IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 67604-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
ANTHONY S. AQUININGOC,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 28, 2013
_____	)	

Becker, J. — Anthony Aquiningoc was convicted of assaulting his wife, witness tampering, and violating a no-contact order. The court imposed an exceptional sentence and a no-contact order, preventing contact with his child. The State makes several concessions of error, which we accept. Otherwise, we affirm.

According to testimony at trial, Anthony and Ashley Aquiningoc were married in 2007. In 2009, they had a daughter. After their daughter's birth, they began fighting. In January 2011, Aquiningoc moved out of their Bellingham apartment. Ashley's mother moved in. The couple saw one another periodically, but they continued to fight. Two of their fights got physical, resulting in tears to Ashley's shirts.

On April 11, 2011, while Ashley's mother was away at work, Aquiningoc

came to the apartment at Ashley's invitation to discuss moving into a new apartment in Everett. They began to fight. Aquiningoc became angry when their daughter spilled a container of milk. He poured the remaining milk down Ashley's back. He threatened Ashley that he would take their daughter away from her. The fight escalated. Ashley testified that Aquiningoc tore her shirt, dragged her and threw her onto the bed, strangled her with his hands, tore her bedroom apart, and slapped her in the face, causing her to hit her head into the toilet.

Police arrived and arrested Aquiningoc in response to a call from Ashley's mother, to whom Ashley sent text messages during the encounter.

The State initially charged Aquiningoc with one count of second degree assault by strangulation. A domestic violence no-contact order was entered. Despite the order, while in jail, Aquiningoc wrote letters to Ashley.

Before trial, the State filed an amended information, adding 10 more counts. The court dismissed one of these counts after trial. The jury acquitted on two counts. The jury convicted Aquiningoc on the remaining eight counts: second degree assault by strangulation on April 11, fourth degree assault on April 11, four counts of violation of a no-contact order, and two counts of witness tampering. The jury found a domestic violence aggravator as to the second degree assault. At sentencing, the court imposed an exceptional sentence of 102 months.

This appeal followed.

WITNESS TAMPERING

Aquiningoc contends and the State concedes that his two convictions for witness tampering violate the prohibition on double jeopardy. Each conviction was based on letters Aquiningoc wrote to Ashley while he was in jail, trying to persuade her not to testify.

We accept the State's concession of error. The two convictions violate double jeopardy under State v. Hall, 168 Wn.2d 726, 230 P.3d 1048 (2010). The unit of prosecution for witness tampering is "the ongoing attempt to persuade a witness not to testify in a proceeding," not necessarily any single attempt to do so. Hall, 168 Wn.2d at 734. Aquiningoc's letters were an ongoing attempt to persuade a single witness not to testify in a single proceeding, his upcoming trial.

In direct response to Hall, in April 2011, the legislature amended the witness tampering statute. Laws of 2011, ch. 165 § 1. The legislature added the following language to supersede Hall: "For purposes of this section, each instance of an attempt to tamper with a witness constitutes a separate offense." Laws of 2011, ch. 165 § 3; RCW 9A.72.120(3) (2011). Because the amendment did not go into effect until July 22, 2011, it does not apply to Aquiningoc's conduct occurring in April and May 2011. On remand, the court shall vacate one of the witness tampering convictions.

NO "SEPARATE AND DISTINCT ACT" INSTRUCTION

Aquiningoc contends his

convictions for second and fourth degree assault violate the constitutional prohibition on double jeopardy because the jury may have rested both convictions on the same act.

The constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the "same offense." U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal. Mutch, 171 Wn.2d at 661. This court's review is de novo. Mutch, 171 Wn.2d at 662.

Where jury instructions are unclear about the need to find that each count of a particular offense that occurs during the same charging period arises from a "separate and distinct" act in order to convict, the resulting ambiguity of the factual basis for a jury's multiple guilty verdicts potentially exposes the defendant to multiple punishments for a single offense in violation of the double jeopardy clause. Mutch, 171 Wn.2d at 662. When a remedy is required for failure to give a separate and distinct act instruction, the remedy is to vacate the redundant conviction. Mutch, 171 Wn.2d at 664.

