

FILED
Court of Appeals
Division II
State of Washington
6/25/2020 3:55 PM

NO. 53529-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

PETER JOSEPH MALDONADO, JR.,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 18-1-01797-3

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

 A. May Maldonado raise a vagueness challenge to the “particularly vulnerable victim” aggravating factor for the first time on appeal where he did not object to the jury instruction below and did not propose a definitional or clarifying instruction? 2

 B. Is the “particularly vulnerable victim” aggravating factor subject to a vagueness challenge where it does not prohibit or require any conduct and where the Washington Supreme Court has held that sentencing guidelines are not subject to a vagueness analysis because they do not define conduct and merely guide a court’s discretion in sentencing a defendant within the statutory range? 2

 C. Was there sufficient evidence for a rational trier of fact to find the “particularly vulnerable victim” aggravating factor beyond a reasonable doubt where there was undisputed evidence that the victim was only three months old at the time of the assault, where she was unable to walk or talk and was completely reliant on Maldonado as one of her caregivers? 2

III. STATEMENT OF THE CASE..... 2

IV.	ARGUMENT	4
A.	Maldonado’s failure to object to or propose a definition for the “particularly vulnerable victim” jury instruction precludes a vagueness challenge for the first time on appeal.	5
B.	Sentencing Guidelines are not Subject to Challenge under the Void-for-Vagueness Doctrine.....	9
C.	The State Submitted Sufficient Evidence for a Jury to Find the “Vulnerable Victim” Aggravating Circumstance Beyond a Reasonable Doubt.	18
V.	CONCLUSION.....	23

TABLE OF AUTHORITIES

State Cases

<i>In re Cashaw</i> , 123 Wn.2d 138, 866 P.2d 8 (1994)	11, 12, 13, 14
<i>In re Cashaw</i> , 68 Wn. App 112, 839 P.2d 332 (1992)	12
<i>In re Sinka</i> 92, Wn.2d 555, 599 P.2d 1275 (1979)	10, 11
<i>Seattle v. Drew</i> , 70 Wash.2d 405, 423 P.2d 522 (1967)	9
<i>State v. Allen</i> , 192 Wn.2d 526, 431 P.3d 117 (2018).....	14, 15
<i>State v. Armstrong</i> , 106 Wn.2d 547, 723 P.2d 1111 (1986).....	19
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	18
<i>State v. Baldwin</i> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	9, 10, 12, 13, 14, 16, 17
<i>State v. Cardenas-Flores</i> , 189 Wn.2d 243, 401 P.3d 19 (2017).....	18
<i>State v. Carver</i> , 113 Wn.2d 591, 781 P.2d 1308 (1989).....	18, 21
<i>State v. DeVore</i> , 2 Wn. App. 2d 651, 413 P.3d 58 (2018).....	17, 18
<i>State v. Fisher</i> , 108 Wn.2d 419, 739 P.2d 683 (1987).....	20
<i>State v. Garibay</i> , 67 Wn. App. 773, 841 P.2d 49 (1992).....	20
<i>State v. Jacobsen</i> , 95 Wn. App. 967, 977 P.2d 1250 (1999)	19
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993).....	18
<i>State v. Kent</i> , 87 Wash.2d 103, 549 P.2d 721 (1976)	9
<i>State v. Moen</i> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	20
<i>State v. Moses</i> , 193 Wn. App. 341, 372 P.3d 147 (2016).....	19

