

NO. 33988-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLAS MENDOZA VERA,

Appellant.

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

The Honorable Alicia H. Nakata, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information is constitutionally deficient because it fails to allege an essential element of the charged offense.

2. The jury instructions violated appellant's right to due process because they failed to require the State to prove an essential element of the offense, the intent to harm the health, safety, or welfare of a minor. CP 49, 51 (Instructions 3, 5).

3. The court erred in denying appellant's motion for a new trial.

4. The jury instructions violated appellant's right to due process by placing the burden on him to disprove an essential element of the offense. CP 53 (Instruction 7).

5. The court erred when it admitted appellant's statements in light of the State's failure to prove corpus delicti.

6. Prosecutorial misconduct violated appellant's right to a fair trial.

7. The court lacked authority to modify appellant's sentence six months after sentencing him.

8. The court erred in entering the order voiding the judgment and sentence.

9. The court erred in entering the amended judgment and sentence.

10. RCW 9.94A.535(b)(3), describing the aggravating factor that the victim was particularly vulnerable, is unconstitutionally vague in violation of due process.

Issues Pertaining to Assignments of Error

1. Appellant was charged with luring under RCW 9A.40.090. Division Two of this Court recently held the statute is unconstitutional unless an element of criminal intent is implied. Was the information constitutionally deficient in failing to allege the implied element of criminal intent?

2. Due process requires that a conviction be based on proof beyond a reasonable doubt of every element of the charged offense. Must appellant's conviction be reversed when the jury was not instructed it had to find beyond a reasonable doubt the implied element of intent to harm the health, safety, or welfare of the child?

3. When the defense to a crime negates an element of the crime, the State violates due process if it places the burden on the defendant to establish the defense. Must appellant's conviction be reversed when the jury was instructed he bore the burden to establish by a preponderance of the evidence that he acted without intent to harm the health, safety, or welfare of the child?

4. Under the corpus delicti rule, an accused person's statements cannot be introduced at trial unless the State presents independent evidence sufficient to permit a logical and reasonable inference that consistent with criminal activity and inconsistent with innocence. Where the State failed to make an adequate showing of criminal activity, did the court err by admitting appellant's statements?

5. A prosecutor commits misconduct when he or she offers a personal opinion on the guilt or credibility of the defendant in a criminal case. Here, the prosecutor told the jury during closing argument that appellant's explanation for his conduct was an excuse and "The State doesn't buy it." Did the prosecutor commit reversible misconduct by offering an impermissible person opinion on appellant's credibility?

6. The court originally imposed an exceptional sentence consisting of 364 days confinement (the top of the standard range) and four years community custody. It found that the facts did not justify an exceptional term of confinement. Several months later, after realizing it lacked statutory authority to impose community custody, the court modified the sentence to impose 24 months of confinement. Did the court lack authority to modify the entire sentence rather than simply strike the unauthorized portion?

7. A penal statute that fails to set forth objective guidelines to guard against arbitrary application is unconstitutionally vague in violation of Fourteenth Amendment due process. The “particularly vulnerable” aggravator in RCW 9.94A.535(3)(b) requires the jury to determine whether the victim was particularly vulnerable or incapable of resistance. Because a jury has no way to know what a typical victim of luring looks like, is this aggravator unconstitutionally vague?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Chelan County prosecutor charged appellant Nicolas Mendoza Vera with one count of luring. CP 8-9. The information also alleged, as an aggravating factor, that he knew or should have known the victim was particularly vulnerable. CP 8-9. The jury found Mendoza Vera guilty and answered “yes” to the special verdict on the aggravating factor. CP 62-63.

The court initially imposed a standard range sentence of 364 days confinement for luring, an unranked felony. CP 76-77. The court expressly found the facts did not justify an exceptional term of confinement. CP 73. However, the court did find the facts justified an exceptional community custody term of 48 months, during which time Mendoza Vera would be required to obtain a sexual deviancy evaluation and follow any

recommended treatment. CP 72-73, 78. Notice of appeal was timely filed. CP 101.

