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SUPREME COURT
STATE OF WASHINGTON
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No. 96325-8

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

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

In *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997), the United States Supreme Court used its supervisory authority over the federal courts to adopt a special Fed. R. Evid. 403 procedure for avoiding the potential emotional response jurors might experience when the nature of a defendant's prior conviction is admitted. The Court strictly limited its newly adopted specialized Fed. R. Evid. 403 non-constitutional mandated rule to "cases involving proof of felon status." *Old Chief*, 519 U.S. at 183, n. 7.

This supplemental brief expands upon arguments contained in the State's Respondent's Brief and Petition for Review regarding the impropriety of extending *Old Chief* to post-conviction no contact orders in general and to Brendon Taylor's order in particular. The State's decision not to address certain issues in this supplemental brief should not be considered as a concession, but should be interpreted as the State's determination that the unaddressed issues are adequately discussed in its other briefs.

II. STATEMENT OF ISSUES

1. *Old Chief* created a "second best evidence rule" to be applied in a specific circumstance. Should application of *Old Chief's* "second best evidence rule" be limited to those situations in which the traditional application of ER 403 is insufficient to protect a defendant's right to a fair

trial?

2. In order to invoke the protections of ER 403, must a defendant identify with specificity the relevant evidence which should be excluded because “its probative value is substantially outweighed by the danger of unfair prejudice?” ER 403.

III. ARGUMENT

Defendants are entitled to a fair trial. Judges may protect this right when a defendant is charged with a violation of a no contact or protection order under the traditional rules of evidence. A defendant who makes a timely and specific objection to irrelevant or unduly prejudicial portions of a protection order is entitled to have those portions of the order redacted under ER 402 and ER 403. A defendant may not, however, force the State to accept an admission¹ in lieu of the order, itself.

The State asks this Court to hold that when a defendant who wishes the State to enter into a stipulation in lieu of the admission of the no contact or protection order, he should ensure that the proposed stipulation addresses

¹While Taylor and Division III both refer to Taylor’s offered statement as a “stipulation,” see *State v. Taylor*, 4 Wn. App. 2d 381, 421 P.3d 983 (2018), review granted, ___ Wn.2d ___ (Feb. 20, 2019), CP 21, it was not. See, e.g., *State v. Cronin*, 142 Wn.2d 568, 585, 14 P.3d 752 (2000) (“Generally, a stipulation is an agreement between the parties to which there must be mutual assent.”). A unilateral statement, such as that offered by Taylor or that mandated by *Old Chief*, is an “admission,” not a “stipulation.” See *Old Chief*, 519 U.S. at 191 (“it was an abuse of discretion to admit the record when an admission was available”); *Old Chief*, 519 U.S. at 200 (O’Connor, J. dissenting) (“Obviously, we are not dealing with a stipulation here. A stipulation is an agreement, and no agreement was reached between petitioner and the Government in this case.”).

all of the relevant points or elements that would otherwise be established by the protection or no contact order, itself. The State's rejection of a proposed stipulation does not require reversal of a conviction where the defendant (1) does not identify with specificity what portions of the no contact or protection order the defendant finds problematic so that they may be redacted from the order that is submitted to the jury, (2) does not acknowledge all of the elements that would otherwise be established from the contents of the no contact or protection order, and/or (3) the order contains information that allows the State to create "a coherent narrative of [the defendant's] thoughts and actions in perpetuating the offense for which he is being tried." *Old Chief*, 519 U.S. at 192.

A trial court does not abuse its discretion by denying a request to compel a prosecutor to accept a defendant's admission in lieu of documentary evidence where (1) the defendant does not identify with specificity the irrelevant or unduly prejudicial portions of the no contact or protection order, (2) the defendant does not establish why redaction of those items from the no contact or protection order is insufficient to preserve the defendant's right to a fair trial, (3) the defendant does not include all of the facts and/or elements contained in the no contact or protection order that the State would otherwise prove through the order in his admission, and/or (4) the contents of the no contact or protection order allows the State to create "a coherent narrative of

[the defendant's] thoughts and actions in perpetuating the offense for which he is being tried." *Old Chief*, 519 U.S. at 192.