<i>State v. Powell</i> , 167 Wn.2d 672, 223 P.3d 493 (2009).....	16
<i>State v. Releford</i> , 148 Wn. App. 478, 200 P.3d 729 (2009)	6, 7
<i>State v. Rhodes</i> , 92 Wn.2d 755, 600 P.2d 1264 (1979)	10, 11, 13, 14
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	6
<i>State v. Siers</i> , 174 Wn.2d 269, 274 P.3d 358 (2012)	15, 16
<i>State v. Stroh</i> , 91 Wn. 2d 580, 588 P.2d 1182 (1979)	9
<i>State v. Suleiman</i> , 158 Wn.2d 280, 143 P.3d 795 (2006)	19, 21, 22
<i>State v. Suleiman</i> , No. 52557-3-I, 2004 WL 1203884 (Wash. Ct. App. June 1, 2004).....	22
<i>State v. Sullivan</i> , 143 Wash.2d 162, 19 P.3d 1012 (2001).....	5
<i>State v. Whitaker</i> , 133 Wn. App. 199, 35 P.3d 923 (2006).....	6, 7
<i>State v. Zigan</i> , 166 Wn. App. 597, 270 P.3d 625 (2012).....	18, 19

Federal and Other Jurisdictions

<i>Beckles v. United States</i> , 580 U.S. ---, 137 S. Ct. 886, 197 L.Ed.2d 145 (2017).....	16, 17
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004)	14, 17, 22
<i>Johnson v. United States</i> , --- U.S. ---, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015).....	16, 17
<i>Kentucky DOC v. Thompson</i> , 490 U.S. 454, 109 S.Ct. 1910 (1989).....	12
<i>Lockett v. Ohio</i> , 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973	14

Constitutional Provision

Fifth Amendment 15

First Amendment 5

Statutes

RCW 10.95.020 14

RCW 10.95.030(1)..... 14

RCW 9.94A.510..... 14

RCW 9.94A.515..... 14

RCW 9.94A.535..... 4, 15

RCW 9.94A.535(3)..... 18

RCW 9.94A.540..... 15

RCW 9.95 10

RCW 9A.36.130..... 20

I. INTRODUCTION

A jury convicted Peter Maldonado of assault of a child in the second degree after hearing testimony about his interactions with his three-month-old daughter L. M., and injuries that she sustained that included bone fractures and bilateral brain and retinal hemorrhages. The jury also returned a special verdict finding the aggravating factor that the victim was particularly vulnerable. Based on that finding, the trial court imposed an exceptional sentence of 60 months—nineteen months above the high end of the standard range, but 60 months below the statutory maximum. All issues raised in this appeal relate to the aggravating factor.

Although Maldonado did not object to the jury instructions related to the aggravating factor at trial, he argues that the aggravating factor is unconstitutionally void. In the face of long-standing precedent to the contrary, he argues that the statute underlying the aggravating factor is subject to void-for-vagueness analysis. Finally, he argues that the jury lacked sufficient evidence to support its special verdict.

Because the aggravating factor is not unconstitutionally vague as applied to Maldonado, the statutory basis for that factor is not subject to void-for-vagueness analysis and the jury had ample evidence to return the verdict that it did, this court should affirm the exceptional sentence.

II. RESTATEMENT OF THE ISSUES

- A. May Maldonado raise a vagueness challenge to the “particularly vulnerable victim” aggravating factor for the first time on appeal where he did not object to the jury instruction below and did not propose a definitional or clarifying instruction?
- B. Is the “particularly vulnerable victim” aggravating factor subject to a vagueness challenge where it does not prohibit or require any conduct and where the Washington Supreme Court has held that sentencing guidelines are not subject to a vagueness analysis because they do not define conduct and merely guide a court’s discretion in sentencing a defendant within the statutory range?
- C. Was there sufficient evidence for a rational trier of fact to find the “particularly vulnerable victim” aggravating factor beyond a reasonable doubt where there was undisputed evidence that the victim was only three months old at the time of the assault, where she was unable to walk or talk and was completely reliant on Maldonado as one of her caregivers?

III. STATEMENT OF THE CASE

On November 13, 2017, police responded to Madigan Hospital in Lakewood, WA to investigate reports that three-month-old L.M. was potentially the victim of abuse. CP 1-2. L.M.’s father, Appellant Peter

Maldonado, was interviewed by police, and he described several incidents that he claimed were accidents where L.M. could have been injured. RP 648. They also obtained information from hospital staff. RP 643-645.

