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Court of Appeals
Division III
State of Washington

No. 96325-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III
No. 35172-6-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRENDAN REIDY TAYLOR,

Defendant/Appellant

Respondent's Brief

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A. RESPONSE TO ASSIGNMENTS OF ERROR

a. When knowledge of a valid no contact order is part of the charged offense, the court is not required to accept the defendant's stipulation regarding knowledge of the order because the state can admit the no contact order in the case in chief to prove the element when the probative value of the no contact order is not substantially outweighed by an unfair prejudice.

i. The trial court did not abuse its discretion in refusing to accept the defendant's stipulation to the no contact order because the state has a right to present evidence of the no contact order and it is not like a prior criminal conviction.

ii. The no contact order was admissible in the case in chief as it was required to prove the state's charged offense.

iii. The no contact order is not like a prior criminal conviction; therefore Old Chief does not apply.

iv. There was no prejudice to the defendant in the admission of the no contact order

b. A defense attorney is not ineffective when making proper objections about the admission of evidence even there were additional objections that could have been raised.

i. Mr. Taylor had the effective assistance of counsel at his trial as demonstrated by the record.

ii. Mr. Taylor was not prejudiced by his attorney's performance when she made proper objections to the admissibility of Mr. Taylor's drug use.

iii. Even when defense did not specifically request preclusion of drug use based on ER 404(b), any objection under those grounds would have been denied as the court weighed admission of the evidence carefully.

iv. Evidence of Mr. Taylor's drug use on the day of the offense was admissible under 404(b) because it was offered to prove his state of

mind, a specific ground allowed under the rules.

v. Evidence of Mr. Taylor's drug use was admissible under ER 403 because the probative value was not substantially outweighed by unfair prejudice.

vi. Evidence that Mr. Taylor acted "mean" was admissible under ER 404(b) because it was offered to prove his state of mind at the time of the assault.

c. A defense attorney is not ineffective when making arguments about credibility in questioning the victim, even when doing so opens the door to previously excluded evidence.

i. Mr. Taylor's counsel attacked the victim's credibility, which was a central issue in the trial, even though doing so opened the door to the 9-1-1 call, which the victim did not remember making.

d. There is no cumulative error based on trial counsel's strategy and effective presentation of Mr. Taylor's

defense, even though there was more the attorney could have argued.

e. Mr. Taylor's guilty plea to Escape from Community Custody cannot be challenged for the first time on appeal and is supported by a sufficient factual basis and is not void due to a clerical/scrivener's error regarding the date of offense.

f. The sentencing court did exceed statutory authority by imposing sixty months prison and an additional twelve months of community custody for a class C felony when the statutory maximum is sixty months.

g. The record demonstrates the state did prove the prior felony convictions supporting the calculations of the defendant's offender score.

B. ISSUES PRESENTED

a. Is it an abuse of discretion for the trial court to admit certified copies of a no contact order when the state charged the defendant with violating a no contact order even when the defendant also stipulated to knowledge of the order when the probative value of

the no contact order is not substantially outweighed by unfair prejudice?

b. Is a criminal defendant's trial attorney effective when they made proper objections, attack the credibility of the victim and preserved the record for appeal, even when there is "more" they could have done or argued.

c. Can a defendant challenge the factual basis for their guilty plea for the first time on appeal, and if so, is a conviction for Escape from Community Custody supported by a factual basis that the defendant confirmed at entry, was accepted by the court, and met the elements of the crime charged even though there was a typographical error on the document regarding the year the alleged offense took place.

d. Must a defendant be resentenced when the sentencing court imposes a total sentence of sixty months in prison and twelve months of community custody that totaled seventy-two months which exceeds the statutory maximum for a class C offense of sixty months?

