No. 96650-8
COA No. 47687-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDRES SEBASTIAN FERRER,

Petitioner

On Appeal from Clark County Superior Court
The Honorable Gregory Gonzales, Presiding

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Andres Sebastian Ferrer asks this Court to accept review of the Court of Appeals' decision terminating review set out in Part B, *infra*.

B. COURT OF APPEALS' DECISION

Mr. Ferrer seeks review of the Court of Appeals' decision in *State of Washington v. Andres Sebastian Ferrer*, No. 47687-8-II, an unpublished opinion issued on October 9, 2018 (attached in App. A). The Court of Appeals' denial of a motion for reconsideration was entered on November 19, 2018. App. B.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals violate this Court's prior remand order in No. 93634-0 when it refused to consider the issue related to the propriety of the instruction defining "disfigurement?"

2. Did Instruction No. 10, CP 47 (App. D) defining "disfigurement" according to subjective standards of beauty, allow the jury to convict Mr. Ferrer based upon racist and sexist stereotypes in violation of the United States and Washington Constitutions?

3. Was the failure to define "substantial" to the jury harmless?

4. Does the assignment to a judge of the task of determining whether there are "substantial and compelling" reasons to impose an exceptional sentence violate the right to due process and a jury trial?

D. STATEMENT OF THE CASE

Andres Ferrer and Kristina Ferrer were married in 2010. They separated in 2014, but Mr. Ferrer still would come by the family home for various reasons including visiting his young daughters. RP II 287-90. On March 22, 2014, Mr. Ferrer was at the house, and had an altercation with Ms. Ferrer. She claimed that he jumped out of a closet and punched her about the face and head, strangled her, and threatened to kill her. RP II 294-309. Mr. Ferrer testified that, instead, when he came out of the closet, Ms. Ferrer shoved him and then grabbed him, and that he punched her in an effort to make her let go. He denied threatening her and denied strangling her. RP IV 653-64. Ms. Ferrer had some bruises about her head and neck as a result. RP II 317.

The State charged Mr. Ferrer with one count assault in the second degree and one count of felony harassment. CP 10-11. The jury convicted on both counts, CP 69-70, although the jury indicated it was not unanimous as to the strangulation means of committing assault. CP 71. The jury returned

special verdicts that Counts 1 and 2 were both "aggravated domestic violence offense[s]," CP 73-74, that were committed within "the sight or sound of the victim's or defendant's child who was under the age of 18 years." CP 64. The jury was not asked to determine whether these factors were "substantial and compelling" to justify an above-range sentence. The judge on his own found facts that there were "substantial and compelling" reasons to impose an exceptional sentence, and imposed 50 months (36 months over the top end of the range) for the assault count. CP 78-87; CP 91.

Mr. Ferrer appealed, challenging the exceptional sentence and whether the two counts were the same criminal conduct. In his Statement of Additional Grounds ("SAG"), Mr. Ferrer raised several issues, including a challenge to the trial court's failure to define the term "substantial bodily harm" in Instruction No. 9. SAG at 2, 9-11. Division Two affirmed, although remanding to strike a condition of community custody. *State v. Ferrer*, 195 Wn. App. 1044 (2016) (unpub.) (App. C).

Mr. Ferrer petitioned for review, and raised an additional issue regarding the constitutionality of the definition of disfigurement in Instruction No. 10. App. E (excepts). On February 7, 2017, this Court granted review in part and denied review in part, remanding the case to Division Two to

consider the issue related to the "disfigurement" instruction (Inst. No. 10) Order, Supreme Court No. 93634-0 (2/7/17) (App. F).

On remand, the parties submitted extensive supplemental briefing regarding the constitutionality of Instruction No. 10. Mr. Ferrer also moved to file a supplemental brief regarding the constitutionality of Washington's exceptional sentence statute that assigns the function of determining whether there are "substantial and compelling" reasons to impose an exceptional sentence to a judge. Division Two denied the motion, App. G, and Mr. Ferrer unsuccessfully moved for discretionary review. Sup. Ct. No. 94590-0.

On October 9, 2018, Division Two issued an unpublished opinion which failed to address the issue regarding the disfigurement instruction. Division Two only decided Mr. Ferrer's pro se SAG issue regarding the failure to define "substantial bodily harm." Mr. Ferrer again seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *The Court Should Accept Review of the Disfigurement Instruction Issue*

Assault in the second degree is defined, in part, as assaulting another "and thereby recklessly inflict[ing] substantial bodily harm." RCW 9A.36.021(1)(a). The jury was instructed on this alternative, as well as the "strangulation" alternative under RCW 9A.36.021(1)(g), CP 44, but the jury

returned a special verdict stating it was only unanimous as to the alternative means of "substantial bodily harm" prong. CP 71.

Instruction No. 9 defined "substantial bodily harm" according to the statutory definition in RCW 9A.04.110(4)(b). This instruction allowed the jury to convict Mr. Ferrer if it concluded he caused "temporary but substantial disfigurement." CP 46 (App. D). "Disfigurement" is not defined in Title 9A of the Revised Code of Washington. The trial court gave, over defense exception,[1] an instruction defining "disfigurement" by reference to a dictionary definition that included impairment of "beauty" and making someone "unsightly" or "imperfect":

> "Disfigurement" means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.

Inst. No. 10, CP 47 (App. D).

As noted, Mr. Ferrer filed a pro se SAG challenging the failure of the trial court to define "substantial" in Instruction No. 9, but did not directly challenge Instruction No. 10. Division Two did not address the merits of the pro se argument in its first opinion, ruling that he had "waived" this challenge by not excepting below. App. C, Slip Op. at 13. Mr. Ferrer filed a petition

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[1] *See* RP IV 706-09.

for review, raising issues he had raised in the Court of Appeals, but also raising a different issue related to how Instruction No. 10, the definition of disfigurement, allowed for conviction based on the jurors' subjective views of beauty. App. E (excerpts).

On February 7, 2017, this Court issued the following order:

> [T]he Petition for Review is granted only as to the jury instruction regarding disfigurement and the case is remanded to the Court of Appeals Division II to address the issue on the merits. Review of all remaining issues is denied.

