

67604-1

67604-1

NO. 67604-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY AQUININGOC,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAR 29 PM 3:43

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR.....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 4

D. STATEMENT OF THE CASE 8

E. ARGUMENT 12

 1. **By entering two convictions for tampering with a single witness in the course of a single prosecution, the court violated the constitution’s prohibition against double jeopardy** 12

 a. The Supreme Court has ruled that the unit of prosecution for tampering with a witness is based on the witness..... 12

 b. By sending several letters to the complainant, Aquiningoc committed only a single unit of prosecution for witness tampering 14

 c. The double jeopardy violation requires striking one of Aquiningoc’s convictions for tampering with a witness and remanding the case for resentencing 16

 2. **Aquiningoc’s convictions for assault in the second and fourth degrees violate double jeopardy because the jury’s verdicts do not clearly rest on unanimous jury findings of separate acts**..... 17

 a. The jury must unanimously find the State proved separate acts when the State seeks multiple convictions for the same conduct 17

 b. The jury was not instructed that it must rest its verdict for assault in the fourth degree on unanimous

agreement of a specific act, separate from that underlying assault in the second degree	18
c. The significant possibility that the jury did not unanimously agree on an act separate and distinct from count one requires reversal of Aquiningoc's conviction for count two	21
3. The prosecutor impermissibly urged the jury to convict Aquiningoc because he had not testified to his innocence	23
a. A prosecutor may not employ improper tactics to gain a conviction.....	23
b. The prosecutor urged the jury to convict Aquiningoc because he had not explained his innocence.....	24
c . The prosecutor's misconduct denied Aquiningoc a fair trial.....	27
4. The judgment and sentence improperly lists three offenses as convictions even though Aquiningoc was acquitted of each charge.....	29
5. The court's exceptional sentence rests upon facts not proven to the jury	32
a. The court may not impose an exceptional sentence absent a clear jury verdict demonstrating the State proved the aggravating factors beyond a reasonable doubt	32
b. The jury must decide whether the standard range is "clearly too lenient" under RCW 9.94A.535(2)(b).	32
c. The jury did not find the presumptive range was clearly too lenient.....	35
d. The prosecution did not prove the "aggravated domestic violence" aggravating factor	36

i. The prosecution did not present evidence of a “pattern of abuse” involving multiple incidents over a prolonged period of time.....	37
ii. The pattern of abuse aggravating factor is impermissibly vague	41
iii. The prosecution did not prove the second degree assault occurred in sight or sound of Aquiningoc’s daughter	44
d. The prosecution did not prove there were substantial and compelling reasons for imposing an exceptional sentence	45
6. The court ordered a ten-year no-contact order between Aquiningoc and his daughter in violation of his fundamental right to have a relationship with his daughter.....	47
F. CONCLUSION	49

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Rainey</u> , 168 Wn.2d 367, 229 P.3d 686 (2010)	47, 48
<u>In re Pers. Restraint of VanDelft</u> , 158 Wn.2d 731, 147 P.3d 573 (2006)	34, 35
<u>In re Pers. Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004)	12
<u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010)	41
<u>State v. Adel</u> , 136 Wn.2d 607, 40 P.3d 669 (2002).....	13
<u>State v. Alvarado</u> , 164 Wn.2d 556, 192 P.3d 345 (2008)..	33, 34, 35
<u>State v. Burke</u> , 163 Wn.2d 204, 181 P.3d 1 (2008)	26
<u>State v. Bush</u> , 26 Wn.App. 486, 616 P.2d 666 (1980)	29
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995)	17
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956)	27
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978)	27
<u>State v. Cruz</u> , 139 Wn.2d 186, 985 P.2d 384 (1999).	16
<u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003)	38, 44
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996) ...	25, 26, 29
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999)	36
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005)	13
<u>State v. Hall</u> , 168 Wn.2d 726, 230 P.3d 1048 (2010).....	13, 14, 15

<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005) ...	33, 35, 36
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011)	23
<u>State v. Mutch</u> , 171 Wn.2d 646, 254 P.3d 803 (2011)	21, 22, 23
<u>State v. Noltie</u> , 116 Wn.2d 831, 809 P.2d 1990 (1991).....	18
<u>State v. Parker</u> , 132 Wn.2d 182, 937 P.3d 575 (1997)	17
<u>State v. Schmidt</u> , 143 Wn.2d 658, 23 P.3d 462 (2001).....	16
<u>State v. Turner</u> , 169 Wn.2d 448, 238 P.3d 461 (2010)	16, 29, 31
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	47
<u>State v. Williams-Walker</u> , 167 Wn.2d 887, 225 P.3d 913 (2010)..	18
<u>State v. Womac</u> , 160 Wn.2d 643,160 P.3d 40 (2007)	12

Washington Court of Appeals Decisions

<u>State v. Ancira</u> , 107 Wn.App. 650, 27 P.3d 1246 (2001)	47
<u>State v. Borsheim</u> , 140 Wn.App. 357, 165 P.3d 417 (2007)	18
<u>State v. Reed</u> , 25 Wn.App. 46, 604 P.2d 1330 (1979).....	27
<u>State v. Romero</u> , 113 Wn.App. 779, 790, 54 P.3d 1255 (2002)....	24
<u>State v. Saltz</u> , 137 Wn.App. 576, 154 P.3d 282 (2007).....	34
<u>State v. Williams</u> , 136 Wn.App. 486, 150 P.3d 111 (2007).....	22

United States Supreme Court Decisions

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.435 (2000).....	18, 31, 32
---	------------

<u>Ball v. United States</u> , 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)	29
<u>Berger v. United States</u> , 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935)	23, 24
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	18, 32
<u>Blockberger v. United States</u> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)	12
<u>Collins v. Youngblood</u> , 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)	16
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)	23
<u>Furman v. Georgia</u> , 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)	43
<u>Grayned v. City of Rockford</u> , 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)	41
<u>Green v. United States</u> , 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)	29
<u>In re Winship</u> , 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	17, 29
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002)	42
<u>Santosky v. Kramer</u> , 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)	47
<u>Stringer v. Black</u> , 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992)	43
<u>Troxel v. Granville</u> , 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)	47

<u>Tuilaepa v. California</u> , 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994)	42, 43
<u>Walton v. Arizona</u> , 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)	42
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006)	33
<u>Wheat v. United States</u> , 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)	23

United States Constitution

Eighth Amendment.....	3, 42
Fifth Amendment.....	12, 17, 24
Fourteenth Amendment	17, 23, 32
Sixth Amendment.....	32, 36

