

63869-6

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COA NO. 63869-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH NJONGE,

Appellant.

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

The Honorable Laura Middaugh, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional rights to a public trial.
2. The court erroneously admitted evidence of the victim's character under ER 405.
3. The court erroneously admitted evidence of appellant's bad acts under ER 404(b).
4. The court erroneously admitted evidence of appellant's misconduct for the purpose of impeachment under ER 608.
5. Appellant received ineffective assistance of counsel.
6. Cumulative error violated appellant's due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. The trial court conducted a portion of jury selection after barring observers from the courtroom due to purported space limitations. The court also excluded the press from the courtroom during jury selection. Did the court's exclusion of the public violate the appellant's constitutional rights to a public trial?
2. An important issue at trial was how appellant's DNA wound up under the deceased victim's fingernails. Is reversal required because the trial court wrongly allowed the State to rebut appellant's non-

criminal explanation with improper evidence of the victim's character under ER 405? Is reversal alternatively required because defense counsel was ineffective in failing to properly object to this rebuttal evidence?

3. Is reversal required because the trial court wrongly admitted various pieces of evidence under ER 404(b) to show motive?

4. Is reversal required because the trial court wrongly allowed the State to impeach appellant's credibility under ER 608 with uncharged acts of taking various pieces of property from his place of employment?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Joseph Njonge with premeditated first degree murder. CP 1. A jury found him guilty of second degree murder as a lesser offense. CP 65. Njonge, who had no criminal history, received a standard range sentence of 200 months in confinement. CP 70, 72. This appeal timely follows. CP 67-68.

2. Trial Evidence

Jane Britt¹ was last seen alive on March 18, 2008 between 5 and 6:30 p.m. when she walked out of a nursing home after visiting her

¹ Jane Britt will be referred to as "Britt" in this brief.

husband, Frank Britt. 5RP 127, 151.² Her husband was a resident of the facility. 5RP 52. Family members began to look for Britt when she did not appear as expected the following morning and located her car in the nursing home parking lot. 4RP 14-16, 21-25. Britt's body was found inside the locked trunk of her car later that day. 4RP 5-6; 5RP 29. Frank Britt's wallet was in the center console of the car; her wallet was in the door pocket of the driver's door. 6RP 153; 7RP 95. There were credit cards and other cards in both wallets. 6RP 156; 7RP 95-96. There were rings on her fingers and a watch on her hand. 6RP 27, 151.

A medical examiner concluded the cause of death was asphyxia due to strangulation with blunt force injuries to the head and neck. 6RP 30. Strangulation was by ligature. 6RP 31-32. The source of the blunt injuries was unknown. 6RP 41. Injuries to Britt's hands were possibly defensive in nature. 6RP 53-57, 71.

Searching for a suspect, police collected DNA samples from nursing home employees. 5RP 171-72. Joseph Njonge was a nursing assistant at the facility. 5RP 141. Njonge's DNA profile matched the

² The verbatim report of proceedings is referenced as follows: 1RP - 6/2/09; 2RP - 6/3/09; 3RP - 6/4/09 (voir dire); 4RP - 6/4/09 (afternoon session); 5RP - 6/8/09; 6RP - 6/9/09; 7RP - 6/10/09; 8RP - 6/11/09; 9RP - 6/15/09; 10RP - 7/20/09.

male profile obtained from underneath Britt's fingernails. 7RP 127, 135-39.

Njonge helped take care of Jane Britt's husband, Frank Britt. 5RP 120; 8RP 64. He was Frank Britt's primary nurse assistant for the night shift and worked with him almost every day since July 2007. 8RP 74, 77-78, 124. Njonge came to know Jane Britt through caring for her husband and saw her almost every day. 8RP 77-78.

Njonge worked from 2:30 p.m. to 10:30 p.m. on March 18, the day on which Britt was last seen alive. 5RP 81. He was assigned to Frank Britt and a number of other patients for that shift. 5RP 119-20; 8RP 53, 69-71. Njonge testified Jane Britt scratched and ran her fingers through his hair while they tended to Frank Britt in his room that day. 8RP 110-11, 173-74. This was not an unprecedented gesture, as the two had grown close. 8RP 111-12. The State's DNA expert testified the level of male DNA under Britt's fingernails indicated more than just a casual contact. 7RP 145. The State's expert acknowledged scratching someone's scalp could leave DNA underneath the fingernails. 7RP 174. The defense expert concurred on this point. 8RP 18, 43.

Njonge testified he last saw Britt at 5:20 p.m. on March 18 when she left the unit after visiting her husband. 8RP 78, 92, 132. He accounted for his activities at the nursing home that day. 8RP 92-106,

125-31. He said he took a five-minute break before 4:30 p.m. 8RP 125-26. He took out the trash around 10:15 p.m., which took five minutes. 8RP 130-31. He otherwise did not leave the facility during his shift. 8RP 125-26, 130-31. He denied killing Britt. 8RP 109.

Before Britt left the facility on March 18, nurse supervisor Sandra Colvin overheard Britt tell Njonge that there were belongings in Frank Britt's room that did not belong there. 5RP 128-29. Njonge looked puzzled. 5RP 128. Britt did not look angry. 5RP 136. According to Njonge, Britt told him she found a pair of pants belonging to her husband's roommate in her husband's closet. 8RP 94-95, 140-41.

Two nursing assistants, Lorlina Aquino and Peter Kamini, worked the same shift in the same unit as Njonge on March 18. 5RP 140-41, 145; 6RP 80. They all worked together to take care of patients. 5RP 81. Aquino did not notice anything unusual about Njonge that night. 5RP 147. Kamini did not notice anything unusual about Njonge that night other than he parked his car in a different spot than he usually did and requested Kamini to drive him to his car when their shift was over. 6RP 87-92, 96. He could not remember if he saw Njonge the entire time during the 6:00 dinner hour, but all nursing assistants were required to be in the dining room at that time to assist with feeding. 5RP 82.

Supervisor Colvin said Njonge was "distant" that night. 5RP 109-110, 124-25. She did not see Njonge in the unit at all times. 5RP 121-22. She said Njonge took a break that night but she did not know when. 5RP 115, 121. Kamini and Aquino also did not know or could not remember when Njonge took his breaks. 5RP 144-45; 6RP 83. Breaks were 15 minutes long. 5RP 103. The State argued Njonge's break time was evidence that he had opportunity to kill Britt. 9RP 53.

