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NO. 73107-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SEON LEWARD GRAHAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 3

1. PROCEDURAL FACTS 3

2. SUBSTANTIVE FACTS 5

C. ARGUMENT 11

1. THE COURT ACTED WITHIN ITS DISCRETION IN DECLINING TO DECLARE A MISTRIAL 11

a. Additional Relevant Facts 12

b. Graham Has Waived These Issues On Appeal 18

c. The Trial Court Acted With Sound Discretion In Denying A Mistrial 20

i. None of the alleged irregularities was even slightly serious 21

ii. Hurt's testimony was entirely cumulative 23

iii. The trial court instructed the jury to disregard the "ultra security" testimony 24

2. THE JURY HAD SUBSTANTIAL EVIDENCE TO FIND THE AGGRAVATING FACTOR OF PARTICULAR VULNERABILITY 24

a. Additional Relevant Facts 25

b. The Jury Had Significant Evidence To Support The Aggravating Factor 26

3. THE AGGRAVATING FACTOR OF PARTICULAR VULNERABILITY IS NOT VOID FOR VAGUENESS 33

a. A Defendant May Not Raise A Vagueness Challenge To A Sentencing Aggravator 34

b. Graham Has Waived Any Vagueness Challenge 38

c. The Statute Is Not Vague 40

D. CONCLUSION 43

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Blakely v. Washington, 542 U.S. 296,
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). 30, 31, 35, 36, 38

Lockett v. Ohio, 438 U.S. 586,
98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) 37

Valerio v. Crawford, 306 F.3d 742
(9th Cir. 2002) 43

Washington State:

City of Spokane v. Douglass, 115 Wn.2d 171,
795 P.2d 693 (1990)... 40, 41, 43

Haley v. Med. Disciplinary Bd., 117 Wn.2d 720,
818 P.2d 1062 (1991).. 41

Seattle v. Eze, 111 Wn.2d 22,
759 P.2d 366 (1988).. 41

State v. Baird, 83 Wn. App. 477,
922 P.2d 157 (1996)............................ 28, 29, 30, 31, 32, 33

State v. Baldwin, 150 Wn.2d 448,
78 P.3d 1005 (2003).................................. 34, 35, 36, 37, 38

State v. Blair, 117 Wn.2d 479,
816 P.2d 718 (1991).. 39

State v. Branch, 129 Wn.2d 635,
919 P.2d 1228 (1996).. 41

State v. Coria, 120 Wn.2d 156,
839 P.2d 890 (1992).. 40

State v. Eckblad, 152 Wn.2d 515,
98 P.3d 1184 (2004) 34

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012) 20

State v. Fowler, 114 Wn.2d 59,
785 P.2d 808 (1990) 39

State v. Garcia, 177 Wn. App. 769,
313 P.3d 422 (2013) 21

State v. Gordon, 153 Wn. App. 516,
223 P.3d 519 (2009) 42

State v. Gordon, 172 Wn.2d 671,
260 P.3d 884 (2011) 27, 37, 38, 42

State v. Gore, 101 Wn.2d 481,
681 P.2d 227 (1984) 38

State v. Guloy, 104 Wn.2d 412,
705 P.2d 1182 (1985) 18

State v. Hopson, 113 Wn.2d 273,
778 P.2d 1014 (1989) 20, 21

State v. Jacobson, 92 Wn. App. 958,
965 P.2d 1140 (1998) 35

State v. Kalebaugh, 183 Wn.2d 578,
355 P.3d 253 (2015) 20

State v. Lord, 161 Wn.2d 276,
165 P.3d 1251 (2007) 18

State v. Mitchell, 149 Wn. App. 716,
205 P.3d 920 (2009) 27

State v. Ogden, 102 Wn. App. 357,
7 P.3d 839 (2000) 28, 29, 30, 31, 32, 33

State v. Payne, 25 Wn.2d 407,
171 P.2d 227 (1946).. 39

State v. Releford, 148 Wn. App. 478,
200 P.3d 729 (2009).. 38

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992).. 27

State v. Siers, 174 Wn.2d 269,
274 P.3d 358 (2012)... 36, 37

State v. Suleiman, 158 Wn.2d 280,
143 P.3d 795 (2006)... 27, 32, 42

State v. Sullivan, 69 Wn. App. 167,
847 P.2d 953 (1993).. 18

State v. Swan, 114 Wn.2d 613,
790 P.2d 610 (1990).. 18

State v. Watson, 160 Wn.2d 1,
154 P.3d 909 (2007).. 41

State v. Whitaker, 133 Wn. App. 199,
135 P.3d 923 (2006), rev. denied,
159 Wn.2d 1017, cert. denied,
555 U.S. 948 (2007).. 40

Statutes

Washington State:

RCW 9.94A.535 .... 26, 36, 37, 41

RCW 9A.36.011 31

Other Authorities

Karl B. Tegland, 14A Washington Practice:
Civil Procedure § 30:41, at 281 (2d ed. 2009) 18

WPIC 300.02 25

WPIC 300.11 .... 25, 41, 42

A. ISSUES PRESENTED

1. A trial court abuses its discretion in declining to declare a mistrial only when there is such prejudice, in the context of the entire trial, that nothing short of a mistrial will ensure a fair trial. In Graham's trial for first-degree assault of a corrections officer and four counts of custodial assault, where Graham blind-sided an officer in a jail solitary-confinement unit, punched, stomped and jumped on the unconscious officer, and then fought with a team of other officers, a State witness referred to the jail unit as "disciplinary" — without objection — and then mentioned that after the assaults Graham was moved to "ultra security." The jury was instructed to disregard the reference to "ultra security," while Graham's entire defense was that the attacks were an unintentional "rageful reaction" to being held in solitary confinement. Did the trial court act within its discretion in declining to declare a mistrial for the witness's remark about "ultra security?"

2. When reviewing the sufficiency of the evidence for a finding of an aggravating factor based on a victim's particular vulnerability or incapability of resistance, this Court determines whether, after viewing the evidence in the light most favorable to the State, any rational jury could have found beyond a reasonable

doubt that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance, and that this was a substantial factor in the commission of the crime. In Graham's trial, the evidence showed that after punching a corrections officer, knocking him unconscious, Graham fought off a second officer so he could return to the unconscious officer and stomp and jump upon the officer's chest, neck and head while he lay unconscious and defenseless on the jailhouse floor. When viewed in the proper light, was there substantial evidence to support a finding of particular vulnerability or incapability of resistance?