Maldonado was initially charged with assault of a child in the second degree, which was later amended to assault of a child in the first degree. CP 3-4, 6-7. The charging documents included allegations that the crime was a domestic violence incident, and that the defendant “knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” *Id.* The case proceeded to trial on June 5, 2019. RP 4. The State’s witnesses included Detective Christopher Bowl who testified concerning the interview that he conducted with the defendant. 636-65. The State also called Dr. Elizabeth Wood, a medical doctor and expert in child abuse who testified that L. M.’s injuries included a subdural hematoma, retinal hemorrhaging and several fractures. RP 723. Dr. Wood also offered her expert opinion that the brain and eye injuries were the result of abusive head trauma. RP 722. The jury was instructed on the lesser included charge of assault of a child in the second degree and returned a verdict of guilty on that charge, and special verdicts of “yes” to the questions asking if the defendant and victim were members of the same family or household and whether the defendant knew or should have known

that the victim was particularly vulnerable or incapable of resistance. CP 32-37, 41-6.

Based on the jury's finding that the victim was "particularly vulnerable or incapable of resistance," the trial court found substantial and compelling reasons justified an exceptional sentence based on this aggravating factor. CP 51-53, 59. The court imposed an exceptional sentence of 60 months. CP 62.¹ Maldonado timely appealed. *See* CP 47.

IV. ARGUMENT

Maldonado attacks his exceptional sentence on two bases. First, he makes a two-part argument that RCW 9.94A.535, the statute underlying the trial court's instructions related to the aggravating factor, is unconstitutionally vague. Because well settled precedent establishes that sentencing guidelines, including the one at issue here are not subject to void for vagueness analysis, he first argues that those precedents have essentially been overruled by subsequent cases—a result that no court has adopted to date. Then, assuming that this court adopts that position, he argues that the aggravating factor actually is unconstitutionally vague—again, a result that no court has adopted to date.

¹ The standard range was 31-41 months. CP 59.

The second basis is sufficiency of the evidence—where Maldonado adopts a position that evidence sufficient to prove the “vulnerable victim” aggravator necessarily must include evidence defining a hypothetical typical victim of the crime to which the factfinder would then compare the victim of the case at issue.

A. Maldonado’s failure to object to or propose a definition for the “particularly vulnerable victim” jury instruction precludes a vagueness challenge for the first time on appeal.

The analysis of whether or not the “vulnerable victim” aggravating factor is unconstitutionally vague must necessarily begin with the jury instructions because when a statute that does not involve First Amendment rights is challenged for vagueness, the statute is evaluated “as applied” in light of the particular facts of the case. *State v. Sullivan*, 143 Wash.2d 162, 184, 19 P.3d 1012 (2001). The statute was applied to Maldonado through the jury instructions. Maldonado had an opportunity to move the court for supplemental instructions or modification of its instructions to provide clarity and failed to do so. This failure precludes appellate review of the instructions that were applied to his case.

It is well settled in Washington law that the requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a

reasonable doubt the defendant must be acquitted. *See, e.g., State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). However, there is no constitutional requirement that the meanings of particular terms used in an instruction be specifically defined for the jury. *Id.* at 691. A failure to give a definitional instruction is not failure to instruct on an essential element. *Id.* at 690. A defendant who fails to propose a defining or clarifying instruction at trial cannot then raise the absence of such an instruction for the first time on appeal. *Id.* at 691.

