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### **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in allowing the state to question Ms. Kruger regarding her prior contact with law enforcement.

2. Did trial counsel's failure to request a limiting jury instruction violate Ms. Kruger's right to effective assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution.(Assignment of Error No.2)

### **B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. The trial court erred in allowing the state to question Ms. Kruger regarding her prior contacts with law enforcement where the evidence was prejudicial to Ms. Kruger and the Court failed to balance the probative value of the evidence against potential prejudice as required by ER 404(b). (Assignment of Error No. 1)

2. Did trial counsel's failure to request a limiting jury instruction violate Ms. Kruger's right to effective assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution.(Assignment of Error No.2)

### **C. STATEMENT OF THE CASE**

#### **1. Procedural History:**

Ms. Kruger was charged by Information with possession of methamphetamine. CP 1-7. A trial was held on December 27 and December 28, 2011. Ms. Kruger was found guilty of possession of methamphetamine. CP 48, 49-59. This appeal timely follows. CP 60.

**2. Statement of the Facts:**

On the evening of July 2, 2010, Ms. Kruger was outside of her residence upset and angry. Ms. Kruger was upset at her significant other, Sky. RP 63-34. Sky had taken the titles of Ms. Kruger's vehicles and would not tell her where he put the titles. RP 65. Ms. Kruger believed Sky was going to take her vehicles. Id. Ms. Kruger went to her vehicle and smashed the windows of the car. RP 66. A neighbor contacted 911 and reported a female, who was later identified as Ms. Kruger, was smashing windows with an object believed to be a crowbar. RP 20. Deputy Herrin responded to the call. RP 21. Upon arrival to the location Deputy saw Ms. Kruger frantically pacing back and forth across the road. RP 21-22. Ms. Kruger was not causing any damage nor did Ms. Kruger have a crow bar in her hand at the time law enforcement arrived. Deputy Herrin asked Ms. Kruger to come towards him. RP 22. Ms. Kruger put her hands above her head and walked backwards while facing the Deputy. RP 22. At that point Deputy Graunke appeared at the scene. RP 23. Ms. Kurger indicated she was not certain that the

individuals approaching her were members of law enforcement. RP 26. The Deputy Prosecuting Attorney asked Deputy Herrin if Ms. Kruger's behavior was consistent with the behavior expected from someone who was afraid of law enforcement. RP 34. Deputy Graunke classified Ms. Kruger's behavior as erratic. RP 42.

The Deputies approached Ms. Kruger. RP 24. Ms. Kruger was placed in handcuffs. RP 24. Ms. Kruger was then patted down by Deputy Herrin. RP 26, 32. While handcuffed Ms. Kruger reached over to her pants pockets and was seen to be fiddling around. RP 26. At some point a baggie containing methamphetamine falls to the ground at Ms. Kruger's feet. RP 26, 36. Deputy Herrin testified that the baggie fell out as Ms. Kruger pulled the tips of her fingers out of her pants pocket. RP 26-27. Deputy Graunke testified the baggie fell out during Deputy Herrin's pat down search of Ms. Kruger. RP 46. Deputy Graunke did not recall if Ms. Kruger was able to get into her pants pockets. RR 46. The conditions at the time of the encounter were dark and the Deputies used a spotlight to see. RP 50.

Through further investigation the Deputies discovered that Ms. Kruger smashed the windows to her own vehicle. RP 28-29 At the time of trial Ms. Kruger admitted to smashing the windows to one of her vehicles. RP 67. Ms. Kruger was upset and believed that her significant other, Sky, was

going to take her vehicles. RP 65. Ms. Kruger feared that Sky was going to harm her. RP 67. Ms. Kruger did not realize that the individuals approaching her, Deputies Herrin and Graunke, were law enforcement officers at first. RP 67-68. Ms. Kruger had difficulty seeing due to the darkness outside and the spotlight shining on her. RP 68. Ms. Kruger was concerned that Sky would harm her as well, so she kept an eye on her house looking for Sky as the Deputies approached her. RP 69. Sky had thrown a rock at her. RP 89. Ms. Kruger did not know where Sky had gone and was concerned for her safety. RP 90-91. Once Ms. Kruger understood the Deputies were not going to harm her, she calmed down and was relieved the Deputies were taking her from the scene. RP 73-74.

