SUPREME COURT NO.
98305-4
COA NO. 35172-6-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

BRENDAN TAYLOR,
Petitioner.

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

Kittitas County Cause No. 16-1-00323-0

The Honorable Scott R. Sparks, Judge

PETITION FOR REVIEW

Skylar T. Brett
Attorney for Appellant/Petitioner

LAW OFFICE OF SKYLAR T. BRETT, PLLC
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner Brendan Taylor, the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Brendan Taylor seeks review of the Court of Appeals unpublished opinion entered on February 18, 2020. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

> The Supreme Court held in *State v. Gower* that the prejudice analysis after a finding of evidentiary error does not turn on whether there was sufficient evidence to convict but on whether there is a reasonable probability that the outcome of the trial would have been different without the improper admission of inadmissible evidence. Does the Court of Appeals' opinion in Mr. Taylor's case conflict with This Court's ruling in *Gower* when it rules that the improper admission of propensity evidence under ER 404(b) does not require reversal because there was sufficient evidence to find guilt?

IV. STATEMENT OF THE CASE

Brendan Taylor and Anna Kelly both had no-contact orders prohibiting them from contacting one another. RP 119-20. But they decided to live together anyway. RP 70.

On Christmas Day, 2016, their landlord drove past their house and saw Kelly using a snow shovel "like a hatchet" against the windshield of Mr. Taylor's car. RP 140-41. The landlord called 911. RP 145.

When the police arrived, Mr. Taylor was gone and Kelly claimed that he had assaulted her. RP 153-54, 157. The responding officer did not see any injuries other than a cut on Kelly's hand and some redness around her temple. RP 154-55.

The state charged Mr. Taylor with Violation of a No-Contact order (a felony because of the assault allegation).[1][2] CP 7-9.

Mr. Taylor moved *in limine* to exclude any allegations that he had been on drugs at the time of the alleged assault. CP 23. In response, the state argued that the evidence was admissible to show Mr. Taylor's motive for the assault because he "acts like a completely different person when

[1] The state also charged Mr. Taylor with Escape from Community Custody. CP 7-9. Mr. Taylor pleaded guilty to that charge. CP 10-20. But the Court of Appeals reversed that conviction in July 2018, holding that the plea lacked sufficient factual basis. *See State v. Taylor*, 4 Wn. App. 2d 381, 391, 421 P.3d 983, 989 (Wash. Ct. App. 2018), *review granted on other grounds,* 192 Wn.2d 1030, 439 P.3d 1063 (2019), and *rev'd,* 193 Wn.2d 691, 444 P.3d 1194 (2019).. The state did not seek review of that holding the last time this case was in This Court, so that decision is final.

[2] The state also charged Mr. Taylor with Second Degree Assault (based on strangulation) and First Degree Burglary. CP 7-9. The jury acquitted him of the assault charge and the judge dismissed the burglary charge at the request of the state. RP 188, 263. Mr. Taylor also pleaded guilty to two counts of misdemeanor Violation of a No-Contact Order based on phone calls he made to Kelly. CP 10-20.

he's using drugs, which [Kelly] believes is the basis for this assault on that day." CP 16.

The court ruled that the evidence about Mr. Taylor's alleged drug use was admissible because it was being offered to show his motive, not his character. RP 18-19.

At trial, Kelly testified that Mr. Taylor had admitted to her that he sometimes used methamphetamine. RP 71. She said that Mr. Taylor became "mean" when he used the drug. RP 72.

Kelly said that Mr. Taylor admitted to using methamphetamine the day before the alleged assault. RP 74-75. She claimed that he then asked her to have sex with him and she refused. RP 76. After that, she said, he hit her in the face multiple times. RP 83.

Kelly said that, after the alleged assault, she wanted to "break something of [Mr. Taylor's]," which is why the landlord found her hitting his car with a snow shovel. RP 84.

Kelly admitted that she did not remember significant portions of the events of the alleged assault. *See e.g.* RP 74, 77-84, 109-110, 115.

A sheriff's deputy who followed-up with Kelly the day after the alleged assault did not see any marks on her head or face. RP 167. But he returned again later that afternoon and some marks had started to develop. RP 170.

The deputy admitted that Kelly's injuries could, theoretically, have been caused by her "flailing" a snow shovel around. RP 180.

In closing, the prosecutor argued that Mr. Taylor turns from Dr. Jekyll into Mr. Hyde when he uses drugs. RP 239, 253. She claimed that his drug use made him "mean," which is why he assaulted Kelly. RP 237-38.

