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Supreme Court No. 100640-3
(Court of Appeals No. 54512-8-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DIEGO MARTINEZ MARTINEZ,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Diego Martinez Martinez asks this Court to review the opinion of the Court of Appeals in *State v. Martinez Martinez*, No. 54512-8-II (filed January 11, 2022). A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In order to safeguard the constitutional right to a unanimous jury verdict, the State must present sufficient evidence to prove beyond a reasonable doubt each alternative means of committing a crime that it presents to the jury. If sufficient evidence does not support each alternative, reversal is required unless there is a "particularized expression" of juror unanimity. Here, the jury was instructed on both the deadly weapon and kidnapping alternative means of committing first degree rape. However, the State failed to prove the deadly weapon alternative means when, after initially testifying that she saw a knife during the sexual assault, the alleged victim recanted her earlier testimony and repeatedly clarified she did

not see the knife until after the assault was complete. Should this Court accept review where (1) the conviction for rape violated Mr. Martinez Martinez's right to a unanimous jury, and (2) whether deference to jury determinations regarding credibility includes assuming jurors disregarded a sworn witness's recantation is an issue of substantial public interest? RAP 13.4(b)(3), (4).

2. Article IV, section 16 prohibits judges from commenting on the evidence, including the credibility of witnesses. Should this Court accept review where (1) the court's redaction of Ms. McKinney's name in the to-convict instructions clearly communicated to the jury the court's resolution of a disputed fact, and (2) whether a court may use redactions in jury instructions is a significant question of constitutional law and an issue substantial public interest? RAP 13.4(b)(3), (4).

3. Mr. Martinez Martinez has a right to due process, including the presumption of innocence. Should this Court

accept review where the redaction of Ms. McKinney's name in the to-convict instruction undermined this presumption and relieved the State of its burden of proof? RAP 13.4(b)(3).

4. A statute fixing a sentence may be void for vagueness where it fails to give fair notice of the conduct it punishes or is so standardless as to invite arbitrary enforcement. The particular vulnerability aggravator creates arbitrary results by inviting jurors to imagine the "typical" version of the crime. Should this Court accept review where (1) Mr. Martinez Martinez's exceptional sentence was predicated on an unconstitutionally vague aggravator, and (2) whether *State v. Baldwin*'s prohibition on challenging aggravators is valid in light of the United States Supreme Court's decision in *Blakely v. Washington* is a significant question of constitutional law and a matter of substantial public interest? RAP 13.4(b)(3), (4).

5. A trial court must correctly calculate a defendant's offender score and standard range sentence prior to imposing an exceptional sentence. Here, the trial court imposed a sentence

based, in part, upon an offender score that included a prior conviction for possession of a controlled substance, held to be unconstitutional in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Should this Court accept review where the Court of Appeals found the imposition of an exceptional sentence in this case precluded resentencing? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

After returning home later than usual, Shenika McKinney told her mother that she was raped by a homeless man. RP 610-11. Ms. McKinney is autistic and functions approximately at the level of a seven-year-old. RP 614. Although she does not live independently, she takes public transportation, gets herself to-and-from appointments, and cooks for herself. RP 526-28, 601, 605, 686.

The following day, Ms. McKinney was evaluated by a sexual assault nurse at the local hospital. RP 700-01, 711-12. Ms. McKinney told the nurse that the man had a knife, and the nurse observed superficial cuts on Ms. McKinney's hands. RP

758, 808-09. The exam revealed the presence of Mr. Martinez Martinez's deoxyribonucleic acid (DNA). RP 945.

The State charged Mr. Martinez Martinez with first degree rape, alleging the alternative elevating means of using or threatening to use a deadly weapon and/or kidnapping Ms. McKinney. CP 7-8. The charge included a deadly weapon enhancement and the aggravating factor that Ms. McKinney was a particularly vulnerable victim. CP 7-9.[1]

At trial, Ms. McKinney testified that Mr. Martinez Martinez approached her while she was waiting for a bus. RP 557-58. Mr. Martinez Martinez appeared intoxicated and asked Ms. McKinney for money. RP 586, 593. The two ended up in Mr. Martinez Martinez's tent in a nearby encampment, where he again allegedly asked her for money and sexually assaulted

[1] The State also charged Mr. Martinez Martinez with first degree kidnapping, but the Court of Appeals reversed the conviction as a violation of double jeopardy. App. at 12. Mr. Martinez Martinez does not seek review of that portion of the court's ruling.

her.[2] RP 531-34. Ms. McKinney initially testified that Mr. Martinez Martinez held the knife in his hand during the sexual assault. RP 538, 566-67. However, she later clarified that she did not see the knife until the assault was over and she was trying to leave the tent. RP 588-91. She confirmed multiple times during both cross-examination and redirect that she did not see the knife until she was leaving. RP 588-91, 594. She also recanted her earlier testimony that Mr. Martinez Martinez displayed the knife during the sexual encounter, stating that her prior testimony was untrue. RP 594.

The court instructed the jury that it could find Mr. Martinez Martinez guilty of first degree rape if it found he either (a) used or threatened to use a deadly weapon or (b) kidnapped Ms. McKinney. CP 33. The jury was further instructed that it need not be unanimous as to the alternative means proved, provided each juror agreed at least one of the

[2] Mr. Martinez Martinez has consistently maintained his innocence. *E.g.* RP 873.

elevating factors was proved beyond a reasonable doubt. CP33. The jury found Mr. Martinez Martinez guilty as charged, including the enhancement and aggravating factor. CP 65-67, 69-71.

Although Mr. Martinez Martinez's standard range sentence was 138-184 months, the court imposed a base sentence of 240 months' confinement based on the particular vulnerability aggravating factor.[3] RP 141-42.

The Court of Appeals affirmed Mr. Martinez Martinez's conviction for rape. App. at 1. The court additionally found Mr. Martinez Martinez was entitled to have his offender score reduced pursuant to *State v. Blake*, but stated he was not eligible for resentencing. App. at 2.

[3] The court imposed a total minimum confinement of 264 months, including the deadly weapon enhancement. CP 141-42.