3. Our supreme court has held that sentencing aggravators are not subject to vagueness challenges under the Due Process Clause. A statute is presumed constitutional, and is unconstitutionally vague only when it forbids conduct that people of common intelligence must necessarily guess at its meaning and differ as to its application. By statute, an exceptional sentence is permitted if a jury finds a crime victim was "particularly vulnerable or incapable of resistance," and Graham did not object to or seek elaboration on a pattern instruction on the legal definition of "particularly vulnerable." Is a vagueness challenge inapplicable to

this sentencing aggravator? Did Graham waive a vagueness challenge by failing to request other instructions? Are the terms "particularly vulnerable" and "incapable of resistance" clear enough that a person of common intelligence does not have to guess at their meaning?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Seon Leward Graham was charged by First Amended Information with Assault in the First Degree with two aggravating factors, four counts of Custodial Assault, and one count of harassment. CP 226-28. Count 1 alleged that on January 11, 2011, in King County, Washington, Graham assaulted Officer Gil Letrondo with intent to inflict great bodily harm and with force and means likely to produce great bodily harm or death, and that Graham knew or should have known that the victim was particularly vulnerable or incapable of resistance and the vulnerability was a substantial factor in the commission of the offense, and that the victim was a law enforcement officer performing his official duties at the time of the offense and the defendant knew of that status. Id.

Counts 2 through 5 alleged that on January 11, 2011, Graham intentionally assaulted officers Michael Wells, Marcial

Williamson, Michael Allen and Timothy Wright, knowing that each was a full- or part-time staff member, or volunteer, at an adult corrections institution or local adult detention facility. Id. Count 6 alleged that on or about June 30, 2010, without lawful authority, Graham knowingly threatened Sharon Coleman.[1] Id.

The State agreed to sever Count 6, and the case proceeded to trial on Counts 1 through 5. 2RP 6.[2] The jury convicted Graham as charged in Counts 1 through 4, and found both aggravating factors in Count 1. CP 203-09; 12RP 5-6. The jury acquitted Graham of Count 5.[3] CP 210; 12RP 5. Following the verdict, the State dismissed Count 6. CP 218-19.

The court imposed an exceptional sentence of 301 months on Count 1, which reflected the top of the standard range on an offender score of 8 — 277 months — plus 12 additional months per aggravating factor. CP 229-33; 17RP 273. The court imposed

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[1] Coleman was also a corrections officer. 10RP 7.

[2] The verbatim report of proceedings in this case consists of 17 volumes, most numbered individually. The State has numbered them as follows: 1RP (October 30, 2014); 2RP (November 3, 2014); 3RP (November 4, 2014); 4RP (November 5, 2014); 5RP (November 10, 2014); 6RP (November 12, 2014 — opening statements); 7RP (November 12, 2014); 8RP (November 13, 2014); 9RP (November 17, 2014); 10RP (November 18, 2014); 11RP (November 24, 2014); 12RP (November 25, 2014); 13RP (various dates from April 11, 2011, through December 28, 2011); 14RP (various dates from March 7, 2012, through November 27, 2012); 15RP (various dates between February 27, 2013, through December 4, 2013); 16RP (competency hearing from March 17, 2014 through April 9, 2014); and 17RP (sentencing, January 9, 2015).

[3] Custodial assault of Officer Timothy Wright.

standard-range terms of 43 months each on counts 2 through 4, to run concurrently with Count 1. Id. Graham timely appealed. CP 520-21.

2. SUBSTANTIVE FACTS

In January 2011, Seon Graham[4] was an inmate at King County's Maleng Regional Justice Center jail in Kent, Washington. 7RP 4; 10RP 41. He was held in a unit known as "Nora East," which was a segregation unit — commonly known as solitary confinement — in which inmates remain in individual cells for 23 hours a day, and are allowed out for one hour per day to bathe, make phone calls, receive visits, exercise and do other activities. 2RP 52; 10RP 36.

Graham was 32 years old and was very strong; he passed the time in his cell by doing pushups, squats, sit-ups and other exercises. 10RP 79, 90. He had very large arms, very large legs, a very big chest, and weighed around 250 pounds. 8RP 31; 10RP 57, 76, 79. One corrections officer would later describe Graham as "a big chunk of muscle." 10RP 76.

[4] Graham was tried and convicted in Superior Court under the name Sean Laward Graham. This Court has titled this case with the name Seon Leward Graham, which the State believes to be Graham's correct name (pronounced, according to his mother, as "See-on." See 10RP 96). The State is following the name in this Court's case title, except in direct quotation of the trial record when Graham was referred to as "Sean," which was pronounced as "Shawn."

While held in Nora East, Graham penned a letter to someone he called "Mama." 9RP 45; Ex. 19. In the letter, Graham described life in solitary confinement, commented that he was trying to enjoy having his own cell, and discussed a television show he wanted to see. But he also said that his "mental" had been on a "roller coaster," and he had been "insanely angry for the past few weeks." 9RP 46; Ex. 19. "Very, very ready to kill them doctors, lawyers, guards, and every inmate in my sight," Graham wrote. Id. "Truly, I can relate to a wild animal." Id.

On January 9, 2011, Corrections Officer Gil Letrondo was on duty in Nora East when officers performed a security check of the cells. 10RP 125. An officer found contraband food in Graham's cell, a rule infraction, and a sergeant decided that Graham would lose his hour out of the cell the next day. 10RP 41-42, 127.

The next day, January 10, Officer Letrondo told Graham that he had lost his hour out. 10RP 128. Letrondo later testified that Graham became "very angry, very mad." 10RP 129. Graham called Letrondo a "pussy motherfucker," and said, "Let me out. I'll beat you up and kill you." Id. Letrondo reported this verbatim in a logbook. 10RP 129-30.

The next day, January 11, Officer Michael Wells was manning Nora East when Graham got his daily hour out of his cell. 10RP 46. Officer Letrondo arrived to relieve Wells for a 15-minute break. 10RP 45, 132. Wells, aware of Graham's threat to Letrondo the day before, asked Letrondo whether he would like Graham to be locked in his cell while Wells left. 10RP 132. Letrondo later testified that he "didn't want to aggravate the situation." Id. But Letrondo knew Graham was still "angry at me, mad at me, and I was — that he was going to kill me if he was out." Id. So Letrondo kept his eye on Graham throughout Wells' break. 10RP 132, 134. "I was watching him very closely because of the threat, and I was in fear of my life, too," Letrondo later testified. 10RP 137. "He threatened to kill me, so I was really watching him closely." Id.