App. F.

When the case was remanded to Division Two, the court directed that the State respond only to Mr. Ferrer's SAG issues. App. H. The parties jointly asked the Court of Appeals to change the briefing order, agreeing that the issue on remand was that raised in the petition for review in the Supreme Court, and the Court of Appeals granted that motion. Apps. I & J. Subsequently, the parties filed briefs addressing only the propriety of Inst. No. 10.[2]

In its recent opinion, Division Two declined to address the issues related to Inst. No. 10 because "the Supreme Court does not generally review

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[2] *Supplemental Brief of Appellant*, *Response to Supplemental Brief* and *Supplemental Reply Brief of Appellant.*

issues not raised before the appellate court and the Supreme Court's remand order does not direct us to address the issues raised for the first time in the supplemental petition for review." Slip Op. at 6. The court only addressed Mr. Ferrer's pro se arguments about the failure to instruct the jurors on the meaning of the word "substantial." Slip Op. at 6-9.

a. The Court Should Accept Review Because the Court of Appeals Refused to Follow this Court's Remand Order

Once a higher court rules on an issue in a particular case, the ruling becomes the "law of the case" and is binding.[3] Lower courts may disagree with the decisions of higher courts, but they cannot just ignore or disregard them.[4] Here, this Court specifically granted review on one issue only: "the jury instruction regarding disfigurement" and "remanded to Court of Appeals to address issue on the merits." App. F. The instruction regarding "disfigurement" is Instruction No. 10. This Court did not grant review on Mr. Ferrer's SAG issue on the failure to define "substantial" in Inst. No. 9.

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[3] *See State v. Strauss*, 119 Wn.2d 401, 412-13, 832 P.2d 78 (1992); *State v. Stein*, 140 Wn. App. 43, 55-56, 165 P.3d 16 (2007).

[4] *See State v. Rodriguez-Flores*, 2018 Wash. App. LEXIS 2337 (No. 35240-4-III, 10/16/18) (unpub.) (reversal where trial judge disagreed with rulings of panel of Court of Appeals).

In fact, Mr. Ferrer did not appear to petition for review on that issue and thus the issue was not even presented to this Court.[5]

To be sure, as the Court of Appeals recognized, this Court *may* decline to address issues for the first time in a petition for review. Slip Op. at 6. But, this Court certainly has the power and authority to address an issue that was not raised below.[6] While Division Two may not have agreed with this Court's consideration of the challenge to Instruction No. 10, it was improper for the Court of Appeals simply to ignore the Court's ruling. The Court of Appeals' decision therefore conflicts directly with the decision of this Court and the Court should grant review under RAP 13.4(b)(1).

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[5] The State agrees "that Ferrer's reading of the Supreme Court's remand order is a reasonable one. That this reading has appeal is evidenced by the State signing the joint motion and devoting its merits argument to Ferrer's new claims." App. K, p.7.

[6] *See State v. McCullum*, 98 Wn.2d 484, 487, 656 P.2d 1064 (1983); *State v. Hendrickson*, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996); *State v. Laviollette*, 118 Wn.2d 670, 680, 826 P.2d 684 (1992). Indeed, the Court has the power to address issues *sua sponte*, where the parties have not raised them at all. *See Siegler v. Kuhlman*, 81 Wn.2d 448, 461-62, 502 P.2d 1181 (1972) (Neill, J., dissenting); *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 624, 465 P.2d 657 (1970).

b. This Court Should Grant Review of the Disfigurement Instruction Issue for the Same Reasons it Did Previously

Two years ago, Mr. Ferrer sought review of issues related to Instruction No. 10 under RAP 13.4(b)(2), (3) and (4). Those reasons still exist, and this Court should grant review again, for the same reasons.

Instruction No. 10 defined "disfigurement" as something which "impairs or injures the beauty, symmetry or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner." CP 47. Yet, the determination of beauty, unsightliness or imperfection is an inherently subjective process, which by necessity is tied to the perpetuation of racist and sexist stereotypes.[7] While attempts to ban discrimination based upon appearance have had mixed results,[8] one of the problems with such claims is the inherent vagueness of the concept of

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[7] *See* D. Rhode, "The Injustice of Appearance," 61 *Stan. L. R*. 1033 (2009); R. Mahajan, "The Naked Truth: Appearance Discrimination, Employment, and the Law," 14 *Asian American L. J*. 165 (2007); I. Perry, "Buying White Beauty," 12 *Cardozo J.L. & Gender* 579 (2005-06).

[8] *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality) (Title VII violation where accounting firm told employee she needed to "walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry."); *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (en banc) (makeup requirement for females might violate Title VII, but rejecting claim in the particular case).

physical attractiveness or beauty itself.[9] The vagueness of the concept of "beauty" (and "unsightly" and "imperfect") is precisely what makes the concept particularly inappropriate for jury instructions and a violation of due process protected by the Fourteenth Amendment and article I, section 3.[10]

Our courts have been particularly sensitive to issues of bias, explicit or implicit, in the criminal justice system.[11] In contrast, a jury instruction that allows jurors to decide which crime applies in a particular fact situation (the gross misdemeanor of assault in the fourth degree, RCW 9A.36.041 or the felony of assault in the second degree, RCW 9A.36.021) based upon their determination of whether someone's "beauty" or "appearance" have been impaired or "render[ed] unsightly" or "imperfect," clearly can lead to discrimination based upon race or gender in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and

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[9] *See, e.g.*, *Alam v. Reno Hilton Corp*., 819 F. Supp. 905, 914 (D. Nev. 2008) ("No Court can be expected to create a standard on such vagaries as attractiveness or sexual appeal."); *Datamize, LLC v. Plumtree Software, Inc*., 417 F.3d 1342, 1348-50 (Fed. Cir. 2005) (term "aesthetically pleasing" in patent context is invalid because it is "completely dependent on a person's subjective opinion.").