While the appeal was pending, the State realized the Sentencing Reform Act, chapter 9.94A RCW, (SRA) does not permit the court to impose a community custody term for luring and filed a motion to vacate the sentence under CrR 7.8. CP 131. Mendoza Vera's attorney also filed a motion for a new trial under CrR 7.5 on the grounds that the decision in State v. Homan, 191 Wn. App. 759, 763, 775-76, 364 P.3d 839 (2015), as corrected (Feb. 11, 2016), rendered his conviction unconstitutional. CP 103-21, 124-28.

The court denied Mendoza Vera's motion for new trial, reasoning that the Court of Appeals should determine the constitutionality of the statute. 1RP 227.¹ Both parties agreed the community custody term must be vacated, but Mendoza Vera argued against finding the entire sentence was void. 1RP 225-26; 2RP 35, 37. The court entered an order voiding the judgment and sentence and resentenced Mendoza Vera to an exceptional 24-month term of confinement. 1RP 225; 2RP 34; CP 161, 167. This Court granted permission for the amended judgment and sentence to be filed (since

¹ There are two volumes of Verbatim Report of Proceedings referenced as follows: 1RP – July 24, Sept. 14, Oct. 14, 19, 21, 28, Nov. 17, 18, 30, Dec. 14, 2015, Jan. 13, Mar. 2, 17, 23, Apr. 18, June 6, 2016; 2RP – Aug. 5, 10, 12, Sept. 21, 23, Oct. 7, Nov. 16, Dec. 10, 2015, Apr. 28, July 6, 2016.

the appeal was already pending), and Mendoza Vera filed notice of appeal from the amended judgment and sentence as well. CP 162-63.

2. Substantive Facts

Gricelda Zamora Chavez testified Mendoza Vera sat down at her picnic table in a Wenatchee park while her four-year-old daughter K.P. played nearby. 1RP 44-47. She claimed he talked to K.P. and asked if she was the mother. 1RP 48-49. She answered that she was and asked why he wanted to know. 1RP 49. He said, "That's all." 1RP 49. K.P. went back to playing, and he walked away. 1RP 49. The mother was then distracted for a few minutes by a phone call. 1RP 49-50. Afterwards, she could not find K.P. 1RP 50.

After speaking with some other people in the park, Zamora Chavez walked down Cashmere Street, which abutted the park. 1RP 50. She paused in front of a house to call for help. 1RP 53-54. When she began her phone call, she did not see K.P. or Mendoza Vera. 1RP 53-54. By this time, eight to ten minutes had elapsed since she had seen K.P. 1RP 54. She was about 600 feet from the playground. 1RP 90-91. Then, she looked up from her phone and saw Mendoza Vera carrying K.P. on his back. 1RP 55. She described their position as being in front of a house, about half way into the street. 1RP 55. Zamora Chavez further testified K.P. did not know Mendoza Vera and she had not given him permission to take her anywhere. 1RP 55-56.

According to Zamora Chavez, she asked Mendoza Vera, “Why did you take her?” and he answered that she asked for water. 1RP 55. She told him that could not be true because he had seen her give the child water back at the picnic table. 1RP 55. She also testified she told Mendoza Vera what he had done was wrong. 1RP 66. He responded that he did not know that. 1RP 66.

When police arrived, Zamora Chavez was walking towards the park with K.P. in her arms. 1RP 72. She pointed out the block of Cashmere Street where she had found K.P. 1RP 73-74. Inside one of three houses there, police found Mendoza Vera. 1RP 71.

After Zamora Chavez and the officer who met her, the only remaining State’s witness was Nathan Hahn, the officer who interviewed Mendoza Vera. Mendoza Vera moved to exclude his statements on the grounds that the State had failed to establish corpus delicti. 1RP 77. The court found there was sufficient corroborating evidence to admit the statements. 1RP 80.

