

67604-1

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No. 67604-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY AQUININGOC

Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether one of two convictions for tampering with a witness should be vacated where the unit of prosecution for tampering was per witness per proceeding at the time of the incident and both convictions were based on the defendant's letters to his wife attempting to induce her to testify falsely although the letters were written on different days.
2. Whether convictions for fourth degree assault and second degree assault violated double jeopardy where the second degree assault required the jury to find that the defendant strangled his wife and the fourth degree assault did not and where the State elected the defendant's slap as the basis for the fourth degree assault and where the defense argued that a fourth degree assault occurred but that no strangulation did.
3. Whether the defendant's right to remain silent was implicated by the State's argument that the defendant's failure to deny that he strangled his wife in his letters to his wife corroborated the wife's testimony that she had been strangled where the defendant was not compelled to write the letters by the government and his statements in the letters were wholly voluntary.
4. Whether the judgment and sentence should simply be amended to strike references to three counts where the defendant was not convicted of those counts and where the judge did not consider those counts in sentencing the defendant.
5. Whether the defendant should be resentenced where the judge erred in making the finding regarding the aggravator of unscored criminal history in imposing an exceptional

sentence and where, although there is sufficient evidence to support the jury's finding regarding the domestic violence aggravator, it isn't clear that the judge would have imposed the same sentence on that aggravator alone.

6. Whether on remand for resentencing where although the State has a compelling reason to support imposition of a complete no contact order, to which the defendant did not object, the judge should address the reasonable necessity to impose such a sentencing condition where the condition affects the defendant's fundamental right to parent.

C. FACTS

1. Procedural.

On April 19, 2011 Appellant Anthony Aquiningoc was charged with Assault in the Second Degree – Domestic Violence, in violation of RCW 9A.36.021(1)(g) and RCW 10.99.020, for his actions on or about April 11, 2011. CP 164-65. The information was later amended on June 1, 2011, to add one count of Assault in the Fourth Degree, pursuant to RCW 9A.36.041(1), a count of Malicious Mischief in the Third Degree, pursuant to RCW 9A.48.090(1)(a), four counts of Violation of a No Contact Order, pursuant to RCW 26.50.110(1), three counts of Tampering with a Witness, pursuant to RCW 9A.72.120(1), and one count of Bribing a Witness, pursuant to RCW 9A.72.090(1). The amended information also alleged the domestic violence aggravating circumstance under RCW 9.94A.535(2)(h) and the prior unscored criminal history aggravating circumstance under RCW 9.94A.535(2)(b) as to the second degree assault

count, the tampering with a witness counts and the bribery count. CP 156-61. During trial the court dismissed the bribery count, and the jury found Aquiningoc not guilty of the malicious mischief charge and one of the tampering counts, count V, but guilty of the remaining charges and the domestic violence aggravating circumstance. RP¹ 190-95; CP 99-102.

At sentencing the prosecutor sought an exceptional sentence and recommended the statutory maximum of 120 months on the second degree assault charge based on the aggravating circumstance found by the jury as well as the unscored criminal history aggravating circumstance. SRP 3-4, 10-11. While the prosecutor advocated for the court to make a finding regarding the unscored criminal history based on both Aquiningoc's lengthy misdemeanor history as well as a Canadian robbery, the court made the finding based solely on the unscored Canadian robbery². SRP 3-7. In making her recommendation, the prosecutor noted that Aquiningoc's criminal history included a second degree assault that also involved strangulation of another woman, Aquiningoc's sister, an offense which he also committed in the presence of the victim's child. SRP 9-10. Defense requested a middle of the range sentence of 72 months on the second

¹ RP refers to the verbatim report of proceedings for the trial and SRP to those for sentencing.

² When asked for his position regarding the aggravating factor of unscored criminal history, defense counsel had no comment. SRP 3.

degree assault conviction³. SRP 17. Based on both aggravating circumstances, the court imposed an exceptional sentence of 102 months on the second degree assault conviction, and imposed standard range sentences on the other two felony counts. SRP 22, 24-25.

2. Substantive⁴.

Nineteen year old Ashley⁵ married Aquiningoc, a man 17 years older than she, on December 31st, 2007. RP 3. Before they were married Aquiningoc didn't show any signs of being jealous and they didn't have physical fights. RP 5. After they got married, Aquiningoc's voice got louder when they fought. RP 6-7. Although Ashley had been working, she lost her job when she got pregnant and gave birth to their daughter Angela in April of 2009. RP 8-9. As Aquiningoc didn't work, the family went on welfare until Ashley got another job in January 2010. RP 8-9.

In January of 2011 Ashley's mother moved in with the family when her husband left her. RP 10. The apartment they all lived in was a one-level two bedroom, two bath apartment. RP 11. In March of 2011, Aquiningoc moved out of the apartment because of a fight Ashley and he had gotten into that got physical. RP 12-13. Aquiningoc, who still wasn't

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

⁴ Additional facts regarding the aggravating factors are addressed later in the brief within the sections regarding the sufficiency of the evidence on those factors.

⁵ Aquiningoc is referred to by his last name and Ashley by her first for the sake of clarity.

working, wanted to take Ashley's computer that she was renting to a pawn shop to get some money, and Ashley told him no, because she was still paying for it and she wanted to keep it. RP 12. Ashley went to the front door of the apartment from the back bedroom and told him to leave. RP 13-14. Aquiningoc didn't want to leave and forcefully grabbed her arm to pull her back into the apartment, and when she tried to get away, he ripped her shirt. RP13-14, 18. Ashley asked Aquiningoc why he was ripping her shirt off her again.⁶ RP 19. Aquiningoc left that day, taking Ashley's car despite her telling him she needed it for work.⁷ RP 20.

Over the next month, Ashley and Aquiningoc visited a couple times at his sister's house where he was living. RP 21-22. They discussed moving down to Everett because Aquiningoc wanted to live there. On April 11th, Ashley invited Aquiningoc over to talk about the applications for apartments in Everett she had submitted. RP 23.

Aquiningoc arrived a little after 5 p.m., when Ashley's mother wasn't home. RP 24. Within 15 minutes of his arrival, Aquiningoc brought up an issue regarding Ashley's old My Space profile account, one she hadn't accessed in 3-4 years. RP 24-25. There were pictures from

⁶ This was not the first time this had happened. Additional facts regarding the violence within their relationship are further detailed within the brief.

⁷ Despite promising to bring the car back, Aquiningoc didn't bring back it until the night he strangled her. RP 20-21.

when she was in high school and some comments from guys that Aquiningoc didn't approve of, but she had forgotten the passwords and had been unable to delete the account. RP 25. Aquiningoc wanted to know why the account was still active and didn't believe her when she told him it was an old account and she couldn't delete it. RP 25.

Aquiningoc then got very angry and told her she was stupid and retarded, and started reading comments the guys, most of whom were black, had left on her account. RP 26. He started calling her a nigger lover, a whore, a cunt, and a bitch. RP 26. Aquiningoc was standing in front of her, two inches from her face, spitting into her face when he was saying these things. RP 27. His eyes were wide, his face red & strained and Ashley was afraid things would escalate. RP 27. Aquiningoc accused her of lying to him and cheating on him. RP 27-28. Ashley told him she had not cheated on him and that she didn't act like a whore, and was able to deescalate him a bit. RP 28.

