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Supreme Court No. ____
(COA No. 71539-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY AQUININGOC,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Anthony Aquiningoc, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Aquiningoc seeks review of the Court of Appeals decision dated July 6, 2015, and the denial of his motions to reconsider and to add an assignment of error on July 29, 2015. Copies are attached as Appendix A and B, respectively.

C. ISSUES PRESENTED FOR REVIEW

1. When the law changes during the pendency of a direct appeal, the change in the law applies to the appellant. While Mr. Aquiningoc's case was pending on direct review, this Court ruled that the identical pattern jury instruction used to explain the legal requirements of a "pattern of abuse" for an exceptional sentence contains an impermissible comment on the evidence.[1] Mr. Aquiningoc asked for permission to add this issue to his appeal in light of the

[1] *State v. Brush*, _ Wn.2d _, 353 P.3d 213 (2015).

change in the law but the Court of Appeals denied his request without explanation. Does the change in the law resulting from this Court's holding in *Brush* apply to a case pending on direct review and require remand for a new sentencing proceeding?

2. Assaultive acts that occur in the course of a single incident constitute one unit of prosecution and may not be separately punished under this Court's decision in *Villanueva-Gonzalez*.[2] Mr. Aquiningoc was convicted of two counts of assault from a single incident occurring in the course of an argument. Did the Court of Appeals unreasonably construe and misapply *Villanueva-Gonzalez* when finding on double jeopardy violation for two assaultive acts within a short period of time during a single argument between the same two people?

3. The right to trial by jury prohibits the court from imposing an exceptional sentence based on facts that were not proven to the jury. When the court imposes an exceptional sentence based on a jury-found aggravating factor but justifies the sentence based on a different assault that was never presented to the jury, has it improperly imposed an exceptional sentence based on facts not found by the jury?

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[2] *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 984, 329 P.3d 78 (2014)

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4. In a criminal case, an accused person's waiver of his right to counsel is presumed invalid absent affirmative evidence demonstrating the accused understood the risks at stake, including the potential punishment. The court did not ask Mr. Aquiningoc if he understood the punishment he faced or explain what that punishment was. Did the prosecution prove Mr. Aquiningoc validly waived his right to counsel?

D. STATEMENT OF THE CASE

In Anthony Aquiningoc's initial direct appeal, the Court of Appeals ruled he was entitled to a new sentencing hearing due to several errors, including his convictions for two counts of tampering with a witness violated double jeopardy and his exceptional sentence rested on an invalid aggravating factor. CP 36, 42-45 (COA 67604-1-I).

Mr. Aquiningoc was convicted of one count of second degree assault and a second count of fourth degree assault, stemming from an argument with his wife Ashley that turned assaultive. Over the course of about ten minutes, the two argued over whether Ashley was cheating on him, Anthony pushed Ashley onto the bed and intermittently squeezed his hand against the side of her throat for several minutes, he smashed a television as he grabbed things in the room, and he slapped Ashley, which caused her to fall down. 7/19/11RP 38-45, 109, 118-19.

At that point, the police arrived at the apartment and arrested Anthony without incident. 7/19/11RP 46, 116-17. The Court of Appeals refused to treat these two assaultive acts as part of a single course of conduct for purposes of double jeopardy. Slip op. at 8-9.

The trial court imposed an exceptional sentence based on the domestic violence aggravating factor found by the jury. CP 139; RCW 9.94A.535(3)(h)(i) and (ii);RP 54-55; Slip op. at 4. This aggravating factor was premised on the pattern jury instruction later invalidated as a comment on the evidence in *Brush*, 353 P.3d at 217-18, decided on July 2, 2015. Mr. Aquiningoc asked to assign error to this comment on the evidence after *Brush* was decided to preserve the issue on direct appeal, but the Court of Appeals denied the request. App. B.

The facts are further set forth in the Court of Appeals opinion, pages 1-6; Appellant's Motion to Reconsider, pages 1-2, 10-122, and the relevant argument sections below.

E. ARGUMENT

1. The Court of Appeals impermissibly refused to apply a change in the law to a case pending on direct review.

a. *The reviewing court must apply a change in the law to an appellant when a case is pending on direct review.*

When the law changes in the course of an appeal, the change in the law applies to the appellant. *State v. Robinson*, 171 Wn.2d 292, 303, 253 P.3d 84 (2011); *see also In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 261, 111 P.3d 837 (2005) (material intervening change in the law constitutes "good cause" permitting petitioner to challenge sentence even after statutory time limit passed).

The Supreme Court's decision in *Brush* is the first published decision rejecting this pattern jury instruction. It holds that the pattern instruction given to the jury setting forth the essential elements of the aggravating factor on which the exceptional sentence was based is presumptively prejudicial as a comment on the evidence.

The Court of Appeals refused Mr. Aquiningoc's request to add this issue to his direct appeal after the Brush decision without explanation. App. B. Mr. Aquiningoc should be allowed the benefit of Brush, which applies to him because his appeal is not final. The Rules of Appellate

Procedure to "are to 'be liberally interpreted to promote justice and facilitate the decision of cases on the merits.'" *Robinson*, 171 Wn.2d at 304, quoting RAP 1.2(a); see *State v. Campbell*, 112 Wn.2d 186, 193, 770 P.2d 620 (1989). I"[B]asic fairness demands" that a reviewing court apply a change in the law to a case pending at the time of the change. *Akrie, et al. v. Grant, et al.*, _ Wn.2d _, _ P.3d _, 2015 WL 4496344, at *2 (July 23, 2015).

