

FILED
MAY 7, 2015
Court of Appeals
Division III
State of Washington

No. 32564-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL RAY ARTEAGA,

Appellant.

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

The Honorable Judge Maryann C. Moreno

APPELLANT'S OPENING BRIEF

JILL S. REUTER, Of Counsel
KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorneys for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR.....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

D. STATEMENT OF THE CASE.....3

E. ARGUMENT.....20

Issue 1: Mr. Arteaga was denied his constitutional right to effective assistance of counsel.....20

a. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to challenge the warrantless search for Mr. Arteaga’s DNA by filing a motion to suppress.....21

b. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of evidence regarding transactions on the eBay account.....26

Issue 2: Evidence of the “controlling issues” and the “ketchup incident” should have been excluded under ER 404(b).....31

Issue 3: The monthly minimum payment of \$25 per month towards Legal Financial Obligations, set without considering the total amount of the restitution owed, Mr. Arteaga’s present, past, and future ability to pay, and any assets he may have, should be stricken from the Judgment and Sentence and the case should be remanded for resentencing.....39

Issue 4: The judgment and sentence contains two errors that should be corrected: the crime of conviction is classified as a domestic violence crime, and it states that domestic violence was pled and proved..... 42

F. CONCLUSION.....43

TABLE OF AUTHORITIES

United States Supreme Court

<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	24
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	20

Washington Supreme Court

<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	41
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	33
<i>State v. Blazina</i> , ___ Wn.2d ___, 344 P.3d 680 (Wash. 2015).....	39, 40, 41
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	41
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	36
<i>State v. Buckner</i> , 133 Wn.2d 63, 941 P.2d 667 (1997).....	25
<i>State v. Bustamante–Davila</i> , 138 Wn.2d 964, 983 P.2d 590 (1999).....	23, 24
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	32, 33, 34
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007).....	32, 33, 34
<i>State v. Garcia-Salgado</i> , 170 Wn.2d 176, 240 P.3d 153 (2010).....	21
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	20, 30
<i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984).....	38
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	20
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	23

<i>State v. Mason</i> , 160 Wn.2d 910, 935, 162 P.3d 396 (2007).....	36, 37
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	20, 21, 23, 26, 28
<i>State v. O’Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	23, 24
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)...	22, 23, 24, 25
<i>State v. Robtoy</i> , 98 Wn.2d 30, 653 P.2d 284 (1982).....	38
<i>State v. Russell</i> , 180 Wn.2d 860, 330 P.3d 151 (2014).....	24, 25
<i>State v. Shoemaker</i> , 85 Wn.2d 207, 533 P.2d 123 (1975).....	24, 25
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	32, 33
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	20
<i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	32, 33, 38
<i>State v. Tharp</i> , 96 Wn. 2d 591, 637 P.2d 961, 964 (1981).....	35
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	20, 21, 28
<i>State v. Thompson</i> , 151 Wn.2d 793, 92 P.3d 228 (2004).....	23
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009).....	21

Washington Courts of Appeal

<i>In re Pers. Restraint of Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007).....	27, 30
<i>State v. Acosta</i> , 123 Wn. App. 424, 98 P.3d 503, 512 (2004).....	36
<i>State v. Flowers</i> , 57 Wn. App. 636, 789 P.2d 333 (1990).....	23, 24, 25
<i>State v. Hamilton</i> , 179 Wn. App. 870, 320 P.3d 142 (2014).....	22, 23, 26
<i>State v. Healy</i> , 157 Wn. App. 502, 237 P.3d 360 (2010).....	42

<i>State v. Lohr</i> , 130 Wn. App. 904, 125 P.3d 977 (2005).....	40
<i>State v. McCreven</i> , 170 Wn. App. 444, 284 P.3d 793 (2012).....	32
<i>State v. Naillieux</i> , 158 Wn. App. 630, 241 P.2d 1280 (2010).....	42
<i>State v. Sargent</i> , 40 Wn. App. 340, 351-52, 698 P.2d 598 (1985).....	35, 36
<i>State v. Sexsmith</i> , 138 Wn. App. 497, 157 P.3d 901 (2007).....	27, 28, 30
<i>State v. Slocum</i> , 183 Wn. App. 438, 333 P.3d 541 (2014).....	31, 32
<i>State v. Thach</i> , 126 Wn. App. 297, 106 P.3d 782 (2005).....	38
<i>State v. Wade</i> , 98 Wn. App. 328, 989 P.2d 576 (1999).....	31
<i>State v. We</i> , 138 Wn. App. 716, 158 P.3d 1238 (2007).....	40

Washington State Statutes

RCW 9.94A.753(1).....	40, 41
RCW 9A.32.030(1)(a).....	27

Washington Court Rules

ER 401.....	27
ER 403.....	28
ER 404(b).....	31, 32
RAP 2.5(a).....	39

Other Authority

Black's Law Dictionary (Rev. 4th ed. 1968).....	35
---	----

A. SUMMARY OF ARGUMENT

Daniel Ray Arteaga was at the home of Kimberly Schmidt until approximately 3:30 a.m. on New Year's Day 2012. Later that afternoon, Kimberly Schmidt was found dead in her home. Mr. Arteaga denied any knowledge of what happened to Kimberly Schmidt. A detective at the crime scene took a DNA sample from Mr. Arteaga. Approximately eight months later, the State charged Daniel Ray Arteaga with first degree murder of Kimberly Schmidt. The case proceeded to a jury trial. Defense counsel did not move to suppress the DNA sample. Defense counsel also did not object to testimony from Kimberly Schmidt's mother Toni Schmidt that Mr. Arteaga paid himself the funds in Kimberly Schmidt's eBay account two days after her death. The trial court permitted the State to present prior bad acts evidence pursuant to ER 404(b) regarding the nature of Mr. Arteaga and Kimberly Schmidt's relationship up until one and a half years before her death, and a specific incident between them that occurred five years before her death. The jury found Mr. Arteaga guilty as charged. The trial court imposed restitution, and set a minimum monthly payment amount without considering Mr. Arteaga's ability to pay. The Judgment and Sentence erroneously classifies the crime as a domestic violence crime. Mr. Arteaga now appeals.

B. ASSIGNMENTS OF ERROR

1. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to challenge the warrantless search for Mr. Arteaga's DNA by filing a motion to suppress.
2. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of evidence regarding transactions on the eBay account.
3. The trial court erred in allowing evidence of the "controlling issues" and the "ketchup incident" contrary to ER 404(b).
4. The trial court erred by setting a monthly minimum payment of \$25 per month for Legal Financial Obligations, without considering the total amount of the restitution owed, Mr. Arteaga's present, past, and future ability to pay, and any assets he may have.
5. The judgment and sentence erroneously classifies the crime of conviction as a domestic violence crime.
6. The judgment and sentence erroneously states that domestic violence was pled and proved.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Mr. Arteaga was denied his constitutional right to effective assistance of counsel.

- a. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to challenge the warrantless search for Mr. Arteaga's DNA by filing a motion to suppress.
- b. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of evidence regarding transactions on the eBay account.

