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Court of Appeals  
Division II  
State of Washington  
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No. 53529-7

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

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STATE OF WASHINGTON,

Respondent,

v.

PETER JOSEPH MALDONADO, JR.,

Appellant.

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

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APPELLANT'S AMENDED OPENING BRIEF

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MAUREEN M. CYR  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports the aggravator, in violation of due process under article I, section 3 and the Fourteenth Amendment.

2. The aggravator is void for vagueness, in violation of due process under article I, section 3 and the Fourteenth Amendment.

3. The court erred in imposing an exceptional sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The “particularly vulnerable victim” aggravator requires proof the victim of the crime was atypical in that she was more vulnerable than the typical victim of the particular crime. Here, the State presented no evidence about the characteristics of the “typical” victim of second degree assault of a child. Did the State fail to prove the aggravator?

2. Statutes that fix or increase sentences are subject to the void for vagueness doctrine. Aggravating circumstances are elements and increase the range of punishment. Are they subject to vagueness challenges?

3. The particularly vulnerable victim aggravator requires the jury to find the victim of the offense is atypical. But what makes a victim “typical” is speculative. And it is unclear what threshold level of

vulnerability makes a victim atypical. Is the particularly vulnerable victim aggravator void for vagueness?

C. STATEMENT OF THE CASE

Peter Maldonado is a young man who was in the United States Army, stationed at Fort Lewis. RP 747-50. He and his wife Angelica lived in Lakewood with their infant daughter, L.M. RP 750-52. L.M. was born on August 23, 2017, when Maldonado was only 21 years old. RP 471, 679. He later acknowledged he had “zero” training in how to be a good father and was unprepared for the challenges of taking care of a newborn. RP 752-53.

On November 12, 2017, Peter and Angelica brought L.M. to the hospital after she began having seizures. RP 757-59. The parents were naturally distressed and concerned about their daughter’s well-being. RP 763-64.

L.M. had no external injuries. RP 650. Medical imaging revealed a subdural hematoma, which could have caused the seizures. RP 503-04, 507, 510-11. L.M. also had a small ischemia, which is an area of the brain that becomes damaged when it does not receive enough oxygen and can cause seizures. RP 512-16. L.M. also had hemorrhages in the retinas of both of her eyes. RP 511, 701.

L.M.'s subdural hematoma was already resolving itself. RP 530. Although the nerve cells damaged by the ischemia will never regenerate and people with such injuries can suffer long-term behavioral, intellectual or motor deficits, other people, especially those who sustain the injury during childhood, can recover the function of the affected area of the brain. RP 521-22, 531-32. And although a retinal hemorrhage can impair a person's vision and affect brain development, subsequent visits revealed that L.M.'s retinal hemorrhages had resolved and she had not lost her vision. RP 710, 715.

The doctors could not say for sure what had caused L.M.'s injuries. They said these kinds of injuries are commonly seen in babies who are shaken. RP 531, 535, 704, 727-29. The doctors estimated that L.M. received the injuries sometime between two days and two months before she came to the hospital. RP 508, 520, 528, 712-13.

L.M. also received a full skeletal x-ray. The radiologist determined she had two rib fractures and a fracture of the tip of the index finger of her left hand.<sup>1</sup> RP 556-60. Like the above injuries, a

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<sup>1</sup> At first, the radiologist believed L.M. might also have a fracture in her right forearm. RP 561, 563. But in a repeat skeletal survey performed two weeks later, the arm fracture no longer appeared. RP 570. The radiologist concluded the apparent arm fracture had probably been an "artifact" and not an actual fracture. RP 570.

baby who is shaken can sustain rib fractures. RP 720. Nothing else on the skeletal survey caused any concern. RP 563.

The rib fractures and the finger fracture were healing at different rates, suggesting L.M. had sustained the injuries at different times. RP 559-65. The radiologist estimated she received the rib fractures between 7 and 35 days before coming to the hospital, and the finger fracture less than 7 days before she came to the hospital. RP 559-60. Another skeletal survey conducted two weeks later showed the ribs were continuing to heal and the finger tip had completely healed. RP 569-71. There was no reason to believe the rib fractures would not completely heal as well. RP 569.

L.M. was given anti-seizure medication and soon stopped having seizures. RP 523-25, 533, 619. After three days in the hospital, she was discharged and placed in foster care. RP 446, 619, 621.

