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NO. 69864-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent

v.

MIGUEL ANGEL VILLANUEVA-GONZALEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-00544-5

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington is the Petitioner in this matter.

B. DECISION

Petitioner State of Washington seeks review of the Court of Appeals, Division I published decision filed June 12, 2013, reversing the defendant's conviction for assault in the fourth degree on the ground that his conviction violated the rule against double jeopardy. A copy of the opinion of the Court of Appeals is attached as Appendix A

C. ISSUES PRESENTED

I. DID THE COURT OF APPEALS MISAPPLY THE SAME EVIDENCE TEST TO THE ASSAULT CONVICTIONS AND ERRONEOUSLY CONCLUDE THAT ASSAULT IN THE FOURTH DEGREE AND ASSAULT IN THE SECOND WERE THE SAME IN FACT?

II. IS THE COURT OF APPEALS' ANALYSIS OF THE UNIT OF PROSECUTION TEST AS IT APPLIES TO ASSAULT CONFUSING AND ERRONEOUS?

D. STATEMENT OF THE CASE

Maria Gobea and the defendant, Miguel Villanueva-Gonzales, were in a romantic relationship and have three children together. RP 151-52. On March 27, 2011, Maria went to a dance. RP 174, 176. The

defendant didn't accompany Maria to the dance. RP 176. When she returned home she went into her children's bedroom to watch television with them and the babysitter, Itsel. RP 176-77. Only her five year-old child was awake. RP 177. At some point later the defendant came into the bedroom and angrily confronted her. RP 177-78. He told her "get out of there," upset because she had attended the dance without him. RP 178. He pulled her out of the room, causing her to hit her leg against some furniture. RP 179. He then head-butted her in the nose, causing it to fracture in two places. RP 179, 242. After head-butting her he grabbed her throat and strangled her. RP 193-94. She had trouble breathing, caused not only by the strangulation but the blood running down through her nose. RP 194.

The State charged Villanueva-Gonzalez with two counts of assault in the second degree. CP 22-23. Count I alleged the defendant committed assault in the second degree by strangling Ms. Gobea, contrary to RCW 9A.36.021 (g), and Count II alleged the defendant committed assault in the second degree by assaulting Ms. Gobea and thereby recklessly inflicting substantial bodily harm. CP 22-23. The jury returned a verdict of guilty to the lesser included offense of assault in the fourth degree as to count I, and convicted the defendant as charged as to Count II. CP 59, 61. The defendant filed a timely appeal. CP 90. Division I of the Court of Appeals

reversed the defendant's conviction for assault in the fourth degree in a decision that was originally unpublished. The Court ordered publication of the opinion on June 12, 2013. The Court held that the defendant's conviction for assault in the second degree, based upon his conduct in head-butting the victim and fracturing her nose, was the same offense as his assault in the fourth degree based upon grabbing the victim's throat because they "were actions taken against the same victim within the same short time span." See Opinion at p. 5. The State asserts that the Court of Appeals misapplied the same evidence test and asks this Court to accept review of the Court of Appeals' decision and reverse the Court of Appeals.

E. ARGUMENT

I. THE COURT OF APPEALS MISAPPLIED THE SAME EVIDENCE TEST TO THE ASSAULT CONVICTIONS AND ERRONEOUSLY CONCLUDED THAT ASSAULT IN THE FOURTH DEGREE AND ASSAULT IN THE SECOND WERE THE SAME IN FACT.

The double jeopardy clauses of the Washington State Constitution and United States Constitution provide identical protection against multiple punishments for the same offense. *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

Washington follows the same evidence rule adopted by the Supreme Court in 1896. *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007); *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). This rule provides that a defendant is subjected to double jeopardy if he is convicted of offenses that are identical both in fact and in law. *Calle* at 777. "'Washington's 'same evidence' test is very similar to the rule set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180 (1932).'" *Womac* at 652, *Calle* at 777. Unless the legislature has expressed a clear intent that multiple punishments not be imposed, the same evidence rule applies. *State v. Gohl*, 109 Wn.App. 817, 821, 37 P.3d 293 (2001).

> "[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other." *State v. Trujillo*, 112 Wn.App. 390, 410, 49 P.3d 935 (2002) (citing *Calle* at 777-78). Washington courts, however, have occasionally found a violation of double jeopardy *despite* a determination that the offenses involved clearly contained different legal elements. *State v. Schwab*, 98 Wn.App. 179, 184-85, 988 P.2d 1045 (1999).

