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STATE OF WASHINGTON
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NO. 96325-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BRENDAN TAYLOR,
Respondent.

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

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

Court of Appeals No. 35172-6-III

The Honorable Scott R. Sparks, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

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

On Christmas Day, 2016, their landlord drove past their house and saw Ms. 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 Ms. Kelly claimed that he had assaulted her.¹ RP 153-54, 157. The state charged Mr. Taylor with Violation of a No-Contact order (a felony because of the assault allegation) and Second-Degree Assault.² CP 7-9.

¹ The responding officer did not see any injuries other than a cut on Ms. Kelly’s hand and some redness around her temple. RP 154-55. A sheriff’s deputy who followed-up with Ms. Kelly the next day also 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.

Ms. Kelly admitted that she sustained the cut on her hand when she tried to use a ski to beat down a bedroom door to get to Mr. Taylor. RP 84, 133. The deputy acknowledged that Ms. Kelly’s other injuries could have been caused by her “flailing” a snow shovel around when she tried to break Mr. Taylor’s windshield. RP 180.

² The state also charged Mr. Taylor with Escape from Community Custody and First-Degree Burglary. CP 7-9. The judge dismissed the burglary charge at the request of the state. RP 188, 263. Mr. Taylor pleaded guilty to Escape from Community Custody, but the Court of Appeals determined that the plea lacked sufficient factual basis. *State v. Taylor*, 4 Wn. App. 2d 381, 390-91, 421 P.3d 983 (2018). Mr. Taylor also pleaded guilty to two counts of misdemeanor Violation of a No-Contact Order based on phone calls he made to Ms. Kelly. CP 10-20.

Mr. Taylor moved pretrial to be permitted to stipulate to the existence of a valid no-contact order in order to preclude the admission of the actual order into evidence. RP 21-22.

The stipulation that defense counsel originally offered provided that: “Mr. Taylor had knowledge of the Order of Protection protecting Anna Kelly and prohibiting him from having contact with her and that it was lawfully served.” CP 21.

During a colloquy with the court, Mr. Taylor made clear that his intention was to stipulate to any and all facts necessary to vitiate the need for the order to be admitted into evidence:

COURT: ... So you're saying that ... you'll be stipulating to the existence of a valid protection order.

DEFENSE COUNSEL: Right.

PROSECUTOR: And the law actually requires two... stipulations. The state's... not willing to accept the stipulation; we'd like to use the order, both of them.³ But there's two elements the state has to prove; number one that there existed a no-contact order, number two that the defendant knew about it.

....

COURT: And, [defense counsel], you're saying that the defendant Mr. Taylor is willing to stipulate to both of those things.

DEFENSE COUNSEL: Yes.

COURT: The existence of the order and his knowledge of it.

DEFENSE COUNSEL: Yes.

RP 21-22.

³ The state only offered one no-contact order at trial. *See RP generally.*

Defense counsel explained that the logic behind the objection was to “eliminate any actual more prejudice with respect to what the orders say.” RP 20.

The state refused to agree to the stipulation. RP 21. But the prosecutor did not point to any relevant facts that would be proved by the admission of the order but were not included in Mr. Taylor’s offered stipulation. *See RP generally.*

The court ruled that the state was not required to accept Mr. Taylor’s stipulation, noting that the United States Supreme Court’s decision in *Old Chief*⁴ only explicitly applies to offers to stipulate to the existence of a prior conviction. RP 48-49. The court concluded that: “... even though Mr. Taylor wants to have the existence of those orders stipulated to, I don’t think I can force the state to limit itself to that.” RP 48.

The no-contact order was admitted into evidence at Mr. Taylor’s jury trial over his objection. RP 181; Ex. 35.

The order specifies in large, bold font that it is a “Domestic Violence No-Contact Order.” Ex. 35, p. 1. The top of the document also specifies that the order was enacted “Post-Conviction.” Ex. 35, p. 1. The

⁴ *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997).

date on the order is less than a week before the alleged assault for which Mr. Taylor was being tried. Ex. 35, p. 1.

The order informs the jury that:

Based upon the record both written and oral, the court finds that [Mr. Taylor] has been charged with, arrested for, or convicted of a domestic violence offense, that [Mr. Taylor] represents a credible threat to the physical safety of [Ms. Kelly], and the court issues this Domestic Violence No-Contact Order under chapter 10.99 RCW to prevent possible recurrence of violence. Ex. 35, p. 2.

