

FILED  
Court of Appeals  
Division II  
State of Washington  
10/5/2018 2:25 PM

NO. 51360-9-II

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

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JONATHON L. TAYLOR,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON,

Appellant.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

A party cannot complain of evidentiary error where that party proposed the very action the party complains of on appeal. Jonathon Taylor asserts that the trial court erred by permitting the jury to hear of his felony conviction and inability to work around children. But Taylor offered to concede to the admissibility of this evidence if the trial court excluded the identity of his conviction and all references to child molestation. The trial court adopted this proposal, and Taylor lodged no further objection. Because it was Taylor who proposed the trial court's action, the invited error doctrine bars his claim.

If the Court reviews Taylor's claim, the trial court did not abuse its discretion by admitting evidence of his work restrictions under ER 403. Taylor does not dispute that his post-injury felony conviction and the resulting inability to work around children were relevant to his ability to work. The court mitigated any potential prejudice, excluding the conviction's name and evidence of Taylor's sex offender status. The court did not abuse its discretion in determining that the potential for unfair prejudice did not outweigh the relevance of the evidence. This Court should affirm.

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## II. ISSUES

1. Under the doctrine of invited error, a party cannot complain of trial court error when that party proposed the court's ruling. Taylor agreed to the admission of testimony about his work restrictions involving children if the court excluded references to child molestation and the nature of his conviction. The court adopted this proposal, and Taylor raised no further objection. Does the doctrine of invited error bar Taylor's claim that the trial court erred by admitting evidence of his work restrictions?
2. Under ER 403, a court may exclude relevant evidence only when the risk of unfair prejudice substantially outweighs its probative value. Taylor's conviction and inability to work around children directly related to his ability to work. The court mitigated the risk for prejudice by excluding all references to child molestation and the nature of Taylor's conviction. Did the court abuse its discretion by admitting evidence of the conviction and work restrictions?

## III. STATEMENT OF THE CASE

### A. **Following His 2008 Industrial Injury, Taylor Pleaded Guilty to Sexual Molestation of a Child in the Third Degree**

Jonathon Taylor suffered a low back injury at work in June 2008.

CP 87. He applied for workers' compensation benefits, and the

Department accepted his claim. CP 55.

After the Department allowed his claim, Taylor pleaded guilty to third-degree child molestation. CP 94. He served seven months in prison and was released to community supervision. CP 96. Following his release, Taylor had to register as a sex offender. CP 96. His release terms

prohibited him from contacting minors without an adult present who knew of his conviction. CP 96.

In October 2013, the Department closed Taylor's claim, finding that he did not need additional medical treatment for his 2008 work-related injury. CP 55.

**B. The Board Ruled That Evidence of Taylor's Inability to Work Around Children Was Admissible**

Taylor appealed to the Board of Industrial Insurance Appeals. CP 35. Taylor argued that his industrial injury proximately caused a low back condition and that he could not work because of this condition. CP 40-41. On his ability to work, the Board heard testimony about Taylor's education, his work history, and his post-injury criminal conviction. Barbara Berndt, a vocational counselor with the Department, testified that a person's criminal history can be a barrier to employment. CP 452-53. Carl Gann, Taylor's vocational witness, likewise testified that criminal convictions are vocationally significant. CP 223. Berndt testified that Taylor could work but that he would not have obtained work while incarcerated. CP 454-55. She also explained that Taylor's inability to work around children would prevent him from working some jobs for which he was otherwise qualified. CP 454-55.

Taylor objected to the testimony about his felony conviction and the terms of his release. CP 94, 96, 236-37, 451-55. The Board overruled these objections, finding that the evidence was not more prejudicial than probative under ER 403. CP 35, 40-41. The Board found that Taylor's industrial injury did not cause his low back condition. CP 40-41. It also determined that Taylor could work. CP 41.

