.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Because any error in the form of the testimony of Crass or Colvin would be evidentiary error only, Njonge has waived any review of that claimed error. State v. Davis, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000).

b. Njonge Has Not Established That The Failure To Object Was Ineffective Assistance Of Counsel.

To establish ineffective assistance of counsel, Njonge must show both that defense counsel's representation was deficient, *i.e.,* that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. Every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id. at 689. In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206.

In addition to overcoming the strong presumption of competence of counsel and showing deficient performance, Njonge must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. Njonge must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Njonge has not shown deficient performance. His argument that defense counsel should have objected on the basis of improper foundation relies on the inaccurate predicate that the evidence was admissible only as character evidence and only in the form of reputation evidence.

ER 404, the general rule regarding the admissibility of character evidence, does not define "character," but the term traditionally has been construed to "refer to elements of one's disposition, 'such as honesty, temperance, or peacefulness.'" United States v. West, 670 F.2d 675, 682 (7th Cir.), cert. denied, 457 U.S. 1124 & 1139 (1982) (quoting McCormick on Evidence §195); accord United State v. Cortez, 935 F.2d 135, 138 (8th Cir. 1991). Thus, for example, "slowness to answer, forgetfulness, or poor ability to express oneself" are not traits of character falling within the rule. Cortez, 935 F.2d at 138 n.3.

It was not the disposition of Jane Britt that was described, but a specific behavior. The admissibility of that evidence was governed by its relevance and probative value (ER 401), and considerations of unfair prejudice and possible confusion of the jury (ER 403), which were the objections that were made by defense counsel in this case. 9RP 5-6.

The testimony of Crass and Colvin was admissible as habit and was properly admitted to rebut Njonge's testimony that Jane Britt was in the habit of running her hands through Njonge's hair. ER 405 provides that "[e]vidence of the habit of a person ... is relevant to prove that the conduct of the person ...on a particular occasion was in conformity with the habit...." Jane Britt's habit was that she did not run her hands through the hair of staff members at the nursing home or of members of her family.

The testimony of Colvin also was direct rebuttal to Njonge's testimony that Jane Britt was in the habit of running her hands through his hair while he was working at Garden Terrace, including while they were in the dining room. 8RP 173. Colvin was a coworker at Garden Terrace. 5RP 117. She testified that she never saw that happen and that she never saw Jane Britt touch any staff person at the facility. 9RP 22-23. That was simple direct testimony as to her observation of the victim's behavior while at the facility, and was proper rebuttal of Njonge's testimony.

Even if treated as character evidence, Njonge appears to concede that this was relevant and admissible evidence. Njonge opened the door to the rebuttal testimony by his own testimony to this character trait, which included Jane Britt's conduct before the day of her death. 8RP 173. When the defendant opens the door to a particular subject, the State has the right to present a fair response. State v. Jones, 111 Wn.2d 239, 247-49, 759 P.2d 1183 (1988); State v. Berg, 147 Wn. App. 923, 938-40, 198 P.3d 529 (2008); Ang v. Martin, 118 Wn. App. 553, 561-63, 76 P.3d 787 (2003), aff'd on other grounds, 154 Wn.2d 477, 114 P.3d 637 (2005).

Even if counsel was deficient in not objecting to the form of this testimony, Njonge has not affirmatively shown prejudice – a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. To the contrary, it is clear that the objection would have been overruled, because the trial court specifically ruled that evidence of specific instances of conduct was admissible under ER 405(b). 9RP 9-10. Njonge has not shown how the lack of an objection to the form of the testimony "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

Even if the rebuttal testimony on one or both of these witnesses is found to be error, as evidentiary error it is harmless unless within

reasonable probabilities the outcome of the trial would have been different if the error had not occurred. Jackson, 102 Wn.2d at 695. Neither witness could directly contradict Njonge's testimony that Jane Britt scratched his head while they were in the bathroom on the day of her death. Njonge was effectively impeached with his repeated denial of contact with Britt when questioned by police. 8RP 176-84. Njonge's story about the contact also was refuted by medical records showing that Frank Britt did not have the physical problem that Njonge testified brought Jane Britt and Njonge into the bathroom together for an extended time. 8RP 82-85, 88-89; 9RP 24. His credibility also was minimized by his admitted thefts from patients, his patently ridiculous rationalizations for those thefts, and his lies in signing declarations to his employer that he had no knowledge of the thefts. See section A.3., supra. The outcome of the trial would not have been different absent this rebuttal testimony.

5. THERE WAS NOT CUMULATIVE ERROR THAT DEPRIVED NJONGE OF A FAIR TRIAL.

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g. Coe, 101 Wn. 2d 772 (discovery

violations, three types of bad acts evidence improperly admitted, impermissible use of hypnotized witnesses, improper cross-examination of the defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of child sex abuse and identity of abuser, court challenged defense attorney's integrity in front of jury, counselor vouched for credibility of victim, prosecutor misconduct).

No error has been shown, so the cumulative error doctrine is inapplicable.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Njonge's conviction and sentence.

DATED this 18TH day of August, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to CASEY GRANNIS, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JOSEPH NJONGE, Cause No. 63869-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

08/18/10
Date