The jury convicted Mr. Taylor of felony Violation of a No-Contact Order. RP 263.

Mr. Taylor timely appealed. CP 78. The Court of Appeals reversed his conviction for violation of a no-contact order, agreeing with Mr. Taylor's argument that he should have been permitted to stipulate to the existence of a valid no-contact order to vitiate the need to admit the order, itself, as an exhibit. *See Taylor*, 4 Wn. App. 2d at 388-89. The Court of Appeals did not consider Mr. Taylor's other arguments. *See Id.* at 389 n. 4.

This Court granted the state's petition for review and reversed the Court of Appeals on the issue regarding admission of the no-contact order. *See State v. Taylor*, 193 Wn.2d 691, 444 P.3d 1194 (2019). This Court remanded with instructions for the Court of Appeals to consider the yet-to-be-decided additional claims. *Id.* at 703.

On remand, the Court of Appeals affirmed Mr. Taylor's conviction for violation of a no-contact order. *See* Decision (2/18/20). Mr. Taylor timely petitions This Court for review of that second Court of Appeals decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the trial court's error in admitting highly prejudicial evidence, which was inadmissible under ER 404(b), was not harmless. The Court of Appeals' harmlessness analysis conflicts with This Court's prior holding *Gower*. This question is also of substantial public interest and should be determined by the Supreme Court.

The Court of Appeals held that the trial court erred and improperly admitted propensity evidence in violation of ER 404(b) by allowing testimony regarding Mr. Taylor's alleged drug use and his girlfriend's opinion that he acted "mean" when he used the drug. Opinion, pp. 7-10. The Court noted that "[t]he only purpose his history of the past illicit drug use could have had was that he was mean when he used drugs in the past; hence, he was more likely to commit the present assault because he was under the influence of drugs." Opinion, p. 9.

ER 404(b) reflects a long-standing policy against character evidence because "it is said to weigh too much with the jury and to so overpersuade them...." that the accused must be guilty of a particular offense if he has been shown to have a propensity toward that type of

misconduct. *State v. Slocum*, 183 Wn. App. 438, 456, 333 P.3d 541, 550 (2014) (*quoting Michelson v. United States,* 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948)).

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). Improperly admitted evidence is only harmless if it is "of little significance in light of the evidence as a whole." *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) (*citing State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002)).

The analysis does not turn on whether there was sufficient evidence to convict. *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). Rather, "the question is whether there is a reasonable probability that the outcome of the trial would have been different without the inadmissible evidence." *Id.*

The improper admission of evidence results in unfair prejudice to the accused when it encourages the jury to convict based on an improper propensity inference. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012). Evidence that bolsters the testimony of the alleged victim and detracts from that of the accused carries a high risk of prejudice. *Slocum*,

183 Wn. App. at 457. This is particularly true when credibility is the main issue in the case. *Gower*, 179 Wn.2d at 858.

Mr. Taylor was prejudiced by the admission of the drug evidence. The prosecutor relied heavily on the allegation during closing argument, telling the jury that Mr. Taylor turned from Dr. Jekyll into Mr. Hyde when he used drugs. RP 239, 253. She argued that Mr. Taylor was "mean" when he used drugs, which made him more likely to have assaulted Kelly. RP 237-39.

The prosecutor's choice to rely on the propensity evidence in closing demonstrates that it was not "of little significance in light of the evidence as a whole." *Fuller*, 169 Wn. App. at 831. The question of whether Mr. Taylor had assaulted Ms. Kelly pitted her credibility directly against his. The chance that the jury improperly relied on the propensity evidence in finding Mr. Taylor guilty is elevated because of the case's nature as a credibility contest. *Gower*, 179 Wn.2d at 858.

Even so, the Court of Appeals held that the improper admission of the propensity evidence does not require reversal of Mr. Taylor's conviction because it was harmless. Opinion, pp. 9-10. The court's harmlessness analysis finds, essentially, that the evidence was sufficient to convict Mr. Taylor of violation of a no-contact order so he was not

prejudiced by the improper admission of the propensity evidence. Opinion, p. 10.

The Court of Appeals' prejudice analysis in Mr. Taylor's case directly conflicts with This Court's admonition in *Gower* that the question of harmlessness should not turn on whether there was sufficient evidence to convict. *Gower*, 179 Wn.2d at 857. This Court should grant review pursuant to RAP 13.4(b)(1).