Nurse assistant Kamini did not notice any injuries on Njonge during the March 18 work shift. 6RP 89-91. When Njonge was arrested on April 3, an officer noticed faint marks on Njonge's left arm and neck, and a small healing injury on his thumb. 5RP 175-76. Nursing assistant Christina Galletes testified Njonge wore a long sleeve shirt after March 18, but she could not remember the day he in fact did so. 6RP 124-26. Njonge testified he wore long sleeves when it was cold or he did not have a clean t-shirt to wear. 8RP 109-10.

The State acknowledged there was no clear motive for the killing. 9RP 45-47, 67-68, 88. It theorized Njonge might have killed Britt due to complaints she made about him and concern that he might lose his job. 1RP 22; 9RP 45-47, 88. The State pointed to several pieces of evidence in support of this theory, which the trial court admitted over defense objection. CP 7, 10; 83-84; 1RP 5-19. The court also admitted evidence

that Njonge took various items from the nursing home for impeachment purposes over defense objection. 1RP 55-61; 5RP 202-04.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED NJONGE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

Reversal is required because the trial court closed jury selection to the press and a portion of it to other members of the public without justification.

a. The Press And Other Members Of The Public Were Excluded From The Courtroom During Jury Selection.

On June 2, 2009, the prosecutor asked the court during pre-trial motions if a family member who was also a witness could be present during voir dire. 1RP 45-46. The judge responded she was not going to allow it in part because "we are in very cramped quarters for jury selection, and I think about the only place for visitors to sit is going to be in the little anteroom out there, and I will tell you, with what we are going to do about trying to get enough just to do this in one meeting." 1RP 46.

The court later described how voir dire would be conducted:

Here is how I handle the jury. We send the questionnaire down and they get to review the questionnaire, obviously, and the jury bios in advance. A lot of this is also for your benefit, Mr. Njonge, because you have never been involved in a trial before; and it's important for you to understand what's going on, okay.

So then we call the entire jury panel up. *We have received permission to get more than the standard 50. I think we are getting 65. That necessitates a rearrangement of our courtroom,* and my Bailiff put out a map for you guys as to how we are going to get this number in. The first two benches must remain clear at all times.

So, we will have jurors seated in front of the jury box. The court reporter is going to move over here; we have a few jurors here. It's kind of a little awkward, but it's more of a jury selection in the round process that way.

1RP 90-91 (emphasis added).

At the close of day, the judge told courtroom observers:

Just let me say for the people who are observing. You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you. *What we are going to do to allow people to observe is check with the fire marshal -- we have a new fire marshal in Kent -- and make sure that we can keep those first swinging doors open. And if we can do that, then we will allow some people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that.*

But, otherwise, as you can see, we are already putting chairs up here to accommodate the jury. We may be able to have chairs out there, we may not. We may be able to have the doors open without the chairs. We are going to find out. The chance of all you being able to be here and observe are slim to none during the jury selection process.

And also for the observers, I understand that this is and can be potentially a very emotional case for all of you. Please do not let your emotions express themselves during the trial. If you do so, I will ask you to leave, and you will not be allowed back.

And, also, just to say this for the people who are here now, and if you are bringing any more family or friends with you as the case goes on, cell phones must be turned off before you get into my courtroom.

1RP 105-06 (emphasis added).

Jury selection started the following day, June 3. 2RP. The court excused some jurors for hardship during the morning session. 2RP 2-54.

At the start of the afternoon session, the following exchange occurred:

[Prosecutor]: Some family members who are not witnesses stuck around this morning, hoping there might be some seats later, and your bailiff informed them at lunch since some people were excused there were some. So I don't know if the Court has any problem with that. They are not witnesses. We tried to figure out a spot that would be in a row that basically has no jurors. So that second row over there only has Juror 30."

The Court: Actually, that seemed to be a better idea. *We checked with fire department. They wouldn't let us leave the doors open for visitors to come in. Let's move No. 30 over next to 34, and then we can have visitors sitting in the second row there.*

2RP 54-55 (emphasis added).

Jury selection proceeded until the end of the day. 2RP 55-145.

Before resuming voir dire the next day, the court addressed the issue of press access:

Court: The other thing is as some of you who were here know that one of the TV stations wants to film the case.

You can have a seat, sir, if you would like. Sorry.

And I have no objection to them filming, but they did not ask my permission before they came into my courtroom with a camera, which is bad form. *I have no objection to them filming, but they cannot during jury selection.*

So, I told them they had to leave until after the jury selection. And it looks, I would let them know when we are

complete with jury selection, and they want to film opening statement.

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

[Prosecutor]: I do not.

[Defense Counsel]: No objection.

3RP 5 (emphasis added).

The court continued: "So, I wanted to let everyone know there will be TV cameras here visiting and observing the case. You should also know occasionally they photograph. So, if you don't want yourself photographed in the courtroom, then you might not want to be here, but I'm not going to seal the courtroom from the press." 3RP 5.

After jury selection resumed, the prosecutor later informed the court that "the press is beings [sic] extremely aggressive out there and attempting to talk to our family members who think they might get on this morning. I don't know if we can deal with them. It sounds like the TV station is out there." 3RP 91. The court responded "I have no jurisdiction outside the courtroom. What I suggest you do is, if the press is being too aggressive, is take them back down to your office and just let them know they need to hang out there." 3RP 91.

The judge said she would have the bailiff tell the press that "my jurisdiction extends to the doors out in the hall, and the press is not to be in there interviewing people or attempting to interview people in my

courtroom, which includes that ante chamber." 3RP 92. Upon being informed the press was already in the anteroom, the court told the bailiff to get them. 3RP 92-93. The bailiff came back and told the court he just saw family members in the corridor. 3RP 93. The prosecutor said she scared the press off. 3RP 93.

After jury selection was finished later in the day, the court told jurors the following:

Now, I also want to tell you that there is some interest by the press in this case, and that means that this afternoon we will have members of the press here. We had some members of the press here this morning. This afternoon we will probably have some TV cameras. The TV cameras will not ever focus on you; so don't worry about that.

But they are entitled to be here. We have an open system of justice. That's another basic foundation for our system of justice, is that our courtrooms are open. And so we certainly allow the media to come in. But it puts an extra burden on you, doesn't it? Because that means you probably shouldn't be watching the news tonight, because we don't want you to hear anything about this case on the news.

