71539-9

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No. 71539-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

ANTHONY AQUININGOC, Appellant.

BRIEF OF RESPONDENT

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B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in permitting the defendant to represent himself at a resentencing where the resentencing had been continued over three months so defendant could hire private counsel but had been unable to do so, where the defendant had repeatedly requested to represent himself during that time, and where the defendant was already aware of the maximum punishment and the court engaged in a colloquy to ensure the defendant's waiver of right to counsel was knowing, intelligent and voluntary.

2. Whether the defendant can raise an issue regarding the validity of his criminal conviction history where he did not challenge that history at sentencing, in his first appeal nor at resentencing.

3. Whether the exceptional sentence imposed at the resentencing was improperly based on a domestic violence aggravator not found by the jury where the prosecutor remarked upon defendant's prior assault conviction for strangling his sister, but where the court indicated the original exceptional sentence it had imposed had primarily been based on the aggravator found by the jury and imposed the same sentence again, reiterating that the sentence was based upon the domestic violence aggravator found by the jury.

4. Whether this Court should exercise its discretion to revisit its double jeopardy ruling from the first appeal pursuant to RAP 2.5(c)(2) where the intervening caselaw is based on a different aspect of double jeopardy jurisprudence and where it is not controlling because the facts are distinguishable.

C. FACTS[1]

Appellant Anthony Aquiningoc was charged with and was convicted by a jury of Assault in the Second Degree – Domestic Violence, Assault in the Fourth Degree, four counts of Violation of a No Contact Order, two counts of Tampering with a Witness. CP 4-5, 8-13, Supp. CP __ Sub Nom. 42. He was also charged with, and the jury found, the domestic violence aggravating circumstance under RCW 9.94A.535(2)(h) as to the second degree assault. CP 8-13, Supp. CP __ Sub Nom. 43. Aquiningoc was also charged with the prior unscored criminal history aggravating circumstance under RCW 9.94A.535(2)(b) as to the second degree assault count, and the judge originally found that aggravating circumstance. CP 8-13, 29-30; 8/22/11RP[2] 24.

At the original sentencing the prosecutor sought an exceptional sentence based on the aggravators and recommended the statutory maximum of 120 months on the second degree assault charge. 8/22/11RP 3-4, 10-11. In making her recommendation, the prosecutor noted that Aquiningoc's criminal history included a second degree assault that also involved strangulation of another woman, Aquiningoc's sister, an offense

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[1] Additional relevant facts are set forth within the argument regarding each of the asserted issues.

[2] RP refers to the verbatim report of proceedings related to the resentencing, 8/22/11RP to those for the original sentencing, and TRP to the trial.

which he also committed in the presence of the victim's child. 8/22/11RP 9-10. Defense requested a middle of the range sentence[3] of 72 months on the second degree assault conviction. 8/22/11RP 17. Based on both aggravating circumstances, the court imposed an exceptional sentence of 102 months on the second degree assault conviction, imposed standard range sentences on the other two felony counts, and imposed a no contact order regarding Aquiningoc's biological daughter. 8/22/11RP 22, 24-25.

Aquiningoc appealed, and this Court remanded for vacation of one count of witness tampering, reconsideration of the exceptional sentence without the aggravator of unscored criminal history[4], and reconsideration of the no contact order. CP 33-45. Upon remand, Aquiningoc requested continuances in order to hire private counsel to represent him at the resentencing hearing. RP 5, 9-10, 19, 21. He also requested to represent himself in the meantime, though the court denied that request as premature. RP 9-11, 13-16. After the last continuance Aquiningoc informed the court he would not be able to hire private counsel and that he would be representing himself. RP 25. After engaging in a colloquy and urging him not to proceed pro se, the trial judge permitted Aquiningoc to

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[3] The standard range was 63-84 months. CP 22.

[4] The State had conceded this aggravator had to have been submitted to a jury in order for the trial judge to rely upon it as a substantial and compelling reason to impose an exceptional sentence.

represent himself. RP 25-32. Aquiningoc did permit the court to require appointed counsel to remain as standby counsel. RP 31. After hearing argument from Aquiningoc and the State, 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.

D. ARGUMENT

1. The trial court did not abuse its discretion in permitting Aquiningoc to represent himself where Aquiningoc refused to proceed with assigned counsel and could not afford to hire a private attorney.

Aquiningoc asserts that his waiver of his right to counsel was not knowing, intelligent and voluntary, primarily because the trial court did not inform him as to the maximum punishment for his convictions at the time it engaged in a colloquy with him about proceeding pro se. Aquiningoc was fully aware of the maximum punishment possible for his convictions because he had previously been sentenced. Aquiningoc insisted on representing himself, and the court was within its discretion to find that Aquiningoc was waiving his right to counsel in a knowing, intelligent and voluntary manner after engaging in an abbreviated colloquy given that the hearing was a resentencing. Aquiningoc was adamant about representing himself even before he knew he could not afford an attorney.

He made his decision to represent himself with his "eyes open." Given that there was no basis to substitute counsel, the trial court's decision to permit Aquiningoc to represent himself instead of proceeding with assigned counsel he rejected was not an abuse of discretion.

A criminal defendant has a right to represent him or herself pursuant to the Sixth Amendment. Faretta v. California, 422 U.S. 806, 819-21, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). A defendant may waive his converse right to counsel and proceed pro se, but s/he must do so unequivocally[5]. State v. DeWeese, 117 Wn.2d 369, 377, 816 P.2d 1 (1991); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001).

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; ... and the right to make a defense is stripped of the personal character upon which the Amendment insists.

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[5] The requirement that the request be unequivocal stems from the tension between the defendant's right to counsel and the right to self-representation.

> Because of this conflict, a defendant's request for self-representation can be a "heads I win, tails you lose" proposition for a trial court. ... If the court too readily accedes to the request, an appellate court may reverse, finding an ineffective waiver of the right to counsel. But if the trial court rejects the request, it runs the risk of depriving the defendant of his right to self-representation. ... To limit baseless challenges on appeal, courts have required that a defendant's request to proceed pro se be stated unequivocally.