Ashley told Aquiningoc not to give their almost two year old daughter, who was sitting on his lap, a milk container because she was concerned the daughter would spill it. RP 28. The daughter did spill the container on Aquiningoc which made him angry. He stood up, opened the back of Ashley's shirt and poured the milk down her back. RP 28.

Aquiningoc then went into the kitchen and Ashley threw away the milk container. RP 31.

Aquiningoc asked Ashley what had happened with the apartment applications. RP 31. Ashley told him that the application had been denied. RP 32. When he asked why, she told him that she had told him this would happen, that her credit was not good and that she couldn't get into an apartment without a co-signor and \$1500 for one month's rent and deposit. RP 32. Aquiningoc told her she must not have filled out the application right, that he didn't have anyone to co-sign and why couldn't she find someone, and told her she wasn't trying hard enough. RP 32. Ashley tried to explain that she couldn't use her family members to co-sign anymore, and asked if he could ask his family. RP 33. He refused and started screaming at her, accusing her of lying to him about the application, calling her a liar, a horrible mother, telling her she didn't try hard enough for the family, that she didn't cook for him or clean for him and that she was worthless. RP 33-34. She apologized and tried to explain why she didn't cook and clean as much as he wanted because of her work. RP 34.

While holding their daughter Angela, Aquiningoc told Ashley he was going to take Angela away from her, that she was a horrible mother, that he would get sole custody of her and she would never see Angela again. RP 35, 37. She told him he couldn't do that, that Angela was the

love of her life, and asked him why a court would give him custody when he didn't buy her food or clothes or even watch her. RP 35.

By this time Aquiningoc and Ashley had moved into the master bedroom. RP 36. The daughter was moving back and forth between the bedroom and living room. RP 37. Aquiningoc started calling Ashley a nigger lover and whore again and they continued to argue about who did what for their daughter. RP 37-38. When Aquiningoc started to push her, Ashley tried to push him on the shoulder. When Aquiningoc put up his hand to push her arm away, her hand brushed his face. RP 38. Aquiningoc started to grab her throat, telling her, "You want to fucking hit me, bitch?" RP 39. He pulled the collar of her shirt down, threw her on the bed and put his hands, one over the other, on her neck and shook her head up and down while he was on top of her. RP 39. Ashley could feel his thumbs at the back of her throat and felt his fingers squeezing on the sides of her neck. Id. As he was strangling her, he said, "Do you want me to fucking kill you, bitch? Do you want me to kill you?" Aquiningoc's face was completely red and he was filled with rage. RP 40. While Ashley tried to scream, "no," and "let go," she didn't know if she made any sound. Her face got hot, her eyesight went blurry and then all she could see was blackness, and she couldn't breathe. RP 40-41. She tried to push him off her, but his weight was on top of her and she couldn't. RP 42-43. She

didn't know how long he strangled her, but at one point Aquiningoc's hands started coming off her throat and her eyesight started to come back, although it was still fuzzy and blurry. RP 42. She felt dizzy and got up slowly once he was off of her. RP 42-43. He told her, "I could have killed you." RP 43.

Aquiningoc then started to gather up his things in the bedroom and started throwing her things around, ripping some of her clothes, tearing up some of her pictures, and knocking over the television set. RP 43-44. They continued to argue and Aquiningoc told her nobody normal would believe her. RP 45-46. He went into the bathroom where Ashley was sitting on the floor and slapped her in the face, causing her to fall backward and hit her head against the toilet. He told her, "You lie and make me mad and that is why I hit you." RP 46. At that point, there was a knock at the door, and Aquiningoc said, "Who the fuck is that?"

Earlier when they had been arguing over their daughter, Ashley had texted her mother that Aquiningoc was at the house and threatening to take their daughter away. RP 36, 105, 176. Concerned about the safety of her daughter and granddaughter, Ashley's mother had called the police. RP 106-07, 179. Aquiningoc answered the door and let the police into the apartment and subsequently was arrested. RP 47. The officer who spoke with Ashley noticed abrasions on her throat. RP 121. When Ashley's

mother returned to the apartment, she noticed that Ashley was shaking, her neck appeared purple and the bedroom looked like a hurricane had hit. RP 109-10.

While Aquiningoc was in jail he wrote a number of letters, some ostensibly to their daughter Angela and some to Ashley. It was clear that all the letters were intended for Ashley due to their content, e.g., the letters requested that the two year old help arrange for his bail to be posted and put credit on his jail account so that he could make phone calls, and because Angela couldn't read. RP 52-77; Ex. 23, 24. In one of the letters Aquiningoc said that he was happy to find out that mommy wasn't the one who had called the police, that grandma had, but that mommy's statement made him look like a bad man, and if mommy refused to take the stand, he wouldn't have to go to prison. RP 65; Ex 23, 24. In others he noted that he couldn't contact mommy because he would be violating a no contact order, and requested that Ashley use a different name when writing him back and to mail the letter to a cell mate of his. RP 58, 70; Ex. 23, 24. He also asked Ashley to talk to the public defender and tell him that it was all a big misunderstanding, that she had been mad and hadn't realized what she was saying, and she just wanted him back. He also told her to tell no one that she was writing him back and to throw away his letter so he wouldn't get caught violating the restraining order. RP 71, 73, 77; Ex.23,

24. While he said that he had acted really strange and that he had said mean and offensive things to her, he blamed what happened on his addiction to methamphetamine. RP 56-57, 75-76; Ex 23, 24.

D. ARGUMENT

1. Given the evidence and the argument presented, the two convictions for tampering are contrary to State v. Hall.

Aquingoc asserts that his two convictions for Tampering with a Witness, counts VIII and X, violate double jeopardy because the unit of prosecution for tampering with a witness, as announced in State v. Hall, is per witness per proceeding. The State concedes based on the specific record in this case that the two convictions violate double jeopardy and agrees that the matter needs to be remanded to vacate one of the convictions and for resentencing on an adjusted offender score.

In State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010), the court determined that the unit of prosecution for Tampering with a Witness is a continuing course of conduct in which there is an ongoing attempt to persuade a witness not to testify in a proceeding⁸. Id. at 734. It held that “the legislature intended to criminalize inducing ‘a’ witness not to testify

⁸ The legislature has since amended the statute to make clear that the unit of prosecution is each instance of an attempt to tamper with a witness. RCW 9A.72.120(3) (July 22, 2011).

or to testify falsely.” Id. at 737. In doing so, the court noted that the facts of a particular case may reveal the presence of more than one unit of prosecution, for example if the defendant changed his means of attempting to tamper with the witness or ceased the tampering and then subsequently resumed it. Id. at 735, 737. The court found that the defendant’s multiple convictions for tampering with a witness based on his multiple phone calls to one witness violated double jeopardy. Id. at 737.