**C. The Superior Court Ruled That Evidence of Taylor's Inability to Work Around Children Was Admissible**

Taylor appealed to superior court. CP 1. There, he renewed his objections to testimony about the nature of his felony conviction, again asserting that this evidence was more prejudicial than probative. RP 5-6. As for his ability to work around children, Taylor agreed to withdraw his objection if the court excluded references to child molestation and the nature of his conviction:

I'm concerned that leaving in that he cannot work around children, that will allow the jury to draw an improper inference if the nature of the conviction is excluded, however, I would be willing to concede that if the nature of the conviction and all references to the child molestation are excluded.

RP 9.

As suggested by Taylor, the superior court eliminated references to third degree child molestation, proposing that the sanitized term "felony" be read in its place. RP 13, 16. Taylor's counsel responded: "I would be

very open to that.” RP 16. The court struck all references to Taylor’s status as a registered sex offender and the requirement that he undergo training for sexual deviance. RP 14-17. Under Taylor’s proposal, the court admitted testimony about Taylor’s inability to work around children following his conviction. RP 16. Taylor did not object to the court’s ruling. RP 17.

The jury affirmed the Board’s finding that Taylor’s industrial injury did not cause his low back condition. CP 786. Based on that finding, the jury did not reach the additional findings of the Board. CP 786. Taylor appeals.

#### IV. STANDARD OF REVIEW

In an industrial insurance case, the appellate court reviews the trial court decision, not the Board decision. *See Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Administrative Procedure Act does not apply and the normal civil practice does. *Id.* at 180; RCW 51.52.140.

The court reviews a trial court’s evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). The trial court has considerable discretion in administering ER 403—“reversible error is found only in the exceptional circumstance of a manifest abuse of discretion.” *Carson v. Fine*, 123 Wn.2d 206, 226, 867

P.2d 610 (1994). An abuse of discretion occurs when a trial court's exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

## V. ARGUMENT

The doctrines of invited error and waiver bar Taylor's claimed evidentiary error. While Taylor contends that the trial court erred by allowing testimony about his inability to work around children, Taylor agreed to concede to the admissibility of this evidence if the court excluded references to child molestation and the nature of his conviction. The trial court adopted this proposal, and Taylor lodged no further objections. Taylor cannot complain that the court erred when it did exactly what he asked.

Nor did the trial court abuse its discretion by allowing the testimony under ER 403. The court reasonably determined that the probative value of the evidence outweighed the risk of prejudice when the evidence directly related to Taylor's ability to work and the court mitigated the potential prejudice by excluding references to child molestation and Taylor's status as a sex offender. There was no manifest abuse of discretion. This Court should affirm.

**A. The Doctrines of Invited Error and Waiver Bar Taylor's Evidentiary Claim Because Taylor Proposed the Trial Court Action He Now Complains of on Appeal**

This Court should deny review of Taylor's evidentiary claim when Taylor proposed the ruling he now asserts was error. The invited error doctrine "prohibit[s] a party from setting up an error at trial and then complaining of it on appeal." *Angelo Prop. Co., LP v. Hafiz*, 167 Wn. App. 789, 823, 274 P.3d 1075 (2012) (quoting *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002)). A party invites error when a party "affirmatively assented to the error, materially contributed to it, or benefited from it." *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009), *overruled on different grounds by Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). The doctrine applies when a party proposes the ruling to which it later assigns error on appeal. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990) (holding invited error doctrine precluded review of a jury instruction proposed by the appealing party). A court considers an error waived if the party asserting the error materially contributed to its occurrence. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Taylor proposed the very action to which he now assigns error. Taylor objected to testimony about the nature of his criminal conviction and his post-conviction sentencing terms. RP 5; CP 556-57. But he offered

to withdraw his objection to evidence about his inability to work around children if the court would exclude the nature of his conviction and all references to child molestation. RP 9. As Taylor’s counsel explained: “I would be willing to concede [the admissibility of testimony about Taylor’s work restrictions around children] if the nature of the conviction and all references to the child molestation are excluded.” RP 9.