The no-contact order document further states that Mr. Taylor is no longer permitted to possess firearms, a concealed pistol license, or “other dangerous weapons.” Ex. 35, p. 1. The order requires Mr. Taylor to “immediately” surrender any guns or other weapons in his possession. Ex. 35, p. 1.

The jury acquitted Mr. Taylor of Second-Degree Assault but convicted him 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, holding that the trial court had abused its discretion under ER 403 by admitting the no-contact order as an exhibit when Mr. Taylor had offered to stipulate to the relevant facts proved by the exhibit. *Taylor*, 4 Wn. App. 2d at 386-88.⁵

⁵ Mr. Taylor also claimed in the Court of Appeals that he had received ineffective assistance of trial counsel and that the sentencing court had exceeded its authority by sentencing him to
(Continued)

This Court granted review. Order Granting Review, 2/20/19.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING THE NO-CONTACT ORDER AS AN EXHIBIT WHEN THE DOCUMENT INCLUDED INFORMATION ENCOURAGING THE JURY TO MAKE AN IMPROPER PROPENSITY INFERENCE AGAINST MR. TAYLOR AND MR. TAYLOR HAD OFFERED TO STIPULATE TO THE ORDER'S EXISTENCE AND HIS KNOWLEDGE.

- A. Under ER 403 and the U.S. Supreme Court's holding in *Old Chief*, documentary evidence of a previously-adjudicated legal status is inadmissible when it is likely to encourage the jury to make an improper propensity inference and the accused has offered to stipulate to all facts stemming from the document that the state is required to prove.

Under ER 403, evidence must be excluded if its probative value is outweighed by the risk of unfair prejudice. ER 403.⁶ When weighing the

a term above the statutory maximum for the class C felony. *See Taylor*, 4 Wn. App. 2d at 389, n. 4. Having already reversed Mr. Taylor's conviction, however, the Court of Appeals declined to decide those issues. *Id.*

If This Court reverses the Court of Appeals and holds that the trial court did not err by admitting the no-contact order, then This Court must either decide the remaining issues in Mr. Taylor's appeal or remand to the Court of Appeals for consideration of those issues. *See* RAP 13.7(b).

⁶ This issue is preserved for appellate review by Mr. Taylor's offer to stipulate and objection below. Defense counsel made clear at trial that Mr. Taylor was offering to stipulate to the order's existence and to his knowledge in order to "eliminate any actual more (sic) prejudice" flowing from the language contained in the order, itself. RP 20. Counsel's colloquy with the court and prosecutor then shifted to a discussion of the United States Supreme Court's decision in *Old Chief*. RP 20-22, 48-49. The trial court's decision was explicitly based on the judge's reading of *Old Chief*. RP 48-49. Defense counsel objected to that ruling. RP 49. Defense counsel objected again when the state offered the no-contact order into evidence based on "reasons previously stated." RP 181.

An objection based on "prejudice" is generally sufficient to inform the trial court of the basis for the alleged inadmissibility. *See State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007). An issue is also preserved for appeal if the basis for an objection is "apparent from

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probative value of evidence under ER 403, a court must consider whether there is “some less risky alternative proof [(such as an offer to stipulate)] going to the same point.” *Old Chief*, 519 U.S. at 183.⁷

Evidence is unfairly prejudicial if it is “likely to provoke an emotional response rather than a rational decision.” *State v. Johnson*, 90 Wn. App. at 62. Because there is “no question” that propensity is an “improper basis” for a conviction, a trial court must consider whether offered evidence carries a “prejudicial risk for misuse as propensity evidence” when conducting the weighing analysis under ER 403. *Old Chief*, 519 U.S. at 182.

Because of the high risk that the jury will make an improper propensity inference upon learning the details of the accused’s prior

the context.” *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992), amended (Jan. 4, 1993) (holding that an objection on the basis that “the jury could be seriously misled” preserved an appellate challenge under ER 403); *See also State v. Walker*, 75 Wn. App. 101, 109, 879 P.2d 957 (1994); ER 103(a)(1) (an evidentiary objection need only cite to a specific rule if the ground is “not apparent from the context”).