Issue 2: Evidence of the "controlling issues" and the "ketchup incident" should have been excluded under ER 404(b).

Issue 3: The monthly minimum payment of \$25 per month towards Legal Financial Obligations, set without considering the total amount of the restitution owed, Mr. Arteaga's present, past, and future ability to pay, and any assets he may have, should be stricken from the Judgment and Sentence and the case should be remanded for resentencing.

Issue 4: The judgment and sentence contains two errors that should be corrected: the crime of conviction is classified as a domestic violence crime, and it states that domestic violence was pled and proved.

D. STATEMENT OF THE CASE

Daniel Ray Arteaga and Kimberly Schmidt were involved in a romantic relationship for approximately six years. (RP¹ 305-306, 327, 369-370, 618, 665, 690-691, 709-712; Supp. RP 8-9, 60-61, 63, 79). They met at the Scuba Center of Spokane and spent time scuba diving together. (RP 338-339, 344, 688-690; Supp. RP 8). Mr. Arteaga was married to another woman. (RP 328, 692; Supp. RP. 9). Mr. Arteaga and Kimberly Schmidt's romantic relationship ended in November 2011. (RP 883-884, 912-913; Supp. RP 20, 65). Around that time, Kimberly Schmidt began a romantic relationship with Joe Regalado, the father of her daughter. (RP 339, 611, 615-616, 618-621, 655, 662-665, 671, 676-677, 680-683; Supp. RP 19-20).

During the day on New Year's Eve 2011, Kimberly Schmidt and her mother Toni Schmidt went shopping together and purchased a washing

¹ References to "RP" herein refer to the six consecutively paginated volumes containing pre-trial hearings, jury trial, and sentencing. References to "Supp. RP" refers to the single volume entitled "Verbatim Report of Compact Disks" containing transcription of Plaintiff's Ex. 1 and Plaintiff's Ex. 146.

machine. (RP 310, 625). Kimberly Schmidt arranged for Mr. Arteaga to pick up the washing machine and bring it to her house. (RP 310, 626, 881; Supp. RP 10, 15). Mr. Arteaga installed the washing machine. (RP 354-355, 369, 881, 913-914; Supp. RP 10-11). He had a key to Kimberly Schmidt's house. (RP 344, 355, 667; Supp. RP 17).

Mr. Arteaga was with Kimberly Schmidt from 3:00 p.m. on New Year's Eve until approximately 3:30 a.m. the next morning. (RP 369-370, 389, 391, 613, 880-889, 964-965; Supp. RP 44). According to Mr. Arteaga, when he left, Kimberly Schmidt was asleep in her bed. (RP 370; Supp. RP 43, 49, 62, 77).

Kimberly Schmidt and Mr. Regalado had plans to spend the evening of New Year's Eve together at a party at Mr. Regalado's house. (RP 623-625; Supp. RP 11). Mr. Regalado communicated with Kimberly Schmidt until around 11:00 p.m. (RP 647-648, 915-916). Kimberly Schmidt did not attend the party. (RP 647-648, 671-672, 677-678; Supp. RP 37).

Kimberly Schmidt was scheduled to pick up her daughter from a party around 11:00 a.m. the next morning, but she did not show up. (RP 648-649, 679; Supp. RP 80-81, 85). Mr. Regalado was unable to get in touch with Kimberly Schmidt, so he contacted Toni Schmidt. (RP 649-650).

Toni Schmidt also attempted to get in touch with Kimberly Schmidt that morning, but she was unable to reach her. (RP 313). She went over to Kimberly Schmidt's house. (RP 314-315). She had Mr. Arteaga on the phone at the time. (RP 315-316, 391-392; Supp. RP 56-57). Toni Schmidt found Kimberly Schmidt in her bedroom lying on the bed with a pillow covering her face. (RP 316-317; Supp. RP 84-86). Toni Schmidt removed the pillow and observed blood on Kimberly Schmidt's face. (RP 317). Kimberly Schmidt had sustained a gunshot wound to the head. (RP 442). Both Toni Schmidt and Mr. Arteaga called 911. (RP 318, 326, 392; Supp. RP 77-86).

Paramedics arrived and determined Kimberly Schmidt was deceased. (RP 365). An autopsy was performed, and the cause of death was determined to be a penetrating contact gunshot wound to the head, and the manner of death was listed as a homicide. (RP 444, 468, 488).

A firearm was found next to Kimberly Schmidt's left shoulder. (RP 438-441, 488, 546-547, 550-554). The firearm was inside of a black sock, and the barrel of the firearm was sticking out of a hole at the end of the sock. (RP 438-439, 550-551).

A toxicology screen was conducted on a blood sample taken from Kimberly Schmidt by toxicologist Dawn Sklerov. (RP 405-407). The

drug diphenhydramine, found in over-the-counter medication such as Tylenol PM or Tylenol, was detected. (RP 405-406).

Mr. Arteaga spoke with police officers at the scene. (RP 368-371, 387-392, 880-890). He told officers Kimberly Schmidt had a headache and a stomachache on New Year's Eve. (RP 389). Officers found two medications for stomach issues in Kimberly Schmidt's car. (RP 595-597).

While speaking with Mr. Arteaga at the scene, Spokane County Sheriff's Office Detective Michael Drapeau took a DNA sample from Mr. Arteaga using buccal swabs. (RP 873-874, 891-893, 950-951). Mr. Arteaga asked Detective Drapeau if he needed a lawyer. (RP 950-951). Detective Drapeau told him "that DNA all looks the same initially, so I would like his DNA as a sample to compare which was his and which was not." (RP 951). Approximately eight months later, Mr. Arteaga again spoke with police officers. (RP 916-921, 932-933, 938, 955-964; Supp. RP 4-77).

The State charged Mr. Arteaga with one count of first degree murder, while armed with a firearm. (CP 61). The State originally alleged this was a domestic violence crime, but the amended Information removed this allegation. (CP 20, 61).

The case proceeded to a jury trial. (RP 292-1075). The State's theory was Mr. Arteaga committed the charged crime because his

romantic relationship with Kimberly Schmidt was over and she started a new relationship with Mr. Regalado. (RP 255, 1044).

The trial court granted Mr. Arteaga's motions in limine to exclude references to the charged crime as one of domestic violence and to exclude evidence regarding the cycle of violence and particular characteristics of domestic violence. (RP 204-205).

The State sought to offer evidence, pursuant to ER 404(b), regarding the relationship between Mr. Arteaga and Kimberly Schmidt, alleging it showed motive, intent, and the res gestae of the crime. (CP 46-51, 64-70; RP 141-144, 151-161, 188-190, 224-266). Specifically, the State sought to offer evidence, via the testimony of Debora Zimmerman, regarding (1) the controlling nature of the relationship (referred to herein as the "controlling issues") and (2) an incident on New Year's Eve in 2006 where Mr. Arteaga allegedly squirted ketchup on Kimberly Schmidt's head while they dined at a restaurant with a group of friends (referred to herein as the "ketchup incident"). (RP 225-233, 266, 695).