Washington Constitution

Article I, section 3	17, 23
Article I, section 9	12, 24
Article I, section 21	17, 18, 23, 32, 36
Article I, section 22	17, 18, 23, 32, 36

Statutes

RCW 26.50.010.....	38, 41
RCW 74.34.020.....	38, 40, 41

RCW 9.94A.010	33, 38
RCW 9.94A.505	17
RCW 9.94A.535	3, 10, 32, 34, 35, 37, 41, 42, 44, 45
RCW 9.94A.537	45, 46
RCW 9.94A.585	45
RCW 9A.72.120	13, 14

Other Authorities

Laws of 2011	14, 15
<u>People v. Sandoval</u> , 41 Cal. 4th 825, 161 P.3d 1146 (2007)	43
WPIC 300.17	42

A. INTRODUCTION.

Anthony Aquiningoc was charged with assault by strangulation in a case where there was no physical evidence of the type commonly found in strangulation cases. Aquiningoc did not testify at trial. The prosecutor told the jury during closing argument that the reason Aquiningoc “didn’t take the stand” was “because he did it.”

At the close of the case, the prosecutor prepared a judgment and sentence that included three charged offenses as “convictions” without mentioning that Aquiningoc was acquitted of them. The court also separately punished Aquiningoc for two convictions of tampering with a witness even though the Supreme Court has ruled that multiple efforts to contact a single witness constitute one unit of prosecution for witness tampering.

The court imposed an exceptional sentence based on one aggravating factor that was not submitted to the jury despite the necessity of resolving a factual issue, and a second aggravating factor that was both insufficiently proven and so unduly vague as to fail to give the jury adequate standards on which to rest a verdict. Furthermore, the court entered a blanket no-contact order between Aquiningoc and his young daughter without requiring the State to

explain the need to completely preclude Aquiningoc's right to a relationship with his child. These multiple errors and others discussed herein denied Aquiningoc his right to a fair trial and sentence authorized by law.

B. ASSIGNMENTS OF ERROR.

1. The court violated the prohibition against placing a person in double jeopardy by imposing multiple convictions for conduct that constituted a single unit of prosecution for tampering with a witness.

2. Aquiningoc's convictions for second and fourth degree assault based on the same incident and without a jury finding that the underlying acts were separate and distinct violate double jeopardy.

3. The prosecutor denied Aquiningoc a fair trial by explicitly directing the jury that Aquiningoc's failure to testify was evidence showing his guilt.

4. The court entered convictions for offenses of which Aquiningoc was acquitted, thus denying Aquiningoc his right to be free from punishment without due process of law.

5. The court entered an exceptional sentence based on the aggravating factor that unscored misdemeanors or foreign

convictions rendered the standard range clearly too lenient in violation of Aquiningoc's right to have a jury determine the factual issues necessary for an exceptional sentence, contrary to the Sixth Amendment and Article I, section 22.

6. The prosecution did not present sufficient evidence that Aquiningoc had engaged in a "pattern of psychological or physical abuse" over a prolonged period of time as required to prove the aggravating factor of RCW 9.94A.535(3)(h)(i), in violation of his right to due process of law.

7. The aggravating factor of a pattern of psychological or physical abuse over a prolonged period of time is unduly vague and does not give fair notice to the accused and ascertainable standards to the jury, contrary to the requirements of due process and the Eighth Amendment's prohibition against cruel and unusual punishment.

8. The prosecution did not present sufficient evidence as required by the guarantee of due process of law that the second degree assault offense occurred in sight or sound of the young child.

9. The court's failure to determine that substantial and compelling reasons supported the exceptional sentence undermines its authority to impose the exceptional sentence.

10. The court's entry of an order prohibiting any contact between Aquiningoc and his biological daughter without any evidence from the State that it had a compelling need for a complete bar on contact between parent and child violated Aquiningoc's right to parent and due process of law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The unit of prosecution for witness tampering is defined as efforts by the accused person to influence the testimony of a single witness without regard to the number of times the accused contacts the witness. Aquiningoc's two witness tampering convictions rested on single letters he sent to the same witness within a few weeks of each other. Did the court's imposition of two convictions for acts that constitute a single unit of prosecution for witness tampering violate double jeopardy?

2. The jury must affirmatively find that the prosecution proved separate and distinct incidents for the court to impose multiple punishments for the same offense. The prosecution charged Aquiningoc with committing both second and fourth

degree assault during the same incident, and the court did not instruct the jury that its verdicts needed to be based on separate and distinct acts. Without any jury finding of separate acts and where there was ambiguous evidence and arguments presented as to what acts the jury should use for the assault charges, does it violate double jeopardy to separately punish Aquiningoc for second and fourth degree assault?

3. The right to remain silent is a fundamental tenet of our criminal law jurisprudence and the prosecution, which is entrusted with a special quasi-judicial authority, may not ask the jury to draw a negative inference from an accused person's failure to proclaim his innocence. The prosecutor argued to the jury that the reason Aquiningoc did not take the stand and deny his guilt was "because he did it." Is reversal required where the prosecution's efforts to use Aquiningoc's right to remain silent against him affected the jury and the State cannot prove that the violation of his right to remain silent was harmless beyond a reasonable doubt?

4. The court lacks authority to enter convictions for offenses that were charged but not proved, and may not consider acquitted conduct as a basis for increasing a person's sentence. The judgment and sentence lists three charged, but unproven, offenses

as convictions. Does the inclusion of unproved charges as convictions on the judgment and sentence undermine the sentence imposed and violate the appearance of fairness so that a new sentencing hearing is required?

5. Our Supreme Court has held that whether unscored prior convictions render the standard range “clearly too lenient” is a factual determination that must be proved to the jury beyond a reasonable doubt. The court imposed an exceptional sentence upon Aquiningoc based on its determination, by no particular threshold of proof, that unscored convictions made the standard range clearly too lenient. Under Supreme Court precedent, do the Sixth Amendment and Article I, sections 21 and 22 require the prosecution to prove whether the standard range is “clearly too lenient” to the jury beyond a reasonable doubt?

6. Aggravating factors that are submitted to the jury must be supported by sufficient evidence and are construed strictly to require proof under the narrow terms of the aggravating factor. The aggravating factor of domestic violence based on a pattern or psychological or physical abuse requires evidence of the willful infliction of injuries on multiple occasions. When the evidence does not establish intentionally inflicted physical injury or psychological

suffering on multiple occasions did the prosecution fail to prove the essential elements of this aggravating factor? Is this aggravating factor so unduly vague that it does not provide fair notice of the prohibited conduct or set sufficiently ascertainable standards to guard against arbitrary enforcement?