3RP 112.

b. Jury Selection Must Be Open To The Public.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. State v. Easterling, 157 Wn.2d 167,

174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). The right to a public trial assure a fair trial, fosters public understanding and trust in the judicial system, and gives judges the check of public scrutiny. State v. Paumier, __ Wn. App.__, 230 P.3d 212, 215 (2010). The public trial right also reminds officers of the court of the importance of their functions, encourages witnesses to come forward, and discourages perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Furthermore, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). Other kinds of harm associated with closure during jury selection include "the inability of the defendant's family to contribute their knowledge or insight to the jury selection and

the inability of the venire persons to see the interested individuals." Orange, 152 Wn.2d at 812. "[C]losure also prevents other interested members of the public, including the press, from viewing the proceedings." State v. Erickson, 146 Wn. App. 200, 206, 189 P.3d 245 (2008).

The right to a public trial encompasses jury selection. Presley v. Georgia __ U.S. __, 130 S. Ct. 721, 724, __ L. Ed. 2d __ (2010); Brightman, 155 Wn.2d at 515. Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173-74.

- c. Under Presley v. Georgia, The Trial Court Violated Njonge's Right To A Public Trial In Closing the Morning Session of Voir Dire Without Taking The Steps Necessary To Justify Closure.

The court closed the June 3 morning session of voir dire to observers on the basis of space limitation. This is reversible error.

Presley controls the outcome here. In Presley, the trial court excluded the defendant's uncle and, by extension, the public, from the courtroom during the jury selection process. Presley, 130 S. Ct. at 722. The trial court excluded members of the public on the ground that there was not enough space for them to sit in the courtroom. Id. The trial court also did not want the uncle to intermingle with members of the jury panel.

Id. The United States Supreme Court held the trial court violated Presley's Sixth Amendment right to a public trial. Id. at 724-25.

Consistent with established precedent, Presley specifically held that before a courtroom proceeding could be lawfully closed to the public, an overriding interest must be identified that is likely to be prejudiced in the absence of closure. Id. at 724, 725. In Njonge's case, the judge closed the courtroom on the ground that there was not enough space to seat members of the public. This is not a cognizable interest, let alone an overriding interest, likely to be prejudiced absent closure.

Furthermore, "the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Id. at 724 (quoting Waller, 467 U.S. at 48). The trial court in Presley asserted there was no room for the public to sit. Id. at 722. The Supreme Court concluded "[n]othing in the record shows that the trial court could not have accommodated the public at Presley's trial." Id. at 725. Some possibilities for accommodating the public, which were not considered on the record by the trial court, included reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members. Id.

Here, as in Presley, the trial court closed a portion of voir dire by excluding members of the public due to a purported lack of space in the courtroom. The trial court did not consider possible alternatives to closure of the courtroom after it was determined the anteroom door needed to remain closed. Specifically, the court did not consider the alternative of reserving a row in the courtroom for members of the public or dividing the jury venire panel to reduce courtroom congestion. Presley, 130 S. Ct. at 725. Nor did the court consider the possible alternative of temporarily moving to a larger courtroom in the Maleng Regional Justice Center to accommodate the public.

The court considered the idea of allowing a few people to be in the anteroom in the event the door could be left open. But after it was determined the door could not be left open due to the fire marshal's concerns, the court did not consider remaining alternatives that would have allowed members of the public to be present in the courtroom during the first portion of voir dire.

Trial courts have a duty to consider *all* reasonable measures to accommodate public attendance at criminal trials. Presley, 130 S. Ct. at 725. The court here did not honor its obligation. Absent consideration of alternatives to closure, the trial court cannot constitutionally close voir dire. Id. at 724. Moreover "trial courts are required to consider

alternatives to closure even when they are not offered by the parties" because "[t]he public has a right to be present whether or not any party has asserted the right." Id. at 724-25.

Furthermore, the trial court must make specific findings supporting its decision to close the proceedings. Id. at 724, 725. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Id. at 724 (quoting Waller, 467 U.S., at 45). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." Presley, 130 S. Ct. at 724 (quoting Waller, 467 U.S., at 45). The court therefore must identify an interest, articulate the threat to that interest posed by a public trial, and address why that interest overrides the right to a public trial. Presley, 130 S. Ct. at 724, 725.

The trial court in Njonge's case did not do any of these things. No findings were made. No special care taken to balance any competing interests.

Presley resolves any question about what a trial court must do under the federal constitution before excluding the public from voir dire. Paumier, 230 P.3d at 219. By shutting out the public without first considering every reasonable alternative to closure and making

appropriate findings explaining why closure was necessary, the trial court violated Njonge's right to an open proceeding. Id. Reversal of the conviction is the appropriate remedy. Id.

d. Authority Preceding Presley Also Requires Reversal Due To Closure Of Voir Dire During the Morning Session.

The Washington Supreme Court in Bone-Club adopted a five-part test to protect a criminal defendant's right to a public trial: (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60.³

In Orange, the trial court closed the courtroom for a portion of jury voir dire due to limited courtroom space. Orange, 152 Wn.2d at 808-10.

³ The Bone-Club components comply with the requirements set forth by the United States Supreme Court in Waller. Orange, 152 Wn.2d at 806. Presley relied on the Waller requirements. Presley, 130 S. Ct. at 724-25.

The Orange Court held the trial court's failure to comply with the five Bone-Club components before ordering courtroom closure violated the defendant's right to a public trial. Id. at 812.

The Orange trial court, in giving space limitations as a reason for closure, failed to comply with the first Bone-Club component of identifying a compelling interest and a serious and imminent threat to that interest. Id. 809-10. Inherent in the "limitation of space" reason was the trial judge's interest in accommodating the entire 98-member jury pool as a single group. Id. at 809-10. The judge, however, "did not explain why he was compelled to call 98 prospective jurors (as opposed to 90, for example, which would have allowed seating for some family members, other spectators, and the press) or why the venire could not have been divided." Id. at 810.

Moreover, the trial court's ruling was not narrowly tailored. Id. at 810-11. "A reasonably tailored order would have, at a minimum, allowed seating for the defendant's family, as well as members of the press, and would have clearly and specifically provided that, as prospective jurors were excused from the crowded courtroom, additional spectators could be admitted to take the available seats or standing positions." Id. at 811.

