

COA NO. 63869-6-I

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

REC'D

MAR 04 2010

King County prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH NJONGE,

Appellant.

2010 MAR 14 PM 12:00
COURT OF APPEALS
FILED

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

The Honorable Laura Middaugh, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments Of Error</u>	1
A. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural History</u>	2
2. <u>Facts</u>	2
C. <u>ARGUMENT</u>	10
1. THE COURT'S IMPROPER ADMISSION OF CHARACTER EVIDENCE UNDER ER 405 UNFAIRLY INFLUENCED THE OUTCOME OF THE CASE.....	10
a. <u>Standard of Review</u>	11
b. <u>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</u>	12
c. <u>Evidence Of The Victim's Character Was Inadmissible Because The State Did Not Offer It In An Acceptable Form Of Proof</u>	14
d. <u>There Is A Reasonable Probability Improper Admission Of The Character Evidence Affected The Outcome</u>	19
e. <u>Defense Counsel Was Ineffective In The Event This Court Determines He Did Not Raise Proper Objection To The Rebuttal Evidence</u>	20
2. THE COURT COMMITTED REVERSIBLE ERROR IN ALLOWING ADMISSION OF ER 404(b) EVIDENCE.....	23

a.	<u>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.....</u>	24
b.	<u>The Court Wrongly Admitted Evidence That Njonge Had Frank Britt's Costco Card In His Possession.....</u>	26
c.	<u>The Court Wrongly Admitted Evidence Related To A Forged Employee Of The Month Nomination Form.....</u>	30
d.	<u>The Court Wrongly Admitted Evidence Related To Britt's Complaint About The State Of Her Husband's Teeth</u>	33
e.	<u>It Is Reasonably Probable Wrongful Admission Of ER 404(b) Evidence Affected The Outcome.....</u>	34
3.	THE COURT COMMITTED REVERSIBLE ERROR IS ALLOWING THE STATE TO IMPEACH NJONGE WITH ACTS OF MISCONDUCT UNDER ER 608.....	35
4.	CUMULATIVE ERROR VIOLATED NJONGE'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.....	40
D.	<u>CONCLUSION.....</u>	41

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Disciplinary Proceeding Against McLendon,</u> 120 Wn.2d 761, 845 P.2d 1006 (1993).....	38
<u>In re Marriage of Littlefield,</u> 133 Wn.2d 39, 940 P. 2d 1362 (1997).....	11
<u>State ex rel. Carroll v. Junker,</u> 79 Wn.2d 12, 482 P.2d 775 (1971).....	11
<u>State v. Aho,</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	21
<u>State v. Alexander,</u> 64 Wn. App. 147, 822 P.2d 1250 (1992).....	41
<u>State v. Bowen,</u> 48 Wn. App. 187, 738 P.2d 316 (1987).....	29
<u>State v. Boyd,</u> 160 Wn.2d 424, 158 P.3d 54 (2007).....	40
<u>State v. Braun,</u> 82 Wn.2d 157, 509 P.2d 742 (1973).....	40
<u>State v. Cummings,</u> 44 Wn. App. 146, 721 P.2d 545 (1986).....	37
<u>State v. Dawkins,</u> 71 Wn. App. 902, 863 P.2d 124 (1993).....	29
<u>State v. Dennison,</u> 115 Wn.2d 609, 801 P.2d 193 (1990).....	25
<u>State v. DeVincentis,</u> 150 Wn.2d 11, 74 P.3d 119 (2003).....	11

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Ermert,
94 Wn.2d 839, 621 P.2d 121 (1980)..... 41

State v. Foxhoven,
161 Wn.2d 168, 163 P.3d 786 (2007)..... 11, 12, 19, 27, 29

State v. Greiff,
141 Wn.2d 910, 10 P.3d 390 (2000)..... 41

State v. Halstien,
122 Wn.2d 109, 857 P.2d 270 (1993)..... 25, 29

State v. Hendrickson,
138 Wn. App. 827, 158 P.3d 1257 (2007)
aff'd, 165 Wn.2d 474, 198 P.3d 1029 (2009)..... 22