[10] *See State v. Stubbs*, 144 Wn. App. 644, 650-51, 184 P.3d 660 (2008), *rev'd on other grounds* 170 Wn.2d 117, 240 P.3d 143 (2010) (jury instruction is unconstitutionally not vague if it has "commonsense meaning that juries could understand") (citing *Tuilaepa v. California*, 512 U.S. 967, 976, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) and *State v. Elmore*, 139 Wn.2d 250, 289-90, 985 P.2d 289 (1999)).

[11] *See State v. Gregory*, ___ Wn.2d ___, 427 P.3d 621, 635 (2018) (discussing overt and implicit bias in Washington's legal system).

article I, section 12 (equal protection) or article XXXI, section 1 (gender discrimination)[12] of the Washington Constitution.

Jurors raised in a culture that values white female beauty will more likely find that a particular bruise impairs the beauty of a woman of Western European descent with the stereotypical appearance of a model from *Cosmopolitan* than the situation where a male, from a non-Western European background, receives the same bruise. And while this calculus devalues the "beauty" of non-European males, the result is actually oppressive towards the white women whose "beauty" is put on a pedestal.[13] In any case, such consideration of gender or race conflicts with settled notions that the jury system should be free from bias and that the existence of bias in the jury system harms society as a whole.[14]

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[12] Article XXXI, the Equal Rights Amendment, was adopted with the purpose of ending "special treatment for or discrimination against either sex." *Blair v. Wash. State Univ*., 108 Wn.2d 558, 565, 740 P.2d 1379 (1987). *See generally State v. Burch*, 65 Wn. App. 828, 833-37, 830 P.2d 357 (1992) (setting out tests for equal protection and gender discrimination challenges regarding jury selection).

[13] *See, e.g.*, H. Cheng, A. Tran, E. Miyake, & H. Kim, "Disordered Eating Among Asian American College Women: A Racially Expanded Model of Objectification Theory," 64 *J. Counseling Psych*. 179 (2017); Naomi Wolf, *The Beauty Myth: How Images of Beauty Are Used Against Women* (1991).

[14] *See, e.g., J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 140, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes. . . .").

Instruction No. 10 also violated the right to a jury trial, protected by the Sixth and Fourteenth Amendments and article I, sections 21 and 22. In *Peña-Rodriguez v. Colorado*, ___ U.S. ___, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), the Supreme Court held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869. Yet, by encouraging jurors to make racist and sexist comments about whether a bruise diminishes "beauty," Inst. No. 10 causes the same type of jury trial violations as the racist comments in *Peña-Rodriguez*.

Finally, Instruction No. 10 is unconstitutional because it constitutes a comment on the evidence in violation of article IV, section 16[15] and weakens the State's burden of proof to a jury, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22.[16] The language

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[15] A jury instruction that resolves a disputed factual issue constitutes an impermissible comment on the evidence. *State v. Becker*, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997).

[16] When a judge gives the jury an instruction that diminishes the burden of proving a statutory element, this is equivalent to a mandatory presumption and a directed

(continued...)

in Instruction No. 10 runs afoul of these principles because it is not authorized by statute – nothing in the RCWs defines "disfigurement" in terms of a juror's perceptions of beauty, and thus improperly allows for conviction based upon a factor not authorized by the Legislature.[17]

At trial, the State justified Instruction No. 10 by citing Division Three's 2002 opinion in *State v. Atkinson*, 113 Wn. App. 661, 54 P.3d 702 (2002). The court there said the instruction merely "supplemented and clarified" the statutory language. *Id*. at 668. *Atkinson*'s holding is limited and outdated, having been issued at a time when courts and litigants were not concerned about implicit bias in the legal system. Notably, the case does not address issues related to sexism and racism, and the discussion in the case only addressed whether it was proper to give an instruction that supplemented and clarified the statutory language. Because Division Three never addressed whether a "disfigurement" definition based upon subjective concepts of

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[16] (...continued)
verdict. *See, e.g.*, *State v. Becker*, 132 Wn.2d at 65; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977); *Smith v. Curry*, 580 F.3d 1071, 1080-84 (9th Cir. 2009).

[17] *See State v. Ogden*, 21 Wn. App. 44, 49, 584 P.2d 957 (1978) (inference of intent instruction not authorized by statute constituted error of law); *State v. Budinich*, 17 Wn. App. 336, 337-38, 562 P.2d 1006 (1977) (a matter may be properly argued, but should not be the subject of an instruction).

"beauty," "unsightly," and "imperfect," perpetuate racist and sexist stereotypes, it offers no guidance in this case.

Atkinson also pre-dates *State v. Dolan*, 118 Wn. App. 323, 73 P.3d 1011 (2003), *overruled on other grounds in State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007), which reversed a conviction where a trial court instructed the jury that it could find substantial bodily harm based on the presence of bruising and swelling. Division Two disapproved of giving the jury a definition of "substantial bodily harm" that was not reflected in the statute because of the potential for lowering the State's burden of proof, the interference with the right to a jury determination of the statutory element and a comment on the evidence (citing Const. art. IV, § 16). *Dolan*, 118 Wn. App. at 330-31.

In this regard, the conflict between *Atkinson*'s endorsement of a supplemental instruction defining a key term of "substantial bodily harm" and *Dolan*'s rejection of such an instruction is a basis for review under RAP 13.4(b)(2). But the Court should also accept review under RAP 13.4(b)(3) & (4) based upon the constitutional issues involved and the issues of public importance. Again, the Court agreed with Mr. Ferrer in 2017 when it accepted review of this issue. Division Two's refusal to address this issue

upon remand should not preclude Mr. Ferrer from review now. The Court should accept review and reverse.

2. *The Court of Appeals Used the Wrong Standard for Determining Harmlessness and the Failure to Define "Substantial"*

In Instruction No. 9, the trial court defined the term "substantial bodily harm" in a circular fashion – as "bodily injury that involves a, temporary but *substantial* disfigurement, or that causes a temporary but *substantial* loss or impairment of the function of any bodily part or organ." CP 46 (emphasis added) (App. D). Thus, the "substantial bodily harm" element of assault in the second degree was defined as that which was "substantial." Mr. Ferrer challenged the lack of a definition of "substantial" in his SAG. Although there was no briefing on this issue upon remand,[18] the Court of Appeals agreed that it was error not to define the term, citing *State v. McKague*, 172 Wn.2d 802, 262 P.3d 1225 (2011), but then held that the failure to define "substantial" was harmless. Slip Op. at 7-9. Mr. Ferrer now seeks review of this decision under RAP 13.4(b)(1), (3) & (4).