In Mr. Taylor’s case, it is clear that the basis of his objection was apparent from the context because the trial judge immediately began discussing a case directly on point, the U.S. Supreme Court’s decision in *Old Chief*. *See* RP 20-22, 48. Defense counsel also objected to the trial court’s ruling, which was directly based on *Old Chief*. RP 49. Mr. Taylor’s claim that *Old Chief* and ER 403 required the court to accept his stipulation and to exclude the no-contact order is properly before this court. ER 103(a)(1); *Braham*, 67 Wn. App. at 935; *Walker*, 75 Wn. App. at 109.

⁷ *Old Chief* analyzes the federal ER 403, but its reasoning and holding were explicitly adopted and applied to Washington State’s ER 403 in *State v. Johnson*. *State v. Johnson*, 90 Wn. App. 54, 61, 950 P.2d 981 (1998); *See also Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008) (the Washington Rules of Evidence are generally patterned off of the federal rules).

conviction, where the existence of a prior conviction is an element of an offense, a trial court must accept the accused's offer to stipulate to that prior conviction. *Old Chief v.*, 519 U.S. at 191-92; *Johnson*, 90 Wn. App. 54; ER 403.

Once that stipulation has been entered, the state may not introduce extrinsic evidence of that prior conviction or of the name of the crime of conviction because such evidence carries no additional probative value under ER 403. *Id.*

Indeed, the *Old Chief* court noted that the functional difference between the evidentiary value of a stipulation to the existence of a prior conviction and of the admission of a court record naming the offense is “distinguishable only by the risk [of unfair prejudice] inherent in one and wholly absent from the other.” *Old Chief*, 519 U.S. at 191.

Evidence containing the details of a prior conviction is particularly prejudicial because of the risk that the jury will:

generaliz[e] the defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the bad act now charged (or, worse, as calling for preventative conviction even if he should happen to be innocent momentarily).

Old Chief, 519 U.S. at 180-81 (parenthetical in original). This risk of an improper propensity inference or of a “preventative conviction” is

particularly high when the prior conviction is for an offense similar to the one for which the accused is currently on trial. *Id.* at 185.

- B. The logic of *Old Chief* applies with equal force to Mr. Taylor's offer to stipulate to the existence and his knowledge of the no-contact order.

The admission of evidence relating to the name or nature of a prior conviction carries a substantial risk of unfair prejudice "whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning." *Old Chief*, 519 U.S. at 185.

Other jurisdictions have applied the reasoning of *Old Chief* to contexts beyond those in which the existence of a prior conviction constitutes an element of a currently-charged offense. *See e.g. McClain v. State*, 898 N.E.2d 409 (Ind. Ct. App. 2008) (reversing a conviction for failure to register as a sex offender when the trial court admitted the registration form, which included the details of the accused's prior conviction, after the accused offered to stipulate to his status as a sex offender); *United States v. Merino-Balderrama*, 146 F.3d 758 (9th Cir. 1998) (reversing a conviction for an offense related to child pornography when the court admitted graphic videos after the accused had offered to stipulate that they constituted child pornography); *Sams v. State*, 688 N.E.2d 1323 (Ind. Ct. App. 1997) (holding that trial court abused its

discretion in a case charging driving with a suspended license by admitting the accused's entire driving record after he had offered to stipulate that his driver's license was suspended for life).

Similarly, in Mr. Taylor's case, ER 403 required the trial court to accept the offer to stipulate to the existence and to Mr. Taylor's knowledge of the no-contact order and then to exclude the order, itself, because the "official record offered by the Government [was] arresting enough to lure a juror into a sequence of bad character reasoning." *Old Chief*, 519 U.S. at 185.

Specifically, the no-contact order made clear to the jury that Mr. Taylor had been convicted for some other domestic violence offense against Ms. Kelly about a week before the alleged current assault. Ex. 35, p. 1. The order told the jury that a court had previously found that Mr. Taylor "represents a credible threat to the physical safety" of Ms. Kelly and that the order was necessary "to prevent possible recurrence of violence." Ex. 35, p. 2. Finally, the order informed the jury that Mr. Taylor had been deemed too threatening to possess any guns or other weapons. Ex. 35, p. 1.

The order carried a high risk of unfair prejudice against Mr. Taylor because it encouraged the jury to "generaliz[e] the defendant's earlier bad

act into bad character” or “worse, ... call[] for preventative conviction.”
Old Chief, 519 U.S. at 180-81.

