No. 96325-8

COA NO. 35172-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

BRENDAN REIDY TAYLOR,

Respondent.

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

STATE'S PETITION FOR REVIEW

GREGORY L. ZEMPEL
Kittitas County Prosecuting Attorney

JODI M. HAMMOND
Deputy Prosecuting Attorney
WSBA No. 44091
205 W 5th Ave, Ste. 213
Ellensburg, WA 98926-2887
(509) 962-7520

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

I. IDENTITY OF MOVING PARTY

The State of Washington, by and through its attorney, Jodi M. Hammond, Kittitas County Deputy Prosecuting Attorney, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this motion.

II. RELIEF REQUESTED

The State seeks review of Division Three's decision in *State of Washington v. Brendan Reidy Taylor*, COA No. 35172-6-III. This published opinion significantly reduces the State's ability to protect victims of domestic violence. The published opinion was issued on July 17, 2018. A copy of the opinion, which is now reported at 4 Wn. App. 2d 381, appears in appendix A. The State's timely filed motion for reconsideration was denied on September 6, 2018. A copy of the order denying reconsideration appears in appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Whether *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), which compels the prosecution to accept a stipulation to the existence of a prior conviction, should be extended to stipulations regarding the existence of a no contact order.

2. Whether a proposed stipulation to the existence of a no contact order that does not address all of the elements of the offense that would other

wise be established by the no contact order is properly rejected by the trial court.

3. Whether the admission into evidence of the no contact order in the instant case was harmless error.

IV. STATEMENT OF THE CASE

Prior to trial, the defendant, Brendan Taylor, submitted the following stipulation to the court along with his request that the court compel the State to accept the stipulation:

> COMES Now, the above-entitled parties and hereby stipulate that the defendant, Taylor, had knowledge of the Order of Protection protecting Anna Kelly and prohibiting him from having contact with her and that it was lawfully served.
>
> The defendant enters this stipulation knowingly, voluntarily, and intelligently and further understands that by entering this stipulation he waives any appeal as to the knowledge of the order. The defendant hereby enters the stipulation, agreeing that he had knowledge of the no contact order.

CP 21. The request was supported by a written motion in limine that contained no legal authority. CP 23. Taylor's oral argument in support of the request similarly lacked any reference to a court rule, statute, or other legal authority. *See* RP 18-22.

The State declined to accept the stipulation on the grounds that it was required to prove certain elements and the content of the no contact order

contained the facts necessary to satisfy those elements. *See* RP 19-21, 45-46. Ultimately, the judge denied Taylor's request for a forced stipulation to the no contact order. RP 48. Although the trial court *sua sponte* mentioned *Old Chief* and explained that the case only applied to proof of a prior conviction, Taylor tendered no argument that *Old Chief* applied. RP 48-49. Taylor's objection to the subsequent admission of the no contact order was similarly devoid of any reference to a court rule, case, or other legal authority. *See* RP 181.

Anna Kelly, the person protected by the protection order, testified at trial. She established that Taylor was sharing a home with her on December 25, 2016, and the preceding days. *See* RP 73-76. *Accord* RP 147. Ms. Kelly described how Taylor hit her and impeded her ability to breath on Christmas morning. RP 76-85. Taylor's actions caused bruising, lumps all over Ms. Kelly's head, massive headaches, and continuing damage to her ears. *See* RP 101.

Ms. Kelly acknowledged that a no contact order was in place on December 25, 2016, that barred Taylor from having access with her. RP 86. Ms. Kelly indicated that she and Taylor were living together despite the no contact order because "we loved each other and we didn't want to be apart." RP 87.

Ms. Kelly's neighbor, Rodney Blossom, confirmed that Taylor had

contact with Ms. Kelly on December 25, 2016. RP 138-141. The police officer who responded to Ms. Kelly's home on December 25, 2016, observed redness around Ms. Kelly's temple and an injury to Ms. Kelly's hand. RP 153-57.

A second officer, who met with Ms. Kelly on the morning of December 26, 2016, observed many visible marks on Ms. Kelly's head and face. RP 166-67. This officer recontacted Ms. Kelly around 4:00 p.m. on December 26, 2016. During this second meeting, Officer Whitsett, observed many bruises upon Ms. Kelly's face and a significant bump on the middle of Ms. Kelly's forehead. RP 169-171. Officer Whitsett photographed Ms. Kelly's bruises. RP 171-174; Exs. 3, 4, 7, and 10.

During its closing argument, the State pointed out that Taylor's stipulation which was read to the jury, RP 255-57, only addressed the first two elements of count two. RP 245; CP 41, Jury Instruction No. 15. The State identified three of the provisions of the no contact order that Taylor violated on December 15th, 1996: do not come within 1,000 feet of Ms. Kelly's home, do not assault Ms. Kelly or cause bodily injury to Ms. Kelly, and do not contact Ms. Kelly. RP 245. The State never mentioned that the no contact order had been issued post-conviction during its closing argument. *See* RP 237-247 and 252-253.