C. STATEMENT OF THE CASE

Mr. Taylor was charged via amended information six counts: Count 1, Assault in the 2nd degree; Count 2, Violation of a Protection Order; Count 3, Burglary in the First Degree; Count 4, Community Custody Violation; and Counts 5 and 6, both Violation of a Protection Order; all except count 4 (community custody violation) were charged as domestic violence offenses. (CP at 7 – 9). Counts 1 – 3 were alleged to have been committed on December 25, 2016. (CP at 7 – 9). Count 4 (the community custody violation) was alleged to have been committed on December 27, 2016. (CP at 7 – 9). Counts five and six were alleged to have been committed on January 7, 2017. (CP at 7 – 9). At a status hearing on March 6, the defendant changed his plea on counts four, five, and six and the remaining three counts were set for trial the next day (RP at 4 – 6).

At his change of plea hearing, defense counsel gave to the court a statement on plea for (RP at 5; CP 10 – 20). The defendant gave a factual basis that had the incorrect date (the date alleged was December 27, 2016 but the paperwork and the judge's recitation of the statement indicates the date December 27, 2017). The factual basis to support the guilty

plea was: "on or about December 27, 2017 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." (RP at 7; CP at 10 – 20). When asked if it was true, the defendant said, "I – I was out of gas in Oregon. But it's – yeah, it's basically true." The court went on, "But you knew that you were supposed to keep yourself –," the defendant answered, "Yeah. I was on the phone with him and – and the 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 – missing out on – on that. So --." (RP at 7 – 8).

On the morning of trial, defense made several motions in limine asking the court to limit the evidence the state could use in its case in chief including asking no reference be made to the fact Mr. Taylor was in custody, Mr. Taylor's prior assaultive behavior, and "testimony regarding Mr. Taylor being on drugs/methamphetamine as not relevant; ER 401/402" and lacking personal knowledge. (CP at 22 – 23; RP 15 – 16). The state informed the court that the

alleged victim, Ms. Kelly would testify that the defendant told her he had done drugs the day before and the day of the assault, that he was going to buy drugs, and that after returning from this trip that he snorted methamphetamine. Additionally the victim's testimony would be that she has a long term relationship with the defendant and that when he uses drugs, he acts like a completely different person and that in her experience on the day of the assault, he was acting consistent with the behavior she had seen from him in the past when using drugs (RP at 16 – 17). The judge specifically ruled the testimony was relevant and that the state had a legitimate purpose under ER 404(b) to offer the evidence (RP at 18 – 19). The court invited the defense to offer a limiting instruction if appropriate at an appropriate time (RP at 19).

Also in the hearing on the motions in limine, defense offered a stipulation, specifically in the filed motions in limine the defendant indicated, "The defendant has entered a stipulation as to the knowledge of the No Contact Order, thus the NCO should be excluded from admission of evidence." (RP at 22 – 23; CP at 21). The state indicated that there were

two active NCOs and the state had planned to admit both of them into evidence. (RP at 19 – 20). Defense indicated the intent was to stipulate to the order and eliminate further prejudice to him regarding the contents of the order. (RP at 20). When the state indicated the requirements for the underlying crime were to prove that the order existed and that the defendant knew of the orders, defense indicated the defendant would be willing to stipulate to both of those elements (RP at 21). The parties took a recess and after the recess, the court indicated it had done some research on whether a defendant can force the state to accept a stipulation (RP at 48).

Additionally, at the pretrial conference the morning trial began, counsel for the state provided a copy of the 9-1-1 call the victim had made in the case (RP at 53). Although defense had requested the audio previously, the only call that had been given to defense was a call by another witness and not a call by the victim (RP at 52, 54, 63). The dispatch center KITCOM admitted that the initial request for the 9-1-1 audio hadn't been fulfilled correctly because they had only given the audio of one of the two 9-1-1 calls (RP at 52).

Counsel for the state became aware of the 9-1-1 call the morning of trial and immediately disclosed to defense (RP at 52 – 53). Based on the untimely disclosure, the court ruled the 9-1-1 call inadmissible (RP at 63).