Womac at 652. "If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005); citing *Calle* at 777. The *Freeman* Court went on to say "[w]hen applying the *Blockburger* test, we do not consider the elements of the crime on an

abstract level. '[W]here the *same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact* which the other does not.'" *Freeman* at 772, (quoting *In re Personal Restraint of Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (2004) (italics in original) (quoting *Blockburger*, supra, at 304)).[1]

In this case the defendant has never argued or claimed that the jury was not clearly informed that the assaultive conduct which formed the basis of count I was separate and distinct from the assaultive conduct which formed the basis of count II. He has not claimed the jury could have been confused or misled into returning two separate verdicts for the singular head butt which broke the victim's nose. Indeed, the State made it abundantly clear through its charging document, its jury instructions and its closing argument that it was relying upon two distinct acts for the crimes charged: the defendant's act of placing his hands around the

[1] The *Blockburger* doctrine for whether two crimes are the "same offense" is a distinct doctrine from merger (or merger-by-elevation). "Several distinct doctrines stem from the prohibition on double jeopardy and the *Blockburger* test is merely one of them." *State v. S.S.Y.*, 150 Wn.App. 325, 207 P.3d 1273 (2009); *affirmed* 170 Wn.2d 322, 241 P.3d 781 (2010). Crimes merge when proof of one is *necessary* to prove an element or degree of another crime. *S.S.Y.* at 330. A conviction for an offense which elevates another can stand, however, where that conviction is based on "some injury to the person or property of the victim of others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." *S.S.Y* at 330, quoting *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

victim's neck in an assaultive manner for count I[2] and the defendant's act of head butting the victim and breaking her nose in count II.

In reaching the conclusion that the defendant's convictions for both assault in the fourth degree as to count I and assault in the second degree as to count II, the Court of Appeals committed several errors of law and issued an opinion which directly conflicts with an unpublished opinion by a different panel of the same division.

The Court of Appeals misapplied the same evidence test and improperly concluded that assault in the fourth degree and assault in the second degree are always the same in both law and fact that they are always the same offense. Here, the defendant committed two distinct acts: a battery upon the victim's neck which resulted in no injury (a fourth degree assault) and a battery which resulted in the reckless infliction of substantial bodily harm. The acts, contrary to the Court's conclusion, were not the same offense. The Court of Appeals asserted, with citation to inapposite authority, that "[a]s a lesser included offense of second degree assault, fourth degree assault is the same in law as second degree assault."

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[2] The State asserted that the defendant strangled the victim as defined by RCW 9A.04.110 (26), which states: "'Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." The jury, in returning a verdict of assault in the fourth degree, clearly rejected the notion that the defendant had obstructed the victim's blood flow or ability to breathe, or had intended to obstruct her blood flow or ability to breathe, but that the defendant nevertheless committed an assault on the victim, in placing his hands on her neck, that did not amount to assault in the second degree.

See Opinion at page 4. But in reviewing the primary authority cited for this proposition, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King,* 95 Colum. L. Rev. 1, 28-29 (1995), it is clear that the authors of this article were referring to successive prosecutions for a lesser included offense following conviction or acquittal on the greater offense, or for a greater offense following conviction or acquittal on the lesser offense, where the prosecutions are based on the *same act*, not different acts. Further, the case cited by the Court of Appeals which originally cited to this law review article in a footnote merely reiterates that while the State may bring, and the jury may consider, multiple charges arising from *the same criminal conduct*[3] in a single proceeding, courts may not then enter multiple convictions for the *same offense* without offending double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005), citing *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137 (1981)). The convictions in this case were clearly based on two distinct acts: the defendant grabbing the victim's throat (in a manner that didn't rise to the level of definitional strangulation, according to the jury) and the defendant head-butting the victim and fracturing her nose. There is no danger, nor has there been any suggestion, that the jury

[3] "Same criminal conduct," as used in this sentence, refers to the same act or transaction, not a determination of same criminal conduct under the SRA.

actually returned verdicts of assault in the second degree and assault in the fourth degree based on the singular act of head-butting which broke the victim's nose. Indeed, both the defendant's and the Court's singular focus on the time that elapsed between the two assaults demonstrates that there is no concern that the jury returned two verdicts, and the defendant was punished twice, for the same physical act (the head-butt).