In the State's offer of proof, Ms. Zimmerman testified she was friends with Kimberly Schmidt since approximately 1994, and she observed the relationship between Mr. Arteaga and Kimberly Schmidt begin. (RP 226-228). At trial, Ms. Zimmerman testified she was part of their lives until about a year and a half before Kimberly Schmidt's death,

and that she had not spoken with Kimberly Schmidt for a little over two years at the time of her death. (RP 696-698, 713).

Mr. Arteaga argued the proffered evidence should be excluded because it is irrelevant and prejudicial. (RP 244-246, 261-262). He argued the evidence does not make it more likely that a murder occurred. (RP 245). The State argued the evidence is relevant “to how [Mr. Arteaga] treated [Kimberly Schmidt] when he didn’t get his way and she was mortified by the incident[,]” and it shows motive, specifically: “this is the evidence that can help the jury understand the dynamics and why there’s motive behind the acts that occurred that night.” (RP 251, 260-261, 264-265). The State argued the “ketchup incident” is proof “[o]f motive as to how he would treat her when things don’t go the way he wanted.” (RP 262-263).

The trial court ruled evidence of the “controlling issues” admissible under ER 404(b), stating “I think that that is very relevant toward proving the defendant’s intent, if you will, premeditation, et cetera, et cetera, motivation.” (RP 265). The trial court also ruled evidence of the “ketchup incident” admissible under ER 404(b), stating “I think that basically shows that pattern that I think is relevant.” (RP 265-266). Although the trial court previously mentioned “I need to do the weighing

of the prejudice versus the probative value[,]” it did not do so at the time of the ruling. (RP 161, 265-266).

At the jury trial, witnesses testified consistent with the facts stated above. (RP 292-1075). In addition, Toni Schmidt testified she dealt with Kimberly Schmidt’s financial matters after her death. (RP 324-325). She testified she discovered an eBay account, and that there was activity on the account after Kimberly Schmidt’s death. (RP 325). Toni Schmidt testified “[t]wo days after her death Mr. Arteaga paid himself the funds that were in the account, her account.” (RP 325). Defense counsel did not object to this testimony. (RP 324-325).

Toni Schmidt also testified that following Kimberly Schmidt’s death, she took all of Kimberly Schmidt’s property to her house, including the items from the laundry room. (RP 603, 609). Toni Schmidt testified she was later contacted by a detective and asked if she had any single socks. (RP 609). She testified she then went through the laundry from Kimberly Schmidt’s house, and gave the detective a single sock. (RP 609-610). The detective testified Toni Schmidt provided him with a sock that was a potential match to the black sock found at the scene that contained the firearm. (RP 578-579, 591-592).

Ms. Sklerov testified that the amount of the drug diphenhydramine found in Kimberly Schmidt’s blood was a high dose, “above our

therapeutic level that's normally seen after taking this medication.” (RP 407). She testified that diphenhydramine “will make you drowsy and sleepy . . . [and] increase your reaction time, meaning it takes longer for you to react to something.” (RP 407, 413-414). She testified that diphenhydramine at an average therapeutic level, not just a high therapeutic level, can make someone drowsy as well. (RP 413-414).

Ms. Sklerov further testified whether diphenhydramine would make a person drowsy, either at an average therapeutic level or a high therapeutic level, “depends on their tolerance to the drugs, depends on the effect of the drugs. If a person takes it consistently, they may be taking more. They may be taking less if they're new to it.” (RP 414). She testified she does not know if Kimberly Schmidt had a tolerance to diphenhydramine. (RP 415).

Ms. Zimmerman testified she was best friends with Kimberly Schmidt for approximately eighteen years. (RP 685). She testified she saw the relationship between Mr. Arteaga and Kimberly Schmidt begin. (RP 691). Regarding the “controlling issues,” Ms. Zimmerman testified:

[The State:] Did you continue to always be involved in their relationship

[Ms. Zimmerman:] No, I did not.

[The State:] What kind of -- what kind of led to that not continuing?

[Ms. Zimmerman:] Um, what led to that is his continued, I mean, control in that he alienated her from all of the people

. . . .

[The State:] Describe why you would say that. What -- give us examples of it.

[Ms. Zimmerman:] Well, examples are, you know, [Mr. Arteaga] had a way of doing things. If you didn't do his way or if you didn't do it the way he liked it, if he was not the center, then he would systematically exclude you from the activities. You could be, you know, three or four of you standing there in a group, and if you were the one that he was singling out, he would literally look past you, nothing you said was heard, nothing you said was acknowledged. And -- and, I mean, he did this with people.

[The State:] Okay. Would he say anything to [Kimberly Schmidt]?

[Ms. Zimmerman:] Um, usually he -- he was very rough with her when she would step out of line, very -- he would make his displeasure of that known.

[The State:] Did he ever express opinions about hair or clothing?

[Ms. Zimmerman:] Absolutely. [Kimberly Schmidt] had her own way. He would -- he would not want her to cut her hair, and when she would cut her hair, he would pick at her and make fun of her and stuff like that. He didn't want her coloring it for a while there. Another, you know, way of his controlling, we -- we would -- after we dove as a group, we would go to different restaurants and things.

....

And he would tell her what she could eat and what she couldn't eat and that he -- he had an overweight wife, he wasn't going to have an overweight girlfriend.

(RP 693-694).

The trial court overruled Mr. Arteaga's objection to this testimony. (RP

693). Regarding the "ketchup incident," Ms. Zimmerman testified:

[Ms. Zimmerman:] We went out -- the group, there was a whole group of us. I think there were four couples for sure that went out on New Year's Eve.

[The State:] Do you remember what year?

[Ms. Zimmerman:] I believe it was 2006

[Mr. Arteaga] didn't like the group. He liked it to be him and [Kimberly Schmidt]. And if he didn't want to go, he would be very distancing, very cranky, very yucky to the group and just, you know, kind of like sullen for the -- the thing. And [Kimberly Schmidt] wanted to go to New Year's, and we went to -- up to Fizzie's.

[The State:] Okay.

[Ms. Zimmerman:] And he didn't want to go. He was upset about it. And we went. And during the course, we all ordered hors d'oeuvres and things and they were on the table. And we were sitting there. And he wasn't happy, didn't want to be there.

[The State:] Okay.

[Ms. Zimmerman:] And something happened and somebody had -- [Kimberly Schmidt] asked to pass the ketchup, so he reached and grabbed the ketchup. And it's not the kind that says "Hunt's" or -- on the bottle. It's the little clear squirty red bottles that I guess they refill.

[The State]: A restaurant squeeze . . . bottle?

[Ms. Zimmerman:] Right. He reached and -- and instead of handing it to her, he just squirted it in the top of her hair right there at the restaurant in front of all the -- I mean, we were at dinner together.

[The State:] What did that cause to happen next?

[Ms. Zimmerman:] We all left. I mean, [Kimberly Schmidt] was mortified. It embarrassed her to death. Just we all left.

(RP 695-696).

Ms. Zimmerman testified Mr. Arteaga repeatedly kept people from Kimberly Schmidt "[b]y ways of manipulation." (RP 714-715). She testified she was part of Mr. Arteaga and Kimberly Schmidt's lives until about a year and a half before Kimberly Schmidt's death, and that she had not spoken with Kimberly Schmidt for a little over two years at the time of her death. (RP 696-698, 713).