Here, the two convictions for tampering with a witness are also based on multiple acts to persuade one witness, Ashley, not to testify or to testify falsely in Aquiningoc’s trial. The means of tampering was the same – via written letters. While the acts occurred on separate days, there doesn’t appear to have been an intervening act demonstrating a cessation of the tampering and a resumption. The prosecutor argued that the counts of tampering were based on Aquiningoc’s letters, attempts to induce his wife not to testify or to testify falsely. RP 219-21. Therefore, the State concedes that the two convictions for tampering violate double jeopardy and the judgment and sentence should be amended to vacate one of the convictions.

2. Aquiningoc has failed to demonstrate that he received multiple punishments for the same offense based on his convictions for assault in the second degree by strangulation and assault in the fourth degree.

Aquiningoc has failed to demonstrate that he may raise his double jeopardy issue for the first time in appeal under RAP 2.5(a). Even if he can assert it for the first time on appeal, the record shows that the jury was informed, based on counsels' closings and the jury instructions, that the act that formed the basis of the second degree assault differed from the act that formed the basis of the fourth degree assault. Any failure to provide a "separate and distinct" instruction and specific unanimity instruction regarding the assaults was harmless where the prosecutor argued that the "slap" was the basis for the fourth degree assault and defense counsel conceded Aquiningoc committed an assault in the fourth degree based on the "physical altercation" that occurred and argued that no strangulation occurred. It was abundantly clear to the jury that the act that formed the basis of the second degree assault charge was different than the act that formed the basis of the fourth degree assault charge.

While double jeopardy implicates constitutional issues, pursuant to RAP 2.5(a) it is Aquiningoc's burden to demonstrate on appeal how his alleged error is a manifest one, *i.e.*, how it actually prejudiced his rights, and that the alleged error is truly of constitutional dimension. State v.

Kirkman, 159 Wn.2d 918, 927, 935, 155 P.3d 125 (2007). The exception under RAP 2.5(a)(3) is a narrow one, only permitting review of certain constitutional questions. *Id.* at 934. In order to demonstrate that an error is “manifest,” the defendant must demonstrate that the error had “practical and identifiable consequences.” *Id.* at 935. “If the trial record is insufficient to demonstrate the merits of the constitutional claim, the error is not manifest and review is not warranted.” *Id.* at 935. Not all alleged double jeopardy violations are manifest errors of constitutional magnitude and Aquiningoc should be required to show how his is. *See, e.g., State v. Corbett*, 158 Wn. App. 576, 242 P.3d 52 (2010) (alleged error in failure to include “separate and distinct act” language in instructions did not result in prejudice to defendant where instructions, evidence and closing arguments demonstrated that “any reasonable jury would have known that it must find separate and distinct acts for each of the four guilty verdicts it entered.”); *State v. Elmore*, 154 Wn. App. 885, 228 P.3d 760, *rev. den.* 169 Wn.2d 1018 (2010) (alleged constitutional error regarding double jeopardy was not manifest because defendant was unable to show sufficient prejudice regarding failure to merge burglary conviction with felony murder). Even if the alleged constitutional error is manifest, it may still be subject to harmless error analysis. Kirkman, 159 Wn.2d at 927.

Aquiningoc faults the lack of a “separate and distinct” jury instruction and a unanimity instruction specific to the assault charges. Jury instructions that fail to inform a jury that certain counts are based on acts that are separate and distinct from other counts potentially expose a defendant to multiple punishments for a single offense. State v. Mutch, 171 Wn.2d 646, 663, 254 P.3d 803 (2011). In order to determine whether a defendant actually received multiple punishments for the same offense, the court reviews the entire record before it. *Id.* at 663-64. In conducting its review of the evidence, instructions and arguments of counsel, it must be manifestly clear that each count was based on a separate act or there is a double jeopardy violation. *Id.* at 664. The remedy for such a violation is to vacate the redundant conviction. *Id.*

A jury unanimity instruction, instructing the jury that they must agree on the specific act, is only necessary where the State does not elect the basis for the charge. A criminal defendant has a right to a unanimous jury verdict. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the State presents evidence of multiple acts, any of which could form the basis of the crime charged, the State must elect which act it is relying upon or the court must instruct the jury that it must be unanimous as to which act has been proven beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), *cert. den.*, 501 U.S. 1237

(1991), *overruled on other grounds*, In re Address, 147 Wn.2d 602, 56 P.3d 981 (2002). In order to determine whether the State elected an act it was relying upon, the court considers the charging document, trial record and instructions, as well as the verdict forms. State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), *overruled on other grounds*, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

If the State fails to elect which act it is relying upon and the trial court fails to instruct on it, the error is presumed to be prejudicial. Kitchen, 110 Wn.2d at 411. The prejudice may be overcome if no rational juror could have a reasonable doubt as to any of the acts alleged. *Id.* at 411. In other words, the error is harmless if no rational trier of fact could find that the defendant committed one act but did not commit the other acts. If the jury is presented with the choice of either believing the victim, such that if one incident happened then all incidents happened, or believing the defendant who asserts a general denial, the failure to instruct is harmless. *Id.* at 71.

Assault in the second degree as charged here required the jury to find an element, strangulation, that it was not required to find for 4th degree assault. CP 118, 121 (Inst. 12, 15). In order to violate double jeopardy the offenses must be the same in law and in fact. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). Here, the to-convict

instruction for second degree assault referenced specifically that it was count I and the fourth degree assault specifically that it was count II.⁹ Id. Inst. 2 informed the jury that they were to reach a unanimous verdict. CP 108. Inst. 3 informed the jury that a separate crime was charged in each count and that they must decide each count separately. CP 109. The jury was also instructed that if they found Aquiningoc guilty of second degree assault, they needed to determine whether the crime was an aggravated domestic violence offense. CP 137. It was *not* likewise instructed regarding the fourth degree assault.

During closing the focus of both attorneys was on the second degree assault. The prosecutor explained what the jury would need to find Aquiningoc guilty of second degree assault, strangulation, and then discussed the special aggravating circumstance related to that count. RP 209-12. The prosecutor then addressed count II, the fourth degree assault charge, and told the jury “that correlates to when she’s sitting, and he comes up and slaps her, and she falls back, and her head hits the toilet. That’s an assault.” RP 212. That is the only statement the prosecutor

⁹ Inst. 12 stated “to convict the defendant of the crime of Assault in the Second Degree, as charged in count I, each of the following elements...” CP 118. Inst. 15 stated “To convict the defendant of the crime of assault in the fourth degree as charged in count II, each of the following ...”. CP 121.

made in closing specifically regarding what the jury had to find in order to convict Aquiningoc of count II.¹⁰

In his closing defense counsel essentially conceded all counts but the second degree assault count. RP 225-26. He informed the jury that the spilling of the milk in and of itself constituted a fourth degree assault. RP 226. He conceded that the physical altercation that occurred was an assault in the fourth degree, noting Ashley's torn shirts and bruising from the torn shirts. RP 226-27. Defense counsel then contrasted that with the evidence regarding count I, the strangulation. RP 227. Counsel again contrasted the evidence to support the second degree assault versus the "physical altercation:

So the issue here isn't fighting over whether or not there was a physical altercation and bad words were said to people. The issue is has the State met their burden of proof to come in here and say that for sure strangulation occurred.