This question is also of substantial public interest because it could affect the harmlessness analysis in countless appellate cases. This Court should grant review pursuant to RAP 13.4(b)(4).

VI. CONCLUSION

The Court of Appeals' prejudice analysis in this case directly conflicts with This Court's holding in *Gower*. Furthermore, because it could impact a large number of appellate cases, it is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(1) and (4).

Respectfully submitted March 19, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Brendan Taylor/DOC#395893
Larch Corrections Center
15314 NE Dole Valley Road
Yacolt, WA 98675

and I sent an electronic copy to

Kittitas County Prosecuting Attorney
prosecutor@co.kittitas.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on March 19, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

FILED
FEBRUARY 18, 2020
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, Respondent, v. BRENDAN REIDY TAYLOR, Appellant.	)))))))))	No. 35172-6-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — In *State v. Taylor*, 193 Wn.2d 691, 444 P.3d 1194 (2019), our Supreme Court reviewed and reversed one of two issues decided in our prior decision. It then remanded the appeal to us to resolve Taylor's unresolved arguments—two claims of ineffective assistance of counsel, cumulative error, and entry of an unlawful sentence. We reject Taylor's ineffective assistance claims and accept the State's concession that the trial court exceeded its authority by sentencing Taylor beyond the statutory maximum.

FACTS

Brendan Taylor and Anna[1] began living together in January 2016. A no-contact order prohibited Taylor from being within 1,000 feet of Anna. Nevertheless, they continued to live together.

[1] We refer to Anna by only her first name to avoid subjecting her to unwanted publicity. We intend no disrespect.

On Christmas Day 2016, their landlord drove past their residence and saw Anna using a snow shovel like a hatchet against the windshield of Taylor's car. The landlord called 911. Anna also called 911.

Taylor, who was under supervision by the Department of Corrections, left by the time law enforcement arrived. Anna told the deputy that Taylor hit her multiple times in the head. An ambulance arrived and took Anna to the hospital. The deputy went to the hospital later that day to ask Anna questions. He later testified that Anna's injuries, facial bruising and bumps, were consistent with her being hit multiple times in the head.

The State charged Taylor with several crimes, including felony violation of a no-contact order,[2] assault in the second degree (strangulation or suffocation), and escape from community custody.

PROCEDURE

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

[2] An assault in violation of a no-contact order is a felony. RCW 26.50.110(4).

> On or about December 27, 2017 [sic[3]], 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.

Clerk's Papers (CP) at 19. Taylor attested to the statement's accuracy by signing it. When questioned by the trial court about the statement's truthfulness, 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.

Report of Proceedings (RP) at 7-8. Taylor went to trial on the felony violation of a no-contact order and assault in the second degree.

On the morning of trial, Taylor asked the court to exclude the no-contact order in light of his stipulation that he knew of its existence and it prohibited him from having contact with Anna. The State responded that it planned to admit two no-contact orders. The trial court refused to accept Taylor's stipulation. At trial, the court admitted the no-contact order over Taylor's ER 403 objection.

Also before trial began, the court addressed the parties' motions in limine, including Taylor's request under ER 401, ER 402, and ER 406 to prohibit the State from

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

eliciting testimony about his methamphetamine use. The State asserted that Anna would testify that Taylor used methamphetamine before the assault and would testify Taylor becomes aggressive when he uses methamphetamine. The State argued that Anna had personal knowledge and it went to Taylor's motive, intent, and state of mind at the time of the assault. The trial court agreed with the State and denied Taylor's motion, reasoning: "[T]he [S]tate's not trying to offer it to show the character, but merely the motive." RP at 18-19.

The trial court also excluded Anna's 911 call because the State failed to disclose it to Taylor until just before trial.

Anna testified at trial. During cross-examination, defense counsel asked Anna a series of questions to test her memory of the event. When asked about her memory, Anna described it as "Not the best." RP at 109. When asked whether she remembered talking to the deputy the day of the event, she said she did not remember talking to the deputy, either in the morning or later that day at the hospital. When asked whether she called 911, she said she did not recall calling 911.

After these questions, the State asked the trial court to admit the 911 call. It argued that Taylor's questions opened the door. The trial court agreed, and the State played Anna's 911 call for the jury.

The State called a deputy to admit pictures of Anna taken the day of the event. The pictures did not show bruising or any serious injuries. The deputy testified that bruising takes a bit longer to appear and, by the afternoon, Anna had some bruising.