Forensic scientist Glenn Davis testified he examined the black sock found at the scene that contained the firearm. (RP 717, 729-730). He testified he determined the hole at the end of the sock “is consistent with a bullet defect.” (RP 731-732, 796-797). Mr. Davis further testified the bullet found in Kimberly Schmidt’s head came from the firearm found lying next to her at the scene. (RP 725-726, 770).

Forensic scientist Anna Wilson testified she tested the inside and outside of the black sock found at the scene that contained the firearm for DNA, against reference samples from Mr. Arteaga, Kimberly Schmidt, and Mr. Regalado. (RP 814, 826-832).

On the inside of the sock, Ms. Wilson testified she identified staining consistent with blood, which contained a mixture of at least two individuals. (RP 830, 854-855). She further testified:

[T]he major profile matched that of the known reference sample for Kimberly Schmidt, and the minor component was of limited genetic information to which no inclusions could be made. However, I was able to exclude [Mr.] Arteaga and [Mr.] Regalado from that mixture.

(RP 830, 854-855, 868).

On the outside of the sock, Ms. Wilson testified:

[F]rom the swab that I generally swabbed of the stocking was a mixture consistent with the combined known profiles for Kimberly Schmidt and [Mr.] Arteaga. And it is 270 times more likely that the observed DNA typing profile occurred as a result of the mixture of both Kimberly [Schmidt] and [Mr. Arteaga] than having originated from

Kimberly [Schmidt] and an unknown individual selected at random from the U.S. population. I also detected a trace profile of limited genetic information to which no conclusions could be made, and I was able to determine that [Mr.] Regalado was excluded as a possible contributor to the mixture.

(RP 831, 856).

Ms. Wilson testified there is no way she can match Mr. Arteaga's DNA alone to the outside of the sock and say it is him, because it is a mixture of DNA of two people that she cannot separate out. (RP 859, 865-866). She was "able to compute that it is 270 times more likely than it's actually [Kimberly Schmidt] and [Mr. Arteaga] than an unknown individual selected at random in the U.S." (RP 866). She testified she has seen statistics a lot larger than this 270 times more likely probability. (RP 831, 858).

Ms. Wilson also testified that she did some testing on the firearm found at the scene. (RP 833-834, 850-851). She testified "the DNA typing profile I obtained from the handgun swabs is a mixture consistent with two individuals." (RP 834). She further testified:

The major profile matches the known reference sample for Kimberly Schmidt, and the minor component is of trace -- is a trace profile to which no inclusions could be made. However, I was able to exclude both [Mr.] Regalado and [Mr.] Arteaga and Toni Schmidt from that mixture.

(RP 834, 851, 863).

Detective Drapeau testified regarding Mr. Arteaga's statements to him at the scene. (RP 880-890). He testified Mr. Arteaga said that on New Year's Eve, he read texts on Kimberly Schmidt's phone to and from Mr. Regalado. (RP 882, 887, 889, 942, 981-982).

Detective Drapeau testified regarding text messages sent between Mr. Arteaga and Kimberly Schmidt, and Kimberly Schmidt and Mr. Regalado. (RP 912-916, 942-947). The text messages addressed the end of Mr. Arteaga and Kimberly Schmidt's romantic relationship, and conversations between Kimberly Schmidt and Mr. Regalado. (RP 912-916, 942-947).

Detective Drapeau testified that Mr. Arteaga said Kimberly Schmidt was feeling ill that night, he confirmed that Mr. Arteaga went to the store and bought her some Advil P.M. and returned to her house and gave her the medicine. (RP 886-887, 938-939, 966-971, 981-982).

Detective Drapeau also testified he learned from Toni Schmidt that Kimberly Schmidt was not feeling well that night. (RP 978-979).

Detective Drapeau testified as follows regarding taking a DNA sample from Mr. Arteaga at the scene:

[Defense counsel:] And when did you take a buccal swab from [Mr. Arteaga] for DNA purposes?

[Detective Drapeau:] Near the end of the interview portion

....

[Defense counsel:] Okay. And he did that voluntarily? He didn't have to do that, correct?

[Detective Drapeau:] He did ask me if he needed a lawyer.

[Defense counsel:] What'd you tell him?

[Detective Drapeau:] I said that, um - - if I may recall - -

....

- - exactly what I told him? (Looking at a document.) I told him that DNA all looks the same initially, so I would like his DNA as a sample to compare which was his and which was not.

(RP 950-951).

The State also admitted into evidence, and played for the jury, Mr. Arteaga's recorded interview given to two detectives in August 2012. (RP 918-921, 938; Supp. RP 4-77).

Mr. Arteaga stated Kimberly Schmidt told him, approximately two weeks before New Year's Eve, that she and Mr. Regalado had started up a relationship again. (Supp. RP 19-20). Mr. Arteaga told the detectives he did not express any concerns to Kimberly Schmidt that she was seeing someone else. (Supp. RP 25). He stated he did not have an issue with Kimberly Schmidt's relationship with Mr. Regalado. (Supp. RP 75). Mr. Arteaga characterized his relationship with Kimberly Schmidt as best friends. (Supp. RP 25, 60-61).

Mr. Arteaga stated that after he installed Kimberly Schmidt's new washing machine on New Year's Eve, he and Kimberly Schmidt did some loads of laundry. (Supp. RP 16-17). Mr. Arteaga stated the clothes they washed belonged to Kimberly Schmidt and her daughter. (Supp. RP 16-17).

Mr. Arteaga stated that on New Year's Eve, he read Kimberly Schmidt's texts on her cell phone, but that he stopped around 10:00 p.m. (Supp. RP 26-27, 37-38). Mr. Arteaga told the detectives Kimberly Schmidt was not feeling well that night. (Supp. RP 18, 22, 32-35). He acknowledged going to the store to purchase some medication for Kimberly Schmidt to help her sleep. (Supp. RP 41-43).

Mr. Arteaga told the detectives he sold items on eBay, and that Kimberly Schmidt had a Paypal account. (Supp. RP 17, 49). He stated their arrangement was as follows:

Any of the items that I sold on E-bay 99 percent of them were mine. Occasionally she'd have me put some of her stuff on there and then we would just send the money to her bank if I needed something or needed money or I would just use the money out of the account to buy things that I wanted off of E-bay.

(Supp. RP 49).

Mr. Arteaga told the detectives he had no idea what happened to Kimberly Schmidt, denied being present when she died, and denied killing her. (Supp. RP 61-62, 64, 68-71, 73-74, 76).

The trial court instructed the jury that in order to find Mr. Arteaga guilty of first degree murder, it had to find:

- (1) That on or about December 31, 2011, [Mr. Arteaga] acted with intent to cause the death of Kimberly R. Schmidt;
- (2) That the intent to cause the death was premeditated;

- (3) That Kimberly R. Schmidt died as a result of [Mr. Arteaga's] acts; and
- (4) That any of these acts occurred in the State of Washington.

(CP 268).

