

67604-1

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No. 67604-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY AQUININGOC,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The prosecution properly concedes that the two convictions for tampering with a witness violate double jeopardy.**

The prosecution accurately admits that Aquiningoc's two convictions for tampering with a witness constitute a single unit of prosecution and one conviction must be vacated, as explained in State v. Hall, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010).

2. **The prosecution misunderstands the double jeopardy violation caused by seeking convictions for two counts of assault without requiring the jury to find that one count does not rest on the same act as the other**

Aquiningoc was separately charged with both second and fourth degree assault for acts that occurred on the same day. CP 157. Fourth degree assault is an inferior degree offense, meaning that any conviction for second degree assault necessarily qualifies as a fourth degree assault plus an additional element enumerated in the second degree assault statute, RCW 9A.36.021(1). RCW 9A.36.041(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."); see State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)

(explaining inferior degree crime involves statutes that “proscribe but one offense” that is divided into degrees).

The jury was never instructed that its verdict for the fourth degree assault needed to rest on an act separate and distinct from that on which the second degree assault rested. The to-convict instruction for fourth degree assault directed the jury to find that “on or about April 11, 2011, the defendant assaulted Ashley Aquiningoc.” CP 121 (Instruction 15). Similarly, the to-convict instruction for second degree assault directed the jury to find, “on or about April 11, 2011, the defendant assaulted Ashley Aquiningoc by strangulation.” CP 118 (Instruction 12).

The prosecution concedes error occurred by failing to expressly instruct the jury that the two charged offenses must rest on different acts, but claims that it should be enough that the jury was told that a separate crime is charged in each count. Courts have rejected this proposition. State v. Mutch, 171 Wn.2d 646, 663-64, 254 P.3d 803 (2011); State v. Wallmuller, 164 Wn.App. 890, 896 n.9, 265 P.3d 890 (2011) (“the Mutch court held that the ‘separate crime is charged in each count’ instruction did not ‘sav[e]’ a potential double jeopardy violation. See 171 Wn.2d at 663.”).

Additionally, there were a number of acts that could have qualified as a fourth degree assault and the prosecution never elected which act on which it was relying. See Appellant's Opening Brief at 19. The jury was not instructed that its verdicts must rest on separate and distinct conduct. See CP 104-42. The jury was not instructed that it had to unanimously agree which act constituted fourth degree assault.

Whether or not the prosecution focused its closing argument on its claim that strangulation occurred, it did not explain to the jury that it could not rest its assault in the fourth degree finding on the same incident as the strangulation. When defense counsel argued in his closing that a variety of incidents could have qualified as fourth degree assault, the prosecution did not respond in its rebuttal by focusing the jury on a single specific act on which it was relying to prove fourth degree assault. Neither the instructions nor the closing arguments explained that the jury could not rest its verdict for the greater and inferior degree assault charges on unanimous agreement of the same act.

Finally, the prosecution tries to avoid the double jeopardy problem by insisting Aquiningoc cannot raise this obviously constitutional error on appeal under RAP 2.5(a) because he cannot

show that the error had practical and identifiable consequences. The fallacy of this argument is made plain by the prosecution's own brief, which also concedes that the Supreme Court has explained that it will be "rare" that the failure to instruct the jury that multiple counts of a single offense may not be based on the same act do not violate double jeopardy. Mutch, 171 Wn.2d at 664. When it is not "manifestly apparent to the jury" that its verdicts for the separate charges needed to be based on separate acts, then the "potentially redundant convictions" must be vacated. Id.

Here, it is not "manifestly apparent" that all 12 jurors rested their verdicts on unanimous agreement of separate acts to convict Aquiningoc of fourth and second degree assault based on a single incident that occurred on the same date. Accordingly, the fourth degree assault conviction must be vacated. See Mutch, 171 Wn.2d at 664.

3. By arguing that Aquiningoc's failure to "take the stand" should be used against him, the prosecution impermissibly commented on his right to silence

Where the prosecution's closing argument includes comments that violate the accused person's constitutional rights, the prosecution must prove the error was harmless beyond a

reasonable doubt. State v. Fuller, __ Wn.App. __, __ P.3d __, COA 40593-8-II, Slip op. at 12 (Aug. 8, 2012) (citing State v. Emery, 174 Wn.2d 742, 758, 278 P.3d 653 (2012)). The Fifth Amendment and article I, section 9 guarantee that a person's exercise of his right to remain silent in the face of criminal charges may not be used against him. Id. ("Eliciting testimony about and commenting on a suspect's postarrest silence or partial silence is constitutional error and subject to our stringent harmless error standard.").

The prosecution told the jury that Aquiningoc's failure to "take the stand" showed he was guilty. 2RP 247. On appeal, the prosecution steps as far away as it can from this argument and concocts as scenario in which the prosecution meant something else. The prosecution claims that what they meant to convey was to comment on Aquiningoc's failure to "take the position" that he did not "do that" to the complainant and what it was referring to was Aquiningoc's postarrest letters and not his failure to testify at trial. But this spin on the prosecution's comments is far-fetched and strained.

The prosecutor asked the jury "why he didn't take the stand," and said the reason why he did not take the stand was "[b]ecause he did that to her." 2RP 247.

