No. 92184-9

THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ANTHONY AQUININGOC, Appellant.

ANSWER TO PETITION FOR REVIEW

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Rules

A. IDENTITY OF RESPONDENT

Respondent, State of Washington, by Hilary Thomas, appellate deputy prosecutor for Whatcom County, seeks the relief designated in Part B.

B. DECISION AND RELIEF REQUESTED

Respondent asks this Court to deny Petitioner Aquiningoc's Petition for Review of the Court of Appeals decision affirming his sentence from resentencing on his convictions for Assault in the Second Degree, Witness Tampering, multiple counts of Violation of a No Contact Order and Assault in the Fourth Degree.

C. ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals erred in declining to address an issue related to the domestic violence aggravator jury instruction language that Aquiningoc first raised in a motion to reconsider on the appeal from resentencing, which issue was not part of the remand order from the Court of Appeals from Aquiningoc's first appeal and which issue was not presented to, nor addressed by, the trial court at the resentencing.

Aquiningoc has presented three other issues in his petition for review. The State is only addressing the new issue Aquiningoc has presented in his petition for review and is not addressing his other issues,

relying instead upon its underlying briefing from the appeal of the resentencing as to those issues.

D. FACTS

The substantive facts of the underlying convictions are set forth in the Court of Appeals opinion attached to Aquiningoc's petition for review. Petitioner's App. A at 2-5. As noted in the Court of Appeals opinion, Aquiningoc was tried and found guilty of second degree assault, fourth degree assault, two counts of witness tampering and multiple counts of violation of a no contact order. Aquiningoc appealed from those convictions and the Court of Appeals remanded only for vacation of one of the witness tampering convictions, reconsideration of the exceptional sentence without consideration of the "prior unscored criminal history" aggravator, which had been found by the trial court not a jury, and for reconsideration of the no contact order regarding Aquiningoc's biological daughter. See attached State's App. A. Court of Appeals Opinion No. 67604-1-I.

Upon remand, counsel and the court discussed the specifics of the remand and resentencing, that one of the tampering counts needed to be vacated, that the court needed to reconsider the exceptional sentence imposed given that it could not rely upon the unscored criminal history

aggravator, and that the court needed to address the no contact order with Aquiningoc's daughter. RP 3-5. At another hearing the judge reiterated that his understanding was that there were two issues he needed to decided: whether to impose an exceptional sentence without consideration of the criminal history aggravator and the scope of the no contact order with the daughter. RP 12. At the resentencing hearing, the judge imposed the same exceptional sentence of 102 months that he had previously imposed, vacated one tampering conviction and modified the no contact order. RP 33-57. The exceptional sentence was based on two of the means of committing the domestic violence aggravator, that the domestic violence offense was committed within the sight or sound of the victim's or offender's minor child, as well as that the domestic violence offense was part of an ongoing pattern of abuse manifested by multiple incidents over a prolonged period of time. CP 94.

Aquiningoc then appealed from the new judgment and sentence and alleged four issues regarding waiver of his right to counsel, an erroneous offender score based unproved criminal history, violation of double jeopardy based on the assault second degree and assault in the fourth degree convictions, and improper argument by the prosecutor for imposition of an exceptional sentence based on facts that were not proved

to the jury. The Court of Appeals issued its opinion on July 6, 2015. Aquiningoc then filed a motion for reconsideration and to add an assignment of error after issuance of the Court's opinion.

E. ARGUMENT IN OPPOSITION TO DISCRETIONARY REVIEW

Aquiningoc's Petition for Review fails to offer adequate grounds and supporting argument to justify discretionary review under RAP 13.4(b). Under RAP 13.4(b), this court will grant review only:

> (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Aquiningoc does not identify under which provisions of RAP 13.4 his petition falls. With respect to the domestic violence aggravator jury instruction issue, he contends that the Court of Appeals erred in denying his motion to reconsider to permit him to add an additional assignment of error related to the jury instruction on the definition of "prolonged period of time" pursuant to State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015).