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[18] Because of the lack of opportunity to provide briefing on remand (the parties only briefing this issue regarding the disfigurement instruction), Mr. Ferrer was denied due process of law under the Fourteenth Amendment and article I, section 3. *See State v. Adamski*, 111 Wn.2d 574, 580, 761 P.2d 621 (1988).

In *McKague*, the issue was what definition of the term "substantial" should be used to determine whether there was sufficient evidence to sustain a conviction. This Court disapproved of Division Two's definition of "substantial" as "something having substance or actual existence,"[19] and instead approved of the Judge Armstrong's dissenting definition:

> While we do not limit the meaning of "substantial" to any particular dictionary definition, we approve of the definition cited by the dissent below: "considerable in amount, value, or worth."

McKague, 172 Wn.2d at 806. Because the issue was sufficiency only, the Court "express[ed] no opinion whether a jury should be further instructed on the definition of 'substantial.'" *Id*. at 805 n.2.

The Court of Appeals in Mr. Ferrer's case resolved that issue, holding that it was error not to define a technical term such as "substantial," but that it was harmless. Slip Op. at 7-9.[20] The court reviewed the photographs of Ms. Ferrer's claimed injuries itself and then relied on State's witness' descriptions of the injuries to hold "the only conclusion a rational jury could have reached

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[19] *McKague*, 172 Wn.2d at 804-05.

[20] The Court of Appeals found the error to be non-constitutional, citing this Court's decision in *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). Slip Op. at 7. With all due respect, the failure to define a technical term to the jury does violate due process under the Fourteenth Amendment and article I, section 3. *See State v. Scott*, 110 Wn.2d 682, 692-95, 757 P.2d 492 (1988) (Utter, J., concurring).

was that the injuries were a temporary but substantial disfigurement given the severity of the bruising." Slip Op. at 9.

The Court of Appeals used the wrong standard of review. Even a non-constitutional error should result in reversal if "there is a reasonable probability that, without the error, the outcome of the trial would have been materially affected." *State v. Gower*, 179 Wn.2d 851, 854, 321 P.3d 1178 (2014) (internal quotes and citations omitted). The Court of Appeals here did not follow this test, and essentially substituted its own review of the trial exhibits for a jury determination – in other words, essentially entering a directed verdict. This violates the right to a jury trial protected by the Sixth and Fourteenth Amendments and article I, sections 21 and 22.[21]

Given defense legitimate attacks on the credibility of the State's witnesses, and Mr. Ferrer's own testimony, there is a reasonable probability that with proper jury instructions, at least one juror would have had a reason to doubt that Mr. Ferrer caused "substantial bodily injury." The Court should accept review under RAP 13.4(b)(1), (3) and (4) and reverse.

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[21] *See Sullivan v. Louisiana*, 508 U.S. 275, 280, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993) ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.").

3. *The Court Should Accept Review of the Exceptional Sentence Issue*

Division Two also declined to address an issue raised by Mr. Ferrer upon remand in a proposed supplemental brief -- Whether *Hurst v. Florida*, 577 U.S. ___,136 S.Ct. 616, 193 L.E.2d 504 (2016), requires that the jury determine, beyond a reasonable doubt, whether there are "substantial and compelling" reasons to impose an exceptional sentence. App. G. This Court should accept review under RAP 13.4(b)(2), (3) & (4) and reverse the exceptional sentence.

The U.S. Supreme Court has repeatedly struck down procedures by which judges, not juries, weigh facts and increase the allowable sentence.[22] In *Hurst*, the Court struck down Florida's two-step capital sentencing scheme. In Florida, first, there was an evidentiary hearing before a jury on the applicability of the death sentence, and the jury made an advisory verdict of life or death. Second, the judge was then to assign "great weight" to the jury's recommended sentence, but, ultimately, independent of the jury's recommendation, the judge would weigh the aggravating and mitigating factors and determine if "*sufficient* aggravating circumstances exist" and if

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[22] *See Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

"there are *insufficient* mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141(3) (2012) (emphasis added). The Court held that Florida's statute involved impermissible judicial fact-finding in violation of the Sixth Amendment, even where the predicate facts were proved to a jury and the judge considered the jury's recommendation. *Hurst*, 136 S. Ct. at 621-22.

Washington's two-step sentencing process for exceptional sentences is similar to Florida's procedure. In the first step, Washington relies on a list of aggravating factors that must be found by a jury beyond reasonable doubt. RCW 9.94A.535 & .537. But this is just the "eligibility" step. The "selection" step takes place after the jury's verdict when the judge determines if there are "substantial and compelling reasons" to impose an exceptional sentence. RCW 9.94A.535 & .537(6). This is fact-driven, as noted by the required "Findings of Fact" entered in this case, CP 91,[23] and the additional testimony taken at the sentencing hearing. RP V 830-42.

A Washington judge making the determination of "substantial and compelling" reasons to impose an exceptional sentence is legally no different than a Florida judge who determined whether there were "sufficient"

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[23] *See State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015).

aggravating factors (and insufficient mitigating factors) to justify a death sentence. The tasks involved in each decision are the same, and Washington's exceptional sentence scheme suffers the same fate as Florida's capital sentencing statute – it violates due process and the jury trial right of the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22.

While Divisions One and Two rejected similar arguments,[24] Division Three held that RCW 9.94A.535(2)(b) was unconstitutional because a finding that a sentence is "clearly too lenient" is a factual, not a legal, determination.[25] Given this split, review should be granted under RAP 13.4(b)(2), as well as RAP 13.4(b)(3) & (4).

F. CONCLUSION

This Court should accept review and reverse the convictions and the exceptional sentence.

DATED this 14th day of December 2018.