State v. Huynh,
49 Wn. App. 192, 742 P.2d 160 (1987)..... 32

State v. Johnson,
90 Wn. App. 54, 950 P.2d 981 (1998)..... 41

State v. Kelly,
102 Wn.2d 188, 685 P.2d 564 (1984)..... 14-18

State v. Kylo,
166 Wn.2d 856, 215 P.3d 177 (2009)..... 21, 22

State v. Lord,
161 Wn.2d 276, 165 P.3d 1251 (2007)..... 19, 32

State v. Mercer-Drummer,
128 Wn. App. 625, 116 P.3d 454 (2005)..... 16

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	11, 19, 34
<u>State v. Norlin</u> , 134 Wn.2d 570, 951 P.2d 1131 (1998).....	32
<u>State v. Oswald</u> , 62 Wn.2d 118, 381 P.2d 617 (1963).....	19, 34
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	28
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008).....	19
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	41
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	21
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	25, 26
<u>State v. Thang</u> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	39
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	27, 31, 34
<u>State v. Thach</u> , 126 Wn. App. 297, 106 P.3d 782 (2005).....	28, 31, 34

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987)..... 21, 23

State v. Wade,
98 Wn. App. 328, 989 P.2d 576 (1999)..... 24-26, 29, 33

State v. Wilson,
60 Wn. App. 887, 808 P.2d 754 (1991)..... 37

State v. Woods,
138 Wn. App. 191, 156 P.3d 309 (2007)..... 22

FEDERAL CASES

Gibson v. Mayor and Council of City of Wilmington,
355 F.3d 215 (3d Cir. 2004) 17

Schafer v. Time, Inc.,
142 F.3d 1361 (11th Cir.1998) 17

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)..... 21

United States v. Keiser,
57 F.3d 847 (9th Cir. 1995) 17, 18

TABLE OF AUTHORITIES (CONT'D)

Page

STATE CASES

Nicholson v. State,
369 So.2d 304 (Ala. Crim. App. 1979)..... 38

Sharpe v. Turley,
191 S.W.3d 362 (Tex. Crim. App. 2006). 38

RULES, STATUTES AND OTHERS

5A Karl B. Tegland, Washington Practice: Evidence Law and Practice
(5th ed. 2007)..... 16

ER 401 25, 33

ER 402 24, 25

ER 403 24, 26

ER 404(a)..... 14, 15, 16

ER 404(b)..... 1, 24-30, 32-35, 41

ER 405 1, 14, 16, 20, 21, 41

ER 405(b)..... 13, 17, 18

ER 608 1, 2, 35, 37, 41

ER 608(b)..... 36-37

FRE 405(b) 17

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

RCW 9A.32.030(1)(a)	18
RCW 9A.32.050(1)(a)	18
RCW 9A.56.020	38
U.S. Const. amend. V	40
U.S. Const. amend. VI	20, 41
U.S. Const. amend. V	40
U.S. Const. amend. XIV	40
Wash. Const. art. I, § 3	40
Wash. Const. art. I, § 22	20, 41

A. ASSIGNMENTS OF ERROR

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

Issues Pertaining to Assignments of Error

1. 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?
2. The State wanted to show motive for the killing in order to convince the jury that appellant was guilty of murder. Is reversal required because the trial court wrongly admitted various pieces of evidence under ER 404(b) to show motive?

3. The State's case was circumstantial. Appellant testified on his own behalf and denied killing the victim. His credibility was at issue. 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 the nursing home facility in which he worked?

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. Facts

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 husband, Frank Britt. 3RP 127, 151.² Her husband was a resident of the facility. 3RP 52. She looked normal when she left. 3RP 127-28.

