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STATE OF WASHINGTON
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DEPUTY

NO. 38471-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER P. TISHCHENKO,

Appellant.

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

The Honorable Roger A. Bennett, Judge

BRIEF OF APPELLANT

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P.N. 4-30-09

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

1. THE TRIAL COURT ERRED BY IMPROPERLY ADMITTING, UNDER ER 404(B), EVIDENCE OF PRIOR ALLEGED DRUG TRANSACTIONS BETWEEN CONFIDENTIAL INFORMANT HAMADEH AND APPELLANT TISHCHENKO. 1

2. THE TRIAL COURT ERRED IN ADMITTING IMPROPER PROPENSITY EVIDENCE UNDER THE GUISE OF ER 404(B). 1

3. THE TRIAL COURT ERRED BY FAILING TO WEIGH THE PREJUDICIAL EFFECTS OF THE ER 404(B) EVIDENCE AGAINST ITS PROBATIVE VALUE. 1

4. THE TRIAL COURT ERRED BY FAILING TO GIVE THE JURY A LIMITING INSTRUCTION THAT IT COULD NOT CONSIDER THE EVIDENCE ADMITTED UNDER ER 404(B) AS PROPENSITY EVIDENCE. 1

5. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPOSE A LIMITING INSTRUCTION VIOLATED TISHCHENKO’S DUE PROCESS RIGHT TO A FAIR TRIAL. 1

6. CUMULATIVE ERROR DENIED TISHCHENKO A FAIR TRIAL. 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

1.	DID THE TRIAL COURT ERR WHEN IT IMPROPERLY ADMITTED UNDER ER 404(B), EVIDENCE OF PRIOR ALLEGED DRUG TRANSACTIONS BETWEEN CONFIDENTIAL INFORMANT HAMADEH AND APPELLANT TISHCHENKO WITHOUT PROPERLY WEIGHING THE PREJUDICIAL EFFECTS OF THE ER 404(B) EVIDENCE AGAINST ITS PROBATIVE VALUE?.....	2
2.	DID THE COURT COMMIT REVERSIBLE ERROR IN FAILING TO FULFILL ITS OBLIGATION TO GIVE LIMITING INSTRUCTION OF EVIDENCE OF PRIOR MISCONDUCT ADMITTED UNDER ER 404(B), WHERE SUCH INSTRUCTION WAS NEEDED TO PREVENT THE JURY FROM CONSIDERING TISHCHENKO'S PRIOR MISCONDUCT AS EVIDENCE OF HIS PROPENSITY TO COMMIT CRIME? ALTERNATIVELY, WAS DEFENSE COUNSEL INEFFECTIVE IN FAILING TO ENSURE THE COURT ISSUED THE INSTRUCTION?	2
3.	WAS TISHCHENKO DENIED A FAIR TRIAL WHEN THE TRIAL COURT IMPROPERLY ADMITTED PROPENSITY EVIDENCE AND THEN FAILED TO GIVE A LIMITING INSTRUCTION ON THE PROPENSITY EVIDENCE WHEN SUCH ERRORS WORKED CUMULATIVELY TO CREATE REVERSIBLE ERROR?	2
C.	STATEMENT OF THE CASE	2
1.	Procedural History.....	2
a.	The charges.	2
b.	Motion in limine.	3
c.	Directed verdict.	5

d.	The verdict.....	5
2.	Substantive facts.....	5
a.	The informant.	5
b.	The alleged buy.	6
c.	The arrest of Tishchenko and Carpenter. ...	8
d.	School zone enhancement	8
e.	Carpenter’s deal.....	9
D.	ARGUMENT	9
1.	THE TRIAL COURT ERRED BY ADMITTING IMPROPER 404(B) EVIDENCE OF PRIOR ALLEGED DRUG TRANSACTIONS BETWEEN HAMADEH AND TISHCHENKO.	9
a.	The Trial Court Failed to Find by a Preponderance of the Evidence that the Prior Transactions Occurred.	12
b.	The Only Relevant Purpose for Admitting the ER 404(b) Evidence Was to Show that Tishchenko had the Propensity to Commit the Crimes Charged.....	13
c.	The Court Erred by Failing to Balance the Probative Value of the Evidence Against its Prejudicial Effect on the Jurors.	15
d.	Tishchenko Was Prejudiced by the Improper Admission of ER 404(b) evidence.....	16
2.	THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b)	