Respectfully submitted,

s/ Neil M. Fox
WSBA No. 15277
Attorney for Petitioner

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[24] *State v. Sage*, 1 Wn. App. 2d 685, 707-10 & n.86, 407 P.3d 359 (2017); *State v. Hyder*, 159 Wn. App. 234, 266-67, 244 P.3d 454 (2011).

[25] *State v. Saltz*, 137 Wn. App. 576, 580-84, 154 P.3d 282 (2007).

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

Fla. Stat. § 921.141 (eff. Oct. 1, 2010), provided in part:

> (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. . . .
>
> . . . .
>
> (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. — Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances . . . .

RAP 13.4 provides in part:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RCW 9A.04.110 provides in part:

(4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;

(b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or

impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part . . .

RCW 9A.36.021 provides:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
>
> (c) Assaults another with a deadly weapon; or
>
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
>
> (e) With intent to commit a felony, assaults another; or
>
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
>
> (g) Assaults another by strangulation or suffocation.
>
> (2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.
>
> (b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.041 provides:

> (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.
>
> (2) Assault in the fourth degree is a gross misdemeanor.

RCW 9.94A.535 provides in 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 a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.
>
> Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.
>
> If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4). . . .
>
> . . .
>
> (2) Aggravating Circumstances - Considered and Imposed by the Court.

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) 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.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537. . . .

. . .

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

RCW 9.94A.537 provides:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous,

and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 12 provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. I, § 21 provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine

or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wash. Const. art. IV, § 16 provides:

> Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Wash. Const. art. XXXI, § 1 provides:

> Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 9, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

SUTTON, J. — In our previous unpublished opinion, we affirmed Andres Sebastian Ferrer's convictions for second degree assault and felony harassment and remanded to the trial court to strike a sentencing condition. *State v. Ferrer*, noted at 195 Wn. App. 1044 (2016), 2016 WL 4371644. We declined to consider a jury instruction issue that Ferrer raised in his Statement of Additional Grounds for Review[1] (SAG). Our Supreme Court granted review "only as to the jury instruction regarding disfigurement," denied all remaining issues, and remanded the matter with instructions that we "address the issue on the merits." *State v. Ferrer*, 187 Wn.2d 1009, 388 P.3d 500 (2017).

In his SAG, Ferrer asserts that the trial court erred by failing to give a jury instruction defining the term "substantial" to supplement and clarify the jury instruction defining "disfigurement." He contends that without a separate definition of "substantial," the jury

[1] RAP 10.10.

instruction defining disfigurement "set[] the bar incredibly low for injury inflicted" and potentially allowed the jury to consider "*any* superficial mark left of any kind as evidence of a felony." SAG at 10. We agree that the trial court erred when it failed to give a jury instruction defining "substantial" to supplement and clarify its meaning in relation to the "disfigurement" instruction, but we hold that this error was harmless. Because the error was harmless, we again affirm.

FACTS

I. BACKGROUND

The background facts for this case are set out in our prior opinion. This case stems from Ferrer's assault of his estranged wife Kristina Ferrer. *Ferrer*, 2016 WL 4371644 at *1-2. During the assault, Ferrer repeatedly punched Kristina[2] "about the head and face." *Ferrer*, 2016 WL 4371644 at *1.

The State charged Ferrer with one count of second degree assault by strangulation or suffocation and/or by reckless infliction of substantial bodily harm and with one count of felony harassment. CP at 10-12; *Ferrer*, 2016 WL 4371644 at *2. At trial, Ferrer admitted to having "punched [Kristina] a number of times." *Ferrer*, 2016 WL 4371644 at *2.

Kristina and other State witnesses testified that Kristina suffered bruising on the side of her head, her ear, her neck, and her shoulder. Her head was "swollen," her ear was bleeding, and she suffered headaches. 2 Report of Proceedings (RP) at 317. Her left hand or wrist was also swollen and painful. The bruising increased over time and did not start to fade for three to four weeks.

[2] Because Ferrer and Kristina share the same last name, we refer to Kristina by her first name for clarity. We intend no disrespect.

The bruising was serious enough that she was unable to go to work because she was required to work with patients.

One law enforcement witness testified that the bruising was very obvious and startling, that the bruising was "really unusual," and that she had rarely seen marks so "severe" after this type of assault. 3 RP at 515. Another law enforcement officer testified that the bruising on Kristina's neck was "very obvious." 3 RP at 501. And a different officer testified that he had investigated "[d]ozens" of strangulation cases and had never before seen marks like this. 3 RP at 533. During this testimony, the trial court admitted numerous photographs of Kristina's injuries taken at the time of the assault and several days after the assault.

Kristina further testified that she also suffered constant headaches for a couple of months following the assault and that she observed vision changes, which she characterized as "seeing stars" periodically for "[a] couple weeks." 2 RP at 321-22. She also testified that when the swelling in her mouth subsided, she lost a dental crown.

II. JURY INSTRUCTIONS

The to convict instruction for the second degree assault charge provided, in part,

> To convict the defendant of the crime of Assault in the Second Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about March 22, 2014, the defendant:
>
> (a) intentionally assaulted Kristina Ferrer and thereby recklessly inflicted *substantial bodily harm*; or
>
> (b) assaulted Kristina Ferrer by strangulation; and
>
> (2) That this act occurred in the State of Washington.

CP at 44 (Jury Instruction 7) (emphasis added).

The trial court also instructed the jury,

> A person commits the crime of Assault in the Second Degree when he or she intentionally assaults another and thereby recklessly inflicts *substantial bodily harm*; or assaults another by strangulation.

CP at 43 (Jury Instruction 6) (emphasis added).

The trial court then defined the terms "substantial bodily harm" and "disfigurement,"

> Substantial bodily harm means bodily injury that involves a temporary but *substantial disfigurement*, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ.

CP at 46 (Jury Instruction 9) (emphasis added).[3]

> "Disfigurement" means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.

CP at 47 (Jury Instruction 10). There was no instruction defining the term "substantial," and neither party requested such an instruction.