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

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

Family members began to look for Britt when she did not appear as expected the following morning. 2RP 14-16, 21-25. They located her car in the nursing home parking lot. 2RP 22. The family called police later that day when Britt did not attend her usual visitation time at the facility. 2RP 25-27. Family members discovered a wheelchair Britt used for her husband and her garage door opener discarded in the woods near the parking lot. 2RP 9-10, 28, 39-42, 45-48.

Police arranged for the locked trunk of Britt's car to be opened later that day. 2RP 29, 57; 3RP 28-29. Britt's body was inside. 2RP 5-6, 30; 3RP 29. There were marks on her face and blood on her face and hair. 3RP 31, 161, 167. She was clothed but her shoes were missing. 3RP 32. A pants pocket was inside out. 4RP 25, 150. Frank Britt's wallet was in the center console of the car; her wallet was in the door pocket of the driver's door. 4RP 153; 5RP 96. There were credit cards and other cards in both wallets. 4RP 156; 5RP 95-96. There were rings on her fingers and a watch on her hand. 4RP 27, 151. Police did not find any fingerprints on Britt's car, the wheelchair or the garage door opener. 3RP 189-91.

A King County medical examiner concluded the cause of death was asphyxia due to strangulation with blunt force injuries of head and neck. 4RP 30. Strangulation was by ligature. 4RP 31-32. The source of

the blunt injuries was unknown. 4RP 41. Her hands had scrapes and bruises; one hand had two broken fingernails. 4RP 53-56. These were possibly defensive type injuries. 4RP 56-57, 71.

Searching for a suspect, police collected DNA samples from nursing home employees. 3RP 171-72; 5RP 65. Joseph Njonge was a nursing assistant at the facility. 3RP 141. He voluntarily gave a DNA sample. 6RP 112-13. A Washington State Patrol Crime Lab forensic scientist examined fingernail scrapings from Britt and obtained a full male profile. 5RP 103, 110-11. Njonge's DNA profile matched the male profile obtained from underneath Britt's fingernails. 5RP 127, 135-39. Njonge was arrested. 3RP 173-75.

Njonge helped take care of Jane Britt's husband, Frank Britt. 3RP 120; 6RP 64. He was Frank Britt's primary nurse assistant for the night shift and worked with him almost every day since July 2007. 6RP 74, 77-78, 124. Nursing assistants are primarily responsible for the personal care of patients. 3RP 77. Duties include dressing, feeding, toileting, and moving patients. 3RP 77.

Njonge came to know Jane Britt through caring for her husband. 6RP 77. He saw her almost every day. 6RP 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. 3RP 81. He was assigned to Frank

Britt for that shift. 3RP 119-20. He typically worked with seven or eight patients in total during a shift and he took care of multiple patients that day. 6RP 53, 69-71.

Njonge testified Jane Britt scratched and ran her fingers through his hair while they tended to Frank Britt in his room. 6RP 110-11, 173-74. This was not an unprecedented gesture, as the two had grown close and become friends through the course of Njonge taking care of her husband every day. 6RP 111-12.

The State's DNA expert testified the level of male DNA under Britt's fingernails indicated more than just a casual contact. 5RP 145. The State's expert acknowledged massaging someone's scalp or scratching someone would leave DNA underneath the fingernails. 5RP 174. The defense expert concurred on this point. 6RP 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. 6RP 78, 92, 132. He accounted for his activities at the nursing home that day. 6RP 92-106, 125-31. He said he took a five-minute break before 4:30 p.m. 6RP 125-26. He took out the trash around 10:15 p.m., which took five minutes. 6RP 130-31. He otherwise did not leave the facility during his shift. 6RP 125-26, 130-31. He went home after his shift ended. 6RP 106-09. He denied killing Britt. 6RP 109.

Two other nursing assistants, Lorlina Aquino and Peter Kamini, worked the same shift in the same unit as Njonge on March 18. 3RP 140-41, 145; 4RP 80. They all worked together to take care of patients. 3RP 81.

Aquino did not notice anything unusual about Njonge that night. 3RP 147. She did not maintain visual contact with Njonge at every moment. 3RP 145-46. She did not know when Njonge took his breaks. 3RP 144-45.