The drug activity occurs in the area where the alleged incident took place. RP 73. Ms. Kruger testified that the baggie did not come from her and did not know where the baggy came from. RP 82.

The Deputy Prosecuting Attorney, Ms. Foster started the line of inquiring regarding Ms. Kruger's behavior influenced by fear of law enforcement through her questioning of Deputy Herrin. RP 34 The issue next came up when defense counsel, Mr. Kelly, questioned Ms. Kruger during her direct examination.

The following exchange occurred:

Q: So at some point did you approach the officer? Did you let them come to you?

A: When they had identified themselves as officers, and it had sunk in, I knew at some point we would have to make contact. I wasn't interested in fleeing; however, I was still frightened, just overall in a state of fright. I had a previous experience that made me nervous with police officers as far as my safety went, so that's not – I am not going to go into that, but I didn't believe that they were out to get me or to harm me. I just didn't – at that time my frame of mind...

Q: Once the police officers came to you, what happened next?

A: They said, "Come with us." They didn't harm me or anything like that. They are asking me what was going on. When I realized they weren't going to immediately start like beating me or something, I was happy to go with them to the car.

RP 69-70

The state questioned Ms. Kruger about her contacts with law enforcement over objection of defense counsel. RP 87-88.

Q. Prior to this day, you said that you had a bad experience with once with law enforcement.

A. Yes

Q. When was that? How long ago?

A. Um - -

RP 87

At this point defense counsel objected RP 87. The Court conducted a sidebar conference on the objection. The conference was later put on the record. RP 107. Neither counsel had any objection to the Court's description of the sidebar conference. RP 107. The trial Court Judge allowed the Prosecutor to

ask Ms. Kruger about one prior bad experience with law enforcement. RP 107. In response to Ms. Foster's questions Ms. Kruger testified she had a bad experience with law enforcement within the last two years of the incident at issue. RP 87. Ms. Foster also inquired whether the Deputies involved in this case were the same officers who were involved in Ms. Kruger's previous bad experience. The answer provided by Ms. Kruger to the question was no. RP 87-88. No jury instruction was requested addressing Ms. Kruger's testimony regarding her prior contacts with law enforcement.

#### **D. ARGUMENT**

**1. The trial court denied Ms. Kruger the right to a fair trial by allowing the state to question her regarding prior contacts with law enforcement.**

When a trial court has correctly interpreted ER 404(b) the appellate court reviews the trial court's decision to admit evidence for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009). A trial court abuses its discretion when it bases its decision on manifestly unreasonable or untenable grounds. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert denied*, 528 U.S. 922 (1999). The trial court has discretion to determine relevancy of evidence. *State v. Demos*, 94 Wn.2d 733, 736, 619 P.2d 968 (1980).

In the case at hand, the trial court allowed the state to question Ms. Kruger regarding her prior contacts with law enforcement over objection of defense counsel. RP 87-88. The evidence of Ms. Kruger's prior contacts with law enforcement is subject to at ER 403 and ER 404(b) analysis to determine admissibility. The prior contacts with law enforcement were evidence of prior bad acts which fall under the rule. The State may not disclose defendant's prior encounters with law enforcement. *State v. Herzog*, 73 Wn.App. 34, 49, 867 P.2d 648 (1994). Admitting such evidence inevitably shifts the jury's attention to a defendant's general propensity for criminal behavior, which is a forbidden inference. *State v. Bowen*, 48 Wn.App. 187, 196, 738 P.2d 316 (1987).

ER 404(b) creates a presumption that evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith. ER 404(b). The trial court is to carefully consider whether proposed evidence sought for admission under ER 404(b) should be allowed. The trial court is to determine whether the evidence of prior bad acts is relevant to prove an element of the crime charged or to rebut a defense. The trial court must begin with the presumption that evidence of prior bad acts is inadmissible. *State v. Scherner*, 153 Wn. App. 621, 225 P.3d 248, (2009), review granted, 168 Wn.2d 1036, 233 P.3d 888.