D. ARGUMENT

1. **This Court should grant review because (1) the State's failure to present sufficient evidence as to an alternative means violated Mr. Martinez Martinez's constitutional right to a unanimous jury, and (2) the Court of Appeals improperly found deference to jury determinations on credibility includes assuming jurors disregarded a sworn witness's recantation.**

    a. *A jury may not be instructed on an alternative means of committing a crime that is unsupported by the evidence.*

The Washington Constitution guarantees criminal defendants the right to a unanimous jury verdict. Const. art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Jury unanimity is necessary to "secure the integrity and reliability of jury deliberations and verdicts." *State v. Woodlyn*, 188 Wn.2d 157, 163, 392 P.3d 1062 (2017) (citing *Richardson v. United States*, 526 U.S. 813, 819, 119 S. Ct. 1707, 143 L. Ed. 2d (1999)). When a jury is instructed that it may convict a defendant based upon alternative means of committing a single crime, the jury need not be unanimous as to the means as long as each alternative is supported by sufficient

evidence. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). If, however, the evidence is insufficient to support any of the means, the conviction must be reversed unless the record shows the jury unanimously agreed on a supported means. *Woodlyn*, 188 Wn.2d at 165. Sufficient evidence exists where a rational juror could have found every element proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The State did not present sufficient evidence to prove beyond a reasonable doubt that Mr. Martinez Martinez used or threatened to use a deadly weapon.

First degree rape is an alternative means offense. *See State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987). To prove rape in the first degree, the State must establish sexual intercourse by forcible compulsion in addition to one or more of four alternative elevating circumstances. *Id*. RCW 9A.44.040 provides,

> (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse

> with another person by forcible compulsion where the perpetrator or an accessory:
> (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
> (b) Kidnaps the victim; or
> (c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or
> (d) Feloniously enters into the building or vehicle where the victim is situated.

In this case, the court instructed the jury that it could convict Mr. Martinez Martinez based upon the deadly weapon and kidnapping alternative means. CP 33.

The evidence, however, was insufficient to establish that Mr. Martinez Martinez used or threatened to use a deadly weapon during the sexual assault because the assault was complete before any weapon was displayed. A defendant "uses" a deadly weapon for the purposes of RCW 9A.44.040(1)(a) where he points the weapon at the victim or actually attempts to use the weapon to harm the victim during the offense. *See State v. Bright*, 129 Wn.2d 257, 266 n.31, 916 P.2d 922 (1996)

(citing *State v. Hentz*, 99 Wn.2d 538, 541, 663 P.2d 476 (1983)).

The timing is critical: the deadly weapon is not ancillary to the crime – it is the "form of forcible compulsion." *See State v. Brown*, 127 Wn.2d 749, 756, 903 P.2d 459 (1995) (defendant's display of a weapon after the sexual assault was in progress was sufficient to elevate offense). Although the weapon need not be the initial or sole form of forcible compulsion, "[u]nder [RCW 9A.44.040(1)], the use or threatened use of a deadly weapon ***during the assault constituting the rape*** is an aggravating factor elevating the crime to first degree rape. The plain language of the statute supports no other conclusion." *Id.* (emphasis added).

Here, the evidence shows Mr. Martinez Martinez did not produce the knife until after the sexual encounter was complete and Ms. McKinney was attempting to leave the vicinity. Although Ms. McKinney initially testified that Mr. Martinez Martinez was holding the knife during intercourse, she later

explained she did not see the knife until she was leaving the tent. RP 588. Recognizing the legal import of this testimony, both attorneys repeatedly asked her when exactly she saw the knife. *See* RP 588-91, 594. Over and over again, both on cross-examination and redirect, she confirmed she did not see the knife until she was leaving the tent. RP 588-91, 594. Most critically, she stated that her original testimony was not true. RP 594. There were no corroborating circumstances suggesting her initial testimony was more accurate than her later testimony. It is simply not rational to isolate her earlier testimony as credible while disbelieving her multiple clarifications and explicit recantation.

Although the knife was displayed sometime shortly after the sexual encounter, a single incident can involve multiple, completed crimes. Where one crime is complete, another may start the next moment. *State v. Allen* is instructive. 94 Wn.2d 860, 621 P.2d 143 (1980), *abrogated on other grounds by State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983). In *Allen*, the

defendants pointed a rifle at a convenience store clerk standing outside the store and demanded he get in their car. *Id.* at 861. After retrieving the cash drawer from the register, the defendants immediately left the store, driving the clerk three blocks before dropping him off. *Id*. The defendants were convicted of both kidnapping and robbery. *Id*.

This Court rejected the defendants' argument that the trial court should have dismissed the kidnapping charge as incidental to the robbery. *Id*. at 862. Because the plain language of the statutes established that robbery and kidnapping encompassed different elements of proof, once the money was obtained by force, the robbery was complete. *Id*. at 862-64. Although the defendants were also guilty of kidnapping by abducting the clerk immediately following the robbery, the "first crime [] had come to an end before the second crime [] began." *Id*. The sequence matters. Displaying a knife after a sexual assault may amount to criminal conduct, but it is not the conduct necessary to elevate an offense to first degree rape.

The Court of Appeals acknowledged that "[t]here is no question that SM's testimony was contradictory," but summed up the issue as one of credibility requiring deference to the jury. App. at 9. While it may be true that the jury is responsible for assessing credibility where testimony is conflicting, the Court of Appeals wrongly extended the general deference to jury assessments to situations where testimony is ***recanted***. Conflicting testimony is fundamentally different than recanted testimony. In the first instance, a juror decides which version to believe; in the second, the witness tells the jury which version is true. No rational juror could find beyond a reasonable doubt that Ms. McKinney's initial testimony was true while finding her multiple clarifications – in response to questions by both the prosecutor and defense – and recantation are not credible.

c. The absence of a particularized expression of juror unanimity requires reversal of the conviction and corresponding deadly weapon enhancement.

"When one alternative means of committing a crime has evidentiary support and another does not, courts may not assume the jury relied unanimously on the supported means." *Woodlyn*, 188 Wn.2d at 162. Absent some form of colloquy or explicit instruction, it is "impossible to rule out the possibility" that a member of the jury relied on the unsupported means and the conviction must be reversed. *Id.* at 166.

There was no particularized expression of unanimity in this case. The State argued the jury could convict Mr. Martinez Martinez under both the deadly weapon and kidnapping alternative means, and the court instructed the jury on each means. CP 33. This Court may not assume the jury relied upon the supported means. *Woodlyn*, 188 Wn.2d at 166. Review is warranted.