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. 4RP 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. 3RP 82. He did not remember when Njonge took his breaks that night. 3RP 83. They clocked out together at the end of the shift. 4RP 86.

Nurse supervisor Sandra Colvin said Njonge was "distant" that night and did not socialize with her. 3RP 109-110, 124-25. Colvin did not see Njonge in the unit at all times. 3RP 121-22. She said Njonge took a break that night but she did not know when. 3RP 115, 121.

Breaks were 15 minutes long. 3RP 103. The State argued Njonge's break time was evidence that he had opportunity to kill Britt. 7RP 53.

Nurse assistant Kamini did not notice any injuries on Njonge during the March 18 work shift. 4RP 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. 3RP 175-76. Njonge told a detective he received the thumb cut from a shoe polish container. 4RP 106-07. Njonge testified it was a container for Frank Britt's shoes. 6RP 114, 136. A detective testified he found a glass jar of shoe polish in Frank Britt's room with a "turn" lid. 7RP 18-20.

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. 4RP 124-26. Colvin testified Njonge wore long sleeves in the past but had not done so in the time period immediately before Britt's death. 3RP 131, 139. Njonge testified he wore long sleeves when it was cold or he did not have a clean t-shirt to wear under his scrubs. 6RP 109-10.

Colvin said Njonge polished his white shoes black around the time of Britt's death, but could not remember if that occurred before or after she was killed. 3RP 131-32. The State did not present any evidence that it tested those shoes.

Before Britt left the facility on March 18, nurse supervisor Colvin overheard Britt tell Njonge that there were belongings in Frank Britt's room that did not belong there. 3RP 128-29. Colvin did not wait to hear Njonge's verbal response but noticed he looked puzzled. 3RP 128. Britt did not look angry. 3RP 136. According to Njonge, Britt told him she found a pair of pants belonging to her husband's roommate in her husband's closet. 6RP 94-95, 140-41.

The State acknowledged there was no clear motive for the killing. 7RP 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; 7RP 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; Supp CP __ (sub no. 38, State's Trial Memorandum at 7-8, 6/1/09); 1RP 6-23.

First, the nursing home had an employee of the month program, in which employees were nominated for recognition. 3RP 83-84. The award is \$100 and a gift certificate. 3RP 84. A staff committee chose the winner after reviewing nomination forms. 3RP 95.96.

In November 2007, Njonge was nominated as employee of the month at the nursing home. 3RP 85. Jane Britt's name was signed on the nomination form. 3RP 85. Njonge testified he was notified of winning in

November 2007 and was told Jane Britt and another employee had nominated him. 6RP 120.

The State's handwriting expert examined the nomination form and samples of Britt's and Njonge's handwriting. 5RP 6, 18-20, 27-28. The expert concluded Britt did not write the nomination form. 5RP 20-21. Njonge could not be identified or excluded as the writer of the form; there were indications he may have been the writer. 5RP 28. In sum, Njonge "maybe" could have been the writer. 5RP 36. The expert conceded handwriting evaluations were a combination of art and science. 5RP 38. Njonge denied writing the nomination. 6RP 119. Njonge testified he thanked Britt for the nomination and could not remember her response. 6RP 166-67.

The second piece of motive evidence involved Frank Britt's teeth. 4RP 132-35. In February 2008, Britt took her husband to the dentist. 4RP 116. The hygienist noticed his dental health was not good and told Britt her husband needed help caring for his teeth at the nursing home. 4RP 116-17. Britt reported this to a unit manager, expressing concern that staff was not properly caring for her husband's teeth. 4RP 132-34. The manager conveyed Britt's concern to the nurse aides, including Njonge. 4RP 133. All the aides, including Njonge, maintained they were taking care of his teeth. 4RP 134-35. Njonge said he was not upset that Britt

complained. 6RP 134. He did not take it personally because day shift aides were supposed to brush teeth more frequently than the one time Njonge was supposed to do it on his shift. 6RP 162. Njonge and Jane Britt never discussed Frank Britt's teeth. 6RP 94.