The jury found Taylor guilty of felony violation of a court order and

acquitted Taylor of assault in the second degree. CP 53 and 55.

Taylor appealed his conviction, claiming that the trial court committed prejudicial error by rejecting his demand to substitute his proposed stipulation for the no contact order. The court of appeals granted Taylor his requested relief. The State now seeks review of that decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Washington has continually and consistently recognized that domestic violence is a widespread societal problem that has devastating effects for individual victims, their children, and their communities. *See, e.g.,* Laws of 2004, ch. 17, § 1. Washington is committed to providing victims of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. RCW 10.99.010. "Because of the likelihood of repeated violence directed at those who have been victims of domestic violence in the past," courts are authorized to prohibit a person who is arrested for a crime involving domestic violence from having any contact with the victim prior to arraignment, RCW 10.99.040(2)(a), through trial, RCW 10.99.040(3), and post-conviction, RCW 10.99.050.[1] Division Three's

[1]Multiple studies have shown that civil protection orders are effective both at eliminating or substantially decreasing violence, and at helping survivors feel safer. *See, e.g.,* Matthew Carlson et al., *Protective Orders and Domestic Violence: Risk Factors for Re-Abuse*, 14 J. Fam. Violence 205, 205, 214-15 (1999) (concluding that violence survivors experience a "significant decline in the probability of abuse" following the entry of a protection order); Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA (Special Issue) 589, 590-92 (2002)(conducting a population-based study and reviewing police records to examine the effectiveness of protection orders, and

opinion, which significantly undermines the effectiveness of no contact orders by depriving the State of relevant and necessary evidence, merits review under RAP 13.4(b)(4) (review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court).

Division Three's opinion also merits review pursuant to RAP 13.4(b)(1). As established *infra*, Division Three's opinion conflicts with this Court's decisions in *Detention of Turay*, 139 Wn.2d 379, 402, 986 P.2d 790 (1999), and *State v. Finch*, 137 Wn.2d 792, 811, 975 P.2d 967 (1999). Division Three's opinion also conflicts with other published opinions of the court of appeals which are identified *infra*. *See* RAP 13.4(b)(2) (a petition

---

finding that having a permanent protection order was associated with a significantly decreased risk of new episodes of violence); Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 Am. J. Pub. Health 613, 613-18 (2004) (finding significant reductions in physical assaults, stalking, threats to do bodily harm, and worksite harassment among women who sought and qualified for protection orders); Judith McFarlane et al., *Intimate Partner Violence Against Immigrant Women: Measuring the Effectiveness of Protection Orders*, 16 Am. J. Fam. L. 244, 248 (2002) (finding that immigrant women who sought protection orders experienced a significant decrease in violence and stalking throughout the duration of the study, comparable to reduced violence experienced by women born in the United States who receive protection orders, and concluding, "Clearly, contact with the justice system and application for a protection order is a powerful deterrent to further abuse and can be deemed highly effective in terms of subsequent intimate partner violence against immigrant women."); TK Logan et al., *Factors Associated with Separation and Ongoing Violence Among Women with Civil Protective Orders*, 23 J. Fam. Violence 377, 382 (2008) (in a study of seven hundred women who received protection orders, seventy-eight percent reported that they felt safe as a result of the order and the orders were effective). Social scientists have concluded that protection orders "appear to be one of the few widely available interventions for victims of [intimate partner violence] that has demonstrated effectiveness." Victoria Holt et al., *Do Protection Orders Affect the Likelihood of Future Partner Violence and Injury?*, 24 Am. J. Preventive Med. 16, 21 (2003).

for review will be accepted by the Supreme Court if the decision of the court of appeals is in conflict with a published decision of the court of appeals).

A. *Old Chief* Does Not Apply to No Contact Orders

Old Chief, which Taylor never cited in the trial court,[2] only applies when the superior court refuses to accept a stipulation to prove the element of a prior conviction in lieu of admitting the full record which discloses the name or nature of the prior offense. *Turay*, 139 Wn.2d at 401 (describing the holding of *Old Chief*). The Fed. R. Evid. 403 holding of *Old Chief* merely recognizes that a jury may have a strong emotional reaction to a conviction for a child sexual abuse crime that could taint the jury's consideration of the evidence in the current case. *Turay*, 139 Wn.2d at 401. "*Old Chief* did not hold that a jury must be completely shielded from any reference to a prior conviction, only that when a defendant stipulates to a prior conviction the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction." *State v. Roswell*, 165 Wn.2d 186, 195, 196

---

[2]Taylor never challenged the admissibility or relevancy of the no contact order in the trial court. Taylor never identified any specific language in the no contact order that he believed was inadmissible. His failure to assert a timely and specific objection as required by ER103(a)(1) waived any argument predicated on *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). Even if there were an exception for constitutional claims, that exception would not apply in this case. *See generally United States v. Jones*, 159 F.3d 969, 979 (6th Cir. 1998) ("*Old Chief* error" is not of constitutional dimension and is therefore harmless unless it is more probable than not that the error materially affected the verdict); *Turay*, 139 Wn.2d at 402 (the *Old Chief* decision was based upon an interpretation of the federal rules of evidence and is not binding on Washington courts); *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998) (applying non-constitutional error test to *Old Chief* error).