Even if Aquiningoc had raised the issue regarding the validity of the jury instruction language defining a "prolonged period of time" in his initial briefing on the appeal from the resentencing, Aquiningoc would have been procedurally barred from raising it because he didn't raise it in his first appeal and didn't raise it on remand at the resentencing. Appellate courts generally are precluded from considering issues that a party could have raised in a prior appeal from the same case, but didn't. State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); *see also*, State v. Worl, 129 Wn.2d 416, 424-425, 918 P.2d 905 (1996) (law of case doctrine precludes appellate courts from considering issues that a party raised or could have raised in prior appeal). The rules of appellate procedure state:

> If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

RAP 2.5(c)(1). The Supreme Court has interpreted this rule narrowly:

> This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

Barberio, 121 Wn.2d at 50; *accord*, State v. Parmelee, 172 Wn. App. 899, 905, 292 P.3d 799 (2013) (issue becomes appealable after remand only if trial court exercised discretion to review and rule again). "The trial court's

discretion to resentence on remand is limited by the scope of the appellate court's mandate." State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009). A decisive factor in determining whether an appeals court may exercise its discretion to review an issue not previously raised in the first appeal is whether the trial court in fact independently reviewed the issue on remand from the appellate decision. Barberio, 121 Wn.2d at 51; *see e.g.*, Kilgore, 167 Wn.2d at 43 (fact that a trial court had discretion to resentence on remand did not revive defendant's right to appeal where trial court did not in fact exercise such discretion).

In State v. Parmelee, 172 Wn. App. 899, 292 P.3d 799, *rev. den.*, 177 Wn.2d 1027 (2013), on remand from vacation of the exceptional sentence, the defendant argued that the offender score was wrong. The trial court, however, stated that the only issue before it was imposition of the exceptional sentence given that the case was otherwise final. Id. at 907. The judge made it clear that the only issue she was addressing was the limited issue regarding the exceptional sentence, even though she permitted the defendant to argue his scoring issues. Id. 907-08. On appeal from the remand the appellate court declined to reach the offender score issues because they had not been considered by the prior appellate court and the judge had not independently reviewed and ruled upon those issues

on remand. Id. at 908; *see also*, State v. Traicoff, 93 Wn. App. 248, 967 P.2d 1277 (1998), *rev. den.*, 138 Wn.2d 1003 (1999) (appellate court declined to review issue regarding community placement conditions because the defendant had not challenged the conditions in his original appeal and the trial court had not revisited the conditions on remand when it corrected the length of the term of community placement).

At the resentencing here, the judge explained again that there were only limited issues regarding sentencing that were to be addressed on remand. RP 28. Aquiningoc did not raise any issue regarding the jury instruction language on the domestic violence aggravator, instead arguing that his offender score was wrong. The prosecutor requested the court to impose the same exceptional sentence it had before, except not based on the unscored criminal history aggravator. RP 32. Before imposing sentence, the judge informed the parties that he still believed that an exceptional sentence was warranted and always had been based on the domestic violence aggravator itself. RP 54-55. When standby counsel inquired what the specific sentence was that the court was imposing, the court stated that it was not changing the sentence itself and confirmed it was imposing 102 months. RP 65.

Even if Aquiningoc had raised the issue regarding the language of the jury instruction defining a "prolonged period of time" in his initial briefing in this case, he would still be procedurally barred from raising it on appeal from the resentencing. The remand order from the first appeal was limited, Aquiningoc did not raise the issue at the resentencing, and the trial court did not consider the issue or make any rulings regarding the validity of the jury instruction language on the domestic violence aggravator at the resentencing. Therefore, Aquiningoc is precluded from raising it at this time.