Aquiningoc contends he is being punished twice for the same offense because the court's instructions did not clearly inform the jury that the fourth degree assault charge needed to rest on a predicate act "separate and distinct" from the assaultive act on which the second degree assault by strangulation was based. But he does not attempt to show

how a second degree assault by strangulation can ever be the "same offense" as a fourth degree assault. The basis for his argument that a double jeopardy violation occurred is that there was no Petrich instruction requiring the jury to be unanimous as to the act underlying the conviction for fourth degree assault. State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).

This argument is misleading. The requirement of juror unanimity and the prohibition on double jeopardy arise from different constitutional provisions. Compare State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (unanimity requirement rests on article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution) with Mutch, 171 Wn.2d at 661 (double jeopardy prohibition arises from article 1, section 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution). Violation of the two constitutional requirements produces different remedies—a new trial if juror unanimity has not been assured, and vacation of the redundant offense if there is a double jeopardy violation.

Aquiningoc does not separately assign error to the absence of a Petrich instruction for the fourth degree assault charge, for good reason. A Petrich instruction is not needed where the evidence, evaluated in a commonsense manner, indicates a continuing course of conduct rather than a series of distinct acts. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). This is typically the case with repeated acts of assault involving a single victim over a relatively short period of time.

The various minor pushes and

slaps embraced in the charge of fourth degree assault could not have supported the conviction for second degree assault. According to the information and the to-convict instruction for second degree assault, that offense had to have been committed "by strangulation." Closing arguments on both sides unmistakably referred to the alleged strangulation as the basis for the second degree assault charge. Neither side ever described the fourth degree assault in context of the strangulation attempt. Under these circumstances, there was no possibility of being punished twice for the "same offense," and therefore no necessity for an instruction that the assault by strangulation had to rest on an act separate and distinct from the act or acts underlying the fourth degree assault charge.

CLOSING ARGUMENT

In the last moments of her rebuttal argument, the prosecutor argued that Aquiningoc's letters served to "corroborate" Ashley's account of the strangulation because Aquiningoc failed in those letters to deny her allegations:

> So in this case, we don't know medically if Ashley Aquiningoc is someone who is going to have petechiae if she's strangled. We don't know that, but we do know there were several other symptoms that corroborated that, and we know there were letters from Mr. Aquiningoc that corroborate that.
>
> And I agree, if I was [defense counsel], I wouldn't want to touch those letters. I wouldn't even want to get anywhere near them, because the one thing that you can't stand up and argue to the jury is why he didn't say that in his letters. Why he didn't take the stand, I didn't do that to you. You know I didn't do that to you. Why? Because he did that to her.

The defense did not object to these remarks. On appeal, Aquiningoc contends the argument about what he did

not say in his letters to Ashley was an impermissible comment on his right to remain silent. He also contends the last-minute reference to his failure to "take the stand" disparaged his exercise of his constitutional right not to testify and denied him a fair trial.

We review allegedly improper statements by the State in the context of the argument as a whole, the issues involved in the case, the evidence referenced in the statement, and the trial court's jury instructions. State v. Fuller, 169 Wn. App. 797, 812, 282 P.3d 126 (2012).

Where, as here, the defense fails to object to a comment at trial, any error is considered waived unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006), quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Failure to object strongly suggests to a court that the argument did not appear critically prejudicial to the appellant at the time it was made. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

Where the State's remarks violate a defendant's constitutional rights, we analyze the prejudice to the defendant under the more stringent constitutional harmless error standard, which requires the State to prove beyond a reasonable doubt that its misconduct did not affect the verdict. Fuller, 169 Wn. App. at 813. Commenting on a suspect's failure to testify or his postarrest silence is constitutional error that may be raised for

the first time on appeal. RAP 2.5(a); State v. Easter, 130 Wn.2d 228, 236-37, 242, 922 P.2d 1285 (1996).

In this case, the discussion of what the defendant did not say in his letters to Ashley was not a comment on silence. The letters were statements to a private actor, not a police officer. And the prosecutor's use of the phrase "take the stand" did not necessarily refer to the defendant's failure to testify. The State explains, plausibly, that it was a reference to the fact that in the defendant's letters to Ashley, he did not deny strangling her, i.e., when writing to Ashley he did not "take the stand" that the strangling never happened.