On the other hand, once Mr. Taylor had offered to stipulate, the order itself had virtually no additional probative value. Like a prior conviction, the existence of a valid no-contact order is a “judgment rendered wholly independently of the concrete events of later criminal behavior charged against [the accused].” *Old Chief*, 519 U.S. at 190. Accordingly, its admission was not necessary to the narrative arc of the state’s presentation of evidence related to the events on the day of the alleged assault. *Id.*

The functional difference between Mr. Taylor’s stipulation to a no-contact order’s existence (and his knowledge of the order) and admission of the order itself was “distinguishable only by the risk [of unfair prejudice] inherent in one and wholly absent from the other.” *Id.* at 191.

1. Mr. Taylor offered to stipulate to all facts that the state needed to prove through the admission of the no-contact order. The order, itself, carried no additional probative value.

In order to prove that Mr. Taylor had committed the charged offense, the state was required to establish that (1) there existed an order prohibiting Mr. Taylor from contacting Ms. Kelly, (2) Mr. Taylor knew of the order’s existence, (3) Mr. Taylor willfully contacted or remained in

contact with Ms. Kelly, and (4) Mr. Taylor's conduct amounted to an assault. *State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002); RCW 26.50.110(4); CP 7.

The state was not required to prove to the jury that the no-contact order was valid; the order's validity was a question of law for the court. *State v. Miller*, 156 Wn.2d 23, 28, 123 P.3d 827 (2005).

Where, as here, an alleged assault forms the basis for a charge of violation of a no-contact order, the assault, itself, constitutes the violation. *See State v. Snapp*, 119 Wn. App. 614, 623, 82 P.3d 252 (2004).

Accordingly, the state charged Mr. Taylor with violating the order only by "contacting" Ms. Kelly and by assaulting her. CP 7. The state was not required to prove (nor had it charged) that he had violated any other provision of the order.⁸

⁸ Indeed, Mr. Taylor admitted during closing argument that he had contacted Ms. Kelly on the date in question. *See* RP 247-52. The relevant issue for the jury was whether he had assaulted her. RP 247-52.

The state argued in its Petition for Review that admission of the order was necessary to inform the jury of its provisions so that the jury could determine whether Mr. Taylor had violated those provisions. *See* State's Petition for Review, pp. 9-10. But a stipulation to the existence of a "no-contact order" would have made it plain that Mr. Taylor was prohibited from "contacting" Ms. Kelly.

The state did not charge or argue at trial, for example, that Mr. Taylor had violated the order by coming within 1,000 feet of Ms. Kelly's school or workplace. *See* CP 7-9; *See* RP *generally*. Those additional provisions were not relevant in this case.

The state has also argued that the order was necessary to inform the jury that Ms. Kelly's consent to contact from Mr. Taylor was not a defense to the charge and that the recency of the order demonstrated that Mr. Taylor's knowledge was "keen." *See* State's Petition for Review, p. 10; Respondent's Brief (in the Court of Appeals), p. 22.

(Continued)

When considering the adequacy of an offer to stipulate, courts regularly look to the content of the colloquy between the court and defense counsel to determine which facts would have been included if the offer had been accepted. *See State v. Case*, 187 Wn.2d 85, 88, 384 P.3d 1140 (2016), *as amended* (Jan. 19, 2017); *See also Old Chief*, 529 U.S. at 176 n. 2.

Mr. Taylor's colloquy with the court makes clear that his intent was to stipulate to the first two elements enumerated above: (1) that the order existed at the relevant time and (2) that Mr. Taylor knew about the order. RP 20-22.

Mr. Taylor's stipulation, if accepted, would have constituted waiver of the right to a jury trial on those elements. *Case*, 187 Wn.2d at 91. Mr. Taylor also would have waived the right to require the state to prove those elements beyond a reasonable doubt and would have been unable to challenge the sufficiency of the evidence of those elements on appeal. *Id.*

Mr. Taylor offered to stipulate to the only two elements of the offense to which the admission of the no-contact order would have been

But an exhibit is not the appropriate medium for instructing the jury on the law. Indeed, the court properly instructed the jury that consent was not a defense to the charge. CP 43.

Likewise, the "keenness" of Mr. Taylor's knowledge of the order was not relevant to the charge. He offered to stipulate that he knew of the order's existence on the date of the alleged events. RP 21-22. It did not matter how long he had known about the order beforehand.

relevant. *Sisemore*, 114 Wn. App. at 78. The admission of the order, itself, was not necessary to the state's case.