P.3d 705 (2008). *Old Chief* does not allow a defendant, through stipulation, to remove an element entirely from consideration by the jury. *Id.*

Old Chief, itself, is "limited to cases involving proof of felon status." *Old Chief,* 519 U.S. at 183 n.7. This Court further limited *Old Chief* to those cases in which evidence is introduced solely to prove the existence of a prior conviction. *See Turay*, 139 Wn.2d at 401. *Accord United States v. Phillippi*, 442 F.3d 1061, 1064 (7th Cir. 2006) (*Old Chief* does not apply when the prosecution will use the document for an additional purpose beyond proof of felony status).

A no contact order is not admitted in a prosecution for felony violation of a protection order under RCW 26.50.110(4) to prove felony status. A prosecution for violating RCW 26.50.110(4) requires the State to prove beyond a reasonable doubt:

> (1) That on or about December 25, 2016, there existed a no-contact order applicable to the defendant;
> (2) That the defendant knew of the existence of this order;
> (3) That on or about said date, the defendant knowingly violated a provision of this order;
> (4) That the defendant's conduct was an assault; and
> (5) That the defendant's act occurred in the State of Washington.

CP 41, Jury Instruction 15. *Accord* WPIC 36.51.02; WPIC 36.51.[3]

A no contact order, whether issued pre-conviction or post-conviction, is introduced to:

- establish the date the order was issued prior to the current offense and that the order had not expired prior to the current offense;
- establish the specific restrictions the court placed upon the defendant's conduct;
- establish that the defendant was advised that only the court could modify or lift the restrictions; and
- establish that the defendant knew the contents of the order, not just that the no contact order had been issued.

All of these facts relate directly to the elements that the jury must find in the determination of guilt.

A court issuing a no-contact order is required to utilize a form that substantially complies with the pattern form developed by the administrative office of the courts ("AOC"). RCW 10.99.040(2)(b). This form includes date of issuance, imposed restrictions, the identity of the protected person, and the defendant's signature indicating receipt of the actual order. All of these items are needed to establish specific elements of a violation of a no

[3]None of these elements require the State to prove that a defendant has a prior conviction. Evidence of a prior conviction is irrelevant in a felony violation of a no contact order prosecution based upon RCW 26.50.110(4), and a timely and specific ER 402 objection by Taylor to the post-conviction checkbox on the first page of the no contact order would be properly sustained with the offending language redacted from the exhibit. Taylor, however, never interposed an ER 402 objection in the trial court.

contact order.

The order, moreover, is required to contain specific warnings that prevents claims of "I did not know it would be a violation of the court order if I went to [the victim's] home at her request":

> "Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order."

RCW 10.99.040(4)(b). *See also* RCW 10.99.050(2)(b). Demonstrating to the jury that the defendant received this warning, particularly in a case such as this one in which the victim "allowed" the defendant to violate the order, educates the jury that consent is not a defense to a violation of a no contact order. *See State v. Dejarlais*, 136 Wn.2d 939, 969 P.2d 90 (1998) (consent is not a defense to a violation of a protection order).

Since the content of the no contact order, rather than its mere existence, is at issue in a no contact prosecution, *Old Chief*, does not apply. *See Detention of Turay, supra.* Instead, the State retains the right to refuse a defendant's proffered stipulation. *See, e.g., State v. Finch*, 137 Wn.2d 792, 811, 975 P.2d 967 (1999) (State under no obligation to accept defendant's offer to stipulate to the identity of the victims; in-life photos admissible in

homicide cases); *State v. Adler*, 16 Wn. App. 459, 558 P.2d 817 (1976) (State under no obligation to accept defendant's offer to stipulate to an assault; gruesome pictures that accurately reflected the injuries sustained by the victim were admissible).

Old Chief, which is merely an application of Fed. R. Evid. 403, also does not apply because the no contact order is unlikely to trigger the same emotional response that a conviction for rape of a child might trigger. AOC has adopted a single pattern form no contact order for use in both superior courts and courts of limited jurisdiction, in pre-trial and post-conviction settings. *See* WPF NC 02.0100.[4] The only indication as to whether the pattern form order was issued pre-trial or post conviction is a of check box on the first page:[5]

---

[4] This form may be downloaded at http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=61.

[5] The word "conviction" appears a second time in paragraph 5. This paragraph, however, does not indicate that the defendant has been convicted:

> Based upon the record both written and oral, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, that the defendant represents a credible threat to the physical safety of the protected person, and the court issues this Domestic Violence No-Contact Order under chapter 10.99 RCW to prevent possible recurrence of violence.