RP 236. Defense counsel's theory was that an assault in the fourth degree happened and that there was insufficient evidence that a strangulation occurred. RP 238-39.

¹⁰ The prosecutor references the fact that he slapped her, knocking her into the toilet, when she argued in rebuttal that some time lapsed between the strangulation and the officers arriving. RP 244-45.

This is not a case where multiple counts of identical crimes were charged. The jury had to find an additional fact to convict Aquiningoc of second degree assault. Given the instructions in the case and the argument of counsel it was clear to the jury that the assault in the second degree was the act of strangulation and was a separate act from the fourth degree assault. While the State's and defense theories as to the basis for the fourth degree assault may have differed somewhat, it was clear that count was based on an act separate from the act of strangulation. The prosecutor specifically elected the slap as the factual predicate and defense counsel conceded, apparently under a continuing course of conduct theory¹¹, that a fourth degree assault occurred. Both arguments made it abundantly clear to the jury that two different acts were the basis of each separate count. Any failure to give a unanimity instruction was harmless because the defense did not contest the sufficiency of any of Aquiningoc's other acts regarding the fourth degree assault. Given this record, Aquiningoc has not demonstrated that he received multiple punishments for the same act or offense.

¹¹ A unanimity instruction is not required where the evidence implicates a continuing course of conduct and not several distinct acts. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

3. The prosecutor's comment in closing did not implicate Aquiningoc's right to remain silent, but commented only on what he voluntarily didn't say in his letters to his wife.

Aquiningoc asserts that the prosecutor's closing argument impermissibly commented on his right to remain silent. Aquiningoc incorrectly asserts that a prosecutor may not comment on what a defendant voluntarily doesn't say to a non law-enforcement person, and misconstrues a statement the prosecutor made in closing. First, since he didn't object below, Aquiningoc must show that his claim constitutes a manifest error of constitutional magnitude under RAP 2.5(a). Since the prosecutor's closing argument, properly taken in context, did not implicate his 5th Amendment right to remain silent, he cannot do so. While the State may not comment substantively on a defendant's silence in the arrest context and may not comment on a defendant's failure to testify at trial, his constitutional right to remain silent does not extend to the situation here where the prosecutor was arguing that what he did and didn't say to his wife in his letters essentially constituted an admission that he had strangled her.

A remark that does not amount to a "comment on a defendant's right to remain silent" is considered a 'mere reference' to silence and is not reversible error absent a showing of prejudice and is not reviewable

for the first time on appeal. Id. State v. Burke, 163 Wn.2d 204, 225, 181 P.3d 1 (2008) (J. Madsen dissenting); State v. Romero, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002). “When the defendant's silence is raised, we must consider “whether the prosecutor manifestly intended the remarks to be a comment on that right.” Crane, 116 Wn.2d at 331. A prosecutor's statement will not be considered a comment on a constitutional right to remain silent if “standing alone, [it] was ‘so subtle and so brief that [it] did not “naturally and necessarily” emphasize defendant's *testimonial* silence.” Id. (*quoting State v. Crawford*, 21 Wn.App. 146, 152, 584 P.2d 442 (1978)) (emphasis added).

A defendant’s right under the 5th Amendment right to remain silent provides that a defendant cannot be compelled to be a witness against him or herself, but it does not extend to statements made in a voluntary context. “The “historic function” of the privilege has been to protect a “natural individual from compulsory incrimination through his own testimony or personal records.” Andresen v. Maryland, 427 U.S. 463, 470-71, 96 S. Ct. 2737, 2743, 49 L. Ed. 2d 627 (1976). “The purpose of the right is ... to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating to the offense or from having to share his thoughts and beliefs with the Government.” State v. Sweet, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999). “The Constitution does not forbid

all self-incrimination; it does forbid the use of *involuntary* statements made by, and used against, a defendant.” In re Teddington, 116 Wn.2d 761, 776, 808 P.2d 156 (1991) (emphasis added) (defendant’s argument that admission of letter he had written to a friend before his arrest violated his 5th Amendment right not to be compelled to testify against himself was without merit). “The constitution does not forbid self-incrimination. . . . It does forbid, however, the use of involuntary statements against a defendant.” State v. Dictado, 102 Wn. 2d 277, 293, 687 P.2d 172 (1984), *overruled on other grounds*, State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986) (internal citation omitted).

A non-law enforcement witness’s testimony regarding a defendant’s statements to him does not violate the 5th Amendment for the simple fact that there is no compulsion involved when the defendant makes voluntary statements to the witness. Hoffa v. United States, 385 U.S. 293, 303-04, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966).

Assuming without deciding that Zanabria's pre-arrest silence falls within the reach of “testimonial communications” protected by the fifth amendment, the record makes manifest that the silence at issue was neither induced by nor a response to any action by a government agent. The fifth amendment protects against compelled self-incrimination but does not, as Zanabria suggests, preclude the proper evidentiary use and prosecutorial comment about *every* communication or *lack* thereof by the defendant which may give rise to an incriminating inference. We find no error in the use of this evidence or in the prosecutor's comments thereon.

United States v. Zanabria, 74 F.3d 590, 593 (5th Cir. 1996).

The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police. We need not hold that every citizen has a duty to report every infraction of law that he witnesses in order to justify the drawing of a reasonable inference from silence in a situation in which the ordinary citizen would normally speak out. ... When a citizen is under no official compulsion whatever, ... either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. ... For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.

Jenkins v. Anderson, 447 U.S. 231, 243-44, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (J. Stevens concurring) (footnotes omitted).

In State v. Oplinger, 150 F.3d 1061 (9th Cir. 1998), *overruled on other grounds*, U.S. v. Contreras, 593 F.3d 1135 (9th Cir. 2010), the Ninth Circuit addressed whether the 5th Amendment privilege against self-incrimination “extends to out-of-court pre-arrest statements made to private individuals” and held that it did not. Relying in part on Justice Stevens concurrence in Jenkins quoted above, the court held that the defendant’s pre-indictment statements to his employer regarding the fraudulent transactions were completely voluntary, not compelled in any way by the government. *Id.* at 1067. In finding that the constitutional

privilege against self-incrimination was not implicated under such circumstances, the court noted, “The self-incrimination clause was intended as a ‘limitation on the investigative techniques of government, not as an individual right against the world.’” *Id.* (*quoting, United v. Gecas*, 120 F.2d 1419, 1456 (11th Cir. 1997)).

If a defendant’s voluntary, incriminating statements made in a non-compulsory context do not violate the 5th Amendment, then the defendant’s omissions within those statements likewise do not violate the 5th Amendment. The prosecutor here did not use Aquiningoc’s failure to testify against him, but used his selective statements in his letters to his wife to show consciousness of his guilt. The statements that Aquiningoc made in his letters were purely voluntary. Whatever he did, and did not say, in the letters was not compelled in any manner by law enforcement or a testimonial process. Therefore, Aquiningoc’s 5th Amendment right to remain silent was not implicated by the prosecutor’s comparison of what he did and did not say in his letters to his wife, and he may not raise this issue for the first time on appeal.