In order to provide Mr. Aquiningoc with effective assistance of counsel, counsel must notify the courts and seek relief where changes in the laws governing sentencing occur, even when they occur in the course of the appeal. *In re Pers. Restraint of Netherton*, 177 Wn.2d 798, 802, 306 P.3d 918 (2013). In *Netherton*, counsel's failure to file a petition for review or seek a stay of proceedings pending the Supreme Court's consideration of an issue that would decrease her sentence constituted ineffective assistance of counsel. *Id. Netherton* demonstrates that counsel is required to raise new issues that arise during an appeal, even if the timing is inconvenient. The Rules of Appellate Procedure emphasize reaching the merits of an issue when it is just to do so. *See Robinson*, 171 Wn.2d at 304; RAP 1.2(a), (c); RAP 18.8(a).

b. *Article IV, section 16 prohibits the court is prohibited from commenting on the evidence when instructing the jury.*

A judge may not convey her personal opinion about the merits of a case or instruct the jury that a fact at issue has been established. *State v. Levy,* 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The constitution prohibits judicial comments on the evidence "to prevent the trial judge's opinion from influencing the jury." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Const. art IV, § 16.[3]

In *Brush*, the pattern jury instruction impermissibly commented on the evidence in violation of article IV, section 16. 353 P.3d at 217. Just as in the case at bar, the court instructed the jury that:

> An "ongoing pattern of abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

Id. at 216; *see* CP 139. This instruction is drawn from the pattern instructions, 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 300.17 (3d ed. 2008) (WPIC).

As the court ruled in *Brush*, this instruction incorrectly interprets the law and constitutes "an improper comment on the evidence because

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[3] Article IV, section 16 reads, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

it resolved a contested factual issue for the jury." *Brush*, 353 P.3d at 217. By directing the jury that any abuse occurring a few weeks necessary satisfies the "prolonged period of time" element, the instruction relieved the State of its burden of proof. *Id.*

"Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *Brush*, 253 P.3d at 218, quoting *Levy*, 156 Wn.2d at 723.

In *Brush*, the evidence showed incidents of abuse occurring over a two month period. *Id.* The Court concluded that given the period of time involved, "a straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of a "prolonged period of time." *Id.* The prosecution did not meet its "high burden of showing from the record that 'no prejudice could have resulted.'" *Id., quoting Levy*, 156 Wn.2d at 723.

Brush dictates the result here. As explained in the initial direct appeal, COA No. 67604-1-I, the complaining witness Ashley Aquiningoc did not testify to prolonged, purposeful abuse that caused harm or suffering. She said Mr. Aquiningoc called her "fat" on a regular basis after her child was born, at times called her "ugly," and

complained that she did not cook more regularly. 1RP 16-17.[4] She also testified about two incidents where Mr. Aquiningoc acted physically against her, but she said she was not injured either time. 1RP 18-19. Both incidents occurred in 2011, the year of the charged incident, and no violence occurred in the year prior. 1RP 14. The prosecution argued to the jury that there was psychological and physical abuse but it did not refer to the facts that supported this assertion. 2RP 212. The prosecution did not articulate what acts constituted abuse.

Given the limited evidence of what prior conduct constituted the alleged prior "abuse" necessary for this aggravating factor to apply, the State cannot overcome the presumption of prejudice. Although there were two alternative means of this aggravating factor, the jury did not specify which means it relied upon, therefore the impermissible comment on the evidence cannot be saved by referring to the other option before the jury. CP 139. The judicial comment on the evidence requires reversal of the exceptional sentence, as in *Brush*. This Court should grant review and apply its holding in *Brush* to the case at bar, remanding for a new sentencing proceeding at which a properly

[4] The transcripts from the trial were previously transferred to this appeal due to their relevance in assessing the issues on appeal.

instructed jury may consider whether the aggravating factor applies to justify an exceptional sentence.

2. The Court of Appeals opinion conflicts with this Court's holding in *Villaneuva-Gonzalez* and violates the double jeopardy protection of the state and federal constitutions

This Court held that it violates double jeopardy to separately punish several assaultive acts that occur within a single course of conduct. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 984, 329 P.3d 78 (2014); U.S. Const. amend 5; Const. art. I, § 9. To apply this legal standard and determine whether two convictions constitute a double jeopardy violation, this Court must view the events "as charged and proved." *State v. Freeman*, 153 Wash. 2d 765, 778, 108 P.3d 753 (2005). This standard of review does not rest on viewing the evidence in the light most favorable to the prosecution. *Id.* at 778-79. Even if it is possible the jury could have viewed the evidence in a certain light, the defining facts must have been those "found by the jury." *Id.* at 779. If the verdict is ambiguous when considering a double jeopardy issue, doubts must be resolved in the defendant's favor. *State v. Kier*, 164 Wn.2d 798, 812, 814, 194 P.3d 212 (2008).

The Court of Appeals misapplied this controlling law. The Court of Appeals opinion labeled the incident as one that occurred over "a relatively long period of time," to distinguish *Villanueva-Gonzalez*, because an "assault should be treated as a course of conduct crime" unless the incidents are clearly distinct. Slip op. at 8; 180 Wn.2d at 984. In *Villanueva-Gonzalez*, just like the case at bar, there was no clear evidence of the length of time in which the acts occurred, so this Court inferred that "the actions took place over a short time period." *Id.* at 985-86. Similarly here, the evidence does not show the acts occurred over a long period of time – there was ten minutes between the call to the police, made prior to the assault, and when the police knocked on the door after the assaultive conduct had ended. Ten minutes is not a relatively long period of time under the standard of *Villanueva-Gonzalez*. As explained in *Kier* and *Freeman*, disputed facts are not resolved in the prosecution's favor when analyzing a double jeopardy error. The Court of Appeals opinion conflicts with this Court's opinions analyzing a double jeopardy violation.