According to Hahn, Mendoza Vera said he was at a friend’s house on Cashmere, but the friend was in the shower, so he went to the park. 1RP 84-85, 102-03. He headed toward the restroom and hung out at the playground for a few minutes. 1RP 85, 102-03. As he was leaving the park, K.P. asked for help, saying she could not find her mother. 1RP 85. Mendoza Vera told

Hahn he needed to get back to his friend's house, but K.P. was scared and did not want to be left behind in the park. 1RP 85. That was why he took her with him and she played on the neighbor's trampoline for a few minutes. 1RP 85. Hahn testified Mendoza Vera told him, "I grab her by the hand and she went with me." 1RP 116. Mendoza Vera had an interpreter at trial, but Hahn testified he appeared to speak and understand English. 1RP 21, 82.

Mendoza Vera told Hahn K.P. was thirsty so he went inside the house and brought her some water. 1RP 85. Friends inside the house told him to take K.P. back, which is what he was doing when he ran into Zamora Chavez on the street. 1RP 85. Mendoza Vera explained he knew her mother was in the park, but he feared a car would hit her if he left her there. 1RP 88. He admitted he had made a mistake. 1RP 88. He explained he was at the friend's house for a ride. 1RP 112.

Mendoza Vera's friend, who had recently had brain surgery, gave a confused account of events via interpreter. 1RP 119. He explained his surgery saying, "I just awoke in the hospital. And they found some animals." 1RP 119. He testified the "animals" were taken out and "I could see better now." 1RP 119-20. He testified that, before Mendoza Vera was arrested, Mendoza Vera was outside with a child but neither of them came inside the house. 1RP 120-21. He testified he gives Mendoza Vera rides to work, but they had not discussed doing so that day. 1RP 121. He testified he did not

tell Mendoza Vera he was going to take a shower, but he did so after Mendoza Vera left to go to the park. 1RP 122. He agreed it was possible someone could have entered the house while he was in the shower. 1RP 123.

C. ARGUMENT

1. THE LURING CHARGE MUST BE DISMISSED BECAUSE THE INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF CRIMINAL INTENT.

Mendoza Vera's conviction must be reversed and the luring charge dismissed because the information failed to advise him of every essential element of the charge. The information does not mention the implied element of intent to harm the health, safety, or welfare of a child. CP 8-9.

A charging document such as the information must include every element, whether statutory or non-statutory, of the charged offense. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). Both the state and federal constitutions require that the accused be notified of the charges so that he can prepare a defense. Id. (discussing U.S. Const. amend. VI and Const. art. 1, § 22); State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991) (same). The information must convey "with clarity" every material element of the offense as well as the essential supporting facts. McCarty, 140 Wn.2d at 425. A challenge to the constitutional sufficiency of the information may be raised for the first time on appeal. Kjorsvik, 117 Wn.2d at 102-03.

At the time of the charged offense in this case, Washington law prohibited luring, defined as occurring when a person “Orders, lures, or attempts to lure a minor . . . into any area or structure that is obscured from or inaccessible to the public, . . . Does not have the consent of the minor’s parent or guardian . . . ; and. . . Is unknown to the child.”² RCW 9A.40.090. Luring includes an implied element of criminal intent. State v. Homan, 191 Wn. App. 759, 777, 364 P.3d 839 (2015), as corrected (Feb. 11, 2016). Without this intent, the statute is overbroad and facially unconstitutional. Id. Thus, to convict a person of luring, the State must, in addition to the above-described elements, prove that the person acted with the intent to harm the health, safety, or welfare of the child. Id.