Court of Washington for	**No**.
, **Plaintiff** **vs**. . **Defendant** (First, Middle, Last Name)	☐ Pre-Trial ☐ Post Conviction ☐ Replacement Order (paragraph **10**) **Domestic Violence No-Contact Order** (clj = NOCON, Superior cts = ORNC, ORWPNP) Clerk's action required: Para 9

The no contact order in this case is identical to the pattern form that was in effect on the date the order was issued. *See* Exhibit 35. This single reference to the existence of a conviction does not offend ER 403 or due process. *See generally Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) (the Due Process Clause of the Fourteenth Amendment does not require the exclusion of evidence of prior convictions); *Roswell*, 165 Wn.2d at 195 (admission of prior convictions, while prejudicial, does not necessarily deprive a defendant of a fair trial).

B. A Court Properly Rejects a Proposed Stipulation That Does Not Fully Address the Elements of the Crime that Would Otherwise Be Proven by the No Contact Order

Even when *Old Chief* applies, a proposed stipulation that does not fully address those elements of the crime that would otherwise be proven by the prosecution's evidence is properly rejected. *See State v. Ortega*, 134 Wn. App. 617, 624, 142 P.3d 175 (2006) (trial court properly rejected a proposed stipulation where the defendant did not offer to stipulate to the language of

the element in question). *Accord United States v. Silva*, 889 F.3d 704, 715 (10th Cir. 2018) (trial court properly rejected defendant's proposed stipulation on the grounds that it varied from the statute). A proffered stipulation that does not fully establish the element(s) that would otherwise be established by the evidence the defendant is seeking to have excluded is not really an offer to stipulate. *Cf. State v. Mayner*, 4 Wn. App. 549, 552, 483 P.2d 151 (1971) ("A request for an instruction that is in part erroneous is no request at all.").

In the instant case, Taylor's proffered stipulation only established element 2, that the defendant knew of the existence of a no contact order that applied to him. CP 21. The stipulation does not establish that the no contact order existed on December 25, 2016. Absent admission of the no contact order which indicated that it was entered on December 19, 2016, and that the order did not expire until December 19, 2018, Ex. 35, the jury would have a failure of evidence as to element 1 of the "to convict" instruction.

Taylor's proffered stipulation did not state that "the defendant knowingly violated a provision of [the] order." CP 41, Jury Instruction 15, element (3). The no contact order, itself, provided the only evidence of the specific restrictions the court placed upon Taylor:

2. Defendant:

A. do not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, or keep under surveillance the protected person [Anna Kelly].

B. do not contact the protected person [Anna Kelly], directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third person, or contact by the defendant's lawyers.

C. do not knowingly enter, remain, or come within 1,000 feet (1,000 feet if no distance entered) of the protected person's [Anna Kelly's] residence school, workplace . . .

Ex. 35, page 1. The no contact order, itself, notified Taylor that "Only the court can change the order upon written request," and that he "can be arrested even if the person protected by this order invites or allows you to violate the order's prohibitions." *Id.*

Taylor only stipulated that "it was lawfully served." CP 21. This legalese falls far short of informing the jury that Taylor received a copy of the order prior to December 25, 2016. This minimal statement could leave the false impression that Taylor was not present when the order was issued in open court and that Taylor never signed the order, acknowledging that he received a copy of the document. *See* Ex. 35, page 2. The State is not required to accept a stipulation that is not equivalent to the actual evidence. *See, e.g., State v. Sparks,* 83 P.3d 304, 312-13 (Ore.), *cert. denied*, 543 U.S. 893 (2004) (a stipulation makes evidence irrelevant when the evidence is

relevant only to prove a fact that is established by the stipulation but not when the stipulation does not have equal evidentiary significance to the disputed evidence); *State v. Kinney*, 278 P.3d 100 (Ore. App. 2012) (defendant's stipulation that the images depicted sexually explicit conduct involving a child was properly rejected as the actual contents of the videos establish that a person who viewed the recordings would know that they depicted sexual conduct involving a child and that the defendant had a sexual purpose for possessing them).

C. The Admission of the Unredacted No Contact Order Was Harmless.

Finally, even if Taylor properly preserved his non-constitutional evidentiary objection in the trial court, his conviction must be affirmed. The trial court's rejection of Taylor's stipulation only requires reversal if the admission of the post-conviction check box on the order was prejudicial. A non-constitutional error is not prejudicial unless, within reasonable probabilities, the outcome of the trial could have been materially affected had the error not occurred. *State v. Bourgeois*, 133 Wn.2d 389, 403-04, 945 P.2d 1120 (1997). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Id.*

In the instant case, the slight prejudicial effect of the admission of "☒ Post Conviction" pale when compared to the other overwhelming evidence of guilt. Both the protected person and a neighbor testified that Taylor was living at Ms. Kelly's home in violation of the "1,000 foot bubble" requirement of the no contact order. Both confirmed that Taylor had contact with Ms. Kelly on December 25, 2016. Ms. Kelly's claim that Taylor struck her was verified by photographic evidence of her injuries. This strong evidence, coupled with the jury's acquittal on count one, establishes that the emotional impact of "☒ Post Conviction" did not prevent the jury from dispassionately reviewing the evidence.

