NO. 93634-0

COA No. 47687-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

ANDRES SEBASTIAN FERRER

PETITIONER

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Greg Gonzales
Superior Court No. 14-1-00656-0

SUPPLEMENTAL PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Andres Ferrer, appellant below, asks this court to accept review of the Court of Appeals decision terminating review designated in part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals opinion in cause number 47687-8-II, which affirmed his conviction and exceptional sentence. The decision was filed August 16, 2016. A copy of the decision is in the Appendix at pages A-1 through A-16.

III. ISSUES PRESENTED FOR REVIEW

1. When petitioner was convicted of felony harassment and assault in the second degree based on conduct which was overlapping in time, did the court err in holding that the convictions were not the "same criminal conduct" for the purposes of sentencing ?

2. Was a 50 month sentence for assault in the second degree "clearly excessive?"

IV. STATEMENT OF THE CASE

A. Procedural History

Appellant Andres Ferrer was charged on May 7, 2015 by a third amended information with assault in the second degree, RCW 9A.36.021 (1) (a) and (g) and felony harassment, RCW 9A.46.020. The jury returned verdicts of guilty on both counts, and found by way of special verdict that

the two crimes were committed within the sight or sound of the victim or defendant's minor children. CP 69-70, 72-74. The jury also returned a special verdict indicating it relied on the "substantial bodily injury" prong of the assault charge rather than the "strangulation" prong. CP 71.

The court determined that standard range for the offense was 12–14 months based on its determination that the assault charge and harassment charge were separate criminal conduct. The prosecutor asked for an exceptional sentence, based on the aggravating factor found by the jury that the case involved domestic violence and had occurred "within the sight or sound" of the couple's children. The prosecutor suggested an additional year was appropriate for each of the three children, for a total enhancement of 36 months, and a total sentence of 50 months. The court adopted this sentence of 50 months. CP 78. Mr. Ferrer filed a timely notice of appeal from the judgment and sentence. CP 94.

B. Trial Testimony

Kristina Ferrer and Andres Ferrer were married in 2010 but separated in March of 2014. In the spring of 2014, she planned to divorce Mr. Ferrer and had prepared the paperwork for it, but had not told him yet. RP II 333-34. [1] They had two children together. She had a daughter by a previous relationship, Autumn, who was 18 by the time of the trial. RP II 218.

[1] The verbatim report of proceedings is in five volumes, numbered continuously. The volume number will be used in citation for the court's convenience.

On March 22, 2014, Kristina was still living in their family home, which the couple had agreed to sell. RP II 288. Mr. Ferrer came to the house that day to do some repairs which were required for the pending sale. RP II 289, 334; RP IV 625. She went to a barbecue with her two daughters, Ava and Sylvie, ages 2 and 3 at the time of the incident. Autumn called her while she was at the barbecue to let her know that Mr. Ferrer had been back at the house since she had left. RP II 291.

When Kristina came home, she could not get in through the garage so she called Autumn to open the door from the inside. Autumn helped her carry the younger girls upstairs because they were asleep. RP II 293. She covered them up and then looked around the room and noticed that some things were missing. One of their daughter's baby pictures was missing, so she looked into the closet to see if Mr. Ferrer had taken out his own things. RP II 294, 338-339. There are two clothes bars, upper and lower, so for a person to fit in the closet if it is closed he would have to crouch down. To her surprise, she saw Mr. Ferrer squatting in the closet. She yelled at him because she was startled. RP II 339. He looked crazed and angry. RP II 294. He asked her angrily where she had taken the children. She told him they had been to the barbecue with her. He jumped up at her. He pushed her down on the bed. He started punching her with his right hand. He asked her if she wanted to die. He put his hands on her neck. RP II 297. He was strangling her. She could not breathe. Her head was pounding. She lost control of her bladder and bowels. RP II 299. He again asked her if

she wanted to die, or told her she was going to die. She was able to get up. He was "chest bumping" her as he guided her to another part of the bedroom. He pushed her down to the floor and started punching her again on the left side of her head. He was intermittently strangling her, also with his right hand. RP II 301, 305. When he was doing this she could not speak or breathe. There was a pounding or throbbing in her head. Her vision was affected. RP II 302. Mr. Ferrer repeated over and over that she was going to die. RP II 303 .

She was able to get up a second time. The couple's toddler girls were screaming and crying by this time. They were afraid. Mr. Ferrer said to one of the girls, "this is the last time you will see Daddy, Ladybug." He told Kristina, "Try to divorce me and you'll die." He walked down the hall, smashing the glass on photographs as he went, saying, "The next time I see you, you are dead." RP II 307-308.

Kristina did not smell alcohol on his breath, and he appeared to be steady on his feet. His speech was not slurred. RP II 306-307. She did not recall telling the police later that she had smelled alcohol on his breath. RP II 352. As he went down the hall, she got her phone and called 911. RP II 309. The recording of her call was played for the jury. RP II 310-314.[2] From the timing of her call, and that of her daughter Autumn, who

[2] There does not appear to have been a transcript made of the tape from its original. The transcriptionist has attempted to reproduce the dialog as well as possible from the CD of the trial.

initiated her own call as soon as she heard her mother crying out, it can be inferred that the incident lasted about three minutes. RP II 237, 309.[3]

When the police arrived, Kristina had not changed her pants, which she claimed to have soiled. She did not show the police officer the condition of her pants, either. RP II 315-16. She gave them a written statement. RP II 316. She had plenty of time to tell them what had happened, but did not tell them about losing control over her bowels and bladder. RP II 348. When describing what had happened, she never told Officer Alba that she had been strangled. RP II 351.

The next day, Kristina talked with Andres' mother Claudine, and his sister Virginia about what had happened to her. She did not tell either woman that she had been strangled. RP II 357-58.

Kristina had headaches over the next few weeks. She had bruising on her neck which developed over a 2–3 week period after her encounter with Mr. Ferrer. She did not go to work during this period. She also had problems with her vision for a few weeks, but these were not still ongoing at the time of the trial. RP II 320-21, 327. She also lost a dental crown, which she believed was attributable to the incident, but this was eight days after the incident. RP II 324, 354-55. The prosecution introduced several photos of the bruising, taken at different time intervals after the incident. RP II 325-326, Supp. CP (Ex. 40, 42, 43, 44). She also wrote out a second statement for the police. RP II 328.

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[3] The time stamp on Autumn's call was 11:14 PM. The time stamp on Kristina's call was 11:17, when the incident was already over.

Autumn Crawford is the daughter of Kristina Ferrer. Although Andres Ferrer had lived in the family home since she was in sixth grade, she never thought of him as a father figure. RP II 217, 218. She never liked him or had a good relationship with him. RP II 269.[4]

Dr. Crina Crisan treated Kristina Ferrer on March 26 at the Urgent Care clinic. Her patient told her that she had been assaulted by her husband four days ago. Her symptoms included headache, dizziness, neck pain and seeing spots. She also had an upset stomach and anxiety symptoms. RP II 369.

On examination, the doctor observed that she was bruised on the left side of the neck, and the left external ear. RP II 370. Dr. Crisan told the jury that bruises go through several coloration stages from reddish purple to bluish or brownish, and then green/yellow and finally to normal coloration. RP II 372.