Division Two’s decision in Homan currently stands in conflict with Division One’s 1996 decision in State v. Dana, 84 Wn. App. 166, 926 P.2d 344 (1996). Dana held the luring statute was not unconstitutionally overbroad because an invitation must include some additional enticement in order to constitute luring. Id. at 175. But Division Two declined to follow Dana for three primary reasons. Homan, 191 Wn. App. at 773. First, the Dana court had improperly placed the burden on the defendant to prove the statute’s unconstitutionality. Homan, 191 Wn. App. at 773 (citing Dana, 84

² The statute also contains language, omitted here for the sake of brevity because not relevant, prohibiting luring a person with a developmental disability. Former RCW 9.94A.090 (2015).

Wn. App. at 175. “The Supreme Court now has clarified that in the First Amendment context, the State bears the burden of justifying a law’s restriction on protected speech.” Homan, 191 Wn. App. at 773 (citing State v. Immelt, 173 Wn.2d 1, 6, 267 P.3d 305 (2011)). Second, the Dana court only considered the one instance of protected speech suggested by the appellant. Homan 191 Wn. App. at 773 (discussing Dana, 84 Wn. App. at 175). The court did not have before it the wide range of protected speech that was presented to the court in Homan.³ Id. Finally, the Dana court did not engage in a detailed analysis of the potential that protected speech would be prohibited. Id. Following the Homan decision, the legislature amended the luring statute to expressly require the State to prove the intent to harm the

³ The Homan court enumerated 11 scenarios in which the statute criminalizes protected speech:

(1) political speech, where a student invites minors or developmentally disabled people to his or her house to discuss school district policies with an enticement of cupcakes; (2) a statement made in an attempt at humor by a student comedian at a talent show; (3) a genuine offer of help, where a good Samaritan offers to drive an injured child to the hospital for aid; (4) statements misunderstood as orders, where a school bus driver would be in violation for telling a child to “Hop in!” absent parental consent; and (5) an invitation from one child to another to play inside his or her home. . . . (1) an offer of help directing a lost child to an administrative office with the enticement of hot chocolate once they arrive, (2) a retail clerk asking a wandering child to come inside her store to play with the latest toys on sale, (3) a responsible person directing a bullied developmentally disabled person to a safe place and telling the person that he could watch his favorite movie until his guardian arrived, and (4) a librarian directing a minor patron to take the elevator to a different floor of the library to locate a book the minor is excited about reading.

In addition, . . . telling someone to “take a long hike off a short pier” or to “go to the moon.”

191 Wn. App. at 770-71.

health, safety, and welfare of the child or to facilitate a crime. RCW 9A.40.090. For all of these reasons, this Court should follow Division Two and apply the holding of Homan to this case. The statute is unconstitutional unless it is construed as containing an implied element of criminal intent. Homan, 191 Wn. App. at 777.

The information was constitutionally insufficient in this case because it failed to advise Mendoza Vera that the offense of luring contained an element of intent. CP 8-9. The information fails to allege any mental state for the offense. CP 8-9. The information luring alleges in full:

That the said defendant in the State of Washington, on or about the 23rd day of July, 2015, a person unknown to K.P., a four year old female and minor child, did then and there unlawfully and feloniously attempt to lure a person under the age of 16, to wit: K.P. into an area or structure obscured from or inaccessible to the public and at such time the defendant was unknown to K.P., and lacked the consent K.P.'s parents, and the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, thereby invoking the provisions of RCW 9.94A.533(3)(b); contrary to the form of the statute RCW 9A.40.090 in such cases made and provided and against the peace and dignity of the State of Washington.

That the maximum penalty for the above crime is five years in prison and/or a \$10,000.00 fine.

CP 8-9.