VI. CONCLUSION

The State respectfully requests that this Court accept review of this case and that the Court reinstate Taylor's conviction as *Old Chief* does not apply to no contact orders. If this Court were to extend *Old Chief* to no contact orders, Taylor's conviction should still be reinstated as Taylor's rejected stipulation was inadequate and submitting the unredacted no contact order to the jury was harmless.

If this Court were to extend *Old Chief* to no contact orders, the State respectfully asks this Court to clarify that any *Old Chief* stipulation must

include the exact language of the elements in the "to convict" instruction[6] that would otherwise be established from the four corners of the Domestic Violence No-Contact Order, specifically:

1. A no contact order applicable to the defendant existed on the date of the violation;

2. The defendant knew of the existence of the order; and

3. The defendant knowingly violated a provision of the order.[7]

Respectfully Submitted this 11th day of September, 2018.

GREGORY L. ZEMPEL
Kittitas County Prosecuting Attorney

/s/ JODI M. HAMMOND
Deputy Prosecuting Attorney
WSBA No. 44091
205 W 5th Ave, Ste. 213
Ellensburg, WA 98926-2887
(509) 962-7520

[6]The "to convict" instructions for felony violation of a court order, WPIC 36.51.02, and for a non-felony violation of a court order, WPIC 36.51, vary slightly. The stipulation must be adjusted to match the elements of the "to convict" instruction tendered in a specific case.

[7]If, unlike Taylor, the defendant is disputing whether he knowingly violated the order, the stipulation would need to acknowledge that the defendant received a copy of the court order prior to the date of violation, the court order prohibited the defendant from doing certain acts, with an exact quotation of the relevant restraint provisions, and that the court order informed the defendant that only the court can change the order upon written request and that the defendant could be arrested even if the person protected by this order invites or allows the defendant to violate the order's prohibitions.

If, like in the instant case, the defendant's actions violated more than one restriction contained in the order, the defendant may not force the State to accept a stipulation to less than all of the restrictions. *Cf. State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990) (where the State charges more than on means of committing a single crime, the defendant is not entitled to plead guilty to only one alternative means), *overruled on other grounds by State v. Condon*, 182 Wn.2d 307, 323-24, 343 P.3d 357 (2015).

PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 11th day of September, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

Skylar T. Brett
Attorney for Appellant
P.O. Box 18084
Seattle, WA 98118-0084
Skylarbrettlawoffice@gmail.com

_____

/s/ Jodi M. Hammond, WSBA #44091
Attorney for Respondent
Kittitas County Prosecuting Attorney's Office
205 W 5th Ave
Ellensburg, WA 98926
509-962-7520
FAX – 509-962-7022
prosecutor@co.kittitas.wa.us

FILED
JULY 17, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 35172-6-III
	)	
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
BRENDAN REIDY TAYLOR,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — *Old Chief v. United States*, 519 U.S. 172, 191-92, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) holds that where the existence of a prior conviction is an element of an offense, the trial court must accept the accused's offer to stipulate to the prior conviction. This appeal requires us to determine whether this rule extends to an accused's offer to stipulate to a postconviction no-contact order. We hold that it does. We, therefore, reverse Brendan Taylor's conviction for felony violation of a no-contact order and remand for retrial.

FACTS

A no-contact order prohibited Brendan Taylor from being within 1,000 feet of Anna Kelly. But they decided to live together nevertheless.

On Christmas Day of 2016, their landlord drove past their residence and saw Kelly using a snow shovel "like a hatchet" against the windshield of Taylor's car. Report of Proceedings (RP) at 140. The landlord called 911.

When the police arrived, Taylor was gone. Kelly claimed that Taylor had assaulted her. At the time, Taylor was under supervision by the Department of Corrections for a prior offense.

The State charged Taylor with several crimes, including the two crimes that are at issue on appeal: felony violation of a no-contact order and escape from community custody.[1]

PROCEDURE

The day prior to trial, Taylor chose to plead guilty to some of the charges, including escape from community custody. At the plea hearing, he presented a written statement that provided the factual basis for his plea. The statement reads in part:

> On or about December 27, 2017 [sic[2]], I did willfully discontinue making myself available to the Department of Corrections for supervision, by making my whereabouts unknown or by failing to maintain contact with the Department as directed by the Community Corrections Office.

[1] The State also charged Taylor with second degree assault (strangulation) and first degree burglary. The State later charged Taylor with two counts of misdemeanor violation of a no-contact order based on calls he made to Kelly while incarcerated. For various reasons, these charges are not before us on appeal.