Additionally, the Court of Appeals unreasonably distinguished *Villanueva-Gonzalez* by concocting a "break" in events between the two physical acts. Slip op. at 8. The opinion claims there

was a period of "relative calm" showing an intervening break, yet it describes this purported period of calmness as the time when Mr. Aquiningoc was "destroying Ashley's belongings, trashing her apartment, and arguing" with her in the bedroom. Slip op. at 8. It is illogical to term "trashing" the apartment as "relative calm." As demonstrated this behavior, there was an on-going dispute, even when the acts were not physical. There was one overarching verbal argument during approximately10 to 15 minutes, comprised of nasty words, claims of cheating, and instances of assaultive force. Applying *Villanueva-Gonzalez* to this case, the acts that occurred in the same location, close in time, without intervening events or evidence of a separate motivation, and should count as a single offense for purposes of double jeopardy. CP 35.

The Court of Appeals misapplied *Villanueva-Gonzalez* to the case at bar. It did not assess the facts as charged and proved, but instead took them in the light most favorable to the prosecution, in an effort to defeat the double jeopardy violation asserted. This Court should grant review due to this conflict and the resulting double jeopardy violation.

3. The court impermissibly imposed an exceptional sentence premised on the State's reliance on uncharged conduct not proved to the jury

A person's sentence may not be increased above the standard range based on allegations that were not proven to a jury. *Blakely v. Washington*, 542 U.S. 296, 302, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). "[T]he jury must unanimously find beyond a reasonable doubt any aggravating circumstance that increases the penalty for a crime." *State v. Nunez*, 174 Wn.2d 707, 712, 285 P.3d 21 (2012); RCW 9.94A.535; RCW 9.94A.537. The State must prove all facts supporting the aggravating circumstance beyond a reasonable doubt. RCW 9.94A.537(3) (implementing *Blakely*, 542 U.S. 296).

The jury found that the second degree assault offense met the elements of the aggravating factor of domestic violence as codified in RCW 9.94A.535(3)(h). The jury was instructed that it could premise this aggravating factor on the alternative means of a pattern of abuse of the victim or having been committed in sight or sound of the victim or defendant's minor child. CP 139 (Instruction 33). The jury was not asked to specify which alternative it found and was encouraged to premise its finding on either alternative. *Id.*; 7/20/11RP 211.

At sentencing, the State argued to the court that it should impose an exceptional sentence based on facts that were not presented to the jury. RP 32-33. It insisted that a prior assault between Mr. Aquiningoc's sister and himself demonstrated the need for additional punishment. RP 33; 8/22/11RP 9-10. The prosecution argued the court should take as "very significant" that there was a pattern of similar assaults with "another victim," where the acts "were almost the same" and his sister "almost died." RP 33. This other assault was "much more significant" justification for an exceptional sentence. *Id.*

But the prosecution had not pled or proved to the jury that this 1995 assault was part of a pattern of abuse. *See State v. Sweat*, 180 Wn.2d 156, 163, 322 P.3d 1213 (2014). The factual allegations used for increased punishment must be proven to the jury. *Nunez*, 174 Wn.2d at 712; *Blakely*, 542 U.S. at 313.

The jury's finding of an aggravating factor based on domestic violence did not entitle the prosecution to argue that other similar incidents should also be considered part of this pattern and justify an exceptional sentence. Mr. Aquiningoc objected to the State's mischaracterization of the 1995 assault. His sister had also objected at the prior sentencing hearing, explaining that the incidents were very

different, when the prosecutor had made a similar argument.8/22/11RP 13-14.

The judge merely said he was imposing an exceptional sentence due to the domestic violence. RP 54-55. He said this sentence was appropriate due to "the other things that were brought to the Court by Ms. Bracke," the prosecutor. RP 55. It entered only boilerplate written findings of fact that contain no reference to the material facts used to justify the exceptional sentence. CP 94.

The Court of Appeals improperly deferred to the court's sentencing discretion, without acknowledging that this discretion does not permit the court to impose an exceptional sentence based on factual allegations that have not been proved to the jury. This case should be remanded for the court to reconsider the exceptional sentence based only upon permissible aggravating circumstances proven to the jury.

4. Mr. Aquiningoc did not knowingly, intelligently, and voluntarily waive his right to counsel when the court did not ensure he understood the potential punishment he faced at sentencing.

A valid and effective waiver of the right to the assistance of counsel must unequivocally demonstrate that the accused is competent, and knowingly, intelligently, and voluntarily waives the assistance of

counsel. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Silva*, 108 Wn.App. 536, 539, 31 P.3d 729 (2001); U.S. Const. amend. 6; Const. art. I, § 22. At the time the accused person waives his right to counsel, the record must show he knowingly and intelligently understands, at a minimum, "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S. Ct. 316, 92 L. Ed. 309 (1948); *State v. Woods*, 143 Wn.2d 561, 588, 23 P.3d 1046 (2001).It is the judge's role to "make certain" the waiver of counsel is understandingly made by conducting "a penetrating and comprehensive examination of all the circumstances." *Von Moltke*, 332 U.S. at 724

Although there may be some distinction between the extensiveness of the pro se colloquy required before trial as opposed to for a new sentencing proceeding, this "does not, however, eliminate the need for the district court to make an inquiry sufficient to support a finding that the waiver of counsel is voluntary, knowing and intelligent." *United States v. Salemo,* 61 F.3d 214, 219 (3d Cir.1995).

The warnings given to Mr. Aquiningoc prior to his waiver of his right to counsel did not convey the essential information that would permit a valid waiver of the right to an attorney.

Mr. Aquiningoc returned to trial court after a partially successful appeal and immediately renewed a request he had made during his trial to discharge his assigned attorney. CP 46-50. He told the court he would try to hire an attorney, but if he could not get a different lawyer, he would prefer to represent himself. RP 9, 12,19-20. When Mr. Aquiningoc was unable to obtain the money he needed to hire a lawyer, he told the court he would waive his right to counsel. RP 25.