A. Compelled Substitution of Second Best Evidence in Criminal Prosecutions is Strictly Limited

Long before the adoption of our modern rules of evidence "[t]he judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow." *Omychund v. Barker*, 26 Eng. Rep. 15, 1 ATK 22, 49 (1744). In fidelity to this one general rule of evidence courts adhered to a conglomerate of auxiliary probative rules "applicable to specific classes of evidential material, and designed to strengthen . . . the evidential fabric and to secure it against dangers and weaknesses pointed out by experience," 4 John Henry Wigmore, *Wigmore on Evidence* §§ 1171 & 1174 (James H. Chadbourn rev. 1972). The phrase "best evidence" ultimately became a descriptive way of describing the rules which included the original document rule, the hearsay rule, witness competency rule and other rules that prefer reliable evidence to other, less reliable evidence. Wigmore, *supra*, § 1174. *Accord* 1 S. Greenleaf, *A Treatise on the Law of Evidence* §§ 50, 82 (1st ed. 1842) (requirements of original document, prohibition on the use of hearsay and attested document rule are all essentially applications of the common law's general best evidence rule). The common law best evidence rule demanded

reliance upon the evidence that was least likely to be susceptible to fraud or to be withheld for a sinister motive. 1 S. Greenleaf, §§ 82-83, at 93-94.

After the American Revolution, many states, including Washington, adopted the common law to the extent it is not repugnant to the United States Constitution and laws and the Washington Constitution and laws. *See generally* RCW 9A.04.060 (common law supplements criminal law); RCW 4.04.010 (common law shall be the rule of decision in all the courts of this state). Jurisdictions that incorporated the common law kept the one general rule of evidence. *See, e.g., United States v. Wood*, 39 U.S. 430, 443, 10 L. Ed. 527 (1840) (“secondary or inferior evidence shall not be substituted for evidence of a higher nature, which the case admits of”); *Lee v. Tapscott*, 2 Va. (2Wash.) 276, 280-81 (1796) (common law requires “the best evidence which the nature of the case admits of, ought to be produced, and if it may be produced, inferior testimony is inadmissible”); *J.I. Case Threshing Mach. Co. v. Wiley*, 89 Wash. 301, 303, 154 P. 437 (1916) (“It is a mandate of the law that proof of a fact must be made by the best evidence obtainable.”).

When the rules of evidence were formally adopted, the one general rule of evidence, a preference for the best evidence possible, was codified in separate distinct rules. Wigmore, *supra*, at §§ 1172-73. Although the phrase “best evidence” does not appear in any of Washington’s evidence rules, the phrase persists, particularly when dealing with the original document rule.

Id. § 1173 (quoting James Bradley Thayer, Preliminary Treatise on Evidence 489 (1898)).

Although a conviction is an event, rather than a writing to which the original document rule applies,² the best documentary evidence of a prior conviction is a certified copy of the judgment. *State v. Witherspoon*, 180 Wn.2d 875, 893, 329 P.3d 888 (2014). A certified judgment may, however, contain prejudicial information that goes beyond that which is necessary to prove the existence of a prior felony conviction. While some of these facts are not unfairly prejudicial with respect to the question before the jury, others can be. *Compare Old Chief v. United States, supra* (identity of prior conviction as contained in the record of conviction is unfairly prejudicial when the prosecution need only prove that the prior conviction falls within a specific definition or classification of crimes), *with State v. Clark*, 143 Wn.2d 731, 780-81, 24 P.3d 1006 (2001) (description of assault or imposition of an exceptional sentence contained in judgment not unduly prejudicial when jury is considering the proper sentence to impose).

Courts traditionally dealt with any undue prejudice by redacting irrelevant information and the information whose probative value was substantially outweighed by its probative value. *See* ER 402, 403, *State v.*

²*In re Personal Restraint of Adolph*, 170 Wn.2d 556, 568, 243 P.3d 540 (2010).

Ish, 170 Wn.2d 189, 198, 241 P.3d 389 (2010) (irrelevant or prejudicial matters contained in a document should be excluded or redacted before the document is admitted into evidence). This practice allows the jury to still receive the best evidence of the fact to be proven.

In *Old Chief*, the Supreme Court rejected the traditional application of the rules of evidence in favor of a limited Fed. R. Evid. ER 403-based “second best evidence rule.” The Court adopted the admission in lieu of certified judgment rule, not because it was constitutionally mandated,³ but because it believed that a record of conviction which names the prior offense would virtually always satisfy Fed. R. Evid. 403 prohibition on the admission of unduly prejudicial evidence in those cases when proof of convict status is an element of the charged crime. *See Old Chief*, 519 at 190-192.