Case law has established a four part test to be used to determine if evidence is admissible pursuant to ER 404(b). The four part test includes the following: 1) the trial court must find by a preponderance of evidence that the misconduct occurred; 2) identify the purpose for which the evidence is sought to be introduced; 3) determine whether the evidence is relevant to prove an element of the crime charged; and 4) weight the probative value against the prejudicial effect of the evidence. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). The test for admissibility based on relevancy is established by case law. "Evidence is relevant and necessary 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).

The trial court must make a showing on the record weighing of whether the probative value of the prior bad acts outweigh its prejudicial impact. *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). The court must examine "...whether the evidence is relevant and necessary to prove an essential element ingredient of the crime charged.". *State v. Lough*, 125 Wn.2d at 863. As mentioned above, the analysis must be made part of the record: "... a trial court must also determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such

evidence, in view of the other means of proof and other factors.”. *State v. Powell*, 126 Wn.2d at 264. If the proposed evidence is likely to create an emotional response in the jury rather than aid the jury in making a rational decision, there is a danger of unfair prejudice to the Defendant. *State v. Powell*, 126 Wn.2d at 264 citing *State v. Rice*, 48 Wn.App 7, 13, 737 P.2d 726 (1987) “In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.” *State v. Powell*, 126 Wn.2d at 264 quoting *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). The purpose of the rule is to prevent the state from suggesting that a defendant is guilty because he/she is a criminal-type of person who would be likely to commit the crime charged. *State v. Russell*, 154 Wn.App. 775, 225 P.3d 478, review granted, 169 Wn.2d 1006, 243 P.3d 1172 (2010).

In this case the state was allowed to ask questions of Ms. Kruger regarding her prior contact with law enforcement over the objection of defense counsel. RP 87-88. This is the type of evidence that ER 404(b) was designed to keep out of trial. The only real purpose of the evidence must be to demonstrate that Ms. Kruger has a bad character which would be in conformity with the current charges against her. This evidence is not admissible under 404(b). The evidence of Ms. Kruger’s prior contacts with law enforcement is not relevant to an element of the offense Ms. Kruger was

charged with. Ms. Kruger was charged with possession of methamphetamine. Whether Ms. Kruger had prior contacts with law enforcement has no bearing on the whether she possessed methamphetamine on July 2, 2010. The state may argue that the evidence is relevant to address why Ms. Kruger hesitated in complying with law enforcement's directions however, Ms. Kruger is not charged with any crime related to her cooperation with law enforcement. Therefore, the evidence was not relevant and should have been excluded on the basis of relevancy.

The other tests required to determine if evidence is admissible under ER 404(b) were not conducted in this matter. The Court did not establish the purpose for which the evidence was admitted as required. RP 108. The Court did not engage in a balancing test weighing the probative value against the potential for prejudice as required by the rule. *Id.* The issue of whether Ms. Kruger had prior contacts with law enforcement was not disputed at the time of trial. However, the Court did not make a finding that the alleged contacts occurred by a preponderance of evidence which is required for the first prong of the ER 404(b) admissibility test as previously outlined. On balance, the trial court did not conduct the level of examination for the admissibility of the evidence as required by the case law previously cited in this brief. The trial

court's decision to allow the prosecutor to inquire of Ms. Kruger regarding her contacts with law enforcement was in error.

The State may argue that Ms. Kruger opened the door in cross-examination on the issue of her contacts with law enforcement. The trial judge's reasoning for allowing the evidence is not clear from the record. Ms. Kruger did testify that she had a previous experience with law enforcement. "I had a previous experience that made me nervous with police officers as far as my safety went, so that's not – I am not going to go into that..." RP 69. Ms. Kruger testified in general terms and did not specifically state whether her experience was the result of direct contact with law enforcement or whether her apprehension was based on some kind of observations with a third party. Thus, Ms. Kruger's testimony did not open the door to allow cross examination of Ms. Kruger regarding her direct experience with law enforcement. The ruling of the trial court allowed the prosecutor to inquire of Ms. Kruger regarding her direct experience with law enforcement.