The jury was not given any instructions or a special verdict form regarding domestic violence. (CP 257-278).

In its closing argument, the State discussed the testimony by Toni Schmidt regarding Kimberly Schmidt's eBay account:

Ms. Schmidt also testified that just interestingly enough there's transactions on the eBay account just three days later. Six and a half years, the person he loves more than his wife is dead by a means that he says he has no idea how, but you got to keep the eBay account going.

(RP 1031).

The State also discussed Ms. Zimmerman's testimony regarding the "controlling issues" and the "ketchup incident." (RP 1037).

The jury found Mr. Arteaga guilty as charged. (CP 279, 281, 355-367; RP 1081). At sentencing, the trial court imposed costs of \$800 and restitution of \$4,065.70, for a total Legal Financial Obligation (LFO) of \$4,865.70. (CP 361-362, 368; RP 1132). The Judgment and Sentence contains the following boilerplate language:

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the

likelihood that the defendant's status will change. (RCW 10.01.160).

(CP 358)

The trial court ordered Mr. Arteaga to make monthly payments as follows:

[X] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25 per month commencing 1/2/15 RCW 9.94A.760.

(CP 362).

When setting this minimum monthly payment, the trial court did not consider the total amount of the restitution owed, Mr. Arteaga's present, past, and future ability to pay, or any assets he may have. (RP 1132). Mr. Arteaga did not object. (RP 1132).

The Judgment and Sentence states that Mr. Arteaga is guilty of "Murder in the First Degree – Domestic Violence." (CP 355, 359). It also states that "[f]or the crime(s) charged in Count I, domestic violence was pled and proved. RCW 10.99.020." (CP 356).

Mr. Arteaga timely appealed. (CP 369-370).

E. ARGUMENT

Issue 1: Mr. Arteaga was denied his constitutional right to effective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

- a. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to challenge the warrantless search for Mr. Arteaga’s DNA by filing a motion to suppress.**

While speaking with Mr. Arteaga at the scene, Detective Drapeau took a DNA sample from Mr. Arteaga using buccal swabs. (RP 873-874, 891-893, 950-951). “Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and article I, section 7.” *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). Therefore, “the search must be supported by a warrant unless the search meets one of the jealously and carefully drawn exceptions to the warrant requirement.” *Id.* (quoting *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009) (internal quotation marks omitted)).

As acknowledged above, in order for Mr. Arteaga to establish defense counsel was ineffective for failing to challenge the warrantless search for his DNA, Mr. Arteaga must show defense counsel’s representation was deficient, and that this deficient representation was prejudicial. *See McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26). Mr. Arteaga can rebut the presumption that defense counsel’s performance was effective by establishing the absence of any legitimate trial tactics for defense counsel’s performance. *See Grier*, 171 Wn.2d at 33.

First, defense counsel's performance was deficient because there was no tactical reason not to move to suppress the DNA sample obtained from Mr. Arteaga without a warrant. *See, e.g., State v. Hamilton*, 179 Wn. App. 870, 879-882, 320 P.3d 142 (2014) (defense counsel's performance in failing to move to suppress evidence based upon a warrantless search of the defendant's purse was deficient); *State v. Reichenbach*, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004) (defense counsel's performance in failing to move to suppress evidence seized during execution of an invalid warrant was deficient). Under the facts discussed below, there is a valid argument for suppression of the DNA sample. Furthermore, the DNA sample was the most crucial evidence in the case, as it was used to test for DNA on the black sock found at the scene that contained the firearm, and it became the only physical evidence remotely connecting Mr. Arteaga to the firearm used in the crime. (RP 826-832, 856, 858-859, 865-866). Moving to suppress would not have involved any risk to Mr. Arteaga. *See, e.g., Hamilton*, 179 Wn. App. at 880 (discussing the lack of risk involved in moving to suppress). There was no tactical reason for defense counsel not to file a motion to suppress the most crucial evidence in the case. Therefore, defense counsel's performance was deficient.

Second, in order to establish prejudice, Mr. Arteaga must show that the trial court likely would have granted a motion to suppress the

DNA sample. *See Hamilton*, 179 Wn. App. at 882; *see also McFarland*, 127 Wn.2d at 337 n.4.

Consent is an exception to the warrant requirement. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). “The State must meet three requirements in order to show a valid consensual search: (1) the consent must be voluntary, (2) the person granting consent must have authority to consent, and (3) the search must not exceed the scope of the consent.” *Reichenbach*, 153 Wn.2d at 131.

“[T]he State has the burden of showing by ‘clear and convincing evidence that the consent was informed and given freely and voluntarily.’” *State v. Flowers*, 57 Wn. App. 636, 645, 789 P.2d 333 (1990) (quoting *State v. Mak*, 105 Wn.2d 692, 713, 718 P.2d 407 (1986)). “Whether consent was voluntary or instead the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.” *State v. O’Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003) (citing *State v. Bustamante–Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)).

Whether consent is voluntary is determined by considering several factors, including:

(1) [W]hether *Miranda*² warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent.

State v. Russell, 180 Wn.2d 860, 871-72, 330 P.3d 151 (2014) (quoting *State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975)).

No one of these factors is dispositive. *Id.* at 872 (citing *Shoemaker*, 85 Wash.2d at 212). Although knowledge of the right to refuse consent is relevant, it is not required to find voluntary consent. *Reichenbach*, 153 Wn.2d at 132. “In addition, the court may weigh any express or implied claims of police authority to search, previous illegal actions of the police, the defendant's cooperation, and police deception as to identity or purpose.” *Id.* (citing *Flowers*, 57 Wn. App. at 645).

Here, the warrantless search for Mr. Arteaga's DNA does not fall under an exception to the warrant requirement, because Mr. Arteaga's consent to provide a DNA sample was not voluntarily given.

Any consent given by Mr. Arteaga to provide a DNA sample was the product of coercion. *See O'Neill*, 148 Wn.2d at 588 (citing *Bustamante–Davila*, 138 Wash.2d at 981). When Detective Drapeau

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

asked Mr. Arteaga if he could take a DNA sample, Mr. Arteaga asked him if he needed a lawyer. (RP 950-951). In response, Detective Drapeau told him “*that DNA all looks the same initially*, so I would like his DNA as a sample to compare which was his and which was not.” (RP 951). (emphasis added). Detective Drapeau’s response coerced Mr. Arteaga into providing a DNA sample under the guise that all DNA looks the same, which is untrue. *See State v. Buckner*, 133 Wn.2d 63, 65-66, 941 P.2d 667 (1997) (stating that “except for identical twins, each individual’s DNA is unique.”). Detective Drapeau’s response to Mr. Arteaga was also deceptive. *See Reichenbach*, 153 Wn.2d at 132 (citing *Flowers*, 57 Wn. App. at 645).