2. This Court should accept review because it is long past time to revisit *State v. Baldwin*'s holding that aggravating factors are not subject to vagueness challenges.

The trial court imposed an exceptional sentence in Mr. Martinez Martinez's case. Based upon his criminal history, the standard range for Mr. Martinez Martinez was 138-184 months' confinement.[4] CP 139. The court granted the prosecutor's request for an upward exceptional sentence and sentenced Mr. Martinez Martinez to a minimum of 240 months in prison based upon the unconstitutionally vague "particular vulnerability" aggravating factor under RCW 9.94A.535(3)(b). CP 80, 141.

a. The void for vagueness doctrine applies to aggravating factors.

The due process clauses of the federal and state constitutions prohibit the deprivation of life, liberty, or property

[4] Because the sentence for first degree rape is indeterminate, Mr. Martinez Martinez's release date is subject to review by the Indeterminate Sentencing Review Board (ISRB). The standard range for an indeterminate sentence is the statutory minimum for the offense.

"under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015); U.S. Const. amend XIV; Const. art. I, § 3. A party may challenge both statutes defining elements of crimes and statutes fixing sentences as void for vagueness. *Johnson*, 576 U.S. at 596 (citing *United States v. Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)).

In this case, the Court of Appeals ruled Mr. Martinez Martinez could not even challenge his sentence as unconstitutionally vague. App. at 14-15. While the court relied on this Court's outdated opinion in *State v. Baldwin*, which found aggravating factors are not subject a vagueness challenge, much has changed in the nearly 20 years since *Baldwin* was decided. 150 Wn.2d 448, 461, 78 P.3d 1005 (2003). *Baldwin* was based on the premise that aggravating factors amounted to discretionary sentencing guidelines that do

not "inform the public of penalties" or "vary the statutory maximum and minimum penalties[.]" *Id*. at 459. Because the guidelines did not require a certain outcome, they did not give rise to a constitutionally protected liberty interest subject to due process protections against arbitrary enforcement. *Id*. at 461.

However, in light of the United States Supreme Court's rulings in *Blakely v. Washington*[5] and *Alleyne v. United States*,[6] it is now settled that "any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime" which must be found by a jury. *Alleyne*, 570 U.S. at 111 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Aggravating factors under RCW 9.94A.535 clearly fall within this category. In response to *Blakely*, the Washington State Legislature amended the Sentencing Reform Act (SRA),

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[5] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[6] *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2131, 186 L. Ed. 2d 114 (2013).

setting the statutory maximum for an offense as the upper end of standard range absent a finding of an aggravating circumstance by a jury. RCW 9.94A.537. Far from merely guiding the sentencing court as to the range of possible sentences, the singular function of aggravating factors under RCW 9.94A.535(3) is to modify the statutory maximum (or minimum) sentence from the upper end of the standard range to a higher sentence based upon additional factual findings. *See* RCW 9.94A.535. The existence of the aggravating factor therefore increases the statutory maximum from the standard range to that designated under RCW 9A.20.021 (providing maximum penalties for each class of offense).

Under *Blakely*, *Apprendi*, and *Alleyne*, aggravators are elements of the offense implicating a defendant's rights not only under the Sixth Amendment, but also under the Fourteenth. In short, aggravating factors now give rise to the constitutionally protected liberty interest found lacking in

Baldwin and are subject to the due process prohibition on vague laws.

Ultimately, this Court has yet to address "whether *Baldwin* survives *Blakely*." *State v. Duncalf*, 177 Wn.2d 289, 296, 300 P.3d 352 (2013). Applying the underlying reasoning in *Baldwin* to the amended SRA should achieve a different result today. Indeed, this Court has signaled its understanding that *Baldwin* no longer applies and aggravators are subject to the prohibition on vague laws. In two post-*Blakely* cases, the Court assumed the defendants could bring void-for-vagueness challenges, reached vagueness arguments on their merits, and noted it need not reach the question of whether *Blakely* abrogated *Baldwin*. *See State v. Murray*, 190 Wn.2d 727, 732 n.1, 416 P.3d 1225 (2018); *Duncalf*, 177 Wn.2d at 298. This Court should accept review because it is finally time to address whether aggravating factors in the amended SRA are subject to vagueness challenges.

b. The particular vulnerability aggravator is void for vagueness.

The particular vulnerability aggravator permits arbitrary application and does not provide fair notice of what conduct will expose a person to an exceptional sentence. The WPIC committee conceded as much in its Comment to the pattern instruction, stating "[n]one of these cases have set out any definition of this term. The committee has not attempted to craft a definition." 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.11 Comment (4th ed.).

Johnson v. United States further supports this conclusion. There, the court applied the vagueness doctrine to the residual clause of the federal Armed Career Criminal Act (ACCA). *Johnson*, 576 U.S. at 593. When applicable, this provision increased a sentence beyond the statutory maximum if the defendant had three or more convictions for a "violent felony." *Id.* Under the residual clause, "violent felony" included a crime that "involves conduct that presents a serious potential risk of

physical injury to another." *Id.* at 594. The Court held that imposing an increased sentence under this provision violated the prohibition against vague laws. *Id.* at 597.

Two features of the clause made it vague. *Id.* at 597. First, a juror must ascertain the "ordinary" version of the offense. *Id.* This was inherently speculative. How, the Court asked, was this to be done? *Id.* By "[a] statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Id.* (internal quotation omitted). Second, it was unclear what level of risk made a crime qualify as a violent felony. *Id.* at 598. "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

Similarly, the particular vulnerability aggravator asks jurors to determine both the ordinary version of the crime and the vulnerability of the typical victim. This typicality inquiry –

particularly combined with the amorphous concept of "vulnerability" – is inherently speculative. It grants the jury with an "inordinate amount of discretion" and makes juror determinations unpredictable and arbitrary. *State v. Myles*, 127 Wn.2d 807, 812, 903 P.2d 979 (1995). Jurors are free to find this aggravator based on their own "personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). The Court should accept review and hold the aggravator void for vagueness, requiring reversal of Mr. Martinez Martinez's exceptional sentence.