2. The admission of the no-contact order added to the state's case only insofar as it carried a risk of unfair prejudice.

Given Mr. Taylor's offer to stipulate, the exhibit containing the no-contact order carried additional probative value only to the extent that it encouraged the jury to make an improper propensity inference against Mr. Taylor. *Old Chief*, 519 U.S. at 191.

Generally, the prosecution may choose how to present the state's evidence. *Old Chief*, 519 U.S. at 190; *Johnson*, 90 Wn. App. at 62-63. However, this rule has "virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." *Old Chief*, 519 U.S. at 190; *Johnson*, 90 Wn. App. at 62-63.

This is because:

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

Old Chief, 519 U.S. at 190.

As such, the prosecution's case does not suffer when some extant legal status of the accused is proved by stipulation rather than by the

admission of court documents. *Id.* The documents carry no additional probative value under ER 403. *Id.* at 191.

Likewise, in Mr. Taylor’s case, the no-contact order was not part of the narrative events of the day of the alleged assault. It was merely evidence of Mr. Taylor’s legal status, dependent on a previous judgment by a different court. *Id.* at 190. Once Mr. Taylor had offered to stipulate to the order’s existence and his knowledge, the admission of the actual order had no proper purpose. *Id.* at 191.

3. The trial court abused its discretion by denying Mr. Taylor’s offer to stipulate and admitting the no-contact order over his objection.

Evidentiary rulings are reviewed for abuse of discretion. *Johnson*, 90 Wn. App. at 62. A trial court abuses its discretion by failing to properly exercise that discretion. *State v. O’Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015) (*citing State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)).

In order to properly exercise discretion under ER 403, a trial court must “evaluate the degrees of probative value” of proffered evidence in light of “actually available substitutes” in the form of offered stipulations. *Old Chief*, 519 U.S. at 182; *See also Merino-Balderrama*, 146 F.3d at 762. If an offer to stipulate has equal or greater probative value and a lower

danger of unfair prejudice, “sound judicial discretion” requires exclusion of the documentary evidence. *Merino-Balderrama*, 146 F.3d at 761-62.

In cases alleging domestic violence “courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts... because the risk of unfair prejudice is very high.” *State v. Gunderson*, 181 Wn.2d 916, 925, 337 P.3d 1090 (2014).

Here, the trial court abused its discretion by failing to properly exercise its discretion under ER 403. *O'Dell*, 183 Wn.2d at 697; *Old Chief*, 519 U.S. at 182; *Johnson*, 90 Wn. App. at 62.

At Mr. Taylor’s trial, the state was unable to point to any probative value provided by the admission of the no-contact order once Mr. Taylor had offered to stipulate to its existence and his knowledge. *See* RP 20-22. The prosecutor stated only that he did not agree to the stipulation. RP 21.

Nor did the trial court identify any additional evidentiary value of the order. RP 21-22, 48-49. Rather, the judge simply relied on a narrow reading of *Old Chief*. RP 21-22, 48-49. Finally, the court did not consider the risk of unfair prejudice if the order was admitted despite Mr. Taylor’s offer to stipulate. RP 21-22, 48-49.

The trial court failed to conduct any weighing analysis at all, relying instead on the fact that the *Old Chief* court only explicitly

considered the admission of documents related to a prior conviction.⁹ *See* RP 21-22, 48-49. But even a cursory reading of *Old Chief* demonstrates that more is required of a trial court. *See Old Chief*, 519 U.S. at 182 (requiring the trial court to “evaluate the degrees of probative value” of alternative forms of evidence). The trial court abused its discretion. *Id.*; *O'Dell*, 183 Wn.2d at 697; *Johnson*, 90 Wn. App. at 62.

Additionally, a trial court abuses its discretion by basing a decision on untenable grounds, such as the misconstruction of an evidentiary rule. *Gunderson*, 181 Wn.2d at 922.

The trial court’s admission of the no-contact order over Mr. Taylor’s objection and offer to stipulate also constituted an abuse of discretion because it was based on untenable grounds. The court misconstrued ER 403 by ruling that the rule did not require a weighing analysis so long as admission of an offered exhibit was not explicitly barred by *Old Chief*. RP 48-49.