State v. DeWeese, 117 Wn. 2d 369, 377, 816 P.2d 1 (1991) (internal citations omitted) (quoting State v. Imus, 37 Wn. App. 170, 179-80, 679 P.2d 376 (1984)).

Faretta, 422 U.S. at 820(internal footnote omitted). "This right is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

A waiver of either the right to counsel or the right to represent oneself must be knowing, intelligent, and voluntary. Silva, 108 Wn. App. at 539, Faretta, 422 U.S. at 835. The focus of the waiver of the right to counsel inquiry is to ensure that a defendant is "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835; *accord*, City of Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984). While a colloquy is the preferred means of ensuring a valid waiver of the right to counsel, the court may look to evidence in the "record that shows the defendant's actual awareness of the risks of self-representation." Acrey, 103 Wn.2d at 211; *see also*, Madsen, 168 Wn.2d at 504 n.2 ("[a] colloquy is unnecessary if there are independent, identifiable facts that show whether the request is voluntary, knowing and intelligent"). If a colloquy is conducted, it should generally address the nature and classification of the charges, the maximum penalty upon conviction, as well as advise the defendant that there are technical

rules that apply to the presentation of evidence. Id. The extent of the colloquy may depend on the nature of the proceeding. *See*, U.S. v. Salemo, 61 F.3d 214, 219 (3rd Cir. 1995) (fact that proceeding was sentencing hearing and not trial was relevant to the content of colloquy the court had to engage in to determine if defendant's waiver of right to counsel was knowing, intelligent and voluntary). The validity of the waiver is determined based upon the defendant's knowledge at the time of the waiver, and if a defendant accurately understands the penalty s/he faces at that time, the waiver is valid. State v. Modica, 136 Wn. App. 434, 445, 149 P.3d 446 (2006), *aff'd*, 164 Wn.2d 83 (2008). Ultimately, whether a defendant's waiver of the right to counsel is valid depends upon the facts and circumstances of the individual case. There is no specific itemized list that must be conveyed to the defendant for the waiver to be valid. DeWeese, 117 Wn.2d at 378.

The validity of such a waiver is reviewed for an abuse of discretion. In re Rhome, 172 Wn.2d 654, 667, 260 P.3d 874 (2011); *see also*, Madsen, 168 Wn.2d at 504(as request to proceed pro se is waiver of right to counsel, denials of requests to proceed pro se are reviewed under an abuse of discretion standard). The only grounds upon which a court may deny a request to proceed pro se are that the request is untimely, equivocal, involuntary, or "made without a general understanding of the

consequences." Madsen, 168 Wn.2d at 504-05. A denial may not be based on concerns that self-representation would negatively affect the defendant's ability to put forth his case or that it will be less efficient than if s/he were represented. Id. at 205. The importance of respecting the right to represent oneself "outweighs any resulting difficulty in the administration of justice." Madsen, 168 Wn.2d at 509.

When an indigent defendant is dissatisfied with current counsel, but fails to provide the court with a legitimate basis for substitution of counsel, the court can require the defendant to choose between continuing with current counsel or proceeding pro se. DeWeese, 117 Wn.2d at 376. "If the defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be represented by counsel, and may represent a valid waiver of that right." Id. On the other hand, a defendant's desire not to continue with assigned counsel does not in and of itself constitute an unequivocal request to proceed pro se, the court still must ensure a valid waiver. Id. at 377. A defendant's clear and knowing request to proceed pro se is not rendered equivocal if it is motivated by something other than purely the desire to represent him or herself. Modica, 136 Wn. App. at 442. In determining whether a defendant's decision to waive the right to counsel is knowing and intelligent, the court may

consider defendant's insistence that he not be represented by a particular attorney. U.S. v. Gallup, 838 F.2d 105, 110 (4th Cir. 1988).

In DeWeese, the defendant was originally represented by appointed counsel, but ethical conflicts developed between them and the court permitted counsel to withdraw, and the court appointed another attorney. DeWeese, 117 Wn.2d at 372. After disagreements arose between this second counsel and the defendant, the first attorney was re-appointed. Id. When the defendant requested new counsel to replace the first appointed counsel, the trial court refused and gave the defendant the option of continuing to be represented by the first counsel or of proceeding pro se. Id. at 372. The judge engaged in a lengthy conversation with the defendant regarding the disadvantages of proceeding pro se. Id. at 373. After the court advised him against representing himself, the defendant chose to proceed pro se. Id. Once trial had commenced, the court appointed stand-by counsel to assist the defendant at the defendant's request. Id. However, thereafter the defendant discharged stand-by counsel, became disruptive in court and eventually the defendant was removed from the courtroom and didn't participate in the trial. Id. at 373-74.

On appeal, the court found that the trial court's denial of a third counsel was appropriate because the defendant could not identify any

valid reason justifying appointment of a new attorney. Id. at 378. It also found that the court properly provided the defendant the option of proceeding with the assigned counsel or going pro se. Id. The court held: "after a valid denial of a defendant's request for appointment of substitute counsel, the trial court may require the defendant to choose between remaining with current counsel or proceeding pro se." Id. at 379.

In this case, Aquiningoc was initially advised of the charge against him and the maximum penalty and acknowledged that the he had been informed that the Assault in the Second Degree charge carried a maximum penalty of 10 years and a $20,000 fine. Supp. CP __, Sub Nom. 1. At the original sentencing the prosecutor stated that the maximum sentence Aquiningoc faced was 120 months given the aggravators, that the State was seeking an exceptional sentence based on those aggravators and that his standard range was 63-84 months, but because of the aggravator the jury found he was looking at 63 to 120 months. 8/22/11RP 3, 7-8. The prosecutor requested a sentence of 120 months. 8/22/11RP 8-9, 11. Certainly after having gone through that hearing and having received a copy of the judgment and sentence, he was aware upon remand that he faced a maximum sentence of 120 months, and of the maximum sentence for each of the convictions. CP 20. Having received an exceptional

sentence, he was also aware that he faced the possibility of a statutory maximum sentence on the second degree assault.