A police detective interviewed Maldonado. Ex. 141; RP 646. Maldonado told the detective that one day he came home from work exhausted, hungry, and angry about something that had happened at work. He began arguing with his wife and, when the baby started to cry, he picked her up and shook her about 10 times. RP 815-16; Ex. 141.

The State never presented any evidence of any other alleged shaking incident or any other intentional abuse suffered by L.M.

Maldonado also told the detective that once, he shut the cabinet door while he was holding the baby and she might have accidentally got her finger caught in the door. RP 776-77. And on other occasions, he once accidentally dropped the baby while changing her; he once took her running strapped to his chest in a baby carrier, jostling her head; her mother once accidentally hit her with the car seat while carrying her; and the baby once accidentally rolled off of the futon and fell about 18 inches onto the floor. RP 642-43.

The State charged Maldonado with one count of first degree assault of a child. CP 6-7. The State also charged the aggravating factor that Maldonado knew or should have known that L.M. was particularly vulnerable or incapable of resistance. CP 6-7.

At trial, multiple witnesses testified that L.M., who was now almost two years old, had greatly improved and stabilized. RP 460, 593, 599, 609. She was not taking any medication and no longer experienced seizures. RP 462, 607. She had reached all of the normal milestones in her gross motor skills, although she reached them at a delayed rate, and she was still delayed in her fine motor skills. RP 452,

460-62. She wore glasses, as she was nearsighted in both eyes and one of her eyes had a shorter field of vision than the other. RP 450, 456. Her language, cognitive, and social skills were delayed, and she was receiving speech and occupational therapy to work on those skills. RP 452-54, 596-99. But she was a happy and active toddler, and played and interacted with others. RP 453-54, 463.

Maldonado testified that, contrary to what he had told the detective, he never shook the baby. RP 783-86. He explained he had said that only because the detective would accept no other explanation and was going to try to blame his wife if he did not confess. RP 801-02, 824-25.

The jury found Maldonado guilty of the lesser degree charge of second degree assault of a child. CP 43-44. The jury also answered “yes” to the question, “Did the defendant know, or should the defendant have known, that the victim was particularly vulnerable or incapable of resistance?” CP 46.

Maldonado had no criminal history. CP 52. The standard sentence range was 31 to 41 months. CP 59. Based on the jury’s finding of the aggravating factor, the court imposed an exceptional sentence of 60 months. CP 62.

D. ARGUMENT

**The exceptional sentence must be reversed due to insufficient evidence and violation of the void for vagueness doctrine.**

The exceptional sentence is predicated on the aggravating factor that Maldonado “knew or should have known that [L.M.] was particularly vulnerable or incapable of resistance.” CP 41; RCW 9.94A.535(3)(b). In a special verdict, the jury found the State had proved the aggravating factor. CP 46. Based on the jury’s finding, the trial court imposed an exceptional sentence, increasing Maldonado’s sentence by 19 months above the top of the standard range. CP 58-70.

The aggravating factor was not supported by sufficient evidence and is unconstitutionally vague, requiring resentencing within the standard range.

1. The evidence does not support the vulnerable victim aggravator because the requirement of atypicality was not satisfied.

Aggravating factors (other than the fact of a prior conviction) are elements of a greater crime and due process requires the State to prove them beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Allen, 192 Wn.2d 526, 538-39, 431 P.3d 117 (2018); RCW

9.94A.537(3); U.S. Const. amend. XIV; Const. art. I, § 3. When a defendant challenges the sufficiency of the evidence on appeal, the question is whether, when the evidence is viewed in the light most favorable to the State, any rational trier of fact could have found the element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970).

The jury was instructed to decide whether Maldonado “knew or should have known that [L.M.] was particularly vulnerable or incapable of resistance.” CP 41; RCW 9.94A.535(3)(b). The jury was further instructed:

A victim is “particularly vulnerable” if he or she is more vulnerable to the commission of the crime than *the typical victim* of Assault of a Child in the First or Second Degree. The victim’s vulnerability must also be a substantial factor in the commission of the crime.

CP 42 (emphasis added).