It is immaterial that, at the time Mendoza Vera was charged, the Homan case had not yet been decided. “[C]onstitutional rulings in criminal cases apply retroactively to all cases not yet finally decided on direct

review.” State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995) (citing State v. McCormack, 117 Wn.2d 141, 145, 812 P.2d 483 (1991) and Griffith v. Kentucky, 479 U.S. 314, 323, 107 S. Ct. 708, 93 L. Ed .2d 649 (1987)). In Campbell, the court considered the sufficiency of the information in light of subsequent interpretation of the law requiring, as an essential element of welfare fraud, the dollar amount of the public assistance unlawfully received. 125 Wn.2d at 802-05. Relying on a Court of Appeals decision finding the dollar amount was a required element, the Washington Supreme Court held the information insufficient because it lacked that element. Id. (discussing State v. Bryce, 41 Wn. App. 802, 707 P.2d 694 (1985)). It did so despite the fact that Campbell was charged in 1979, well before the appellate decision in Bryce. Id. at 800.

Because Mendoza Vera’s case is on appeal, the constitutional holding of Homan applies. Id. Intent to harm the minor’s health, safety or welfare is an essential element of the offense of luring. Homan, 191 Wn. App. at 777. As such, it must be included in the information. McCarty, 140 Wn.2d at 425; Campbell, 125 Wn.2d at 800.

Mendoza Vera did not challenge the information before the verdict. When this is the case, courts liberally construe the information’s sufficiency. McCarty, 140 Wn.2d at 425. But the information may be found sufficient only “if the necessary elements appear in any form, or by fair construction

may be found, on the face of the document.” Id. “If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.” Campbell, 125 Wn.2d at 802. Therefore, if the missing elements are not found or fairly implied, prejudice is presumed, and dismissal without prejudice is the proper remedy. McCarty, 140 Wn.2d at 425-26, 428.

A liberal reading of the information in this case fails to reveal, by implication or otherwise, the essential element of intent to harm the health, safety, or welfare of the child. CP 8-9. This Court should therefore reverse Mendoza Vera’s conviction and dismiss the luring charge against him without prejudice. McCarty, 140 Wn.2d at 428; Campbell, 125 Wn.2d at 805.

2. MENDOZA VERA’S CONVICTION MUST BE REVERSED BECAUSE THE COURT FAILED TO INSTRUCT THE JURY ON AN ESSENTIAL ELEMENT OF THE OFFENSE.

Mendoza Vera’s conviction must also be reversed because the jury instructions violated his right to due process. Like the information, the jury instructions in this case did not contain the implied element of intent to harm the health, safety, or welfare of the child. CP 49 (Instruction 3 defining luring), 51 (instruction 5 listing elements that must be proved to convict of

luring). Under Homan, a new trial is required because this essential element was omitted from the jury instructions.

This issue hinges on the constitutionality of the 2015 version of the luring statute, RCW 9A.40.090. The trial court recognized this, but declined to make any substantive ruling on that question. 1RP 227-28. Instead, it denied the new trial motion explaining that the motion involved a legal question that should be decided by this Court instead. 1RP 228. Thus, there is no trial court decision on the legal question for this court to review. Furthermore, legal questions underlying a motion for a new trial are reviewed de novo. See State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981) (“Except where questions of law are involved, a trial judge is invested with broad discretion in granting motions for new trial.”).

The constitutionality of a statute is a legal question reviewed de novo on appeal. State v. Ramos, 149 Wn. App. 266, 270, 202 P.3d 383 (2009). Courts also review de novo whether a to-convict jury instruction omits an essential element. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Omission of an element is a serious constitutional error that warrants examination even when raised for the first time on appeal. Id. at 6. This court should review de novo whether the jury instructions relieved the State of its burden of proof, thereby violating Mendoza Vera’s right to due process.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). All essential elements must be included in the “to convict” jury instruction because it is the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Omission of an element violates due process because it relieves the State of its burden to prove every element beyond a reasonable doubt. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997).

Although jury instructions are generally reviewed as a whole, reviewing courts do not rely on other instructions to supply an element missing from the to-convict instruction. Mills, 154 Wn.2d at 7. The to-convict instruction is constitutionally deficient when it does not convey to the jury every element necessary for conviction. Id. at 7-8. That is the case here.