Ferrer did, however, object when the State initially proposed the instruction defining disfigurement. He argued that (1) the instruction, which he asserted was not a pattern jury instruction, was unnecessary because the term disfigurement was within the common understanding of the jury, (2) the instruction was too broad and was potentially confusing, and (3) the instruction "may actually lower the burden of . . . proof." 4 RP at 707.

The State responded that the instruction defining disfigurement accurately stated the law and that Division Three of this court held that this instruction was proper in *State v. Atkinson*, 113 Wn. App. 661, 54 P.3d 702 (2002). The State argued that although the term disfigurement might

[3] Ferrer did not object to this instruction.

be commonly understood, "it can mean a lot of different things to a lot of different people." 4 RP at 707. The State asserted that the instruction was necessary in this case because the basis for the substantial bodily harm here was, in part, based on bruising, and the jury may not necessarily understand that bruising could qualify as disfigurement. The trial court agreed and gave the instruction.

The trial court also instructed the jury on the lesser offense of fourth degree assault. The to convict instruction for fourth degree assault required the jury to find that Ferrer had assaulted Kristina—it did not require the jury to find any injury.

The jury found Ferrer guilty of both charges. By special verdict, the jury also unanimously found that Ferrer had inflicted substantial bodily harm. Also by special verdict, the jury stated that it had not been unanimous as to whether Ferrer assaulted Kristina by strangulation. Ferrer appealed.

III. APPEAL AND REMAND

As noted above, in his SAG, Ferrer asserts that the trial court erred by failing to give a jury instruction defining the term "substantial" to supplement and clarify the jury instruction defining "disfigurement." He contends that without a separate definition of "substantial," the jury instruction defining disfigurement "set[ ] the bar incredibly low for injury inflicted" and potentially allowed the jury to consider "*any* superficial mark left of any kind as evidence of a felony." SAG at 10. In our unpublished opinion affirming his convictions, we held that this instructional issue was not preserved. *Ferrer*, 2016 WL 4371644 at *6.

Ferrer petitioned for review with our Supreme Court and raised new issues in his supplemental petition for review. Our Supreme Court granted review "only as to the jury

instruction regarding disfigurement," denied the remaining issues, and remanded the case back to this court with instructions that we "address the issue on the merits." *Ferrer*, 187 Wn.2d 1009 (Order, Feb. 8, 2017).

We acknowledge that Ferrer raised numerous additional arguments for the first time in his supplemental petition for review and that he has also briefed several new arguments in his supplemental brief to this court.[4] Because the Supreme Court does not generally review issues not raised before the appellate court and the Supreme Court's remand order does not direct us to address the issues raised for the first time in the supplemental petition for review, we address only the issue raised in Ferrer's SAG related to the jury instruction issue. *See Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) *(*citing *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993)); *State v. Clark*, 124 Wn.2d 90, 104-05, 875 P.2d 613 (1994) (Supreme Court generally declines to review issues not raised before a lower appellate court), *reversed on other grounds by State v. Catlett*, 133 Wn.2d 355, 361, 945 P.2d 700 (1997).

ANALYSIS

I. LEGAL PRINCIPLES

We review challenges to jury instructions de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). If the legal definition of a term differs from the common understanding of the word, the term is considered a technical term. *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997); *State v. O'Donnell*,

[4] Because Ferrer raised the jury instruction issue in his SAG, we accepted supplemental briefing from both parties on the jury instruction issue.

142 Wn. App. 314, 325, 174 P.3d 1205 (2007). The failure to define a technical term is not a constitutional error. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992).

II. "SUBSTANTIAL" IS A TECHNICAL TERM

To determine if the trial court erred by failing to define "substantial" to supplement and clarify the instruction defining the term "disfigurement," we must first determine whether the term "substantial" is a technical term in the context of a second degree assault charge. *State v. McKague*, suggests that "substantial" is a technical term in this context. 172 Wn.2d 802, 262 P.3d 1225 (2011).

In *McKague*, our Supreme Court considered a challenge to the sufficiency of the evidence to convict McKague of second degree assault. 172 Wn.2d at 805. In so doing, it considered the definition of "substantial" as used in relation to the element "substantial bodily harm." *McKague*, 172 Wn.2d at 805.

The court held that the dictionary definition of "substantial" applied by the Court of Appeals, which included "'something having good substance or actual existence,' would make practically any demonstrable impairment or disfigurement a 'substantial' injury regardless of how minor," and concluded that a different definition of "substantial" applied. *McKague*, 172 Wn.2d at 806 (quoting *State v. McKague*, 159 Wn. App. 489, 503, n.7, 246 P.3d 558 (2011) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (2002). The court further held that the term "substantial," as used in relation to the element substantial bodily harm, "signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." *McKague*, 172 Wn.2d at 806. Although our Supreme Court refused to limit the term "substantial" to any particular dictionary definition, by rejecting the definition

adopted by the Court of Appeals, the Supreme Court demonstrated that not all definitions of "substantial" apply in this context.

Our Supreme Court's conclusion in *McKague* suggests that the common understanding of "substantial," represented by the dictionary definition, is too broad in the context of a second degree assault charge, and the court's holding supports the conclusion that there is a technical definition of the term that must be presented to the jury. Because a dictionary definition reflects a common understanding of a term, it is also possible that the jurors could have had an overbroad understanding of what "substantial" meant in this context. Because each juror's individual understanding of the term could differ, without an instruction defining the term "substantial," the jury would need "to find a common denominator among each member's individual understanding of [the] term[] and to determine on its own just what was [the term's] meaning." *State v. Allen*, 101 Wn.2d 355, 362, 678 P.2d 798 (1984). And "[t]here is no way to ascertain whether [the jurors] used the proper . . . definition[]." *Allen*, 101 Wn.2d at 362.

We hold that in the context of the charge of second degree assault, the term "substantial," in relation to the element "substantial disfigurement," is a technical term. Thus, the trial court erred by failing to provide the jury with a definition of "substantial" to supplement and clarify the definition of "disfigurement." We next examine whether this error was harmless.