The prosecutor's choice of words was unfortunate, especially when seen on a page of transcript. But viewed in context, the statement was not "'of such character that the jury would naturally and necessarily accept it as a comment on defendant's failure to testify.'" State v. Scott, 93 Wn.2d 7, 13-14, 604 P.2d 943 (quoting State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)), cert. denied, 446 U.S. 920 (1980). Because the State's remarks did not violate Aquiningoc's constitutional rights, the harmless error standard does not apply. Because any prejudice could have been neutralized by a curative instruction if there had been an objection, we deem the issue waived by Aquiningoc's failure to object.

EXCEPTIONAL SENTENCE

Aquiningoc contends and the State concedes that resentencing is required because one of the factors

aggravating the sentence on second degree assault was imposed by the court without a required jury finding.

The court sentenced Aquiningoc to 102 months on the second degree assault charge, which was above the standard range.[1] One basis was a domestic violence aggravator found by the jury. The court also found that "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." See RCW 9.94A.535(2)(b).

We accept the State's concession of error. The unscored criminal history aggravator cannot be imposed by the court without a factual determination by the jury that a standard range sentence would be "clearly too lenient." State v. Alvarado, 164 Wn.2d 556, 567-68, 192 P.3d 345 (2008). The court did not state that it would have imposed the same exceptional sentence without this aggravator. We remand for reconsideration of the exceptional sentence.

The jury did find a domestic violence aggravator for the second degree assault charge, based on either an ongoing pattern of abuse or the act occurring within sight or sound of the parties' young daughter. The court relied on this aggravating factor in imposing an exceptional sentence. Aquiningoc contends the aggravator was unconstitutionally vague as applied because the court's

[1] The judgment and sentence lists the standard range to be 63 to 120 months, but the parties agreed at oral argument that the top of the standard range was actually 84 months. Thus 102 months was an exceptional sentence.

instructions did not define for the jury certain terms contained in one of the two alternative prongs.

Aquiningoc did not preserve this argument by objecting below. Because definitional issues in instructions are not constitutional in nature, the issue may not be raised for the first time on appeal. State v. Duncalf, 164 Wn. App. 900, 911, 267 P.3d 414 (2011), review granted, 173 Wn.2d 1026 (2012).

CORRECTION OF CLERICAL ERROR

Three of the eleven charges in the amended information were either dismissed or resulted in an acquittal. These charges were nevertheless listed on Aquiningoc's judgment and sentence as part of a table of "Current Offenses." For all three charges, the column of the table marking the "date of crime" was left blank.

The State concedes this was an error that must be corrected. We accept the concession. Reference to the three charges should be stricken from the judgment and sentence on remand. Because the error is clerical in nature, it does not provide an independent ground for resentencing. The record reflects the court did not consider the charges. Page four of the judgment correctly reflects the two acquittals and the one dismissed charge. The same trial judge presided over both the jury trial and the sentencing hearing. At sentencing, the court correctly noted that there were two witness tampering convictions, not three.

NO-CONTACT ORDER

Aquiningoc contends and the State concedes that the no-contact order should be stricken and the issue remanded for the court to carry out the required analysis of less restrictive alternatives. See In re Pers. Restraint of Rainey, 168 Wn.2d 367, 382, 229 P.3d 686 (2010). A sentencing court may not impose a no-contact order between a defendant and his biological child as a matter of routine practice. The court must consider whether the order is reasonably necessary in scope and duration to prevent harm to the child. Rainey, 168 Wn.2d at 377-82. Less restrictive alternatives such as indirect contact or supervised contact may not be prohibited unless there is a compelling State interest in barring contact. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009); State v. Ancira, 107 Wn. App. 650, 27 P.3d 1246 (2001).

We accept the State's concession of error. The record does not reflect any balancing or consideration of alternatives before the court imposed the no-contact order. On resentencing, the court should engage in such an analysis on the record.

STATEMENT OF ADDITIONAL GROUNDS

Aquiningoc raises numerous issues in a 21-page statement of additional grounds. They generally fall into the categories of due process violations, double jeopardy violations, prosecutorial misconduct, and ineffective assistance of counsel. We find no basis that warrants additional review.

The case is remanded for vacation of one witness tampering conviction, reconsideration of the exceptional sentence, and consideration of alternatives to the no-contact order concerning the defendant's daughter. In all other respects, the judgment and sentence is affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Schindler, J.