Graham, who was unrestrained in the common area of Nora East while Officer Letrondo was alone in the unit, stared angrily at the officer, but said nothing and did not approach. 10RP 133. After about 12 minutes, Wells returned. 10RP 46. Wells and Letrondo stood at a central officer counter, discussing a computer issue. 10RP 48, 139. Wells glanced down at a logbook. 10RP 48. When he looked up, Graham was two feet away from Letrondo and rushing up fast from behind. 10RP 49.

Graham threw a left hook to Letrondo's temple, sending the 58-year-old, 5-foot-4-inch, 150-pound officer reeling backward four or five steps. 10RP 50, 52, 121, 143. Letrondo appeared dazed, and Wells could not tell whether Letrondo "was even aware of where he was at that point." 10RP 52. Wells punched Graham once in the face and made a "code blue" distress call on his radio. 10RP 53.

Graham turned his attention back to Letrondo, sprinting toward the stunned officer to deal a second blow that knocked Letrondo across the room and into a wall. 10RP 53. Letrondo lay unmoving on the floor, apparently unconscious. 10RP 54. Graham kept advancing on Letrondo, so Wells intervened and traded punches with Graham. Id. Graham caught Wells with a hook that sent him five feet backward and knocked his jaw out of place. Id.

"At that point, inmate Graham ran over and started jumping up and down on top of Officer Letrondo, stomping on the upper part of his body here, around the neck and head area," Wells later told the jury. 10RP 55. "He was jumping up in the air as high as he could and stomping down with one foot on top of him." Id. Letrondo remained unconscious and supine, never moving to defend himself. 10RP 55, 70. "Inmate Graham was stomping hard

enough to cause Officer Letrondo's body to actually come up off the ground," Wells recounted. Id. Wells stood and demonstrated for the jurors how Graham stomped on Letrondo. 10RP 71. "Every time [Graham] would stomp down, [Letrondo's] body would come up off the ground about three or four inches," Wells said. Id.

Wells rushed to stop Graham and brawled with the inmate as they went to the floor, but Graham ended up on top of Wells. 10RP 56. Two other corrections officers, Marcial Williamson and Sgt. Michael Allen, rushed into Nora East. 10RP 57. Williamson saw Graham on top of Wells, throwing punch after punch. 8RP 104-06. Williamson and Allen battled with Graham in what Allen later described as "a fight for my life." 9RP 123. Other officers rushed in, and Graham was handcuffed but continued struggling. 8RP 31-32, 92-95.

It took a phalanx of officers to force Graham out of Nora East and down a hallway to a holding cell in another part of the jail. 8RP 112. Graham bit at Officer Williamson's groin area. Id. Graham cursed and said, "This is what happens when you fuck with me." 8RP 35. Midway, Graham pulled the scrum of officers to the floor, and Officer Timothy Wright's right hand was broken when it was pinned underneath Graham. 9RP 69, 93.

As officers fought with Graham, other officers and staff hurried to Officer Letrondo to find him lying motionless, with blood welling into a pool around his head. 7RP 21; 8RP 71, 164. Officer Williamson initially thought Letrondo might be dead. 8RP 110. Officer John Hurt saw Letrondo's eyes moving back and forth. 7RP 24. "Hey, Gil," Hurt called out. 7RP 24. Letrondo appeared to try to speak but could not, and his breathing was labored. 7RP 24-25. Officer Dawn Bouta, who was trained as a paramedic, knelt by Letrondo, held his hand, and asked him if he knew who and where he was. 8RP 155, 165. Letrondo was not sure where he was, and could not identify the president. 8RP 165. A jail nurse found Letrondo confused and unable to remember what the nurse had told him moments before. 9RP 104-05.

Letrondo later testified that one moment he was standing at the guard station, and the next thing he remembered was waking up on the floor, with Officer Bouta holding his hand and a nurse asking him questions. 10RP 139. He remembered pain all over his head and body, and nausea. 10RP 140-41. He remained at Valley Medical Center for three days, where doctors found bleeding around the brain, which was potentially life-threatening. 10RP 140; 11RP 17.

Letrondo later needed surgery on his nose. 10RP 142. He complained of pain, dizziness and headaches for months. 10RP 108. He suffered from memory problems for years afterward. 10RP 142. He never returned to work. 10RP 143-44.

C. ARGUMENT

1. THE COURT ACTED WITHIN ITS DISCRETION IN DECLINING TO DECLARE A MISTRIAL.

Despite harrowing evidence of a vicious, premeditated and deadly attack on Officer Letrondo and subsequent assaults of other officers, and despite the fact that Graham's entire defense relied on his solitary confinement, Graham now contends that the trial court abused its discretion by not declaring a mistrial when a single witness described the jail unit as "disciplinary" and said that after the attacks Graham was moved to "ultra security." His arguments have not been preserved for appeal because Graham failed to object contemporaneously to the word "disciplinary," and the objections he makes now to the term "ultra security" are raised for the first time here. But even if these arguments were properly raised, they are meritless because the trial court was correct and judicious in observing that there had been no prejudice whatsoever to Graham, especially considering that Graham himself embraced the term "solitary confinement" as the heart of his defense and later

raised the issue of disciplinary confinement with other witnesses. The court acted well within its discretion by declining to declare a mistrial.

a. Additional Relevant Facts.

Pretrial, the State — not Graham — raised the issue of Nora East being a segregation unit, and asked for permission to present testimony that inmates in Nora East are held in isolation for 23 hours a day, and "that only one inmate is allowed out at a time," because it was relevant to "intent and anger the defendant showed toward the officer, because they took his one hour away." 2RP 50-52. The State said it did not intend to present evidence of the exact reasons that Graham was being held in Nora East.[5] 2RP 51.

The trial court agreed that "it's clearly relevant, what the layout of the area was, where the incident occurred, that there's limited access to common areas, limited access to the cells, that it's not an open pod, the one-hour rule." 2RP 52. But the court said it was concerned that "saying it's an administrative segregation does strongly imply that's because of prior disciplinary problems, which could lead the jury to infer a propensity for violence." 2RP 52-53. "'Segregated unit' is a little more neutral," the court added. 2RP 53.

[5] The reasons Graham had been placed in Nora East are not in the trial record.