Kristina Ferrer was in no acute distress at the time of exam. She had normal blood pressure. High blood pressure would be indicative of anxiety. Her X-rays were normal. The bruising which the doctor saw was a superficial injury. RP III 428-29. She did not see any injuries like a fingerprint or some kind of bruise that would look like it was left by a finger on Kristina's throat. RP III 430. Kristina's symptom of seeing spots could be attributable to an electrolyte problem, or abnormal blood sugar.

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[4] Mr. Ferrer testified that their relationship was good until she became a teenager. RP IV 622.

Kristina did not mention losing control of her bladder or bowels in the history she gave. RP III 434.

Officer Eddie Alba was called to the Ferrer residence because of a report of a domestic violence disturbance. RP III 456. He made contact with Kristina Ferrer, who was crying and hysterical. RP III 458. The officer took several photos to document the condition of her face and neck and ears. RP III 461, 462, Supp. CP 1, (Ex. 9, 10A, 18A, 14, 19). He interviewed Kristina and then asked her to do a written statement. She had told him that she had smelled alcohol on Mr. Ferrer's breath and that he appeared intoxicated. RP III 489.

He was with her for an hour and was standing within 3 feet of her. RP III 486, 490. He never got the impression from that contact that she had lost control of her bladder or bowels. She did not mention losing control of her bowels or bladder. RP III 490. She declined any medical treatment. RP III 486. Because Kristina had not mentioned anything verbally regarding strangulation, he referred the case for evaluation as an assault in the fourth degree. RP III 486.

Andrew Hamlin, a Vancouver police officer, took additional photographs of Kristina's face. He felt she had obvious discoloration and obvious bruising, RP III 501, and offered his opinion that some of the marks on her face were finger marks. RP III 505. He acknowledged that the marks he attributed to finger pressure could be caused by blunt force,

and that prolonged or severe strangulation would be more likely to leave marks. RP III 505, 507.

Sandra Aldridge, also a police officer, took some additional photos of Ms. Ferrer's face. EX. 26, 27, 31 and 32, Supp. CP 1-2; RP III 513-14. She also took Exhibits 50-53, which were photos of Kristina's face taken the same day as the other exhibits. RP III 521, Supp. CP 2.

Steve Donahue, another Vancouver police officer , testified about his interrogation of Mr. Ferrer when the latter came to the police station to surrender himself. RP III 592. Donahue testified that Mr. Ferrer told him that he got upset after argument with his wife, with whom he was going through a divorce.[5] Then he went to his sister's house on Hayden Island and started drinking. He went back to his house and hid himself in the closet to wait for his wife. He suspected his wife might be seeing someone else and he wanted to see if she brought someone home with her. She found him in the closet. They were yelling at each other. He got in her face. She pushed him away. He shoved her onto the bed and hit her on the head several times. Then he got up to leave. He broke some picture frames on the way out and then left. RP IV 596-97. Donahue testified that Mr. Ferrer said he gets enraged and upset when he drinks, RP IV 598, but he was not showing any signs of intoxication when they talked. RP IV 600. He was cordial, cooperative and forthcoming when they talked. RP IV 602. Their conversation was not tape recorded. RP IV 603.

[5] Mr. Ferrer testified he was served with divorce papers while he was in jail, so he had not told Office Donahue that he was in the midst of a divorce. RP IV 668.

After the state rested, Mr. Ferrer testified in his own behalf. The couple had agreed to sell their house. Mr. Ferrer was doing repairs on the house to comply with the inspection which was done on the house as part of the sale. RP IV 625. On March 22, 2014, he came to the house on four occasions. On the first trip, he saw his wife but not Autumn. RP IV 628. She told him the kids were at their aunt's house. RP IV 628

He returned to the house around 6:30 or 7 in the evening. Only Autumn was there. He started gathering some of his things. He left the house to go back to Hayden Island around 8 PM. RP IV 636.

Because Kristina had not responded to his texts during the day, he went back to the house again to talk with her about where the kids had been. RP IV 638.

He wanted to talk with Kristina, but he panicked. He did not want her to know he was there, so he decided to hide in the closet in their bedroom. RP IV 642-644. He heard her voice in the bedroom and then she opened the closet door. RP IV 651. He was embarrassed and scared. RP IV 652. She was very angry. RP IV 653.

He did not see the kids on the bed. He asked her where the kids were. He had assumed the kids would be with their aunt. RP IV 649-50. She told him she had been at a function with friends, but did not answer his question about the kids. She began to shove him. She shoved him into a night–stand.They had never had a physical confrontation before. RP IV 653-55. She pushed him again, so he pushed her back. He pushed her

toward the bed and she grabbed onto him and they fell onto the bed. She wrapped her legs around his waistline. RP IV 656-57. He hit her in the back of the head to get her to release her hold. She did not let go, and he hit her again in the neck area, with his right hand. RP IV 657. He punched her three times in the head and neck on her left side. RP IV 676. He admitted causing the bruising on her neck and her ear. RP IV 678. He denied saying he was going to kill her. RP IV 658, 661.

Mr. Ferrer looked to his right and saw his kids crying. He was not aware previously that they were there. RP IV 659. He told his daughters he was sorry. As he was leaving, he saw Autumn. She said she was on the phone with the police. RP IV 663. He told her to go check on her mother, because she might be hurt. RP IV 661. He did not tell Autumn that Kristina might be dead. RP IV 663.

Mr. Ferrer turned himself in to the police the next morning around 9 AM. RP IV 664. At the police station, he spoke to Officer Donahue. RP IV 666. He told the officer he formerly had problems with alcohol, but had been sober for six years. He denied telling Officer Donahue that he goes into a rage when he drinks. RP IV 669. He also denied telling Donahue he flew into a rage when Kristina pushed him. RP IV 670.

At the sentencing hearing, defense counsel argued that the standard rage should be 6-12 months based on an offender score of one, and also that the harassment and assault charge should be deemed to be the "same criminal conduct". RP V 850-852, 854.

The trial court concluded that although there was one continuous course of conduct, the harassment had a separate intent from the assault, and hence was not "same criminal conduct" under RCW 9.94A.589. RP V 857. The court then followed the prosecution's recommendation for the top of the sentence range, and added 36 months for the aggravating factor that was found by the jury. RP V 865-86.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The decision of the Court of Appeal conflicts with this court's decisions in *State v. Dunaway*, 109 Wn. 2d 207, 743 P. 2d 1237 (1987); *State v. Porter*, 133 Wn. 2d 177, 942 P.2d 974 (1997); *State v. Tili*, 139 Wn. 2d 107, 985 P.2d 365 (1999) and the Court of Appeals decisions in *State v. Grantham*, 84 Wn. App. 854, 932 P.2d (1997) and *State v. Wilson*, 136 Wn. App. 596, 150 P.3d 144 (2007). RAP 13.4 (b)(1) and (b)(2).

The panel's decision cites the *Dunaway* criteria for evaluating same criminal conduct, but does not follow them. Slip Op. at 7. The court's decision also conflicts with this court's determination in *Tili* that separate acts of rape involving different orifices constitute the "same criminal conduct." The panel's decision also conflicts with the holding in *Porter* that two crimes may involve the same intent if they were part of a "continuing uninterrupted course of conduct." *Porter* at 186. The panel decision conflicts with the holding of *Grantham*. Finally, the panel's decision conflicts with the reasoning of *State v. Wilson*, a case also involving the two crimes of harassment and assault.