To the extent that the Court of Appeals' opinion stands for the idea that distinct acts of assault committed by different means will always be the same in fact if they are committed close in time (although we are never given guidance on how much time is enough time for multiple conviction to ensue), the opinion is contrary to the recent opinion of a different panel of Division I. In *State v. Aquiningoc* (Unpublished Opinion, 2013 Wash.App. LEXIS 231 (Jan. 28, 2013) (petition for review filed 4-1-13, Supreme Court No. 88637-7) attached as Appendix B, Division I held that the defendant's right to double jeopardy was not violated in circumstances very similar to this case. The facts, as stated by the Court, were:

> On April 11, 2011, while Ashley's mother was away at work, Aquiningoc came to the apartment at Ashley's invitation to discuss moving into a new apartment in Everett. They began to fight. Aquiningoc became angry when their daughter spilled a container of milk. He poured the remaining milk down Ashley's back. He threatened Ashley that he would take their daughter away from her. The fight escalated. Ashley testified that Aquiningoc tore her shirt, dragged her and threw her onto

> the bed, strangled her with his hands, tore her bedroom apart, and slapped her in the face, causing her to hit her head into the toilet.

The defendant was convicted of assault in the second degree by strangulation and assault in the fourth degree. The defendant complained that because the jury was not given a "separate and distinct" instruction his right to be free from double jeopardy was violated because the jury may have based both convictions on the same act. The Court flatly rejected this claim:

> Aquiningoc contends he is being punished twice for the same offense because the court's instructions did not clearly inform the jury that the fourth degree assault charge needed to rest on a predicate act "separate and distinct" from the assaultive act on which the second degree assault by strangulation was based. *But he does not attempt to show how a second degree assault by strangulation can ever be the "same offense" as a fourth degree assault.*

Aquiningoc at p. 5 (emphasis added). Notably, the Court was unconcerned with the closeness in time between the strangulation and the remaining assaultive conduct that formed the basis of the assault fourth degree conviction. The *Aquiningoc* opinion further said:

> The various minor pushes and slaps embraced in the charge of fourth degree assault could not have supported the conviction for second degree assault. According to the information and the to-convict instruction for second degree assault, that offense had to have been committed "by strangulation." Closing arguments on both sides unmistakably referred to the alleged strangulation as the basis for the second degree assault charge. Neither side

> ever described the fourth degree assault in context of the strangulation attempt. Under these circumstances, there was no possibility of being punished twice for the "same offense," and therefore no necessity for an instruction that the assault by strangulation had to rest on an act separate and distinct from the act or acts underlying the fourth degree assault charge.

Aquiningoc at p. 7.

The State submits that clarification by this Court on this issue is needed. This issue will continue to arise and there is an absence of needed clarity for criminal law practitioners on how the double jeopardy clause impacts multiple convictions for assault in circumstances such as those presented in this case. Review of this case is warranted under RAP 13.4 (2) because the decision is in conflict with another decision from the same division of the Court of Appeals; under RAP 13.4 (3) because it involves a significant question of law under the Constitution of the State of Washington and the United States Constitution; and under RAP 13.4 (4) because it involves an issue of substantial public interest which should be reviewed by the Supreme Court.

II. THE COURT OF APPEALS' ANALYSIS OF THE UNIT OF PROSECUTION TEST AS IT APPLIES TO ASSAULT IS CONFUSING AND ERRONEOUS.

The Court of Appeals' discussion of the unit of prosecution for assault is unsupported by on-point authority and misleading. Relying on

State v. Tili, 148 Wn.2d 350, 60 P.3d 1192 (2003) the Court of Appeals stated that assault is not defined by each physical act against a victim. See Opinion at 5-6, 7-8. But the language from *Tili* relied upon by the Court of Appeals is dictum.[4] As discussed above, the Court of Appeals contends in its opinion that all assaultive acts, no matter the means of commission or degree, will always be the same in fact so long as they were committed against the same victim in a short period of time. Yet on the unit of prosecution question, the Court's opinion implies that had the jury returned verdicts of guilty for two counts of assault in the second degree rather than one each of assault in the second degree and assault in the fourth degree, the unit of prosecution test would have applied and the result may have been different. The Court of Appeals' unit of prosecution analysis rests on its assertion that the defendant was convicted of violating several distinct statutory provisions rather than one statute separated into four degrees. Assault, however, is a statute that proscribes one offense that is divided into different degrees. See *State v. Fernandez-Medina,* 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). See also *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

[4] The discussion of the assault statute was not essential to the outcome of the case. *Tate v. Showboat Marina Casino Partnership,* 431 F.3d 580 (7th Cir. 2005) (Posner, J.)