Graham said that the jury learning about the restrictive nature of the unit, generally, would lead the jury to believe that Graham was "simply a dangerous guy." 2RP 53.

The trial court remained clear that the "layout, the rules, that's all important," and boiled the issue down to whether Nora East could be called "administrative segregation" versus "segregated unit." 2RP 56. However, the court issued no ruling, and did not issue any order regarding the use of the word "disciplinary." Id. Instead, the court said it was "going to reserve on that, whether this is going to be referred to as administrative segregation or a segregated unit," and told the parties to "talk about that," and "if the two of you can't work something out, I'm happy to have you bring it back to me and I'll decide." Id. Neither party brought the issue up again for a specific ruling.

In his opening statement, Graham's lawyer told the jury that "jail was even more stressful and anxiety provoking and upsetting for Sean Graham" than for other inmates because "Sean had been in jail for a long time, he was locked in a cell, by himself, 23 hours a day," and "nothing of his life was something that he could personally control." 6RP 15. This "constant stress, struggle, and

indignity of his situation boiled to the point where he lost control of himself," Graham's lawyer told the jury. Id.

The first prosecution witness was Officer John Hurt, who testified that he heard a "code blue" distress call from Nora East. 7RP 10. When the prosecutor asked Hurt to explain the term "Nora East," Hurt replied that it "was primarily a disciplinary unit." Id. Graham did not object. Id. The prosecutor asked Hurt to explain instead the "geographical unit," and Hurt explained that Nora East was some 300 meters away when he heard the "code blue." Id.

Shortly thereafter, while explaining how long it took to reach Nora East and get inside, Hurt offered that "like I said, it was a disciplinary or ... ." 7RP 11. Graham did not object. Id. The court *sua sponte* called a recess. Id. During the recess, the court told the State, "I think I said they could use the term 'segregated unit,' but nothing about discipline." 7RP 12. The State said that it had told witnesses not to discuss disciplinary issues, and noted that anybody with common experience would know that 23-hour-a-day lockup is "solitary confinement." 7RP 12-13.

The court admonished the witness not to say that Nora East was a "disciplinary unit," but to call it a "segregated unit" instead. 7RP 13. Graham was silent during this discussion and did not ask

for a curative instruction for Officer Hurt's prior use of the word "disciplinary." 7RP 12-20. Hurt went on to testify at length about finding Officer Letrondo in a state of semi-consciousness, and about helping to move a combative Graham out of Nora East to a holding cell. 7RP 21-41.

Hurt was asked whether he was ordered to "do something else with the inmate" after Graham was secured and the situation had settled down. 7RP 41. Hurt said, "I actually transported him, myself and Officer Lang, to the King County Jail, King County Correctional facility, here in Seattle, where he was made a[n] ultra security inmate and ...." 7RP 41-42. Graham immediately objected and moved to strike for "relevance." 7RP 42. The court sustained the objection and said, "The jury's instructed to disregard the last comment." Id.

Prior to cross examination, Graham moved for a mistrial. 7RP 42. Graham claimed that Hurt had "flagrantly violated the court's pretrial orders" by testifying to the "completely irrelevant" fact that Graham was "being transferred to an ultra security status." Id. The State responded by noting that the issue of Graham being moved to a "higher level of security" as a result of the attack on Letrondo was "much different than what the witness was warned

about, regarding the prior behavior of the defendant," and would be "no surprise" to the jury given the circumstances of the assaults. 7RP 43-44. The State also noted that Graham's defense hinged on Graham being in isolation and the "rigors and the hard times of being in jail." 7RP 44.

The court found "no reason to think that [the witness] was trying to prejudice Mr. Graham," and denied the motion for a mistrial. 7RP 45. "I don't find that — as a result of this comment, that Mr. Graham can no longer get a fair trial," the court found. Id. The court also noted that "solitary confinement" had already been raised, and "any reasonable juror would probably infer that after the incident, as described by the witness, that Mr. Graham would be going to some sort of more secure situation." 7RP 45-46. The court offered to give another curative instruction "if one is recommended by defense," but Graham did not ask for one. 7RP 46-47.

Throughout the rest of the trial, Graham solicited testimony about his isolation in Nora East and the reasons why inmates might be placed there. For example, Graham's attorney asked Sgt. Anamaria Cabrera to discuss "life in the Nora East unit," and Cabrera agreed with Graham's lawyer that sometimes inmates are

there "because they're a disciplinary problem," or because "they just don't want to deal with other people," or to keep them separated from another inmate. 8RP 77. Graham's lawyer asked the sergeant, "So, essentially, they're in solitary confinement 23 hours a day?" 8RP 78. Cabrera agreed. Id.

Even when cross-examining Officer Letrondo, Graham delved into the reasons for being placed in a "solitary confinement environment." 10RP 146. Graham questioned Letrondo about his belief that being held in Nora East "affects their mental health," though for some of them, "their mental problems or behavioral problems are from before they were ever sent to Nora East." 10RP 160-61. The trial court ruled that this line of questioning "opened the door" for the State to elicit from Letrondo that inmates generally have "pre-existing problems with anger," and "pre-existing problems or issues with violence" but none had ever attacked Letrondo. 10RP 162-64.

Before closing argument, the court gave the jury a standard instruction that if evidence was not admitted or was stricken from the record, it was not to be considered. 11RP 69; CP 169. In closing, Graham reiterated that the attack on Letrondo and the other officers was not intentional but was "the act of rageful reaction

by a man who was under stress, who had been locked up for days at a time, and who simply acted out." 11RP 122.

b. Graham Has Waived These Issues On Appeal.

In order to preserve a trial-irregularity issue for appeal, counsel must request some relief at the time the irregularity occurs. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (defense failure to object, ask for curative instruction or immediate mistrial precluded appellate review); State v. Lord, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007) (same); see also Karl B. Tegland, 14A Washington Practice: Civil Procedure § 30:41, at 281 (2d ed. 2009). This is "to give the trial court the opportunity of curing any potential prejudice." State v. Sullivan, 69 Wn. App. 167, 172, 847 P.2d 953 (1993). A party may seek relief in the form of a curative instruction or immediate mistrial. See Swan, 114 Wn.2d at 661. Where a party objects but does not seek relief, the issue is not preserved. Lord, 161 Wn.2d at 291.

Additionally, a "party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182, 1189 (1985). If the specific objection made at trial is not the basis the

defendants are arguing on appeal, "they have lost their opportunity for review." Id.