The panel's decision acknowledges that Mr. Ferrer made several threats during the course of his confrontation with his wife, some during

the fight itself, and one or two at the time he was leaving the bedroom when the fight was over. Slip Op. at 3, 4. It also acknowledges that the trial court found that the incident was a single continuing course of conduct. Slip Op. at 5, RP IV 692 and RP V 857. The same observations are made in the panel's disposition of Mr. Ferrer's SAG argument on the failure to give a *Petrich*[6] instruction.[7] The panel's decision conflicts with the holding and reasoning in *Tili* because in that case, there was a continuous uninterrupted course of conduct constituting two separately charged rapes. Here, some of the threats were made during the course of the assault and there was no significant gap between the end of the assault and the end of the threats.

In *Grantham, supra* the Court held that where a defendant has "the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act, then the crimes are separate and distinct for the purposes of computing the offender score." *Grantham* at 859. Conversely, where the record demonstrates there was no pause and reflection period, the crimes are the "same criminal conduct" for sentencing purposes. Such was the case here. According to Kristina's testimony, Mr. Ferrer threatened her all during their physical fight and continued to make threats as he left the bedroom and walked down their

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[6] *State v. Petrich*, 101 Wn. 2d 566, 683 P.2d 173 (1984)

[7] "The State argued, and the trial court found, that based on the short time period during which Ferrer pushed Kristina on the bed, punched her in the face and head, and threatened her life five times, there were 'no distinct time periods for which the incident stopped,' and that the incident was a continuous course of conduct." Slip opinion at 15. The state had argued during the discussion of a *Petrich* instruction that "I'm only alleging one act of harassment here – that the Defendant only put the victim in fear once. RP IV 573.

hallway.[8] There was no period of pause and reflection, merely a continuation of what had already been going on. Under *Grantham's* test, this was the same criminal conduct. The panel's decision conflicts with *Grantham's* holding.

The panel decision also conflicts with the Court of Appeals decision in *Wilson*, which also involved a defendant charged with assault and also felony harassment. Wilson broke down the door of his victim's apartment, pulled her out of bed by her hair, and kicked her in the stomach. There was no indication he verbally threatened her while doing so. When she told him she was calling the police, he left the house. He warned his friends who were outside the house that the police were being called, and then reentered the house. He took a piece of wood from the door he had broken and threatened to kill his victim. The Court of Appeals held that the trial court erred when it found that the two crimes met the "same criminal conduct" test because the assault had already been completed before Wilson returned to the house to threaten his victim. Wilson had time to reflect when he left the house to warn his friends, and formed a new and different criminal intent, the intent to threaten and harass his victim which was manifested by his arming himself with a club and then returning to the scene of the assault. In stark contrast, in the present case there was no significant period of time between the end of the fight, and Mr. Ferrer's departure from the scene. Once he left the bedroom

[8] The whole incident lasted about three minutes, as demonstrated by the timing of the two 911 calls. See App. Br at 5, FN 4.

and the hallway leading to it, he never returned to make another threat. Moreover, unlike *Wilson*, there were threats made all during the fight itself according to Kristina Ferrer's own testimony. The assault and the threats were one continuing course of conduct, and thus constituted the "same criminal conduct" for the purposes of sentencing. Both the panel decision and the trial court acknowledged the two crimes were intimately interwoven in time. Review should be granted because of this irreconcilable conflict with the reasoning and holding in *Wilson.*

The panel decision also conflicts with *Dunaway*, because it is clear that the assault furthered the harassment, rather than the harassment furthering the assault. Ms. Ferrer indicated that the reason she believed the threats was because of the injury she suffered during the fight. In her mind, the assault reinforced the message of the threats.[9] Since Mr. Ferrer made threats during the assault, it is clear that his intent to harass was *already* formed during the assault, not subsequently and separately.

The panel's decision is thus in conflict with a number of this court's decisions on the "same criminal conduct" issue and also with two Court of Appeals decisions involving the same issue, one of which deals with the same two criminal offenses. This court should grant review pursuant to RAP 13.4 (b)(1) and (b)(2).

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[9] A:...as he walked down the stairs he looked at me and said the next time I see you, you're dead.
Q: Did you believe him?
A: Yes.
Q: Why did you believe him?
A: Because he just tried to murder me in the bedroom. RP II 308.
This testimony was cited by the panel's decision at page 8.

B. The case involves an issue of substantial public interest that should be determined by the Supreme Court. The court should take review pursuant to RAP 13.4 (b)(4) to create a workable, fair rule for the review of the length of exceptional sentences.

The panel's decision upheld the length of the sentence imposed in this case, 50 months. The panel relies on this court's decision in *State v. Ritchie*, 126 Wn. 2d 388, 894 P.2d 1028 (1995) which held that a sentence is clearly excessive only when its length, in light of the record, "shocks the conscience."

Factually, the basis for the exceptional sentence here was the jury's finding that the assault took place within the "presence" of Mr. Ferrer's two toddler children and within earshot of his teenage step daughter. Mr. Ferrer was not initially aware that his own children were present until they awoke sometime during the fight with his wife. No evidence was presented about what they saw or heard. Mr. Ferrer had seen his step–daughter earlier in the evening, but was not aware she was in the house at the time of the assault itself. She did not claim to see anything that happened, but heard the sounds of the struggle between her mother and step–father. RP II 233, RP IV 641.

As a result of the children's "presence", the court imposed 36 months on top of the standard range sentence[10], basically adding 12 months for each child, a clearly arbitrary figure chosen by the prosecutor.

[10] The standard range was miscalculated, as argued in the Appellant's opening brief because of the court's error concerning the "same criminal conduct issue".

Petitioner argued below that this sentence was clearly excessive and an abuse of the trial court's discretion. Petitioner submitted materials from the Sentencing Guidelines Commission regarding the use of this aggravating factor in other similar cases. Given the extremely short duration of the whole incident, during at least some of which the two younger children were asleep on the bed, the 36 months attributed to the statutory aggravating factor, RCW 9.94A.535 (h)(ii), was clearly excessive even under the *Ritchie* "shocks the conscience" rubric.

This court should take review for two reasons in this case. One is to give further guidance to trial courts about the length of exceptional sentences using this aggravating factor. But the second reason is to reconsider and overrule the vacuous *Ritchie* "standard", and replace it with one which takes a more measured and proportional approach to sentencing.

The *Ritchie* "shocks the conscience" rubric was derived from language in *State v. Ross*, 71 Wn.App. 556, 861 P.2d 473 (1993) which first used the colorful but vacuous phrase "shocks the conscience" in this context. It was picked up and repeated by the *Ritchie* court, and was not an attempt to analyze a sentence's length, but merely a restatement of the "no reasonable person" portion of the abuse of discretion standard. The "shocks the conscience" rubric is of no guidance whatsoever to appellate courts whatsoever in reviewing the length of a sentence, and should be

replaced with a proportionality based approach, as in the review of capital sentences under RCW 10.95.130.

Another more objective measure for reviewing the length of an exceptional sentence would be by comparison to other statutory aggravators such as firearms or deadly weapons or sexual motivation. Compared with such benchmarks, the sentence here was clearly excessive. See Appellant's Opening Brief, 23-25, and Reply Brief, pp.11-13.