Moreover, when a defendant does not exercise his right to remain silent and instead talks to police, the state may comment on what he does *not* say. *State v. Clark*, 143 Wn. 2d 731, 765, 24 P.3d 1006, 1023 (2001) (*citing State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978)). In

State v. Young, the defendant asserted that the prosecutor's remarks in closing about what he told two postal inspectors, federal officers who had arrested the defendant, violated his 5th Amendment right to remain silent.

The prosecutor argued:

Now did you hear in any of the testimony of these two men [referring to the arresting postal inspectors] think about this did you hear anyone, in their entire testimony, say that the defendant denied that he mailed the bomb or had anything to do with the construction of it? Now what is your reaction?

Young, 89 Wn.2d 613, 620, 574 P.2d 1171 (1978). Defendant objected, but the objection was overruled. The court held that “[t]he prosecutor was entitled to argue the failure of the defendant to disclaim responsibility after he voluntarily waived his right to remain silent and when his questions and comments showed knowledge of the crime.” *Id.* at 621; *see also*, State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496, *rev. den.*, 172 Wn.2d 1012 (2011) (defendant's right to remain silent was not violated by officer's testimony regarding her lack of response to certain questions where defendant never invoked her right to remain silent during police questioning after being advised of her *Miranda* rights); State v. McFarland, 73 Wn. App. 57, 63-64, 867 P.2d 660 (1994) (where defendant did not invoke his right to remain silent prosecutor could comment on defendant's failure to take residue test and failure to explain why he had handled the guns); State v. Bradfield, 29 Wn. App. 679, 685,

630 P.2d 322 (1995) (prosecutor could question officer about defendant's "non-statements" where defendant gave selective information to officer after he had waived *Miranda*).

Even if his right to remain silent were implicated in this context, just as in Young, Aquiningoc was not silent about the incident. He made certain statements within his letters about the incident. Given that he did make certain voluntary statements about the incident, the prosecutor was free to argue what he didn't say as well.

The cases that Aquiningoc references, Easter¹² and Romero¹³, are distinguishable because both of those cases address a defendant's silence in the context of his arrest. In State v. Hager, 171 Wn.2d 151, 248 P.3d 512 (2011), the court distinguished Easter in holding that an officer's testimony that the defendant had been "evasive" during questioning did not implicate his privilege against self-incrimination under the 5th amendment and article 1, §9 of the Washington Constitution. *Id.* at 156-57. The court found that the officer's remarks had not commented on the defendant's silence, but described his answers to the officer's questions after he had waived his right to remain silent, therefore there was no infringement of the defendant's privilege against self-incrimination. *Id.* at

¹² State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996).

¹³ State v. Romero, 113 Wn. App. 779, 790-91, 54 P.3d 1255 (2002).

158. The court distinguished Easter based on the fact that the defendant in Easter had exercised his right to remain silent. Id. at 157.

State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996), the companion case to Easter, explained the holding in Easter:

We held that a defendant's pre-arrest silence, *in answer to the inquiries of a police officer*, may not be used by the State in its case in chief as substantive evidence of defendant's guilt.

Lewis, 130 Wn.2d at 705 (emphasis added). The court went on to clarify that "[a] police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." Id. It's clear that the references in Easter are limited to the law enforcement context in which they arose.

Aquiningoc was not compelled to be a witness against himself when he wrote his letters. In closing, the prosecutor first referenced the letters because they were the basis of the violation of no contact and tampering charges. RP 216-18. She then juxtaposed what he did say with what he didn't say in the letters to argue that what he said was consistent with his believing that what Ashley had said about what happened was the truth:

You know what's interesting is in the letters as you go through, never once does he say, you know, I didn't strangle you. Could you please tell them the truth that that didn't happen? Not once does he say that.

Now why wouldn't he say that if that didn't happen? If you were being held on, on a charge, and that never happened, and you're going to take the risk to write a letter and violate a no-contact order that is a non-felony charge, why wouldn't you take it and say tell them the truth, I didn't do that. That's not anywhere.

But what is here is, "If mommy refuses to take the stand against me, the charges will be dropped and daddy won't go to prison." That has nothing to do – that's with what she's saying is the truth, just don't come in and say it. That's what that says.

RP 218.

Later in response to defense counsel's statement in his closing that he was not going to address counts IV through XI and was going to focus on the second degree assault charge, the prosecutor argued in rebuttal:

... We don't know that, but we do know there were several other symptoms that corroborate that [Ashley's testimony that she was strangled], and we know there were letters from Mr. Aquiningoc that corroborate that.¹⁴

And I agree, if I was Mr. Hall, I wouldn't want to touch those letters. I wouldn't even want to get anywhere near them, because the one thing that you can't stand up and argue to the jury is why he didn't say that *in his letters*. Why he didn't take the stand, ["I didn't do that *to you*. You know I didn't do that *to you*."] Why? Because he did that to her.

¹⁴ The prosecutor earlier argued that the jury could use Aquiningoc's attempts to get Ashley not to testify or to change her story as corroboration for Ashley's version of what happened that night. RP 221.

RP 225 (emphasis added). Aquiningoc argues that the prosecutor's reference to "stand" was a comment on his failure to testify, *i.e.*, his failure to take the "witness stand." On the contrary, it's clear from the context of the argument, and a careful reading of the sentence itself, that the prosecutor meant "stand" as in "position" or "stance," and was arguing, as she had before, why didn't Aquiningoc tell his wife in his letters to tell the truth, *i.e.*, that he didn't do that to her, instead of telling her not to testify. The sentence would not have made sense if the prosecutor had meant "witness stand" because that would mean she would have argued: Why he didn't take the witness stand, [and say] ["I didn't do that *to you*. You know I didn't do that *to you*."] (emphasis added). His reference "to you" makes it clear that the prosecutor is referencing what Aquiningoc is saying to his wife, in the letters, and not referencing what he would be telling the jury if he had been on the witness stand. If the prosecutor had been referring to his taking the witness stand, she would have stated, "Why didn't he take the stand, [and say] ["I didn't do that *to her*. [*She*] know[s] I didn't do that [*to her*."]"]

The prosecutor very clearly was not referencing Aquiningoc's failure to take the witness stand. Taken in context the prosecutor's use of the word "stand" can only be understood as meaning "position" or "stance." Defense counsel certainly would have objected to any reference

to his client's failure to take the stand, and it can be inferred from his failure to object that he understood the prosecutor to be referencing his client's stance in his letters.¹⁶ Moreover, the jury was directed that they could not make any negative inferences from Aquiningoc's failure to testify. CP 115.

The prosecutor's argument did not reference Aquiningoc's constitutional right to remain silent, therefore he may not raise any such issue for the first time on appeal. Even if he could raise such an issue, the prosecutor did not violate Aquiningoc's constitutional right by comparing what he did not say in his letters to what he did say when he did not remain silent about the incident.