Anna Kelly testified that throughout her relationship with the defendant, they fought about his drug use, that the defendant told Ms. Kelly he used Meth and she could notice a difference in his behavior when he was using (RP at 71 – 72). She told the jury that on December 23, 2016[1] the defendant went to Cle Elum to get drugs (RP at 72). They had a text message conversation where she told the defendant not to come back to the house if he was going to be on drugs, but that he did eventually return to the house (RP at 73). When he returned he was paranoid and sexually aggressive and the victim testified she didn't get any sleep (RP at 74). She said she tried to avoid him on Saturday and that he had told her he finished the rest of what he had Saturday morning (RP at 74). She said he didn't sleep or eat (RP at 73, 75).

[1] The transcript lists "Christmas, 2015" but it is clear the incident happened in 2016. (RP at 72). Deputy Richey specifically testified that the incident occurred on Christmas morning, 2016 (RP at 152). Deputy Whitsett also testified that it was "Christmas this year." (RP at 165).

On Sunday, Christmas morning, he approached the victim about having sex and she told him she didn't want to be used when he was on drugs (RP at 76). He came back into the room later and said something to her about "wifely duties" and then although she couldn't remember the details of the conversation, his arm was across her chest and he grabbed her arm, although she testified that she was trying to block him out (RP at 77). His arm was on her throat and she turned her head so she could keep breathing because he was pushing pretty hard and with her free hand she grabbed his glasses off his face and threw them across the room to get him off of her (RP at 77 – 78).

She had trouble remembering some specific parts of the attack, specifically the chronology and order of events was difficult for her to piece back together (RP at 79 – 80, 82, 83, 84, 95, 107, 134). She was able to describe that they left the bedroom and were in the living room/kitchen area and he hit her and her body went to the ground and he kept hitting her while she was on the floor (RP at 82 – 83). At some point they went outside and she attempted to break the windshield of his car with a snow shovel because he had hurt

her and she wanted to hurt something of his (RP at 85, 126 – 27). She said their landlord showed up, Mr. Rodney Blossom and she asked him to call the police (RP at 86). She told the jury that she had bruises and lumps all over her head, a large lump on her forehead that continued to cause her pain, pain in her jaw, and the assault had a permanent impact on her hearing (RP at 96 – 97). In the days after the assault she had several bruises appear on her arms and legs and she was unable to work (RP at 98).

She told the jury she stayed in a relationship with him despite his "mean" treatment and use of drugs because he was trying to be clean and sober and had been to rehab the previous January (RP at 86). She told the jury that even though she knew about a no contact order prohibiting the defendant from contacting her they were living together because they loved each other and didn't want to be apart. (RP at 87). In a series of questions about what the victim remembered about that day[2], defense also asked the victim

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[2]Q: Okay. So, I understand that you're indicating that you're -- having a hard time recalling the event, okay—
A: Correct.
Q: And so how is your memory from day to day.
A: Not the best.

directly if she called 9-1-1 and the victim answered that she did not recall calling 9-1-1 (RP at 109 -108).

After the testimony, over defense objection, the state moved and admitted state's exhibit number 35, which was the NCO in effect on the date of the assault prohibiting the defendant from having contact with the victim (Exhibit 35, RP at 181). After admission, the defense wanted to review the exhibit and the court specifically noted, "I don't see anything on here that's objectionable." (RP at 183).

After the victim's cross examination, the state also asked the court to reconsider its prior ruling precluding the 9-1-1 recording, indicating defense had opened the door to its admission by asking the victim directly if she called 9-1-1. The court took the issue under advisement for the evening

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Q: Okay. So do you remember events when they're happening during the day?
A: I do.
Q: Okay. So, when you gave a statement on the -- on Christmas morning, a few hours after it occurred, do you remember that?
A: I was in the hospital, with a lot of head pain.
Q: Okay. Do you remember a deputy coming out that day? That morning?
A: To the house?
Q: Uh-huh.
A: No, I don't.
Q: You don't. You don't remember talking to a deputy.
A: Not that day, no.
Q: Would it surprise if you did talk to a deputy that day?
A: No.
Q: Okay. Did you -- did you call 9-1-1?
A: I don't recall calling 9-1-1.

recess after the first day of trial and readdressed it before trial resumed the next morning (RP at 186 – 87). The court reversed their prior ruling excluding the call and listened to the 9-1-1 call and ruled it admissible based on defense opening the door (RP at 197). The tape was played to the jury (RP at 206 – 211).