**EVIDENCE AND DEFENSE COUNSEL WAS
INEFFECTIVE IN FAILING TO REQUEST ONE. 16**

**3. CUMULATIVE ERROR DEPRIVED TISHCHENKO
A FAIR TRIAL..... 21**

E. CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

<u>Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	17
<u>In re Pers. Restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835, <u>clarified</u> , 123 Wn.2d 737, 780 P.2d 964, <u>cert. denied</u> , 513 U.S. 849, 115 S.Ct. 146 (1994)	22
<u>Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP</u> , 110 Wn. App. 412, 40 P.3d 1206 (2002).....	21
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	19
<u>State v. Bacotgarcia</u> , 59 Wn. App 815, 801 P.2d 993 (1990).....	17, 21
<u>State v. Barragan</u> , 102 Wn. App. 754, 9 P.3d 942 (2000)	20
<u>State v. Carleton</u> , 82 Wn.App. 680, 919 P.2d 128 (1996)	11
<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990)	11
<u>State v. Donald</u> , 68 Wn. App. 543, 844 P.2d 447 (1993)	17, 18
<u>State v. Hess</u> , 85 Wn.2d 51, 541 P.2d 1222 (1975)	18
<u>State v. Hodges</u> , 118 Wn. App. 668, 77 P.3d 375 (2003), <u>review denied</u> , 151 Wn.2d 1031 (2004)	22
<u>State v. Jackson</u> , 102 Wn.2d 689, 689 P.2d 76 (1984)	11, 15, 16

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)
.....10, 12, 14

State v. Roth, 75 Wn.App. 808, 881 P.2d 268 (1994),
review denied, 126 Wn.2d 1016 (1995).....12

State v. Salterelli, 98 Wn.2d 358, 655 P.2d 697 (1982)
.....10, 11, 13, 16, 17

State v. Smith, 106 Wn.App. 772, 725 P.2d 951 (1986) 12

State v. Stevens, 58 Wn. App. 478, 794 P.2d 38, review
denied, 115 Wn.2d 1025 (1990).....22

State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981)
.....11, 12, 15

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)
..... 18, 19

State v. Wade, 98 Wn.App. 328, 989 P.2d 276 (1999)
..... 10, 11

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,
80 L.Ed. 2d 674 (1984)18

Other Authorities

CrR 3.5 3

ER 403. 15, 16

ER 404(B).....i, ii, iii, 1, 2, 3, 9, 10, 13, 14, 15, 16, 21

A. ASSIGNMENTS OF ERROR

- 1. THE TRIAL COURT ERRED BY IMPROPERLY ADMITTING, UNDER ER 404(B), EVIDENCE OF PRIOR ALLEGED DRUG TRANSACTIONS BETWEEN CONFIDENTIAL INFORMANT HAMADEH AND APPELLANT TISHCHENKO.**
- 2. THE TRIAL COURT ERRED IN ADMITTING IMPROPER PROPENSITY EVIDENCE UNDER THE GUISE OF ER 404(B).**
- 3. THE TRIAL COURT ERRED BY FAILING TO WEIGH THE PREJUDICIAL EFFECTS OF THE ER 404(B) EVIDENCE AGAINST ITS PROBATIVE VALUE.**
- 4. THE TRIAL COURT ERRED BY FAILING TO GIVE THE JURY A LIMITING INSTRUCTION THAT IT COULD NOT CONSIDER THE EVIDENCE ADMITTED UNDER ER 404(B) AS PROPENSITY EVIDENCE.**
- 5. INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPOSE A LIMITING INSTRUCTION VIOLATED TISHCHENKO'S DUE PROCESS RIGHT TO A FAIR TRIAL.**
- 6. CUMULATIVE ERROR DENIED TISHCHENKO A FAIR TRIAL.**

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- 1. DID THE TRIAL COURT ERR WHEN IT IMPROPERLY ADMITTED UNDER ER 404(B), EVIDENCE OF PRIOR ALLEGED DRUG TRANSACTIONS BETWEEN CONFIDENTIAL INFORMANT HAMADEH**

AND APPELLANT TISHCHENKO WITHOUT PROPERLY WEIGHING THE PREJUDICIAL EFFECTS OF THE ER 404(B) EVIDENCE AGAINST ITS PROBATIVE VALUE?