A defendant may open the door by introducing evidence of questionable admissibility which will allow rebuttal with evidence that would otherwise be inadmissible or a party who is the first to raise a subject at trial may open the door to evidence to explain, clarify, or contradict the party's evidence. 5 *Karl B. Tegland*, Washington Practice & Evidence §103.14 (5th

Ed.). A passing reference will not be sufficient to open the door to further questioning. In the case of *State v. Avendando-Lopez*, 79 Wn.App. 706, 904 P.2d. 324 (1995) The court determined that the defendant did not open the door to cross examination regarding his prior drug use by making a brief passing reference to his release from jail or in his response to questioning of defense counsel stating he had not sold drugs on a particular occasion. The case at hand is similar to the *State v. Avendando-Lopez*, supra. Ms. Kruger made a passing reference to a generic encounter with law enforcement. She did not testify as to specifics or whether the encounter that caused her to have apprehension was the result of direct or indirect contact with law enforcement. Therefore, Ms. Kruger did not open the door to allow further inquiry.

Reversal of the conviction is required. It is within reasonable probabilities that had the error not occurred the outcome of the trial would have been materially effected. *State v. Alams* 93 Wn.App. 754, 970 P.2d 367 (1999), *review denied* 138 Wn.2d 1014, 989 P.2d 1142. In this case reversal is appropriate. The effect of the evidence of Ms. Kruger's prior contacts with law enforcement was to undoubtedly suggest to the jury that Ms. Kruger engages in concerning behavior for which law enforcement was required to respond to Ms. Kruger in an aggressive manner. This evidence influenced

the jury to believe law enforcement, rather than Ms. Kruger's version of events as to where the baggy containing the methamphetamine came from. Credibility of the witnesses was a key issue in this case. Ms. Kruger's credibility was likely destroyed in the minds of the jury as the result of the questioning regarding Ms. Kruger's other encounters with law enforcement.

2. Failure of trial counsel to request a limiting jury instruction to address Ms. Kruger's testimony regarding her prior contacts with law enforcement was ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn.App 406, 410, 907 P.2d 310 (1995) Assertions of ineffective assistance of counsel are determined with the application of a two part test. To establish a claim of ineffective assistance of counsel a defendant must prove counsel's deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984); *In Re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). To prove deficient performance, a defendant must prove the representation fell below an objective standard of reasonableness under professional norms and a reasonable possibility exists that but for counsel's error, the result would have been different. *State v. Rice*, 118 Wn.2d at 888-89. The Court starts with

the presumption counsel's representation was effective. *State v. Hendrickson*, 129 Wn.2d.61, 77, 917 P.2d 563 (1996).

To establish ineffective assistance of counsel for failure to object, the defendant must show the absence of a legitimate or tactical reason for not objecting and that the trial court would have sustained the objection if it had been made and the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders*, 91 Wn.App 575, 578, 958 P.2d 364 (1998)

If evidence of bad acts is admitted, a limiting instruction must be given to the jury. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). The jury did not receive an instruction on the proper use of this evidence. In this case no limiting instruction was given. In this matter the outcome of the trial would likely had been different if the jury had received the required instruction informing them they were not to use the testimony of Ms. Kruger's prior encounters with law enforcement to determine her guilt on the crime charged. Without that instruction it is likely the jury used the testimony regarding contacts with law enforcement improperly.

**E. CONCLUSION**

For the reasons cited above, Ms. Kruger respectfully requests the court to reverse the conviction entered in this matter.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of August, 2011.



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COURT OF APPEALS  
DIVISION II

NO. 41820-7-II

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IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION II

STATE OF WASHINGTON  
DEPUTY

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
NANOKA T. KRUGER,  
  
Appellant.

CERTIFICATE OF MAILING

I, Tracy Kirby, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the BRIEF OF THE APPELLANT in the above-captioned case hand-delivered or mailed as follows:

Original Brief of the Appellant Sent via Mailed with postage prepaid To:

Clerk of Court  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

Copy of Brief of the Appellant Hand-Delivered To:

Randall Sutton  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS-35  
Port Orchard, WA 98366

Copy of Brief of the Appellant Mailed To:

Nanoka T. Kruger  
1768 S.E. Crawford Rd  
Port Orchard, WA 98366

DATED this 19th day of August, 2011, at Port Orchard,  
Washington.

  
\_\_\_\_\_  
TRACY KIRBY  
Legal Assistant