3. This Court should accept review to address the legality of redactions in jury instructions and because the redaction of Ms. McKinney's name in the to-convict instruction constituted a comment on the evidence and deprived Mr. Martinez Martinez of his right to due process.

a. The trial court commented on the evidence when it redacted Ms. McKinney's name in the to-convict instruction in violation of article IV, section 16.

Here, the trial court adopted to-convict instructions that conspicuously concealed Ms. McKinney's identity by

repeatedly using her initials in lieu of her name. CP 33, 44. This constituted a powerful and prejudicial comment on the evidence.[7] Article IV, section 16 of the Washington Constitution states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. jury instruction constitutes an improper comment on the evidence when it reveals the court's personal evaluation of the credibility, weight, or sufficiency of evidence presented at trial. *See State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). "[T]he

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[7] Instruction No. 8, the to-convict instruction for first degree rape, provided:

> To convict the defendant of the crime of RAPE IN THE FIRST DEGREE (COUNT 1), each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 17th day of June, 2018, the defendant engaged in sexual intercourse with S.M.;
> (2) That the sexual intercourse was by forcible compulsion;
> (3) That the defendant:
> (a) Used or threatened to use a deadly weapon or what appears to be a deadly weapon or
> (b) Kidnapped S.M.[.]

CP 33.

court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

In summarily rejecting Mr. Martinez Martinez's argument, the Court of Appeals relied on Division One's reasoning in *State v. Mansour*, 14 Wn. App. 2d 323, 329-30, 470 P.3d 543 (2020). App. at 15. Yet the reasoning in *Mansour* is fundamentally flawed. Specifically, the *Mansour* Court concluded the redaction of the name of a child victim did not constitute a comment on the evidence because the "name of the victim of child molestation" was not an element of the crime to be decided by the jury. 14 Wn. App. at 329-30. This conclusion constitutes tunnel vision where, as in this case, the court identified an adult witness in a way that plainly conveyed to the jury that she is the victim of a sexual assault, the ultimate issue in dispute.

Mansour's reliance on *State v. Levy* and *State v. Alger* was similarly misplaced. *Id*. *State v. Levy* involved the inclusion of a name in the jury instruction, not the court's obvious ***redaction*** of a name. 156 Wn.2d at 721. If Ms. McKinney's full name, rather than a redaction, were used in the "to-convict" instruction in this case, there would be no comment on the evidence. Meanwhile, the facts in Mr. Martinez Martinez's case are vastly different from those in *State v. Alger*, where the court made a single, mid-trial reference to the "victim" when discussing a stipulation between the parties, and defense counsel declined a curative instruction. 31 Wn. App. 244, 249, 640 P.2d 44 (1982). At no point did the court conclude the use of the term "victim" in a jury instruction was proper.

The reality is that potential jurors read newspaper articles and immediately understand that the ***reason*** behind the redaction is to protect the victim. *See* Philip B. Corbett, *When We Name Names*, The N.Y. Times, April 15, 2017 (available at

https://www.nytimes.com/2017/04/15/insider/sexual-assault-naming-victims-standards.html) ("It has long been standard practice in journalism not to name victims or possible victims in [sexual assault] cases[.]"). Even if the jurors did not explicitly mull over why the court would have used a pseudonym, "S.M." triggers a reflexive awareness that the redaction is to protect her. By using her initials, the court accorded her the status of a sexual assault victim.

Tellingly, the use of initials is the ***exact method*** our appellate courts adopt when they want to protect the identity of victims of sexual assault after a conviction. *See* Gen. Order 2011-1 of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash. Ct. App.), available at http://www.courts.wa.gov/appellate_trial_courts/; Gen. Order of Division III, *In Re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App.), available at https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genor

ders_orddisp&ordnumber=2012_001&div=III. To a jury, there is no other conceivable purpose for using an alleged victim's initials in a case involving a sex offense. Especially after Ms. McKinney testified under her full name at trial, every juror who then saw initials in place of her name could only logically conclude that the redaction was a method of protecting her not just as a victim, but as a victim of sexual assault.

Whether a court can redact the names of alleged victims in a to-convict instruction – thereby affording them the status of a post-conviction victim – is a significant question of constitutional law and raises an issue of substantial public interest. This Court should accept review.

b. The redaction undermined the presumption of innocence demanded by the Due Process Clause.

"The presumption of innocence is the bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007); U.S. Const. amends VI, XIV. Jury instructions must accordingly convey the State's

burden to prove every element beyond a reasonable doubt. *Id*. (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)). Reversal is warranted where the jury is instructed in a manner that relieves the State of this high burden of proof as to any element. *See Bennett*, 161 Wn.2d at 307.

The modification of the pattern jury instructions to palpably conceal Ms. McKinney's identity effectively instructed the jury on her status as a victim. It was then up to Mr. Martinez Martinez to prove his innocence, a burden he does not bear. The error deprived Mr. Martinez Martinez of his right to due process and a fair and impartial jury. This Court should accept review.

4. This Court should grant review because the Court of Appeals deprived Mr. Martinez Martinez of his right to be sentenced based upon a correct offender score.

When imposing an exceptional sentence, a court must "consider the presumptive punishment" under the SRA "before

it may adjust it up" based on aggravating facts. *State v. Parker*, 132 Wn.2d 182, 187, 937 P.2d 575 (1997). Thus, the sentencing court must correctly determine the defendant's offender score and standard range prior to imposing a sentence outside of that range. *Id*. at 188. "A sentence that is based on an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002).

An error in calculating the standard range is likely to affect the outcome, even where the court imposed an exceptional sentence. *Parker*, 132 Wn.2d at 190. Because the standard range is intended as the departure point, there is a "great likelihood that the judge relied, at least in part, on the incorrect standard ranges" in calculating an exceptional sentence. *Id*. Remand is therefore required unless the record is "expressly clear" that the court would have imposed the same sentence. *Id*. at 192.