In addition to the Court of Appeals' mischaracterization of the assault statute, the opinion confuses the reader as to whether, even if the defendant had been convicted of assault in the second degree as to both counts, the Court would nevertheless hold that there was but one assault because a strangulation which is followed close in time by an intentional battery which fractures a bone is akin to punishing "every punch thrown in a fistfight." See Opinion at 7-8. If the Court's opinion stands for that proposition, it is entirely inconsistent with its opinion in *State v. Aquiningoc*, cited above. It is also clearly inconsistent with the intent of the legislature. The legislature has prescribed seven distinct ways of committing second degree assault. Any one of the ways constitutes a single unit of prosecution. *State v Smith*, 124 Wn.App. 417, 432, 102 P.3d 158 (2004), *reviewed and affirmed on other grounds*, 159 Wn.2d 778, 154 P.3d 873 (2007) (assaulting another with a deadly weapon comprises the criminal activity measured by the unit of prosecution under second degree assault statute). The legislature, by setting out seven specific alternative ways of committing the offense, defined the unit of prosecution. An assault by strangulation and an intentional battery accompanied by the reckless infliction of substantial bodily harm each constitute one unit of prosecution.

Perhaps most troubling, the Court's opinion provides no guidance as to how much time must past between assaults committed by separate means before they will no longer be deemed the same in fact. If a defendant strangles the victim one hour after breaking her nose, are they

the same act? How many free assaults will a defendant be entitled to under the Court's analysis? This Court should accept review of this case to clarify the correct unit of prosecution under the assault statute. This issue is a significant question of law under the Constitution of the State of Washington and the United States Constitution and review should be granted under RAP 13.4 (3); the decision of the Court of Appeals on this issue appears to be in conflict with other Supreme Court opinions such as *Fernandez-Medina*, supra, and *Smith*, supra, making review appropriate under RAP 13.4 (1); the decision of the Court of Appeals involves an issue of substantial public interest that should be decided by the Supreme Court, warranting review under RAP 13.4 (4).

F. CONCLUSION

The State respectfully asks this Court to accept review of the published decision of the Court of Appeals in this case, as review is warranted under RAP 13.4 (1), (2), (3) and (4).

DATED this 12th day of July, 2013.

Respectfully submitted:

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MIGUEL ANGEL VILLANUEVA-GONZALEZ, Appellant.	)	No. 69864-8-I ORDER GRANTING MOTION TO PUBLISH AND AMEND OPINION

Appellant, Miguel Angel Villanueva-Gonzalez has moved for publication of the opinion filed in this case on April 22, 2013. The panel hearing the case has considered the motion and Respondent's answer and has determined that the motion should be granted.

Appellant has also moved to amend the opinion. The court hereby

ORDERS that the motion to publish the opinion is granted and that the slip opinion shall be modified as follows:

At page 2 of the slip opinion, in the first full paragraph, delete "violated" and insert "did not violate."

At page 2 of the slip opinion, in the first full paragraph, delete "charges" and insert "convictions."

Dated this 12th day of June 2013.

COX, J.

Denny, J.

Grosse

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 69864-8-I
Respondent,	)	DIVISION ONE
v.	)	
MIGUEL ANGEL VILLANUEVA-GONZALEZ, aka KEVIN CORTEZ-HERRERA,	)	UNPUBLISHED
	)	FILED: April 22, 2013
Appellant.	)	

Cox, J. — Where two offenses are the same in law and fact and there is no indication that the legislature intended to allow convictions for both offenses, it is a violation of double jeopardy to convict a defendant of both offenses.[1] Here, Miguel Angel Villanueva-Gonzalez was convicted of second and fourth degree assault, in violation of double jeopardy. Consequently, we reverse his conviction for fourth degree assault and remand with instructions.

Villanueva-Gonzalez and M.G. were in a romantic relationship. On the night in question, Villanueva-Gonzalez returned home angry because M.G. had been out at a nightclub without him. He confronted M.G. and pulled her out of the room in which she was sitting. He head butted her, fracturing her nose in two

[1] State v. Kelley, 168 Wn.2d 72, 77, 226 P.3d 773 (2010) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

places. Villanueva-Gonzalez then grabbed M.G. by the throat and held her against a piece of furniture.

The State charged Villanueva-Gonzalez with two counts of second degree assault. Count I was based on Villanueva-Gonzalez's attempted strangulation of M.G. Villanueva-Gonzalez's injury to M.G.'s nose was the basis for count II.

After a jury trial, the court instructed the jury as to second degree assault and the lesser included fourth degree assault for both counts I and II. The jury found Villanueva-Gonzalez guilty of second degree assault for count II. It also found him guilty of the lesser included crime of fourth degree assault as to count I.

Villanueva-Gonzalez appeals.

DOUBLE JEOPARDY

Villanueva-Gonzalez argues that his convictions for second and fourth degree assault violated his right against double jeopardy. We agree.

Article I, section 9 of the Washington Constitution, the double jeopardy clause, guarantees that, "[n]o person shall . . . be twice put in jeopardy for the same offense." It mirrors the protections offered by the federal constitutional protection against double jeopardy.[2] "Double jeopardy principles protect a defendant from being convicted more than once under the same statute if the defendant commits only one unit of the crime."[3] "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy

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[2] See State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (holding that Article I, section 9 of the Washington Constitution should be given the same interpretation as the United States Supreme Court gives to the Fifth Amendment).