7. The aggravating factor that a particular offense occurred in sight or sound of a young child must be strictly construed. The prosecution offered no evidence that Aquiningoc's child saw or heard the acts constituting second degree assault. When the prosecution does not prove that a child saw or heard the specific offense on which the aggravating factor rests, has the State failed to prove the essential requirements of this aggravating factor?

8. The court is required to find that substantial and compelling reasons support the imposition of an exceptional sentence. The court's oral ruling was based on its lukewarm endorsement of the prosecution's request for an exceptional sentence. Does the court's failure to determine there are substantial and compelling reasons to impose a sentence greater than the standard range require reversal and remand for a standard range sentence?

9. A parent's fundamental right to have a relationship with his biological child may not be terminated without due process of law. The court ordered that Aquiningoc may not have any contact whatsoever with his child for the next ten years. By entering a blanket no-contact order without any determination that the order was reasonably necessary to serve a compelling state interest, did the court impermissibly prohibit all contact between a father and his daughter?

D. STATEMENT OF THE CASE.

Ashley Aquiningoc and her husband Anthony had temporarily separated as of April 11, 2011 when she invited him to come to her apartment to discuss whether she would move to another apartment. 1RP 12, 24.¹ Anthony was upset because of rumors he had heard about his wife cheating on him and he called her nasty names. 1RP 26. When their young daughter spilled her cup of milk, Anthony spilled the remaining milk on Ashley.² 1RP 28.

¹ The verbatim report of proceedings from the trial consists of two consecutively paginated volumes containing testimony from July 19 -22, 2011, and are referred to herein as "1RP" and "2RP." Any additional transcripts are referred to by the date of the proceeding.

² Ashley and Anthony Aquiningoc are referred to by their first names when required for purposes of clarity. No disrespect is intended.

As the two continued arguing, Ashley went into the bedroom in hopes her daughter would not “watch us scream” at each other. 1RP 37. Her daughter was almost two years old. 1RP 9. In the bedroom, Anthony pushed Ashley onto the bed and intermittently squeezed his hand against the side of her throat for several minutes, which left Ashley temporarily unable to breathe. 2RP 38-42. Anthony then smashed a television as he grabbed things in the room. 1RP 44. He slapped Ashley, which caused her to fall down. 1RP 46. At that point, the police arrived at the apartment and arrested Anthony without incident. 1RP 46, 116-17.

After his arrest, Anthony sent four letters to Ashley, two of which were addressed to their almost two year-old daughter who could not read. 1RP 52, 59, Exs. 23, 24. In the letters he apologized for saying mean things to Ashley, explained his drug use had made him unreasonably jealous, and expressed his sincere love for his wife and daughter. 1RP 57, 59-60, 65, 70, 75-76. In one letter he said that if Ashley did not testify, he would not go to prison. 1RP 65. In another letter, he said that Ashley should contact the defense investigator and explain that her allegations were a misunderstanding. 1RP71, 73. He also asked for help posting bail. 1RP 60.

The prosecution charged Aquiningoc with four counts of violation of a no contact order based on each letter. It charged him with three counts of tampering with a witness based on the content of three of the letters. It charged him with one count of second degree assault and another count of fourth degree assault based on the April 11, 2011 incident. It also charged him with bribery for a comment in a letter about accessing money to post bail and third degree malicious mischief based on damage to the television.

The jury acquitted Aquiningoc of malicious mischief and one count of witness tampering. CP 100-01. The court dismissed the bribery allegation based on insufficient evidence. 2RP 195. Despite these acquittals, the court listed these offenses as convictions in the judgment and sentence. CP 20-21. Aquiningoc was convicted of the remaining offenses. CP 100-01.

The prosecution also charged Aquiningoc with two aggravating factors under the exceptional sentence statute, RCW 9.94A.535. It alleged the second degree assault offense was a crime of domestic violence against a family member that either constituted a pattern of abuse over a prolonged period of time or it occurred within sight or sound of the couple's child. CP 157. As evidence of this aggravating factor, Ashley testified that Anthony

called her fat on multiple occasions and, on two occasions, he had grabbed her shirt and ripped it. 1RP 13-14, 16-17. She was not injured. 1RP 18-19. Ashley also testified that her 23-month old daughter was at the apartment during the incident but did not know whether she was in the bedroom when Aquiningoc pushed her and squeezed her throat. 1RP 37. The jury found this aggravating factor was proven without specifying the basis for its verdict.

The prosecution also claimed that Aquiningoc had unscored misdemeanor offenses or foreign criminal history that rendered the standard range clearly too lenient. The latter aggravating factor was not presented to the jury. The judge imposed an exceptional sentence above the standard range based on the combination of the two aggravating factors. 8/22/11RP 24.

Pertinent facts are explained in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **By entering two convictions for tampering with a single witness in the course of a single prosecution, the court violated the constitution's prohibition against double jeopardy**

a. The Supreme Court has ruled that the unit of prosecution for tampering with a witness is based on the witness.

The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9.³ “Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently.” State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the

³ The double jeopardy clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. amend. 5; Const. art. I, § 9.

same criminal conduct. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). When an accused person's conduct constitutes a single unit of prosecution, the prosecution may not divide that conduct into multiple charges for which it seeks separate punishment. State v. Adel, 136 Wn.2d 607, 610, 40 P.3d 669 (2002).

Witness tampering occurs when a person "attempts to induce a witness [or potential witness] in any official proceeding" to testify falsely or absent him or herself from the proceedings. RCW 9A.72.120(1).

The unit of prosecution for tampering with a witness is the ongoing attempt to persuade a witness not to testify in a single proceeding. State v. Hall, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010). In Hall, the court held that the defendant's multiple phone calls to a prospective witness supported only a single conviction of witness tampering. Id. at 734-37. Hall controls the outcome here.

Hall construed the language of the statute defining the elements of tampering with a witness and reviewed the legislative history. Id. at 731-36. It determined that the offenses was designed to address efforts made by a person to convince a witness not to

participate in a trial, and repeated efforts to do so were not separate violations of the statute under its plain language.

After Hall, the Legislature changed the statute defining the elements of witness tampering. Laws of 2011, ch. 165, § 3. RCW 9A.72.120(3) (2011) now states that “each instance of an attempt to tamper with a witness constitutes a separate offense.” But this 2011 amendment was not effective until July 22, 2011. Laws of 2011, ch. 165. Aquiningoc’s charges rested on conduct that occurred before the change in the statute. CP 158-60.

b. By sending several letters to the complainant, Aquiningoc committed only a single unit of prosecution for witness tampering.

