

NO. 91318-8

IN THE STATE SUPREME COURT OF WASHINGTON STATE

Joseph Njonge,

COA No. 63869-6-I

Appellant,

v.

PETITION FOR REVIEW; RAP 13.4  
Received  
Washington State Supreme Court

State of Washington

Respondent.

FEB 25 2015

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Ronald R. Carpenter  
Clerk

1. OPENING STATEMENT

The Court of appeals Division One, affirmed the Petitioner's Judgment & Sentence on January 12, 2015. Mr. Njonge asserts that both his Federal & State Constitutional claims have been violated.

Mr. Njonge presents the five issues placed before the Appellate Court. In addition, Mr. Njonge asks that this court reconsider his Public Trial Right claim pursuant to U.S. v. Dharni, 757 F.3d 1002 (C.A.9 (Cal) 2014).

2. GROUNDS AND ARGUMENTS FOR RELIEF

A. THE COURT'S IMPROPER ADMISSION OF  
CHARACTER EVIDENCE UNDER ER 405 UNFAIRLY  
INFLUENCED THE OUTCOME OF THE CASE

The court allowed the State to present improper evidence of Jane Britt's character to rebut Njonge's explanation for how his DNA wound up under Britt's fingernails. Reversal is required because there is a reasonable probability admission of this evidence influenced the outcome. Alternatively, defense counsel was ineffective in failing to properly object.

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court's abuse of discretion violated the Petitioner's Federal right to present a defense and other Fair Trial Rights. This clearly violates established federal law. Schafer v. Time, Inc., 142 F.3d 1361, 1371 (11th Cir. 1998).

The determination of whether character constitutes an essential element requires examination of the "authoritative statutory or common law statement of the elements of the prima facie case and defense." United States v. Keiser, 57 F.3d 847, 856 n.20 (9th Cir. 1995).

B. THE COURT COMMITTED REVERSIBLE ERROR IN  
ALLOWING ADMISSION OF ER 404(b) EVIDENCE

Over defense objection, the trial court admitted evidence that Frank Britt's Costco card was found in Njonge's possession upon arrest and that a form nominating Njonge as employee of the month contained Jane Britt's forged signature. The court erred in admitting this evidence because it was either not relevant to show motive for murder or its unfair prejudicial value outweighed its marginal relevance. Without conducting a balancing analysis on the record, the court also wrongly admitted evidence of Britt's complaint that staff did not take proper care of her husband's teeth.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn.App. 328, 333, 989 P.2d 576 (1999).

Mr. Njonge adopts his attorney's argument in the "Opening Brief" for this portion of this petition.

The trial court did not properly analyze the ER 404(b) issues, so its decision is not entitled to deference in this court or the federal courts. State v. Foxhoven, 161 Wn.2d at 174. This violates the Petitioner's procedural and Substantive Due Process rights under the Federal Constitution. This Court must grant review because the lower courts decision is objectively unreasonable in light of the record before the court. The appeals court allegedly viewed the record as a whole and exceeded the trial judge's actual 404(b) ruling, to unreasonably determine that the evidence is admissible because "This established a motive for Nkonge to kill Jane: keeping his job." at 7. This is unreasonable, the dental care complaint, the alleged forged nomination form, and the Costco card does not establish a reasonable motive to kill. Therefore, it is not relevant, nor material, and as such, is inadmissible. This evidence is highly prejudicial and takes the jury away from the real facts of the case, allowing a conviction based on speculation that Mr. Njonge would kill a person because he did not brush their loved one's teeth, get real. Mr. Njonge killed a person because he may, or may not have forged a name on a nomination card, really? That one forged card would not allow Mr. Njonge to become employee of the month, it would take more than one. Who would kill someone over a costco card? Nobody. This evidence is inadmissible and designed to make Mr. Njonge look like a psycho serial killer. This Court must grant review.

C. THE COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE STATE TO IMPEACH NJONGE WITH ACTS OF MISCONDUCT UNDER ER 608

The trial court improperly allowed the State to impeach Njonge with evidence that he had taken various things from the nursing home. Defense counsel moved in limine to exclude prior acts of misconduct under ER 404(b), including allegations that (1) Njonge stole a ring from the facility; (2) Njonge took a Thomas Kincaid painting from the facility; (3) Njonge had a credit card from a resident of the facility in his possession. CP 10-11; 1RP 60-61.

The State agreed it would not seek to introduce evidence of those enumerated bad acts as part of its case in chief, but expressed its intent to cross-examine Njonge under ER 608(b) about those specific instances of misconduct if he testified. 1RP 55-58, 60-61. Defense counsel objected and moved to exclude evidence of these acts for impeachment purposes, saying they fell outside of ER 608 and carried little probative value. 1RP 56.