[3] State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002).

challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense."[4] "To determine if a defendant has been punished multiple times for the same offense, this court has traditionally applied the 'same evidence' test."[5] This test "mirrors the federal 'same elements' standard adopted in Blockburger v. United States."[6]

Under this test, two convictions constitute the "same offense" for the purposes of double jeopardy if they are the same in law and in fact.[7] Thus, if each conviction includes elements not included in the other, or requires proof of a fact that the other does not, the offenses are different and the convictions may stand.[8]

For the first time on appeal, Villanueva-Gonzalez argues that his convictions for assault in the second and fourth degree have subjected him to double jeopardy. Even though this issue was not raised below, we consider it because it involves an alleged violation of Villanueva-Gonzalez's constitutional right against double jeopardy.[9]

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[4] State v. Nysta, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012).

[5] State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (quoting State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)).

[6] Id. (citing State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)).

[7] Calle, 125 Wn.2d at 777.

[8] Adel, 136 Wn.2d at 633.

[9] Id. at 631-32.

Here, Villanueva-Gonzalez's convictions violated double jeopardy. As a lesser included offense of second degree assault, fourth degree assault is the same in law as second degree assault.[10] It requires proof that the defendant assaulted another, an element required by second degree assault.[11]

Villanueva-Gonzalez's convictions were also the same in fact. The State alleged that Villanueva-Gonzalez committed two separate assaults, grabbing of M.G.'s throat and head butting her. But these events were actions taken against the same victim within the same short time span. Because assault is not defined in terms of each physical act against a victim, Villanueva-Gonzalez's actions constituted one single assault in fact. As the supreme court in State v. Tili stated:

> [T]he assault statute does not define the specific unit of prosecution in terms of each physical act against a victim. Rather, the Legislature defined assault only as that occurring when an individual 'assaults' another. A more extensive definition of 'assault' is provided by the common law, which sets out many different acts as constituting 'assault,' some of which do not even require touching. Consequently, the Legislature clearly has not defined 'assault' as occurring upon *any* physical act.[12]

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[10] See State v. Freeman, 153 Wn.2d 765, 771 n.1, 108 P.3d 753 (2005) (citing Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 28-29 (1995) (noting that where a lesser included offense can be presumed to be punished by the greater offense, conviction under both offenses would offend double jeopardy); see also Amar & Marcus, supra., at 28-29 ("[T]he phrase 'same offence' encompasses more than identical provisions. If statute X requires an element or elements that statute Y does not, these statutes will still be treated as describing the 'same' offence so long as X contains all of Y's elements—that is, so long as Y is a 'lesser included' offence.").

[11] RCW 9A.36.041; RCW 9A.36.021.

[12] State v. Tili, 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999).

Here, the evidence to prove each charged crime was the assaultive acts committed against the victim. Because assault is not defined in terms of each separate physical act, the assaults here were the same in fact.[13] Thus, it was a violation of double jeopardy to convict Villanueva-Gonzalez of two different offenses, which were the same in fact.

The State argues that Villanueva-Gonzalez's rights against double jeopardy were not violated, but it applies the "unit of prosecution" test. This is the wrong inquiry. As our supreme court recognized in State v. Adel, the "same evidence" test, not the "unit of prosecution" test, applies "to a situation where a defendant has multiple convictions for violating ***several*** statutory provisions."[14] The "unit of prosecution" test is appropriate only where a defendant is "convicted for violating one statute multiple times."[15] Here, though Villanueva-Gonzalez was charged with two counts of second degree assault, the jury convicted him of one count of fourth degree assault and one count of second degree assault. Thus, the appropriate test to determine whether these convictions violated double jeopardy is the "same evidence" test, not the "unit of prosecution" test. Consequently, the State's argument is not supported by controlling law.

The State also argues that Villanueva-Gonzalez's actions of grabbing M.G.'s throat and head butting her constituted two separate assaults in fact. The

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[13] Id.

[14] Adel, 136 Wn.2d at 633 (some emphasis added).

[15] Id.; see United States v. McLaughlin, 164 F.3d 1, 8 (D.C. Cir. 1998) (noting that in "unit of prosecution" cases, the Blockburger test is not used).