[2] The statement erroneously states the year as 2017 instead of 2016.

Clerk's Papers (CP) at 19. Taylor signed the statement, attesting to its accuracy. When asked by the trial court if the statement was true, Taylor responded,

> I was out of gas in Oregon. But it's—Yeah, it's basically true. . . . I was making my way to get back up here . . . .
>
> . . . .
>
> . . . I was on the phone with [my community corrections officer] and then he had left a message that I wasn't going to be able to make an appointment, but it's still—it's still the same as—as missing out on—on that.

RP at 7-8.

On the morning of trial, Taylor asked that the no-contact order be excluded in light of his stipulation that he knew of its existence. The State responded that it planned on admitting two no-contact orders. The following discussion occurred:

> THE COURT: . . . [S]ometimes . . . we'll have a case where there's a charge of felon in possession of a firearm,—
>
> . . . .
>
> THE COURT: One of the things the state would have to prove is the underlying felony conviction. Often-times the defense will stipulate to that in an effort to avoid the prejudice of having the specific named felony brought into the mix. And I think that's been approved pretty regularly as [an] appropriate thing to do.
>
> . . . .
>
> [THE DEFENSE]: Right.
>
> [THE STATE]: And the law actually requires two [elements]. The state's—state's not willing to accept the stipulation; we'd like to use the order, both of them. But there's two elements the state has to prove; number one that there existed a no-contact order, number two that the defendant knew about it.
>
> . . . .

> [THE COURT]: . . . [Y]ou're saying that the defendant Mr. Taylor is willing to stipulate to both of those things.
> [THE DEFENSE]: Yes.

RP at 20-21.

After a short recess, the trial court denied Taylor's request to accept his stipulation in lieu of the no-contact order.

At trial, and over Taylor's ER 403 objection, the trial court admitted the no-contact order. The defense asked to review the order, but the court noted, "I don't see anything on here that's objectionable." RP at 183.

The no-contact order was signed by the same judge who presided over the trial. It is entitled a "Domestic Violence No-Contact Order," and is marked "Post Conviction." Plaintiff's Ex. 35 at 1. The trial court's findings of fact are also part of the order. Finding of fact 5 states:

> Based upon the record both written and oral, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, that the defendant represents a credible threat to the physical safety of [Kelly], and the court issues this Domestic Violence No-Contact Order . . . to prevent possible recurrence of violence.

Plaintiff's Ex. 35 at 2. The date of the order is less than one week before the alleged assault for which Taylor was being tried.

After all of the evidence was presented, the jury convicted Taylor of felony violation of a no-contact order. The trial court sentenced Taylor to five years of imprisonment and one year of community custody. Taylor timely appealed.

ANALYSIS

A. ADMISSION OF NO-CONTACT ORDER

Taylor contends that the trial court abused its discretion when it denied his stipulation and admitted the no-contact order. Taylor argues that the rule established in *Old Chief*—and adopted by this court in *State v. Johnson*, 90 Wn. App. 54, 63, 950 P.2d 981 (1998)—applies equally here. That rule requires the trial court to accept the accused's offer to stipulate to his felony status and exclude documentary proof when the accused's felony status is an element of the offense charged.

The State contends that stipulating to a no-contact order is not the same as stipulating to a prior felony. For the reasons explained below, we disagree. We hold that the trial court abused its discretion under ER 403 when it refused to accept Taylor's offered stipulation and then admitted the postconviction no-contact order.

Whether a trial court properly applied ER 403 is reviewed for abuse of discretion. *Johnson*, 90 Wn. App. at 62. A trial court abuses its discretion when its decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons.'" *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Evidence is unfairly prejudicial if it is "likely to provoke an emotional response rather than a rational decision." *Johnson*, 90 Wn. App. at 62. "The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence." *Id*. Where the existence of a prior conviction is an element of an offense, the court must accept the accused's offer to stipulate to the prior conviction. *Old Chief*, 519 U.S. at 191-92; *Johnson*, 90 Wn. App. at 63.[3]

While the courts in *Old Chief* and *Johnson* recognized the general rule that the prosecution may choose how to present the State's evidence in an attempt to prove guilt, both courts noted that this rule has "'virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him.'" *Johnson*, 90 Wn. App. at 62-63 (quoting *Old Chief*, 519 U.S. at 190).

[3] *Old Chief* analyzes FEDERAL RULE OF EVIDENCE 403, but its reasoning and holding were explicitly adopted and applied to Washington's ER 403 in *Johnson*, 90 Wn. App. at 62-63.

The *Old Chief* Court explained:

> Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach.

519 U.S. at 191. Hence, the State does not suffer any prejudice when some extant legal status of the accused is proved by stipulation rather than by the admission of court documents.