When the matter came back to the trial court on 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 one of the aggravators, and that the court needed to address the no contact order with his daughter. RP 3-5. Although both counsel indicated to the court that scoring wasn't an issue and hadn't been on appeal, Aquiningoc requested a continuance in order to review his felony history. RP 4-6. The court granted the continuance so Aquiningoc could review his history and so the court could review the sentencing transcript. RP 5-7.

A few days later, Aquiningoc filed a motion to discharge counsel and requested to proceed pro se. CP 46-50. In that motion, Aquiningoc advised that he was back before the court for

> 1. VACATION OF ONE WITNESS TAMPERING CONVICTION;
> 2. RECONSIDERATION OF THE EXCEPTIONAL SENTENCE IMPOSED;
> 3. CONSIDERATION OF ALTERNATIVES TO THE NO-CONTACT ORDER CONCERNING THE DEFENDANT'S DAUGHTER.

CP 47. He requested to proceed pro se because he felt that defense counsel was "inadequate to proceed in the Defendants (sic) best interest."

CP 47. After asserting that defense counsel had not conferred with him enough and that they didn't agree as to how to proceed with the resentencing, Aquiningoc requested to discharge his appointed counsel and requested to represent himself. CP 47-49.

At the November 12th hearing, Aquiningoc asserted that he was going to hire private counsel and wanted an additional 30 day continuance to arrange that. RP 9-11. When the court inquired as to why he wanted new counsel since there were limited sentencing issues to be addressed, Aquiningoc informed the court that he wanted to present some mitigating circumstances before the court resentenced him, address some of the points in his offender score, and present some information about how well he had been doing in prison. RP 9-10. After advising Aquiningoc that the attorney wouldn't have the benefit of knowing all that happened at the trial, the court asked Aquiningoc what would happen if he weren't able to get a new attorney, and Aquiningoc said that he would proceed pro se. RP 11. The court outlined its understanding of the two main issues before it: whether it would still impose an exceptional sentence not taking into consideration the criminal history aggravator; and the no contact order. RP 12. The court again inquired whether Aquiningoc would really want to proceed pro se if he wasn't able to obtain new counsel within the additional 30 days. RP 12. He confirmed he did. RP 12.

When the prosecutor requested that the public defender be kept on as counsel in the meantime, Aquiningoc informed the court he wanted to discharge that attorney and proceed pro se from then on. RP 13. When the court advised it would be better to keep the public defender on until he could get new counsel, Aquiningoc reiterated that he didn't want the public defender representing him any further. RP 14. When the public defender brought up the issue of a colloquy, the court deferred on that because it was keeping the public defender on as counsel until Aquiningoc's new attorney substituted in. RP 15. Aquiningoc indicated he understood, but again asked to invoke his 6th Amendment right to represent himself right then. RP 15. The court responded it wasn't sure the specific colloquy requirement for a resentencing, and indicated it wouldn't be necessary if new counsel substituted in. RP 16-17. Aquiningoc again objected, and informed the court that he had been representing himself in another matter and that he felt he could adequately represent himself. RP 17. The court indicated it was concerned about some right or risk that Aquiningoc might not be aware of, to which Aquiningoc indicated he was aware of his rights. RP 17.

When the court reconvened in December for the resentencing, Aquiningoc requested additional time in order to hire a private attorney, who was present in court. RP 19. He indicated that he wanted to hire the

attorney so that he could bring up some mitigating facts, some certificates he obtained while incarcerated, and to address some point issues. RP 19. The private attorney indicated he had not been retained yet, but that he was willing to take the case on if he were. RP 19-20. Aquiningoc assured the court that if he had through the holidays, his family could raise the money. RP 20. The court noted that the matter had originally come on for resentencing in late September and informed Aquiningoc that if he weren't able to hire private counsel by the next hearing date that they would proceed with resentencing with or without that attorney. RP 21. It informed Aquiningoc if he still wanted to represent himself at that time, they would address it then, and the court continued the matter for another 30 days. RP 22.

A month later, Aquiningoc informed the court he had been unable to raise the money to hire the private attorney and informed the court that he would be representing himself. RP 25. When asked why, Aquiningoc explained that he and the public defender never were on the same level when they discussed the mitigating circumstances and points issue he wanted to address. RP 25-26. He told the judge that no one else understood his case like he did, that there were certain things he wanted to point out to the judge, that he'd been working hard at getting some certifications to change his life. RP 26. After explaining what a "conflict

of interest" was, the court asked whether there was just a disagreement or a true conflict of interest. RP 27. Aquiningoc stated that the dispute went back to before the trial when the public defender had mentioned that he had previously been a victim of strangulation. He also felt that counsel should have objected more at trial, and that counsel had told him it was a waste of time coming back to Whatcom County.[6] RP 27. When asked specifically what the concern was regarding the issues the court had to address at resentencing, Aquiningoc explained they just didn't see "eye to eye," and that they hadn't gotten along throughout. RP 28.

The court then inquired what experience, if any, Aquiningoc had had in representing himself. RP 28-29. Aquiningoc indicated that he had been litigating a public records act matter related to this case, but admitted that he had not represented himself in a criminal case or at a sentencing. RP 29. The judge then inquired if he had studied anything about the process of sentencing and asked if he were familiar with the guidelines and the sentencing grid. RP 30. Aquiningoc said that he was. RP 30. The judge then asked if he understood the legal basis for an exceptional sentences versus a standard range sentence. RP 30. Aquiningoc stated that did not in a professional capacity, but he had studied it enough in order to

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[6] The public defender had previously responded to the strangulation allegation and responded to the "waste of time" allegation. 7/18/11RP 5-6, RP 66.

represent himself. RP 30. The court advised that if Aquiningoc were to proceed pro se, the court would not be assisting him at all, that it was just his job to conduct the proceeding and to decide the outcome. RP 30-31. Aquiningoc stated he understood. The court then informed him that his request at this stage in the case was unusual and advised him against proceeding pro se. The judge explained that the public defender better understood how to present information and the intricacies of the legal system, and urged him to continue with appointed counsel. RP 31. Aquiningoc agreed to permit the public defender to "stand beside [him] as additional counsel," but still wanted to represent himself. RP 31. The court asked if he were ready to proceed, to which Aquiningoc said he was. RP 32.