Graham assigns error to Officer John Hurt's utterances of the word "disciplinary" during his direct testimony, though there had been no prohibitive ruling by the trial court. While Hurt's adjectives may have violated the general spirit of the trial court's pretrial comments, Graham may not raise these as errors on appeal because he did not contemporaneously object to either instance of Hurt saying the word. In both instances, Graham was silent, raising no objection whatsoever. Even though in the second instance, the court *sua sponte* excused the jury so it could admonish the State's witness on using the word, Graham was obligated to object to preserve the error and request some immediate cure, but he did neither. He may not seek reversal now because of this testimony.

Even though Graham contemporaneously objected to the term "ultra security" and sought a mistrial (notwithstanding that this testimony was not part of any pretrial ruling or discussion), he did so on the grounds that this testimony was irrelevant. He may not now assign error to the testimony on a host of other grounds, including that it amounted to prejudicially "improper character evidence." Appellant's Opening Brief (AOB) at 15.

Additionally, Graham may not now bootstrap these unpreserved issues into reversible error by labeling them cumulative. Graham had the responsibility to object and seek a cure at trial. These arguments should be rejected.

c. The Trial Court Acted With Sound Discretion In Denying A Mistrial.

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court should grant a mistrial only if there is such prejudice that nothing short of a mistrial will ensure the defendant a fair trial. Id. An abuse of discretion will be found for denial of a mistrial only when no reasonable judge would have reached the same conclusion. Id. Jurors are presumed to follow the court's instructions. State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

In evaluating a motion for a mistrial based on trial "irregularity," the reviewing court considers the so-called Hopson factors: (1) the seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court instructed the jury to disregard the evidence. Emery, 174 Wn.2d at 765 (quoting State v. Hopson, 113 Wn.2d 273, 284, 778

P.2d 1014 (1989)). These factors are considered with deference to the trial court because it is in the best position to discern prejudice. State v. Garcia, 177 Wn. App. 769, 777-78, 313 P.3d 422 (2013).

Even assuming that Graham has preserved this issue for appeal, Officer Hurt's testimony had no prejudicial effect on Graham's trial, given the extensive direct evidence of Graham's assault against Letrondo and the other officers — and the fact that Graham's entire defense was that he snapped under the pressure of being held against his will in solitary confinement. The Hopson test highlights the harmlessness of Hurt's testimony:

i. None of the alleged irregularities was even slightly serious.

First, none of Officer Hurt's comments actually violated a trial-court order because there was no operative trial-court order to violate. Though it is clear from the record that there was a general understanding to avoid the issue, the trial court never specifically forbade the State from using the word "disciplinary." If Graham had considered this issue so incurably prejudicial, he presumably would have insisted on a clear directive from the trial court — and he should have objected at the time and asked for a curative instruction. Additionally, the trial court had issued no order

addressing testimony that Graham was moved to a more secure situation as a result of the attacks.

Even so, Hurt's comments were of no importance in the context of the entire trial. The jury heard dramatic, emotional and detailed testimony that Graham ambushed Officer Letrondo and nearly stomped him to death while he lay unconscious on a concrete jailhouse floor. The jury further heard from multiple witnesses that Graham was an angry man who had been contemplating killing jail guards, and was so combative after attacking Letrondo and Officer Wells that it took a team of trained officers to subdue him.

Additionally, the jury heard testimony — elicited from Graham himself — that Nora East was a "solitary confinement" unit where people were kept because of issues with mental health and violence. It would require a major stretch of the imagination, and willful ignorance of the rest of the record, to conclude that the jury would not have convicted Graham but for Hurt saying that Nora East was "disciplinary" and that Graham's security status increased after the deadly attack.

Still, Graham argues that Hurt's testimony cast Graham as having a "bad or violent character," which was "too powerfully

tempting to ignore." AOB at 15. Yet the jury acquitted Graham of one of the custodial-assault charges. That disposes of Graham's argument, because it shows that the jury considered all the evidence fairly, and was not prejudiced by insignificant adjectives.

ii. Hurt's testimony was entirely cumulative.

Graham can hardly complain that Hurt's testimony prejudiced his case when Graham himself spent the entire trial eliciting testimony about the pain of solitary confinement, and his entire defense was that he unintentionally reacted to the pressure of his involuntary isolation.

Graham imagines that Hurt's testimony created an incurable inference that Graham was predisposed to violence. But Graham's own opening statement — "Sean had been in jail for a long time, he was locked in a cell, by himself, 23 hours a day" — evokes a dangerous criminal whose behavior has caused his isolation. Not only that, but Graham repeated this theme in his own cross-examination of state witnesses. For example, his attorney asked Sgt. Cabrera to agree that people are held in Nora East "because they're a disciplinary problem," or because "they just don't want to deal with other people." 8RP 77. Graham's attorney used the term

"solitary confinement." 8RP 78. He even asked Officer Letrondo, the primary victim, to agree that "their mental problems or behavioral problems are from before they were ever sent to Nora East." 10RP 160-61.

Hurt's testimony was entirely cumulative and devoid of prejudice.

iii. The trial court instructed the jury to disregard the "ultra security" testimony.

Because Graham did not object or seek a cure for Hurt's uses of the word "disciplinary," he cannot complain here that the jury was not instructed to ignore the remarks. When Hurt said Graham was moved to "ultra security," the trial court immediately admonished the jury to disregard that statement. The jury was also instructed before closing argument to ignore any testimony or evidence that the judge had stricken. Graham has not offered anything in the record to rebut the presumption that the jury followed the court's instructions. He can show no prejudice, and his argument fails.

2. THE JURY HAD SUBSTANTIAL EVIDENCE TO FIND THE AGGRAVATING FACTOR OF PARTICULAR VULNERABILITY.

Next, Graham contends that the State's evidence could not have supported the aggravating factor of particular vulnerability or

incapability of resistance, essentially as a matter of law. To the contrary, the jury had overwhelming evidence to find that Letrondo's total incapacitation was a major factor in Graham's first-degree assault of the officer.

a. Additional Relevant Facts.