The third piece of motive evidence involved Njonge's possession of Frank Britt's Costco card, which police found in Njonge's wallet upon arrest. 3RP 174; 5RP 88. Njonge testified he took the card in the summer of 2007 to buy a television from Costco at a discount. 6RP 114-16. He did not tell Jane Britt he had the card. 6RP 149. Njonge knew he could get in trouble with his employer for having the card. 6RP 150.

Over defense objection, the State sought to admit evidence that Njonge took various items from the nursing home. Supp CP __ (sub no. 38, supra at 16); 1RP 55-58, 60-61. The court admitted this evidence for impeachment purposes. 3RP 202-04.

C. ARGUMENT

1. 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. DeVincentis, 150 Wn.2d at 17; State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Its decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. Foxhoven, 161 Wn.2d at 174.

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. 6RP 110-11, 173-74. The DNA experts agreed scratching someone's scalp or skin could leave DNA deposit under the fingernails. 5RP 174; 6RP 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. 7RP 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. She even sent her granddaughter to etiquette school when she was 12 years old." 7RP 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,³ "telling him that he had kinky hair." 7RP 6. The State maintained "if you are going to 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." 7RP 7-8.

³ The State referred to March 19 but must have meant March 18. 7RP 6.

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. 7RP 6-7.

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

The court described the granddaughter's testimony as presenting a general character trait for "reservedness." 7RP 8. The State responded "[t]hat may be," but reiterated it was relevant that Britt was not demonstrably affectionate with her own family. 7RP 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." 7RP 9-10. The court said the evidence was admissible to rebut "evidence of the specific actions or the character of the victim." 7RP 10.

The court also admitted Colvin's proposed testimony: "Clearly, any of the testimony regarding her interactions with staff is relevant." 7RP 8.

As rebuttal witnesses, the granddaughter and Colvin testified consistent with the State's offer of proof. 7RP 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. Kelly, 102 Wn.2d at 193.

The State, in seeking admission of rebuttal testimony from the granddaughter and Colvin, premised its argument on the notion that Britt was not a "touchy feely" type of person. 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 point to specific instances of Britt's conduct (i.e., reserved behavior) 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.

The State thus argued the granddaughter's testimony would show Britt was not a "touchy feely" type of person and thus would not have touched Njonge. 7RP 6. 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. Colvin had no personal knowledge of that event. Instead, she testified she had not seen Britt touch other staff members at other times, including other times that day. 7RP 21-23. This is character evidence because its significance 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. 7RP 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?" 7RP 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. Tegland, *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. In Kelly, for example, the trial court admitted State's rebuttal evidence related to the defendant's character. Id. at 190-91. The Supreme Court held the rebuttal evidence should not have been admitted because the defendant's character was not an essential element of a self-defense claim. Id. 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. At most, Britt's character was only circumstantial evidence related to the charges and Njonge's defense. As such, evidence of her character was inadmissible under ER 405(b).

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. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007); 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. Neal, 144 Wn.2d at 611. 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. 7RP 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. 7RP 62. The trial court understood how important this evidence was. 7RP 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 nor of minor significance. A new trial is required because the remaining evidence was entirely circumstantial and not overwhelming.

- 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. The State may also argue counsel did not properly object to Colvin's testimony on any ground.

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). The constitutional right to effective assistance "exists, and is needed, in order to protect the fundamental right to a fair trial." Strickland, 466 U.S. at 684.

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. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). 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 to the granddaughter's testimony but not specifically on ER 405 grounds. He apparently objected to Colvin's testimony but did not articulate an ER 405 objection. No legitimate tactic justifies objecting to evidence but on the wrong ground. Reasonable

attorney conduct includes a duty to know the law. Kyllo, 166 Wn.2d at 862; State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007).