A vagueness analysis ensures that ordinary people can understand what conduct is proscribed and protected against arbitrary enforcement of the law. *State v. Whitaker*, 133 Wn. App. 199, 233, 135 P.3d 923 (2006). “This rationale applies to statutes and official policies, not to jury instructions.” *Id.*; *State v. Releford*, 148 Wn. App. 478, 493, 200 P.3d 729 (2009). Unlike individuals who must try to conform their conduct to a vague statute, a defendant who believes a jury instruction is vague has a remedy—proposal of a clarifying jury instruction. *Whitaker*, 133 Wn. App. at 233. In *Whitaker*, the Court rejected Whitaker’s vagueness challenge to the “major participant” jury instructions and held that his failure to propose a definition for this aggravating factor precluded review of his claim of error. *Id.*

Here, Maldonado’s failure to object to the "particularly vulnerable victim” jury instruction, and failure to propose any instructions defining or clarifying its meaning, precludes appellate review. Instruction No. 21 informed the jury: “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. Maldonado did not object to this instruction. RP 846-47, 849, 852. Nor did he propose a definitional or clarifying instruction for this aggravating factor. *See id.* In fact, he repeatedly informed the court that he had no exceptions to the instruction. *See* RP 846-47, 849, 852. Nonetheless, he argues that he may challenge this aggravating factor as “void for vagueness.” Maldonado’s argument ignores well-established case law holding that unobjected-to jury instructions are not subject to constitutional vagueness challenges for the first time on appeal. *See Releford*, 148 Wn. App. at 493; *Whitaker*, 133 Wn. App. at 233.

Prior to instructing the jury, the trial court held the following colloquy—on the record—with counsel regarding the final version of the court’s instructions. The court explicitly inquired with respect to a motion to add to, subtract from, substitute or not give the instruction and special verdict form that addressed the “vulnerable victim” factor:

THE COURT: So, Instruction Number 1 is going to be...

21: A victim is particularly vulnerable if he or she is more vulnerable to the commission. And then Verdict Form 1A. Verdict Form 1B. Special Verdict Form, Count 1. Special Verdict Form Count -- sorry. Previous special verdict form was Special Verdict Form Count 1, Family or Household Member. Next was Special Verdict Form Count 1, Particularly Vulnerable Victim. Those are all the instructions that I have. Any other changes, deletions, that you think is necessary, Mr. Nelson?

MR. NELSON: No, Your Honor. Thank you.

THE COURT: Mr. Kibbe?

MR. KIBBE: No, Your Honor.

THE COURT: No additions, deletions, substitutions, exceptions?

MR. KIBBE: No.

RP at 850-852. .

The court again confirmed that there was no objection to the instructions before reading the instructions to the jury. RP 846-847.

Instruction number 21 explained the aggravating factor:

Jury Instruction 21

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

Because Maldonado failed to propose an instruction defining or clarifying what constitutes a “vulnerable victim” or a “typical victim” at trial, he cannot attack the instruction as vague or speculative.

B. Sentencing Guidelines are not Subject to Challenge under the Void-for-Vagueness Doctrine

A useful logical categorization of statutes or administrative processes is between those that are permissible—provide guidance or allow a particular result, and those that mandate a particular result. Ultimately, that logical categorization provides the rationale by which courts analyze whether or not a particular statute is subject to analysis under the void-for-vagueness doctrine or not.

A statute is presumed to be constitutional. *State v. Stroh*, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979). The party challenging the statute has the burden of proving that it is unconstitutionally vague. *Seattle v. Drew*, 70 Wash.2d 405, 423 P.2d 522 (1967); *State v. Kent*, 87 Wash.2d 103, 549 P.2d 721 (1976).

A vagueness analysis encompasses two due process concerns. *State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). First, criminal statutes must be specific enough that citizens have fair notice of what conduct is proscribed. *Id.* Second, laws must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution. *Id.*

Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. *Id.*

To survive a vagueness challenge, a statute must provide both fair notice of the proscribed conduct and ascertainable standards of guilt to protect against arbitrary arrest and prosecution. *Id.* Statutes that define illegal conduct are subject to analysis under the void-for-vagueness doctrine. Sentencing guidelines that do not define conduct, but rather provide guidance to judges who are sentencing convicted criminals are not. *Id.* at 459. The due process considerations that underlie the void-for-vagueness doctrine are not present in the context of sentencing guidelines. *Id.*