As in Orange, the trial court in Njonge's case did not analyze the requisite Bone-Club factors before closing the courtroom for a portion of

voir dire due to purported space limitations. Lack of courtroom space is not a compelling interest capable of overriding the right to a public trial. Orange, 152 Wn.2d at 809-10. Furthermore, the judge did not explain why the entire panel, which was larger than ordinary, needed to be present at one time. 1RP 90-91. Nor did the judge consider every reasonable alternative to closure. The trial court in Orange at least gave those present an opportunity to object. Orange, 152 Wn.2d at 811. That did not even happen in Njonge's case.

Reversal of Njonge's conviction is required because the trial court failed to articulate a compelling interest to be served by the closure and did not hold a hearing, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically support the order. Id. at 821-22.

The Washington Supreme Court's decisions in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) make clear reversal is required here.

The majority in Momah acknowledged the court closure in Orange was a "structural" error requiring reversal. Momah, 167 Wn.2d at 150-51. The majority recognized reversal is required when "the record lack[s] any

hint that the trial court considered the defendant's right to a public trial when it closed the courtroom." Id. at 149-151.

Reversal was not required in Momah because the trial court balanced Momah's right to a public trial with his right to an impartial jury despite failing to explicitly discuss the Bone-Club factors. Id. at 156. In what the Momah Court identified as "perhaps most important" to its decision, "the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests." Id. at 151-152.

In Njonge's case, the trial court expressed no concern that restricting public access to the courtroom was needed to safeguard Njonge's right to a fair trial. No balancing of interests occurred.

Drawing on the invited error doctrine, the Momah Court essentially found the defendant waived his public trial right: "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution." Id. at 151, 153-154. Because the defendant in Momah affirmatively accepted closure, argued for its expansion, and actively participated in the closed hearing designed to protect his right to a

fair trial, the Court held courtroom closure in that circumstance was "not a structural error" warranting reversal. Id. at 156.

Unlike Momah, the trial court here did not discuss various courses of action with the parties. Unlike Momah, the trial court did not give Njonge an opportunity to object. Unlike Momah, Njonge's counsel neither requested closed voir dire nor sought its expansion. Unlike Momah, nothing in the record suggests closure was necessary to protect Njonge's right to a fair trial or that the trial court even considered Njonge's interest in having jury selection open to the public. There is no waiver here. The error was structural.

Strode compels this conclusion. In that case, the trial judge and counsel for both parties asked questions of the potential jurors in a courtroom closed to the public. Strode, 167 Wn.2d at 224. A majority of the Supreme Court reversed conviction because the trial court failed to weigh the Bone-Club factors before closing the courtroom. Strode, 167 Wn.2d at 226-229 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-236 (Fairhurst, J., concurring).

The lead and concurring opinions differed on whether a defendant can waive the issue through affirmative conduct. The lead opinion concluded a defendant's failure to object to courtroom closure does not constitute a waiver of the issue for appeal, and that waiver occurs only if it

is shown to be knowing, voluntary and intelligent. Id. at 229 n.3 (Alexander, C.J.).

Justice Fairhurst's concurring opinion concluded defense participation in the closed courtroom proceedings could, under certain circumstances not present in Strode, constitute a valid waiver of the right to a public trial. Id. at 234-236 (Fairhurst, J., concurring). As an example of intentional relinquishment of a known right, Justice Fairhurst noted the trial court in Momah expressly advised that all proceedings are presumptively public yet defense counsel affirmatively requested individual questioning of panel members in private, urged the court to expand the number of jurors subject to private questioning, and actively engaged in discussions about how to accomplish this. Id. at 234.

The pertinent facts in Njonge's case are like those in Strode. Defense counsel did not request voir dire take place without the public present. The trial court announced voir dire would be closed to the public. Njonge was not advised of his public trial right. The court neither addressed the Bone-Club test nor in any other way weighed the competing interests before closing a portion of voir dire. While Njonge's attorney participated in questioning the jurors outside the presence of the public, simple participation is not enough to show waiver. The appropriate

remedy in Strode was automatic reversal (six justices agreed) even though the defendant participated in the closed hearing.

Njonge's defense counsel did not object, nor was he given the opportunity to do so. "The public has a right to be present whether or not any party has asserted the right." Presley, 130 S. Ct. at 724-25. A defendant does not waive his right to challenge an improper closure by failing to object to the closure. State v. Heath, 150 Wn. App. 121, 128, 206 P.3d 712 (2009); Brightman, 155 Wn.2d 506, 514-15, 517-18, 122 P.3d 150 (2005); Bone-Club, 128 Wn.2d at 257; State v. Marsh, 126 Wn. 142, 146, 217 P. 705 (1923). The issue is preserved for review.

e. Closure Of Voir Dire To The Media Also Violated Njonge's Right To A Public Trial.

The trial court closed voir dire to the press without analyzing the Bone-Club requirements. Reversal is required for this reason as well.

The trial judge correctly recognized she could not exclude media members from the courtroom during trial. 3RP 5, 112. What the judge failed to recognize is that she could not exclude media members from the courtroom during jury selection without complying with the Bone-Club requirements. The right to a public trial encompasses jury selection. Presley, 130 S. Ct. at 724, Brightman, 155 Wn.2d at 515. The public

includes the press. Orange, 152 Wn.2d at 811; Erickson, 146 Wn. App. at 206.

State v. Russell, 141 Wn. App. 733, 172 P.3d 361 (2007) is instructive. In that case, the defendant argued the trial court violated his right to a public trial when it prohibited the press from photographing juvenile witnesses without their consent at trial in the absence of a Bone-Club analysis. Russell, 141 Wn. App. at 737-38. This claim failed because the trial court never fully closed the courtroom; rather, it merely ordered that the press not photograph the juvenile witnesses without their permission. Id. at 739. The trial court explained its reasons for prohibiting the press from photographing juvenile witnesses. Id. Of particular importance, the trial court did not prohibit the media from recording the juvenile witnesses' testimony so long as they did not point the camera at the juvenile witnesses. Id. at 739-40.

Unlike Russell, the trial court in Njonge's case barred the media from the courtroom during voir dire. 3RP 5. The trial court did not explain what, if any, overriding interest compelled media exclusion, did not consider whether any less restrictive alternative was available, and did not enter specific findings justifying closure to the press. The trial court needed to do these things to protect Njonge's right to a public trial.