At its inception, the Sentencing Reform Act envisioned the development of a common law of sentencing regarding the length of a sentence as well as reasons for imposing one in the first place.[11] Washington Courts briefly considered "doubling" or "tripling" rules

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[11]" ...another legislative policy is identified in RCW 9.94A.210 [recodified as RCW 9.94A.585] to prevent sentencing which is either "clearly excessive or clearly too lenient", RCW 9.94A.210(4)(b), by "developing a common law of sentencing within the state", RCW 9.94A.210(6). One legal scholar has written in this regard:

A major hope of those who have advocated sentencing reform of this type has been that it would produce a "common law" of sentencing, in which the time-honored methods of the common law--reasons for decisions, appellate review of those reasons and the further articulation and rearticulation of reasons in the light of new circumstances--would be applied to sentencing.... If this expectation is met, sentencing decisions in Washington will, to a significantly greater extent than ever before, be based on principle and guided by reason, and much of the promise of the reform will be realized.

D. Boerner, Sentencing in Washington § 9.3, at 9-9 through 9-10 (1985); see also D. Boerner, § 9.22(b), at 9-61.

Quoted in *State v. Pryor*, 56 Wn. App. 107, 782 P.2d 1076 (1989)

adopted from Minnesota cases, but ultimately declined to utilize them. See *State v. Oxborrow*, 106 Wn. 2d 525, 723 P.2d 1123(1986).[12]

This court should take review of this case as an issue of public importance and give trial and appellate courts a meaningful way to measure and review the appropriate length of a sentence. The current "standard" derived from *Ritchie* and *Ross* is in reality, not a standard at all but a rubber stamp.[13]

To overrule a prior Supreme Court decision, this court must find that the previous rule was both harmful and incorrect. See e.g. *State v. Devin*, 152 Wn. 2d 157, 142n P.3d 599 (2006). While the "abuse of discretion" standard of review for the length of sentences is not clearly incorrect, given the statutory directive to reverse only sentences that are "clearly excessive", RCW 9.94A.585 (4), its transmutation in *Ritchie* to the "shocks the conscience" rubric was and is incorrect. The *Ritchie* "shocks the conscience" rule is harmful because it effectively stifles and muzzles any meaningful or objective review of the sentence, once the factual and legal basis for the sentence is established. This court should

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[12] The sentence in this case more than quadrupled the length of the even the incorrectly calculated standard range sentence of 6-12 months, and was nearly 6 times the length of the top of the correct standard range, 3-9 months.

[13] "Unbridled judicial discretion in sentencing is exactly what the SRA was designed to prevent, given the elimination of the administrative authority of the Board of Prison Terms and Paroles to set minimum terms under the former indeterminate sentencing statute. The 'abuse of discretion' standard set out in *Oxborrow*, 106 Wn.2d at 529-30, 723 P.2d 1123; and *State v. Nelson*, 108 Wn.2d 491, 740 P.2d 835 (1987), requires a determination on appeal that 'no reasonable person would take the position adopted by the trial court.' *Nelson*, 108 Wn.2d at 504-05, 740 P.2d 835. The practical effect of the standard as stated may result in rubber-stamp approval of any sentence up to the maximum term." *State v Pryor*, 56 Wn. App. 107, 120, 782 P.2d 1076 (1989).

grant review and reformulate the standard of review for the length of exceptional sentences such as this one.

C. The court should take review to determine whether the trial court correctly instructed the jury on the elements of assault in the second degree when it added an instruction defining the non-statutory term "disfigurement." RAP 13.4 (b) (2), (b)(3) and (b)(4) .

The court gave a jury instruction proposed by the state which further defined "disfigurement" as an element of second degree assault as something which "impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner." Instruction 10. The State argued that Kristina Ferrer's temporary bruising constituted "disfigurement." Contrary to the panel's response to Mr. Ferrer's SAG, (Slip Op at 13), defense counsel did object to this instruction, RP IV 707-708, and this issue was not waived on appeal.

In order to convict Mr. Ferrer of second degree assault, the jury had to find that he inflicted "substantial bodily harm", defined in relevant part by statute as "bodily injury which involves a temporary but substantial disfigurement." RCW 9A.36.021; RCW 9A.04.110 (4)(b). The statute does not define "disfigurement."An instruction similar to the one given here was reviewed and approved by the court in *State v. Atkinson*, 113 Wn. App. 661, 54 P.3d 702 (2002).The court there said the instruction merely "supplemented and clarified" the statutory language. 54 P.3d at 706. The danger here, however, is that such an instruction does not clarify

the element of "substantial disfigurement", but lessens the burden of proof by eliminating the emphasis on the level of injury needed, which must be "substantial." This court should take review to clarify whether such a supplementary instruction purporting to define an undefined statutory term thereby lessens the state's burden of proof of the element of "substantial bodily harm."

In addition, the court should accept review because the instruction with the non-statutory definition of the term "disfigurement" allowed the jury to convict Mr. Ferrer of a felony based in subjective feelings regarding beauty, a process that allows for conviction based on sexist and racist stereotypes.

The "disfigurement" instruction allowed the jury to decide whether Mr. Ferrer was guilty of a felony or gross misdemeanor based upon its subjective determination that Kristina Ferrer's bruising impaired her "beauty." Instruction No. 10, CP 35-69. This is such a subjective standard that it essentially allowed the jurors to base a conviction on racist and sexist stereotypes or on implicit biases which perpetuate those biases. The Court should accept review of this issue under RAP 13.4(b)(4), because of issues of public importance, under RAP 13.4(b)(3), because of the constitutional issues at stake, and under RAP 13.4(b)(2) because of a conflict between decisions of different divisions of the Court of Appeals.

Mr. Ferrer's lawyer argued that Mr. Ferrer had been overcharged and that he was guilty only of assault in the fourth degree. This strategy was reflected in defense attempts to cross-examine the lead detective about how the case "grew" from a gross misdemeanor to a felony, RP 26-35, 474-86, 772-73, 798-800, to the provision to the jury of a lesser-included offense instruction for assault in the fourth degree, CP 35-69 and to the highly contested, and ultimately successful, attempt to discredit Kristina Ferrer's claims that she was strangled. Because the jury was not unanimous that the State proved assault by strangulation, and was unanimous only as to the "substantial bodily harm" prong of assault, CP 71, ultimately the definition of "disfigurement" given to the jury took on key significance.

In Instruction No. 9, the jury was instructed, according to the statutory definition in RCW 9A.04.110(4)(b), that "substantial bodily harm means bodily injury that involves a, temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ." CP 35-69.

In some past cases, excessive bruising has been held to be sufficient to meet this element. *See, e.g., State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (bruise marks on three year old child caused by shoe with rigid sole). However, bruising and swelling are not always indicative of substantial disfigurement and their presence do not always constitute assault in the second degree. *See State v. Dolan*, 118 Wn. App.

323, 330-32, 73 P.3d 1011 (2003), *overruled on other grounds in State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) (improper to give instruction to the jury that bruising and swelling can constitute substantial bodily harm). Otherwise, almost any simple assault that resulted in a swelling or a bruise would be automatically ratcheted up to a Class B felony, thereby eliminating any reasoned distinction between assault in the fourth degree under RCW 9A.36.041and assault in the second degree under RCW 9A.36.021.