Maldonado at least tacitly acknowledges that for this court to overturn the exceptional sentence at issue, it must at a minimum distinguish this case from *Baldwin* and be governed by the rule articulated in *State v. Rhodes*, 92 Wn.2d 755, 600 P.2d 1264 (1979)(*Overruled by, Baldwin*). The *Baldwin* Court was well aware of its own precedent from *Rhodes*. In June of 1979, the Washington Supreme Court decided *In re Sinka* 92, Wn.2d 555, 599 P.2d 1275 (1979). The *Sinka* Court considered the statutory scheme under Chapter 9.95 RCW whereby the Board of Parole would set a minimum term of a sentence based on inputs from the sentencing judge and prosecuting attorney and a meeting with the inmate.

Sinka held that process to be one that created a liberty interest, and therefore subject to due process analysis. *Sinka* at 564.

Later that same year the Court considered whether the “manifest injustice” exception to juvenile disposition guidelines—analogue to the exceptional sentence at issue here—was void for vagueness. *State v. Rhodes*, 92 Wn.2d 755, 756, 600 P.2d 1264 (1979). Reasoning that the standard disposition ranges set for juvenile offenders were similar to the Board of Paroles process for setting minimum terms it had just considered in *Sinka*, the *Rhodes* Court held that the juvenile guidelines also created a constitutionally protected liberty interest and were therefore subject to a void-for-vagueness analysis². *Rhodes* at 758.

The liberty interests at issue in *Sinka* and *Rhodes* arose not from the due process clause, but from enactment of statutes that guided the decisionmaking process of the Board of Paroles and the juvenile disposition process respectively. By enacting a law that places substantive limits on official decisionmaking, the State can create an expectation that the law will be followed, and this expectation can rise to the level of a constitutionally protected liberty interest. *In re Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)(*internal citations omitted*).

² Although the *Rhodes* Court found that the statute was subject to analysis under the void-for-vagueness doctrine, it did not find that the statute was unconstitutional. *Rhodes* at 760.

Of course, not every law enacted by a state legislature creates a constitutional liberty interest. The 1981 Sentencing Reform Act (SRA) and its impact on the operation of the Department of Corrections regulations related to parole hearings provided a context for articulation of a rule to distinguish between statutes that create such an interest from those that do not. In a post-SRA case, *In re Cashaw*, the Court of Appeals noted that prior to enactment of the SRA (and prior to *Baldwin*) the Board of Paroles had “nearly unfettered discretion” in matters of parole and that the SRA (and regulations promulgated to implement the SRA) had significantly reduced that discretion and thus created a protected liberty interest. *In re Cashaw*, 68 Wn. App 112, 122, 839 P.2d 332 (1992)(*Overtaken by In re Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994)). However, guided by federal precedent, the Supreme Court, noted that state regulations that establish only the procedures for official decisionmaking, such as those creating a particular type of hearing, do not by themselves create liberty interests. *Cashaw* at 123 Wn.2d 14. Such an interest exists only when the state law in question contains “‘substantive predicates’ to the exercise of discretion and ‘specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.’” *Cashaw* at 146 (*Citing, Kentucky DOC v. Thompson*, 490 U.S. 454, 463 109 S.Ct. at 1910 (1989)).

When tasked with review of a criminal case where the trial court had imposed an exceptional sentence, the *Baldwin* Court recognized that its decision in *Rhodes*—where it had held that enactment of the juvenile disposition guidelines that informed a court’s decisionmaking created a protected liberty interest—was in conflict with its rule from *Cashaw*—that in order for a statute to create a liberty interest the statute “must contain ‘substantive predicates’” to the exercise of discretion and “ ‘specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.’” *Baldwin* at 460 (*Citing, Cashaw* at 144). The Court correctly noted that in the presence of a substantial and compelling reason the trial court was free to exercise its discretion and impose a sentence outside the standard range (but no greater than the statutory maximum), but was not compelled to do so. *Baldwin* at 460-461. As in the situation in the case before this Court, the statute at issue in *Baldwin*—that allowed for the imposition of an exceptional sentence--contained “substantive predicates” that guided the trial court in exercise of its discretion, but lacked a requirement that “if the regulations’ substantive predicates are present, a particular outcome must follow.” *Id.* (*Internal citations omitted*).