Furthermore, the failure to object to evidence altogether 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) (counsel ineffective for failing to object to admission of hearsay evidence), aff'd, 165 Wn.2d 474, 198 P.3d 1029 (2009).⁴ When the trial judge asked if defense counsel was objecting to other rebuttal witnesses "other than these witnesses," counsel responded "Yes, the sole reason for that is, if Sandra Colvin chooses to testify, she can at least, she was active at that facility. I mean, for somebody to say that was something might have happened or didn't happen outside of the facility over a period of time, I just believe is too vague. I don't see what probative value would be in that." 7RP 7.

If this Court interprets counsel's response as a concession that Colvin's testimony was admissible, then the failure to maintain objection does not constitute a legitimate tactic. Colvin's testimony was damaging and was used to skewer Njonge's defense theory regarding the DNA. It is

⁴ The Supreme Court affirmed on a different issue; the issue of ineffective assistance was not before the Court. Hendrickson, 165 Wn.2d at 476.

inconceivable that competent defense counsel would not object to this evidence on a proper ground.

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.1.d., supra, Njonge suffered prejudice as a result of counsel's ineffective assistance in failing to keep the character evidence out.

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

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

- 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.⁵ ER 403 prohibits admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice.⁶

ER 404(b) prohibits admission of character evidence to prove the person acted in conformity with that character on a particular occasion.⁷

⁵ ER 402 provides: " All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

⁶ ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

⁷ ER 404 provides in relevant 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: . . . (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

"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); Wade, 98 Wn. App. at 334.

"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). That is, ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Id. at 361-62.

Relevant evidence is defined in ER 401 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." Under ER 404(b), the evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." Saltarelli, 98 Wn.2d at 362.

Even relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; Saltarelli, 98 Wn.2d 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 60-61.

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." Supp CP __ (sub no. 38, supra at 7; 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. This was not the State's theory of the case.

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).

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 whatever marginal probative value it retained.

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 expressed concern that the evidence was unfairly prejudicial because it could leave the jury with the impression that the killer robbed Britt. 1RP 11-12. This was not the State's theory of the case.

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 60-61.

The State asserted the forged nomination form was admissible to show a possible motive for the killing. Supp CP __ (sub no. 38, supra at 7-8); 1RP 7-9. In its offer of proof, the State indicated Njonge was nominated for employee of the month in November 2007. Id. at 7. The nomination form was signed by "Jane Britt." Id. at 7. After Njonge was arrested, the State submitted samples of Jane Britt's handwriting and a handwriting exemplar from Njonge to the Washington State Patrol Crime Lab. Id. at 7-8. A handwriting expert concluded Jane Britt did not sign the form. Id. at 8. "The lab further found that there were characteristics of the handwriting that were similar to the defendant's so he could not be excluded as having written the form." Id. Njonge could not be identified as having written it either. 1RP 16. The State did not know if Britt learned of the nomination form at some point. 1RP 9.

The State further contended that if it could not establish Njonge authored the nomination form "the fact that it's nominating him and Jane Britt's name has been signed, we would argue there is relevance simply because he is the only one that is going to benefit from that." 1RP 17-18.

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 18-19.⁸

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.

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.

⁸ The trial court denied the State's attempt to admit a second nomination form that contained a signature that could not be attributed to anyone, indicating the connection was "very tenuous." 1RP 8-10, 19.

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. 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.

The State relied on its handwriting expert to argue Njonge forged the form, but the expert was unable to identify Njonge as the forger. Supp CP __ (sub no. 38, supra at 8); 1RP 16. If the expert cannot express an opinion to a reasonable degree of probability, then his or her opinion does not make the material issue more or less likely and is thus irrelevant under ER 401. Lord, 161 Wn.2d at 295 n.16 (citing State v. Huynh, 49 Wn. App. 192, 198, 742 P.2d 160 (1987) (such testimony amounts to speculation and speculation is inadmissible).