In this case, the trial court went one step beyond giving the jury an instruction that bruising itself can constitute substantial bodily harm. The trial court gave the jury an instruction that defined "disfigurement" in a manner not reflected in the statute, defining it by means of a dictionary definition to include impairment of "beauty" and making someone "unsightly" or "imperfect." Instruction No. 10. Defense counsel took exception to this instruction, RP IV 706-712, although at a later time counsel did not repeat the exception. RP IV 731. However, whether there was an exception or not, the issue was properly raised by Mr. Ferrer on appeal under RAP 2.5(a)(3) and is grounds for this Court to accept review and reverse the conviction.

The determination of beauty, unsightliness or imperfection is an inherently subjective process, which by necessity is tied to racist and sexist stereotypes. *See* D. Rhode, "The Injustice of Appearance," 61 *Stan. L. R.* 1033 (2009); R. Mahajan, "The Naked Truth: Appearance

Discrimination, Employment, and the Law," 14 *Asian American L. J.* 165 (2007). While attempts to ban discrimination based upon appearance have had mixed results,[14] one of the legal problems with such claims is the inherent vagueness of the concept of physical attractiveness or beauty itself. *See, e.g., Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 914 (D. Nev. 2008) ("No Court can be expected to create a standard on such vagaries as attractiveness or sexual appeal.").[15]

What makes the concept of "beauty" vague and impossible to enforce in the Title VII area is precisely what makes the concept particularly inappropriate for jury instructions. This Court has been particularly sensitive to issues of bias, explicit or implicit, in the criminal justice system. *See State v. Saintcalle*, 178 Wn.2d 34, 47-49, 309 P.3d 326 (2013). A jury instruction that allows jurors to base their decision as to which crime applies in a particular fact situation based upon their determination of whether someone's beauty has been impaired clearly can lead to discrimination based upon race or gender in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States

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[14] *Compare Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality) (Title VII violation where accounting firm told employee she needed to "walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry.") *with Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1108 (9th Cir. 2006) (makeup requirement for females might violate Title VII, but rejecting claim in the particular case).

[15] *See also Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1348-50 (Fed. Cir. 2005) (term "aesthetically pleasing" in patent context is invalid because it is "completely dependent on a person's subjective opinion.").

Constitution and Article I, section 12 (equal protection) or Article XXXI, section 1 (gender discrimination)[16] of the Washington Constitution. Jurors raised in a culture that values white female beauty will more likely find that a particular bruise impairs the beauty of a woman of Western European descent with the stereotypical appearance of a model from *Cosmopolitan* than the situation where a male, from a non-Western European background receives the same bruise. Such consideration of gender or race conflicts with settled notions that the jury system should be free from bias and that the existence of bias in the jury system harms society as a whole. *See, e.g., J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 140, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes.").[17]

Thus, Instruction No. 10 not only violates the Equal Protection clauses of the state and federal constitutions and the Washington ban on gender discrimination, it also is unconstitutionally vague and violates due process protected by the Fourteenth Amendment and Article I, section 3. *See State v. Stubbs*, 144 Wn. App. 644, 184 P.3d 660 (2008), *rev'd on*

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[16] Article XXXI, the Equal Rights Amendment, was adopted with the purpose of ending "special treatment for or discrimination against either sex." *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 565, 740 P.2d 1379 (1987).

[17] The U.S. Supreme Court just heard oral argument in a case involving whether the ban on inquiry into juror deliberations is appropriate where a juror made an explicitly racist comment during deliberations. *Peña-Rodriguez v. Colorado*, No. 15-606. Here, Instruction No. 10 essentially invites such prohibited determinations.

other grounds 170 Wn.2d 117, 240 P.3d 143 (2010) (jury instruction is unconstitutionally vague if it lacks a "commonsense meaning that juries could understand.") (citing *Tuilaepa v. California*, 512 U.S. 967, 976, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994); *State v. Elmore*, 139 Wn.2d 250, 289-90, 985 P.2d 289 (1999)). If "beauty" is too amorphous of a term based on gender and race biases, it is too vague to leave in the hands of jurors.

Below, the State argued in favor of Instruction No. 10 by citing *State v. Atkinson*, 113 Wn. App. 661, 54 P.3d 702 (2002). RP IV 707-11. The trial court in *Atkinson* did give the jury a definition of "disfigurement" that tracked Instruction No. 10 in this case, using a definition taken from *Black's Law Dictionary*, and Division Three rejected arguments that this definition was overly broad, misstated the law, and misled the jury. 113 Wn. App. at 667-68.[18] But *Atkinson* came out in 2002, in a different era when courts (and litigants) were not as concerned about implicit bias in the legal system. Notably, the case does not address in any way issues related to sexism and racism, and the discussion in the case only addressed whether it was proper to give an instruction that supplemented and clarified the statutory language. Because Division Three never addressed whether a "disfigurement" definition based upon subjective concepts of

[18] The Comment WPIC 2.03.01 (2015) endorses this approach ("The instruction's definition uses the word 'disfigurement.' The jury may be further instructed on the meaning of 'disfigurement' using the definition from Black's Law Dictionary. *State v. Atkinson*, 113 Wn.App. 661, 667–68, 54 P.3d 702 (2002).").

"beauty" perpetuates racist and sexist stereotypes, it offers no guidance in this case. *See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) ("In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.").

Moreover, *Atkinson* pre-dated Division Two's decision in *State v. Dolan, supra*, which, as noted, reversed a conviction where a trial court instructed the jury that it could find substantial bodily harm based on the presence of bruising and swelling. Division Three disapproved of giving the jury a definition of "substantial bodily harm" that was not reflected in the statute, because of the potential for lowering the State's burden of proof, the interference with the right to a jury determination of the statutory element[19] and a comment on the evidence (citing Const. art. IV, § 16). *Dolan*, 118 Wn. App. at 330-31.

The conflict between *Atkinson*'s endorsement of a supplemental instruction defining a key term of "substantial bodily harm" and *Dolan*'s rejection of such an instruction is a basis for review under RAP 13.4(b)(2). But the Court should also accept review under RAP 13.4(b)(3) & (4) based upon the constitutional issues involved and the issues of public importance, and overrule *Atkinson* on more fundamental grounds. The Court should hold that Instruction No. 10 was improper because it allows

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[19] Division Two did not cite to any particular constitutional provisions to support its holding, but clearly lowering the burden of proof and trenching on the jury function would violate the Sixth and Fourteenth Amendments and article I, sections 3, 21 & 22.

for the perpetuation of sexist and racist stereotypes. No jury in Washington should be tasked with determining the level of criminal culpability based upon whether a white woman's "beauty" is valued more than the "beauty" of someone with darker skin and a different gender identification.

VI. CONCLUSION

This Court should grant review of this case to revolve the substantial conflicts between the panel's decision and previous Supreme Court and Court of Appeals decisions dealing with the "same criminal conduct" rule n the context of a prosecution for an interwoven assault and harassment case, pursuant to RAP 13.4 (b)(1) and (b)(2). The court should also grant review to give better guidance to trial and appellate courts about the length of exceptional sentences by overruling *State v. Ritchie* and creating a meaningful basis for review of the length of such sentences pursuant to RAP 13.4 (b)(4). The court should also grant review to clarify the appropriateness of a supplementary instruction on "disfigurement" in this second degree assault, pursuant to RAP 13.4 (b)(2), (b)(3) and (b)(4).