Presley, 130 S. Ct. at 724-25; Strode, 167 Wn.2d at 226-229 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-236 (Fairhurst, J., concurring).

Defense counsel stated he had no objection to excluding the media from voir dire. 3RP 5. The issue is nonetheless preserved for review because a defendant does not waive his right to challenge an improper closure by failing to object to the closure. Heath, 150 Wn. App. at 128; Brightman, 155 Wn.2d at 514-15, 517-18; Bone-Club, 128 Wn.2d at 257; Marsh, 126 Wn. at 146. Structural error requiring reversal occurs when "the record lack[s] any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom." Momah, 167 Wn.2d at 149-51.

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

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

a. Standard of Review

The correct interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74

P.3d 119 (2003). The trial court's decision to admit evidence is reviewed for an abuse of discretion only if the trial court correctly interprets the rule. Id. Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

b. The Court Allowed The State To Put On Evidence Of The Victim's Character To Rebut A Key Component Of The Defense Theory Of The Case.

Njonge testified Jane Britt scratched and ran her hand through his hair the day before she was found dead. 8RP 110-11, 173-74. The DNA experts agreed scratching someone's scalp or skin could leave DNA deposit under the fingernails. 7RP 174; 8RP 18, 43.

To rebut Njonge's explanation for the presence of his DNA, the State sought to have Britt's granddaughter testify as to her grandmother's reserved character. 9RP 6. According to the State, Jane Britt "was not the type of woman who is touchy-feely. She did not run her hands through the hair of her grandkids. She didn't get down on the floor and play with the grandkids." 9RP 6. The State argued such testimony was relevant in light of Njonge's testimony that Britt ran her hands through her hair "on a regular basis," including the night when Britt was last seen,⁴ "telling him that he had kinky hair." 9RP 6. The State maintained "if you are going to

⁴ The State referred to March 19 but must have meant March 18. 9RP 6.

be affectionate like that with anybody, it is going to be your grandchild, and if not with your grandchild, it is very unlikely you are going to do that with somebody who is a third of your age or less who is a staff person working with your husband." 9RP 7-8.

The State also sought to have nurse assistant supervisor Sandra Colvin testify she never saw Britt touch the staff and did not see that happen on the night of March 18. 9RP 6-7.

Defense counsel moved to exclude testimony from the proposed "rebuttal witnesses." 9RP 6. Counsel referenced the granddaughter's testimony in objecting on the ground that it was vague, highly prejudicial, and of no substantive value. 9RP 5-6. The trial court recognized counsel was objecting to both witnesses. 9RP 7-8.

The court described the granddaughter's testimony as presenting a general character trait for "reservedness." 9RP 8. The State acknowledged this but reiterated it was relevant that Britt was not demonstrably affectionate with her own family. 9RP 8-9.

The court admitted the granddaughter's testimony under ER 405(b), which states "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." 9RP 9-10.

The court said the evidence was admissible to rebut "evidence of the specific actions or the character of the victim." 9RP 10.

The court also admitted Colvin's proposed testimony: "Clearly, any of the testimony regarding her interactions with staff is relevant." 9RP 8. As rebuttal witnesses, the granddaughter and Colvin testified consistent with the State's offer of proof. 9RP 21-23, 27-28.

c. Evidence Of The Victim's Character Was Inadmissible Because The State Did Not Offer It In An Acceptable Form Of Proof.

ER 404(a) provides in pertinent part:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

...

(2) *Character of Victim*. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

ER 405 provides:

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

"Character evidence may be used circumstantially to show that a person acted consistently with that character." State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). This use of character evidence to show conformity is generally rejected under ER 404(a), subject to the exceptions listed in that rule. Id.

The State argued the granddaughter's testimony would show Britt was not a "touchy feely" type of person and thus would not have touched Njonge. 9RP 6. Under the State's theory, Njonge's explanation for how the DNA got under her nails simply could not have happened if Britt acted in conformity with her character. The State used the rebuttal witnesses to show Britt's conduct (i.e., reserved behavior) on other occasions as the basis for its argument that Britt would have acted in conformity with that character on March 18 when she was alone with Njonge and her husband in a room.

Colvin's testimony was also character evidence in the way it was used by the State. Colvin was not present when Njonge and Britt were in the husband's room on March 18, at which time the contact described by Njonge took place. Colvin did not personally observe their interaction at that crucial point in time. Instead, she testified she had not seen Britt touch other staff members at other times, including other times that day.

9RP 21-23. This is character evidence because it rests on the notion that Britt would not have touched Njonge as he described if Britt acted in conformity with her reserved behavior demonstrated on other occasions.

The prosecutor presented this evidence to the jury in closing argument as character evidence. 9RP 62. In explaining why Njonge's explanation was "preposterous," the prosecutor explained the significance of the rebuttal testimony in terms of Britt's character: "does it even make sense with what you know about Mrs. Britt?" 9RP 62.

The issue here is whether the trial court erred in allowing admission of this character testimony by an unacceptable method of proof. "Rule 405 specifies the acceptable methods of proving character, assuming the character of a party or victim is admissible under Rule 404(a)." 5A Karl B. Teglund, *Washington Practice: Evidence Law and Practice* § 405.1 at 1 (5th ed. 2007). Character evidence can qualify under one of the ER 404(a) exceptions but remain inadmissible if the method of proof does not meet the requirements of ER 405. Kelly, 102 Wn.2d at 196-97; State v. Mercer-Drummer, 128 Wn. App. 625, 630, 632, 116 P.3d 454 (2005).

Such is the case here. Evidence of specific instances of conduct to prove someone acted in conformity with that character on a given occasion may only be made when a person's character is an "essential

element of a charge, claim, or defense." ER 405(b). "In criminal cases, character is rarely an essential element of the charge, claim, or defense." Kelly, 102 Wn.2d at 196.

"For character to be an essential element, character must itself determine the rights and liabilities of the parties." Id. at 197. "Character evidence does not constitute an 'essential element of a claim or charge unless it alters the rights and liabilities of the parties under the substantive law.'" Gibson v. Mayor and Council of City of Wilmington, 355 F.3d 215, 232 (3d Cir. 2004) (addressing identical language under FRE 405(b)) (quoting Schafer v. Time, Inc., 142 F.3d 1361, 1371 (11th Cir.1998)). The determination of whether character constitutes an essential element requires examination of the "authoritative statutory or common law statement of the elements of the prima facie case and defenses." Schafer, 142 F.3d at 1371 (quoting United States v. Keiser, 57 F.3d 847, 856 n.20 (9th Cir. 1995)). "The relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense?" Keiser, 57 F.3d at 856. If not, then character is not essential and cannot be shown by specific acts of conduct. Id.