Moreover, in addition to overcoming this procedural constraint, Aquiningoc would have to show that the alleged error was a manifest error of constitutional magnitude, pursuant to RAP 2.5, since he did not object to the instruction below. RP 199-202. Generally, Washington courts do not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). However, an exception may apply when a party raises a manifest error affecting a constitutional right. RAP 2.5(a)(3). Exceptions to RAP 2.5(a), however, are to be construed narrowly. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). In order to show "manifest error," an appellant must show that the alleged error had practical and identifiable consequences in

the trial. Id. It is the appellant's burden to demonstrate how the error actually affected his right to a fair trial such that the alleged constitutional error would fall within the narrow exception of RAP 2.5(a). Id. at 926-27.

Aquiningoc relies upon State v. Robinson, 171 Wn.2d 292, 253 P.3d 84, 89 (2011), to argue that he should be permitted to raise this issue regarding the language in the jury instruction on appeal from the resentencing, asserting that there has been a change in the law that should apply to his circumstances. Robinson did modify the preservation requirement to permit certain, limited issues to be raised on appeal for the first time, but *only when* four factors have been met.

> We recognize, however, that in a narrow class of cases, insistence on issue preservation would be counterproductive to the goal of judicial efficiency. Accordingly, we hold that principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation. A contrary rule would reward the criminal defendant bringing a meritless motion to suppress evidence that is clearly barred by binding precedent while punishing the criminal defendant who, in reliance on that binding precedent, declined to bring the meritless motion.

Robinson, 171 Wn.2d at 305. The four factor test permits a defendant who, in reliance on binding precedence, declines to file a meritless motion to suppress evidence clearly barred by that precedence, while discouraging

defendants from bringing meritless motions in the first place. Id. Failure to meet one of the four factors means the issue was not preserved for appellate review. State v. Lee, 162 Wn. App. 852, 856-57, 259 P.3d 294 (2011), *rev. den.*, 173 Wn.2d 1017 (2012).

Robinson is inapposite to Aquiningoc's situation because his circumstances do not meet factors two and three of that test. There was no prior binding constitutional precedence regarding the "prolonged period of time" language, and Brush did not overrule any such constitutional controlling precedent. Moreover, Robinson involved a direct appeal case in which the issue of whether the constitutional search issue could be raised occurred in the *first*, direct appeal of the case, not on appeal from a limited remand.

In re Netherton, 177 Wn.2d 798, 306 P.3d 918 (2013), also relied upon by Aquiningoc, is distinguishable as well. That case involved a situation in which the very issue raised in the personal restraint petition, regarding imposition of a firearm enhancement under the line of State v. Recuenco cases[1], had been raised during the course of the first direct appeal, was the issue that the Supreme Court remanded to the Court of

[1] State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005) (Recuenco I); Washington v. Recuenco, 548 U.S., 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (Recuenco II); State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco III).

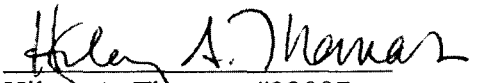
Appeals to address, and was the issue that the Court of Appeals addressed in its second decision. Id. at 799-801. The court in Netherton concluded that appellate counsel had provided ineffective assistance because counsel had failed to file a petition for review from the second Court of Appeals decision, and had one been filed, the defendant's case would have been stayed during the pendency of the subsequent litigation regarding firearm enhancements and the defendant ultimately would have prevailed. Id. at 802. Contrary to Netherton, Aquiningoc's issue was never raised in the first appeal, was not the issue to be addressed on remand, and was not the basis for the Court of Appeals decision on appeal from resentencing.

F. CONCLUSION

Based on the preceding analysis, the Court of Appeals opinion, and the State's briefing below, the Respondent respectfully requests that Acquiningoc's Petition for Review be denied.

DATED this 18th day of September, 2015.

Respectfully submitted,



Hilary A. Thomas, #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificates is attached, to this Court and petitioner's counsel, addressed as follows:

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TDA Stanik — **Name**

9/18/15 — **Date**

APPENDIX

A

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

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[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.

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.

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Please see attached Response to Petition for Review.

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