State improperly relies on Tili to support this argument. In Tili, the court upheld the defendant's convictions for three counts of rape. In doing so, it rejected Tili's argument that "if he can be charged and convicted for three counts of first-degree rape based on three separate penetrations, then a defendant could also be charged and convicted for every punch thrown in a fistfight without violating double jeopardy."[16] As noted above, the supreme court in Tili discussed how assault, ***unlike*** rape, is not defined by every individual physical act.[17] Thus, the State's citation to Tili, rather than buttressing its argument, demonstrates why Villanueva-Gonzalez's conviction violated double jeopardy.

Finally, the State submitted a Statement of Additional Authorities, citing State v. Nysta.[18] There, this court concluded that Nysta's convictions for second degree rape and felony harassment violated the prohibition against double jeopardy.[19] That case is unhelpful. The charges here were for second and fourth degree assault, which fail to satisfy the same evidence test that we discussed in this opinion.

When a conviction violates double jeopardy principles, we must reverse and remand a sentence that contains convictions for the same offense with

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[16] Tili, 139 Wn.2d at 116-17.

[17] Id.

[18] 168 Wn. App. 30, 275 P.3d 1162 (2012).

[19] Id. at 47-48.

instructions to vacate the lesser punished crime.[20] Here, the lesser punished crime was the fourth degree assault offense. Thus, the trial court should vacate the fourth degree assault conviction

We reverse and remand with instructions to vacate only the fourth degree assault conviction. The second degree assault conviction remains undisturbed.

COX, J.

WE CONCUR:

[20] See, e.g., State v. Schwab, 163 Wn.2d 664, 675, 185 P.3d 1151 (2008) (noting with approval the holding of this court in a prior case where we "vacated the lesser conviction where convictions for both first degree manslaughter and second degree felony murder violated double jeopardy").

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY S. AQUININGOC, Appellant.	)	No. 67604-1-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: January 28, 2013

Becker, J. — Anthony Aquiningoc was convicted of assaulting his wife, witness tampering, and violating a no-contact order. The court imposed an exceptional sentence and a no-contact order, preventing contact with his child. The State makes several concessions of error, which we accept. Otherwise, we affirm.

According to testimony at trial, Anthony and Ashley Aquiningoc were married in 2007. In 2009, they had a daughter. After their daughter's birth, they began fighting. In January 2011, Aquiningoc moved out of their Bellingham apartment. Ashley's mother moved in. The couple saw one another periodically, but they continued to fight. Two of their fights got physical, resulting in tears to Ashley's shirts.

On April 11, 2011, while Ashley's mother was away at work, Aquiningoc

came to the apartment at Ashley's invitation to discuss moving into a new apartment in Everett. They began to fight. Aquiningoc became angry when their daughter spilled a container of milk. He poured the remaining milk down Ashley's back. He threatened Ashley that he would take their daughter away from her. The fight escalated. Ashley testified that Aquiningoc tore her shirt, dragged her and threw her onto the bed, strangled her with his hands, tore her bedroom apart, and slapped her in the face, causing her to hit her head into the toilet.

Police arrived and arrested Aquiningoc in response to a call from Ashley's mother, to whom Ashley sent text messages during the encounter.

The State initially charged Aquiningoc with one count of second degree assault by strangulation. A domestic violence no-contact order was entered. Despite the order, while in jail, Aquiningoc wrote letters to Ashley.

Before trial, the State filed an amended information, adding 10 more counts. The court dismissed one of these counts after trial. The jury acquitted on two counts. The jury convicted Aquiningoc on the remaining eight counts: second degree assault by strangulation on April 11, fourth degree assault on April 11, four counts of violation of a no-contact order, and two counts of witness tampering. The jury found a domestic violence aggravator as to the second degree assault. At sentencing, the court imposed an exceptional sentence of 102 months.

This appeal followed.

WITNESS TAMPERING

Aquiningoc contends and the State concedes that his two convictions for witness tampering violate the prohibition on double jeopardy. Each conviction was based on letters Aquiningoc wrote to Ashley while he was in jail, trying to persuade her not to testify.

We accept the State's concession of error. The two convictions violate double jeopardy under State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010). The unit of prosecution for witness tampering is "the ongoing attempt to persuade a witness not to testify in a proceeding," not necessarily any single attempt to do so. Hall, 168 Wn.2d at 734. Aquiningoc's letters were an ongoing attempt to persuade a single witness not to testify in a single proceeding, his upcoming trial.

In direct response to Hall, in April 2011, the legislature amended the witness tampering statute. Laws of 2011, ch. 165 § 1. The legislature added the following language to supersede Hall: "For purposes of this section, each instance of an attempt to tamper with a witness constitutes a separate offense." Laws of 2011, ch. 165 § 3; RCW 9A.72.120(3) (2011). Because the amendment did not go into effect until July 22, 2011, it does not apply to Aquiningoc's conduct occurring in April and May 2011. On remand, the court shall vacate one of the witness tampering convictions.