In this case, the record does not establish that the sentencing court would have imposed the same sentence under a correct offender score. While finding there were substantial and compelling circumstances justifying an exceptional sentence, the court also relied on Mr. Martinez-Martinez's incorrect offender score in determining his "presumptive punishment" before imposing the sentence. *See* CP 159. The court admitted records of prior convictions as exhibits for the purposes of sentencing. RP 1140. The court's findings of fact discussed Mr. Martinez-Martinez's criminal history, which convictions "wash" and which should be included in his offender score, and calculated the standard range according to that offender score. CP 159. The court additionally calculated Mr. Martinez-Martinez's standard range when including the 24-month deadly weapon enhancement. CP 159. Finally, the court did not specify that the sentence was independent of Mr. Martinez-Martinez's offender score. This Court should not

assume the sentencing court disregarded his standard range and grant review.

E. CONCLUSION

For the reasons stated above, this Court should grant review and reverse Mr. Martinez Martinez's conviction.

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains 4846 words (word count by Microsoft Word).

DATED this 10th day of February, 2022.

Respectfully submitted,

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

January 11, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DIEGO MARTINEZ-MARTINEZ, aka DIEGO MARTINEZ MARTINEZ, Appellant.	No. 54512-8-II UNPUBLISHED OPINION

MAXA, P.J. – Diego Martinez Martinez appeals his convictions for first degree rape and first degree kidnapping and his exceptional sentence based on the victim's particular vulnerability. The convictions arose from an incident in which Martinez Martinez approached a developmentally disabled woman who was waiting for the bus and then kidnapped and raped her in his tent in the woods.

We hold that:

(1) there was sufficient evidence to support the deadly weapon alternative means of the first degree rape conviction based on the victim's testimony, even though the testimony contradicted itself;

(2) the first degree kidnapping conviction merged with the first degree rape conviction in violation of double jeopardy because the kidnapping had no independent purpose from the rape and did not result in a separate injury;

(3) there was sufficient evidence to show that Martinez Martinez knew or should have known that the victim was particularly vulnerable and that the victim's particular vulnerability was a substantial factor in the commission of the offenses;

(4) the particularly vulnerable aggravating factor is not subject to a due process vagueness challenge;

(5) the use of the victim's initials in the to-convict jury instructions or court documents did not violate Martinez Martinez's constitutional rights;

(6) Martinez Martinez is entitled to have his offender score reduced by one point under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) because one of his prior convictions was for unlawful possession of a controlled substance, but he is not entitled to resentencing because the record is clear that the trial court would have imposed the same exceptional sentence regardless of his offender score; and

(7) the record is unclear as to whether the trial court intended to impose community custody supervision fees as a legal financial obligation (LFO).

Accordingly, we affirm Martinez Martinez's first degree rape conviction, but we remand for the trial court to (1) strike Martinez Martinez's first degree kidnapping conviction, (2) amend Martinez Martinez's offender score in the judgment and sentence, and (3) consider the imposition of community custody supervision fees.

FACTS

Background

SM was a 28-year-old female at the time of the incident. She was autistic, developmentally disabled, and had the vocabulary and mental ability of a five- to 10-year-old child. SM generally exhibited little emotion on her face, kept her eyes down during a normal

conversation, had a very soft voice, had child-like vocabulary, and did not speak often. SM had never lived alone. Because SM was unable to manage money by herself and was susceptible to outside influences from other people who wanted to financially exploit her, the Support Services for the Developmentally Disabled (SSDD) managed her finances.

Martinez Martinez lived in a tent in a homeless encampment located in the woods in Tacoma.

The Incident

In June 2018, SM was standing at a bus stop when Martinez Martinez began following her. Martinez Martinez had been drinking at the time. Martinez Martinez told SM to go to the nearby smoke shop across the street with him, where he bought beer.

After leaving the smoke shop, Martinez Martinez told SM to go to the woods with him. Martinez Martinez raped SM three times in his tent. At some point, Martinez Martinez displayed a knife and SM grabbed it, cutting her hands during the process. While Martinez Martinez was raping SM, he asked her for money several times. SM told Martinez Martinez that she did not have any money.

SM eventually was able to leave Martinez Martinez's tent and went home. She told her mother that she had been kidnapped and raped. The next day, SM went to the SSDD office, where she told Sandra Bayer, the executive director for SSDD, that she had been kidnapped and raped. Bayer called the police.

Officer Matthew Watters interviewed SM about what had happened the night before. He then took her to the local hospital to have a rape kit completed. At the hospital, nurse Kathi Lewis, a board certified sexual assault nurse examiner, conducted an examination of SM and

noted that she had lacerations on both hands. Stacia Adams, a child forensic interviewer, attempted to interview SM.

The State charged Martinez Martinez with first degree rape and sexually motivated first degree kidnapping. Both charges alleged that Martinez Martinez was armed with a deadly weapon and that SM was particularly vulnerable. The first degree rape charge was based on two alternative means: the use or threat of using a deadly weapon and/or kidnapping. The first degree kidnapping charge alleged that the kidnapping was done to facilitate the crimes of rape and/or robbery.

Jury Trial

At trial, SM testified using her full name, and she was referred to by her full name throughout the trial. SM initially testified several times during direct-examination and cross-examination that she saw Martinez Martinez's knife while she was being raped. She testified as follows:

> Q: Okay. When did you first see the knife?
> A: In his hand.
> Q: Okay. And did he -- where did he have it positioned?
> A: In his left hand.
> Q: Okay. And was -- did you see it?
> A: Yeah.
> Q: How close did the knife get to you?
> A: Right here.
> Q: To your chest?
> A: Yeah.

5 Report of Proceedings (RP) at 532-33.

> Q: Where was the knife when he was raping you?
> A: In his hand.

5 RP at 538.

> Q: So you said, earlier today, that while he was raping you, he had the knife in his hand. Is that true?

> A: Um-hum. Yeah.
> Q: Okay. So we're clear, when you say he was raping you, is that the part where his private part was inside your private part?
> A: Yeah.
> Q: And while that was going on, he at the same time had a knife in his hand?
> A: Yeah.
> . . . .
> Q: And at the same time, he had a knife in his hand while he was raping you; is that true?
> A: Yeah.

5 RP at 565-67.

Toward the end of cross-examination, SM testified for the first time that Martinez Martinez pulled out the knife as she was leaving the woods and after he had raped her. From that point forward, SM began to testify for the remainder of cross-examination and redirect that Martinez Martinez did not have the knife his hands while he was raping her.

Bayer and SM's mother both testified that SM functioned either at the level of a seven- or 10-year-old child. Bayer explained that SSDD distributed only small sums of money each week in part because SM was easily susceptible to people who wanted to financially exploit her.