While the judge could have reiterated the maximum penalty to Aquiningoc, Aquiningoc was already aware of what it was, having already gone through sentencing once before. The scope of remand was limited to vacating one of the tampering convictions, addressing whether the court would have imposed the exceptional sentence based only on the one remaining aggravator, and the parameters of the no contact order. Aquiningoc was insistent on representing himself even before it was clear that he wasn't able to hire a private attorney. Aquiningoc did not request a different public defender be appointed. In fact there was no basis to do so,

and Aquiningoc does not contend otherwise on appeal. The court delayed the resentencing for over three months in order to allow Aquiningoc to hire private counsel. He could not do so and refused to proceed with the public defender as appointed counsel. Aquiningoc had the assistance of the public defender as standby counsel.

As in Deweese, the court was faced with permitting Aquiningoc to proceed pro se or to require the public defender's continued representation over the insistence of Aquiningoc that he be permitted to represent himself. *See also*, U.S. v. Gallup, 838 F.2d 105, 109 (4th Cir. 1988) (once court determines that substitution of counsel is not warranted, court can insist that defendant proceed with current counsel or go pro se); U.S. v. Mitchell, 788 F.2d 1232 (7th Cir. 1986) (court's decision to require defendant to proceed pro se with standby counsel or with defense counsel was not impermissible where defendant's request to proceed pro se due to differences of opinion about the case and its presentation was made the day of trial). The colloquy was sufficient to ensure that Aquiningoc's waiver was knowing, intelligent and voluntary where Aquiningoc was otherwise aware of what his maximum, penalty was. Under these circumstances, it would have been an abuse of discretion to not have permitted Aquiningoc to represent himself. *See*, Madsen, 168 Wn.2d 496(trial court abused its discretion in denying defendant's right to self-

representation where defendant's request was unequivocal, timely, voluntary , knowing and intelligent, although court's colloquy was limited to asking defendant why he wanted to represent himself).

U.S. v. Moskovits, 86 F.3d 1303 (3rd Cir. 1996), relied upon by Aquiningoc, is distinguishable. In that case, the court noted that the record was "not at all clear that [the defendant] had been made aware when he waived his right to counsel before [the judge] that the original 15 year sentence would not serve as a ceiling on the sentence he could receive in the event he was convicted again." Id. at 1307. The court therefore concluded that there was no basis for inferring that the defendant was aware at the time he waived counsel for his retrial that he faced the possibility of an increased sentence if found guilty again. Id. In fact, the case distinguished another case, U.S. v. McFadden, 630 F.2d 963 (3rd Cir. 1980), *cert. den.*, 450 U.S. 1043 (1981), that concluded since the defendant had otherwise been made aware of the range of punishment he faced, the court was not required to inform him again at the time of the colloquy regarding the waiver of counsel. In distinguishing that case, the court noted that the defendant in McFadden had twice been informed of the range of punishment he faced. Similarly here as in McFadden, Aquiningoc was at least twice informed of the maximum punishment he

faced, once at his preliminary hearing and the second time at the original sentencing hearing.

2. As Aquiningoc didn't challenge the validity of any of his criminal history in his first appeal, nor at the resentencing, he cannot challenge the validity of his conviction history in this appeal.

Aquiningoc is procedurally barred from raising the issue regarding the evidentiary support for his criminal conviction history because he didn't raise it in his first sentencing, didn't raise it in his first appeal and didn't raise it on remand at the resentencing. The court did not revisit the validity of any individual convictions. Moreover, Aquiningoc did not contest the existence of his burglary in the second degree from 1991 nor his juvenile history at resentencing. He only argued that his offender score was wrong because of what it was listed as in a prior judgment and sentence. Aquiningoc does not assert on appeal that his offender score is wrong based on the criminal history listed in the judgment and sentences. If this Court were to determine that another resentencing hearing were necessary, the State should have the ability to present additional evidence upon remand because Aquiningoc did not object specifically to any individual conviction history below.

a. Aquiningoc cannot raise any issue regarding the validity of his criminal history because he failed to raise this issue previously.

Aquiningoc did not assert any issue regarding the sufficiency of the showing for his criminal conviction history until this appeal. 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). Therefore, the issue of the validity of Aquiningoc's criminal conviction history is not properly before this Court.

"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). 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). This rule contemplates that the trial court addressed an issue that had not been previously litigated in the prior appeal. 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 make a record and 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 time of the original sentencing, the State submitted an exhibit to support its request for the finding of the unscored criminal history aggravator. Supp. CP __ Sub Nom. 45. In that summary, the State provided a copy of the plea statement and judgment and sentence from Aquiningoc's 1991 second degree burglary, in addition to a DCH and an NCIC III. The plea statement, listed Aquiningoc's understanding of his criminal history based on the prosecutor's summary, which included 10 juvenile felonies, 8 of which are listed in the judgment and sentences in this case. CP 20, 85, Supp. CP__ Sub Nom. 45. The prosecutor informed the court that he had a total of 15 felonies, nine prior juvenile felonies, three prior adult felonies, and the three current felony convictions, and asserted that Aquiningoc's offender score on the second degree assault

was more than nine. 8/22/11RP 5, 11. Defense counsel did not contest the prosecutor's summary of Aquiningoc's criminal history, stating "He has, the criminal history has been outlined." 8/22/11RP 18.

When the case came back on remand, Aquiningoc told the court he wanted a continuance in part to review his "felony scoring history," and the prosecutor interjected that she believed a review was unnecessary because that was not part of the remand from the Court of Appeals. RP 4-6. Despite the prosecutor's objection, the court agreed to continue the matter and indicated it wanted to review the sentencing transcript and to see what Aquiningoc's issue was. RP 6-7.

At the next hearing, Aquiningoc referenced his offender score as a reason why he wanted to represent himself. RP 10. When the prosecutor told the court that she didn't understand how the offender score was going to change, the judge responded that he believed there were two issues before the court: 1) whether to impose the exceptional sentence without consideration of the unscored history aggravator, and 2) the no contact order. RP 12.