Dated this 13th day of OCTOBER, 2016

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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDRES SEBASTIAN FERRER, Appellant.	No. 47687-8-II UNPUBLISHED OPINION

SUTTON, J. — Andres Sebastian Ferrer appeals his conviction and sentence for one count of second degree assault and one count of felony harassment. Ferrer argues that (1) the trial court erred when it determined his convictions were not the same criminal conduct under RCW 9.94A.589(1)(a) and (2) his 50-month exceptional sentence is clearly excessive. In his Statement of Additional Grounds (SAG), Ferrer claims that the trial court made several evidentiary, instructional and sentencing errors.

We hold that (1) the trial court did not err when it determined that Ferrer's second degree assault and felony harassment convictions were separate and distinct offenses and not the same criminal conduct, and (2) Ferrer's 50-month sentence is not clearly excessive. As to Ferrer's SAG claims, we hold that Ferrer waived any challenges to the trial court's admission of the photographs and the trial court's jury instructions on substantial bodily harm and disfigurement; Ferrer was not

entitled to a *Petrich*[1] instruction on his felony harassment charge; and the sentencing court properly imposed a 10-year no-contact order, but exceeded its authority in ordering Ferrer to seek mental health treatment. Thus, we affirm Ferrer's convictions, reverse the mental health sentencing condition, and remand with instructions to the sentencing court to strike the mental health evaluation and treatment condition from Ferrer's judgment and sentence.

FACTS

A. BACKGROUND FACTS

Ferrer and Kristina Ferrer[2] were married in 2010. They have two daughters together, and Kristina has an older daughter, AC,[3] from a previous relationship. In January 2014, after Ferrer and Kristina separated, Ferrer lived with his sister and Kristina lived with her daughters in the family's home in Vancouver, Washington.

Ferrer would stop by the family home to get belongings or to see his two daughters. On March 22, Ferrer visited the home during the day, returning later in the evening while Kristina was at a barbeque with her two younger daughters. AC was at home when Ferrer arrived sometime between 8:30 p.m. and 9:30 p.m., encountering Ferrer in the hallway outside her bedroom. Ferrer left the home.

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[1] *State v. Petrich,* 101 Wn.2d 566, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen,* 110 Wn.2d 403, 756 P.2d 105 (1988).

[2] We refer to parties with the same last name by their first name for clarity and intend no disrespect.

[3] AC was a minor in March 2014; therefore, we use the minor witness's initials to maintain privacy.

Kristina returned home around 11:00 p.m., and AC helped her carry the smaller child upstairs. AC and Kristina put both girls in Kristina's bedroom. AC went downstairs, and upon returning upstairs, saw Ferrer jump out of Kristina's bedroom closet and start yelling at Kristina.

Ferrer pushed Kristina down on the bed next to their young daughters, pinning her down and punching her about the head and face. The girls woke up and began screaming and crying. AC called 911. Throughout the assault, Ferrer threatened to kill Kristina, and then as he left the bedroom, he apologized to his daughters and then told Kristina, "[D]ivorce me and you'll die." II Verbatim Report of Proceedings (VRP) at 307. As Ferrer walked out the door into the hallway, he punched picture frames on the wall and called back to Kristina, "[N]ext time I see you, you're dead." II VRP at 308. When he left the house, Ferrer asked AC if she was on the phone with 911 and suggested that she check on Kristina because, "She might be dead." II VRP at 234-35.

At trial, Ferrer admitted that he returned to the family home a number of times that evening, and that he encountered AC at home alone. Ferrer stated that he arrived at the house the last time at 10:45 p.m., and that he parked his car away from the house because he knew if Kristina saw his vehicle she would not come inside the house. Ferrer also admitted that he hid in the closet when he heard Kristina's car pull up, that he punched her a number of times, and that he became aware that his young daughters were on the bed when he hit Kristina and knew that they were screaming and crying.

B. PROCEDURAL FACTS

1. Trial

The State charged Ferrer with one count of second degree assault and one count of felony harassment based on the death threats Ferrer made to Kristina. Both charges carried a domestic

violence aggravator based on the fact that Kristina's three minor children were present during the assault.[4]

Before trial, the State moved to admit about 30 photographs of Kristina's injuries. The trial court examined each photograph, requiring the State to make an initial offer of proof as to each. During the hearing, the State withdrew nine disputed photographs of Kristina's injuries, and the trial court excluded 12 photographs due to their cumulative nature or poor quality and reserved ruling on the admissibility of the remaining photographs.

During trial, the State offered 20 photographs of Kristina's injuries from the evening of March 22 and then from a week later to show bruising and the extent of her injuries. The trial court admitted the 20 photographs without objection.

Ferrer proposed a *Petrich*[5] instruction, arguing that there were multiple allegations of death threats during the course of the assault, that each were of a "different character," and that the State should have to "pick one." IV VRP at 573. The State argued that it was charging one allegation of felony harassment, that the multiple threats during the assault were one continuing course of

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[4] RCW 9.94A.535(3)(h)(ii) provides in part:

> (h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:
>
> . . . .
>
> (ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years.

[5] *Petrich,* 101 Wn.2d at 572 (the court held that where the State does not elect which act it will rely upon for a conviction on the charge, a *Petrich* instruction must be given that instructs the jury that all 12 jurors must unanimously agree that the same underlying criminal act has been proved beyond a reasonable doubt in order to ensure a unanimous verdict).

conduct, and that Kristina was "only . . . in fear once." IV VRP at 572. The trial court initially reserved ruling on Ferrer's requested *Petrich* instruction, but later agreed with the State and denied the instruction, finding that there were "no distinct time periods for which the incident stopped" because of the short time period and that the incident was a continuous course of conduct. IV VRP at 692.

The jury found Ferrer guilty of both charges. The jury also found that both crimes were "aggravated domestic violence offenses" because they were committed within the sight or sound of Kristina's three minor children, and that Ferrer and Kristina "were members of the same family or household." CP at 69-74.

2. Sentencing

The sentencing court determined that Ferrer's convictions for second degree assault and felony harassment required two separate criminal intents, and therefore, they did not constitute the same criminal conduct. Based on his offender score, Ferrer's standard sentence ranges were 12 to 14 months for second degree assault and 4 to 12 months for felony harassment, and 36 additional months above the standard sentence for the aggravators.

After reviewing the testimony of AC, Kristina, and Ferrer on the record, the sentencing court found that "substantial and compelling reasons" supported an exceptional sentence, and stated,

> [Y]ou brutally attacked your wife. That previous to this event you knew [AC] was in the house - and you knew that she was under the age of eighteen yet in your testimony at trial you seemed to blame her - meaning you - the victim here - Ms. Ferrer that she shoved you - that she did everything.
>
> That's not the case sir. You brutally attacked her in his manner - your children were on the bed. For those reasons I believe there are substantial and

> compelling reasons to justify an exceptional sentence. The findings for the compelling and substantial reasons I've just outlined by way of the testimony of [AC], Kristina Ferrer and your minimization of what took place on the night in question.

V VRP at 863-64. The sentencing court found that because the evidence showed that Kristina's children were present during the assault, the jury's finding of the aggravating domestic violence factor supported an exceptional sentence.

The sentencing court then imposed the State's recommended sentence—50 months for second degree assault and 12 months for felony harassment, with both sentences running concurrently. The exceptional sentence for second degree assault included a standard sentence of 14 months and an additional 36 months—12 months for each of Kristina's three children present during the assault—above the standard base sentence.

The sentencing court also imposed a 10-year no-contact order, domestic violence evaluation and treatment, and mental health evaluation and treatment as conditions of Ferrer's sentence. Ferrer appeals.