Watters testified that when he interviewed SM, he had to ask her very basic questions, she had very limited vocabulary, and she was almost non-verbal in her responses, providing only one or two word answers. Watters testified that SM exhibited no emotions during their conversation and made limited eye contact with him. Another police officer involved in the investigation likewise testified that SM appeared developmentally delayed to him.

Lewis testified that she had been told before meeting SM that she was developmentally disabled and that her conversation with SM affirmed that fact. Lewis explained that she immediately noticed that SM had trouble understanding the examination procedure and could verbalize her thoughts with only a couple of words at a time. Lewis testified that she had to ask direct questions and simple vocabulary to piece together what had happened to SM.

Adams testified that she had been told before her interview with SM that she functioned around the age level of a seven-year-old child. Adams testified that she noticed SM's mental acuity deficiency as soon as SM started speaking and that she believed that SM functioned closer to a five-year-old. Adams stated that during the entire interview, SM had trouble answering her questions and would give an answer that did not track the question being asked.

Jury Instructions

The to-convict jury instructions used SM's initials, rather than her full name. The trial court instructed the jury that it could find Martinez Martinez guilty of first degree rape if it found that he had either (a) "used or threatened to use a deadly weapon or what appear[ed] to be a deadly weapon" or (b) "kidnapped [SM]," and that the jury did not need to be unanimous as to which alternative means had been proven beyond a reasonable doubt. Clerk's Papers (CP) at 33. The court instructed the jury that it could find Martinez Martinez guilty of first degree kidnapping if it found that he had "abducted [SM] with intent to facilitate the commission of rape and/or robbery." CP at 44. Martinez Martinez did not object to these jury instructions.

The jury convicted Martinez Martinez of first degree rape and first degree kidnapping. The jury found in special verdict forms the deadly weapons enhancement on both counts, and that Martinez Martinez knew or should have known that SM was particularly vulnerable or incapable of resistance on both counts. The jury also found in a special verdict form that Martinez Martinez had committed the crime of first degree kidnapping with sexual motivation.

Sentencing

At sentencing, the State conceded that the first degree rape and first degree kidnapping constituted the same course of conduct and as a result, Martinez Martinez should only be sentenced on the rape conviction and not the kidnapping conviction. The court accepted the

State's concession. The State calculated Martinez Martinez's standard range sentence of 138 to 184 months for first degree rape based on an offender score of 5, which included one point for an unlawful possession of a controlled substance conviction. The State requested an exceptional sentence based on the particularly vulnerable aggravating factor.

The trial court imposed an exceptional sentence for the first degree rape conviction based on the particularly vulnerable aggravating factor of 240 months in confinement plus 24 months for the deadly weapon enhancement, for a total of 264 months to life. The court explained why it found the particularly vulnerable aggravating factor to be a substantial and compelling reason to impose an exceptional sentence. The court did not impose any sentence on the kidnapping conviction.

The trial court found that Martinez Martinez was indigent for purposes of imposing LFOs. The court stated that the only financial penalty it would be imposing was the crime victim penalty assessment because that was mandatory. The judgment and sentence stated that "payment of nonmandatory legal financial obligations [was] inappropriate" because Martinez Martinez was indigent. CP at 139. However, in two preprinted sections the judgment and sentence imposed supervision fees as determined by the Department of Corrections (DOC) as a condition of community custody.

Martinez Martinez appeals his convictions and his sentence.

ANALYSIS

A. SUFFICIENCY OF EVIDENCE – USE OF DEADLY WEAPON

Martinez Martinez argues that the State did not present sufficient evidence to prove that he used a deadly weapon to support one of the alternative means of first degree rape because the assault had ended before a weapon was displayed. We disagree.

1. Legal Principles – Jury Unanimity

Criminal defendants have the right to a unanimous jury verdict under article I, section 21 of the Washington Constitution. This right includes the right to a unanimous jury determination as to the specific means by which the defendant committed an alternative means offense. *State v. Smith*, 17 Wn. App. 2d 146, 151, 484 P.3d 550, *review denied*, 198 Wn.2d 1005 (2021). An alternative means crime is one where the statute defining the crime provides that the proscribed criminal conduct can be proved in multiple ways. *Id.* at 150. If there is sufficient evidence to support each of the alternative means presented to the jury, express jury unanimity as to which means the defendant committed the crime is not required. *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). But if there is insufficient evidence to support any one of the alternative means presented to the jury, the conviction must be reversed. *Id.*

RCW 9A.44.040 provides four alternative means of committing first degree rape. The State relied on two of the means at trial. First, under RCW 9A.44.040(1)(a), a defendant commits first degree rape when he or she "engages in sexual intercourse with another person by forcible compulsion" and "[u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon." Second, under RCW 9A.44.040(1)(b) a defendant commits first degree rape when he or she "engages in sexual intercourse with another person by forcible compulsion" and "[k]idnaps the victim." Martinez Martinez disputes only that the State did not provide sufficient evidence to prove that he used or threatened to use a deadly weapon to support his first degree rape conviction under RCW 9A.44.040(1)(a).

2. Sufficiency of Evidence

When evaluating the sufficiency of evidence for a conviction, we view the evidence in the light most favorable to the State and ask whether a rational trier of fact could have found the

elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). As part of the test for the sufficiency of evidence, we assume the truth of the State's evidence and all reasonable inferences drawn from the evidence. *Id.* at 106. These inferences must be drawn in the State's favor and strongly against the defendant. *Id.* And we defer to the fact finder's resolution of conflicting testimony and evaluation of the evidence's persuasiveness. *Id.* Circumstantial evidence is as equally reliable as direct evidence. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

3. Analysis

Here, the record shows that SM testified several times during direct and cross-examination that Martinez Martinez had a knife in his hand while raping her. She explained that the knife was near her chest and that the knife cut her hand when she grabbed it to prevent Martinez Martinez from stabbing her. Lewis testified that she noticed lacerations on SM's hands, and the trial court admitted several photos of the lacerations.