During closing arguments, defense made repeated points about the victim's credibility: "So Jekyll and Hyde. Who fits this description? Her credibility;" "Her testimony doesn't add up;" "She can't remember a lot of stuff;" "What are the details? We don't know 'cause she can't remember;" "States she can't remember because of all the trauma. What trauma? Look at the photos. Again, they are not (inaudible) consistent with what she told you;" "This is made up. She's vindictive." "She asked for the ambulance when she got there, but on the 91-1-1 call today you heard she said, 'No, I don't need one;'" "There's another inconsistency;" "She is not credible." (RP at 247, 248, 249, 250, 251, 252).

After closing arguments, the court read a stipulation to the jury regarding the no-contact order saying, "The defendant hereby enters a stipulation agreeing that he had

knowledge of the no-contact order" and instructing the jury they could also consider that stipulation (RP at 256, CP at 21). The jury found the defendant not guilty of Assault in the 2nd degree (count one); guilty of violation of a protection order (count two) and answered the special verdict form regarding domestic violence in the affirmative (RP at 263, CP at 53 – 56). As the trial concluded, counsel for the state indicated that the defendant's certified prior convictions had been marked as exhibits for the court to consider prior to sentencing[3] (RP at 270). At sentencing, the court sentenced the defendant to sixty months on count two, 90 days on count four, and 364 days on counts five and six all to run concurrent and also imposed twelve months of community custody (CP at 60 – 72)

D. ARGUMENT

a. The trial court did not err by admitting certified copies of a no contact order when the state charged the defendant with violating a no contact order even

[3] The Felony Judgment and Sentence document lists three felony convictions as counting in calculating the offender score but the record on appeal is silent as to which of these priors were marked as exhibits by the state prior to sentencing.

when the defendant also stipulated to knowledge of the order.

The interpretation of an evidentiary rule is a question of law that we review de novo. Diaz v. State, 175 Wn.2d 457, 461-62, 285 P.3d 873 (2012) (citing State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)). So long as the trial court interpreted the rule correctly, we will review its decision to admit or exclude evidence for "an abuse of discretion." State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012) (citing Foxhoven, 161 Wn.2d at 174). "Abuse of discretion" means "no reasonable judge would have ruled as the trial court did." State v. Mason, 160 Wn.2d 910, 934, 162 P.3d 396 (2007) (citing State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). Put another way, to reverse we must find the decision is "'unreasonable or is based on untenable reasons or grounds.'" Id. at 922 (quoting State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003)).

"A stipulation is an express waiver that concedes, for purposes of trial, the truth of some

alleged fact, with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it. While the State must prove every element of a crime beyond a reasonable doubt, for strategic reasons, defendants charged with felony violation of a domestic violence no-contact order under Wash. Rev. Code § 26.50.110(5) regularly stipulate to prior convictions that are elements of the charged crime in order to constrain the prejudicial effect on a jury. When the parties stipulate to the facts that establish an element of the charged crime, the jury need not find the existence of that element, and the stipulation therefore constitutes a waiver of the right to a jury trial on that element. A defendant also waives the right to require the State prove that element beyond a reasonable doubt." State v. Case, 187 Wn.2d 85, 384 P.3d 1140 (2016). If the government accepts a stipulation to a particular fact but the stipulation is inadequate, then the government must accept that risk. State v. Case, 187 Wn.2d 85; 384 P.2d 1140 (2016), citing Tompkins *v.* State, 278 Ga. 857, 857,

607 S.E.2d 891 (2005) (refusing to imply from defendant's stipulation to a bench trial that the stipulation also included a stipulation regarding venue); United *States* v. Hollis, 506 F.3d 415, 419-20 (5th Cir. 2007) (refusing to imply from defendant's stipulation to prior convictions that these prior convictions were valid or constitutionally obtained so as to preclude the defendant from challenging the validity of those convictions at sentencing under the federal Armed Career Criminal Act of 1984 (18 U.S.C. § 924(e))); Gooding v. Stotts, 856 F. Supp. 1504, 1508 (D. Kan. 1994) ("If the proof is lacking, regardless of whether a case is tried to the court on stipulated facts or to a jury, on either stipulated facts or in a trial filled with in-court testimony, the result is the same—the defendant is found not guilty.").

A defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense. Old Chief v. United States, 519 U.S. 172, 176; State

v. Johnson, 90 Wn. App. 54, 62-63, 950 P.2d 981, 98 (1998).

Defendant was charged with violating a Domestic Violence No Contact Order under RCW 26.50.110(4), which states: "Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony." For instruction, the WPIC for this offense is: WPIC 36.51.01 Violation of a Court Order—Felony—Definition, A person commits the crime of felony violation of a court order when he or she knows of the existence of a no-contact order and knowingly violates a provision of the order, and the person's conduct was an assault.

Defendant's offer to stipulate to knowledge of the no contact order would have proven the element of the crime the state had to prove regarding knowledge of the order. The question for the court here is whether a no-contact order is like a prior conviction (as in Old Chief), or whether the no contact order has probative value that is not substantially outweighed by unfair prejudice that would require sanitation or a stipulation as opposed to admission. The court made and initial ruling on the admission, finding specifically that the order was not like a prior conviction as in Old Chief and admitted the order.

Arguing that a no contact order has the same prejudicial effect (particularly using 404(b) language) as a prior conviction is not a strong argument. If a jury knows a defendant has a prior felony conviction, there is danger that they may convict the person charged because of their history and not based upon the present case and facts presented before them and so the prejudicial effect of a prior conviction

substantially outweighs the probative value of any document proving that conviction exists – a stipulation gives the jury the requisite knowledge to find the prior without having the details of the prior.

The prejudicial effect of a no contact order is not the same – the jury does not face the same temptation – the order simply proves that a court has ordered the defendant not to have contact with the protected party. The only arguable prejudicial effect in this particular case is that the No contact order was captioned a "post-conviction" no contact order, which raises some of the concerns that were raised in the Old Chief case; that a jury who is aware of a prior conviction might convict for the wrong reason. This prejudicial effect does not substantially outweigh any probative value and is almost de minimus because although the order has the caption, the content of the actual order is regarding the exact obligation of the party regarding prohibited content – lending support to the additional probative value of the actual order:

it is very explicit regarding what type of contact is disallowed.

There is also additional probative value – the copy of the no contact order has the defendant's signature and shows the strength of his "knowledge" regarding the order – he hasn't just heard at some time or place that there is an order, he has signed a copy of the order; his signature is strong evidence for the state.

In this particular case, the protective order also had additional probative value in that the order was issued on December 19, 2016 – showing that six days prior to the assault the defendant was ordered by the court not to have contact with the victim. The nearness in time to the conviction is probative value that the defendant was keenly aware of the existence of the order. Although a stipulation could be fashioned that did also give the jury that information, that was not the case here and the law remains that aside from prior convictions, the default is that the

state is put to their burden and not required to accept defense stipulations.

b. Mr. Taylor's attorney was effective when she made proper objections, attacked the credibility of the victim and preserved the record for appeal, even when there is "more" she could have done or argued.

To establish ineffective assistance of counsel a defendant must prove deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984); In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992). To prove deficient performance, a defendant must demonstrate that the representation fell below an objective standard of reasonableness under professional norms and that there is a reasonable probability that, but for counsel's error, the result would have been different. Rice, 118 Wn.2d at 888 – 89.

As a general rule, in any claim of ineffective assistance of counsel, the "[c]ourts engage in a strong

presumption counsel's representation was effective" and deference is given when reviewing a defense attorney's strategic trial decisions. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "Competency of counsel is determined based upon the entire record below." McFarland, 127 Wn.2d at 335. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). In this regard, the presumption of adequate representation is not overcome if there is any "conceivable legitimate tactic" that can explain counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Throughout the trial, Ms. Alumbaugh showed strategy, thought, and decision-making that indicated she was able to provide effective assistance to Mr.