Baldwin acknowledged that the Court’s holding in *Rhodes* also conflicted with the 1978 U.S. Supreme Court decision in *Lockett v. Ohio*,

438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (cited for the proposition that in noncapital cases a defendant does not have a constitutional right to sentencing guidelines) and overturned *Rhodes*.³ *Id.* at 460.

Maldonado suggests that *Baldwin* “is no longer viable post-*Blakely*.” (Amended Br. of App. at 11). Apparently relying on *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018), he asserts that aggravating factors are “elements of a greater crime” and therefore increase the mandatory minimum sentence. (Amended Br. Of App. at 7, 11).

Maldonado misreads both *Blakely* and *Allen*. First, it is correct that the aggravating factor at issue in *Allen* increases the mandatory minimum. But that is because in *Allen*, the defendant was charged with Murder in the First Degree. A finding of one or more of the statutory aggravating factors listed in RCW 10.95.020 elevates murder in the first degree to the greater crime of aggravated murder in the first degree. Murder in the first degree is a seriousness level XV offense that has a standard range of 240 – 320 months. RCW 9.94A.515. Aggravated murder in the first degree is a level XVI offense with a mandatory minimum of life without the possibility of parole.⁴ RCW 9.94A.515, RCW 10.95.030(1), *Allen* at 530. However,

³ *Lockett* applies specifically to sentencing guidelines and does not more broadly state that it is impossible to create a protested interest by enactment of a state statute that satisfies the *Cashaw* test.

⁴ Twenty-five years to life if the offender is under the age of 18. RCW 9.94A.510.

there is no analogous elevation of the crime of assault of a child in the second degree to a greater crime.⁵ Here, if a jury returns the aggravating factor the sentencing judge may exercise his or her discretion to impose a sentence above the standard range or may decline to do so—the minimum sentence available to the offender is not impacted. RCW 9.94A.535.

Similarly, Maldonado’s reliance on the fact that the *Allen* court found that aggravating factors are “an ‘element’ for purposes of double jeopardy” is misguided. The issue in *Allen* was whether or not, after a jury was unable to reach a verdict on the underlying offense but rejected the aggravating factors, the State could litigate those aggravating factors at a second trial. This is a classic double jeopardy question firmly rooted in Fifth Amendment jurisprudence. The issue before this Court is whether or not void-for-vagueness doctrine applies to an aggravating factor—a due process question. *State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012) considered the question of whether or not an aggravating factor was an element and concluded that it was not:

[So] long as a defendant receives constitutionally adequate notice of the essential elements of a charge, “the absence of an allegation of aggravating circumstances in the information [does] not violate [the defendant's] rights under article I, section 22 of the Washington

⁵ RCW 9.94A.540 lists a number of felony offenses subject to a mandatory minimum sentence. Assault of a child in the second degree is not included.

Constitution, the Sixth Amendment to the United States Constitution, or due process.”

Siers, 174 Wn.2d at 276 (alterations in original) (quoting *State v. Powell*, 167 Wn.2d 672, 687, 223 P.3d 493 (2009)).

Maldonado also argues that *Johnson v. United States*, --- U.S. ---, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), which held that imposition of an enhanced sentence under the residual clause of the Armed Career Criminal Act was unconstitutional as that clause was void-for-vagueness compels a basis for distinguishing *Baldwin*. However, *Johnson* is easily distinguishable from the matter before this Court.