III. HARMLESS ERROR ANALYSIS

A trial court's failure to instruct on a term's definition may be harmless error. *State v. Flora*, 160 Wn. App. 549, 554, 249 P.3d 188 (2011). "'A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" *Flora*, 160 Wn. App. at 554 (quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). Having reviewed the photographs of Kristina's injuries that were admitted into evidence and also having reviewed the testimony describing her injuries, we hold that the only conclusion a rational jury could have reached was that the injuries were a temporary but substantial disfigurement given the severity of the bruising.

Serious bruising may be sufficient indication of substantial bodily harm to find second degree assault. *McKauge*, 159 Wn. App. at 502; *State v. Hovig*, 149 Wn. App. 1, 13, 202 P.2d 318 (2009); *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993). Here, the exhibits show extensive, dark bruising around Kristina's neck and jaw area. And the law enforcement witnesses testified that the bruising was very obvious and startling and that it was "really unusual." 3 RP at 515. In fact, two law enforcement officers who had extensive experience with similar assaults described the bruising as some of the most severe bruising they had seen following an assault of this nature. Given the severity of the bruising, we hold that, even assuming that "substantial" is a technical term that must be defined in the court's instructions to the jury, the absence of such an instruction in no way affected the final outcome of this case.

Accordingly, we affirm the conviction.

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

Sutton, J.

SUTTON, J.

We concur:

, A.C.J.

LEE, A.C.J.

Johanson, J.

JOHANSON, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

November 19, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDRES SABASTIAN FERRER, Appellant.	No. 47687-8-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the unpublished opinion on remand filed October 9, 2018, in the above entitled matter. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. LEE, JOHANSON, SUTTON

FOR THE COURT:

SUTTON, Judge

APPENDIX C

Filed
Washington State
Court of Appeals
Division Two

August 16, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

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

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

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

FACTS

A. BACKGROUND FACTS

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

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

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

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

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

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

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

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

B. PROCEDURAL FACTS

1. Trial

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

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

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

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

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

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

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

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

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

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

2. Sentencing

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

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

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

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

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

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

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

ANALYSIS

I. SENTENCING

A. SAME CRIMINAL CONDUCT

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

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

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

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

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

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

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

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

In its ruling, the trial court stated,

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

V VRP 857.

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

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

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

B. SENTENCE LENGTH

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

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

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

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

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

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

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

II. STATEMENT OF ADDITIONAL GROUNDS (SAG)

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

A. ADMISSION OF PHOTOGRAPHS

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

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

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

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

1. Standard of Review

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

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

2. No-Contact Order

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

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

3. Mental Health Treatment

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

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

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

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

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

C. JURY INSTRUCTIONS

1. Jury Instructions Nos. 9 and 10

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

2. *Petrich* Unanimity Instruction

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

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

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

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

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

CONCLUSION

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

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

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

Sutton, J.
SUTTON, J.

We concur:

Johanson, J.
JOHANSON, P.J.

J
LEE, J.

APPENDIX D

INSTRUCTION NO. 9

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 10

"Disfigurement" means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.

APPENDIX E

NO. 93634-0

COA No. 47687-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

ANDRES SEBASTIAN FERRER

PETITIONER

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

SUPPLEMENTAL PETITION FOR REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

Dated this 13th day of OCTOBER, 2016

LAW OFFICE OF MARK W. MUENSTER

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APPENDIX F

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANDRES S. FERRER, Petitioner.	)	No. 93634-0 **ORDER** Court of Appeals No. 47687-8-II

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered at its February 7, 2017, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is granted only as to the jury instruction regarding disfigurement and the case is remanded to the Court of Appeals Division II to address the issue on the merits. Review of all remaining issues is denied.

DATED at Olympia, Washington, this 8th day of February, 2017.

For the Court

Fairhurst, C.J.

CHIEF JUSTICE

APPENDIX G

Filed
Washington State
Court of Appeals
Division Two

May 8, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDRES SEBASTIAN FERRER, Appellant.	No. 47687-8-II ORDER DENYING MOTION TO FILE SECOND SUPPLEMENTAL BRIEF

Appellant filed a motion for permission to file a second supplemental brief in the above-entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. JMJ, LCL, LLS

FOR THE COURT:

Sutton, J.

LISA L. SUTTON, JUDGE

APPENDIX H

Filed
Washington State
Court of Appeals
Division Two

February 21, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDRES SEBASTIAN FERRER, Appellant.	No. 47687-8-II ORDER FOR RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS

In light of the Washington State Supreme Court's remand in this matter, this court directs Respondent to file a supplemental response addressing Appellant's argument in his Statement of Additional Grounds for Review (SAG) challenging the "disfigurement" jury instruction. *See* SAG at 9-11.

Accordingly, Respondent is directed to file a response to Ferrer's SAG argument within 30 days of the date of this order. Appellant may, but is not required to, file a reply to the Respondent's supplemental response within 30 days of service of the Respondent's supplemental response.

FOR THE COURT: Johanson, Lee, Sutton

Sutton, J.

LISA L. SUTTON, JUDGE

APPENDIX I

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

STATE OF WASHINGTON, Respondent v. ANDRES SEBASTIAN FERRER Appellant.	NO. 47687-8-II JOINT MOTION TO CHANGE BRIEFING SCHEDULE

A. IDENTITY OF MOVING PARTIES

Appellant Andres Sebastian Ferrer and Respondent State of Washington jointly seek the relief set out in Section B, *infra*.

B. STATEMENT OF RELIEF SOUGHT

The parties seek a change in briefing schedule set out in this Court's order entered on February 21, 2017. The parties request that Mr. Ferrer file a supplemental brief by no later than April 14, 2017, that the State file a brief in response by May 15, 2017, and that Mr. Ferrer may file an optional reply brief by May 29, 2017.

C. STATEMENT OF FACTS

Mr. Ferrer appealed from convictions from Clark County Superior Court for second degree assault and harassment. Mr. Ferrer's opening brief raised sentencing issues. Mr. Ferrer filed a pro se Statement of Additional Grounds ("SAG"), raising a variety of issues including a challenge to Instructions Nos. 9 & 10, the instructions defining "substantial bodily harm" and "disfigurement." The State's brief responded only to the sentencing issues raised in the opening brief. On August 16, 2016, the

Court issued its unpublished opinion, affirming the convictions and sentences, rejecting issues raised in the opening brief and in the SAG.