Taylor in his trial, even though as is always the case on appeal a different attorney could view her strategy as lacking.

i. Mr. Taylor's counsel made a timely objection to evidence by the state regarding prior drug use of the defendant and the court denied defense's motion to preclude the testimony under other evidence rules, but an objection under ER 404(b) still would have failed.

An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Courts may admit ER 404(b) evidence to prove the defendant's state of mind where the misconduct comes to bear on the defendant's mental state at the time of the alleged offense. State v. Acosta, 123 Wn. App. 424, 434-35, 98 P.3d 503 (2004). In State v. Lord, 117 Wn.2d 829, 872-73, 822 P.2d 177 (1991), the court did not

abuse its discretion by admitting evidence of the defendant's alcohol and marijuana use under ER 404(b) to demonstrate his state of mind during the commission of the crime.

The argument made by appellate counsel that trial counsel was ineffective regarding an improper objection fails for two reasons – first defense did object to the admission of the evidence in her motions in limine, although as counsel points out she did not specifically argue an ER 404(b) objection. Second, the court made a finding admitting the evidence that is consistent with established case law. The objection here by appellate counsel is that trial counsel did not do a good job because she didn't make the right objection. The state's response is that even if defense had objected under 404(b), the evidence was admissible and the objection would have been denied; therefore her failure to raise the correct evidentiary rule results in

harmless error. The question for the court to consider is whether Ms. Alumbaugh made effective objections – the answer is that she put thought into the admission of the state's evidence, prepared motions in limine regarding the evidence and advanced arguments about the evidence to the court at the pretrial hearing. Her failure to object under a different theory does not make her deficient.

ii. Mr. Taylor's attorney attacked the victim's credibility, which was a central issue in this case by asking her about whether she called 9-1-1, even though doing so opened the door to previously excluded evidence.

Because Mr. Kelly was the only state's witness who presented eye witness testimony to the jury of the assault, her credibility was a central issue in the case – her retelling of the assault varied dramatically between two different police officers to whom she gave a

statement about the assault and even in her testimony at trial[4]. Her ability to recall the events was critical to the state's case, thus her credibility was a central issue in the case and the main point of the defense – she could not be believed. Thus, the fact that an audio recording existed that she "didn't remember" making became an important factor for the jury to consider in evaluating her credibility. Defense's tactical decision to address this lack of memory or recall on cross examination, while opening the door to the admission of the audio, highlighted her credibility issues for the jury and was not ineffective.[5]

Even if Ms. Alumbaugh' s decision to attack the victim's credibility regarding her memory of the event and calling 9-1-1 was not a calculated risk, it was a good argument to

[4] Arguably, even her version of the assault given on the 9-1-1 audio differed from her accounts given to police or her trial testimony, thus highlighting her credibility issues from the viewpoint of the defense.

[5] Defense counsel actually used the inconsistencies between the 9-1-1 call and the victim's trial testimony in her closing argument.

make the jury because her credibility was the central issue in the case – if the jury could not believe her, they could not convict. Defense's opportunity to show her lack of credibility was essential in their presentation of the case.

b. There is no cumulative error

Under the cumulative error doctrine, a court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant their right to a fair trial, even if each error standing alone would be harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. See Weber, 159 Wn.2d at 279.

The only error present here arguably that has weight is that defense should have made a 404(b) objection to the admission of Mr. Taylor's drug use on the day of the assault. Based on case law though, that argument was unlikely to persuade the court

because the drug use was relevant to his state of mind on the day of the assault. Opening the door to the 9-1-1 call was also beneficial to defense because the question to the victim about her memory of the 9-1-1 call highlighted the credibility issues that were central to the defense case. Additionally, the admission of the no contact order was required by the court as a no contact order is not like a prior criminal conviction. There is no cumulative error.