The trial court accepted Taylor’s proposal. It ruled that it would exclude all references to third degree child molestation. RP 13. In place of this term, the court proposed the sanitized term “felony,” a term that Taylor indicated he would accept. RP 15-16. As Taylor proposed, the court excluded all references to his status as a registered sex offender. RP 16.

The invited error doctrine bars Taylor’s evidentiary claim. On appeal, he argues that the trial court erred by admitting evidence of his inability to work around children given testimony about his felony conviction. Appellant’s Brief (AB) 1, 10. But Taylor “materially contributed” to this alleged error when he offered to concede to the evidence’s admissibility. *See Momah*, 167 Wn.2d at 154. Taylor agreed to the term “felony” in place of “third degree child molestation” and, after the court accepted Taylor’s concession to allow testimony about his work restrictions, he lodged no further objection. The trial court simply

followed Taylor's proposal. Had Taylor not offered to concede, the court may have resolved his evidentiary objections in another way. Taylor cannot not cry error where he suggested the ruling he now contests.

Similarly, Taylor both "benefited from" and "affirmatively assented to" the court's ruling. *Momah*, 167 Wn.2d at 154. Taylor benefited because the court excluded the nature of his third degree child molestation conviction, his status as a registered sex offender, and all references to child molestation. He assented to the alleged error where he agreed to using the term "felony" and, following the court's ruling, he raised no further objection. RP 16. Under the doctrine of invited error, a party cannot set up an error at trial and then complain of it on appeal. *Angelo Prop.*, 167 Wn. App. at 823.

And Taylor did not object to the trial court's final ruling on the evidence, waiving the issue. After acting on Taylor's concession, the court allowed testimony about his inability to work around children. RP 16-17. Taylor then raised no further objection to the court's ruling.<sup>1</sup> He has waived the error as a party must object to an evidentiary ruling. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 744, 850 P.2d 599 (1993); ER 103(a)(1). This Court should decline to review Taylor's evidentiary claim.

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<sup>1</sup> RP 17. Taylor complains that the Department referenced his inability to work around children in its opening and closing statements. AB 6. But Taylor made no objections to the Department's statements. RP 64; RP (Oct. 20, 2017) at 22.

Because Taylor invited the superior court to err and has waived the objection, this Court should deny review of the alleged evidentiary error.

**B. The Trial Court Did Not Abuse Its Discretion by Admitting Evidence of Taylor's Conviction and Work Restrictions When Taylor's Ability to Work Was at Issue and the Court Mitigated Any Potential Prejudice**

The trial court did not abuse its discretion by admitting testimony that Taylor could not work around children. Taylor's post-injury felony conviction and associated work restrictions related to a central issue of the case, and the court took steps to mitigate any potential prejudice. As the court reasonably determined, this evidence's probative value was not substantially outweighed by its prejudicial effect. So for this reason as well, this Court should affirm.

Under ER 403, a court may exclude relevant evidence when its probative value is substantially outweighed by its prejudicial effect.<sup>2</sup> The burden of proving prejudice is on the party seeking exclusion. *Carson*, 123 Wn.2d at 225. The trial court has considerable discretion in administering ER 403, and a reviewing court will reverse only where there is a manifest abuse of discretion.<sup>3</sup> If evidence is probative of a central issue in the case,

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<sup>2</sup> ER 403. Taylor cites to evidence rule 404(b) in his brief but, as Taylor admitted at the trial court, ER 404(b) does not apply. AB 10; RP 10. ER 404(b) does not apply because evidence of Taylor's conviction and post-sentencing terms were not introduced to prove conformity with a character trait.

<sup>3</sup> *Carson*, 123 Wn.2d at 226. A trial court need not balance the probative and prejudicial nature of the evidence on the record. *Id.* at 223. And even when a court errs by

the danger that unfair prejudice will substantially outweigh the probative nature of that evidence is “quite slim.” *Carson*, 123 Wn.2d at 224.