Mr. Ferrer filed a petition for review to the Washington Supreme Court (No. 93634-0). Apart from sentencing issues, Mr. Ferrer sought review of issues related to Instructions Nos. 9 and 10. In a supplemental petition, Mr. Ferrer expanded the legal argument surrounding the two instructions, providing a more detailed analysis of the definition of the term "disfigurement." Pages of the supplemental petition are attached to this motion, for the Court's convenience. The State did not file an answer.

On February 7, 2017, the Supreme Court issued the following order:

> Petition for review granted on issue of the jury instruction regarding disfigurement only & remanded to Court of Appeals to address issue on the merits; review of remaining issues is denied.

On February 21, 2017, referring only to the argument raised in the SAG, this Court issued the following order:

> In light of the Washington State Supreme Court's remand in this matter, this court directs Respondent to file a supplemental response addressing Appellant's argument in his Statement of Additional Grounds for Review (SAG) challenging the "disfigurement" jury instruction. See SAG at 9-11.
>
> Accordingly, Respondent is directed to file a response to Ferrer's SAG argument within 30 days of the date of this order. Appellant may, but is not required to, file a reply to the Respondent's supplemental response within 30 days of service of the Respondent's supplemental response.

D. ARGUMENT

The Court's briefing order of February 21st requires the State to respond only to the issues raised in Mr. Ferrer's pro se SAG. However, the Supreme Court's grant of review and remand order were based, in part, on the issues as presented in Mr. Ferrer's Petition for Review and Supplemental Petition for Review.

Given the procedural posture, the parties agree that it makes more sense for Mr. Ferrer to file a supplemental brief in this Court first, raising the issues as framed in his Supreme Court pleadings, and for the State to respond to that briefing, with Mr. Ferrer having the option of filing a reply brief. This way the issues can be fully presented in the Appellant's briefing, and the State can respond to those issues, rather than respond

by anticipating arguments raised in the Supreme Court pleadings that Mr. Ferrer would put into his reply brief.

RAP 10.1(h) provides:

> **Other Briefs**. The appellate court may in a particular case, on its own motion or on motion of a party, authorize or direct the filing of briefs on the merits other than those listed in this rule.

This rule allows for the filing of supplemental briefs in the order suggested in this joint motion.

In terms of timing, given the involvement of Mr. Ferrer's new counsel (Neil M. Fox), the parties ask that the briefing schedule be changed so that the Appellant's Supplemental Brief is due by no later than April 14, 2017; the State's Supplemental Brief of Respondent be due by May 15, 2017, and Mr. Ferrer's optional Supplemental Reply Brief be due by May 29, 2017.

E. CONCLUSION

The parties jointly ask that the Court change the briefing schedule set out in the February 21, 2017, order as follows:

1. Appellant's Supplemental Brief due by April 14, 2017
2. Supplemental Brief of Respondent due by May 15, 2017
3. Appellant's Supplemental Reply Brief may be filed by May 29, 2017.

DATED this 8 day of March 2017.

Respectfully submitted,

NEIL M. FOX
WSBA NO. 15277
Attorney for Appellant

AARON T. BARTLETT
WSBA NO. 39710
Attorney for Respondent

APPENDIX A – PAGES FROM SUPPLEMENTAL PETITION FOR REVIEW

APPENDIX J

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDRES SEBASTIAN FERRER, Appellant.	No. 47687-8-II ORDER ON JOINT MOTION TO CHANGE BRIEFING SCHEDULE

Filed
Washington State
Court of Appeals
Division Two

March 16, 2017

Upon consideration of the parties' joint motion to change the supplemental briefing schedule set out in this court's order entered on February 21, 2017, the court grants the motion.

Appellant's supplemental brief is due no later than April 14, 2017;

Respondent's brief in response is due no later than May 15, 2017; and

Appellant's optional reply brief is due no later than May 29, 2017. Accordingly, it is

SO ORDERED.

FOR THE COURT: Johanson, Lee, Sutton

Sutton, J.

LISA L. SUTTON, JUDGE

APPENDIX K

NO. 47687-8-II

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

STATE OF WASHINGTON, Respondent

v.

ANDRES SEBASTIAN FERRER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00656-0

RESPONSE TO MOTION FOR RECONSIDERATION

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
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issues he raised and "decide the issue regarding Instruction No. 10, defining 'disfigurement' by means of 'beauty.'" Mot. for Rec. at 9.

B. FACTUAL HISTORY

The State incorporates the factual history contained in the State's original Respondent's Brief.

ARGUMENT

I. Because the Supreme Court did not instruct this Court to address each, every, or any of Ferrer's new arguments concerning the "jury instruction regarding disfigurement" this Court properly exercised its discretion and still "address[ed] the issue on the merits" when it ruled only on Ferrer's non-waived SAG claim.

As a preliminary matter, the State agrees that Ferrer's reading of the Supreme Court's remand order is a reasonable one. That this reading has appeal is evidenced by the State signing the joint motion and devoting its merits argument to Ferrer's new claims. But, this Court's decision of which issue to reach complies with Supreme Court's remand order while being more faithful to this case's procedural history. Consequently, this Court should not reconsider its decision.

As established above, Ferrer did initially object to Instruction No. 10 in the trial court. And while his argument did morph as part of his SAG, it was still based in part on the disfigurement instruction and so he

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent v. ANDRES SEBASTIAN FERRER Petitioner.	NO. _____ COA No. 47687-8-II CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December 2018, I electronically filed the foregoing PETITION FOR REVIEW with the Clerk of the Court using the Appellate Courts Portal which will send notification of such filing and an electronic copy to attorneys of record for the Respondent and any other party.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day December 2018, at Seattle, WA.

s/ Alex Fast
Legal Assistant

Law Office of Neil Fox, PLLC
2125 Western Ave., Suite 330
Seattle, Washington 98121
206-728-5440

LAW OFFICE OF NEIL FOX PLLC

December 14, 2018 - 1:37 PM

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