The State's alternative theory of admission was that the nomination form was relevant even if it could not establish Njonge was the author "because he is the only one that is going to benefit from that." 1RP 17-18. This theory of admission also fails. To show motive, the State needed to lay a sufficient foundation. Specifically, the State at least needed to establish Njonge knew the form was forged, accepted its benefits, and knew Jane Britt learned of the bogus nomination. There is no legally permissible basis to argue Njonge had motive to kill Britt in the absence of evidence that he knew the form was forged because, under those circumstances, the State cannot show Njonge knowingly did something wrong in connection with the nomination form that he did not want Britt to find out about and report to his employers.

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 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.

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. 7RP 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 therefore remains even if not all of the ER 404(b) evidence was inadmissible.

3. 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 agreed it would not seek to introduce evidence of those enumerated bad acts as part of its case in chief, but expressed its intent to cross-examine Njonge under ER 608(b) about those specific instances of misconduct if he testified. Supp CP __ (sub no. 38, supra at 16; 1RP 55-58, 60-61. Defense counsel objected and moved to exclude evidence of these acts for impeachment purposes, saying they fell outside of ER 608 and carried little probative value. 1RP 56.

The trial court ruled the State could impeach Njonge with these prior bad acts if he chose to testify because "they go to his credibility." 3RP 202-04. There was no dispute Njonge took these things. 3RP 203. According to the court, "It's arguably theft. It just hasn't been charged." 3RP 203.

ER 608(b) provides:

Specific Instances of Conduct. 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, or (2) concerning the character for

truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

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 prosecutorial 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. Cummings, 44 Wn. App. at 152.

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 State could not establish Njonge actually committed theft in taking these various objects. The trial court recognized Njonge's actions were "arguably theft." 7RP 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. 6RP 118-19.⁹

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. 7RP 14. Njonge thought the resident abandoned the card. 6RP 150-52. He cut up the card and used it for an art piece. 6RP 116-17, 150-52. There was no evidence he used or attempted to use the card for financial gain.

Njonge found the ring left in the shower room. 6RP 117-18, 157-58. He did not know who it belonged to at the time. 6RP 157-58. There

⁹ Njonge testified at trial he took other paintings besides the Kincaid painting but did not keep them. 6RP 119.

was no evidence showing how long it had been there before Njonge picked it up. Njonge did not necessarily commit theft in taking the ring and the credit card.

Assuming uncharged acts of theft are admissible to impeach credibility under ER 608, the evidence at issue here remains inadmissible because the State did not prove Njonge committed theft.

Njonge did not waive the court's ER 608 ruling as an issue for appeal by preemptively presenting the evidence on direct examination before the State had the opportunity to cross-examine him 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. Thang, 145 Wn.2d at 646. The three main reasons for preemptive disclosure are: (1) the triers of fact are more likely to trust the side that discloses the information, (2) it avoids the appearance of hiding information, and (3) the advocate can couch the information in sympathetic terms. Id. "[A] defendant whose motion to suppress such evidence has been denied should not be cast in the untenable position of choosing between his right to mitigate the impact of that evidence and his right to seek appellate review of an erroneous trial court decision." Id. at 649.

Njonge's counsel made the strategic decision to preemptively disclose the bad acts after losing the motion in limine. See 3RP 203-04; 5RP 100-03. The error is preserved for review.

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.

Even if this error, standing alone, does not require reversal, it is part of the cumulative error argument advanced in C. 4., infra.

4. 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 under Article 1, section 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). The right to a fair trial also implicates article 1, section 22 of the Washington Constitution and the

Sixth Amendment to the United States Constitution. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

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. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); 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). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the defendant received an unfair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

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; (2) ineffective assistance related to admission of the character evidence (3) improper admission of ER 404(b) evidence; and (4) improper admission of ER 608 evidence.

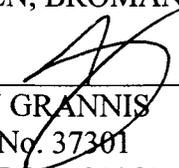
D. CONCLUSION

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

DATED this 4th day of March 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorney for Appellant

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

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 4TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSEPH NJOONGE
DOC NO. 332783
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF MARCH, 2010.

x *Patrick Mayovsky*