In addition, the other relevant factors weigh against a finding of voluntary consent. *See Russell*, 180 Wn.2d at 871-72 (quoting *Shoemaker*, 85 Wash.2d at 212). First, *Miranda* warnings were not given to Mr. Arteaga. Second, although the degree of education and intelligence of Mr. Arteaga are not directly stated in the record, the fact that he requested a lawyer indicates confusion with the process, and therefore, this factor weighs against a finding of voluntariness. (RP 950-951). Third, Mr. Arteaga was not advised of his right to not to consent to the warrantless search for his DNA. Furthermore, because Mr. Arteaga had no criminal history, he did not have experience in the criminal justice system, and

therefore, it cannot be implied that he knew he could refuse consent. (CP 330-351, 357). The fact that Mr. Arteaga requested an attorney also indicates he did not know he could refuse consent. (RP 950-951).

Because the warrantless search for Mr. Arteaga's DNA does not fall under the consent exception, or any other exception to the warrant requirement, the trial court likely would have granted a motion to suppress the DNA sample. Therefore, Mr. Arteaga was prejudiced by defense counsel's failure to challenge the warrantless search for Mr. Arteaga's DNA by filing a motion to suppress. *See Hamilton*, 179 Wn. App. at 882; *see also McFarland*, 127 Wn.2d at 337 n.4.

Mr. Arteaga has met the two-prong test for ineffective assistance of counsel. Defense counsel's failure to challenge the warrantless search for Mr. Arteaga's DNA by filing a motion to suppress constituted deficient performance and Mr. Arteaga was prejudiced by that deficient performance. His conviction should be reversed.

b. Mr. Arteaga was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of evidence regarding transactions on the eBay account.

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show "that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would

have been different if the evidence had not been admitted[,]”and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). “[S]trategy must be based on reasoned decision-making[.]” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Toni Schmidt testified she discovered an eBay account, and that there was activity on the account after Kimberly Schmidt’s death. (RP 325). She testified “[t]wo days after her death Mr. Arteaga paid himself the funds that were in the account, her account.” (RP 325). Defense counsel did not object to this testimony. (RP 324-325).

An objection to this evidence would have been sustained. *See Sexsmith*, 138 Wn. App. at 509. In order to convict Mr. Arteaga of first degree murder of Kimberly Schmidt, the State had to prove Mr. Arteaga acted with the premeditated intent to cause the death of Kimberly Schmidt and that she died as a result of those acts. (CP 268); *see also* RCW 9A.32.030(1)(a) (first degree premeditated murder). The evidence that Mr. Arteaga paid himself funds in Kimberly Schmidt’s eBay account two days after her death does not show Mr. Arteaga acted with premeditated intent to cause her death. The alleged payment occurred after Kimberly Schmidt’s death, and therefore, it cannot be proof of Mr. Arteaga’s intent in causing her death two days earlier. *See* ER 401 (defining relevant

evidence as “evidence having 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.”).

Even if it was minimally relevant the evidence would have been excluded because “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .” ER 403. The evidence that Mr. Arteaga paid himself funds in Kimberly Schmidt’s eBay account two days after her death was more prejudicial than probative, because it suggests a financial motive for Mr. Arteaga to commit the crime. To the contrary, the record does not show a financial motive. (Supp. RP 17, 49). The record shows the vast majority of the eBay transactions belonged to Mr. Arteaga: he told detectives he occasionally put items on eBay for Kimberly Schmidt, but that 99 percent of the items he sold on eBay belonged to him. (Supp. RP 49).

Defense counsel’s deficient performance prejudiced Mr. Arteaga. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that absent this error the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26); *see also Sexsmith*, 138 Wn. App. at 509.

The State emphasized the irrelevant evidence that Mr. Arteaga paid himself funds in Kimberly Schmidt's eBay account two days after her death by discussing the evidence during its closing argument. (RP 1031). Without the irrelevant evidence, the result of the trial would have been different. The evidence that Mr. Arteaga acted with premeditated intent to cause the death of Kimberly Schmidt and that she died as a result of those acts was not overwhelming.

Mr. Arteaga was excluded as a contributor to the DNA found on the firearm used in the crime. (RP 834, 851, 863). The only physical evidence remotely connecting Mr. Arteaga to the firearm used in the crime was the DNA found on the black sock found at the scene that contained the firearm. (RP 826-832, 856, 858-859, 865-866). The probability that this DNA matched Mr. Arteaga was low. (RP 831, 858, 866).

In addition, there were alternate explanations for the presence of Mr. Arteaga's DNA on the sock. First, he could have touched the sock while doing laundry with Kimberly Schmidt. Mr. Arteaga told detectives he and Kimberly Schmidt did some loads of her and her daughter's laundry on New Year's Eve. (Supp. RP 16-17). When looking through Kimberly Schmidt's laundry following her death, Toni Schmidt found a sock that appeared to match the black sock found at the scene. (RP 578-579, 591-592, 603, 609-610). Second, the sock with Mr. Arteaga's DNA

could have been present in the house from their six-year relationship and then used by the assailant without Mr. Arteaga having participated in the crime itself.

Furthermore, the evidence that Mr. Arteaga gave Kimberly Schmidt sleeping medicine is not proof that he intentionally caused her death. (RP 938-939, 966-971, 981-982; Supp. RP 41-43). Ms. Sklerov could not testify regarding how the medicine would have affected Kimberly Schmidt. (RP 414-415). There was also evidence that Kimberly Schmidt was not feeling well on New Year's Eve. (RP 886-887, 978-979; Supp. RP 18, 22, 32-35).

In addition, the text messages sent between Mr. Arteaga and Kimberly Schmidt, and Kimberly Schmidt and Mr. Regalado, do not show that Mr. Arteaga intentionally caused Kimberly Schmidt's death. (RP 912-916, 942-947).

Defense counsel did not make a tactical decision by failing to object to the admission of evidence regarding transactions on the eBay account. *See Grier*, 171 Wn.2d at 33; *Sexsmith*, 138 Wn. App. at 509. Defense counsel's failure to object to this irrelevant evidence was not based on reasonable decision-making. *Hubert*, 138 Wn. App. at 928. Where the record does not show a financial motive for Mr. Arteaga to commit the crime, and the evidence that Mr. Arteaga committed the

alleged crime was not overwhelming, there was no tactical reason for defense counsel's failure to object to this irrelevant prejudicial evidence.

Mr. Arteaga has met the two-prong test for ineffective assistance of counsel. Defense counsel's failure to object to the admission of evidence regarding transactions on the eBay account constituted deficient performance and Mr. Arteaga was prejudiced by that deficient performance. His conviction should be reversed.

Issue 2: Evidence of the “controlling issues” and the “ketchup incident” should have been excluded under ER 404(b).

“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). Admitting evidence of a criminal defendant's prior bad acts “presents a danger that the defendant will be found guilty not on the strength of evidence supporting the current charge, but because of the jury's overreliance on past acts as evidence of his character and propensities.” *State v. Slocum*, 183 Wn. App. 438, 442, 333 P.3d 541 (2014).

Accordingly, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident.”
ER 404(b).

“The burden of demonstrating a proper purpose for admitting evidence of a person’s prior bad acts is on the proponent of the evidence.” *Slocum*, 183 Wn. App. at 448. In order to admit evidence under ER 404(b), the trial court must follow four steps: “(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. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). “This analysis must be conducted on the record.” *Id.* at 175 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

“Evidence of prior bad acts is presumptively inadmissible.” *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012). “In doubtful cases, the evidence should be excluded.” *Thang*, 145 Wn.2d at 642 (citing *Smith*, 106 Wn.2d at 776).