The jury would not construe the prosecution's remarks to mean taking "a position." Instead, the comments came in the context of referring to defense counsel's inability to muster much of a defense, and this lack of defense included Aquiningoc's failure to testify. 2RP 247. The prosecution's repeated insistence that Aquiningoc's failure to proclaim his innocence in his letters showed he was guilty surely led the jury to want to hear from him. When the prosecution reminded the jury that Aquiningoc had not "take[n] the stand" and "why" was "because he did that to her," the jury was left with the unmistakable proposition that his guilt could be inferred from his failure to testify. 2RP 247.

The State claims free reign to comment upon an accused person's postarrest silence anytime the comments are made to people other than the police. Yet this construction of the right to remain silent is incongruous. Once arrested and charged, a person knows that there is a risk in discussing those charges with other people. Thus, a person's silence about the incident does not mean the person is admitting guilt, which is precisely the improper inference demanded by the prosecution here.

For example, Aquiningoc was not supposed to even contact the complaining witness, and he wrote letters addressed to his

daughter, rather than to the complainant. It appears that Aquiningoc was trying to communicate his desire to reconcile and apologize for his rotten behavior – behavior that most likely had little to do with the alleged assault and more to do with the mean things he had said. It was illogical and unfair for the prosecution to insist Aquiningoc’s guilt could be inferred from his failure to proclaim his innocence when he was trying to reconcile with his wife and child in his letters. It was a clear violation of his right to remain silent to insist that the reason he did not “take the stand” was because “he did that to her.” 2RP 247.

4. The prosecution properly concedes various sentencing errors require a new sentencing hearing and a corrected Judgment and Sentence

The prosecution acknowledges that the trial court erroneously listed offenses for which Aquiningoc was acquitted as convictions in the judgment and sentencing. CP 21. But the prosecution insists this Court should not to remand the case for resentencing based on this error. This argument is incongruous because there are other sentencing errors, also conceded by the prosecution, that require a new sentencing hearing. Thus, a new

sentencing hearing is required for this error as well as other sentencing improprieties.

Another sentencing error that the prosecution properly concedes is the imposition of an exceptional sentence based on the allegation that unscored misdemeanor or foreign offenses resulted in an offender score that was clearly too lenient, under RCW 9.94A.535(2)(b). Response Brief at 34. The prosecution agrees that the court lacked authority to impose an exceptional sentence based on this aggravating factor absent a jury verdict determining the factual issue that the standard range is “clearly too lenient.” Id.; see State v. Hughes, 154 Wn.2d 118, 138-40, 110 P.3d 192 (2005) (“clearly too lenient” is “a factual determination that cannot be made by the trial court following Blakely.”); State v. Saltz, 137 Wn.App. 576, 581, 154 P.3d 282 (2007) (“the ‘clearly too lenient’ conclusion is a factual determination, rather than a legal one”). Thus, this aggravating factor cannot be a basis for an exceptional sentence and therefore, remand for resentencing is necessary. Response Brief at 34.

The third sentencing error conceded by the prosecution is the imposition of a lifetime ban on all contact between Aquiningoc and his child. The prosecution admits that the court was required to

conduct a fact-specific inquiry and explore less restrictive alternatives before permanently denying Aquiningoc is fundamental right to have a relationship with his child. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). This error requires remand for resentencing.

The fourth sentencing error is not conceded by the prosecution. The court imposed an exceptional sentence based on the aggravating factor that the incident was part of an on-going pattern of prolonged abuse or it occurred within sight or sound of a minor child. The prosecution contends there are no due process protections that apply to aggravating factors and therefore they do not require adequate definitions so that the accused and the jury understand what they mean. Response Brief at 35-37. This argument is puzzling because it relies on cases decided before Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (citing due process clause as constitutional protection “of surpassing importance” that is at stake when court imposes increased sentence based on additional facts). Additionally, it mistakenly claims that the vagueness of the aggravating factor is resolved by the Court of Appeals decision in State v. Duncalf, 164 Wn.App. 900, 267 P.3d 414 (2011), rev.

granted, 173 Wn.2d 1026 (2012). It fails to recognize that the Supreme Court granted review of this precise issue in Duncalf.¹

Here, as explained in Appellant's Opening Brief, the essential elements of this aggravating factor were not proved.

The essential elements must be strictly construed as all aspects of penal statutes are. See State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Saying unkind things, and engaging in two prior instances where Aquiningoc was physical but did not injure the complainant do not qualify as the enduring psychological abuse contemplated by the aggravating factor. Similarly, no one testified that the child was in the bedroom and watched or heard the attempted strangulation. The prosecution's allegations do not satisfy the necessary elements of the aggravating factor alleged and meet the constitutional requirements of an exceptional sentence. Accordingly, at the resentencing hearing, Aquiningoc

¹ The Supreme Court's website explains that review was granted to decide: Whether in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), sentence aggravating factors may be challenged as unconstitutionally vague, and if so, whether the factor based on the infliction of bodily harm that "substantially exceeds" the level necessary to satisfy the elements of the crime is unconstitutionally vague.
Available at: http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2012Sep#P198_14348 (last viewed August 9, 2012).

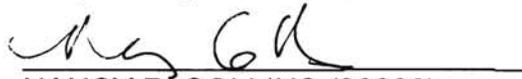
should receive a standard range sentence based on a properly calculated offender score.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Aquiningoc respectfully requests this Court remand his case for further proceedings.

DATED this 9th day of August 2012.

Respectfully submitted,



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RESPONDENT,)	
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)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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