Before letting him represent himself, the judge conducted a brief colloquy. RP 28-31. The judge did not mention Mr. Aquiningoc's charges at the time he waived his right to counsel. *Id.* He did not discuss the possible penalties that applied to Mr. Aquiningoc. *Id.*

The court said generically, "Okay, and do you understand do you think the legal basis for exceptional sentences as opposed to standard range sentences?" *Id.* Mr. Aquiningoc ambiguously responded, "In the professional capacity Your Honor, I do not, I do not, but as just a layman in propria persona representing myself, I studied enough to understand, yes, Your Honor." *Id.*

Without inquiring into the nature of Mr. Aquiningoc's "layman" understanding of "enough," the court told Mr. Aquiningoc he would not receive any assistance from the court. *Id.* It warned Mr. Aquiningoc that it "would be better if you have an attorney" but accepted Mr. Aquiningoc's request to represent himself, with prior counsel remaining in the courtroom as standby if Mr. Aquiningoc sought help. RP 31-32.

This discussion between the court and Mr. Aquiningoc does not establish a knowing, intelligent, and voluntary waiver of counsel based on an understanding of the danger of self-representation, particularly as premised on the degree of punishment at risk in the sentencing hearing. The "complexity and difficulty applying the SRA" (Sentencing Reform Act), increases with each year's amendments but the court did not inquire into Mr. Aquiningoc's understanding of the degree of punishment at stake. *In re LaChapelle,* 153 Wn.2d 1, 7, 100 P.3d 805 (2004).

Mr. Aquiningoc's desire to separate himself from his assigned attorney does not demonstrate he possessed the requisite knowledge necessary for a knowing, intelligent, and voluntary waiver of counsel. His written motion asking to discharge counsel did not mention the charges, standard range, or statutory maximum. CP 47-49. Instead, he

complained about how defense counsel had not spent time with him or investigated mitigating factors he wished to present. CP 48-49. Due to the lack of record establishing a knowing, voluntary, and intelligent wavier of counsel, reversal and remand for a new sentencing proceeding are required. *Id.*

F. CONCLUSION

Based on the foregoing, Petitioner Anthony Aquiningoc respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 28th day of August 2015.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY AQUININGOC, Appellant.	)	No. 71539-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 6, 2015

SPEARMAN, C.J. — Anthony Aquiningoc was charged and convicted of multiple counts of assault, witness tampering, and violation of a no-contact order following a violent incident involving his wife. The trial court imposed an exceptional sentence and a no-contact order protecting his daughter, who was present during the assaults. Aquiningoc appealed and we remanded the case for vacation of one of two witness tampering convictions, reconsideration of the exceptional sentence, and consideration of alternatives to the no-contact order.

On appeal from the resentencing hearing, Aquiningoc challenges his fourth degree assault conviction on double jeopardy grounds. He also challenges his sentence, arguing that his waiver of the right to counsel at the resentencing hearing was ineffective, his offender score was improperly calculated, and his

exceptional sentence was improperly based on facts not proved to the jury. He raises additional issues in a statement of additional grounds. We affirm.

FACTS

On April 11, 2011, Anthony Aquiningoc went to the apartment of his estranged wife Ashley and their daughter to discuss the possibility of moving into a new home together. Aquiningoc and Ashley had previously talked about reconciliation and Ashley had already applied to several apartments for the family. Initially, the couple interacted calmly. However, after about fifteen minutes, Aquiningoc confronted Ashley about an old social media profile, which contained pictures of her and comments from other men. He yelled at her for not deleting the account. He began to verbally attack her, spewing racially and sexually charged insults. He also accused her of lying and being unfaithful. Ashley testified that he was "[v]ery forceful, very upset and angry, and he was standing in front of me in my face, and when he was yelling, he was basically spitting in my face." Verbatim Report of Proceedings (VRP) (7/19/11) at 26-27.

Aquiningoc calmed down for a short time and the couple sat down in the living room to discuss their finances and living situation. While the couple talked, Aquiningoc held their young daughter in his lap. When the little girl spilled some milk on Aquiningoc, he became angry again and poured the remainder of the milk down Ashley's back. Ashley was "in shock" and went into the bedroom to change her shirt.

A short time later, the couple resumed the discussion of their finances and living arrangements. When Ashley told Aquiningoc their apartment rental

applications had been unsuccessful, he became angry again. He accused Ashley of making mistakes on the application, not trying hard enough to find a cosigner, and lying about her efforts to find housing for the family. Each time she tried to respond, he interrupted and screamed at her. He called her a liar and a bad mother.

Ashley moved from the living room to the master bedroom in an effort to shelter their daughter from the argument. Aquiningoc, who was seated on the bed, continued to insult Ashley and threatened to take their daughter away from her. Aquiningoc got up and tried to push Ashley. She tried to push back, but missed and hit Aquiningoc in the face. In response, Aquiningoc yelled, "You want to fucking hit me, bitch?" VRP (7/19/11) at 39. He grabbed Ashley by the throat, pulled the collar of her shirt down, threw her on the bed, and put his hand around her neck. He got on top of her and strangled her and shook her head up and down. Aquiningoc squeezed her throat so hard and so long that she blacked out. Eventually, he released his hold and told Ashley, "I could have killed you." VRP (7/19/11) at 43.

Aquiningoc left Ashley on the bed and went to the closet, where he began gathering his clothes. He also threw many of Ashley's belongings around the room, ripped her clothes, tore photos, and knocked over a television. Ashley became concerned that their young daughter might get into the items Aquiningoc had strewn on the floor and began to pick them up. Eventually she made her way to the master bathroom and sat on the floor.