- 2. DID THE COURT COMMIT REVERSIBLE ERROR IN FAILING TO FULFILL ITS OBLIGATION TO GIVE LIMITING INSTRUCTION OF EVIDENCE OF PRIOR MISCONDUCT ADMITTED UNDER ER 404(B), WHERE SUCH INSTRUCTION WAS NEEDED TO PREVENT THE JURY FROM CONSIDERING TISHCHENKO'S PRIOR MISCONDUCT AS EVIDENCE OF HIS PROPENSITY TO COMMIT CRIME? ALTERNATIVELY, WAS DEFENSE COUNSEL INEFFECTIVE IN FAILING TO ENSURE THE COURT ISSUED THE INSTRUCTION?**

- 3. WAS TISHCHENKO DENIED A FAIR TRIAL WHEN THE TRIAL COURT IMPROPERLY ADMITTED PROPENSITY EVIDENCE AND THEN FAILED TO GIVE A LIMITING INSTRUCTION ON THE PROPENSITY EVIDENCE WHEN SUCH ERRORS WORKED CUMULATIVELY TO CREATE REVERSIBLE ERROR?**

C. STATEMENT OF THE CASE

1. Procedural History.

a. The charges.

Appellant Alexander Tishchenko was tried to a jury on a four-count amended information. The amended information charged Tishchenko with the following crimes:

delivery of methamphetamine; intimidating a witness; bribing a witness; and tampering with a witness.¹ CP 3-4. The delivery charge included an enhancement that the delivery occurred within 1,000 of a school bus stop. CP 3.

b. Motion in limine.

Prior to the start of trial, the court held a CrR 3.5 hearing and ruled that Tishchenko's post-arrest statements to the police were admissible.² 3A RP 85-136. Also prior to the start of trial, Tishchenko made a motion in limine that, under ER 404(b), the State be prohibited from introducing evidence of any uncharged drug transactions involving Tishchenko. CP 11; 3A RP 70. The State objected to the motion in limine, 3A RP 71, and the court ruled against Tishchenko saying:

THE COURT: The reason that prior dealings between the defendant and Mr. Hamadeh are admissible is that it shows a common scheme or plan; that is permitted under 4.03(b) – 4.04(b).

¹ The object of the alleged intimidating, bribing, and tampering was Hassam "Sammy" Hamadeh, the informant on the delivery charge.

² No findings of facts and conclusions of law from that hearing have been entered to date.

And also it's relevant to explain why this transaction occurred between these two people as claimed by Mr. Hamadeh as opposed to two strangers, for example, or two people who aren't involved in this.

So the prior dealing of drugs between these two is admissible. That's - the case law on that is substantial. Yes, it is prejudicial. But its probative value exceeds its prejudicial effect.

3A RP 72. Tishchenko argued with the court saying that all the evidence did was bolster a single-delivery case. 3A RP 72-75. The court agreed that the evidence of prior transactions could not be admitted to prove Tishchenko's propensity to deliver drugs. 3A RP 74-75. But the court, on its own initiative, refused to tell the jury that the evidence could not be used for propensity purposes. 3A RP 74-75. Instead, the court said that it was the duty of defense counsel to propose a limiting instruction and it would be given only if proposed by defense counsel. 3A RP 74-75. Notably, defense counsel at no point proposed a limiting instruction. And consequently, the jury was left to consider evidence of prior transactions admitted as evidence at trial as evidence of Tishchenko's propensity to deliver methamphetamine.

c. Directed verdict.

After the State presented its case in chief, the court, on Tishchenko's motion for a directed verdict dismissed the intimidating a witness charge 4A RP 296-300.

d. The verdict.

The jury acquitted Tishchenko on the bribery and tampering charges but found him guilty of the methamphetamine delivery including the school stop enhancement. CP 39-42. Following sentencing, Tishchenko filed a notice of appeal. CP 61.

2. Substantive facts.

a. The informant.

Hassam "Sammy" Hamadeh was arrested by the police for possessing a large quantity of methamphetamine. 3A RP 178-79. Vancouver police officer Leonard Gabriel promised Hamadeh that the charge and his anticipated lengthy prison sentence would go away if he would act as an informant against Alexander Tishchenko. 3A RP 140, 3B RP 227-30. What Officer Gabriel asked for was a single purchase of

methamphetamine from Tishchenko and to testify against Tishchenko if the matter were to go to trial. 3B RP 227-30. Eager to avoid prison, Hamadeh agreed. Id.

b. The alleged buy.