The jury in this case was not instructed the State had to prove that Mendoza Vera acted with any wrongful intent. CP 48, 49, 52, 53. On the contrary, the jury was instructed Mendoza Vera bore the burden to prove lack of wrongful intent. CP 53.

The instructions were in line with the statute as written at the time. Former RCW 9A.40.090 (2015). But the statute as written at the time is unconstitutional, giving rise to a presumption of prejudice. Homan, 191 Wn. App. at 778 (citing State v. Williams, 144 Wn.2d 197, 213, 26, P.3d 890 (2001)). Prejudice is presumed and the error is constitutional because the instructions relieved the State of its burden to prove every element of the offense (including the implied element of intent) beyond a reasonable doubt. State v. Hayward, 152 Wn. App. 632, 645, 217 P.3d 354 (2009) (citing State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)). Reversal is, therefore, required unless the State proves beyond a reasonable doubt that any reasonable trier of fact would reach the same result without the error. Homan, 191 Wn. App. at 778 (citing Williams, 144 Wn.2d at 213).

The State cannot meet its burden here. During closing argument, the State conceded there was no evidence about what Mendoza Vera's intent was. IRP 151. It cannot be assumed a jury would necessarily have convicted Mendoza Vera if it had been informed the State bore the burden to prove criminal intent. Mendoza Vera's conviction must be reversed. See Homan, 191 Wn. App. at 778.

3. THE COURT VIOLATED DUE PROCESS BY INSTRUCTING THE JURY THAT MENDOZA VERA BORE THE BURDEN TO PROVE A DEFENSE THAT NEGATES AN ELEMENT OF THE CRIME.

The court violated due process by requiring Mendoza Vera to present evidence to negate an element of the crime. Because intent is an essential element of the offense of luring, due process requires that the State, not the defense, bear the burden on this question. See State v. W.R., 181 Wn.2d 757, 763, 336 P.3d 1134 (2014) (due process violation to require defendant to prove consent in rape case because consent negates element of forcible compulsion). Jury instruction 7 informed the jury:

It is a defense to a charge of luring that:

- (1) The defendant's actions were reasonable under the circumstances; and
- (2) The defendant did not have any intent to harm the health, safety, or welfare of the minor.

The defendant has the burden of proving the defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

CP 53. This instruction violated Mendoza Vera's constitutional right to due process by requiring him to disprove the element of criminal intent.

In a criminal prosecution, due process requires the State to prove every fact necessary to constitute the charged crime beyond a reasonable

doubt. Winship, 397 U.S. at 364. In W.R., Washington’s Supreme Court held the due process clause requires that the State, not the defendant, hold the burden on the issue of consent in a rape case. 181 Wn.2d at 759. W.R. explicitly overruled two earlier cases, State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989), and State v. Gregory, 158 Wn.2d 759, 801-04, 147 P.3d 1201 (2006). Those cases held that, notwithstanding the “conceptual overlap” between consent and the statutory element of forcible compulsion, an accused asserting that complainant consent could be required to prove such consent by a preponderance of the evidence. W.R., 181 Wn.2d at 763. Those cases were, however, incorrect and harmful because “[r]equiring a defendant to do more than raise a reasonable doubt is inconsistent with due process principles.” Id. at 766, 768. The W.R. Court determined that when a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the accused. Id. at 765.

The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist. Id. In some cases, the existence of the required conceptual overlap may be in question. Here, it is not. The luring statute has been construed as containing an implied element of “intent to harm the health, safety, and welfare of the minor.” Homan, 191 Wn. App. at 777. That is the very language used to describe the fact on which Mendoza Vera bore the burden of proof at his trial in jury

instruction 7. CP 53. Intent to harm the health, safety, and welfare of the minor cannot coexist with the absence of that intent.

Mendoza Vera has a constitutional right not to be convicted without proof beyond a reasonable doubt of every element of the crime charged. The court violated that due process right by requiring him to bear the burden of proving a lack of criminal intent. His conviction must be reversed.