In *Beckles v. United States*, 580 U.S. ---, 137 S. Ct. 886, 892, 197 L.Ed.2d 145 (2017) the Court considered the question of whether or not the *Johnson* result applied to sentencing guidelines and explicitly held that the federal sentencing guidelines are not subject to void-for-vagueness analysis. The Court explained that prior cases had invalidated two kinds of criminal laws as “void for vagueness”: laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses. *Id.* at 892. The residual clause at question in *Johnson* was one such law because it *required* the sentencing court to increase the term of the defendant’s sentence. *Id.* In contrast, the sentencing guidelines do not fix the permissible range of the sentence—they “merely guide the exercise of

a court’s discretion.” *Id.* Accordingly, the sentencing guidelines are not subject to a vagueness challenge under the Due Process Clause. *Id.*, *State v. DeVore*, 2 Wn. App. 2d 651, 664-65, 413 P.3d 58 (2018). This distinction between laws that compel a result—that are subject to a vagueness challenge, and those that guide a court’s exercise of its discretion—that are not subject to such a challenge—brings Washington law in accord with federal law.

As explained by *DeVore*, *Blakely* in no way invalidates *Baldwin*. *DeVore* addresses head on the question of whether the void for vagueness doctrine applies in the context of a sentencing factor that may increase the length of incarceration, but not beyond the statutory maximum for the crime—exactly the question before this Court. *DeVore* at 660-661. After reviewing *Blakely* and other recent Federal precedent,⁶ the *DeVore* Court concluded that, “We consider Matthew DeVore’s appeal akin to *Beckles v. United States*, not *Johnson v. United States*. The [aggravating] factor does not increase the permissible sentence of the offender. The trial court must still sentence the defendant within the statutory maximum of the crime, life imprisonment. Therefore, we hold that challenges to the destructive

⁶ *Beckles v. U.S.*, 580 U.S. ___, 137 S.Ct.886, 892 (2017) concluded that the “advisory [Sentencing] Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause.”

impact factor and other aggravating factors under RCW 9.94A.535(3) do not merit review under the void for vagueness doctrine. *DeVore* at 665.

C. The State Submitted Sufficient Evidence for a Jury to Find the “Vulnerable Victim” Aggravating Circumstance Beyond a Reasonable Doubt.

In reviewing the sufficiency of evidence in a criminal case, the question is whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of all of the State’s evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Aten*, 130 Wn.2d 640, 666-667, 927 P.2d 210 (1996). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

The facts supporting an aggravating factor must be proved to a jury beyond a reasonable doubt. *State v. Zigan*, 166 Wn. App. 597, 601, 270 P.3d 625 (2012). Courts use the same standard of review for the sufficiency of the evidence of an aggravating factor as they do for the

sufficiency of the evidence of the elements of a crime. *Id.* Under this standard, the court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Id.* at 601-02.

In order for the victim's vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known of the victim's particular vulnerability and (2) that the 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). The conclusion that a victim is particularly vulnerable must be supported by facts in the record. *Id.* at 292.

Washington courts have concluded that very young victims are particularly vulnerable. *See, e.g., State v. Jacobsen*, 95 Wn. App. 967, 979-80, 977 P.2d 1250 (1999) (five-year-old victim was particularly vulnerable). In *State v. Moses*, 193 Wn. App. 341, 366, 372 P.3d 147 (2016), the Court found that the fact that the victim was five years of age and completely dependent on the defendants to care for him, feed him, and assist in his education and growth was sufficient to support the "vulnerable victim" factor. In *State v. Armstrong*, 106 Wn.2d 547, 549-50, 723 P.2d 1111 (1986), *superseded by statute on other grounds*, the fact

that the victim was a “totally defenseless 10-month-old child” was sufficient to justify an exceptional sentence based on the victim’s particular vulnerability and extreme youth.