After some time, Aquiningoc finished packing and left the closet. He went into the bathroom where Ashley was seated and slapped her in the face, saying, "You lie to me. This is why I hit you. You lie to me and make me mad, and that's why I hit you." VRP (7/19/11) at 46. The force of the slap knocked Aquiningoc's wife backwards and caused her to bang her head on the toilet.

A short time later, police officers knocked on the front door of the apartment, apparently in response to a domestic disturbance call. They arrested Aquiningoc, who was subsequently charged with second degree assault arising from these incidents. Prior to trial, the State amended the charges, adding one count of fourth degree assault and one count of third degree malicious mischief arising from the April 11, 2011 incidents as well as four counts of violation of a no contact order, three counts of tampering with a witness, and one count of bribing a witness arising from subsequent events. The State alleged two aggravating circumstances with respect to the second degree assault charge: that Aquiningoc had prior unscored criminal history under RCW 9.94A.535(2)(b) and that the crime was a domestic violence offense under RCW 9.94A.535(3)(h)(i) and (ii).

The jury found Aquiningoc not guilty on the malicious mischief charge and one of the three witness tampering charges; he was found guilty as charged on all other counts. By special verdict, the jury found that the second degree assault was a domestic violence offense under RCW 9.94A.535(3)(h). At sentencing, the trial court determined that Aquiningoc's "prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence [on the second degree assault] that is clearly too lenient in light of the purpose of the

[Sentencing Reform Act of 1981] as expressed in RCW 9.94A.010." CP at 29. And, in written findings of fact and conclusions of law, the court concluded that the "aggravating factors found by the court and jury support[ed] the imposition of an exceptional sentence above the standard range." Id. Accordingly, the trial court imposed an exceptional sentence of 102 months confinement on the second degree assault conviction. The trial court imposed standard range sentences on the witness tampering convictions, 364 days each on the fourth degree assault and violation of a no contact order convictions, and entered a no contact order protecting Aquiningoc's daughter. The terms of confinement were to be served concurrently.

Aquiningoc appealed the judgment and sentence to this court. Finding several errors, we remanded for vacation of one of his two witness tampering conviction, consideration of less restrictive alternatives to the no-contact order, and reconsideration of the exceptional sentence.

At the resentencing hearing, Aquiningoc maintained that appointed counsel had not conferred with him sufficiently in preparation for the resentencing hearing. He also disagreed with defense counsel's advice that he was unlikely to receive a different sentence on remand and objected to his attorney's alleged refusal to present mitigating factors to the court. Accordingly, Aquiningoc moved the court for permission to discharge appointed counsel and proceed pro se. The court granted Aquiningoc three continuances so that he could either retain private counsel or prepare to represent himself, as requested. After the last

continuance, Aquiningoc informed the court that he had not been able to retain private counsel and wished to represent himself.

Before granting Aquiningoc's request to proceed pro se, the trial court conducted a brief colloquy. The judge cautioned Aquiningoc that certain technical requirements would govern the proceedings and that appointed counsel would be better equipped to meet these challenges. At the end of this colloquy, the court warned Aquiningoc that it "would be better if you have an attorney," but granted Aquiningoc's request to represent himself. VRP (02/14/14) at 31-32. Aquiningoc refused to allow appointed counsel to remain as standby counsel.

Following argument from Aquiningoc and the State, the trial court vacated one witness tampering conviction and modified the no contact order. The trial court also concluded that the exceptional sentence originally imposed was justified based solely on the domestic violence aggravating factor found by the jury. The court entered a new judgment and sentence, which imposed the same exceptional sentence of 102 months that had been imposed previously.

Aquiningoc appeals.

DISCUSSION

I. Double Jeopardy

The double jeopardy provisions of the federal and state constitutions "protect a defendant from being punished multiple times for the same offense." State v. Allen, 150 Wn. App. 300, 312, 207 P. 3d 483 (2009) (citing State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); see also, U.S. Const. amend. V; Wash. Const. art. I, § 9. In his first appeal, Aquiningoc unsuccessfully argued that

his convictions for both second and fourth degree assault violated the protections against double jeopardy because there was no clear finding from the jury that its verdicts were based on separate acts of assault. We rejected his argument because the record revealed that the prosecutor had made a clear election to the jury of which act supported each charge.

On appeal from the resentencing hearing, Aquiningoc asks us to reconsider our ruling on the double jeopardy issue in light of State v. Villanueva-Gonzalez, 180 Wn.2d 975, 980-81, 329 P.3d 78 (2014), which the Supreme Court decided after remand. But the case is unhelpful to Aquiningoc.

In Villanueva-Gonzalez, the Court held that when the acts underlying two assault convictions occur as part of the same course of conduct, they are part of the same unit of prosecution and may not be separately punished. Id. at 984. Multiple convictions for such a course of conduct violates the state and federal prohibitions against double jeopardy. Id. at 986.

The Court identified several factors to be considered in determining whether a defendant's multiple assaultive acts constituted one course of conduct, including:

- The length of time over which the assaultive acts took place,
- Whether the assaultive acts took place in the same location,
- The defendant's intent or motivation for the different assaultive acts,
- Whether the acts were uninterrupted or whether there were any intervening acts or events, and
- Whether there was an opportunity for the defendant to reconsider his or her actions.

Id. at 985. Applying these factors to the facts of the case, the Court reasoned:

> First, the assaultive actions for which [Villanueva-Gonzalez] was charged—head butting the victim and then grabbing her neck and holding her against some furniture—took place in the same location. Second, the record implies (although does not clearly state) that the actions took place over a short time period, and there is no indication in the record of any interruptions or intervening events. Similarly, there is no evidence that would suggest that he had a different intention or motivation for these actions or that he had an opportunity to reconsider his actions. Based on the evidence in the record before us, we conclude that Villanueva–Gonzalez's actions constituted a single course of conduct. Therefore, we affirm the Court of Appeals and hold that his two assault convictions violated double jeopardy.