On December 20, 2007, with his handler, Officer Gabriel, standing nearby, Hamadeh called a phone number. 3A RP 142. The phone number Hamadeh called was purported to be Tishchenko's phone number. 3A RP 141, 166, 172. Hamadeh spoke with a person he said was Tishchenko. 3B RP 190. During the call, the person said to be Tishchenko talked about meeting at Big Al's. 3B RP 191. Instead, Hamadeh arranged a meeting at a specific Safeway parking lot. 3A RP 142. Officer Gabriel listened in on the call and recognized Tishchenko's voice based on prior contact with him. Officer Gabriel could not identify any specific words used during the conversation that led him to believe that a drug deal was being arranged. 3A RP 176.

Officer Gabriel searched Hamadeh for any contraband. 3A RP 153. The police gave Hamadeh \$50.

3A RP 155. Vancouver Police Officer Dustin Nicholson, using an undercover car, drove Hamadeh to the designated Safeway parking lot. 4A RP 260-61. Shortly after they arrived at the parking lot, Tishchenko's black BMW pulled into the lot. 4A RP 263. Hamadeh got out of the undercover car and walked over to the passenger side of Tishchenko's car. 4A RP 264. Sarah Carpenter got out of the front passenger seat and moved to the backseat. 4A RP 264. Hamadeh got into the front passenger seat. The BMW's windows were darkened and no one could see into the car from the outside. 4A RP 264. Hamadeh testified that Carpenter gave him \$20 worth of methamphetamine and he laid the \$20 on the back of the console near her. 3B RP 193-94, 197. Hamadeh got out and returned to the undercover car where he gave Officer Nicholson the unused \$30 of buy money and a substance that later tested positive for methamphetamine. 3B RP 197, 4A RP 264-65. Hamadeh was searched and no other money or contraband was found on him. 4A RP 267.

c. The arrest of Tishchenko and Carpenter.

Police officers immediately moved in and took Tishchenko and Carpenter into custody. 3A RP 159-60. The \$20 buy money was not found which did not surprise Tishchenko. 3A RP 174, 183. While being interrogated by the police Tishchenko said they got the wrong guy. 3A RP 183. Although the police found Tishchenko's cell phone in the car, they never checked to see if the number Hamadeh purportedly called to talk to Tishchenko earlier was Tishchenko's number. 3A RP 164, 172. Also, Hamadeh had told police that Tishchenko would have a gun yet no gun was found on Tishchenko or in his car. 3A RP 173.

d. School zone enhancement.

Through representatives of the Clark County GIS office and the school district, it was established that the place where Tishchenko parked in at the Safeway lot was within 1,000 feet of two school bus stops. 4A RP 281-195.

e. Carpenter's deal.

Tishchenko did not testify at trial. Neither the State nor the defense called Carpenter to testify. Outside of the presence of the jury, the State acknowledge that Carpenter had accepted their offer to plead to a drug paraphernalia charge and in exchange for her plea, the State had agreed that they would not call her as a witness in Tishchenko's case. 4B RP 354-55.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY ADMITTING IMPROPER 404(B) EVIDENCE OF PRIOR ALLEGED DRUG TRANSACTIONS BETWEEN HAMADEH AND TISHCHENKO.

The trial court improperly admitted evidence of Tishchenko's prior bad acts of selling methamphetamine to Hamadeh. The only purpose for admitting the evidence was to show that Tishchenko had a propensity to sell drugs. Tishchenko was prejudiced by the improperly admitted evidence and, therefore, reversal is required.

ER 404(b) provides:

- (b) **Other Crimes, Wrongs, or Acts:** 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 the absence of mistake or accident.

ER 404(b).

ER 404(b) forbids evidence of prior acts that tend to prove a defendant's propensity to commit a crime. State v. Wade, 98 Wn.App. 328, 333, 989 P.2d 276 (1999); State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). As such, evidence of prior bad acts is never admissible to show the defendant is a "criminal type" who is therefore more likely to have committed the crime charged, nor is it admissible to show he acted in conformity therewith during the alleged crime. State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). If the only relevancy is to show propensity to commit similar acts, admission of prior acts may be reversible error. Wade, 98 Wn.App. 328.