ANALYSIS

I. SENTENCING

A. SAME CRIMINAL CONDUCT

Ferrer argues that the trial court erred in calculating his offender score when it failed to find that his convictions for second degree assault and felony harassment constituted the same criminal conduct. We disagree.

We review a trial court's determination of same criminal conduct for an abuse of discretion. *State v. Davis*, 174 Wn. App. 623, 641, 300 P.3d 465 (2013). The appellant bears the burden of

proving that the trial court abused its discretion by relying on unsupported facts, applying an incorrect legal standard, or adopting an unreasonable view. *Davis*, 174 Wn. App. at 641-42.

Offenses constituting the same criminal conduct are treated as one crime for sentencing purposes when they involve "the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). Generally, courts construe the requirements of RCW 9.94A.589(1)(a) narrowly "'to disallow most claims that multiple offenses constitute the same criminal act.'" *Davis*, 174 Wn. App. at 641 (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)).

When two statutes involve different criminal intents, they do not constitute the same criminal conduct. *State v. Chenoweth*, 185 Wn.2d 218, 223, 370 P.3d 6 (2016). However, offenses have the same criminal intent when, viewed objectively, the intent does not change from one offense to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Often the analysis will "include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same." *Dunaway*, 109 Wn.2d at 215. When the defendant has "the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," the crimes are separate and distinct from one another. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

Here, Ferrer's objective intent was not the same for the second degree assault and felony harassment. Ferrer formed his intent for the second degree assault when he hid in Kristina's bedroom closet, jumped out of the closet, yelled at Kristina, and pushed her down on the bed next to their two daughters, pinning her down and punching her in the head and face. Their two

daughters woke up and began to scream and cry. During this time, Ferrer repeatedly threatened that he was going to kill her, telling Kristina, "[Y]ou're going to die." II VRP at 299, 303.

Ferrer's intent in the crime of felony harassment was to put Kristina in fear that she would be killed in the future. He told Kristina that if she tried to divorce him, he would kill her. Then, after he stopped hitting her and got up from the bed, Ferrer threatened Kristina two more times, saying "[T]ry to divorce me[,] and you die," and as he walked out into the hall, punching the pictures on the wall, he turned back to Kristina and said, "[T]he next time I see you, you're dead." II VRP at 307-08. Kristina testified that she believed the threats.

In its ruling, the trial court stated,

> Mr. Ferrer's objective intent in assaulting Ms. Ferrer was to harm her, to establish some bodily injury not to legitimize the threat to kill. . . . [A]lthough the conduct was similar one crime was not - or did not further the other.

V VRP 857.

After the assault ended, Ferrer had time to pause and reflect on his conduct, and to form the intent to create fear and apprehension of future harm to Kristina—the felony harassment. These two later threats did not further the assault because the assault was already complete. The trial court found that

> [t]he Assault II was completed before the last threat was made. The Defendant's intent at that time shifted from placing [Kristina] in . . . apprehension of imminent fear during the assault to placing her in apprehension of future harm by making the last threat."
>
> . . . .
>
> [H]e made statements quite clear to the victim that he would kill her if he divorces her [sic] that he was going to kill her. That is a separate intent - that's different from the Assault II.

RP 857-58. The evidence supports the trial court's finding that Ferrer had different intents when he committed second degree assault and then felony harassment. Thus, the trial court did not abuse its discretion when it concluded that these convictions did not constitute the same criminal conduct. Accordingly, Ferrer's argument fails.

B. SENTENCE LENGTH

Ferrer also argues that the trial court's 50-month exceptional sentence was "clearly excessive." Br. of Appellant at 21-22. Ferrer does not challenge any of the sentencing court's findings or the sufficiency of the facts supporting the findings; he only challenges the imposed 50-month sentence as clearly excessive. We disagree.

When reviewing an exceptional sentence, we ask whether (1) the sentencing court's reasons for an exceptional sentence are supported by the record, (2) those reasons justify a sentence outside the standard range, and (3) the sentence imposed is clearly excessive. *State v. Kolesnik*, 146 Wn. App. 790, 802, 192 P.3d 937 (2008).

We review whether an exceptional sentence is clearly excessive for an abuse of discretion. *Kolesnik*, 146 Wn. App. at 805. The sentencing court has "'all but unbridled discretion'" in determining the structure and length of an exceptional sentence. *State v. France*, 176 Wn. App. 463, 471, 308 P.3d 812 (2013) (internal quotation marks omitted) (quoting *State v. Halsey*, 140 Wn. App. 313, 325, 165 P.3d 409 (2007)).

A sentence is "clearly excessive" if it is clearly unreasonable, "'*i.e.* exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'" *Kolesnik*, 146 Wn. App. at 805 (quoting *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1038 (1995)). When based on proper reasons, we will find an imposed exceptional sentence to be clearly

excessive only if its length, in light of the record, "'shocks the conscience.'" *State v. Vaughn*, 83 Wn. App. 669, 681, 924 P.2d 27 (1996) (internal quotation marks omitted) (quoting *Ritchie*, 126 Wn.2d at 396).

The sentencing court found that the exceptional sentence was supported by Kristina's and AC's testimony, the jury's finding that both Ferrer's convictions were aggravated domestic violence convictions under RCW 10.99.020, and the fact that the incident occurred "within the sight or sound" of Kristina's three minor children. RCW 9.94A.535(h)(ii); CP at 91 (FF 1). Also, Ferrer admitted to parking away from the house so Kristina would not know he was there, and to hiding in her closet. He also admitted that he knew AC was present and that he saw his two young daughters on the bed next to Kristina crying and screaming when he assaulted Kristina. The sentencing court found that Ferrer continually minimized his role in the assault, blaming Kristina.

Given the testimony from AC and Kristina, and Ferrer's admissions that he hid, waited, and that he knew AC and his two young daughters were present for the assault, we hold that the trial court's sentence of 50 months was supported by the record and evidence, and that it does not shock the conscience. Thus, we affirm Ferrer's exceptional sentence of 50 months.

II. STATEMENT OF ADDITIONAL GROUNDS (SAG)

Ferrer raises four additional claims in his SAG. For various reasons, three of his four claims fail.

A. ADMISSION OF PHOTOGRAPHS

Ferrer claims that the trial court abused its discretion when it admitted a number of photographs of Kristina's injuries and that the cumulative nature of the photographs was prejudicial. But Ferrer failed to object at trail and thus failed to preserve this claim.

Absent manifest constitutional error, failure to preserve an issue waives that issue on appeal. *State v. Powell*, 166 Wn.2d 73, 82-83, 206 P.3d 321 (2009); RAP 2.5(a)(3). Evidentiary errors are not constitutional errors. *Powell*, 166 Wn.2d at 84. Thus, we decline to review this issue because Ferrer failed to preserve this argument.

B. TERMS OF SENTENCE—10-YEAR NO-CONTACT ORDER, MENTAL HEALTH TREATMENT

Ferrer claims that the 10-year no-contact order with Kristina[6] is excessive and that the ordered mental health treatment is an abuse of discretion. We disagree that the no-contact order is excessive, but we agree that the sentencing court exceeded its authority when it imposed the requirement for mental health treatment.