Id. at 985-86.

In contrast to Villanueva-Gonzalez, the assaultive acts in this case occurred over a relatively long period of time, during which Aquiningoc and his victim moved to several locations throughout the apartment. And, unlike the continuous and uninterrupted assault in Villanueva-Gonzalez, Aquiningoc's attack was punctuated by several instances of relative calm, during which his focus turned to packing clothing, destroying Ashley's belongings, trashing her apartment, and arguing. These interruptions in the violence show that Aquiningoc had opportunities to reconsider his actions after the first assaultive acts in the living room. Finally, unlike the assault in Villanueva-Gonzalez, there was evidence here that each of the acts underlying Aquiningoc's assault convictions had a separate motive. The jury heard testimony that Aquiningoc told Ashley he strangled her in order to punish her for attempting to defend herself against his attacks and that he slapped Ashley in the bathroom because he believed she lied to him when she denied his allegations of infidelity.

The facts of this case distinguish it from Villanueva-Gonzalez. Because the holding in Villanueva-Gonzalez does not clearly necessitate a different resolution of Aquiningoc's double jeopardy claim than that reached in his first appeal, the interests of justice do not demand discretionary review of the claim in this appeal from the resentencing hearing.

II. Waiver of the Right to Counsel

Criminal defendants have a federal and state constitutional right to waive assistance of counsel and represent themselves. Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975); State v. Woods, 143 Wn. 2d 561, 585, 23 P.3d 1046, 1061 (2001). "When an accused manages his own defense, he relinquishes ... many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." Faretta, 422 U.S. at 835 (citing Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). "[H]e should be made 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.'" Id. (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 1942)). Additionally, a criminal defendant's request to proceed pro se must be (1) voluntary, (2) timely made, and (3) stated unequivocally. Id. at 807; Woods, 143 Wn.2d at 585. We review a trial court's determination that a defendant has validly waived the right to counsel for abuse of discretion. In re Rhome, 172 Wn.2d 654, 667, 260 P.3d 874 (2011).

At the resentencing hearing, Aquiningoc filed a written motion to dismiss assigned counsel and proceed pro se. He also made repeated verbal requests to represent himself. The trial court granted Aquiningoc's request to waive his right to counsel, but not before conducting a colloquy to ensure that Aquiningoc knew of the technical requirements of the proceeding and the risks of proceeding pro se. However, the trial court did not affirmatively advise Aquiningoc of the charges against him or the potential punishment he faced. Thus, Aquiningoc argues that, under the circumstances, the trial court abused its discretion when it accepted his waiver of the right to counsel because he did not make the waiver knowingly, intelligently and voluntarily. We disagree.

When a defendant unequivocally requests to represent himself, it is the responsibility of the trial court to assure the "decision[ ] regarding self-representation [is] made with at least minimal knowledge of what the task entails." City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The defendant must be apprised of the nature of the charges, the possible penalties, and the disadvantages of self-representation. Id. at 211; Woods, 143 Wn.2d at 588. "[A] colloquy on the record is the preferred means of assuring that defendants understand the risks of self-representation." Acrey, 103 Wn.2d at 211. "Nonetheless, in cases where no colloquy exists on the record, [Washington courts] will look at any evidence on the record that shows defendant's actual awareness of self-representation." Id. "In the absence of a colloquy, the record must somehow otherwise show that the defendant understood the seriousness of the charges and knew the possible maximum penalty. The record should also

show that the defendant was aware of the existence of technical rules and that presenting a defense is not just a matter of telling one's story." Id. (Citing Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976)).

In this case, there is no dispute that Aquiningoc timely and unequivocally requested to represent himself during the resentencing proceedings. The trial court also engaged in a colloquy to ensure that Aquiningoc's waiver was knowing and intelligent. The court asked:

> So since what we're talking about is what is the appropriate level of sentence here, at this point in time, have you studied any case law or any other law about the process of sentencing? Are you familiar with those guidelines and the sentencing grid and all those things that are used in the process of sentencing someone in this state?

VRP (01/14/14) at 30. Aquiningoc responded, "Yes, Your Honor." VRP (01/14/14) at 30. The court also inquired: "Okay, and do you understand do you think the legal basis for exceptional sentences as opposed to standard range sentences?" Resentencing VRP at 30. Aquiningoc responded, "In the professional capacity Your Honor, I do not, but as just a layman in propria persona representing myself, I studied enough to understand, yes, Your Honor." VRP (01/14/14) at 30. The court admonished Aquiningoc that he would not receive assistance from the court, stating, "I won't assist you this way or that way. That's not going to happen. You understand that?" VRP (01/14/14) at 31. Aquiningoc said he understood. Finally, the court advised Aquiningoc of the perils of self-representation, stating:

> I think it would be better if you have an attorney to speak for you and to represent you. [Appointed counsel] is an experienced criminal defense lawyer. He knows how to

> present information to the Court. He also understands the intricacies of the law that are involved here.
>
> I don't think it's wise for you to try and represent yourself, because although you have some familiarity with the law, you indicated to me that you're not fully aware of it. So I'm going to urge you to continue to use counsel here. I'm not going to say you have to. I'm just suggesting that that might be in your best interest, but it's your decision.

VRP (01/14/14) at 31.

The trial court did not expressly advise Aquiningoc of the nature and classification of the charges against him and the maximum penalty associated with those charges. Nevertheless, it is apparent from the record that Aquiningoc had the requisite knowledge at the time of the waiver. Prior to the resentencing hearing, Aquiningoc had already been tried, convicted, and sentenced once in this case. He had been present in the courtroom during trial and for the jury's verdicts on each count charged against him. And it is clear from Aquiningoc's written motion to discharge counsel at the resentencing hearing that he had read the mandate from the first appeal in this case, which lists all the charges he was convicted of. Thus, the record demonstrates that Aquiningoc had actual knowledge of the nature and classification of the charges against him.