The trial court’s interpretation of ER 404(b) is reviewed de novo. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009) (citing *Foxhoven*, 161 Wn.2d at 174). If the trial court correctly interprets the

rule, its decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *Id.* (citing *Foxhoven*, 161 Wn.2d at 174). “A trial court abuses its discretion where it fails to abide by the rule's requirements.” *Id.* (citing *Foxhoven*, 161 Wn.2d at 174). In addition, “[d]iscretion is abused if it is exercised on untenable grounds or for untenable reasons.” *Thang*, 145 Wn.2d at 642 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Here, the State moved to admit evidence, pursuant to ER 404(b), by the testimony of Ms. Zimmerman, regarding the controlling nature of the relationship between Mr. Arteaga and Kimberly Schmidt (the “controlling issues”) and an incident on New Year’s Eve in 2006 where Mr. Arteaga allegedly squirted ketchup on Kimberly Schmidt’s head at a restaurant (the “ketchup incident”). (RP 225-233, 266, 695). Mr. Arteaga objected to the admission of this evidence. (RP 244-246, 261-262, 693). The trial court ruled the evidence was admissible. (RP 265-266).

The trial court committed reversible error by failing to weigh the probative value of this evidence against its prejudicial effect, prior to admitting the evidence. *See Foxhoven*, 161 Wn.2d at 175 (stating that all four steps of the ER 404(b) analysis must be conducted on the record) (citing *Smith*, 106 Wn.2d at 776); *see also* RP 265-266. The trial court abused its discretion by failing to follow the rule’s requirements. *See*

Fisher, 165 Wn.2d at 745 (citing *Foxhoven*, 161 Wn.2d at 174).

Therefore, Mr. Arteaga's conviction should be reversed and remanded for a new trial.

If this Court finds the record sufficient to review the issue itself, despite the trial court's failure to conduct the required ER 404(b) analysis, this Court should find (1) that no ER 404(b) exceptions apply that would allow admission of evidence of the "controlling issues" and the "ketchup incident" and (2) that the prejudicial effect of this evidence outweighs its probative value.

First, no ER 404(b) exceptions apply that would allow admission of evidence of the "controlling issues" and the "ketchup incident." The State argued the evidence showed motive, intent, and the *res gestae* of the crime. (CP 46-51, 64-70; RP 141-144, 151-161, 188-190, 224-266). The trial court ruled evidence of the "controlling issues" admissible to prove "the defendant's intent, if you will, premeditation, et cetera, et cetera, motivation." (RP 265). The trial court ruled evidence of the "ketchup incident" admissible based on the following: "I think that basically shows that pattern that I think is relevant." (RP 265-266).

Motive is defined as "[c]ause or reason that moves the will . . . [a]n inducement, or that which leads or tempts the mind to indulge a criminal act. . . . the moving power which impels to action for a definite

result.... that which incites or stimulates a person to do an act.” *State v. Tharp*, 96 Wn. 2d 591, 597, 637 P.2d 961, 964 (1981) (quoting Black’s Law Dictionary (Rev. 4th ed. 1968)). In *State v. Sargent*, where the defendant was charged with the murder of his wife, the trial court permitted a witness to testify that eight months prior to the wife’s death, the defendant told him he was upset because he hit his wife during an argument. *State v. Sargent*, 40 Wn. App. 340, 341-42, 351-52, 698 P.2d 598 (1985). In admitting this evidence, the trial court stated “I believe that these alleged statements would be admissible because they would be probative of the intent, attitude and disposition of the defendant toward the victim. . . .” *Id.* at 352. On appeal, the defendant argued this evidence was inadmissible under ER 404(b), while the State argued it was properly admitted to prove motive. *Id.* at 351. The court found the trial court erred in admitting the evidence, reasoning “[w]e can discern no relationship between proof of [the defendant’s] intent the night of the murder and an argument with his wife 8 months earlier.” *Id.* at 352.

Here, evidence of the “controlling issues” and the “ketchup incident” was not admissible to show intent, motive, or premeditation. Ms. Zimmerman had not observed Mr. Arteaga and Kimberly Schmidt’s relationship for at least a year and a half before Kimberly Schmidt’s death. (RP 696-698, 713). The “ketchup incident” occurred five years before

Kimberly Schmidt's death. (RP 232-233, 266, 695). As in *Sargent*, there is no relationship between proof of Mr. Arteaga's intent on the night Kimberly Schmidt died and the nature of their relationship a year and a half before or Mr. Arteaga pouring ketchup on her head five years earlier. *See Sargeant*, 40 Wn. App. at 351-52; *cf. State v. Mason*, 160 Wn.2d 910, 916, 935, 162 P.3d 396 (2007) (the trial court did not err in admitting evidence of a prior interaction between the defendant and the victim to demonstrate the nature of their relationship; the prior interaction occurred less than four months³ before the February 19, 2001, crime).

In addition, given the time span between the evidence of the "controlling issues" and the "ketchup incident" and Kimberly Schmidt's death, the evidence was not admissible under the *res gestae* exception to ER 404(b). "This exception permits the admission of evidence of other crimes or misconduct where it is 'a link in the chain of an unbroken sequence of events surrounding the charged offense . . . in order that a complete picture be depicted for the jury.'" *State v. Acosta*, 123 Wn. App. 424, 442, 98 P.3d 503, 512 (2004) (quoting *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)).

³ The date of the prior interaction, November or December 2000, is found in an unpublished portion of the Court of Appeals decision, rather than in the Washington Supreme Court decision. *See State v. Mason*, 110 P.3d 245 (Wash. App. 2005).

No ER 404(b) exceptions apply that would allow admission of evidence of the “controlling issues” and the “ketchup incident.” The only plausible purpose for this evidence is the prohibited purpose of showing Mr. Arteaga’s propensity to commit the crime charged. *See* ER 404(b).

Second, the prejudicial effect of this evidence outweighs its probative value. Evidence of the “controlling issues” was, at minimum, a year and half before Kimberly Schmidt’s death. (RP 696-698, 713). The “ketchup incident” occurred five years before her death. (RP 232-233, 266, 695). Because these two pieces of evidence were so remote in time from the date of the crime, any probative value they have is outweighed by their prejudicial effect. This evidence is not probative of the relationship between Mr. Arteaga and Kimberly Schmidt at, or even near, the time of her death. *Cf. Mason*, 160 Wn.2d at 935 (the trial court did not err in admitting evidence of the relationship between the defendant and the victim that occurred less than four months before the crime). Any probative value is outweighed by the prejudice generated by the evidence - that Mr. Arteaga controlled Kimberly Schmidt and therefore acted in conformity with this trait at the time of Kimberly Schmidt’s death. Under these circumstances, evidence of the “controlling issues” and the “ketchup incident” was more prejudicial than probative.