The trial court abused its discretion by admitting the no-contact order over Mr. Taylor’s objection and despite his offer to stipulate because the court failed to properly weigh the issue under ER 403 and the decision

⁹ In fact, the “Post-Conviction” no-contact order at issue in Mr. Taylor’s case *was* evidence of a prior conviction, though it did not state the offense for which Mr. Taylor had been previously convicted. *See* Ex. 35.

was based on untenable grounds. *O'Dell*, 183 Wn.2d at 697; *Gunderson*, 181 Wn.2d at 922.

- C. The erroneous admission of the no-contact order -- which informed the jury that Mr. Taylor had been previously convicted of a domestic violence offense against Ms. Kelly and had been determined by a court to “represent[] a credible threat to [her] safety” -- prejudiced Mr. Taylor’s defense.

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *Gunderson*, 181 Wn.2d at 926. 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)).

This Court has recognized the heightened risk of unfair prejudice in cases involving admission of prior acts of domestic violence because “the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.” *Gunderson*, 181 Wn.2d at 925 (citing *State v. Brown*, 113 Wn.2d 520, 531, 782 P.2d 1013 (1989) (Brachtenbach, J., lead opinion)).

In *Gunderson*, the state charged the accused with felony violation of a no-contact order based on the allegation that he had assaulted the protected party. *Id.* at 926. This Court found that the improper admission of a prior incident of domestic violence was prejudicial in that case

because of the significant risk that the jury would rely on the prior conviction as propensity evidence that the assault had occurred. *Id.* at 926-27; *See also State v. Young*, 129 Wn. App. 468, 476, 119 P.3d 870 (2005) (exposing jury venire to evidence that accused had been previously convicted of an offense similar to the current charge was a “serious irregularity that is inherently prejudicial” because of the risk that the jury will draw an improper propensity inference).

Likewise, in Mr. Taylor’s case, the state was required to prove that he had assaulted Ms. Kelly to convict of the felony charge. CP 7. Though it was relatively undisputed that Mr. Taylor and Ms. Kelly had been in contact, the issue of whether an assault had occurred was hotly contested at trial. *See* RP 247-52.

Mr. Taylor’s acquittal on the charge of second-degree assault demonstrates that the jury did not accept all the state’s evidence at face value. *See* RP 263. The only injury that the responding officer saw was a cut on Ms. Kelly’s hand, which she later admitted she had sustained while trying to use a ski to beat down a bedroom door to get to Mr. Taylor. RP 84, 133, 154-55. Though some other marks began to appear later, the sheriff’s deputy who saw them acknowledged that Ms. Kelly could have gotten those injuries while “failing” a snow shovel to try to break Mr. Taylor’s windshield. RP 170, 180.

But the improper admission of the no-contact order informed the jury that Mr. Taylor had been convicted of a domestic violence offense against Ms. Kelly less than a week before the current alleged assault. Ex. 35, p. 1. The exhibit went on to notify the jury that Mr. Taylor had been deemed by a court to “represent[] a credible threat to the physical safety of [Ms. Kelly]” and to be too dangerous to possess guns or other weapons. Ex. 35, p. 2.

This is exactly the type of evidence that encourages the jury to “generaliz[e] the defendant’s earlier bad act into bad character and tak[e] that as raising the odds that he did the bad act now charged.” *Old Chief*, 519 U.S. at 180-81. Even worse, the exhibits could have lead the jury to vote for a “preventative conviction” even if it found that the state had failed to prove beyond a reasonable doubt that he had assaulted Ms. Kelly on the day in question. *Id.*

There is a reasonable probability that the court’s improper admission of the no-contact order affected the outcome of Mr. Taylor’s trial. *Gunderson*, 181 Wn.2d at 926. Mr. Taylor was prejudiced by the trial court’s evidentiary error; his conviction must be reversed. *Id.*

CONCLUSION

For the reasons set forth above and in Mr. Taylor's briefing in the Court of Appeals, the trial court erred by admitting the no-contact order despite Mr. Taylor's offer to stipulate to its existence and his knowledge. This Court should affirm the Court of Appeals and uphold the reversal of Mr. Taylor's conviction for felony violation of the no-contact order.

Respectfully submitted on March 22, 2019,



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of the Supplemental Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Supreme Court through the Court's online filing system.

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 22, 2019.



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March 22, 2019 - 2:52 PM

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