Likewise, the record indicates that Aquiningoc was aware of the potential jeopardy he faced on resentencing. Before trial, he had signed the written defendant's acknowledgment of rights form, which listed the second degree assault charge against him along with the maximum penalty of "10 yrs/$20,000 for the Class B Felony." CP at 146. The maximum penalty on this charge, which was the most significant Aquiningoc faced, was reiterated in the trial court's first

judgment and sentence in this case. That document also listed the standard ranges associated with each of the charges against him. Thus, it is beyond reasonable dispute that Aquiningoc was well aware of the jeopardy he faced.

Because the record shows that Aquiningoc timely and unequivocally asserted his right to represent himself with knowledge of the seriousness of the charges, the maximum standard range penalty, and the existence of technical rules that governed the proceedings, the trial court did not abuse its discretion by concluding that he validly waived the right to counsel.

III. Sentence

On remand, the trial court resentenced Aquiningoc based on the same criminal history presented at the initial sentencing hearing and the State's unchallenged offender score calculations. Aquiningoc challenges the sentence for several reasons, which we find have no merit.

First, Aquiningoc renews his argument, advanced for the first time at the resentencing hearing, that the State presented insufficient evidence of the prior convictions included in his offender scores. This argument is not properly before us on appeal.

A 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). And where a trial court exercises no discretion on an issue, it is not properly before this court on review. State v. Barberio, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993); accord, Kilgore, 167 Wn.2d at 43; State v. Parmelee, 172 Wn. App. 899, 905, 292 P.3d 799, review denied, 172 Wn.2d 1027 (2013).

In this case, the mandate empowered the trial court to three ends: (1) vacation of one witness tampering conviction; (2) consideration of alternatives to the no contact order concerning Aquiningoc's daughter; and (3) consideration whether the exceptional sentence was properly based on the one aggravating factor found by the jury. The mandate affirmed the judgment and sentence "[i]n all other respects," and did not authorize the trial court to reconsider the validity of Aquiningoc's criminal conviction history. CP at 45. Given the scope of the mandate, the resentencing court properly declined Aquiningoc's invitation to review his conviction history. And because the trial court exercised no discretion on this issue, it is not properly before this court.

Next, Aquiningoc argues that after following our mandate to vacate one of his two witness tampering charges, the trial court improperly counted the charge as a "current offense" in his offender score. We review the calculation of Aquiningoc's offender score de novo. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994).

In calculating a defendant's offender score for purposes of identifying the standard range sentence for a felony conviction, courts consider both the defendant's current offenses and prior convictions in the defendant's criminal

history. See, RCW 9.94A.589(1)(a).[1] Aquiningoc's criminal history showed three adult felony convictions and eight juvenile felony convictions between 1985 and 2007, none of which washed out under RCW 9.94A.525.[2] The State represented that based on this history, Aquiningoc's offender score was eight on the sole remaining witness tampering charge and nine on the second degree assault. Standby counsel agreed with the State's offender score calculation and the court accepted it as accurate.

Aquiningoc is understandably chagrined because according to the State's calculation, his offender scores on remand—eight on the witness tampering charge and nine on the second degree assault—remained the same as they were before the trial court vacated the second witness tampering conviction. However, independent review of Aquiningoc's conviction history reveals that, to

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[1] RCW 9.94A.589(1)(a) provides:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

[2] Aquiningoc set forth a different version of his criminal history. He asserted that only two prior convictions from 1991, one from 1995, and one from 2007 counted toward his offender scores in this case. However, it is clear from the record that Aquiningoc mistakenly omitted several felony convictions, such as the eight convictions he sustained between 1985 and 1988. It is also clear that Aquiningoc improperly counted at least one misdemeanor conviction from 1991. Thus, the trial court properly declined to rely on Aquiningoc's offender score calculations.

the extent that there was error in calculating Aquiningoc's offender score, that error appears to have occurred at the initial sentencing hearing, not on remand.

RCW 9.94A.525(7) and (8) set forth the method for assigning points to each of Aquiningoc's current offenses and prior convictions to calculate his offender score. Under those provisions, we calculate Aquiningoc's witness tampering offender score by counting one half point for each of Aquiningoc's eight juvenile felony convictions, three points for each adult felony conviction, and one point for the current offense of second degree assault. The resulting score is eight for the witness tampering charge. RCW 9.94A.525(7) requires double scoring of Aquiningoc's 1995 second degree assault conviction for purposes of calculating his second degree assault offender score. Counting one point for each of his two remaining adult felonies, four points for his juvenile felonies, and one point for his witness tampering current offense results in a score of nine on the second degree assault. Thus, we find no error in the trial court's offender score calculations on remand.

Aquiningoc also challenges the exceptional sentence imposed on remand, arguing that the trial court relied on factors not properly found by the jury. In reviewing an exceptional sentence, we engage in a three-part analysis. First, we asks whether the factors listed by the trial court for an exceptional sentence are supported by the underlying record. We apply a "clearly erroneous" standard to this review. Second, we determine whether the factors used by the trial court are valid as a matter of law. Finally, we determine, under an "abuse of discretion" standard, whether the sentence is clearly too lenient or clearly too excessive.

State v. Cardenas, 129 Wn.2d 1, 5-6, 914 P.2d 57 (1996) (citing State v. Solberg, 122 Wn.2d 688, 705, 861 P.2d 460 (1993); State v. Batista, 116 Wn.2d 777, 792, 808 P.2d 1141 (1991)).