Washington courts have upheld an exceptional sentence based on a particularly young victim even when the statute included an age element. *See, e.g., State v. Fisher*, 108 Wn.2d 419, 421-25, 739 P.2d 683 (1987) (holding that the five-year-old victim was particularly vulnerable and justified an exceptional sentence for indecent liberties of a child younger than age fourteen); *State v. Garibay*, 67 Wn. App. 773, 776-79, 841 P.2d 49 (1992), *abrogated on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996) (holding that the record supports the finding that the four-year-old victim was particularly vulnerable and justified an exceptional sentence for rape of a child younger than age twelve). Here, the crime of assault of a child in the second degree requires a victim to be under the age of thirteen. RCW 9A.36.130; *see* CP 33, 36. Thus, it includes a wide age-range of victims from age 0 to 13 years. To prohibit consideration of the age of the victim in a particular case would be to assume that all victims of this offense were equally vulnerable regardless of their age, which is an “unrealistic proposition.” *Fisher*, 108 Wn.2d at 424.

Here, it is undisputed that the victim, L.M., was only three months old at the time of the incident. *See* RP 711-12, 724, 728, 737, 752, 757. Maldonado testified that his daughter L.M. was born on August 23rd and was taken to the hospital with seizures in November 2017—when she was approximately three months old. *See* RP 752, 757-59. L.M. could not walk or talk yet—or even hold her own head up without assistance. RP 817. There was expert testimony that at that age children are not able to roll, crawl, pull up to a stand, and are completely reliant upon their caregiver. RP 728-729. There was also expert testimony that at that age children are still developing verbal and motor skills. *See* RP 737-738. The record shows that L.M. was only three months old and completely reliant upon Maldonado when she was in his care. The jury determined that Maldonado knew, or should have known, that L.M. was particularly vulnerable or incapable of resistance. CP 46. Deference must be given to the trier of fact who evaluates the persuasiveness of the evidence. *See Carver*, 113 Wn.2d at 604.

Relying on *Suleiman*, Maldonado argues that it was necessary for the State to present evidence concerning the characteristics of a “typical” victim of assault of a child in the second degree. *See* Amended Br. of App. at 8-9. Maldonado’s argument does not survive a cursory reading of *Suleiman*. First, the holding of *Suleiman* is that the trial court made

factual findings beyond those admitted to support the exceptional sentence imposed in violation of *Blakely*.⁷ *Suleiman*, 158 Wn.2d at 283-84. To support that holding the Court details—in the footnote upon which Maldonado relies—that it was necessary for the trial court to do some level of judicial factfinding in order to conclude, as it did, that the trial court relied upon facts that had neither been proven or admitted. *See Suleiman*, 158 Wn.2d at 294 n.5. The reference to a “factual determination” is dicta, and was used to explain that the trial court must have done judicial factfinding as to the severity of the injuries-impermissible under *Blackley*-in order to find that the injuries suffered by the victim in *Suleiman* were greater than that contemplated by the legislature. In fact, *Suleiman* referenced the unpublished Court of Appeals opinion noting that the otherwise unchallenged “particularly vulnerable” factor⁸ was also a product of judicial factfinding. *Id.*

Jury instruction 5 limits the potential victims of assault of a child in the second degree to those under thirteen years of age. CP 24. The jury can compare evidence offered about the characteristics of the victim in the

⁷ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004)

⁸ Apparently the only, and apparently sufficient, basis for the “particularly vulnerable” factor is that the victim was a passenger in the automobile who was unable to exit because *Suleiman* was driving and refused to stop. *See State v. Suleiman*, No. 52557-3-I, 2004 WL 1203884 (Wash. Ct. App. June 1, 2004) (unpublished). This citation is included only to provide information upon which the *Suleiman* Court relied and not as any sort of legal authority.

particular case before them with that pool. We find no authority for the proposition that the State must offer explicit evidence of the fact that the overwhelming majority of children between the ages of two and thirteen are able to both walk and talk having produced evidence that the victim in the matter before the court cannot.

Considering the evidence in the light most favorable to the State, there was ample evidence from which a rational trier of fact could have found beyond a reasonable doubt that the victim was particularly vulnerable—that is, that she was more vulnerable to the commission of the crime than the typical victim of assault of a child in the second degree.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the sentence.

RESPECTFULLY SUBMITTED this 25th day of June, 2020.

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6/25/20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 25, 2020 - 3:55 PM

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