4. The judgment and sentence should be amended to strike reference to three of the charged offenses as convictions.

Aquiningoc correctly contends that the judgment and sentence is erroneous in that it lists three charged offenses of which he was not found guilty. The judge dismissed count VI, the bribery charge, upon a half time motion for insufficient evidence, and the jury found Aquiningoc not guilty of counts III and V, the malicious mischief charge and one count of tampering with a witness. Aquiningoc, however, incorrectly asserts that

¹⁶ Defense counsel had just objected a couple paragraphs before to argument of the prosecutor. RP 247.

the proper remedy is resentencing based on speculation that the court may have considered the offenses in imposing sentence. The proper remedy is to correct the typographical errors that occurred and to strike any reference to those counts as convictions in the judgment and sentence.

Aquiningoc provides no authority for his asserted remedy in the present context. The proper remedy when convictions cannot stand *due to double jeopardy concerns* is to strike the convictions that affront double jeopardy from the judgment and sentence. State v. Turner, 169 Wn.2d 448, 465, 238 P.3d 461 (2010). The references on page two of the judgment and sentence to findings of guilt regarding count III, malicious mischief in the third degree, count V, tampering with a witness, and count VI, bribery, are clearly erroneous. CP 21. While Aquiningoc contends the court may have considered those counts in sentencing him, there is nothing in the record to support that. On page four the judgment clearly states that Aquiningoc was found not guilty of counts III and V and the court dismissed Count VI. CP 23. The judge never referenced those counts in explaining his decision to impose the sentence that he did. SRP 22-24. He specifically referenced that there were only two tampering convictions. SRP 25. He was the one who dismissed the bribery charge on a half-time motion, and it is highly unlikely he would have forgotten that he had done

that. The proper remedy in this case is solely to strike the references to counts III, V and VI on page two of the judgment and sentence.

5. The aggravating factor of unscored criminal history should be vacated and the matter remanded for resentencing.

The State concedes that the aggravating factor regarding Aquiningoc's prior unscored criminal history was improperly found. As it isn't clear from the record that the judge would have imposed the same exceptional sentence based on the jury's special verdict alone¹⁷, remand for resentencing is appropriate. While the judge relied upon both aggravating factors in imposing the exceptional sentence, he did not indicate that he would have imposed the same sentence on each of the aggravating factors in and of themselves. The other aggravating factor the judge relied upon, the domestic violence aggravator, is both legally and factually sufficient and provides an independent basis upon which the judge could decide to impose an exceptional sentence on remand. Aquiningoc's other contentions regarding the judgment and sentence findings are without merit.

¹⁷ Remand for resentencing is not required if the record is clear that the judge would have imposed the same sentence. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

Review of an exceptional sentence is limited by statute. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4); former RCW 9.94A.120(4) (1994). Whether the trial court's reasons for imposing an exceptional sentence are "substantial and compelling" is still a legal issue for the trial court post-Blakely. State v. Hyder, 159 Wn. App. 234, 266-67, 244 P.3d 454, *rev. den.*, 171 Wn.2d 1024 (2011).

Aquiningnoc challenges the legal sufficiency of the domestic violence aggravating factor as well as the factual sufficiency. While the jury had to be unanimous to find the aggravating factor, he does not contest that it did not need to be unanimous as to whether it was based on evidence that the offense was part of an on-going pattern of physical or psychological abuse, RCW 9.94A.535(3)(h)(i), or the offense occurred within the sight or sound of the victim's minor child, RCW 9.94A.535(3)(h)(ii). Appellant's Brief at 37; CP 139 (Inst. 33).

- a. *aggravating factor of unscored criminal history included a factual finding that under State v. Hughes was required to be found by a jury.*

Aquiningoc contends and the State concedes that the aggravating factor that his unscored criminal history resulted in a sentence that was clearly too lenient is a finding that needed to be made by the jury and not the judge pursuant to State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), and State v. Saltz, 137 Wn. App. 576, 154 P.3d 282 (2007). Even though the legislature assigned this finding to the judge, under Hughes the “clearly too lenient” finding is a factual finding must be made by a jury in order to impose an exceptional sentence. Saltz, 137 Wn. App. at 583-84. The judge’s finding that Aquiningoc’s prior unscored criminal history resulted in a sentence that was “clearly too lenient” was contrary to law and therefore could not provide the basis for imposition of an exceptional sentence.¹⁸

- b. *aggravating factor of pattern of domestic violence is not impermissibly vague*

While Aquiningoc couches his argument regarding the sufficiency of the language of the statutory aggravating factor as a constitutional

¹⁸ Given the State’s concession that this aggravating factor was improperly found, the State does not address Aquiningoc’s assertion that there was insufficient factual basis for the court’s finding that his criminal history included a prior robbery he committed in Canada.

vagueness issue, his true claim is one of instructional error regarding failure to include definitions for certain terms within the aggravating factors. He cannot raise this issue for the first time on appeal because failure to define terms or phrases within an aggravating factor does not implicate a constitutional right. Even if Aquiningoc could assert this issue for the first time on appeal, the domestic violence aggravator's terms "psychological," "physical" have ordinary, common-sense meanings and "pattern" was further defined within the instruction to provide a sufficient context for the jury to apply.

Aquiningoc asserts that the aggravating factor of "ongoing pattern of psychological or physical abuse" is impermissibly vague because the terms "physical," "psychological" and "pattern" were not further defined. The omission of definitions for terms within statutory aggravating factors does not present an error of constitutional magnitude that satisfies the RAP 2.5(a) standard. State v. Gordon, 172 Wn.2d 671, 679-80, 260 P.3d 884 (2011) (failure to further define "deliberate cruelty" and "particular vulnerability" was not an issue that could be raised for the first time on appeal because it was not an error of constitutional magnitude); *see also*, State v. Duncalf, 164 Wn. App. 900, 911, 267 P.3d 414 (2011), *rev. granted*, 173 Wn.2d 1026 (2012) (failure to further define "substantially exceeds" in aggravating factor under RCW 9.94A.535(3)(y) did not raise

an issue of constitutional magnitude that could be asserted for the first time on appeal). As Aquiningoc really is asserting a failure to further define terms within the domestic violence aggravator, he may not raise this issue for the first time on appeal.

Moreover, this aggravating factor is not unconstitutionally vague because such due process considerations are not implicated by the Sentencing Guidelines.

A vagueness challenge seeks to vindicate two principles of due process: the need to define prohibited conduct with sufficient specificity to put citizens on notice of what conduct they must avoid, and the need to prevent arbitrary and discriminatory law enforcement. ... A statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability. ... The context of the entire statute is considered by the court to determine a sensible, meaningful, and practical interpretation.

State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998) (citations omitted). State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), held that “the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines.” *Id.* at 459.

The sentencing guideline statutes challenged in this case do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State... Sentencing guidelines do not inform the public of the penalties attached to a criminal conduct nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the

legislature. A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engaged in prohibited conduct because the guidelines do not set penalties.

...

The guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.

Id. at 459, 461. That rationale remains true today, even post-Blakely.

Under the current sentencing guidelines, even if the jury finds certain aggravating factors to exist, the sentencing judge does not have to impose an exceptional sentence, that is still a discretionary call on the judge's part.