At the resentencing, in addressing Aquiningoc's desire to go pro se, the court explained again that there were only limited issues regarding sentencing that they were to address on remand. RP 28. Aquiningoc argued there had been an error in a prior judgment and sentence, that the

burglary in the first degree had been dismissed, and since the burglary in the second degree (sic)[7] had been dismissed, he should have been a three point offender in his 1995 judgment and sentence instead of a four point offender as it stated. RP 41. When he asserted at he was a seven point offender on the second degree assault and a six otherwise, the court inquired of the prosecutor if there was an issue regarding points. RP 46.

The court reviewed the criminal history and stated there were 11 felonies dating back to 1985. RP 47. He inquired if any washed out, and the prosecutor informed him that they did not. Standby defense counsel also later confirmed that he had extensively researched whether any of the juvenile felonies had washed out, and that he and the prosecutor had specifically reviewed the criminal convictions together to determine if any of them washed out. RP 63. When standby defense counsel informed the court that he was pretty confident that the scoring was correct, the court stated that he hadn't been presented with anything to show they had washed out or that the scoring was incorrect, and that if he had been, he would correct it. RP 64. The court indicated that its understanding was that all the felonies counted, though they may not in the future, and explained to Aquiningoc that there wasn't anything he could do about

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[7] The DCH shows that the first degree burglary charge was dismissed as part of the 1995 cause number. CP 83, Supp. CP __ Sub Nom. 45.

prior judgments that may have had incorrect offender scores in them. RP 64. 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.

Aquiningoc did not contest the validity of his convictions in the original sentencing and he did not contest the validity of the history on remand. What he did contest was his offender score, and this was based upon what a prior judgment had stated his offender score was. The court did not readdress the validity of his convictions on remand, and in fact did not revisit the calculation of his offender score. As in Parmalee, the trial court did not address the validity of Aquiningoc's criminal conviction history upon remand, although the court did permit Aquiningoc to make a record and argument regarding his offender score. Aquiningoc's assertions about what his offender score was did not revive this issue. *See,* Parmelee, 172 Wn. App. at 908(although finding of offender score was necessary to judge's consideration as to whether to impose an exceptional sentence, judge's finding did not mean that trial court independently reviewed and ruled again as to the offender score). The validity of the Aquiningoc's criminal conviction history is not properly before this Court because the trial court did not independently review and rule on that issue on remand.

Moreover, Aquiningoc admitted the existence of his 1991 burglary conviction when he referenced its judgment and sentence. Aquiningoc admitted he was convicted of a felony in 1991 when he argued that he was only a two point offender in 1991. RP 46. It is the burglary in the first degree that was dismissed, not the burglary in the second degree. His juvenile criminal history was referenced on the 1991 burglary plea statement and the prior judgment and sentence. He never contested the validity of those convictions.

While Aquiningoc asserts that the trial court should have reduced the offender score before resentencing Aquiningoc because it vacated one of the tampering convictions, he does not assert that the offender score is wrong based on his criminal history listed in the judgment and sentence. It appears that the offender scores listed on the prior judgment and sentence were either wrong or not as accurate as they could have been. The prosecutor indicated at the first sentencing hearing that she believed Aquiningoc was above a nine point offender, though she did not explain her calculation of his offender score. 8/22/11 RP 5. While the offender score perhaps should have stated more accurately 9+ or 10 regarding the second degree assault conviction on the first judgment, there is no increase in the standard range on any conviction that has an offender score of 9 or

above, so it didn't affect the standard range the judge was to consider before deciding to impose an exceptional sentence.

Aquiningoc also asserts that his offender score should be reduced because he contested the 1991 burglary at resentencing and the prosecutor stated she hadn't included a burglary in the second degree in his offender score. The State disagrees with Aquiningoc's interpretation of what he said or meant at the resentencing. He asserts that he said his 1991 burglary in the second degree should not be included in his criminal history. What he stated after making the comment about the burglary being dismissed was:

> My points, Your Honor, I'm looking at my points here. My judgment and sentence states I have two points in 1991, and my next conviction was in 1995 which states that I had four points, and in fact, it should have been three, and then I had a malicious mischief in the second degree in '07 which should have been, which should have been four points, and then the charges that I have now which should have brought me up to six points, Your Honor, is how I calculated it.
>
> If you were to use the doubler, the multiplier, because of the second degree assault and the second degree assault in 1995, some, some years, back, I believe it would have been seven points, something like that, Your Honor.

RP 41, 46. Aquiningoc's statement confirms that he had, and he understood that he had, a felony conviction in 1991. The criminal history summary submitted shows that conviction was a burglary in the second degree, and the State had previously filed the information, probable cause

affidavit, plea statement and judgment and sentence as evidentiary support for that conviction, in addition to the DCH an NCIC III. CP 83, Supp. CP __ Sub Nom. 45.

It is unclear what the prosecutor meant when she stated she did not "include *it* as a point in his calculation." (emphasis added) Just prior to that statement she had been referencing her argument in the first sentencing hearing and her argument regarding *unscored* criminal history. She used the 1991 judgment and sentence in the first sentencing to argue the existence of his Canadian robbery conviction, and Aquiningoc's admission of its existence. 8/22/11RP 4. It was the *Canadian robbery* conviction that she hadn't previously included in his offender score, not the 1991 burglary. 8/22/11RP 5. Both judgments include the 1991 burglary in the list of criminal history. They do not include the robbery conviction. When asked if "it" was one of those listed on the previous judgment and sentence, she stated no, that she had not included it. RP 48-49. Perhaps she misspoke when she made the statement she did, perhaps she thought they were referencing the robbery conviction. The reality is the 1991 burglary conviction was listed in the first judgment, was listed in the second judgment, evidentiary support was provided for it, and it counts in his offender score.