In retrospect, Mr. Taylor's attorney could have made different choices regarding the presentation of evidence or his defense, but her failure to measure up to the perfect attorney's standard, looking through a backwards lens does not render her performance so deficient that the cumulative errors totaled require reversal. Instead, Ms. Alumbaugh made careful choices regarding limiting the evidence before the jury, attacking the credibility of the victim, and arguing a defense theory of the case.

c. Mr. Taylor's conviction for Escape from Community Custody was supported by a factual basis that was accepted by the court and met the elements of the crime charged even though there was a typographical error on the document regarding the year the alleged offense took place.

An appellate court will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An exception exists, however, for manifest errors affecting a defendant's constitutional rights. RAP 2.5(a) (3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). There is a two-step analysis to determine whether to examine alleged constitutional errors for the first time on appeal. State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). First, the court must determine whether the alleged error involves a constitutional issue. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Second, the court must determine whether the error was manifest. Id. 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). Put another way, a "manifest error" is an error that is "'unmistakable, evident or indisputable.'" State v. Burke, 163 Wn.2d 204, 224, 181 P.3d 1 (2008) (quoting Lynn, 67 Wn. App. at 345). Purely formalistic errors are not manifest. Kronich, 160 Wn.2d at 899. Even where a constitutional error is manifest, it can still be waived if the issue is deliberately not litigated during trial. State v. Walton, 76 Wn. App. 364, 370 (1994).

The defendant has a remedy under the criminal rules in the Superior Court, CrR 4.2. Under CrR 4.2, to obtain relief from his plea, the defendant must demonstrate a manifest injustice, i.e., an injustice that is "'obvious, directly observable, overt, not obscure.'" State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (quoting State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).

Examples of a manifest injustice include denial of effective assistance of counsel and an

involuntary plea. State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991). An inadequate factual basis may affect the voluntariness of a plea, but it is not necessarily fatal to a plea's validity. In re Hews, 108 Wn.2d 579, 741 P.2d 983 (1987); In re Barr, 102 Wn.2d 265, 269, 684 P.2d 712 (1984). "[T]he establishment of a factual basis is not an independent constitutional requirement, and is constitutionally significant only insofar as it relates to the defendant's understanding of his or her plea." In re Hews, 180 Wn. 2d at 591 -92.

In this case, the defendant may not raise an objection to his factual basis for the first time on appeal. If the court is inclined to consider this argument, the case law regarding grounds for withdrawal of plea under CrR 4.2 are instructive – the issue defendant raises here is with the element of willfulness.

The facts before the court at sentencing were that Mr. Taylor had engaged in criminal conduct with the victim on Christmas day and was gone from the

scene when the police arrived. In his factual basis, he admitted he was in another state two days later and when confronted with the language on the statement on plea; he acknowledged it was "basically true." The court accepted this basis and this court should affirm.

The argument regarding the incorrect year number is superfluous. It is within every human's understanding that in the months of December and January, as the year changes and the number changes in dates that are written, many typographical errors are committed by people in inserting the prior year's number instead of the new year; i.e. writing January, 2016 instead of January, 2017. That type of error is clearly what happened here. The months were January and December and the attorney filling out the form in 2017 wrote "2017" instead of "2016." This is a clerical error and is not a deficiency in the factual basis at all.

d. Mr. Taylor should be resentenced because the court imposed a total sentence of sixty months in prison

and twelve months of community custody that totaled seventy-two months which exceeds the statutory maximum for a class C offense of sixty months.

The state agrees with defense analysis on this issue, the court exceeded the statutory maximum for a Class C felony by imposing sixty months in prison and twelve months of community custody and the court must resentence and strike the community custody or reduce the prison sentence.

B. CONCLUSION

For the reasons stated, the convictions should be affirmed. The case should be remanded to the Superior Court to strike the community custody ordered or to re-sentence Mr. Taylor below the statutory maximum of sixty months including the community custody if any is ordered.

Dated this 30th day of October, 2017,

/s/

Jodi M. Hammond
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Attorney for Respondent

PROOF OF SERVICE

I, Jodi M. Hammond, do hereby certify under penalty of perjury that on 30th day of October, 2017, 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:

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