Aquiningoc specifically argues that the term "pattern" is unconstitutionally vague. However, it's clear from the statutory language itself, the language that was provided in the jury instruction, that "ongoing pattern of abuse" is further defined or clarified by the phrase "multiple incidents over a prolonged period of time." "Prolonged period of time" was further defined in the instruction as "more than a few weeks." CP 139 (Inst. 33). The term "pattern" was adequately defined in the instruction, and the terms "physical" and "psychological" are terms that are commonly understood and didn't require any further definition. Even if Aquiningoc could raise this issue for the first time on appeal, the terms were not impermissibly vague.

The court in State v. Duncalf was confronted with such an argument regarding the term “substantially exceeds” within the aggravator under RCW 9.94A.535(3)(y), but found it so lacking in merit that it addressed it in a footnote. After referencing Baldwin and concluding that the defendant did not have a liberty interest in being sentenced below the maximum term authorized by the jury’s findings, the court noted in the footnote: “Because Duncalf has no right to be sentenced below the maximum term authorized by the jury’s finding of the aggravating circumstance, no right has been violated.” Duncalf, 164 Wn. App. at 911, n.2.

Aquiningoc cites to Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and Tuilaepa v. California, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) for his assertion that vague terms within an aggravator implicate his due process rights. However, both those cases, both death penalty cases, are distinguishable. Walton actually does not support Aquiningoc’s position because in that case the court upheld the sentence based on the judge’s aggravating findings because the judge was the one who was the “final sentencer,” not the jury. Walton, 497 U.S. at 653-55. The quote cited by Aquiningoc only applies in those cases in which the jury is the one who decides the final punishment. One sentence beyond the quote referenced by Aquiningoc, the court states:

“But the logic of those cases [Maynard and Godfrey] has no place in the context of *sentencing by a trial judge*” because trial judges are presumed to know the law and apply it in determining a sentence. Walton, 497 U.S. at 653 (emphasis added). Tuileapa similarly is distinguishable because in that case the jury was the final sentencer.

Under the SRA the jury is not the “final sentencer” regarding exceptional sentences, even if it must make the findings to support an exceptional sentence. Moreover, the terms Aquiningoc objects to, under the complete definition provided in the instructions, were capable of a common-sense meaning and therefore not impermissibly vague. Furthermore, there was sufficient evidence to support the jury’s finding on the alternative prong of the aggravator, occurring within the sight or sound of the minor child, and the judge relied upon this factor in imposing the exceptional sentence. Even if the domestic violence pattern of abuse aggravator was vague, any vagueness would be harmless because the aggravator can be upheld on the “minor child” prong.

c. *there was sufficient evidence for the jury to find the domestic violence aggravating factor*

Aquiningoc also challenges the factual sufficiency for the jury’s finding that he committed the second degree assault either as part of an ongoing pattern of psychological or physical abuse or within the sight or

sound of a minor child of the victim or defendant. As instructed in this case, the jury's finding can be upheld if there is sufficient evidence under either the prong that there was an "ongoing pattern of physical or psychological abuse" or that "the offense occurred within the sight or sound of the victim's or defendant's minor child." As it is clear that the offense occurred within the sound of the Aquiningocs' two year old daughter, taking the evidence in the light most favorable to the State, there is sufficient evidence for a rational trier of fact to have found the domestic violence aggravator.

The domestic violence aggravating factor is a circumstance that can constitute a substantial and compelling basis for imposing an exceptional sentence. State v. Atkinson, 113 Wn. App. 661, 672, 54 P.3d 702 (2002), *rev. den.*, 149 Wn.2d 1013 (2003). In order to determine whether the record supports the jury's aggravating finding, the appellate court determines whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the aggravator beyond a reasonable doubt. Gordon, 172 Wn.2d at 680; Hyder, 159 Wn. App. at 259.

RCW 9.94A.535(3)(h)(ii) states that if the jury finds that the offense involved domestic violence and it "occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen

years,” an exceptional sentence may be imposed. The aggravator does not require testimony from the child that s/he heard or saw the domestic violence, but only proof that it occurred within the sight or sound of the child. Here, the testimony was that their two year old daughter Angela was present when Aquiningoc arrived that evening at the apartment. RP 24. During the time that Aquiningoc was yelling at Ashley and calling her names initially, the daughter was sitting on his lap and she was in the room when Aquiningoc poured the milk on Ashley. RP 28-29. Ashley testified that their daughter was within earshot during the incident, that based on the size and set-up of the apartment, that a person could hear what was being said in a normal tone of voice in one room from another within the apartment, whether it was from the bedroom to the kitchen/living room, or to the bathroom, and vice-versa. RP 29-31. When Aquiningoc threatened to take Angela away from Ashley, he was holding Angela. RP 37. When they were in the bedroom, the door was open and Angela moved back and forth between the bedroom and the living room. RP 37. When Aquiningoc was yelling at Ashley in the bedroom, the daughter was unusually quiet. After she left the bedroom, they continued to argue, and then Aquiningoc started strangling Ashley. RP 38-40. Ashley tried to scream. RP 40. While Ashley didn't know whether her

daughter was in the room at the time she was strangled, her daughter was present in the bedroom shortly before and after the strangulation. RP 45.

The layout of the apartment was such that no matter where the daughter was in the apartment, she was within sound of whatever was going on in another room. Aquiningoc certainly had no qualms about berating and being violent with Ashley when their daughter was present. Taking the evidence in the light most favorable to the State, this was sufficient evidence for a rational trier of fact to find that their daughter was within sight or sound of the offense beyond a reasonable doubt.

There was also sufficient evidence that the assault in second degree was part of an ongoing pattern of physical and psychological abuse. Ashley testified that after she gave birth to her daughter in May 2009, Aquiningoc started calling her fat, ugly and other names a few times a week. RP 16-17. In late November, early December, Aquiningoc told her that if she didn't go from her weight of 174 pounds to 138 pounds by Dec. 31st, that he would leave her. RP 15-16. This was not the first time that he'd given her such an ultimatum. RP 16.

The physical violence didn't start until 2011. RP 14. Sometime in January/mid February 2010, Aquiningoc told her again that she didn't cook enough and how fat she was. RP 14, 17-18. He told her that if she didn't lose a certain amount of weight, he would divorce her or go looking

elsewhere for what he needed that he couldn't get from her. RP 15. He made comments about how she looked and dressed and forcibly ripped her shirt all the way off of her. RP 14-15, 18.

The next physical incident occurred in March of 2011 when they were fighting about Aquiningoc wanting to pawn Ashley's computer that she was renting. RP 12-13, 18. Aquiningoc forcefully grabbed Ashley's arm and pulled her back into the apartment when she told him to leave. When she tried to get away, he grabbed her shirt and ripped it off her. RP 13-14.