The jury was instructed that if it found Graham guilty of first-degree assault in Count 1, it must then decide "[w]hether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance" beyond a reasonable doubt. CP 199, 201. See also WPIC 300.02. The court instructed the jury that "particularly vulnerable" means the victim "is more vulnerable to the commission of the crime than the typical victim of Assault in the First Degree" and "the victim's vulnerability is a substantial factor in the commission of the crime." CP 202. See also WPIC 300.11. The term "incapable of resistance" was not further defined in the instructions.[6]

In the State's closing, the prosecutor emphasized that the evidence showed that Graham "had a goal" to specifically attack Officer Letrondo, as shown by Graham's focus on Letrondo despite the intervention of Officer Wells. 11RP 106. For the first-degree-

[6] The pattern jury instructions for this aggravating factor do not supply a definition of "incapable of resistance." See WPIC 300.11.

assault element of "force or means likely to produce great bodily harm or death," the prosecutor pointed to Graham "with the full weight of his hulking frame repeatedly crashing on Officer Letrondo's neck, his chest and his body." 11RP 93. "This is a person who is being stomped on with the force and means that ... was likely to produce great bodily harm," the prosecutor said. 11RP 100.

Specifically as to Letrondo's particular vulnerability or incapability of resistance, the prosecutor explained that "what we are referring to is about when Officer Letrondo was on the ground unconscious." 11RP 119. "The defendant knew that, yet he continued to stomp on him." Id. The prosecutor reminded the jurors that "the victim's body was bouncing off the ground when he was being stomped on." Id. Graham did not address the aggravating factors in his closing argument. 11RP 122-41.

b. The Jury Had Significant Evidence To Support The Aggravating Factor.

RCW 9.94A.535(3)(b) allows a sentencing court to impose an exceptional sentence based on a jury finding that the "defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." To prove a

victim's vulnerability as an aggravating factor justifying an exceptional sentence, the State must show that (1) the defendant knew or should have known (2) of the victim's particular vulnerability and (3) that vulnerability was a substantial factor in the commission of the crime. State v. Suleiman, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006). To be a substantial factor, a disability must have rendered the victim more vulnerable to the particular crime than a nondisabled person. State v. Mitchell, 149 Wn. App. 716, 724, 205 P.3d 920 (2009). These are factual determinations that are reviewed under a sufficiency of the evidence standard. See Suleiman, 158 Wn.2d at 292.

The test for determining whether evidence is sufficient to support a jury's finding of aggravating circumstances is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have made that finding beyond a reasonable doubt. State v. Gordon, 172 Wn.2d 671, 680, 260 P.3d 884 (2011). All reasonable inferences from the evidence are viewed in favor of the State and most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Whether a victim is particularly vulnerable will depend on the facts of each case. State v. Ogden, 102 Wn. App. 357, 369, 7 P.3d 839 (2000). "Typically, cases addressing [a] particularly vulnerable victim as an aggravating factor involve victims who are particularly vulnerable before the attack began." Id. at 367. However, "we soundly reject the premise that an assailant who beats a victim into unconsciousness thereby rendering him or her totally helpless, and then takes advantage of that helplessness to inflict gratuitous additional injuries is not subject to a finding by the sentencing court that an exceptional sentence upward or a manifest injustice disposition is warranted based on particular vulnerability of the victim." Id. at 369.

A "victim beaten unconscious and then further assaulted is surely no less vulnerable than a sleeping victim." State v. Baird, 83 Wn. App. 477, 489, 922 P.2d 157 (1996). Furthermore, there is no requirement of a "temporal break" between the blows that render the victim unconscious and the subsequent assault of the defenseless victim. Ogden, 102 Wn. App. at 368 (citing Baird, 83 Wn. App. at 489).

Because the standard of review here is substantial evidence, the question for this Court is not complicated: Could any rational

jury have found that Officer Letrondo was incapacitated; that Graham knew it or should have known it; and that the incapacitation was a substantial factor in the first-degree assault? Clearly so. Put another way, would it have been *impossible* for a rational jury to find the aggravating factor of particular vulnerability or incapability of resistance? Clearly not.

To prove the "force or means" element of first-degree assault, the State focused on the testimony that Graham stomped and jumped upon Officer Letrondo's head, neck and chest while Letrondo was entirely unconscious and immobile. This testimony was substantial that Letrondo was wholly incapable of resistance as Graham's weight bounced Letrondo's limp body off the cement floor. Any rational jury could have concluded that Letrondo was both particularly vulnerable and incapable of resistance.

Graham contends that because, in his view, knocking out Letrondo was an inseparable part of the assault, then Letrondo's incapability of resistance "inhered in the State's proof of the commission of the crime itself." AOB at 35. Ogden and Baird make it clear that the temporal break Graham implies is not required. Even so, the question here is simply sufficiency of the evidence in the light most favorable to the State. Even framing the

question as Graham wants it, the jury had ample facts to conclude that the actual first-degree assault here — i.e., the assault with force or means likely to produce great bodily harm or death — commenced when Graham saw Letrondo unconscious on the floor and broke away from Officer Wells to stomp and jump on Letrondo. Letrondo's particular vulnerability and incapability of resistance was obvious to Graham and allowed him to deliver the force and means likely to produce great bodily harm or death.

Apparently in search of a bright-line rule as a matter of law, that rendering a victim unconscious can *never* lead to this aggravating factor regardless of the facts, Graham attempts to discredit this Court's reasoning in both Ogden and Baird. His attempt should be rejected.

First, Graham contends that because Ogden and Baird were decided before Blakely v. Washington,[7] which held that a jury, not a judge, must find the aggravating factor beyond a reasonable doubt, then Ogden and Baird are essentially void. This is not so. Graham fails to explain why transferring the fact-finding role to the jury, and increasing the burden of proof, changes the basic holdings of Ogden and Baird — that attacking an unconscious victim can

[7] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

establish this aggravator even if the attacker caused the unconsciousness. All that Blakely changed was who decides that question, and how sure the factfinder must be.[8]

Graham further attempts to distinguish Ogden by noting that Ogden was not charged with assault. But that is a distinction without a difference. The key point in Ogden — a felony-murder case — was that Ogden beat the victim unconscious, making him incapable of resisting his fatal stabbing. 102 Wn. App. at 367. As this Court in Ogden put it: "Ogden's actions in this case are indistinguishable from the actions of a perpetrator who finds a person lying on the ground immobilized, and seizes the opportunity to rob and stab the person to death, knowing that the victim is unable to resist." Id. Such is the virtually identical situation here, where Graham seized the opportunity to jump and stomp on the visibly unconscious Officer Letrondo.