Aquiningoc asserts that his numerous juvenile convictions should not be included in his offender score because the court directed the prosecutor to "address this history," and the DCH summary filed after that did not include any juvenile criminal history. Aquiningoc's position misinterprets the record. The criminal history information filed at the time of the original sentencing included a 1991 burglary plea statement listing his juvenile criminal history. At the initial hearing upon remand, defense counsel indicated Aquiningoc wanted to review his scoring history, even though defense counsel didn't think such a review was necessary as the Court of Appeals had not indicated that there had been a lack of information regarding his history. RP 4-5. Aquiningoc interjected that he was asking for a 30 day continuance for the "motion" that he'd made. RP 5. Apparently no one else had seen this motion. Id. The court indicated it wanted some time to review the transcript of the sentencing hearing before making a decision about "what sort of exceptional sentence to impose" and the no contact order. RP 5. The court then mentioned material the attorneys could submit to the court with their recommendations, to which the prosecutor responded that she hadn't planned on submitting anything in writing. RP 5. The following discussion occurred:

> THE COURT: I'm just suggesting, and if Mr. Hall thinks that there needs be a review or Mr. Aquiningoc wants the Court to look at his prior scoring history, I will need to see that, to see what that

history is and what those courts did. So you will need to prepare something for me in that regard.

MR. HALL: Okay.

MS. BRACKE: And I'm not – well, I think in terms of that –

THE COURT: I'm not prepared to address that.

MS. BRACKE: Right, I don't think that's an issue that can be prepared. This is a mandate for us to address certain issues. If he didn't appeal that issue, it is not before the Court.

THE COURT: I don't know what the nature of his motion is, because I haven't seen that.

MS. BRACKE: Right, but if Mr. Hall is correct, and he's now going to challenge points, that is not an issue before the Court, and it could have been, you know, during the appeal.

THE COURT: I want to see what his request is. I don't know what his request is.

MS. BRACKE: I understand.

THE COURT: Get that to the Court and address that as soon as you can, and you shoot it to Mr. Hall, and then I want to get a transcript of the sentencing hearing so that I can recall what happened two years ago and what the Court considered and what was said, because I don't have a recollection of that having been so long ago.
So what I think you need to do is get the schedule from Ms. Ortner and get another date and get Mr. Aquiningoc's motion to me and anything you want to submit. I'll get the transcript, and I'll be prepared to address it.

Further on, the court summarized the process going forward:

THE COURT: Okay. Then what we're going to do is get another date that fits everyone's schedule, and I'll get the materials that you want to submit and anything counsel wants to. Then I'm

> going to look at the transcript of the previous hearing, and we'll do a resentencing on that date.

RP 7. A couple days after the hearing, Aquiningoc's motion entitled "Motion to Discharge Counsel ..." was filed. CP 46-50.

The court did not direct the prosecutor to file evidentiary support for Aquiningoc's criminal convictions. To the extent that the court directed anything about criminal history, it was directed at defense counsel. The court wanted a copy of Aquiningoc's motion to see what his request was. The court did not revisit the validity of Aquiningoc's criminal history and did not rule on it. The issue of the evidentiary support for his juvenile convictions was not contested in the original sentencing or on remand. He cannot now challenge it.

b. If remanded, the State would not be limited to the current record because Aquiningoc did not specifically object.

Aquiningoc asserts that the 1991 burglary and juvenile convictions must be stricken from his offender score because the State did not meet its burden to prove those convictions. As argued above, Aquiningoc cannot raise the validity of that conviction history now. In addition, there was ample evidentiary support submitted for the 1991 burglary. Should this case be remanded again, the State would not be limited to the previous

record because the State alleged the prior convictions and Aquiningoc failed to specifically object.

Aquiningoc cites State v. Lopez, 147 Wn.2d 515, 55 P.3d 609 (2002) for the proposition that upon remand, the State cannot provide any additional evidence to support those convictions he now challenges. Lopez is distinguishable however. In Lopez, the defendant objected to being sentenced to a persistent offender sentence without any evidence of the two prior qualifying convictions. Id. at 518. The prosecutor offered to obtain the judgments but admitted s/he didn't have them at that point in time, not realizing that the convictions were going to be contested. The judge proceeded to sentence the defendant to life without parole without any evidentiary support for the prior strike offenses. Id. The court held that "a remand for evidentiary hearing is only appropriate when the defendant has failed to specifically object to the state's evidence of the existence or classification of a prior conviction." Id. at 520. On the other hand, it held, where the defendant raises a specific objection and the disputed issues are argued to the court, the state is held to the existing record on remand. Id. In that case, the defendant had made a specific objection and therefore the State was limited to the prior record on remand. Id. at 521.

Here, Aquiningoc did not object to the evidence submitted by the State for the first hearing and did not specifically object at the second hearing. Therefore, should this case be remanded again, the State should have an opportunity to provide additional evidence to support the juvenile conviction history listed in Aquiningoc's 1991 plea statement and judgment and sentence. *See*, State v. Hunley, 175 Wn.2d 901, 906 n.2, 287 P.3d 584 (2012) (if offender score determination was based on insufficient evidence, case is remanded for resentencing with opportunity for the State to introduce new evidence if the State alleged existence of prior convictions at sentencing and defense failed to specifically object before sentence was imposed).

3. The exceptional sentence was properly imposed based on the domestic violence aggravator.

Aquiningoc asserts that the State impermissibly sought an exceptional sentence based on the domestic violence aggravator under RCW 9.94A.535(3)(h)(i) involving another victim, Aquiningoc's sister. The prosecutor did not request the court to impose an exceptional sentence based on an unfound aggravator. The prosecutor requested the court to impose the same exceptional sentence it had imposed before, 102 months, but based only on the aggravators the jury had found and not the aggravator under RCW 9.94A.535(2)(b) for unscored criminal history. As

she had before, the prosecutor referenced that one of Aquiningoc's prior offenses involved strangulation as well. Her argument based on Aquiningoc's prior criminal history of a similar nature did not impermissibly seek the court to impose an exceptional sentence based on an aggravator not found by the jury.

> In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. [8]Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537.

RCW 9.94A.530. "Acknowledgement" permits a sentencing judge to rely upon unchallenged facts and information introduced at sentencing. State v. Ford, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999). Facts relied upon by the trial court in sentencing a defendant must have a basis in the record. Id. at 482. Otherwise, the defendant must make a "timely and specific challenge" to information presented for consideration at the sentencing hearing. State v. Garza, 123 Wn.2d 885, 890, 872 P.2d 1087 (1994).