This definition requires the jury to compare the characteristics of this victim with those of the typical victim of this particular crime. Cf. State v. Suleiman, 158 Wn.2d 280, 294 n.5, 143 P.3d 795 (2006) (stating that “a determination of whether this crime was far more egregious than the typical” requires a “factual comparison”).

The evidence does not support the jury’s finding that the vulnerable victim aggravator was proved beyond a reasonable doubt. The State presented *no evidence* concerning the “typical” victim of second degree assault of a child. Thus, the vulnerable victim aggravator is not supported by sufficient evidence.

Where the evidence is insufficient to prove an aggravating factor, the reviewing court must reverse the exceptional sentence and remand for resentencing within the standard range. State v. Stubbs, 170 Wn.2d 117, 131, 240 P.3d 143 (2010). Maldonado must be resentenced within the standard range.

2. The aggravating factor is void for vagueness.
  - a. The void for vagueness doctrine applies to aggravating factors.

When “a criminal law [is] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement,” it violates due process. Johnson v. United States, \_\_ U.S.\_\_, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015); U.S. Const. amend XIV; Const. art. I, § 3.

“[T]he most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern

law enforcement.” Smith v. Goguen, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). “[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department.” Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). In that sense, the void for vagueness “doctrine is a corollary of the separation of powers—requiring that [the legislative branch], rather than the executive or judicial branch, define what conduct is sanctionable and what is not.” Sessions v. Dimaya, \_\_\_ U.S. \_\_\_, 138 S. Ct. 1204, 1212, 200 L. Ed. 2d 549 (2018) (plurality opinion).

In a case predating Blakely, when aggravators were not considered elements, our supreme court concluded that statutory aggravating factors are immune from vagueness challenges. State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). In reaching this conclusion, the court reasoned that aggravating factors do not “vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature.” Id. at 459. The court further reasoned that anyone “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.

Baldwin is no longer viable post-Blakely. For example, the court reasoned the vagueness doctrine did not apply because the sentencing court had broad discretion to impose an exceptional sentence so long as it articulated a substantial and compelling reason. Baldwin, 150 Wn.2d at 461. But under Blakely, this is no longer true and is inconsistent with the high court’s reasoning that it was immaterial that “the [sentencing] judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure.” Blakely, 542 U.S. at 305 n.8.

Our supreme court recently declined to reconsider the viability of Baldwin. State v. Murray, 190 Wn.2d 727, 732 n.1, 416 P.3d 1225 (2018).<sup>2</sup> But more recently, the court held the constitutional prohibition against double jeopardy barred retrial on an aggravator the jury had rejected. Allen, 192 Wn.2d at 542-43. The court reasoned the aggravator was an “element” for purposes of double jeopardy because if found it increased the mandatory minimum sentence. Id.

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<sup>2</sup> The court assumed without deciding the void for vagueness doctrine applied but concluded the “rapid recidivism” aggravating factor was not unconstitutionally vague as applied in that case. Murray, 190 Wn.2d at 732 n.1, 736-38.

As with countless other elements of crimes, the aggravating factor at issue does not mandate a minimum penalty. But when a jury finds an aggravating circumstance in RCW 9.94A.535(3), the sentencing court is authorized to impose a longer sentence. Excluding exceptions not applicable here, a court cannot impose a sentence above the standard range unless the jury finds an aggravating factor. Because statutory aggravators alter the range of punishment, they are elements subject to vagueness challenges.

Before Allen, the Court of Appeals reached the contrary conclusion in two cases. State v. DeVore, 2 Wn. App. 2d 651, 665, 413 P.3d 58, review denied, 191 Wn.2d 1005, 424 P.3d 1216 (2018); State v. Brush, 5 Wn. App. 2d 40, 63, 425 P.3d 545 (2018), review denied, 192 Wn.2d 1012, 432 P.3d 792 (2019). Both cases incorrectly reason that the jury's finding of an aggravator does not alter the range of punishment because the court must still sentence the defendant within the statutory maximum for the crime. DeVore, 2 Wn. App. 2d at 665; Brush, 2 Wn. App. 2d 61-62. This reasoning is wrong because without the aggravator, the judge is unable to impose a sentence beyond the standard range. And a sentence beyond the standard range is an alteration of the range of punishment.