1. Standard of Review

Ferrer did not object to any of the sentencing conditions at his sentencing hearing; nevertheless, a defendant may challenge an erroneous or illegal sentence for the first time on appeal. *State v. Munoz-Rivera*, 190 Wn. App. 870, 890, 361 P.3d 182 (2015). We review the sentencing court's imposition of crime-related prohibitions and sentencing conditions for an abuse of discretion. *State v. Corbett*, 158 Wn. App. 576, 597, 242 P.3d 52 (2010).

[6] Ferrer claims that the no-contact order interferes with his parental rights and visitation with his daughters. The parenting plan was not before the sentencing court, and it made no rulings on Ferrer's parental rights. Thus, the matter of Ferrer's parental rights is not before us on appeal, and we decline to consider this argument.

2. No-Contact Order

A sentencing court may "impose and enforce crime-related prohibitions," including no-contact orders under former RCW 9.94A.505(8) (2010).[7] *State v. Amendariz*, 160 Wn.2d 106, 114, 156 P.3d 201 (2007). A sentencing court's authority to impose a no-contact order is independent of its authority to impose any conditions of community custody. *Amendariz*, 160 Wn.2d at 119. The statutory maximum for the defendant's conviction is an appropriate time limit for a no-contact order imposed under former RCW 9.94A.505(8). *Amendariz*, 160 Wn.2d at 119. Second degree assault is a class B felony, subject to a maximum statutory sentence of 10 years. RCW 9A.36.021(2)(a); RCW 9A.20.020(1)(b).

Here, the 10-year no-contact order was related to Ferrer's second degree assault conviction. Because the no-contact order does not exceed the 10-year statutory maximum sentence for Ferrer's conviction, we hold that the sentencing court did not abuse its discretion and that the no-contact order was proper.

3. Mental Health Treatment

A sentencing court may order a defendant to undergo a mental status evaluation and treatment under former RCW 9.94B.080 (2008),[8]

> [1] if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and [2] that this condition is likely to have influenced the offense.

[7] "[T]he law in effect at the time a criminal offense is committed controls the sentence." *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). The legislature amended the statute in July 2015, after Ferrer's May 2015 sentencing hearing. Laws of 2015, ch. 287 § 10.

[8] The legislature amended this statute in July 2015. Laws of 2015, ch. 80, § 1.

Under former RCW 9.94B.080, a sentencing court was required to base its order for a mental health evaluation and treatment on a presentence report or mental status evaluation of the defendant's competency. There is no evidence in the record from Ferrer's May 2015 sentencing hearing of any testimony regarding Ferrer's mental health status, that he meets the definition of a mentally ill person under former RCW 71.24.025(18) (2013),[9] or that the sentencing court considered a presentence report recommending mental health treatment for Ferrer. Thus, because there was no evidence to support the sentencing condition, we hold that the sentencing court exceeded its authority in imposing the mental health evaluation and treatment as a condition of Ferrer's sentence, and we reverse and remand with instructions to the sentencing court to strike this condition from Ferrer's judgment and sentence.

C. JURY INSTRUCTIONS

1. Jury Instructions Nos. 9 and 10

Ferrer claims that jury instructions 9 and 10 were incorrect because they failed to adequately define "substantial bodily harm" and disfigurement. SAG at 9-11. Ferrer failed to object to the instructions on appeal. A party who fails to object to jury instructions waives a claim of error on appeal. RAP 2.5(a); *State v. Smith*, 174 Wn. App. 359, 364, 298 P.3d 785 (2013).

2. *Petrich* Unanimity Instruction

Ferrer also claims that the trial court abused its discretion when it declined his request to provide a *Petrich* unanimity instruction defining the acts of harassment. We disagree.

[9] Persons who are acutely, chronically, or "seriously disturbed." Former RCW 71.24.025(18) (2013). The legislature amended this statue in 2016. Laws of 2016, ch. 29, § 501.

We review a trial court's refusal to give a jury instruction for an abuse of discretion. *State v. Stacy*, 181 Wn. App. 553, 569, 326 P.3d 136 (2014). "'Criminal defendants in Washington have a right to a unanimous jury verdict.'" *Emery*, 161 Wn. App. 172, 198, 253 P.3d 413 (2011) (quoting *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P/2d 231 (1994)); WASH. CONST. art. I, § 21. In some instances, the right to a unanimous jury verdict also includes the right to unanimity on the means by which the jury finds the defendant committed the crime. *Ortega-Martinez*, 124 Wn.2d at 707; *See also State v. Knutz*, 161 Wn. App. 395, 407-08, 253 P.3d 437 (2011) (stating that when the State presents evidence of multiple acts, unanimity is required for the particular criminal act) (citing *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989)).

In multiple acts cases, the State must inform the jury which act to rely on in its deliberations or the court must instruct the jury that they must all agree on a specific criminal act. *State v. Stockmyer*, 83 Wn. App. 77, 86, 920 P.2d 1201 (1996). The threshold for determining whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. *Ortega-Martinez*, 124 Wn.2d at 707. When the State presents evidence of multiple "distinct criminal acts" supporting a charge, the jury must be unanimous on the specific conduct supporting the conviction. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); *See also State v. Kitchen*, 110 Wn.2d 403, 412, 756 P.2d 105 (1988) (stating that the State alleged several acts and any one act could constitute the charged crime). However, no additional unanimity instruction is required if the evidence indicates a "'continuing course of conduct.'" *Knutz*, 161 Wn. App. at 408 (quoting *Handran*, 113 Wn.2d at 17).

Ferrer proposed a *Petrich* instruction at trial, arguing that there were five allegations of a death threat during the course of the harassment and that each threat was characteristically different. Ferrer argued that the State was required to "pick one" of the alleged threats as the foundation for the felony harassment conviction. IV VRP at 573. The State argued, and the trial court found, that based on the short time period during which Ferrer pushed Kristina on the bed, punched her in the face and head, and threatened her life five times, there were "no distinct time periods for which the incident stopped," and that the incident was a continuous course of conduct. IV VRP at 692. Thus, based on the record, we hold that Ferrer was not entitled to a *Petrich* instruction on the felony harassment charge.

CONCLUSION

We hold that the trial court did not err when it determined that Ferrer's second degree assault and felony harassment convictions were separate and distinct offenses and not the same criminal conduct, and that Ferrer's 50-month sentence is not clearly excessive. As to Ferrer's SAG claims, we hold that Ferrer waived his challenges to the trial court's admission of the photographs and the trial court's jury instructions on substantial bodily harm and disfigurement; Ferrer was not entitled to a *Petrich* instruction on his felony harassment charge; and the sentencing court properly imposed a 10-year no-contact order, but exceeded its authority in ordering Ferrer to seek mental

health treatment. Thus, we affirm Ferrer's convictions, but we reverse the mental health sentencing condition, and remand with instructions to the sentencing court to strike the mental health evaluation and treatment condition from Ferrer's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Johanson, J.
JOHANSON, P.J.

J
LEE, J.

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

STATE OF WASHINGTON,	)	
	)	
Respondent	)	
	)	
vs.	)	NO. 47687-8-II
	)	
ANDRES SEBASTIAN FERRER	)	CERTIFICATE OF SERVICE
	)	FOR Petition for Review
Appellant.	)	
	)	

I hereby certify that I caused to be served a copy of: Appellant's Petition for Review on Aaron Bartlett, DPA and Andres Ferrer at the addresses shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 13th day of September, 2016 with postage fully prepaid.

DATED this 13th day of September, 2016

Mark W Muenster

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