The prosecution separately charged Aquiningoc with three counts of tampering with a witness. CP 158-60. Each count was based on a single letter received by the complainant over the course of three weeks, spanning April 12 through May 6, 2011. CP 158-60. The jury acquitted Aquiningoc of one of the counts of tampering with a witness. CP 101. The court imposed punishment for the two remaining counts and used both in calculating Aquiningoc’s offender score. CP 21-23.

As dictated by Hall, the two letters dated April and May 2011 that form the basis of the two tampering with a witness charges

constitute a single unit of prosecution. The letters largely focus on Aquiningoc's desire to repair his relationship with his daughter and wife. 1RP 62, 65, 69, 72. The witness tampering aspects of the letter are short explanations that if Ashley "refuses to take the stand," he would not go to prison; or asking her to talk to the investigator and tell him "you didn't realize what you were saying and don't want nothing to happen to me." 1RP 65, 73. Aquiningoc's request that Ashley speak to the investigator and say that the initial allegations were a mistake may not even meet the bare elements of witness tampering. In any event, that letter cannot be separately punished.

It violates double jeopardy to separately punish several efforts to induce a witness not to testify or to testify falsely. Hall, 168 Wn.2d at 737. Under the statute in effect at the time of the offense, Anthony's letters to Ashley sent over the course of a few weeks do not constitute more than a single unit of prosecution. Id.

Although the Legislature amended the witness tampering statute in response to Hall, this amendment occurred after the underlying offenses. Laws of 2011, ch. 165, § 1 (explaining statutory amendment enacted in response to Hall). It would violate Aquiningoc's due process right to notice, the separation of powers,

and the prohibition against ex post facto punishment to apply that amendment to Aquiningoc. Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); State v. Schmidt, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001); State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 384 (1999). The amendment of the witness tampering statute does not retroactively apply to Aquiningoc.

c. The double jeopardy violation requires striking one of Aquiningoc's convictions for tampering with a witness and remanding the case for resentencing.

When two offenses constitute a single unit of prosecution for purposes of double jeopardy, the court may impose only a single sentence and judgment entered may not refer to both offenses.

State v. Turner, 169 Wn.2d 448, 464, 238 P.3d 461 (2010).

As the Supreme Court explained in Turner,

To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

169 Wn.2d at 464-65.

Aquiningoc received an exceptional sentence above the standard range, based in part of the length of his criminal history.

The court must accurately determine an offender's criminal history

before it may consider exceeding the standard range by imposing an exceptional sentence. State v. Parker, 132 Wn.2d 182, 187, 937 P.3d 575 (1997); RCW 9.94A.505(2)(a)(i). Due to the double jeopardy violation, the court must strike one witness tampering conviction from Aquiningoc's criminal history, re-calculate his criminal history without one of the tampering convictions, and assess whether the lower offender score undermines the reason for imposing an exceptional sentence.

2. Aquiningoc's convictions for assault in the second and fourth degrees violate double jeopardy because the jury's verdicts do not clearly rest on unanimous jury findings of separate acts

- a. The jury must unanimously find the State proved separate acts when the State seeks multiple convictions for the same conduct.

Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amends. 5, 14; Wash. Const. art. I, §§ 3, 21, 22. The right to a unanimous jury verdict demands the jury verdict reflects a unanimous finding of the act or acts underlying the charged offense. See Apprendi v. New Jersey, 530 U.S. 466,

498, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (Scalia, J. concurring) (charges must be proved “beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens”); Blakely v. Washington, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

In Washington, the state constitutional right to a trial by jury “provides greater protection for jury trials than the federal constitution.” State v. Williams-Walker, 167 Wn.2d 887, 895-96, 225 P.3d 913 (2010); Const. art. I, §§ 21, 22. The jury’s verdict must explicitly authorize the punishment imposed. 167 Wn.2d at 900. Punishment sought by the State “must not only be alleged, it also must be authorized by the jury” in its verdict. Id.

- b. The jury was not instructed that it must rest its verdict for assault in the fourth degree on unanimous agreement of a specific act, separate from that underlying assault in the second degree.

A violation of the right to jury unanimity occurs when the defendant is accused of several counts of the same offense but the jurors were not expressly instructed that each conviction must rest on a “separate and distinct act or event.” State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 1990 (1991); State v. Borsheim, 140 Wn.App. 357, 365, 165 P.3d 417 (2007).

Aquiningoc was charged with separate counts of second and fourth degree assault for acts that occurred on the same day. CP 157. The jury was not instructed that its verdicts must rest on separate and distinct conduct. See CP 104-42. The jury was not instructed that it had to unanimously agree which act constituted fourth degree assault.

Ashley Aquiningoc's testimony offered various acts that could potentially constitute fourth degree assault. She accused Anthony of pouring milk on her while arguing with her. 1RP 28. During another part of the incident, she said Anthony "slapped me across the face" which caused her to fall backward and hit her head. 1RP 46. He was also accused of trying to push her, then throwing her onto the bed and pressing his hands against her throat. 1RP 38-39. Any of these alleged acts could have constituted the basis for fourth degree assault.

It would violate double jeopardy for jurors to convict Aquiningoc of fourth degree assault based on pushing the complainant to the bed and squeezing his hands against her throat, because these were the actions on which the prosecution predicated its second degree assault allegation, as charged in count one. Yet the jury was never instructed that the predicate acts

for second degree assault had to be different acts from those used in the fourth degree assault claim based on the same incident.

The to-convict instruction for fourth degree assault merely directed the jury to find that “on or about April 11, 2011, the defendant assaulted Ashley Aquiningoc.” CP 121 (Instruction 15). Similarly, the to-convict instruction for second degree assault directed the jury to find, “on or about April 11, 2011, the defendant assaulted Ashley Aquiningoc by strangulation.” CP 118 (Instruction 12).

Notably, the court expressly instructed the jury that the prosecution alleged Aquiningoc committed acts of tampering with a witness and violation of a no contact order on multiple occasions. CP 111, 112 (Instruction 5, 6). For these charges, the court instructed the jury “you must unanimously agree as to which act has been proved.” *Id.* The court did not give the same instruction for the multiple allegations of assault. The court never informed the jury that the assault charges needed to rest on unanimous agreement of separate acts.

- c. The significant possibility that the jury did not unanimously agree on an act separate and distinct from count one requires reversal of Aquiningoc's conviction for count two.

It is only in the rare instance that flawed jury instructions permitting the jury to convict an accused person for multiple counts based on the same act do not violate double jeopardy. State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). If it is not “manifestly apparent to the jury” that its verdicts for the separate charges needed to be based on separate acts, then the “potentially redundant convictions” must be vacated. Id.