SM did not state until the end of cross-examination that she saw the knife for the first time after the rape occurred as she was leaving the woods or tent after being prompted by Martinez Martinez about the timeline. Even then, when Martinez Martinez continued to repeat his questions about the timeline of when the knife appeared, SM responded that "[h]e was about to stab me" and that she was "on the ground." 5 RP at 590. SM then continued to agree that Martinez Martinez did not have the knife in his hand while he was raping her. However, there also was testimony about SM's developmental disability, low vocabulary level, and the need to use very simple vocabulary along with simple questions to ascertain information from her.

There is no question that SM's testimony was contradictory. But she provided clear, unequivocal testimony on direct examination that Martinez Martinez was holding a knife when

he raped her. It was well within the jury's province to decide which portions of SM's testimony to believe and which portions to disregard. *See Homan*, 181 Wn.2d at 106. The jury apparently considered SM's ability to understand questions and determined that SM's first version of the incident was more believable than her later version.

Martinez Martinez essentially is asking us to reweigh SM's testimony on appeal when he highlights the inconsistency between SM's two versions of the incident and the fact that SM stated that the first version was not true. But we cannot re-evaluate credibility and weight of testimony on appeal. *Id.*

Martinez Martinez argues that our deference to jury determinations on credibility does not include ignoring explicit testimony recanting earlier testimony. But Martinez Martinez provides no legal authority to support his argument and does not explain why his proposition falls outside the scope of prohibited reweighing of testimony on appeal.

We hold that there was sufficient evidence to support the deadly weapons alternative means element. As a result, there was no requirement to have a particularized expression of unanimity in this case.

B. DOUBLE JEOPARDY – FIRST DEGREE RAPE AND KIDNAPPING

Martinez Martinez argues that his convictions for first degree rape and first degree kidnapping violated double jeopardy because the kidnapping elevated the seriousness level of the rape from second degree to first degree and had no independent purpose apart from the rape. We agree.

1. Legal Principles

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution prohibit double jeopardy. This prohibition includes that a person

cannot receive multiple punishments for the same act. *See State v. Muhammad*, 194 Wn.2d 577, 616, 451 P.3d 1060 (2019). We review alleged violations of double jeopardy de novo. *State v. Arndt*, 194 Wn.2d 784, 815, 453 P.3d 696 (2019). The remedy for a violation of double jeopardy is to vacate the lesser charge or the charge that carries a lesser sentence. *State v. Albarran*, 187 Wn.2d 15, 21-22, 383 P.3d 1037 (2016).

Under the merger doctrine, double jeopardy generally applies when the commission of one offense elevates the degree of another offense. *State v. Berg*, 181 Wn.2d 857, 865, 337 P.3d 310 (2014). The presumption is that " 'the legislature intended to punish both offenses through a greater sentence for the greater crime.' " *Arndt*, 194 Wn.2d at 819 (quoting *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005)). An exception is when the two offenses have "independent purposes or effects." *Arndt*, 194 Wn.2d at 819. An independent purpose or effect exists when the offense injures the victim " 'in a separate and distinct manner from the crime for which it also serves as an element.' " *Id.* (quoting *State v. Harris*, 167 Wn. App. 340, 355, 272 P.3d 299 (2012)).

In *State v. Johnson*, the Supreme Court determined that the legislature intended to punish criminal defendants only for first degree rape when a kidnapping conviction elevates the seriousness level of the rape and the kidnapping has no independent purpose or a separate and distinct injury from the rape. 92 Wn.2d 671, 676, 680-81, 600 P.2d 1249 (1979). In that case, the court concluded that the defendant's first degree kidnapping convictions and first degree assault convictions merged with his first degree rape convictions because the kidnapping and assault (1) elevated the rape to first degree rape, (2) occurred almost contemporaneously in time and place with the rape, (3) had no independent purpose other than to force the victims to have

sexual intercourse with the defendant, and (4) involved no injury to the victims independent of or greater than the injury of rape. *Id.* at 681.

2. Analysis

The State does not dispute that one of the purposes of Martinez Martinez's kidnapping was to facilitate the rape. But the State argues that the kidnapping had an independent purpose: to steal SM's money. However, even though Martinez Martinez asked SM for money during the rape, there is no indication that he kidnapped her in order to take her money. And there was no evidence that Martinez Martinez took any money from SM at any time during the kidnapping. Therefore, SM did not suffer an injury from the kidnapping that was separate and distinct from the rape. *See Arndt*, 194 Wn.2d at 819.

As in *Johnson*, the kidnapping elevated the rape to first degree rape, occurred almost contemporaneously in time and place with the rape, had no independent purpose other than to force SM to have sexual intercourse with Martinez Martinez, and involved no injury other than the rape. *See* 92 Wn.2d at 681. Therefore, the two offenses must merge for double jeopardy purposes.

We hold that the first degree kidnapping conviction violated double jeopardy. Accordingly, the trial court on remand must strike Martinez Martinez's first degree kidnapping conviction. Resentencing is not required because the trial court imposed no sentence for the first degree kidnapping conviction and that conviction was not included in the offender score.

C. PARTICULARLY VULNERABLE AGGRAVATING FACTOR

Martinez Martinez argues that (1) the State failed to present sufficient evidence to show that he knew or should have known that McKinney was particularly vulnerable and that

McKinney's vulnerability was a substantial factor in the commission of the sexual assault and (2) the particular vulnerability aggravating factor is unconstitutionally vague. We disagree.

1. Sufficiency of the Evidence

a. Legal Principles

RCW 9.94A.535(3)(b)[1] provides that an exceptional sentence upward may be imposed when the jury finds that "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." The State bears the burden to show "(1) that the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

We review a jury's special verdict finding under the sufficiency of the evidence standard. *State v. Perry*, 6 Wn. App. 2d 544, 552, 431 P.3d 543 (2018). The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Homan*, 181 Wn.2d at 105.

b. Knew or Should Have Known

The record shows that there was sufficient evidence for a rational fact-finder to find that Martinez Martinez knew or should have known that SM was particularly vulnerable because of her autism. Multiple witnesses testified that SM functioned at a level of a five- to 10-year-old and spoke with a soft voice with child-like vocabulary. In addition, at least four people testified that based on their limited interaction with SM, they quickly realized that SM did not have the

[1] RCW 9.94A.535 has been amended since the events of this case transpired. Because these amendments are not material to this case, we do not include the word "former" before RCW 9.94A.535.

same mental capabilities as an average 28-year-old. Accordingly, we hold that sufficient evidence supported the jury's conclusion that Martinez Martinez knew or should have known that SM was particularly vulnerable.

c. Particular Vulnerability as a Substantial Factor

Here, the record shows that SM's development disability was a substantial factor in the kidnapping and rape offenses when compared to the average 28-year-old without SM's disability. Consistent with how a young child could act in a similar situation, SM testified that she went to the smoke shop and the woods with Martinez Martinez simply because he told her to do so. And as stated above, several witnesses testified that SM functioned at the age of a young child. A jury rationally could conclude that SM's developmental disability was a substantial factor in the commission of the kidnapping and rape based off of SM's demeanor at trial, her testimony that she followed Martinez Martinez because he simply told her to, and testimony from others who described SM's cognitive ability and overall personality.