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[8] The portion of RCW 9.94A.530(2) that states that "Acknowledgment includes ... not objecting to criminal history presented at the time of sentencing" was held unconstitutional in State v. Hunley, 175 Wn.2d 901, 287 P.3d 584 (2012).

When a defendant disputes information presented, the sentencing court must either not consider it or must hold an evidentiary hearing regarding that information. State v. Handley, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990).

Aquiningoc asserts that the prosecution did not plead or prove that the domestic violence was a pattern of abuse. On the contrary, the prosecution did plead and prove this aggravator, although the factual basis for the pattern of abuse was based solely upon the Aquiningoc's abuse of his wife. The state also alleged, and the jury found, the aggravator that the domestic violence occurred within the sight or sound of a minor child, pursuant to RCW 9.94A.535(h)(ii). At resentencing, the prosecutor requested the court to impose the same sentence it had before, except the exceptional sentence could not be based on the unscored criminal history aggravator as the appellate decision instructed. RP 32. In doing so, the prosecutor recounted that Aquiningoc's sister had appeared on his behalf at the original sentencing and, in minimizing the strangulation that had occurred in this case, had informed the court that the strangulation she had incurred at the hands of Aquiningoc had been much more significant[9]. RP

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[9] At the original sentencing the prosecutor read from the probable cause statement regarding Aquiningoc's prior second degree assault. The sister stated: "I'm here to say that when she was going over the case that happened about 11 years ago that my brother

33. The prosecutor stated that similar, prior criminal history and the aggravator that the assault had occurred while the child was present had been significant to her belief that the original sentence had been appropriate. RP 33-34. While Aquiningoc stated he did not understand why the prosecutor was bringing up his prior assault conviction involving his sister from 1995, he admitted he was guilty of that offense although he argued that it was different than what he had done to his wife. RP 35, 42.

Before imposing sentence, the judge informed the parties that he had reviewed the original sentencing transcript, which had refreshed his recollection that the main reason he had imposed an exceptional sentence was the domestic violence aggravator found by the jury, and at that time he had felt that alone had been a sufficiently aggravating circumstance to warrant the exceptional sentence. RP 53-54. He then stated that he still believed that the aggravator found by the jury was a sufficient basis for imposition of the exceptional sentence in and of itself. RP 54-55. When Aquiningoc continued to contest the sentence, the judge explained that he was sentencing him to an "exceptional sentence because the jury made a finding of an aggravating factor," that the assault had been a "domestic violence" offense. RP 60-61, 67.

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did to me, that was a serious strangulation case. I don't believe this case was anywhere near that." 8/22/11RP 9-10, 14.

The prosecutor did not request the court to impose an exceptional sentence based on an aggravating factor it had not charged and that the jury had not found. The prosecutor charged the domestic violence aggravator under RCW 9.94A.535(3)(h) under both prongs (i) pattern of abuse, and (ii) occurring within sight or sound of child. The jury found that aggravator. While the prosecutor found the fact that Aquiningoc's prior second degree assault also involved strangulation compelling, it is clear that the judge's exceptional sentence was based on the aggravating factor found by the jury, as he repeatedly stated. The exceptional sentence was properly imposed.

4. This case is factually distinguishable from State v. Villanueva-Gonzalez and therefore this Court should not exercise its discretion under RAP 2.5(c)(2) to reach this issue on this appeal from resentencing.

This Court remanded this case solely for resentencing to address three issues, vacation of one count of witness tampering, reconsideration of imposition of the exceptional sentence due to vacation of the unscored criminal history aggravator, and reconsideration of the no contact order regarding Aquiningoc's biological daughter. Despite this, Aquiningoc now asserts that this Court should reconsider its decision regarding whether his convictions for assault in the second degree and the assault in the fourth degree violate double jeopardy based on the State v. Villanueva-

Gonzalez. Aquiningoc asserts that he can raise this issue now pursuant to RAP 2.5(c)(2)'s exception to the law of the case doctrine for intervening controlling precedent. RAP 2.5(c)(2) is discretionary and the State asserts that this Court should not reconsider its decision because the facts of this case are distinguishable from those in State v. Villanueva-Gonzalez.

The law of the case doctrine dictates that an appellate court's holding regarding a legal issue must be followed in all subsequent stages of litigation. State v. Schwab, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). However, RAP 2.5(c)(2) provides a discretionary exception to the doctrine. Id. That rule provides:

> (c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:
> ...
> (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c). RAP 2.5(c)(2) codifies two historical exceptions to the law of the case: 1) reconsideration may be appropriate if the decision is clearly erroneous and would work a manifest injustice to one party; and 2) reconsideration may be appropriate where there has been an intervening change in the law. Id. at 672-73. Although the language of RAP 2.5(c)(2)

appears to be permissive regarding the first historical exception, case law is more restrictive and requires that only those decisions that are clearly erroneous and that would work a manifest injustice to one party may be reconsidered by an appellate court. State v. Worl, 129 Wn.2d 416, 425, 918 P.2d 905; *see also*, State v. Calhoun, 163 Wn. App. 153, 168, 257 P.3d 693 (2011), *rev. den.* 173 Wn.2d 1018 (2012) ("Once an issue is decided on appeal, it cannot be reargued unless the decision in the prior appeal is clearly erroneous.") The second exception applies where there has been an "intervening change in controlling precedent" between trial and appeal. Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005).