In Mutch, the defendant was charged with five counts of second degree rape but the jury was not instructed that each count must rest on a separate act. Id. at 665. The Supreme Court determined that his case presented a “rare circumstance” where the deficient jury instruction did not require reversal of the multiple potentially overlapping counts, because Mutch had never disputed the actual occurrence of the acts underlying each charge of rape. Id. He offered no claim that any part of the incident did not occur and the arguments of counsel made clear there were five separate acts. Id. The court concluded that, based on the evidence and arguments, it was manifestly apparent to the jury that each count

represented a separate act and the jury's verdict reflected such a finding. Id. at 665-66.

Unlike Mutch, there was no manifestly clear understanding of what act the fourth degree assault was predicated upon. The defense thought the assault in the fourth degree was based on the milk spill, while the prosecutor directed the jury's attention to the slap that caused Ashley to slip but did not exclude other acts as the basis of a conviction. 2RP 212, 226; see State v. Williams, 136 Wn.App. 486, 497, 150 P.3d 111 (2007) (prosecutor does not "specifically elect" one act by merely focusing on a certain aspect of the case in closing argument). The prosecution never expressly articulated that the jury's verdict could only rest on a single act and the court did not inform the jury that the actions of assault involved in the strangulation could not be the basis for the fourth degree assault conviction.

Aquiningoc contested whether any of the assaults occurred, focusing on the lack of corroborating injuries. 1RP 126, 133-34; 2RP 163, 229-30, 235. The deficient jury instructions did not make it manifestly apparent that the jury must rest its fourth degree assault conviction for count two upon a particular act separate and distinct from the assault required for count one. The "potentially

redundant verdicts” constitute a double jeopardy violation for which reversal of the fourth degree assault conviction is required. Mutch, 171 Wn.2d at 664.

3. The prosecutor impermissibly urged the jury to convict Aquingoc because he had not testified to his innocence.

- a. A prosecutor may not use improper tactics to gain a conviction.

Trial proceedings must not only be fair, they must “appear fair to all who observe them.” Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). A prosecutor’s misconduct violates the “fundamental fairness essential to the very concept of justice.” Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935).

Because the public expects that the prosecutor acts impartially,

improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger, 295 U.S. at 88.

b. The prosecutor urged the jury to convict Aquiningoc because he had not explained his innocence

An accused person's right to remain silent is a bedrock principle of our criminal justice system. Griffin v. California, 380 U.S. 609, 614-15, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); U.S. Const. amend. 5; Const. art. I, § 9.⁴ The Fifth Amendment "forbids" any "comment by the prosecution on the accused's silence." Griffin, 380 U.S. at 615.

"It is constitutional error also for the State to inject the defendant's silence into its closing argument. And, more generally, it is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt." State v. Romero, 113 Wn.App. 779, 790, 54 P.3d 1255 (2002) (internal citations omitted);

⁴ The Fifth Amendment provides that no person "shall ... be compelled in any criminal case to be a witness against himself." Article I, section 9 similarly provides, "[n]o person shall be compelled in any criminal case to give evidence against himself."

see State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (“the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence”). A direct comment on the accused’s right to remain silent is constitutional error that requires reversal unless the prosecution proves it was harmless beyond a reasonable doubt. Romero, 113 Wn.App. at 790.

The prosecutor mentioned several times that Aquiningoc could have told Ashley in his letters that he was not guilty, but he did not do so. 2RP 218 (pointing out that “he never says I didn’t strangle you . . . [or] that didn’t happen. Why wouldn’t he say that if it didn’t happen? That’s not anywhere”). In those letters, Aquiningoc did not address the substance of the incident. Instead, he apologized for being disrespectful and explained that he felt extremely jealous at the time. 1RP 70 , 72, 76-77. The prosecutor’s contention that Aquiningoc’s failure to offer any evidence of his innocence in his letters showed his guilt was not a reasonable inference. The letters were primarily focused on attempting to reconcile with Ashley and did not discuss the details of the incident. 2RP 218.

Even when a prosecutor may comment on a person's silence, it may only do so to impeach him, not as substantive evidence of guilt. Easter, 130 Wn.2d at 235; see State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008) ("This court has been very careful to limit the use of silence to impeachment only."). When a criminal defendant has not testified, his credibility is not at issue and is not subject to impeachment.

At the end of her closing argument, the prosecutor made explicit what she had previously left implicit. The prosecutor told the jury that the reason Aquiningoc did not testify and deny his guilt was because he was guilty. 2RP 247.

The prosecutor said, "Why he didn't take the stand, [and say] I didn't do that to you? You know I didn't do that to you. Why? Because he did that to her." 2RP 247.

This contention was the very last thing the prosecutor said to the jury before they began deliberations. 2RP 247. It was part of a theme that converted Aquiningoc's failure to assert his innocence in his letters into a comment on Aquiningoc's failure to testify at trial. The prosecutor informed the jury that Aquiningoc's failure to deny his guilt was substantive evidence that could be used against him. 2RP 247.

c . The prosecutor's misconduct denied Aquiningoc a fair trial.

The danger of prosecutorial misconduct is that it “may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial.” State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) (citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)).

It has long been held that it violates the right to remain silent, and dilutes the State's burden of proof, for the prosecutor to argue that the defense's failure to present evidence contradicting the allegations may be used as evidence favoring conviction. State v. Reed, 25 Wn.App. 46, 49, 604 P.2d 1330 (1979) (comment that “nobody” testified the incident did not occur is “a direct reference to the accused's failure to testify”). The Reed Court pronounced this argument “flagrant error” because “[s]ilence is not evidence, and neither it nor an inference therefrom can be used to supply evidence of guilt.” Id.

The prosecutor committed similar flagrant error here, by first implying that Aquiningoc's failure to deny his committed assault in his apology letters constituted affirmative evidence of guilt, and

second by expressly arguing that Aquiningoc did not “take the stand” because he was guilty.

The prosecutor’s argument that Aquiningoc’s failure to deny his guilt was evidence of his guilt was not an off-hand, isolated comment. In the opening and rebuttal portions of the prosecutor’s closing argument, the prosecutor directed the jury to Aquiningoc’s lack of assertions of innocence. 2RP 218, 247. The argument was made far more explicit when the prosecutor noted that Aquiningoc “didn’t take the stand,” and the reason he did not was “because he did that to her.” 2RP 247. This final salvo ended the prosecutor’s argument and was fresh in the jury’s mind as it began deliberations.