The trial court ruled the State could impeach Njonge with these prior bad acts if he chose to testify because "they go to his credibility." 3RP 202-04. There was no dispute Njonge took these things. 3RP 203.

This ruling violated Mr. Njonge's Federal Constitutional Rights to procedural and Substantive Due Process, and Fair Trial. See Amendments 5, 6, and 14 of the U.S.C. Mr. Njonge adopts his attorneys arguments for this section.

D. TRIAL COUNSEL WAS INEFFECTIVE

Mr. Njonge adopts the ineffective assistance of counsel arguments laid out in his appeals brief. The Appeals Courts addressed the IAC claims on pages 4-6 of their decision. Mr. Njonge asserts that Trial counsel violated his Federal Constitutional Right to effective representation. Strickland v. Washington, 466 U.S. 668, 687 (1984).

E. THE RECENT DECISION U.S. V. DHARNI, 757 F.3d 1002 (C.A.9(Cal)2014)  
CALLS FOR THIS COURT TO RE-EXAMINE MR. NJONGE'S PUBLIC TRIAL RIGHT CLAIM

Mr. Njonge's Federal Constitutional Right to a Public Trial was violated numerous times. This Court held "Based on our review of the record, we conclude the trial court did not close proceedings in violation of Njonge's public trial right." State v. Njonge, No. 86072-6/1-2. The Court room had a maximum occupancy of 49, the appeals court correctly held that when the court filled the court room over capacity with potential jury members, that the public could not enter, therefore, there is a closure.

This Court made family members & friends of the accused in a criminal trial a protected class in In re Orange, 152 Wn.2d 795, 809 (2004). That holding is consistent with Presley v. Georgia, 558 U.S. 209 (2010). It is amazing that this Court declined to further protect family & friends by making a bright line rule, that the trial court must make room "ON THE RECORD" for family & friends to observe the trial. The record is clear that the court room was over capacity, and there was no room for family and friends to participate in the voir dire, and just like Orange, the jury only saw their "Conspicuous exclusion." Orange at 809. Mr. Njonge's family & friends could not enter the court room because there were over 70 people in a 49 maximum capacity courtroom. When the potential jurors, prosecution, defense, Judge, and other courtroom officers fill the room over capacity, there is no chance for any of the public to participate in the trial. This Court must make a rule that instructs the Trial Judge to make room for the protected class of friends and family of both the accused and alleged victim.

The Ninth circuit recently held that "where 'the courtroom was totally closed to the general public at some critical juncture in the proceeding,' we deem the closure 'substantial,' not trivial." at 1004. This logic applies to an over capacity courtroom. It is logical that if 49 people can fit into a room, and that room is over capacity without the public, then the courtroom is closed pursuant to Dharni, and that closure is not trivial.

The Ninth Circuit in Dharni basically ordered a reference hearing to further develop the facts. At the very least Mr. Njonge is entitled to a reference hearing to determine if the public was prevented from entering the courtroom. Both Chief Justice Madsen & Justice Wiggins took this position in In re Morris, No. 84929-3 (2012). What has changed since Morris?

#### Conclusion

Mr. Njonge asks that this court reconsider its prior decision under Dharni and order a reference hearing to develop the facts, or reverse and remand for a new trial.

#### F. CUMULATIVE ERROR VIOLATED MR. JONGE'S RIGHTS

Every criminal defendant has the constitutional due process right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. State v. Boyd, 160 Wn.2d 424, 434 (2007). The Ninth Circuit has held Cumulative error to be clearly established Federal Law.

Please reverse and remand for a new trial due to the many violations of Mr. Njonge's Constitutional rights.

Respectfully Submitted,

This 20<sup>th</sup> Day of FEB' 2015.

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Joseph Njonge

Appendix

"A"

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
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 Respondent, )  
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 v. )  
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 JOSEPH NJUGUNA NJONGE, )  
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 Appellant. )

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No. 63869-6-1  
DIVISION ONE  
UNPUBLISHED OPINION  
FILED: January 12, 2015

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

APPELWICK, J. — Njonge appeals his conviction for second degree murder.<sup>1</sup> He asserts that the trial court improperly allowed the State to use evidence of the victim's character to rebut a component of his defense theory. He argues that his counsel was ineffective for failing to object to the allegedly improper character evidence. He contends that the court erred in admitting evidence of his prior bad acts to show his criminal propensity. He argues that the court wrongly allowed the State to use evidence of his prior bad acts to impeach his credibility. We affirm.

**FACTS**

On March 18, 2008, 75 year old Jane Britt visited her husband, Frank Britt, at the Azalea Unit in the Garden Terrace nursing home.<sup>2</sup> Frank suffered from Parkinson's disease, and Jane visited him almost daily. After her March 18 visit, Jane left Garden Terrace in the early evening.

Jane's body was found the next day in the locked trunk of her car. Her cause of death was asphyxia due to strangulation with blunt force injuries to the head and neck.