In deciding the admissibility of evidence under ER 404(b), the trial court must first determine whether the

alleged misconduct has been proven by a preponderance of the evidence. State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981). If the court finds sufficient proof, it must then undertake a three-part analysis: (1) the court must identify the purpose for admitting the evidence; (2) the evidence must be materially relevant and necessary to prove an essential element of the crime charged; and (3) the court must balance the probative value of the evidence against any unfair prejudicial effect it may have on the fact-finder. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); Salterelli, 98 Wn.2d 358.

The court must identify the purpose and relevance of the evidence, as well as balance its probative value against its prejudicial effects, on the record. Wade, 98 Wn.App 15 334; State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984); State v. Carleton, 82 Wn.App. 680, 684, 919 P.2d 128 (1996). Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted. Tharp, 96 Wn.2d 597. Doubtful cases should be resolved in favor of the

defendant. State v. Smith, 106 Wn.App. 772, 776, 725 P.2d 951 (1986). Here the court failed to follow these procedures.

a. **The Trial Court Failed to Find by a Preponderance of the Evidence that the Prior Transactions Occurred.**

The party offering evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred. Tharp, 96 Wn.2d at 594; State v. Roth, 75 Wn.App. 808, 815, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995). On appeal, a finding that the misconduct actually occurred will be affirmed only if supported by substantial evidence in the record. Lough, 125 Wn.2d at 889; Tharp, 96 Wn.2d at 594; Roth, 75 Wn.App. at 816.

Here the trial court made no finding that the alleged controlled buys were proven by a preponderance of the evidence. This is significant especially given the circumstances in this case. First, Hamadeh was only able to give vague, innocuous details about the alleged prior deals such as the arrangements were made over the

phone and Tishchenko used his car to complete the deals. Second, no one else was offered as a witness who could attest to seeing the deals or knowing that there was a drug connection between Hamadeh and Tishchenko. Finally, Hamadeh was looking at a substantial prison sentence if he did not convince the police that Tishchenko sold him methamphetamine. As such, Hamadeh was motivated to exaggerate his relationship with Tishchenko. This certainly does not constitute the substantial evidence needed to support the admission of this evidence. The record does not support a finding that these incidents occurred by a preponderance of the evidence. Therefore, reversal is required.

b. The Only Relevant Purpose for Admitting the ER 404(b) Evidence Was to Show that Tishchenko had the Propensity to Commit the Crimes Charged.

In determining the relevance of ER 404(b) evidence, the court must first identify the purpose for which the evidence is to be admitted, and the purpose must be one set out in ER 404(b). Sarterelli, 98 Wn.2d at 362. Here,

the court ruled that all of the ER 404(b) evidence relating to Tishchenko's delivery of drugs was relevant to show a common scheme or plan. The court's failure to individually assess the purpose of each alleged act under ER 404(b) and its broad rulings allowed the jury to apply all of the ER 404(b) evidence to the single delivery. Furthermore, the purpose for admission of the evidence that the court *did* identify permitted otherwise irrelevant evidence to show that Tishchenko had the propensity to commit the crimes charged.

Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue. Sufficient similarity is reached only when the trial court determines that the "various acts are naturally to be explained as caused by a general plan...." Lough, 125 Wn.2d at 860. Here the trial court could not make that determination because it did not have sufficient evidence about the alleged prior deals by which to make a comparison.

c. **The Court Erred by Failing to Balance the Probative Value of the Evidence Against its Prejudicial Effect on the Jurors.**

Even if the court was correct in determining that the ER 404(b) evidence was relevant for the purpose identified, 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. ER 403. The court's balancing of the probative value of ER 404(b) evidence against its prejudicial effects must take place on the record. Jackson, 102 Wn.2d at 693-94. Otherwise, the evidence is not properly admitted. Tharp, 96 Wn.2d at 597. The extent of the court's weighing and balancing is reflected in the following few short words:

So the prior dealing of drugs between these two is admissible. That's - the case law on that is substantial. Yes, it is prejudicial. But its probative value exceeds its prejudicial effect.