The evidence in the case was far from overwhelming. The jury found several charged offenses were not proved and thereby demonstrated that it did not credit all of the complainant’s testimony. CP 100-01. Ashley did not exhibit “common” injuries suffered by a person who has been strangled, and the allegations of witness tampering were based on ambiguous statements asking Ashley to say the incident was a misunderstanding. See 1RP 71, 73 2RP 155-56 (medical examiner explained common injuries from strangulation, including petachia, which Ashley did not have). The

State's infringement on the constitutional right to remain silent requires reversal unless the prosecution can prove the error did not affect the outcome of the case beyond a reasonable doubt. Easter, 130 Wn.2d at 242. The prosecution cannot establish that the jury was unaffected by the plainly improper argument seeking a guilty verdict based on Aquiningoc's failure to "take the stand" and deny his guilt.

4. The judgment and sentence improperly lists three offenses as convictions even though Aquiningoc was acquitted of each charge

It is axiomatic that when the prosecution does not meet its burden of proof, and the jury or court finds he is not guilty, the accused person may not be punished for the charged conduct. Winship, 397 U.S. at 364; see State v. Bush, 26 Wn.App. 486, 616 P.2d 666 (1980) ("the judiciary's function ends with ... a verdict of acquittal"). No person may be forced to "run the gantlet" after an acquittal. Green v. United States, 355 U.S. 184, 190, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

The fact of conviction has punitive consequences, even when the court does not impose a prison term for the crime. Turner, 169 Wn.2d at 454-55 (citing Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)). Consequently,

the judgment and sentence may not list crimes as convictions when they may not be punished under the double jeopardy prohibition. Turner, 169 Wn.2d at 464-65. Similarly, it is punitive to list charges as convictions when no punishment may flow based on the prosecution's failure to prove those offenses to the jury.

Aquingoc's judgment and sentence contains the heading, "II. Findings," and states that "the Court FINDS . . . The defendant is guilty of the following offenses based upon a JURY VERDICT." CP 20. It lists every offense for which Aquingoc was charged. CP 21. Inexplicably, this list includes three offenses of which Aquingoc was not convicted and it contains no mention of the acquittals. CP 21.

The judgment and sentence lists the bribery allegation contained in count 6 as a crime of conviction. CP 21. But the court did not even submit that charge to the jury, finding the prosecution had not presented a *prima facie* case that Aquingoc committed that crime. 2RP 195.

The judgment and sentence also lists malicious mischief in the third degree, as charged in count 3, as a crime of conviction. CP 21. The jury found him not guilty of this charge. CP 100.

Likewise, the jury found Aquiningoc not guilty of tampering with a witness as charged in count 5, but the judgment and sentence lists that crime as if a conviction occurred. CP 101.

Although the court did not impose terms of imprisonment for the offenses for which Aquiningoc was acquitted, treating these charges as convictions deprived him of a fair sentencing hearing. The court was reminded of the allegations that were not proved to the jury. See Turner, 169 Wn.2d at 464-65 (“no reference should be made” to a vacated conviction at sentencing because it undermines the guarantee against double jeopardy). Similarly, it violates due process as well as the appearance of fairness to use conduct for which the accused person was acquitted in the course of an argument seeking a sentence above the standard range. See Apprendi v. New Jersey, 530 U.S. 466, 483-84, 120 S.Ct. 2348, 147 L.Ed.435 (2000). The court may not have remembered the nature of the jury’s verdict and may have considered those charges when deciding to impose an exceptional sentence upon Aquiningoc. This court should order a new sentencing hearing based upon the improper use of allegations for which Aquiningoc was not convicted at the sentencing hearing.

5. The court's exceptional sentence rests upon facts not proven to the jury

- a. The court may not impose an exceptional sentence absent a clear jury verdict demonstrating the State proved the aggravating factors beyond a reasonable doubt.

A judge exceeds her constitutional authority if she imposes a sentence based on factual determinations that are made by the judge, not the jury, and are not proven beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi, 530 U.S. at 483; U.S. Const. amends. 6, 14; Const. art. I, §§ 21, 22.

Here, the court imposed an exceptional sentence above the standard range based on two aggravating factors, one found by the judge under RCW 9.94A.535(2)(b) and the other found by the jury under RCW 9.94A.535(3)(h). 8/22/11RP 24. The lack of a valid jury verdict for both aggravating factors undermines the court's authority to impose the exceptional sentence, as explained below.

- b. The jury must decide whether the standard range is "clearly too lenient" under RCW 9.94A.535(2)(b).

The prosecution sought an exceptional sentence based on RCW 9.94A.535(2)(b), which permits the trial court to impose an exceptional sentence "without a finding of fact by a jury" where,

the defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

CP 157; 8/22/11RP 3.

Although the statute does not instruct the court to obtain a jury finding before imposing an exceptional sentence based on this aggravating factor, the Supreme Court has held that a jury determination is required for an exceptional sentence when the sentence is based on the factual determination that the standard range is "clearly too lenient." State v. Alvarado, 164 Wn.2d 556, 567-68, 192 P.3d 345 (2008); State v. Hughes, 154 Wn.2d 118, 138-40, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006).

In Hughes, the Supreme Court ruled that the question of whether criminal history makes the standard range "clearly too lenient" is "a factual determination that cannot be made by the trial court following Blakely." 154 Wn.2d at 140 (emphasis in original). The Hughes Court overruled prior cases that "allow[ed] the too lenient conclusion to be made by judges." Id.; accord In re Pers.

Restraint of VanDelft, 158 Wn.2d 731, 733-34, 147 P.3d 573 (2006).

In Alvarado, the Court reaffirmed its holding in Hughes. It held that when an exceptional sentence requires a factual determination that the standard range is clearly too lenient, that question must be resolved by the jury. 164 Wn.2d at 567-68. On the other hand, the aggravating factor at issue in Alvarado allowed a court to impose an exceptional sentence based on criminal history alone, without considering whether the standard range was clearly too lenient. Id. at 568. The Alvarado Court distinguished this aggravating factor, in RCW 9.94A.535(2)(c), from other aggravating factors such as the “unscored misdemeanor” aggravator, that require an additional factual determination. Id. at 569; RCW 9.94A.535(2)(c). Unlike RCW 9.94A.535(2)(c), RCW 9.94A.535(2)(b) requires that the fact-finder assess the offender’s unscored criminal history and determine whether these offenses make the standard range clearly too lenient.