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<sup>1</sup> This case comes to us on remand from the Washington Supreme Court. Pursuant to the Supreme Court's decision in State v. Njonge, \_\_\_ Wn.2d \_\_\_, 334 P.3d 1068 (2014), Njonge's public trial issues are not before us. We consider only his remaining evidentiary challenges and claim of ineffective assistance of counsel.

<sup>2</sup> Going forward, we use the Britts' first names for clarity. No disrespect is intended.



Additional injuries, likely occurring at or around the time of death, included injuries to her face, knee, hands, and wrists. Her neck was broken. Her fingernails were bloody, broken, and torn. Jane was fully clothed except for her shoes. The trunk was empty other than her body. The wheelchair normally located in Jane's trunk was discovered in the wooded area on the grounds of Garden Terrace, along with her garage door opener.

Police located deoxyribonucleic acid (DNA) under Jane's fingernails. Several Garden Terrace employees, including Joseph Njonge, voluntarily provided DNA samples to the police. The DNA located under Jane's fingernails matched Njonge's.

Njonge, a 24 year old nursing assistant, worked the evening shift at Garden Terrace. He had responsibility for the care of several patients, often including Frank. On the evening Jane was killed, Njonge worked from 2:30 p.m. to 10:30 p.m. He was assigned to care for Frank that evening.

The State charged Njonge with first degree murder. At trial, Njonge testified on his own behalf. He stated that on March 18, 2008, Jane scratched his hair while they worked together to assist Frank in the restroom. He also testified that Jane occasionally scratched his head or ran both of her hands through his hair, sometimes while they were in the facility dining room. According to Njonge, Jane "used to say I have kinky hair."

The State elicited testimony from two witnesses to rebut Njonge's explanation for the presence of his DNA evidence under Jane's fingernails. Sandra Colvin, the nurse who supervised Njonge's shift the night of Jane's death, testified that she had never seen Jane run her hands through Njonge's hair or otherwise touch or hug staff. Jane's granddaughter, Sarah Crass, explained that Jane was not a "touchy-feely grandma" and

did not touch the hair of her family members. Crass stated that she had never heard her grandmother use the word “kinky.”

The State also presented several pieces of evidence to suggest that Njonge had a motive to kill Jane. First, the State showed that in March 2008—shortly before her death—Jane complained to Garden Terrace about the care of her husband’s teeth. A Garden Terrace supervisor informed the staff, including Njonge, of that complaint. Second, the State demonstrated that Njonge won an employee recognition award in November 2007. Although one of the forms nominating Njonge for the award was purportedly signed by Jane, a forensic handwriting expert testified that Jane did not sign it. Third, the State showed that police found Frank’s Costco card in Njonge’s wallet upon arrest. Njonge admitted that he had taken the card without Frank’s permission and tried to use it.

The jury found Njonge guilty of the lesser included offense of second degree murder. He appeals.

## DISCUSSION

Njonge makes several evidentiary challenges. We review a trial court’s evidentiary rulings for abuse of discretion. Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000). A trial court has “broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.” Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

### I. Character Evidence Under ER 405

Njonge argues that the State presented improper evidence of Jane’s character to rebut Njonge’s explanation for the DNA found under his fingernails. Specifically, he

asserts that the trial court admitted character evidence by an unacceptable method of proof in allowing Colvin and Crass to testify about specific instances of conduct under ER 405(b).

The State contends that Njonge waived this error by failing to properly object at trial. Njonge objected to the testimony on the basis of relevance and prejudice. He did not object on ER 405 grounds. An objection made on other grounds does not preserve an evidentiary error for review. See State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (“An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review.”). We decline to review this challenge. See RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”).

## II. Ineffective Assistance of Counsel

In the alternative, Njonge asserts that his trial counsel was ineffective for failing to object to Colvin’s and Crass’s testimony on ER 405 grounds.

We review de novo a claim of ineffective assistance of counsel. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance claim, a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness based on consideration of all the circumstances and (2) the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). More specifically, an appellant claiming ineffective assistance based on counsel’s failure to object to the admission of evidence must show: (1) an absence of legitimate tactical reasons for the failure to object; (2) that an objection to the evidence would likely have been sustained; and (3) a reasonable probability that

the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

ER 405 establishes the acceptable methods of proving character. See ROBERT H. ARONSON AND MAUREEN A. HOWARD, THE LAW OF EVIDENCE IN WASHINGTON §§ 503.1-503.3 (5th ed. 2013). Njonge maintains that Colvin's and Crass's testimony violated ER 405(b). Under ER 405(b), specific instances of conduct may be offered as character evidence where that character is an essential element of a charge, claim, or defense. Njonge asserts that the testimony here was improper, because Jane's character was not an essential element of the charge or defense.