The Court carefully limited the reach of its new “second best evidence rule” in two ways. First, the Court stated that while its discussion had been general because of the general wording of Rule 403, its holding “is limited to cases involving proof of felon status.” *Old Chief*, 519 U.S. at 183 n. 7. Where proof of any other fact is at issue, a defendant must establish abuse of

³See 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); *Detention of Turay*, 139 Wn.2d 379, 401-402, 986 P.2d 790 (1999) (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).

discretion in admitting evidence over an ER 403 objection, “a standard that is not satisfied by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon.” *Id.*

Second, the Court indicated that its new “second best evidence rule” does not require the prosecution to accept the defendant’s admission in all cases in which proof of convict status is at issue. “[T]he prosecutor’s choice will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.” *Old Chief*, 519 U.S. at 192. *Accord United States v. Phillippi*, 442 F.3d 1061, 1064 (7th Cir. 2006) (*Old Chief*’s admission in lieu of evidence rule does not apply when the prosecution will use the document for an additional purpose beyond proof of felony status); *Detention of Turay*, 139 Wn.2d 379, 401, 986 P.2d 790 (1999) (*Old Chief*’s “second best evidence rule” is limited to those cases in which the evidence is introduced solely to prove the existence of a prior conviction).

Other courts have recognized an additional implicit limitation upon *Old Chief*’s admission in lieu of evidence rule. Specifically, the admission must fully address the elements of the crime and/or match the language of the statute. A proposed admission that fails to do so will not tip the ER 403 scale in the defendant’s favor. *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).

Division III’s extension of the *Old Chief* Fed. R. Evid. 403-based second evidence rule to post-conviction no contact orders is unsupported by *Old Chief* and is unwarranted. The contents of the no contact order, itself, are necessary to prove the defendant’s mens rea, the imposed restrictions, the date of issuance, the expiration date, the identity of the protected person, and the limitations upon whom may amend the order. Where the contents of the order, not just a defendant’s status is relevant, the State’s preference for the best available evidence is tested under a traditional case-specific ER 403 analysis. As noted by the Supreme Court, the ER 403 analysis will virtually always favor the prosecution in such cases as a defendant does not satisfy ER 403 “by a mere showing of some alternative means of proof that the prosecution in its broad discretion chose not to rely upon.” *Old Chief*, 519 U.S. at 183 n. 7 and 192. *Accord State v. Finch*, 137 Wn.2d 792, 811-12, 975 P.2d 967 (1999) (State’s use of an in-life photo of victim did not violate ER 403 where defendant offered to stipulate to the identity of the victim; admission of autopsy photo of head injury did not violate ER 403 where a

sketch or diagram may be utilized); *State v. Adler*, 16 Wn. App. 459, 465-66, 558 P.2d 817 (1976) (gruesome pictures of assault victim's injuries not subject to exclusion pursuant to ER 403 where defendant "offered to stipulate that the victim had in fact been assaulted").

Application of the extended *Old Chief* rule to Taylor's case presents additional grounds for reversal. Taylor never cited *Old Chief* in the trial court in support of his motion to substitute his admission for the no contact order itself. Taylor never identified ER 402 or ER 403 as a basis for excluding the no contact order. Taylor did not specify what portions of the no contact order would cause the jury to be so inflamed that it would be unable to dispassionately evaluate the other evidence. Taylor did not explain why redaction or excision of those portions of the order that elicit an emotional response was insufficient to ensure a fair trial. Taylor's offered admission, moreover, did not address all of the facts that the State would otherwise prove through the no contact order itself. Taylor's conviction must be reinstated.

B. ER 402 and 403 Will Protect a Defendant's Right to a Fair Trial in a Protection Order Prosecution

Old Chief's "second best evidence rule" does not need to be extended to other situations. Defendants already have the means of preventing the jury from being exposed to irrelevant evidence and to evidence whose probative value is substantially outweighed by the danger of unfair prejudice. *See* ER

402 and 403. A defendant secures the protections offered by ER 402 and 403 through a timely objection or a motion to strike. *See* ER 103(a). The objection or motion to strike may be written or oral and may be tendered prior to trial or during trial. *See generally* 5 Karl B. Tegland, *Washington Practice: Evidence Law & Practice*, §§ 103.2-103.11, at 31-63 (6th ed. 2016) (explaining the various ways in which to object to the admission of evidence).