NO "SEPARATE AND DISTINCT ACT" INSTRUCTION

Aquiningoc contends his

convictions for second and fourth degree assault violate the constitutional prohibition on double jeopardy because the jury may have rested both convictions on the same act.

The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the "same offense." U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal. Mutch, 171 Wn.2d at 661. This court's review is de novo. Mutch, 171 Wn.2d at 662.

Where jury instructions are unclear about the need to find that each count of a particular offense that occurs during the same charging period arises from a "separate and distinct" act in order to convict, the resulting ambiguity of the factual basis for a jury's multiple guilty verdicts potentially exposes the defendant to multiple punishments for a single offense in violation of the double jeopardy clause. Mutch, 171 Wn.2d at 662. When a remedy is required for failure to give a separate and distinct act instruction, the remedy is to vacate the redundant conviction. Mutch, 171 Wn.2d at 664.

Aquiningoc contends he is being punished twice for the same offense because the court's instructions did not clearly inform the jury that the fourth degree assault charge needed to rest on a predicate act "separate and distinct" from the assaultive act on which the second degree assault by strangulation was based. But he does not attempt to show

how a second degree assault by strangulation can ever be the "same offense" as a fourth degree assault. The basis for his argument that a double jeopardy violation occurred is that there was no Petrich instruction requiring the jury to be unanimous as to the act underlying the conviction for fourth degree assault. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).

This argument is misleading. The requirement of juror unanimity and the prohibition on double jeopardy arise from different constitutional provisions. Compare State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (unanimity requirement rests on article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution) with Mutch, 171 Wn.2d at 661 (double jeopardy prohibition arises from article 1, section 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution). Violation of the two constitutional requirements produces different remedies—a new trial if juror unanimity has not been assured, and vacation of the redundant offense if there is a double jeopardy violation.

Aquiningoc does not separately assign error to the absence of a Petrich instruction for the fourth degree assault charge, for good reason. A Petrich instruction is not needed where the evidence, evaluated in a commonsense manner, indicates a continuing course of conduct rather than a series of distinct acts. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). This is typically the case with repeated acts of assault involving a single victim over a relatively short period of time.

The various minor pushes and

slaps embraced in the charge of fourth degree assault could not have supported the conviction for second degree assault. According to the information and the to-convict instruction for second degree assault, that offense had to have been committed "by strangulation." Closing arguments on both sides unmistakably referred to the alleged strangulation as the basis for the second degree assault charge. Neither side ever described the fourth degree assault in context of the strangulation attempt. Under these circumstances, there was no possibility of being punished twice for the "same offense," and therefore no necessity for an instruction that the assault by strangulation had to rest on an act separate and distinct from the act or acts underlying the fourth degree assault charge.

CLOSING ARGUMENT

In the last moments of her rebuttal argument, the prosecutor argued that Aquiningoc's letters served to "corroborate" Ashley's account of the strangulation because Aquiningoc failed in those letters to deny her allegations:

> So in this case, we don't know medically if Ashley Aquiningoc is someone who is going to have petechiae if she's strangled. We don't know that, but we do know there were several other symptoms that corroborated that, and we know there were letters from Mr. Aquiningoc that corroborate that.
>
> And I agree, if I was [defense counsel], I wouldn't want to touch those letters. I wouldn't even want to get anywhere near them, because the one thing that you can't stand up and argue to the jury is why he didn't say that in his letters. Why he didn't take the stand, I didn't do that to you. You know I didn't do that to you. Why? Because he did that to her.

The defense did not object to these remarks. On appeal, Aquiningoc contends the argument about what he did

not say in his letters to Ashley was an impermissible comment on his right to remain silent. He also contends the last-minute reference to his failure to "take the stand" disparaged his exercise of his constitutional right not to testify and denied him a fair trial.

We review allegedly improper statements by the State in the context of the argument as a whole, the issues involved in the case, the evidence referenced in the statement, and the trial court's jury instructions. State v. Fuller, 169 Wn. App. 797, 812, 282 P.3d 126 (2012).

Where, as here, the defense fails to object to a comment at trial, any error is considered waived unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Failure to object strongly suggests to a court that the argument did not appear critically prejudicial to the appellant at the time it was made. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

Where the State's remarks violate a defendant's constitutional rights, we analyze the prejudice to the defendant under the more stringent constitutional harmless error standard, which requires the State to prove beyond a reasonable doubt that its misconduct did not affect the verdict. Fuller, 169 Wn. App. at 813. Commenting on a suspect's failure to testify or his postarrest silence is constitutional error that may be raised for

the first time on appeal. RAP 2.5(a); State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996).