Taylor concedes that evidence of his post-injury felony conviction and resulting inability to work around children was probative here. AB 11. At both the Board and superior court, Taylor argued that he was temporarily, totally disabled from the date of his industrial injury to the date of claim closure. CP 47, 534-35. “Total temporary disability” occurs when a worker cannot return to reasonably continuous gainful employment as a direct result of an industrial injury. WAC 296-20-01002. To prove this disability, Taylor had to show that his industrial injury was a proximate cause of his inability to work. *See* CP 773.

Taylor’s post-injury conviction and resulting work restrictions were relevant to this question. Both vocational witnesses identified criminal convictions as vocationally significant. CP 223, 452-53. Vocational counselor Berndt identified Taylor’s conviction and terms of release as affecting his ability to obtain employment. CP 454. She explained that Taylor would not have obtained work while incarcerated. CP 454. Brendt also testified that, after his release, Taylor’s inability to work around children would prevent him from obtaining jobs he was otherwise qualified to

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admitting the evidence, reversal is required only when, “within reasonable probabilities, it materially affected the outcome of the trial.” *State v. Berry*, 184 Wn. App. 790, 802, 339 P.3d 200 (2014) (*quoting State v. Beadle*, 173 Wn.2d 97, 120-21, 265 P.3d 863 (2011)).

perform. CP 455. Taylor's post-injury conviction and his resulting work restrictions constitute non-injury-related reasons for his inability to return to work. As Taylor admits, evidence of these reasons was probative to whether he was temporarily disabled. AB 11.

Contrary to Taylor's assertion, there was little risk of unfair prejudice from this evidence. The trial court took steps to mitigate any prejudice by excluding all references to the nature of Taylor's conviction and his sex offender status. RP 14-17. Recognizing the potential for prejudice, the trial court excluded references to "Third Degree Child Molestation," replacing this prejudicial term with the sanitized term "felony." RP 16. The court also excluded evidence of Taylor's post-conviction requirement to report his status as a sex offender. RP 16-17. These rulings align with Taylor's own proposal to resolve his objections. By excluding evidence of the nature of Taylor's conviction and all references to child molestation, the trial court eliminated any risk of unfair prejudice.

A reviewing court will not disturb a trial court's evidentiary rulings absent a manifest abuse of discretion. *Carson*, 123 Wn.2d at 226. Here, under ER 403, the trial court carefully balanced the probative value of Taylor's conviction and work restrictions against this evidence's potential prejudicial effect. As Taylor concedes, his felony conviction and resulting inability to work around children were relevant to the question of temporary

total disability. AB 11. The court mitigated the potential for unfair prejudice by removing all references to the nature of the conviction and Taylor's status as a sex offender. Indeed, it was Taylor who proposed this action by the court. Because the trial court did not abuse its discretion by admitting the evidence under ER 403, this Court should affirm.

## **VI. CONCLUSION**

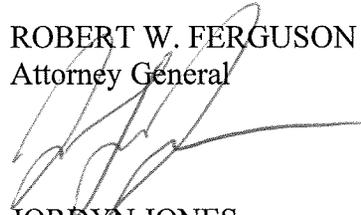
This Court should decline to review Taylor's claim of evidentiary error. Taylor invited any error by offering to concede to the admissibility of the disputed evidence if the superior court excluded references to child molestation and the nature of his conviction. Under the doctrine of invited error, Taylor cannot complain of error where the trial court did exactly as he asked.

Even if the Court considers this issue, the trial court did not abuse its discretion by allowing the testimony. Taylor concedes that his post-injury felony conviction and inability to work around children were probative to the question of temporary total disability. The trial court acted to mitigate any prejudice by excluding the name of the conviction and evidence of Taylor's status as a sex offender. The evidence's probative

value was not substantially outweighed by its prejudicial effect. This Court should affirm.

RESPECTFULLY SUBMITTED this 5 day of October, 2018.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department's Brief of Respondent and this Declaration of Service in the below described manner:

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