Martinez Martinez claims that SM's vulnerability was not a substantial factor in the commission of the offenses because he did not target her specifically due to her disability. But when analyzing particular vulnerability, the focus is on whether "the victim is more vulnerable to the offense than other victims," not whether the defendant targeted an individual because of a disability. *See State v. Bedker*, 74 Wn. App. 87, 94, 871 P.2d 673 (1994).

We hold that sufficient evidence supports the jury's conclusion that SM's particular vulnerability was a substantial factor in the commission of the offenses.

2. Vagueness Challenge

Martinez Martinez argues that the particular vulnerability aggravating factor stated in RCW 9.94A.535(3)(b) is unconstitutionally vague. But the law is clear that aggravating

sentencing factors are not subject to vagueness challenges. *State v. Baldwin*, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003); *State v. Burrus*, 17 Wn. App. 2d 162, 177, 484 P.3d 521, *review denied*, 198 Wn.2d 1006 (2021); *State v. Brush*, 5 Wn. App. 2d 40, 57, 63, 425 P.3d 545 (2018). Therefore, we reject Martinez Martinez's argument.

D. USE OF VICTIM'S INITIALS IN JURY INSTRUCTIONS

Martinez Martinez argues that the use of SM's initials in the to-convict jury instructions (1) was a judicial comment on the evidence in violation of article IV, section 16, (2) violated his right to due process and a fair and impartial jury, and (3) violated his right to a public trial. Division One of this court rejected all three arguments in *State v. Mansour*, 14 Wn. App. 2d 323, 329-33, 470 P.3d 543 (2020), *review denied* 196 Wn.2d 1040 (2021). Martinez Martinez urges us to reject the holding in *Mansour*, but we agree with Division One's reasoning. Therefore, we reject Martinez Martinez's arguments regarding the use of SM's initials.

E. REVISED OFFENDER SCORE UNDER *BLAKE*

Martinez Martinez argues that he is entitled to be resentenced because his offender score at the time of sentencing included a conviction for unlawful possession of a controlled substance. The State concedes that remand is appropriate for the trial court to determine the effect of *Blake* on his offender score, but argues that resentencing is unnecessary because Martinez Martinez's exceptional sentence was not based on his offender score. We agree with the State.

In *Blake*, the Supreme Court held that Washington's strict liability drug possession statute, RCW 69.50.4013(1), violates state and federal due process clauses and therefore is void. 197 Wn.2d at 195. "[A] conviction based on an unconstitutional statute cannot be considered in calculating the offender score." *State v. LaBounty*, 17 Wn. App. 2d 576, 581-82, 487 P.3d 221 (2021).

Martinez Martinez's offender score at sentencing was calculated at 5 points, which included a conviction for possession of a controlled substance. Based on that offender score, Martinez Martinez's standard range sentence for first degree rape was 138 to 184 months. Martinez Martinez's offender score without the unlawful possession of a controlled substance would be 4 points, which has a standard range sentence of 129 to 171 months – a 13 month difference at the high end. RCW 9.94A.510.

Resentencing is not necessarily required when a defendant's offender score includes a void conviction and the defendant was sentenced to an exceptional sentence. "When the sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand is the remedy *unless the record clearly indicates the sentencing court would have imposed the same sentence anyway*." *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (emphasis added).

Here, the trial court provided an extensive explanation why it found the jury's finding of the particularly vulnerable aggravating factor a substantial and compelling reason to impose an exceptional sentence upward. The court emphasized that Martinez Martinez took advantage of a person with a significant developmental disability who was simply minding her own business. And because of SM's disability, she was incapable of resistance when Martinez Martinez kidnapped and raped her. During its oral ruling, the sentencing court did not reference the now-incorrect standard sentencing range.

We believe that the record is clear that the trial court would have imposed the same exceptional sentence even if the standard range sentence had been 13 months lower. Therefore, we remand for the trial court to correct the offender score on the judgment and sentence but not for resentencing.

F. COMMUNITY CUSTODY SUPERVISION FEES

Martinez Martinez argues that the trial court erred when it imposed community supervision fees as an LFO despite finding that he was indigent. We conclude that the record is unclear whether the trial court intended to impose supervision fees.

RCW 9.94A.703(2)(d) provides that "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the department." Supervision fees are considered discretionary LFOs because they are waivable by the trial court. *State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020). However, because supervision fees do not constitute "costs" under RCW 10.01.160(3), they can be imposed even if the defendant is indigent. *Id.* at 536-37.

Here, the judgment and sentence section regarding community custody imposed supervision fees as determined by DOC as a condition of community custody. But the judgment and sentence stated that the "payment of nonmandatory legal financial obligations [was] inappropriate" because the defendant was indigent. CP at 139. And at sentencing, the court stated, "The imposition of financial penalties is only going to be the Crime Victim Penalty Assessment, because that is mandatory." 9 RP at 1149. Therefore, the imposition of supervision fees seems inconsistent with the court's intention to impose mandatory LFOs only.

The record is unclear whether the trial court intended to impose supervision fees. Accordingly, on remand the trial court should consider in its discretion whether to impose community custody supervision fees.

CONCLUSION

We affirm Martinez Martinez's first degree rape conviction, but we remand for the trial court to (1) strike Martinez Martinez's first degree kidnapping conviction, (2) amend Martinez

Martinez's offender score in the judgment and sentence, and (3) consider the imposition of supervision fees.

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.

MAXA, P.J.

We concur:

VELJACIC, J.

PRICE, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54512-8-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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