Acquiningoc asserts the second exception applies in his case, and that State v. Villanueva-Gonzalez is controlling precedent that dictates vacation of his fourth degree assault conviction. In Villanueva-Gonzalez, the Supreme Court decided the unit prosecution for assault is a continuing course of conduct and is not based on separate acts of assault. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 329 P.3d 78 (2014). In that case, the defendant had been found guilty of one count of assault in the second degree based on reckless infliction of substantial bodily harm and one

count of fourth degree assault.[10] Id. at 979. The court recognized that "there is no bright-line rule for when multiple assaultive acts constitute one course of conduct." Id. at 985. It noted that the issue was highly fact dependent and that there are a number of factors to consider in making that determination: 1) length of time over which acts occurred; 2) whether the acts occurred in same location; 3) the defendant's intent or motivation for the different acts; 4) whether the acts were interrupted or there were any intervening events; and 5) whether there was an opportunity for the defendant to reconsider his actions. Id. The court advised that no one factor was determinative and that the determination ultimately depended upon the totality of the circumstances. Id. In applying those factors to Villanueva's actions, the court noted that his actions took place in the same location, that it appeared the actions took place over a short period of time, and there was no indication of any intervening events or that he had an opportunity to reconsider his actions or that his intent differed from one assaultive act to the next. Id. at 985-86. Therefore, the court concluded that the defendant's multiple assaultive acts constituted a continuing course of conduct and that his two convictions for assault violated double jeopardy. Id. at 986.

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[10] The defendant was originally charged with assault in the second degree based on strangulation, but the jury found him guilty of only the lesser-included charge of fourth degree assault. Villanueva-Gonzalez, 180 Wn.2d at 979.

In our case, however, Aquiningoc did have an opportunity to reconsider his actions, chose to gather up his belongings and then reinitiated the physical violence in the bathroom. Within 15 minutes of his arrival at the house, Aquiningoc started calling her names and accusing her of lying to him and cheating on him. TRP 24-28. Ashley tried to deescalate him a bit, but when his daughter spilled some milk, he got angry again. TRP 28-31. When he found out that applications she had made for another apartment for them had been denied, he started screaming at her and accused her of not doing enough for the family, and calling her names again. TRP 31-34. Aquiningoc then threatened to take their daughter away from Ashley, and that she would never see their daughter again. TRP 35, 37. By this time Aquiningoc and Ashley had moved into the master bedroom. TRP 36. While their daughter was moving back and forth between the bedroom and living room, Aquiningoc continued to argue with Ashley and call her names. TRP 37. As they argued, Aquiningoc started to get physical and in trying to push back, Ashley's hand touched his face. He started to grab her throat, telling her, "You want to fucking hit me, bitch?" TRP 38-39. He pulled the collar of her shirt down, threw her on the bed and put his hands, one over the other, on her neck and shook her head up and down while he was on top of her. TRP 39. As he was strangling her, he said, "Do you want me to fucking

kill you, bitch? Do you want me to kill you?" TRP 40. Ashley tried to scream, "no," and "let go," but her eyesight went blurry, all she could see was blackness and she couldn't breathe. TRP 40-41. She was unable to push Aquiningoc off her. TRP 42-43. She didn't know how long he strangled her, but at one point Aquiningoc's hands started coming off her throat and her eyesight started to come back, although it was still fuzzy and blurry. TRP 42. She felt dizzy and got up slowly once he was off of her. TRP 42-43. He told her, "I could have killed you." TRP 43.

Aquiningoc then started to gather up his things in the bedroom. As he did so, he threw her things around, ripped up some of her clothes, tore up some of her pictures, and knocked over a television set. TRP 43-44. He wreaked so much havoc in the bedroom that it looked like a hurricane had it. TRP 109-10. As she picked up some thumbtacks that had fallen on the floor, Aquiningoc continued to accuse her of lying and cheating on him. TRP 44-45. Then he came across from the closet area where he had been standing, went into the bathroom where Ashley was sitting on the floor and slapped her in the face. TRP 46. This caused her to fall backward and hit her head against the toilet. He told her, "You lie and make me mad and that is why I hit you." RP 46. Aquiningoc went back into the bedroom, but there was a knock at the door, and the police had arrived. TRP 46-47.

In the first appeal Aquiningoc argued that because there had not been an instruction informing the jury that the second degree assault was based on an act separate and distinct from the assault, the jury could have been confused and could have based its verdict on the same act, thereby violating double jeopardy. Aquiningoc also faulted the lack of a unanimity instruction, but the prosecutor had elected the slap as the basis for the assault four and the assault two required evidence of strangulation that was not a necessary element for the fourth degree assault. Aquiningoc did not assert that the two convictions violated double jeopardy because the unit of prosecution for assault was a continuing offense. Aquiningoc's petition for review was denied less than a year before the Supreme Court issued its opinion in Villanueva-Gonzalez.

Aquiningoc's double jeopardy argument in his first appeal was premised on the jury's finding of guilt for the fourth degree assault being based on the same act, the strangulation, as the second degree assault. He did not assert a unit of prosecution argument. Moreover, in this case, Aquiningoc's statement "I could have killed you" after he strangled Ashley demonstrates he had an opportunity to cease the assault. He did in fact cease assaulting Ashley at that point and focused his efforts on getting some of his belongings from the bedroom and on damaging some of Ashley's belongings, as well as their television. Ashley moved to a

different location, the bathroom, and Aquiningoc had to walk across the bedroom and into the bathroom in order to hit her.

The two assaults occurred in different locations, and there was an intervening period of time between them, a period in which Aquiningoc ceased being assaultive and focused his efforts on damaging some of Ashley's belongings. His statement that he could have killed her acknowledged that he was stopping the assault. While his legal intent in strangling her and slapping her was to hit her, his rationale for strangling her was retaliation for her daring to touch him in defense. His stated rationale for slapping her was because she had lied to him and made him mad. Even if Aquiningoc's first double jeopardy argument had been based on a unit of prosecution theory, on the whole the Villanueva-Gonzalez factors weigh in favor of finding separate acts of assault here because the acts happened in different locations, with a period of time in between them, during which time Aquiningoc had an opportunity to reconsider his actions, and in fact did. Aquiningoc chose to commit a separate act of assault in retaliation for her lying to him and making him mad after they started arguing again. Given these distinguishing facts, Villanueva-Gonzalez is not controlling precedent, and this Court should not revisit its double jeopardy holding from the first appeal.

E. CONCLUSION

The State respectfully requests that this Court deny Appellant's appeal and affirm his judgment and sentence.

Respectfully submitted this 7th day of November, 2014.

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Attorney for Respondent
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CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's counsel, Nancy P. Collins, addressed as follows:

Nancy P. Collins
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TJA Stark
NAME

11/7/14
DATE