Trial courts have discretion to impose a sentence outside the standard range if the current offense "involved domestic violence, as defined in RCW 10.99.020[3]" and the offense "occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years. RCW 9.94A.535(3)(h)(i). Aquiningoc does not challenge the trial court's discretion to impose an exceptional sentence on his second degree assault conviction based on this aggravating circumstance. Rather, he contends that the trial court relied on entirely separate facts to justify its exceptional sentence. The argument lacks merit.

At the resentencing hearing the trial court heeded our directive in the mandate that the uncharged criminal history aggravating factor must be vacated because it was not found by the jury. The court then considered the State's recommendation and reviewed the transcripts of the first sentencing hearing in order to refresh its recollection regarding its original reasons for imposing an exceptional sentence. Ultimately, the court concluded that the domestic violence aggravating factor alone justified the exceptional sentence imposed in this case. It explained:

> It was my belief [at the first sentencing hearing] and the court of appeals has asked this Court to determine what it was that was the

[3] The statute defines "domestic violence" as, among other things, second degree assault committed by one family or household member against another. RCW 10.99.020(5)(b).

> basis for the aggravating factor, and it was my belief at that time, and this language refreshes my recollection of that, but it was always my belief that because the jury had clearly found a domestic violence aggravator on the assault second charge, they clearly made that finding, it's the determination in the special verdict form that under those circumstances that alone was sufficient for an aggravator factor as an aggravating factor for an exceptional sentence.
>
> I believe that it was compounded by the other things that were brought to the Court by Ms. Bracke, and the court of appeals has said the Court may not consider the Canadian conviction, and so I will not consider that, and with that out of the mix, it's still my belief that the aggravating factor found by the jury is such that it is a basis for the exceptional sentence in this case, with or without the other.
>
> I think in and of itself, it was always my belief that that was sufficient. My belief was that was as I said enhanced, if you will, by the other, but that was the basis for the determination.
>
> So the Court would find specifically that the jury-determined aggravator factor was the basis, the primary basis for the Court to sentence the first time and will continue to be so now.

VRP (01/14/14) at 54-55. It is evident from the trial court's oral ruling that it thought the domestic violence aggravating circumstance found by the jury on its own justified the exceptional sentence imposed on remand. Given the facts surrounding the crimes in this case, we cannot find the trial court's reliance on this factor alone clearly erroneous.

Aquiningoc also seems to argue that the domestic violence aggravating circumstance relied on by the trial court was invalid as a matter of law because the jury was encouraged to premise its finding on either of two alternatives and was not asked to specify which alternative means it found. Thus, according to Aquiningoc, the jury's special verdict finding the domestic violence aggravating

circumstance violated his right to a unanimous jury verdict. This argument also lacks merit.

"If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the [charged act] is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). In this case, the State charged and proved this domestic violence aggravating circumstance based on two alternative statutory means: (1) "pattern of abuse" and (2) "presence of a minor child" (RCW 9.94A.535(3)(h)(ii)). VRP (07/22/11) at 211-12. Accordingly, at trial the State elicited testimony from the victim regarding repeated incidents of psychological and physical abuse that she endured at Aquiningoc's hands over a period of about two years, as well as testimony that the assaults charged in this case were committed in the sight or sound of her two-year-old daughter. Viewed in the light most favorable to the State, this evidence was more than sufficient to support a finding by the jury that the domestic violence aggravating circumstance was present in this case under either theory alleged.

Since we conclude that the domestic violence aggravating circumstance was not invalid as a matter of law and the trial court's decision to rely on that factor was not clearly erroneous, we are left to determine whether the sentence is clearly too excessive. In determining whether a sentence is clearly excessive, we apply an abuse of discretion standard, upholding the decision unless no

reasonable judge would have imposed the exceptional sentence. Cardenas, 129 Wn.2d at 13. Based on the facts of the case, we find the imposition of 102 months incarceration, which is 18 months lower than the maximum allowable term and the State's recommendation, was not unreasonable.

IV. Statement of Additional Grounds

Aquiningoc raises several issues in a statement of additional grounds. These issues run the gamut of constitutional and evidentiary challenges, but they arise from three events: (1) the alleged failure of appointed counsel in his Bellingham Municipal Court assault IV action[4] to communicate a favorable plea offer; (2) the State's alleged mischaracterization of police reports not admitted in evidence during motions in limine; and (3) the trial court's denial of the deliberating jury's request to see the original victim's summary.

As discussed previously, the appellate court's mandate determines the scope of a remand order. Kilgore, 167 Wn.2d at 49. The trial court, on remand, has discretion to act only insofar as it is authorized by the appellate court's mandate. Id. And "[o]nly if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on [an] issue does it become an appealable question. Barberio, 121 Wn.2d at 50 (interpreting RAP 2.5(c)(1)).

In this case, our mandate empowered the trial court to take three actions on remand: "vacation of one witness tampering conviction, reconsideration of the exceptional sentence, and consideration of alternatives to the no-contact order

[4] According to Aquiningoc, the municipal court action was dismissed shortly after review. The appellate record contains no information on the disposition of the municipal court action.

concerning the defendant's daughter." CP at 45. The trial court had no authority on remand to consider the issues raised in Aquiningoc's statement of additional grounds. Because the trial court did not purport to exercise discretion on these matters, they are not appealable.

Affirm.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANTHONY AQUININGOC, Appellant.	)))))))))	No. 71539-9-I ORDER DENYING MOTIONS TO RECONSIDER AND TO ADD ASSIGNMENT OF ERROR

Appellant Anthony Aquiningoc filed motions to reconsider and to add assignment of error in the above matter.

A majority of the panel has determined the motions should be denied. Now therefore,

IT IS HEREBY ORDERED that appellant's motions to reconsider and to add assignment of error are denied.

DATED this 29th day of July, 2015.

Spearman, C.J.
Presiding Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71539-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Hilary Thomas
Whatcom County Prosecutor's Office
[Appellate_Division@co.whatcom.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
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Date: August 28, 2015