Britt's character was not an essential element of either first or second degree murder. If Njonge killed with intent, then he was guilty of second degree murder. RCW 9A.32.050(1)(a); CP 59 (Instruction 13). If

he killed her with premeditation, then he was guilty of first degree murder. RCW 9A.32.030(1)(a); CP 54 (Instruction 8). Proof of Britt's character trait for "reservedness" does not, by itself, satisfy an element of the charge and was therefore inadmissible under ER 405(b). Kelly, 102 Wn.2d at 197; Keiser, 57 F.3d at 856.

Britt's character was not an essential element of the defense either. Njonge's defense was general denial. The defense theory was that he did not kill Jane Britt and the State could not establish all the elements of first or second degree murder. Proof of Britt's character trait for "reservedness" does not, by itself, satisfy an element of the defense. Kelly, 102 Wn.2d at 197; Keiser, 57 F.3d at 856.

The court did not correctly apply the ER 405(b) rule. A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); Foxhoven, 161 Wn.2d at 174.

d. There Is A Reasonable Probability Improper Admission Of The Character Evidence Affected The Outcome.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence

constitutes harmless error only if the evidence is trivial, of minor significance in reference to the evidence as a whole, and in no way affected the outcome. Id.; State v. Oswald, 62 Wn.2d 118, 122, 381 P.2d 617 (1963).

In arguing for the admission of this rebuttal evidence, the State maintained the issue of how the DNA got under Britt's fingernails was a "very critical point in this case" and "very important" to the State's case. 9RP 7, 9. In closing argument, the state argued Njonge's explanation was incredible because it was inconsistent with what the jury knew about Britt's character. 9RP 62. The trial court understood the important of this evidence. 9RP 9.

The jury likely did too. That is why it is so prejudicial. The jury never should have heard this evidence. If they had not, there is a reasonable probability the outcome of the case would have been different.

The evidence in this case was not overwhelming. The State was fishing for a motive. No one saw Njonge anywhere near Britt when she was killed. The evidence was circumstantial. The most damning piece of evidence was Njonge's DNA under Britt's fingernails. The plausibility of Njonge's explanation for how it got there was a crucial issue. The improperly admitted character evidence likely undermined Njonge's

explanation in the eyes of the jury, as was the State's intent. The character evidence was not trivial or of minor significance. A new trial is required.

e. Defense Counsel Was Ineffective In The Event This Court Determines He Did Not Raise Proper Objection To The Rebuttal Evidence.

Defense counsel objected to the evidence, but not specifically on ER 405 grounds. The trial court, in admitting the evidence, relied on ER 405 as justification. The State may argue counsel did not lodge a proper objection to the evidence under ER 405.

If this Court determines counsel did not properly object, then he provided ineffective assistance in so doing. Njonge was guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington 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 of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyлло, 166 Wn.2d

856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, counsel's insufficient objection was not the product of legitimate strategy. He objected but not on ER 405 grounds. This rebuttal testimony was used to skewer Njonge's defense theory regarding the DNA. No legitimate tactic justifies objecting to evidence on the wrong ground. The failure to object to evidence constitutes ineffective assistance when there is no sound reason for the failure and prejudice results. See, e.g., State v. Hendrickson, 138 Wn. App. 827, 832-33, 158 P.3d 1257 (2007), aff'd, 165 Wn.2d 474, 198 P.3d 1029 (2009).⁵

Reversal is required under an ineffective assistance claim where there is a reasonable probability that, but for counsel's error, 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. For the reasons set forth in C.2.d., supra, Njonge suffered prejudice as a result of counsel's ineffective assistance.

⁵ The Supreme Court affirmed on a different issue; the issue of ineffective assistance was not before the Court. Hendrickson, 165 Wn.2d at 476.

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

Over defense objection, the trial court wrongly admitted evidence that (1) Frank Britt's Costco card was found in Njonge's possession upon arrest; (2) a form nominating Njonge as employee of the month contained Jane Britt's forged signature; and (3) Britt complained staff, which included Njonge, did not take proper care of her husband's teeth.

- a. Evidence Must Not Be Admitted To Show Bad Character Or Propensity To Commit Crime, And Even Character Evidence Theoretically Admissible For A Permissible Purpose Should Be Excluded If It Is Unduly Prejudicial.

"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). To that end, ER 402 prohibits admission of irrelevant evidence. ER 403 prohibits admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.

ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion. "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." Wade, 98 Wn. App. at 336. Prior misconduct is inadmissible to show the defendant is a "criminal type" and

is likely to have committed a crime for which charged. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

ER 404(b) provides evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive. In applying ER 404(b), a trial court must establish the relevance of the evidence and identify its permissible purpose, then balance on the record the probative value of the evidence against the prejudicial effect it may have on the fact-finder. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

"ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Id. at 361-62. In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

b. The Court Wrongly Admitted Evidence That Njonge Had Frank Britt's Costco Card In His Possession.

Defense counsel moved in limine to exclude prior acts of misconduct under ER 404(b), including evidence that Njonge had Frank Britt's Costco card in his wallet when arrested. CP 7, 10; 1RP 11-12.

The State claimed the Costco card evidence was admissible to show a possible motive for the killing: "The fact that the defendant had this card could have been discovered by Mrs. Britt who either saw it or discovered it missing from her husband's wallet." CP 83; 1RP 6. The State maintained "we don't know whether it relates or not" and "we don't know if Mrs. Britt discovered it or came upon it, we don't know, but because it is directly connected to the Britts, it does seem to have more probative value than other cards in his wallet." 1RP 6. The State did not proffer a theory that Njonge robbed Britt to obtain the Costco card and that robbery provided a motive for the murder.

The trial court allowed the Costco card into evidence, ruling: "that was in the victim's name. I will allow that. I think that does establish a possible connection with the Defendant. It does establish a connection." 1RP 14-15.

When determining whether evidence is admissible under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. Foxhoven, 161 Wn.2d at 175. This analysis must be conducted on the record. Id.