DeVore and Brush rely upon recent United States Supreme Court precedent: Johnson, 135 S. Ct. 2551, and Beckles v. United States, \_\_\_ U.S. \_\_\_ 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017). Read properly, these cases support application of the vagueness doctrine to aggravating factors.

In Johnson, the Court stated the void for vagueness doctrine applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences.” 135 S. Ct. at 2557. Because a provision of a federal statute increased a sentence to a minimum of 15 years, the vagueness doctrine applied. Id. at 2555. The Court held the provision at issue was unconstitutionally vague. Id.

Beckles involved a vagueness challenge to the Federal Sentencing Guidelines, specifically a provision similar to the one held vague in Johnson. Although once mandatory, the Guidelines are now advisory. Beckles, 137 S. Ct. at 999; see United States v. Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). Thus, even though the language of the provision in Beckles was similar to the provision in Johnson, it did “not fix the permissible range of sentences.” Beckles, 137 S. Ct. 892. Rather, it simply guided sentencing “courts in exercising their discretion.” Id. at 894. Given

their advisory nature, the Guidelines are not subject to due process vagueness challenges. Beckles, 137 S. Ct. at 892, 894.

Unlike the provision in Beckles, which if satisfied resulted in an advisory sentence, the existence of an aggravator is necessary to impose the sentence at issue here. And unlike under the federal system, aggravating factors are elements. Allen, 192 Wn.2d at 542-43. Further, Beckles states the vagueness doctrine applies to laws that permit juries to “prescribe the sentences or sentencing range available.” In Washington, when the jury finds an aggravator, the jury is effectively prescribing a sentencing range up to the statutory maximum. Thus, Beckles supports application of the vagueness doctrine.

In sum, aggravating factors are elements. Once found by the jury, they effectively prescribe a higher sentencing range. Consistent with United States Supreme Court precedent and our supreme court’s decision in Allen, this Court should conclude that the statutory aggravators set out in RCW 9.94A.535(3) are subject to void for vagueness challenges.

- b. The particularly vulnerable victim aggravating factor is unconstitutionally vague.

The particularly vulnerable victim aggravator permits arbitrary application and does not provide fair notice of the conduct proscribed.

At what point does a “typical” victim of second degree assault of a child become particularly vulnerable? People can only guess.

Johnson supports the conclusion that this aggravator is impermissibly vague. There, the court applied the vagueness doctrine to the residual clause of the federal Armed Career Criminal Act (ACCA). Johnson, 135 S. Ct. at 2555. When applicable, this provision increased a sentence from a statutory maximum of 10 years to a minimum of 15 years. Id. The provision was triggered 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. The Court held that imposing an increased sentence under this provision violated the prohibition against vague laws. Id.

In reaching this conclusion, the Court reasoned two features of the clause made it vague. Id. at 2557. First, it required a person to ascertain what the “ordinary” version of the offense involved. 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 2558. “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.; accord Dimaya, 138 S. Ct. at 1216.

Similarly here, the particularly vulnerable victim aggravator asks jurors to determine the characteristics of the typical victim of the crime and then compare that to the characteristics of the victim in the present case. Similar to an inquiry about what is “ordinary,” this atypicality inquiry is inherently speculative. Further, it is unclear what level of vulnerability is required. This indeterminacy makes juror determinations of the aggravator unpredictable and arbitrary. The Court should hold the aggravator is void for vagueness.

Because the aggravator is invalid, this Court must remand for resentencing within the standard range. Stubbs, 170 Wn.2d at 131.

E. CONCLUSION

The State did not prove the aggravating factor and the aggravator is void for vagueness. Maldonado must be resentenced within the standard range.

Respectfully submitted this 12th day of May, 2020.

/s Maureen M. Cyr  
State Bar Number 28724  
Washington Appellate Project – 91052  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
Phone: (206) 587-2711  
Fax: (206) 587-2710  
Email: maureen@washapp.org

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON,	)	
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	)	NO. 53529-7-II
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	)	
PETER MALDONADO, JR.,	)	
	)	
Appellant.	)	

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PIERCE COUNTY PROSECUTOR'S OFFICE		
930 TACOMA AVENUE S, ROOM 946		
TACOMA, WA 98402-2171		

**SIGNED** IN SEATTLE, WASHINGTON THIS 12<sup>TH</sup> DAY OF MAY, 2020.



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**Washington Appellate Project**  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

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