During closing arguments, Taylor emphasized Anna's inability to remember and various inconsistent statements. He argued these problems made her testimony unreliable.

The jury found Taylor not guilty of assault in the second degree, but did find him guilty of felony violation of a no-contact order. We infer the jury found that an assault occurred, but that the State failed to prove the type of harm—strangulation or suffocation—to raise the assault to second degree. The trial court convicted Taylor and sentenced him to five years of imprisonment and one year of community custody.

Taylor appealed to this court. Taylor argued (1) the trial court abused its discretion by refusing to accept his stipulation and admitting the no-contact order over his objection, (2) he received ineffective assistance of counsel in two instances, (3) cumulative error warrants reversal, (4) the factual basis of his guilty plea to escape from community custody was insufficient, and (5) the sentencing court exceeded its authority by sentencing him beyond the statutory maximum.

In our previous decision, we addressed the first and the fourth issues. We held that *Old Chief v. United States*, 519 U.S. 172, 191-92, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), which requires a trial court to accept an accused's offer to stipulate to a prior conviction when the existence of a prior conviction is an element of the offense, extends to an accused's offer to stipulate to a postconviction no-contact order. *State v. Taylor*, 4 Wn. App. 2d 381, 383, 421 P.3d 983 (2018), *rev'd by*, 193 Wn.2d 691, 444 P.3d 1194 (2019). We also held that the trial court erred by not inquiring about Taylor's inconsistent statements prior to accepting his guilty plea to escape from community custody. *Id.* at 391. Because we reversed Taylor's conviction for felony violation of a no-contact order, we did not address Taylor's other assignments of error. *Id.* at 389 n.4.

The State sought review of our decision. The Supreme Court granted review to address whether *Old Chief* applies to domestic violence no-contact orders. The court reversed our decision and held that *Old Chief* does not apply to domestic violence no-contact orders, and the trial court did not abuse its discretion by declining Taylor's offer to stipulate to the facts contained in the no-contact order. *Taylor*, 193 Wn.2d at 703. The court remanded the appeal to this court for further proceedings. *Id.* We now address Taylor's remaining assignments of error.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Taylor contends there were two instances in which he received ineffective assistance of counsel. First, his attorney waived the proper evidentiary objection by objecting to his prior drug use on grounds other than ER 404. Second, his attorney opened the door to the highly prejudicial and previously excluded 911 call.

To protect a defendant's right to counsel, a defendant has the right to receive effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An allegation of ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *Id.* at 698. To determine whether counsel provided effective assistance, we apply a two-pronged test: (1) whether counsel's performance was deficient, and (2) whether that deficient performance prejudiced the defendant to an extent that changed the result of the trial. *Id.* at 687. We can address the second prong initially "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice." *Id.* at 697.

1. ER 404(b) objection was preserved, and admission of improper evidence was harmless error

Taylor argues his attorney provided ineffective assistance of counsel by objecting to evidence of drug use on improper grounds, rather than ER 404(b) and ER 403. In the

alternative, Taylor argues that—if the ER 404(b) issue is preserved—the trial court erred in its ruling.

Although the motion in limine did not raise ER 404(b), the trial court's ruling shows it addressed the evidence in light of ER 404(b):

> And the [S]tate's not trying to offer [the drug use] to show the character, but merely the motive.

RP at 18-19. Because the ER 404(b) issue was addressed by the trial court, and therefore preserved for review, Taylor is not prejudiced by his counsel's failure to raise an ER 404(b) objection.

This court reviews a trial court's admission of ER 404(b) evidence for an abuse of discretion. *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). "An abuse of discretion occurs only when the decision of the court 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)).

ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). The evidence may be admitted for certain purposes such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity or absence of mistake or accident. ER 404(b). The State must meet a "substantial burden" when attempting to bring in evidence of prior bad acts under one of these exceptions. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Before admitting misconduct evidence, the court must find by a preponderance of the evidence that the misconduct actually occurred, identify a proper purpose for the evidence, determine its relevance to prove an element of the offense, and weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

Here, the trial court engaged in no analysis other than to affirmatively state "the [S]tate's not trying to offer [the evidence] to show the character, but merely the motive." RP at 18-19. Anna's testimony of Taylor's history of drug use had no bearing as to whether Taylor violated the no-contact order. The court held that it was to show motive. We disagree. The only purpose his history of past illicit drug use could have had was that he was mean when he used drugs in the past; hence, he was more likely to commit the present assault because he was under the influence of drugs. This is propensity evidence, which is prohibited by ER 404(b). However, not all evidentiary error is reversible.