Indeed, the functional difference between the value of a stipulation to the existence of a prior conviction and of a court record naming the offense is "'distinguishable only by the risk [of unfair prejudice] inherent in one and wholly absent from the other.'" *Johnson*, 90 Wn. App. at 63 (quoting *Old Chief*, 519 U.S. at 191). Evidence containing the crime of a prior conviction is inherently prejudicial because of the risk that the jury will "generaliz[e] a defendant's earlier bad act into bad character" or "worse, . . . call[ ] for preventative conviction even if [the accused] should happen to be innocent momentarily." *Old Chief*, 519 U.S. at 180-81. This risk is particularly high when the prior conviction is for an offense similar to the one for which the accused is currently on trial. *Id.* at 185.

Whether the *Old Chief* doctrine applies with equal effect to postconviction no-contact orders is an issue of first impression. For the reasons set forth below, we hold that the rationale of *Old Chief* applies to postconviction no-contact orders.

First, similar to a prior conviction, the existence of a postconviction no-contact order is dependent on a judgment rendered independent of the subsequent charges against the defendant. As with offenses where a prior conviction is an element of the crime—in the present case—the defendant's legal status is at issue. *Old Chief* held that if the justification for admitting the evidence was to prove some issue other than legal status—such as motive, opportunity, intent, or knowledge—the opposing party could seek the admission of the conviction. Here, Taylor offered to stipulate that the order was an existing order, and he knew of it. The State fails to explain how the order has any relevance beyond that to which Taylor offered to stipulate.

Once the defendant stipulates to the existence of, and his knowledge of, the no-contact order, the order itself has no additional probative value. The difference between proof by stipulation and proof by admitting the order is only that the latter will carry a risk of unfair prejudice to the defendant. No-contact orders generally contain prior charges, convictions, and allegations that the defendant acted violently against the victim. They

also often include other language that makes the accused appear particularly dangerous or violent.

All of these considerations are present here. The no-contact order contained the phrase, "Post Conviction." Plaintiff's Ex. 35 at 1. It told the jury that Taylor had been found guilty of assaulting Kelly not long before the charged felony assault. It further told the jury that Taylor "represents a credible threat to the physical safety of [Kelly]." Plaintiff's Ex. 35 at 2. The threat was sufficient that the order required Taylor to immediately surrender all firearms and other dangerous weapons.

Here, there was no additional probative value to the no-contact order beyond Taylor's offered stipulation. But the risk of unfair prejudice was substantial. In light of Taylor's offered stipulation, the risk of unfair prejudice from admitting the no-contact order substantially outweighed its probative value. We conclude that the trial court abused its discretion when it admitted the no-contact order and refused to accept Taylor's stipulation.

The State does not argue that the error, if any, was harmless. We therefore reverse Taylor's conviction for felony violation of a no-contact order and remand for retrial.[4]

B. ACCEPTANCE OF GUILTY PLEA TO ESCAPE FROM COMMUNITY CUSTODY

Taylor argues that the trial court violated his due process rights when it accepted his guilty plea to escape from community custody. He contends that the record establishes that his plea was not knowing, voluntary, and intelligent. As a preliminary matter, the State asserts that Taylor may not raise this issue for the first time on appeal. We disagree.

RAP 2.5(a)(3) provides that "manifest error affecting a constitutional right" may be raised for the first time on appeal. We first consider whether the issue raised affects a constitutional right. A defendant gives up constitutional rights by agreeing to plead guilty and, because fundamental rights of the accused are at issue, due process considerations come into play. *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). Due process requires that a guilty plea be knowing, voluntary, and intelligent. *State v. Buckman*, 190 Wn.2d 51, 59, 409 P.3d 193 (2018). A guilty plea is not knowing, voluntary, and intelligent when the defendant does not understand the nature of the charge. *State v.*

[4] In light of our disposition, Taylor's claims that he received ineffective assistance of counsel and that his five-year sentence is unlawful are moot.

R.L.D., 132 Wn. App. 699, 705-06, 133 P.3d 505 (2006). We conclude that the error raised by Taylor affects a constitutional right.

We next consider whether the error is manifest. An error is manifest if it has "practical and identifiable consequences in the trial of the case." *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). Manifest error is also described as error that is "'unmistakable, evident or indisputable.'" *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)). When a defendant at the plea hearing denies an element of the charged crime, accepting the plea has identifiable consequences and is evident error.

Because the issue raised by Taylor involves a manifest error affecting a constitutional right, he may raise it for the first time on appeal.

We next consider whether Taylor's guilty plea was knowing, voluntary, and intelligent. The crime of escape from community custody occurs when a person

> *willfully* discontinues making himself . . . available to the [Department of Corrections] for supervision by making his . . . whereabouts unknown or by failing to maintain contact with the department as directed by the community corrections officer . . . .

RCW 72.09.310 (emphasis added).

Taylor provided the trial court with a signed statement in which he admitted to the prohibited conduct. But when questioned by the court, his oral statements contradicted

his written statement. Specifically, he seems to claim that he did not *willfully* commit the offense because his car ran out of gas so he missed a scheduled appointment. At this point, it was incumbent on the trial court to ask further questions to determine whether Taylor actually understood the elements of the crime and was admitting to the prohibited conduct. *See R.L.D.*, 132 Wn. App. at 705-06. Yet, the trial court did not question Taylor further.