And in Baird, the fact that Baird was charged under a different means of first-degree assault is similarly of no significance.[9] The key point in Baird was that the defendant

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[8] Even under the pre-Blakely standard of review, this Court still reviewed whether the trial court had "substantial evidence" to support the aggravating factor. See Baird, 83 Wn. App. at 488.

[9] Baird was charged under RCW 9A.36.011(c), requiring intent to inflict great bodily harm and actual infliction of great bodily harm. Baird, 83 Wn. App. at 487.

committed the act that constituted first-degree assault — cutting off his wife's nose — while his wife was incapacitated by Baird's own hand. The means of committing the first-degree assault was not relevant to this finding. Here, there was substantial evidence that Graham committed the acts that constituted first-degree assault — stomping and jumping on Letrondo — after the victim was incapacitated by Graham's own hand. There are no relevant differences between this case and Baird and Ogden.

Still, Graham complains that allowing this aggravator to apply to first-degree assault cases where the victim is injured "progressively" would allow the State to dole out "automatic" exceptional sentences on a "whim." AOB at 35. First, this is a faulty argument because a jury must decide the facts, and the trial court retains the legal discretion to decide whether an exceptional sentence is warranted. See Suleiman, 158 Wn.2d at 290-91. But more importantly, this Court has rejected this same argument twice, in Baird and Ogden.

In Baird, this Court rejected the argument that finding particular vulnerability "from the assault itself" would set "a dangerous precedent." 83 Wn. App. at 489. In Ogden, this Court rejected Ogden's contention that particular vulnerability could be

found "in every case where the perpetrator strikes the victim more than once." 102 Wn. App. at 368. Instead, this Court wisely concluded that a victim who is immobilized and then is gruesomely assaulted is different than a victim who "receives multiple blows but who is not thereby rendered totally helpless to defend himself or herself from further injury." Id. at 368-69. "Although the latter victim may be more vulnerable than other victims after he or she receives the first blow, his or her status does not rise to the level of 'particularly vulnerable victim' by mere virtue of enduring multiple strikes." Id. And this Court further refused to establish a bright-line rule in such cases. Id. This Court here should adhere to its sound reasoning in Ogden and Baird.

Again, the question here is not complicated: Could any rational jury find this aggravating factor beyond a reasonable doubt? Surely. The aggravating factor of particular vulnerability or incapability of resistance should be affirmed.

3. THE AGGRAVATING FACTOR OF PARTICULAR VULNERABILITY IS NOT VOID FOR VAGUENESS.

Lastly, Graham contends that the aggravating factor of particular vulnerability is unconstitutionally vague. His argument is a non-starter because our supreme court has long held that

sentencing aggravators are not subject to vagueness challenges under the Due Process Clause, and Graham fails to demonstrate why this Court should not follow binding supreme court precedent. Even so, Graham may not raise a constitutionality challenge now because he failed to preserve the error. Finally, this aggravating factor is not vague.

a. A Defendant May Not Raise A Vagueness Challenge To A Sentencing Aggravator.

Under the Due Process Clause, a statute is void for vagueness if (1) it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003).

Our supreme court has previously held that sentencing aggravators are not subject to vagueness challenges under the Due Process Clause because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459. "A citizen reading the guideline

statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." Id. The Court further observed that "[t]he guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest." Id. at 461.

Graham declares that "courts" have relied on a "faulty premise" to hold that sentencing aggravators are not subject to vagueness challenges. AOB at 38. Graham does not explain why Baldwin is wrong — in fact, he does not mention Baldwin at all. Instead, he fleetingly suggests that the "courts" are wrong in light of Blakely because they supposedly relied previously on "judicial discretion."

Graham apparently gets this idea from a single sentence of *dictum* from this Court in State v. Jacobson, which was decided five years before Baldwin. 92 Wn. App. 958, 966-67, 965 P.2d 1140 (1998). In Jacobson, this Court addressed a vagueness challenge to a different aggravating factor and noted that federal sentencing guidelines are "simply not subject to a vagueness attack." 92 Wn.

App. at 966. This Court said that "it is difficult to imagine a case in which a Sentencing Reform Act provision that grants limited discretion to sentencing courts could be found unconstitutionally vague." Id. But because the State did not make that argument, this Court entertained (and rejected) the vagueness challenge, "even though we believe the application to be theoretically and analytically unsound." Id. at 967. After Baldwin, this Court presumably would not have bothered to even address vagueness.

The supreme court's analysis in Baldwin remains valid after Blakely. Blakely mandated that a jury, rather than a judge, decides whether facts exist to support an exceptional sentence. The change in the finder of fact, and the burden of proof from "by a preponderance," to "beyond a reasonable doubt," are the only pertinent changes that resulted from Blakely.

The sentencing aggravators in RCW 9.94A.535 do not purport to define criminal conduct. Graham claims that after Blakely, there is a "now-irrefutable proposition that aggravating circumstances operate as elements of a higher offense." AOB at 38. But our supreme court has stated that "an aggravating factor is not the functional equivalent of an essential element." State v. Siers, 174 Wn.2d 269, 271, 274 P.3d 358 (2012). And more

specifically, the particular-vulnerability aggravator is not the equivalent of an element of the underlying crime. Gordon, 172 Wn.2d 671, 678, 260 P.3d 884 (2011).

Instead, the statute lists accompanying circumstances that *may* justify a trial court's imposition of a higher sentence. But a jury's finding of a sentencing aggravator does not mandate an exceptional sentence. The trial court still has discretion in deciding whether the sentencing aggravator is a substantial and compelling reason to impose an exceptional sentence.[10] RCW 9.94A.535.

Graham discusses vagueness challenges to aggravating factors in capital cases, but capital cases are not applicable here. Our supreme court specifically addressed this in Baldwin, noting that "in noncapital cases a defendant does not have a constitutional right to sentencing guidelines." 150 Wn.2d at 448 (citing Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The difference is that in capital cases, the finding of an aggravating factor mandates a death sentence, while in noncapital cases the trial court can still opt not to give an exceptional sentence, and that discretion means "the statutes create no constitutionally protectable

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[10] For example, in Siers, the jury found the existence of a sentencing aggravator but the trial court declined to impose an exceptional sentence. 174 Wn.2d at 272-73.

liberty interest." Baldwin, 150 Wn.2d at 460-61. That is not changed by Blakely.