Njonge protests that the State improperly offered specific instances of conduct as to Jane's character. But, it was Njonge who introduced evidence of specific instances of conduct.<sup>3</sup> The State did not. Rather, the State elicited testimony that Jane was not "touchy-feely" with her family or the Garden Terrace staff.

Njonge asserted a defense predicated on Jane's character. The State was thus entitled to offer evidence of Jane's character in rebuttal. See ER 404(a)(2). To the extent that the testimony constituted character evidence, it was properly admitted under ER 405(a).<sup>4</sup> Njonge cannot show that an objection on ER 405 grounds would have been sustained. He cannot show counsel's performance was deficient. His ineffective assistance claim fails.

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<sup>3</sup> Whether Njonge's evidence was properly admitted is not at issue here.

<sup>4</sup> "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation." ER 405(a).

III. Evidence of Prior Bad Acts Under ER 404(b)

Njonge contends that the trial court erred in admitting evidence of the dental care complaint, the forged nomination form, and the Costco card to suggest that he had a motive to kill Jane.

Evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity with it. ER 404(b); Carson v. Fine, 123 Wn.2d 206, 221, 867 P.2d 610 (1994). But, such evidence may be admissible for other purposes, like “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). To admit evidence of other wrongs under ER 404(b), 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. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). This analysis must be conducted on the record. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). However, the failure to do so is not fatal if the record is sufficient to provide a basis for appellate review. See, e.g., 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).

Njonge asserts that the trial court failed to balance the necessary factors on the record to admit the evidence under ER 404(b). The trial court did not conduct the full four factor analysis on the record. However, the record is sufficient for us to conclude that the evidence was properly admitted.

First, the State established by a preponderance of the evidence that the misconduct occurred. The State offered prima facie evidence of each incident: a Garden Terrace nurse testified that Jane made the dental care complaint and Njonge was aware of it; the State's handwriting expert testified that Jane's signature was forged on the nomination form through which Njonge received a cash award; and, detectives testified that they found Frank's Costco card in Njonge's wallet. The first factor is satisfied.

As for the second factor, the record is clear: the evidence was offered for proof of motive. ER 404(b) explicitly identifies motive as a permissible purpose.

The evidence is also relevant to prove an element of the crime charged. Each piece of evidence involved bad conduct that was somehow connected to Jane or Frank. This established a motive for Njonge to kill Jane: keeping his job. Motive is "particularly relevant" to premeditation. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995). And, premeditation is an essential element of first degree murder. RCW 9A.32.030(1)(a); see also State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

Finally, we find that the evidence was not unduly prejudicial. Njonge singles out the Costco card, arguing that it was more prejudicial than probative because the State did not establish that Jane knew Njonge had the card. But, the card must be viewed in the context of the evidence together. Like most evidence, these incidents are prejudicial. See State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). However, their probative value is clear. Collectively, they establish a motive for Njonge to kill Jane. The evidence satisfies the four factor test under ER 404(b).

Njonge further argues that the forged nomination form should have been excluded, because the State could not show that Njonge committed the forgery. For evidence of a

wrongful act to be admissible under ER 404(b), the “necessary connection between the defendant and the prior act must be established by a preponderance of the evidence.” State v. Norlin, 134 Wn.2d 570, 577, 951 P.2d 1131 (1998). The State’s handwriting expert could not conclusively determine that Njonge forged the form. Nonetheless, the evidence demonstrates a sufficient connection between Njonge and the forged form. The form submitted under Jane’s name purported to praise Njonge’s work performance. But, Jane did not sign the form. According to the handwriting expert, there were “indications that [Njonge] wrote the award form” and characteristics on the form that are similar to Mr. Njonge’s handwriting characteristics. The form resulted in Njonge receiving a cash prize. Nothing in the record suggests that anyone but Njonge benefited from the forged document. On this record, the trial court could conclude by a preponderance that there was a connection between Njonge and the forged document.

The trial court did not abuse its discretion in admitting the State’s ER 404(b) evidence.

#### IV. Impeachment Under ER 608

Njonge argues that the trial court erred in admitting evidence of his prior misconduct under ER 608. The State responds that Njonge failed to preserve this issue for review. We agree.

The State moved in limine to offer evidence that Njonge stole a diamond ring, a painting, and a credit card from Garden Terrace as specific instances of conduct to attack his credibility under ER 608(b). Njonge did not object on ER 608 grounds. Instead, he objected that the evidence was inadmissible under ER 609. The trial court ruled that the evidence could be used to impeach Njonge’s credibility if he testified. The State raised

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the issue once again before introducing the evidence. Njonge did not object and told the court "I have no issues." He later declined a limiting instruction related to this evidence. Njonge did not preserve the issue for appellate review.

We affirm.

*Lypulwek, J.*

WE CONCUR:

*Spencer, C.J.*

*Reach, J.*