Taylor both admits and denies the prohibited conduct. From Taylor's conflicting statements, the trial court erred by not confirming that his guilty plea was knowing, voluntary, and intelligent. The court should have questioned Taylor further to clarify the ambiguity. We, therefore, remand for the trial court to question Taylor further.

If Taylor admits to the prohibited conduct, his prior guilty plea is valid. However, if Taylor denies the prohibited conduct, we direct the trial court to vacate the guilty plea and to modify the corresponding judgment and sentence to reflect only those counts to which Taylor knowingly, voluntarily, and intelligently pleaded guilty.

Reversed and remanded with instructions to conduct a new plea hearing and new trial.

Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

July 17, 2018

E-mail
Jodi Marie Hammond
Gregory Lee Zempel
Kittitas County Prosecuting Attorney
205 W 5th Ave Ste 213
Ellensburg, WA 98926-2887

Skylar Texas Brett
Law Office of Skylar Brett
PO Box 18084
Seattle, WA 98118-0084
skylarbrettlawoffice@gmail.com

CASE # 351726
State of Washington v. Brendan Reidy Taylor
KITTITAS COUNTY SUPERIOR COURT No. 161003230

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** Hon. Scott Sparks
c: Brendan Taylor
#395893
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

Log Number: P-047
Oral Argument Date: 06/14/2018

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 35172-6
Title of Case: State of Washington v. Brendan Reidy Taylor
File Date: 07/17/2018

SOURCE OF APPEAL

Appeal from Kittitas Superior Court
Docket No: 16-1-00323-0
Judgment or order under review
Date filed: 03/27/2017
Judge signing: Honorable Scott R. Sparks

JUDGES

Authored by Robert Lawrence-Berrey
Concurring: Laurel Siddoway
George Fearing

COUNSEL OF RECORD

Counsel for Appellant(s)

Skylar Texas Brett
Law Office of Skylar Brett
Po Box 18084
Seattle, WA, 98118-0084

Counsel for Respondent(s)

Gregory Lee Zempel
Kittitas Co Pros Attorney
205 W 5th Ave Ste 213
Ellensburg, WA, 98926-2887

Jodi Marie Hammond

Kittitas County Prosecuting Attorney
205 W 5th Ave Ste 213
Ellensburg, WA, 98926-2887

OPINION FACT SHEET

Case Name: State v. Taylor
Case Number: 351726

1. TRIAL COURT INFORMATION:

   A. SUPERIOR COURT: Kittitas County
   Scott Sparks; Judgment; filed 3/27/17

2. COURT OF APPEALS INFORMATION:
   Disposition:
   ( ) Affirmed
   ( ) Affirmed as Modified
   ( ) Affirmed in Part/Remanded**
   ( ) Affirmed/Reversed-in part and Remanded**
   ( ) Affirmed/Vacated in part
   ( ) Affirmed/Reversed in part
   ( ) Denied (PRP, Motions, Petitions)
   ( ) Dismissed
   ( ) Granted/Denied in part
   ( ) Granted (PRP, Motions, Petitions)
   ( ) Other
   ( ) Reversed and Dismissed
   ( ) Remanded**
   ( ) Remanded with Instructions**
   ( ) Reversed in part
   (X) Reversed and Remanded**
   ( ) Reversed
   ( ) Reversed, Vacated and Remanded**
   ( ) Vacated and Remanded**
   * These categories are established by the Supreme Court
   ** If remanded, is jurisdiction being retained by the Court of Appeals? () YES
   (x) NO

3. **SUPERIOR COURT INFORMATION:**
   (IF THIS IS A CRIMINAL CASE, CHECK ONE)

   Is further action required by the superior court?
   (x) YES
   ( ) NO

   RLB
   Authoring Judge's Initials

KITTITAS COUNTY PROSECUTOR'S OFFICE

September 11, 2018 - 10:23 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35172-6
Appellate Court Case Title:	State of Washington v. Brendan Reidy Taylor
Superior Court Case Number:	16-1-00323-0

The following documents have been uploaded:

- 351726_Petition_for_Review_20180911102311D3788976_6108.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- greg.zempel@co.kittitas.wa.us
- prosecutor@co.kittitas.wa.us
- skylarbrettlawoffice@gmail.com
- valerie.skylarbrett@gmail.com

Comments:

Sender Name: Theresa Burroughs - Email: theresa.burroughs@co.kittitas.wa.us
Filing on Behalf of: Jodi Marie Hammond - Email: jodi.hammond@co.kittitas.wa.us (Alternate Email:)

Address:
205 West 5th Ave
Ellensburg, WA, 98926
Phone: (509) 962-7520

Note: The Filing Id is 20180911102311D3788976