"Erroneous admission of evidence in violation of ER 404(b) is analyzed under the nonconstitutional harmless error standard—that is, we ask whether there is a reasonable probability that, without the error, 'the outcome of the trial would have been materially

affected.'" *State v. Gower*, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014) (internal quotation marks omitted) (quoting *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012)).

The admitted testimony was harmless because the outcome of the trial would not have been different. The jury found Taylor not guilty of assault in the second degree. The evidence presented at trial supported Taylor's sole conviction for violation of a no-contact order. The State admitted the two no-contact orders, which were in effect on December 25, 2016. Taylor knew of these orders. Anna testified to her interaction with Taylor on Christmas Day and how he put his arm across her throat and hit her multiple times. The deputy testified that her bruising, which was manifested later that day at the hospital, was consistent with being assaulted. And because the felony violation of a no-contact order required the jury to find that Taylor's conduct amounted to an assault—and the jury found him not guilty of assault in the second degree—the jury was not materially affected by the testimony of Taylor's drug use by Anna.

2. Asking victim if she called 911 was not deficient performance

Taylor argues he received ineffective assistance of counsel because his attorney opened the door to the 911 call. We disagree.

To establish ineffective assistance of counsel, the defendant must show deficient performance and that the deficient performance prejudiced the defendant. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). To prove deficient performance, the defendant must show that the representation fell below an objective standard of reasonableness and there is a reasonable probability that, absent the error, the result would have been different. *Id.* at 842. In analyzing such a claim, the appellate court starts with a presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Competency of counsel is determined based on the entire record below. *Id.*

When counsel's conduct exhibits legitimate trial strategy or tactics, the performance is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). A defendant can rebut the presumption of reasonable performance by showing that there was no "'conceivable legitimate tactic'" explaining his counsel's conduct. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The key question is not whether the attorney's choices were strategic, but whether they were reasonable. *Id.* at 34.

Defense counsel's central defense was that Anna was not believable. Defense counsel sought to show this, in part, by establishing that Anna had a poor recollection of

the day's events. He succeeded in doing so. This success may have been part of the reason the jury did not convict Taylor on the serious charge of assault in the second degree.

Unfortunately, the trial court determined that defense counsel opened the door to the 911 call when he asked the victim *if* she called 911. Anna testified she did not recall. This answer may have left the jury with the false impression that Anna did not call 911. Such an impression would have added weight to Taylor's argument that he did not injure Anna or that her injuries were not serious.

Defense counsel took a calculated risk the trial court would not admit the 911 recording and the jury would be left with a false impression that Anna did not call 911. Because this strategy was reasonable, defense counsel was not deficient. We conclude that Taylor did not receive ineffective assistance of counsel.

B. CUMULATIVE ERROR

Taylor contends the cumulative errors warrant reversal. We disagree.

"The cumulative error doctrine applies when several trial errors occurred and none alone warrants reversal but the combined errors effectively denied the defendant a fair trial." *State v. Jackson*, 150 Wn. App. 877, 889, 209 P.3d 553 (2009). The only trial

court error was admitting propensity evidence, which we concluded was harmless. There is no cumulative error.

C. SENTENCE EXCEEDING STATUTORY MAXIMUM

Taylor argues the sentencing court exceeded its authority by sentencing him to a combined period of incarceration and community custody longer than the 60-month statutory maximum for class C felonies. A felony violation of a no-contact order is a class C felony. RCW 26.50.110(4). It carries a maximum sentence of five years. RCW 9A.20.021(1)(c). The five-year maximum includes the total combined period of incarceration and community custody. RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). The court sentenced Taylor to 60 months in prison and 12 months of community custody.

The State concedes the trial court exceeded its authority by imposing a prison term and community custody totaling 72 months. We agree, accept the State's concession, and remand for resentencing.[4]

D. APPELLATE COSTS

[4] Because resentencing is required, we do not address Taylor's argument that the State failed to prove prior convictions.

Taylor asks the panel to exercise its discretion to waive costs on appeal. In accordance with RAP 14.2, we defer the decision of appellate costs to our court commissioner.

Affirmed, but remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

LAW OFFICE OF SKYLAR BRETT

March 19, 2020 - 3:21 PM

Transmittal Information

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