In this case, the discussion of what the defendant did not say in his letters to Ashley was not a comment on silence. The letters were statements to a private actor, not a police officer. And the prosecutor's use of the phrase "take the stand" did not necessarily refer to the defendant's failure to testify. The State explains, plausibly, that it was a reference to the fact that in the defendant's letters to Ashley, he did not deny strangling her, i.e., when writing to Ashley he did not "take the stand" that the strangling never happened.

The prosecutor's choice of words was unfortunate, especially when seen on a page of transcript. But viewed in context, the statement was not "'of such character that the jury would naturally and necessarily accept it as a comment on defendant's failure to testify.'" State v. Scott, 93 Wn.2d 7, 13-14, 604 P.2d 943 (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)), cert. denied, 446 U.S. 920 (1980). Because the State's remarks did not violate Aquiningoc's constitutional rights, the harmless error standard does not apply. Because any prejudice could have been neutralized by a curative instruction if there had been an objection, we deem the issue waived by Aquiningoc's failure to object.

EXCEPTIONAL SENTENCE

Aquiningoc contends and the State concedes that resentencing is required because one of the factors

aggravating the sentence on second degree assault was imposed by the court without a required jury finding.

The court sentenced Aquiningoc to 102 months on the second degree assault charge, which was above the standard range.[1] One basis was a domestic violence aggravator found by the jury. The court also found that "the defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." See RCW 9.94A.535(2)(b).

We accept the State's concession of error. The unscored criminal history aggravator cannot be imposed by the court without a factual determination by the jury that a standard range sentence would be "clearly too lenient." State v. Alvarado, 164 Wn.2d 556, 567-68, 192 P.3d 345 (2008). The court did not state that it would have imposed the same exceptional sentence without this aggravator. We remand for reconsideration of the exceptional sentence.

The jury did find a domestic violence aggravator for the second degree assault charge, based on either an ongoing pattern of abuse or the act occurring within sight or sound of the parties' young daughter. The court relied on this aggravating factor in imposing an exceptional sentence. Aquiningoc contends the aggravator was unconstitutionally vague as applied because the court's

[1] The judgment and sentence lists the standard range to be 63 to 120 months, but the parties agreed at oral argument that the top of the standard range was actually 84 months. Thus 102 months was an exceptional sentence.

instructions did not define for the jury certain terms contained in one of the two alternative prongs.

Aquiningoc did not preserve this argument by objecting below. Because definitional issues in instructions are not constitutional in nature, the issue may not be raised for the first time on appeal. State v. Duncalf, 164 Wn. App. 900, 911, 267 P.3d 414 (2011), review granted, 173 Wn.2d 1026 (2012).

CORRECTION OF CLERICAL ERROR

Three of the eleven charges in the amended information were either dismissed or resulted in an acquittal. These charges were nevertheless listed on Aquiningoc's judgment and sentence as part of a table of "Current Offenses." For all three charges, the column of the table marking the "date of crime" was left blank.

The State concedes this was an error that must be corrected. We accept the concession. Reference to the three charges should be stricken from the judgment and sentence on remand. Because the error is clerical in nature, it does not provide an independent ground for resentencing. The record reflects the court did not consider the charges. Page four of the judgment correctly reflects the two acquittals and the one dismissed charge. The same trial judge presided over both the jury trial and the sentencing hearing. At sentencing, the court correctly noted that there were two witness tampering convictions, not three.

NO-CONTACT ORDER

Aquiningoc contends and the State concedes that the no-contact order should be stricken and the issue remanded for the court to carry out the required analysis of less restrictive alternatives. See In re Pers. Restraint of Rainey, 168 Wn.2d 367, 382, 229 P.3d 686 (2010). A sentencing court may not impose a no-contact order between a defendant and his biological child as a matter of routine practice. The court must consider whether the order is reasonably necessary in scope and duration to prevent harm to the child. Rainey, 168 Wn.2d at 377-82. Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest in barring contact. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009); State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001).

We accept the State's concession of error. The record does not reflect any balancing or consideration of alternatives before the court imposed the no-contact order. On resentencing, the court should engage in such an analysis on the record.

STATEMENT OF ADDITIONAL GROUNDS

Aquiningoc raises numerous issues in a 21-page statement of additional grounds. They generally fall into the categories of due process violations, double jeopardy violations, prosecutorial misconduct, and ineffective assistance of counsel. We find no basis that warrants additional review.

The case is remanded for vacation of one witness tampering conviction, reconsideration of the exceptional sentence, and consideration of alternatives to the no-contact order concerning the defendant's daughter. In all other respects, the judgment and sentence is affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Schindler, J.