The evidence included testimony of at least three physical incidents of abuse, including the charged offense, that occurred over a three – four month period, and that prior to that there had been months of psychological abuse by calling her names, and threatening to leave her if she didn't lose weight. On the night of the charged offense, he angrily called her a nigger lover, a whore, a cunt, bitch, accused her of cheating on him and yelled at her that she was stupid and retarded. He told her she was a liar and a horrible mother, that she hadn't tried hard enough for their family and that she was worthless. He told her that he was going to take their daughter away from her, that he would get sole custody of the daughter and she would never see the daughter again. Taking the evidence in the light most favorable to the State, this was sufficient

evidence that Aquiningoc committed the strangulation as part of an ongoing pattern of physical and psychological abuse, one that involved multiple incidents over a period of more than two weeks. *See, Atkinson*, 113 Wn. App. at 671-72 (evidence of at least three incidents of abuse over a seven to ten month period is sufficient to find there was an ongoing pattern of abuse); *see also, State v. Harris*, 123 Wn. App. 906, 915, 99 P.3d 902 (2004), *overruled on other grounds, State v. Hughes, supra* (at least four incidents of sexual abuse over a six month period constituted pattern of abuse over a prolonged period of time).

d. The court did enter written findings justifying the exceptional sentence it imposed.

Aquiningoc asserts that the matter needs to be remanded for resentencing because the court did not enter written findings justifying the exceptional sentence, and specifically that the court didn't find that there were "substantial and compelling reasons" to impose an exceptional sentence. Contrary to his assertion, the judge did enter written findings and did specifically find that there were "substantial and compelling reasons" to impose an exceptional sentence¹⁹. Here, the court entered

¹⁹ While the court did make this specific finding, nothing in RCW 9.94A.535 requires the court to use the phrase "substantial and compelling" in making its determination to impose an exceptional sentence. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011).

written findings relying upon the domestic violence aggravating factor and the prior unscored criminal history in imposing the exceptional sentence. CP 31-32. The court concluded that the aggravating factors found by the court and the jury supported the imposition of an exceptional sentence and that such a sentence was consistent with the purposes of the SRA. *Id.* The box under section 2.4 related to exceptional sentences is marked in the judgment and sentence, and there it states that the court found that there were substantial and compelling reasons justifying imposition of an exceptional sentence and referenced the attached appendix. CP 22-23. The court complied with the statutory requirement to enter written findings and those findings were substantial and compelling reasons to impose the exceptional sentence it did.

6. On remand, the court should address whether there are reasonable alternatives to a complete no contact order with Aquiningoc's daughter.

Aquiningoc only challenges the scope of the no contact order with his daughter and does not challenge the duration. Crime-related prohibitions impacting a defendant's fundamental rights must be narrowly drawn. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008). The imposition of crime-related prohibitions is reviewed for abuse of discretion because the inquiry is fact-specific and based on the judge's evaluation of the defendant and the evidence produced at trial. In re

Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). A sentencing court abuses its discretion in imposing a crime-related prohibition if applies the wrong legal standard. Id.

A defendant's fundamental right to parent limits a sentencing court's ability to impose a condition limiting the defendant's ability to have contact with his child. In re Rainey, 168 Wn.2d at 377. If a sentencing condition impacts a defendant's fundamental right to parent, the sentencing court must make a determination that the condition is "reasonably necessary to accomplish the essential needs of the State and public order." Id. (*quoting* State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). A prohibition on a defendant's contact with his child must be reasonable in scope as well as duration. Id. at 378-81. Whether such a prohibition is reasonably necessary is fact dependent. Rainey, 168 Wn.2d at 377. Ultimately the question the court has to answer is whether the no contact order under the facts of the case is reasonably necessary to realize the State's compelling interest in protecting the child witness or victim. Id. at 379. If a defendant objects to the imposition of such a sentencing condition and the court fails to adequately address the reasonable necessity of such a condition, the remedy is to strike the condition and remand for reconsideration of that condition. Id. at 382.

The State has a compelling interest in protecting a victim of crime. Id. The State also has a compelling interest in protecting children from witnessing domestic violence. Id. at 378. A “sentencing condition may also prohibit a defendant’s access to a means or medium through which he committed a crime,” including a child through which the defendant harassed the mother. Id. at 380.

The facts of this case are more similar to Rainey in which the scope of the no contact order, prohibiting all contact with the defendant, was upheld and distinguishable from State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001), in which the court struck down a complete no contact order with the children of the defendant’s wife when he was convicted of felony violation of a no contact order. In Rainey, the defendant was convicted of kidnapping his three year old daughter in order to inflict extreme emotional distress on his ex-wife and of telephone harassment of his ex-wife. Rainey, 168 Wn.2d at 371-72. After the defendant and his wife got divorced due to domestic violence, the defendant repeatedly called and harassed the wife, threatening to take their daughter away. Id. In addition to making allegations that the ex-wife’s boyfriend was abusing the daughter, the defendant started to violate the visitation terms within their parenting plan and ultimately took the daughter to Mexico. Id. at 371. Once he was in custody, the defendant

ostensibly sent several letters to the three year old daughter in which he blamed the ex-wife for breaking up and hurting the family. Id. at 372. At sentencing, the grandfather informed the court of the great emotional damage he had inflicted on the child, as well as his daughter, the defendant's ex-wife. Id. at 372. The court upheld the scope of the no contact order, which prohibited the defendant from having any and all contact with his daughter, because the State had a compelling interest in protecting the child as a victim and as a witness to domestic violence. In addition to his actions constituting a serious violent felony against the child, the defendant had attempted to use the child to gain leverage over his ex-wife, had sent letters to the child blaming the ex-wife for the family's break-up, which not only caused emotional stress on the child, but also was intended to cause emotional stress on and harassment of his ex-wife. Id. at 378-80. In Ancira, the defendant was only convicted of felony violation of a no contact order and there was a pending dissolution that the Court believed would be better at addressing the issue of visitation with the children.

While Aquiningoc's strangulation of his wife did not amount to a serious violent felony, he also used his two year old daughter as a means of attempting to communicate with his wife and to blame her for what had happened to the family. Ex 23, 24. During the incident Aquiningoc

threatened to take their daughter away from Ashley. He purposefully strangled Ashley knowing their daughter was present in the apartment at the time. During sentencing, Ashley informed the judge of the great impact the crime had had upon her daughter. SRP 12-13. Aquiningoc did not object to imposition of the no contact order.

While this case is distinguishable from Ancira and there certainly is a basis for the trial court to find that a no contact order is reasonably necessary in order to protect Aquiningoc's daughter from witnessing domestic violence, the State concedes that the trial court did not engage in any such analysis prior to imposing the no contact order, presumably because Aquiningoc did not object to imposition of the order. Therefore, on remand it would be appropriate for the court to engage in such an analysis on the record.

E. CONCLUSION

The State requests that the Court affirm Aquiningoc's convictions on all but one of the counts of tampering with a witness, remand the matter to strike the references in the judgment and sentence to convictions for that count of tampering, as well as counts III, V and VI, the malicious mischief, bribery and tampering counts of which he was found not guilty. The matter should be remanded for resentencing, the offender score

recalculated, and the court should address the reasonable necessity for the scope of the no contact order imposed.

Respectfully submitted this 9th day of July, 2012.


HILARY A THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

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

WASHINGTON APPELLATE PROJECT
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 07/09/2012
NAME DATE