In addition, the error in admitting this evidence was exacerbated by the State's emphasis of Ms. Zimmerman's testimony regarding the "controlling issues" and the "ketchup incident" in its closing argument. RP 1037; *see also Thang*, 145 Wn.2d at 645 (finding the potential prejudice of evidence admitted under ER 404(b) outweighed its probative value, based in part upon the mention of the evidence in the State's closing argument).

"Evidentiary errors under ER 404 are not of constitutional magnitude." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Therefore, such errors are not harmless when, "within reasonable probabilities . . . the outcome of the trial would have been different if the error had not occurred." *Id.* (citing *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982)); *see also State v. Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005) (stating this harmless error standard).

Here, the error in admitting the ER 404(b) evidence was not harmless. The evidence that Mr. Arteaga acted with premeditated intent to cause the death of Kimberly Schmidt and that she died as a result of those acts was not overwhelming. Mr. Arteaga was excluded as a contributor to the DNA found on the firearm used in the crime. (RP 834, 851, 863). The only physical evidence remotely connecting Mr. Arteaga to the firearm used in the crime was the DNA found on the black sock found at the scene

that contained the firearm. (RP 826-832, 856, 858-859, 865-866). The probability that this DNA matched Mr. Arteaga was low. (RP 831, 858, 866). And, as argued above, there are two alternate explanations for the presence of Mr. Arteaga's DNA on the sock. (RP 578-579, 591-592, 603, 609-610; Supp. RP 16-17). Furthermore, both the evidence that Mr. Arteaga gave Kimberly Schmidt sleeping medicine and the text messages sent between Mr. Arteaga and Kimberly Schmidt, and Kimberly Schmidt and Mr. Regalado are not proof that Mr. Arteaga intentionally caused Kimberly Schmidt's death. (RP 414-415, 886-887, 912-916, 938-939, 942-947, 966-971, 978-979, 981-982; Supp. RP 18, 22, 32-35, 41-43). Accordingly, Mr. Arteaga's conviction should be reversed and the case remanded for a new trial.

Issue 3: The monthly minimum payment of \$25 per month towards Legal Financial Obligations, set without considering the total amount of the restitution owed, Mr. Arteaga's present, past, and future ability to pay, and any assets he may have, should be stricken from the Judgment and Sentence and the case should be remanded for resentencing.

Although Mr. Arteaga did not make this argument below, "an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5." *State v. Blazina*, ___ Wn.2d ___, 344 P.3d 680, 681 (Wash. 2015). Mr. Arteaga requests this Court exercise its discretion and accept review of this claimed error. *See* RAP 2.5(a); *see also* *Blazina*, 344 P.3d at 681. As our state Supreme Court recognized "[n]ational and

local cries for reform of broken LFO systems” demand this result.

Blazina, 344 P.3d at 683. “Washington’s LFO system carries problematic consequences[,]” which particularly affect indigent offenders. *Id.* at 683-85.

When setting a minimum monthly payment an offender is required to pay towards restitution ordered, “[t]he court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.” RCW 9.94A.753(1); *see also State v. We*, 138 Wn. App. 716, 728, 158 P.3d 1238 (2007) (acknowledging this requirement).

Here, the trial court imposed restitution of \$4,065.70. (CP 362, 368; RP 1132). The trial court ordered Mr. Arteaga to make a minimum monthly payment of \$25 per month towards his LFOs. (CP 362). When setting this minimum monthly payment, the trial court did not consider the total amount of the restitution owed, Mr. Arteaga’s present, past, and future ability to pay, and any assets he may have, as required by RCW 9.94A.753(1). (RP 1132); *cf. State v. Lohr*, 130 Wn. App. 904, 911-12, 125 P.3d 977 (2005) (the trial court complied with RCW 9.94A.753(1) in setting monthly restitution payments by considering the defendant’s financial situation).

The Judgment and Sentence does contain boilerplate language addressing the factors set forth in RCW 10.01.160. (CP 358). However, this is insufficient to meet the requirements set forth in RCW 9.94A.753(1). The boilerplate language addresses the requirements of RCW 10.01.160, not the applicable statute, RCW 9.94A.753(1). Even if the boilerplate language addressed the applicable statute, the fact that the trial court signed a judgment and sentence with boilerplate language is insufficient to prove the trial court engaged in an individualized inquiry into Mr. Arteaga's present, past, and future ability to pay restitution. *See Blazina*, 344 P.3d at 685; *see also* RCW 9.94A.753(1). Findings must have support in the record. Specifically, a trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Therefore, because the monthly minimum payment of \$25 per month towards LFOs was set without considering the total amount of the restitution owed, Mr. Arteaga's present, past, and future ability to pay, and any assets he may have, as required by RCW 9.94A.753(1), the monthly minimum payment of \$25 per month should be stricken from the Judgment and Sentence and the case remanded for resentencing. *See Blazina*, 344 P.3d at 685 (setting forth this remedy).

Issue 4: The judgment and sentence contains two errors that should be corrected: the crime of conviction is classified as a domestic violence crime, and it states that domestic violence was pled and proved.

The Judgment and Sentence states that Mr. Arteaga is guilty of “Murder in the First Degree – Domestic Violence.” (CP 355, 359). It also states that “[f]or the crime(s) charged in Count I, domestic violence was pled and proved. RCW 10.99.020.” (CP 356). However, the amended Information did not allege that this was a domestic violence crime. (CP 20, 61). Further, the trial court granted Mr. Arteaga’s motions in limine to exclude domestic violence references and evidence. (RP 204-205). The jury was not given any instructions or a special verdict form regarding domestic violence. (CP 257-278). Therefore, contrary to the indications in the Judgment and Sentence, the crime of conviction was not a domestic violence crime and domestic violence was not pled and proved.

Accordingly, this court should remand this case for correction of the judgment and sentence to remove the domestic violence classification from the crime of conviction and to remove the statement that domestic violence was pled and proved. (CP 355-356); *see also, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand

appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

F. CONCLUSION

Mr. Arteaga was denied his right to effective assistance of counsel, where defense counsel failed to challenge the warrantless search for Mr. Arteaga's DNA by filing a motion to suppress, and failed to object to the admission of evidence regarding transactions on the eBay account. In addition, the trial court should have excluded evidence of the "controlling issues" and the "ketchup incident" under ER 404(b). For these reasons, Mr. Arteaga's conviction should be reversed.

The monthly minimum payment of \$25 per month towards LFOs, set without considering the total amount of the restitution owed, Mr. Arteaga's present, past, and future ability to pay, and any assets he may have, should be stricken from the Judgment and Sentence and the case should be remanded for resentencing. In addition, the case should be remanded for correction of the judgment and sentence to remove the domestic violence classification from the crime of conviction and to remove the statement that domestic violence was pled and proved.

Respectfully submitted this 7th day of May, 2015.


Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 32564-4-III
vs.)
DANIEL RAY ARTEAGA)
Defendant/Appellant)
PROOF OF SERVICE)
_____)

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC and Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 7, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Daniel Arteaga, DOC #375673
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at scpaappeals@spokanecounty.org using Division III's e-service feature.

Dated this 7th day of May, 2015.



Jill S. Reuter, Of Counsel, WSBA #38374
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com