In a prosecution for violation of a no contact order or protection order, a defendant is not entitled to the exclusion of the entire order solely on the grounds that its contents will persuade the trier of fact to convict, rather than acquit. A defendant is, however, entitled to the exclusion of those portions of the order that are irrelevant or are more likely to arouse an emotional response rather than a rational decision among the jurors. *See, e.g., State v. Beadle*, 173 Wn.2d 97, 121, 26 P.3d 863 (2011).

In this case, Taylor did not tender an ER 402 or ER 403 objection to the no contact order in the trial court. *See* CP 21-23; RP 18-22. Taylor offered no legal argument in support of his motion to substitute an admission for the no contact order itself. *Id.* His failures to do so merits reversal of Division III's opinion and reinstatement of his conviction. *See generally* ER 103(a)(1); RAP 2.5(a).

In his Brief of Appellant, Taylor makes a general argument regarding the inherent risk of unfair prejudice from the admission of any no-contact order. *See* Brief of Appellant, at 13. Taylor, however, identified only four specific statements from the first page of Ex. 35 that caused specific prejudice in his case: “Domestic Violence No-Contact Order” or “domestic violence,” “Post Conviction,” the date of issuance, and the prohibition upon possessing firearms. Brief of Appellant, at 6 and 14. Only three of these statements merit serious consideration under ER 403, as the date of issuance is relevant to Taylor’s knowledge of the order’s existence, that the order had not yet expired, and the specific restrictions placed upon his behavior. Redaction of the other items from the first page of the order would allay all of Taylor’s specific concerns.

In its opinion, Division III condemns the trial judge for abusing his discretion in his application of ER 403 with respect to a “question of first impression.” *See State v. Taylor*, 4 Wn. App. 2d 381, 388 ¶ 19, 389 ¶ 23, 421 P.3d 983 (2018), *review granted*, ___ Wn.2d ___ (Feb. 20, 2019). Division III then uses a machete in lieu of a scalpel by excising the entire order rather than the items Taylor specifically objected to in his appellate brief. This was improper. Division III’s opinion cannot stand as the traditional application of ER 402 or ER 403 would have fully addressed Taylor’s specific concerns. Division III’s opinion must also be overruled and Taylor’s conviction

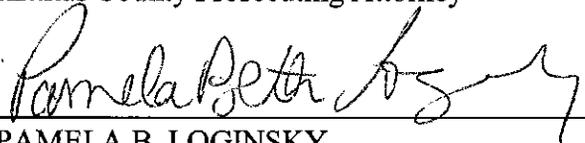
reinstated because the inclusion of the three arguably unduly prejudicial items Taylor belatedly identified on Ex. 35 did not materially affect the jury's verdict which was based on overwhelming evidence. *See, e.g. State v. Brougeois*, 133 Wn.2d 389, 403-04, 945 P.2d 1120 (1997) (non-constitutional error regarding the admission of evidence will not support a reversal if the evidence is of minor significance in reference to the overall evidence).

IV. CONCLUSION

The State requests that this Court reject Division III's expansion of *Old Chief's* Fed. R. Evid. 403-based "second best evidence rule" to no contact and protection orders. Division III's reversal of Taylor's conviction for felony violation of a no-contact order must, itself, be reversed.

Respectfully Submitted this 22nd day of March, 2019.

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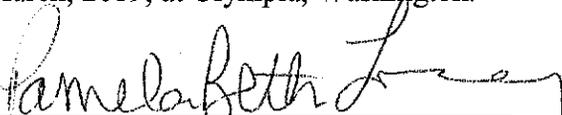
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I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 22nd day of March, 2019, pursuant to the agreement of the amici curiae, an electronic copy of the document to which this proof of service is attached was served upon the following individuals via the CM/ECF System and/or e-mail:

Skylar Brett at skylarbrettlawoffice@gmail.com

Signed under the penalty of perjury under the laws of the state of Washington this 22nd day of March, 2019, at Olympia, Washington.


PAMELA B. LOGINSKY, WSBA No. 18096

WASHINGTON ASSOC OF PROSECUTING ATTY

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