A jury’s verdict is required under subsection (2)(b) because whether the standard range is “clearly too lenient” is a fact that must still be found by a jury. State v. Saltz, 137 Wn.App. 576, 581, 154 P.3d 282 (2007) (“the ‘clearly too lenient’ conclusion is a factual

determination, rather than a legal one”). As the Saltz Court explained, RCW 9.94A.535(2) was enacted shortly before Hughes was decided, and shortly after Blakely. Id. at 581. The statutory language permitting a judge to make the “clearly too lenient” determination was crafted without a full understanding of the type of fact-finding that cannot be made judicially under the Sixth Amendment. Id. at 582. As the Supreme Court has explained on several occasions, the question of whether the presumptive range is clearly too lenient presents a factual determination that must be proved to the jury. Alvarado, 164 Wn.2d at 567-68; VanDelft, 158 Wn.2d at 733-34; Hughes, 154 Wn.2d at 138-40.

c. The jury did not find the presumptive range was clearly too lenient.

The necessary factual finding to impose an exceptional sentence based on RCW 9.94A.535(2)(b) was never presented to the jury. Furthermore, the court relied on the allegation that Aquiningoc had committed a robbery in Canada which would not count in his offender score. The prosecution presented no evidence of that conviction other than a notation in a 1991 judgment and sentence that listed a prior conviction as “Robbery (Canada).” CP 91; 8/22/11RP 4. It does not appear that this foreign

conviction was counted in the criminal history score for that prior conviction. CP 91. The only finding the court made about this Canadian conviction was that it was not comparable to a robbery in Washington. 8/22/11RP 8. While the fact that this conviction was “unscored” meant it could not be used in Aquiningoc’s offender score, due process still applies at the sentencing hearing, it should not be used to increase Aquiningoc’s sentence absent a finding that Aquiningoc was convicted of such an offense and its seriousness merits additional punishment. See State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999).

Absent a jury verdict finding the elements of this aggravating factor, and without a factual determination that the unscored foreign offense actually occurred and merits further punishment, the court’s imposition of an exceptional sentence based on this unproven aggravating factor violated the jury trial rights of the Sixth Amendment and article I, sections 21 and 22, and Aquiningoc’s right to due process of law. Hughes, 154 Wn.2d at 140.

d. The prosecution did not prove the “aggravated domestic violence” aggravating factor.

The second aggravating factor stemmed solely from the second degree assault charge and was based the claim that this

offense was one of aggravated domestic violence as codified in RCW 9.94A.535(3)(h). CP 157. The court instructed the jury to consider two alternatives for this aggravating factor and it did not need to unanimously agree upon which alternative the jurors found proved. CP 139 (Instruction 33).⁵ The two alternative grounds for the aggravating factor were either:

- (2) (a) That the offense was part of an on-going pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time. An on-going pattern of abuse means multiple incidents of abuse over a prolonged period of time. A prolonged period of time means more than a few weeks; or
- (2) (b) That the offense was committed in sight or sound of the victim or defendant's child children [sic] who were under the age of 18 years.

CP 139. The prosecution reminded the jury that they did not need to agree on which applied. 2RP 211.

- i. The prosecution did not present evidence of a "pattern of abuse" involving multiple incidents over a prolonged period of time.

Although this aggravating factor requires a pattern of abuse, abuse is not defined in the exceptional sentence statute, RCW 9.94A.535(3), or elsewhere in the Sentencing Reform Act. Cf.

⁵ The instruction set forth alternatives (2)(a) and (2)(b), and provided "the jury need not be unanimous as to which alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one

RCW 9.94A.010. In other contexts, the Legislature has defined physical abuse to require a willful action that inflicts bodily injury and “mental abuse” as willful action that includes coercion, harassment, and verbal assault involving “ridiculing, intimidating, yelling, or swearing.” RCW 74.34.020(2) (defining abuse under abuse of vulnerable adults statutes). The Legislature has defined the abuse that constitutes “domestic violence” under RCW ch. 26.50 to mean sexual abuse, stalking, or “physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm” between family or household members. RCW 26.50.010(1).

Penal statutes are strictly construed. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Although the court may consult a dictionary to ascertain the plain meaning of an undefined word, the principle of lenity requires the court to construe an ambiguous term in the light most favorable to the accused. Id.

This aggravating factor requires a pattern of physical or psychological abuse that is prolonged and recurs on multiple

alternative has been proved beyond a reasonable doubt.” CP 139.

occasions.⁶ These terms must be construed strictly, not expansively.

Ashley did not testify to prolonged, purposeful abuse that caused harm or suffering. She said Anthony 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. She did not testify that these comments intimidated her, made her fearful, or changed her behavior in some fashion.

Ashley also testified about two incidents where Anthony acted physically against her, but she said she was not injured either time. 1RP 18-19. Once he ripped off her shirt and another time he grabbed her shirt, causing it to rip. 1RP 13-14. On this latter occasion, she broke an acrylic nail and “got a scratch across my chest,” but she did not say that Anthony scratched her. 1RP 13. Both incidents occurred in 2011. 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

⁶ Although sexual abuse is another basis for proving this aggravating factor, there were no allegations of sexual abuse.

that supported this assertion. 2RP 212. The prosecution did not articulate what acts constituted abuse.

It can certainly be said that Aquiningoc said unkind things to his wife over the course of their relationship, and said particularly mean things on the day of the incident. But prolonged “psychological abuse” requires an injury to the psyche, such as mental suffering.

In the context of a vulnerable adult, the Legislature permits a presumption of injury only where there is evidence of abusive conduct and the victim is physically unable to say that he or she suffered mental anguish or pain. RCW 74.34.020(2). Ashley was able to express whether she suffered pain or mental anguish and she did not do so. Ashley said she was uninjured in the two prior incidents where Anthony acted physically and she did not say his criticisms of her weight or appearance caused her mental anguish. 1RP 18-19.

The aggravating factor must be strictly and narrowly construed. The requirement of a prolonged pattern of psychological or physical abuse cannot be read to be more expansive than the protections accorded vulnerable adults or the definition of domestic violence, both of which require evidence of actual injury. See RCW

74.34.020(2); RCW 26.50.010(1). Absent evidence of actual injury, the prosecution has not proved the necessary elements of this aggravating factor.

ii. The pattern of abuse aggravating factor is impermissibly vague.

Penal statutes must provide citizens with fair notice of what conduct is proscribed, and laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Id. at 108-09.

Only an affirmative and unanimous jury finding permits the court to deviate from the standard sentencing range. Blakely, 542 U.S. at 300-01; State v. Bashaw, 169 Wn.2d 133, 147-48, 234 P.3d 195 (2010); RCW 9.94A.535; 537.