In the final analysis, this Court is obliged to follow directly controlling authority of our supreme court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Because Graham has not provided any cogent legal argument to show how Baldwin is wrong, this Court should reject Graham's vagueness challenge.

b. Graham Has Waived Any Vagueness Challenge.

Graham claims now that the pattern instructions to the jury on particular vulnerability were unconstitutionally vague, especially as they pertain to comparing Letrondo to a typical victim. However, Graham never proposed any additional or clarifying instructions at trial.[11] Unobjected-to jury instructions are not subject to constitutional vagueness challenges on appeal. State v. Releford, 148 Wn. App. 478, 493, 200 P.3d 729, 736 (2009). Failure to elaborate on the meanings of aggravating factors is not error of constitutional magnitude that can be raised for the first time on appeal. Gordon, 172 Wn.2d at 678. This Court has repeatedly

[11] Graham's only comment at trial to the instructions about the aggravating circumstances was an objection to part of the definition of "reasonable doubt." 11RP 64.

held that a defendant who believes a jury instruction is unconstitutionally vague has a ready remedy — proposal of a clarifying instruction — and the failure to propose further definition precludes appellate review.

In State v. Fowler, 114 Wn.2d 59, 69, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 486-87, 816 P.2d 718 (1991), the defendant attempted to challenge the term "unlawful force" in the jury instructions as unconstitutionally vague. The Court held the claim was waived:

> Although Fowler did take exception to the assault instruction proposed by the court, his exception did not involve the potential vagueness or overbreadth of the court's definition of the term "unlawful force." His objection cannot be raised for the first time on appeal.

114 Wn.2d at 69; see also State v. Payne, 25 Wn.2d 407, 414, 171 P.2d 227 (1946) (defendant who did not take exception to jury instructions waived claim that they were vague and confusing).

The reasons for this waiver rule have been explained as follows:

> Vagueness analysis is employed to ensure that ordinary people can understand what conduct is proscribed and to protect against arbitrary enforcement of law. See City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000). *This rationale applies to statutes and official policies, not to jury instructions.* Unlike citizens who must try to conform their conduct to a vague statute, a criminal

> defendant who believes a jury instruction is vague has a ready remedy: proposal of a clarifying instruction.

State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006), rev. denied, 159 Wn.2d 1017, cert. denied, 555 U.S. 948 (2007) (emphasis added).

This Court should decline to address the defendant's vagueness arguments. A defendant who believes an instruction is vague should request a clarifying instruction so that the trial court can cure any possible error. To hold otherwise would encourage defendants to delay raising such issues until they receive an adverse verdict. Because the defendant did not propose any further instructions with respect to the aggravating circumstance, he has waived any claim that the instruction was vague.

c. The Statute Is Not Vague.

A statute is presumed to be constitutional. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). The party challenging a statute's constitutionality for vagueness bears the burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague. City of Spokane v. Douglass, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

A statute meets constitutional requirements "[i]f persons of ordinary intelligence can understand what the ordinance proscribes." Douglass, 115 Wn.2d at 179. It is not enough to hold a statute vague merely because "a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 740, 818 P.2d 1062 (1991) (quoting Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)). After all, "[s]ome measure of vagueness is inherent in the use of language." Id. Thus, vagueness "is not mere uncertainty." State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. State v. Branch, 129 Wn.2d 635, 648, 919 P.2d 1228 (1996).

Even if Graham could make a due-process vagueness challenge to RCW 9.94A.535(3(b), the statute that has long established the "particularly vulnerable or incapable of resistance" sentencing aggravator at issue here, his argument would fail.[12] The term "particularly vulnerable" is not so vague that a person of

[12] See 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.11 (3d Ed) ("The aggravating factor of victim vulnerability has been part of the Sentencing Reform Act since it was first adopted in 1981.").

common intelligence must guess at its meaning. See State v. Gordon, 153 Wn. App. 516, 538, 223 P.3d 519 (2009) ("A jury would readily understand the concept of vulnerability.").[13] The definition provided in the pattern instruction here further clarified the meaning and provided the required substantial-factor instruction. See Suleiman, 158 Wn.2d at 291-92 (jury must find that vulnerability was a substantial factor). Moreover, the term "incapable of resistance" is even easier for an ordinarily intelligent person to understand.[14]

Graham complains that the language of the statute gave no notice that he might be sentenced more harshly for repeatedly jumping and stomping upon an obviously unconscious and much smaller man, but Letrondo epitomized the commonsense definition of a "particularly vulnerable" victim who was "incapable of resistance."

Graham further complains that jurors are not intelligent enough to evaluate the difference between a typical victim and an unconscious, defenseless victim, and "reasonable minds will

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[13] This case was reversed on other grounds by Gordon, 172 Wn.2d 671 (2011).

[14] So much so that the Washington State Supreme Court Instruction Committee does not suggest that any further explanatory instruction need be given in regards to the phrase "incapable of resistance." See 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.11 (3d Ed).

differ."[15] AOB at 40. But jury unanimity dispels such concerns, and Graham did not even bother to argue the issue of Letrondo's vulnerability to the jury. While reasonable minds may indeed differ, that does not make the statute unconstitutionally vague. Rather, Graham must prove beyond a reasonable doubt that a person of ordinary intelligence would be unable to know what the statute proscribes. Douglass, at 179. He fails in that burden here, so his arguments fail.

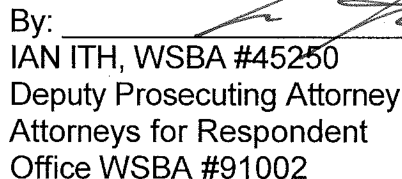
D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Graham's judgment and sentence.

DATED this 6TH day of January, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

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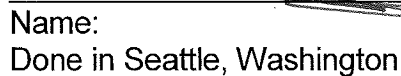
[15] Graham offers a Ninth Circuit case, Valerio v. Crawford, in the context of distinguishing a vulnerable victim from a typical victim. 306 F.3d 742, 756-57 (9th Cir. 2002). The State is at a loss to understand what Valerio has to do with Graham's case. Valerio was a capital case, and the section that Graham cites is about the proper procedure for an appellate court to follow after one death-sentence aggravator (depravity of mind) was found unconstitutional but the jury also found a second aggravator, which needed to be reweighed against the mitigating factors. Valerio does not appear to have any applicability here.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the appellant, at Oliver@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. Sean Laward Graham, Cause No. 73107-6, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 7 day of January, 2016.



Name:
Done in Seattle, Washington