The trial court here failed to balance the probative value of the Costco card against the potential for unfair prejudice on the record. "Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). The trial court did not specify how this evidence was relevant to prove an element of the crime charged or to rebut a defense. The court only said it established a "connection" with Njonge. 1RP 14-15. The court altogether failed to balance any supposed probative value against its prejudicial effect. This was error. State v. Thach, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005); State v. Venegas, ___ Wn. App. ___, 228 P.3d 813, 822-23 (2010).

Even if the court had conducted a balancing analysis, the evidence would still be inadmissible because it was either irrelevant or its prejudicial effect outweighed its marginal probative value.

Evidence is relevant and necessary under ER 404(b) if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). If the State had established Jane Britt knew Njonge had the Costco card in his possession and that Njonge was aware she knew, then the factual predicate for establishing motive to kill would have been laid. The State did not lay a sufficient foundation.

The motive exception to ER 404(b) refers to an impulse, desire, or any other moving power that causes an individual to act. Powell, 126 Wn.2d at 260. The State did not explain, and the trial court did not articulate, how Njonge's possession of the Costco card gave him a motive to kill Jane Britt in the absence of evidence that Britt knew Njonge had the card or that Njonge believed she knew. That factual predicate was necessary to establish Njonge's possession of the Costco card as a "moving power" that caused Njonge to kill Jane Britt.

Defense counsel rightly expressed concern that the evidence was unfairly prejudicial because it could leave the jury with the misimpression that the killer robbed Britt. 1RP 11-12. In addition, the fact that Njonge took Frank Britt's card certainly made him look bad. Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe bad people are more likely to commit crime and that the defendant deserves to be punished for a series of immoral actions. Halstien, 122 Wn.2d at 126; State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Whatever marginal relevance Njonge's possession of the card had in relation to Britt's death is outweighed by the prejudicial effect of this evidence, given the speculative connection between the two acts. Doubtful cases like this one should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

"If the trial court properly analyzes the ER 404(b) issue, its ruling is reviewed for an abuse of discretion." State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). The trial court here did not properly analyze the ER 404(b) issue. Its evidentiary decision is not entitled to deference. Foxhoven, 161 Wn.2d at 174. In any event, the court abuses its discretion in failing to adhere to the requirements of an evidentiary rule. Id. Under either de novo standard or an abuse of discretion standard, the court erred in admitting this evidence.

c. The Court Wrongly Admitted Evidence Related To A Forged Employee Of The Month Nomination Form.

Defense counsel also moved in limine to exclude ER 404(b) evidence that Jane Britt's signature on a form nominating Njonge as "employee of the month" was a forgery. CP 7, 10; 1RP 12-13, 16-17.

The State asserted the forged nomination form was admissible to show a possible motive for the killing. CP 83-84; 1RP 7-9. The nomination form was signed with the name "Jane Britt." CP 83. The State's handwriting expert concluded Jane Britt did not sign the form. CP 83-84. Njonge could not be excluded as having written the form. CP 84. Njonge could not be identified as having written it either. 1RP 16.

The court determined it was "inconclusive" whether Njonge forged the nomination form signed by "Jane Britt." 1RP 17, 20. The court

nevertheless allowed the nomination form into evidence, ruling "it does establish a definite connection between the Defendant and the victim, and it can go to establish motive." 1RP 18-19.

The court determined the evidence was "more probative than prejudicial." 1RP 18-19. The Court did not say why it was more probative than prejudicial. Simply parroting the legal rule offers no insight into a careful balancing process that is supposed to occur on the record. The court erred in failing to conduct a full balancing analysis on the record. Tharp, 96 Wn.2d at 597, Thach, 126 Wn. App. at 310-11; Venegas, 228 P.3d at 822-23.

Even if the court had conducted a balancing analysis, the nomination form evidence would still be inadmissible because it was either irrelevant or its prejudicial effect outweighed whatever marginal probative value it retained.

Evidence of other wrongful acts may be admitted pursuant to ER 404(b) only if the State first establishes a connection between the defendant and those acts. State v. Norlin, 134 Wn.2d 570, 577, 951 P.2d 1131 (1998). "The necessary connection between the defendant and the prior act must be established by a preponderance of the evidence." Id.

It was inconclusive whether Njonge forged the nomination form. 1RP 17, 20. He could not be identified as the person who wrote it. At

most, he could not be excluded.⁶ The State theorized Njonge was motivated to kill Britt because he forged the nomination form. That theory fails because the State could not establish by a preponderance of the evidence that Njonge forged the form. The relevant connection could not be established. Norlin, 134 Wn.2d at 577. Moreover, the State did not assert much less establish Britt knew about the forged form when the trial court made its ruling on admissibility.

Whatever marginal relevance this evidence retained was outweighed by its prejudicial effect. As with the Costco card, the entire episode surrounding the nomination made Njonge look petty and immoral. Doubtful cases like this one should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

d. The Court Wrongly Admitted Evidence Related To Britt's Complaint About The State Of Her Husband's Teeth.

Defense counsel objected to ER 404(b) evidence that Britt complained about the poor state of her husband's teeth to a nursing home supervisor, who in turn informed Njonge and other nursing assistants of the complaint. 1RP 6-7, 12. The defense argued the complaint lacked probative value and that intending to prove motive based on that fact was

⁶ At trial, the expert testified Njonge could not be identified or excluded as the writer of the form; there were indications he may have been the writer. 7RP 28. In sum, Njonge "maybe" could have been the writer. 7RP 36.

a "far stretch." 1RP 12. The court admitted this evidence for the following reason: "what I find probative is not that the care may have been less than standard but that Mr. Njonge was admonished by staff for substandard care, and I think that that also can be probative of a motive."

1RP 15.

The Court did not say why it was more probative than prejudicial. The court wrongfully admitted this evidence in the absence of conducting a full balancing analysis on the record. Tharp, 96 Wn.2d at 597, Thach, 126 Wn. App. at 310-11; Venegas, 228 P.3d at 822-23.

e. It Is Reasonably Probable Wrongful Admission Of ER 404(b) Evidence Affected The Outcome.

Improper admission of evidence constitutes reversible error if the evidence is not trivial, not of minor significance in reference to the evidence as a whole, and there is a reasonable probability that it affected the outcome. Neal, 144 Wn.2d at 611; Oswalt, 62 Wn.2d at 122. The prosecutor did not consider the ER 404(b) evidence trivial, as shown by the fact she fought so hard for its admission.