RP 72. From these words alone, it is impossible to tell if the court truly took into consideration, as it must, whether the probative value of Hamadeh's unfounded allegations

substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403.

d. Tishchenko Was Prejudiced by the Improper Admission of ER 404(b) evidence.

Evidentiary errors under ER 404(b) are reversible if, within reasonable probabilities, the outcome of the trial would have differed had the error not occurred. Jackson, 102 Wn.2d at 695. Here, there is a reasonable probability the outcome of Tishchenko's trial would have been different but for the erroneous admission of propensity evidence.

2. THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST ONE.

Regardless of admissibility, in no case may evidence of other bad acts "be admitted to prove the character of the accused in order to show that he acted in conformity therewith." State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). "A juror's natural inclination is to reason that having previously committed a crime, the accused is

likely to have reoffended.” State v. Bacotgarcia, 59 Wn. App 815, 822, 801 P.2d 993 (1990). For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose. Salterelli, 98 Wn.2d at 362. Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of the evidence to the jury. State v. Donald, 68 Wn. App. 543, 546, 844 P.2d 447 (1993). Indeed, the Supreme Court recently reiterated, “a limiting instruction *must* be given to the jury” if evidence of other crimes, wrongs, or acts is admitted. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (emphasis added). The court erred in failing to issue a limiting instruction in this case.

Some courts hold the failure to request a limiting instruction waives the error. See, e.g., State v. Hess, 85 Wn.2d 51, 52, 541 P.2d 1222 (1975); Donald, 68 Wn. App. at 547. If this Court finds defense counsel waived the error by failing to request a proper limiting instruction or in failing to object to its absence, then counsel's failure constitutes ineffective assistance of counsel.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, § 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d. at 225-26. Deficient performance is that which falls below an objective standard or reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute

reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Defendant's counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from considering Tishchenko's prior acts of selling methamphetamine as evidence of his propensity to commit the charged crime. There was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of this character evidence. Allowing the jury to convict Tishchenko on the basis of bad character did nothing to advance his defense.

Under certain circumstances, courts have held lack of a request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g.,

State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence).

The "reemphasis" theory is inapplicable here. Evidence that Tishchenko sold methamphetamine to Hamadeh 20 times was not the type of evidence the jury could be expected to forget or naturally minimize. This is not the case where a limiting instruction raised the specter of "reminding" the jury of briefly referenced evidence. This evidence formed a central piece of the State's case.

Regardless of whether the court erred in failing to fulfill its obligation to issue a limiting instruction or counsel was ineffective in failing to ensure the court gave one, the dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of prior deliveries as evidence of Tishchenko's propensity to commit the charged crimes.

The jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn.App. at 822; see also Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) ("Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others."). If that were not the case, there would never be any reason to give a limiting instruction for ER 404(b) evidence.

There is a reasonable probability the outcome of the trial would have been different had the instruction been given because the absence of a limiting instruction allowed the jury to consider evidence of prior misconduct as evidence of Tishchenko's propensity to commit crime. Reversal of the convictions is therefore required.

**3. CUMULATIVE ERROR DEPRIVED
TISHCHENKO A FAIR TRIAL.**

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative

errors cause a trial to be fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 780 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146 (1994).

Reviewing courts apply the cumulative error doctrine when several errors occurred at the trial court level but none alone warrant reversal. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004). Instead, it is the combined errors which effectively deny the defendant a fair trial. Hodges, at 673-74. Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990).

As applied to Tishchenko's case, although this Court could find that a single error alone did not deprive him a fair trial necessitating reversal, the cumulative error of the issues noted above did deprive him of a fair trial. Thus, Tishchenko's convictions should be reversed.

E. CONCLUSION

For the reasons set for above, appellant Tishchenko requests that this Court reverse his conviction and remand for a new trial.

Respectfully submitted this 30th day of April, 2009.

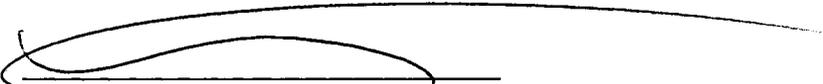
A handwritten signature in black ink, appearing to read "LISA E. TABBUT", written over a horizontal line.

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

8 Dated this 30th day of April 2009, in Longview, Washington.

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11 Lisa E. Tabbut, WSBA No. 21344
12 Attorney for Appellant
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