The jury in this case was asked to decide whether Aquiningoc’s actions before the charged incident constituted “an ongoing pattern” of abuse, pursuant to RCW 9.94A.535 (3)(h)(i). CP 139. The court instructed the jury that “[a]n ‘ongoing pattern of

abuse' means multiple incidents of abuse over a prolonged period of time." Id.; see RCW 9.94A.535(3)(h)(i); WPIC 300.17.

The court did not define psychological or physical abuse. It defined "pattern" simply as "multiple incidents of abuse over a prolonged period of time." The use of the word "multiple" permitted entry of a special verdict if a juror found that more than a single incident sufficed.

The trial court failed to narrow the jury's consideration. This was a constitutional error, and violative of Aquiningoc's right to fair notice of what conduct might cause him to run afoul of the law.

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

Walton v. Arizona, 497 U.S. 639, 653, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled in part by Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002).

In the Eighth Amendment context, vague aggravators such as the one at issue here have consistently been stricken.

In Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), the Court explained,

In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (e.g., whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). Those concerns are mitigated when a factor does not require a yes or no answer to a specific question, but only points the sentencer to a subject matter.

Tuilaepa, 512 U.S. at 974-75.

The aggravating circumstance submitted to this jury asked for a “yes or no” answer to a question that required an “an imprecise quantitative or comparative evaluation of the facts.” Cf. People v. Sandoval, 41 Cal. 4th 825, 161 P.3d 1146, 1156 (2007). It therefore created an “unacceptable risk of randomness,” Tuilaepa, 512 U.S. at 974, in violation of due process. This Court should conclude that the “pattern of abuse” aggravator is void for vagueness.

- iii. The prosecution did not prove the second degree assault occurred in sight or sound of Aquiningoc's daughter.

RCW 9.94A.535(3)(h)(ii) permits an exceptional sentence when the prosecution proves that “the offense occurred in sight or sound of the victim’s” child. It does not allow for an exceptional sentence where the child is merely close by or sees the injuries afterward.

The offense on which this aggravating factor rested was only the second degree assault, thereby requiring the prosecution to prove the child saw or heard the portion of the incident that constituted second degree assault. CP 137, 139. Ashley said she walked into the bedroom because she did not want her young daughter watching them scream, and the assault occurred in the bedroom. 1RP 37. No one testified that the child walked into the bedroom and watched or heard the attempted strangulation, and the possibility that she “might have” seen or heard some aspect of the incident is not the test set forth in the statute.

When a statute is plain on its face, the Legislature is presumed to mean exactly what it says. Delgado, 148 Wn.2d at 727. RCW 9.94A.535(3)(h)(ii) requires the offense occur in sight or

sound of the child, and the mere possibility of that having occurred is not sufficient.

- d. The prosecution did not prove there were substantial and compelling reasons for imposing an exceptional sentence.

RCW 9.94A.535 requires a court to find “substantial and compelling reasons justifying an exceptional sentence.”⁷ The same requirement applies when a jury finds the aggravating circumstance. RCW 9.94A.537(6). The court must supply its reasons for imposing an exceptional sentence in written findings. RCW 9.94A.535; RCW 9.94A.585.

The court imposed an exceptional sentence far shorter than that sought by the prosecution and while sounding less than persuaded that an exceptional sentence was appropriate. 8/22/11RP 6, 8. The court entered no written findings. The judge disputed the prosecution’s claim that Aquiningoc’s unscored misdemeanor history was particularly unusual or that it merited additional punishment. 8/22/11RP 6-7. When imposing the

⁷ RCW 9.94A.535 provides in pertinent part:
The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of

exceptional sentence, the judge said that based on the combination of the aggravating factor found by the jury and the robbery conviction that Aquiningoc received in Canada, which was not a comparable Washington offense, "there needs to be something in terms of the sentence that recognizes those circumstances."

8/22/11RP 24.

Aquiningoc's exceptional sentence is flawed for several reasons, not the least of which is the lack of jury verdict and clear instruction for aggravating factors. In addition, the court did not correctly calculate Aquiningoc's standard range where it used multiple tampering convictions that violate double jeopardy. The prosecution presented offenses for which Aquiningoc was acquitted to the sentencing judge, even though those crimes should not have been considered. The court never determined there were substantial and compelling reasons to impose a higher sentence. Accordingly, a new sentencing hearing should be ordered and the aggravating factors should be stricken.

a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

6. The court ordered a ten-year no-contact order between Aquiningoc and his daughter in violation of his fundamental right to have a relationship with his daughter.

A parent has a fundamental liberty and privacy interest in the care, custody and enjoyment of his child. Troxel v. Granville, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); State v. Ancira, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001);.

A sentencing court may not impose a no-contact order between a defendant and his biological child as a matter of routine practice. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). Instead, the court must consider whether the order barring all contact is “reasonably necessary in scope and duration to prevent harm to the child.” Alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest in barring contact. See State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (no-contact order with defendant’s children lawful only where no reasonable alternative way to achieve State’s interest); Ancira, 107 Wn.App. at 655 (blanket no-contact order “extreme and unreasonable given the

fundamental rights involved,” where less stringent limitations on contact would successfully realize the State's interest in protecting the children”).

The court imposed a complete prohibition on Aquiningoc’s contact with his daughter without any discussion of the necessity of such an order. CP 29. The sentencing order barred him from “any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly. . . .” CP 29.

The court did not find that the no-contact order is reasonably necessary to realize a compelling state interest. Rainey, 168 Wn.2d at 381-82. Moreover, although the State has a compelling interest in protecting children from harm, it did not demonstrate how prohibiting all contact between Aquiningoc and his daughter is reasonably necessary in order to effectuate that interest. Because the sentencing condition implicates Aquiningoc’s fundamental constitutional right to parent his children, the State must show that no less restrictive alternative would prevent harm to those children. Id. Any limitations must be narrowly drawn. Id.

The order barring all contact between Aquiningoc and his daughter should be stricken and, at a new sentencing hearing, the court should consider the reasonable alternatives if the prosecution

offers a compelling reason to restrict contact between Aquiningoc and his daughter based on any remaining convictions.

F. CONCLUSION.

For the foregoing reasons, Anthony Aquiningoc respectfully requests this Court order a new trial based on the prosecution's improper comments during closing argument, strike the witness tampering and fourth degree assault convictions that violate double jeopardy, reverse the improperly imposed exceptional sentence, and remand the case for further proceedings consistent with the court's ruling.

DATED this 29th day of March 2012.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 67604-1-I
)	
ANTHONY AQUININGOC,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF MARCH, 2012.

X _____ 