The jury was instructed to consider this evidence only for the purpose of assessing motive. CP 5 (Instruction 51). Motive was a central issue in this case. The prejudicial effect of the improperly admitted ER

404(b) evidence is precisely that the jury was allowed to consider it in assessing whether Njonge had reason to kill Britt.

The State theorized Njonge killed Britt because he was afraid of losing his job due to her complaints. 9RP 45-47, 67-68, 88. The State, in arguing for admission of all the ER 404(b) evidence, explained each piece of evidence was a part of a larger pattern of Britt complaining and Njonge not taking it well. 1RP 22. Each evidentiary piece admitted to show motive under ER 404(b) was in this sense intertwined with the other pieces. The improperly admitted ER 404(b) evidence increased the persuasive strength of other evidence used to show motive. Prejudice remains even if not all of the ER 404(b) evidence was inadmissible.

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

The trial court improperly allowed the State to impeach Njonge with evidence that he had taken various things from the nursing home.

Defense counsel moved in limine to exclude prior acts of misconduct under ER 404(b), including allegations that (1) Njonge stole a diamond ring from the facility; (2) Njonge took a Thomas Kincaid painting from the facility; (3) Njonge had a credit card from a resident of the facility in his possession. CP 10-11; 1RP 60-61. The State expressed its intent to cross-examine Njonge under ER 608(b) about those specific

instances of misconduct if he testified. CP 92; 1RP 55-58, 60-61. Defense counsel objected and moved to exclude evidence of these acts for impeachment purposes, saying they fell outside of ER 608 and carried little probative value. 1RP 56.

The court ruled the State could impeach Njonge with these prior acts if he chose to testify because "they go to his credibility." 5RP 202-04. There was no dispute Njonge took these things. 5RP 203. According to the court, "It's arguably theft. It just hasn't been charged." 5RP 203.

ER 608(b) provides

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

Evidence of specific instances of misconduct may be used to impeach a witness under ER 608(b) if the misconduct is relevant to the witness's veracity and is germane to an issue in the case. State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991). "An act of theft is not directly relevant to a defendant's propensity for truthfulness and veracity as a witness." State v. Cummings, 44 Wn. App. 146, 152, 721 P.2d 545 (1986). In Cummings, the trial court erred in allowing inquiry into

defendant's prior theft of money from the murder victim where the purpose of inquiry was to impeach the defendant under ER 608. Id.

The court here erred as well. Cummings controls. Njonge's acts, even if properly described as uncharged thefts, were inadmissible for impeachment purposes under ER 608(b).

Even if an act of uncharged theft is relevant to show credibility under ER 608 as a general matter, the evidence here is still inadmissible for impeachment purposes because the court did not find by a preponderance of the evidence that Njonge actually committed theft in taking these various objects. The trial court recognized Njonge's actions were "arguably theft." 5RP 203. The State needed to establish Njonge's acts were theft, not arguably theft.

Theft is committed when one wrongfully obtains or exerts unauthorized control over the property of another with intent to deprive him or her of the property. RCW 9A.56.020. Theft is a specific intent crime. In re Disciplinary Proceeding Against McLendon, 120 Wn.2d 761, 770, 845 P.2d 1006 (1993). There was no dispute Njonge took the items at issue, but Njonge did not admit he took the painting with the intent to permanently deprive the owner of it. 8RP 118-19.⁷

⁷ Njonge testified at trial he took other paintings besides the Kincaid painting but did not keep them. 8RP 119.

Moreover, abandoned property cannot be the subject of theft. Sharpe v. Turley, 191 S.W.3d 362, 366 (Tex. Crim. App. 2006). Because abandoned property belongs to no one, nor is it in anyone's possession, there is no property right in it. Nicholson v. State, 369 So.2d 304, 307 (Ala. Crim. App. 1979). The former patient testified he noticed his card missing from his wallet when he was in the process of moving out of the facility. 9RP 14. Njonge thought the resident abandoned the card. 8RP 150-52. He cut up the card and used it for an art piece. 8RP 116-17, 150-52. There was no evidence he used the card for financial gain.

Njonge found the ring left in the shower room. 8RP 117-18, 157-58. He did not know who it belonged to at the time. 8RP 157-58. No evidence showed how long it had been there before Njonge picked it up.

Assuming uncharged acts of theft are admissible to impeach credibility under ER 608, the evidence at issue here remains inadmissible because the court did not find by a preponderance of the evidence that Njonge committed theft.

Defense counsel did not waive the court's ER 608 ruling as an issue for appeal by preemptively presenting such evidence before the State had the opportunity to cross-examine Njonge about it. State v. Thang, 145 Wn.2d 630, 646-49, 41 P.3d 1159 (2002). It has been a long-standing practice for a defendant to mitigate the damaging effect of testimony

regarding prior crimes by introducing the conviction during direct evidence, to take the sting out of the evidence. Id. at 646, 649.

The evidence in this case was not overwhelming. Motive was murky and there was no eyewitness to the killing. The circumstantial evidence was susceptible to different inferences. Njonge took the stand and testified in his own defense. He denied killing Britt. He explained how his DNA could have gotten under Britt's fingernails. His credibility was a critical issue in the case. The improper admission of evidence that impeached his credibility therefore cannot be considered harmless error.

5. CUMULATIVE ERROR VIOLATED NJONGE'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. V and XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court retains the discretion to examine

them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

As discussed above, an accumulation of errors affected the outcome of Njonge's trial and produced an unfair trial. These errors include (1) improper admission of evidence to show Britt's character under ER 405 or, in the alternative, ineffective assistance in failing to properly object to this evidence (2) improper admission of ER 404(b) evidence; and (3) improper admission of ER 608 evidence.

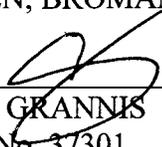
D. CONCLUSION

For the reasons stated, this Court should reverse the conviction and remand for a new trial.

DATED this 21st day of June 2010.

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63869-6-I
)	
JOSEPH NJONGE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH NJOONGE
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WALLA WALLA, WA 99362

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STATE OF WASHINGTON
2010 JUN 21 PM 4:12

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF JUNE, 2010.

x *Patrick Mayovsky*