A due process violation that improperly shifts the burden of proof is constitutional error. State v. Lozano, 189 Wn. App. 117, 122 n. 2, 356 P.3d 219 (2015). It may be raised for the first time on appeal and is presumed prejudicial. Id.; W.R., 181 Wn.2d at 770. Reversal is required unless the State can prove the error was harmless beyond a reasonable doubt. W.R., 181 Wn.2d at 770. As discussed above, the State cannot meet this burden. If the burden of proof had been properly allocated to the State, the jury may have acquitted because the State admitted there was no evidence of Mendoza Vera's intent. IRP 151.

4. THE COURT ERRED IN ADMITTING MENDOZA VERA'S STATEMENTS WITHOUT PROOF OF CORPUS DELICTI.

The State failed to present, aside from Mendoza Vera's own statements, prima facie proof that he committed the criminal offense of luring. In other words, the State failed to sufficiently prove the corpus delicti. The trial court's decision to the contrary should be reversed and the

statements should be excluded. Mendoza Vera's conviction should be reversed because, without the statements, the evidence is insufficient to support his conviction.

- a. Mendoza Vera's statements were inadmissible without independent evidence that would be inconsistent with a hypothesis of innocence.

Where evidence presented to the jury includes a defendant's admissions, the State must establish the corpus delicti of the charged offense through evidence independent of the admissions. State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). The rule is designed to protect against the possibility that any confession, though voluntarily given, may be false. City of Bremerton v. Corbett, 106 Wn.2d 569, 576-77, 723 P.2d 1135 (1986); State v. Hamrick, 19 Wn. App. 417, 419, 576 P.2d 912 (1978).

The independent evidence is sufficient only if it provides "prima facie corroboration of the crime described in a defendant's incriminating statement." Brockob, 159 Wn.2d at 329. Prima facie corroboration exists if the independent evidence supports a "logical and reasonable inference" of the facts to be proved. Corbett, 106 Wn.2d at 578-79. If the State fails to meet its burden to produce independent corroborating evidence, the defendant's statements cannot be used to establish the corpus delicti or to prove the defendant's guilt at trial. State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996); State v. Pineda, 99 Wn. App. 65, 77, 992 P.2d 525 (2000).

The corpus delicti doctrine is a rule that tests the sufficiency of evidence, other than a defendant's confession, to corroborate the confession. State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). Its purpose is "to ensure that other evidence supports the defendant's statement and satisfies the elements of the crime." Id. The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's statement. Aten, 130 Wn.2d at 656. This is because a defendant's incriminating statement alone is insufficient to prove a crime occurred. Brockob, 159 Wn.2d at 328.

In addition to corroborating a defendant's incriminating statement, the independent evidence "must be consistent with guilt and inconsistent with an hypothesis of innocence." Aten, 130 Wn.2d at 660 (quoting State v. Lung, 70 Wn.2d 365, 372, 423 P.2d 72 (1967)). In assessing whether there is insufficient evidence of the corpus delicti, this Court reviews the evidence in the light most favorable to the State. Aten, 130 Wn.2d at 658. But when the independent evidence supports "reasonable and logical inferences of both criminal agency and noncriminal cause," it fails to corroborate a defendant's admission of guilt. Id. at 660. In short, the evidence must preponderate in favor of the existence of a criminal act. State v. Angulo, 148 Wn. App. 642, 653, 200 P.3d 752 (2009) (citing Aten, 130 Wn.2d at 660).

In this case, the corpus delicti rule required the State to present evidence, independent of Mendoza Vera's statements, that preponderates in favor of finding a criminal act occurred. Angulo, 148 Wn. App. at 653. The State failed to do so, and Mendoza Vera's statements must, therefore, be disregarded when considering whether the State has met its burden to prove corpus delicti.

b. The State failed to present any independent evidence of a criminal act.

The State failed to establish the corpus delicti because, without Mendoza Vera's statements, there is no evidence that any crime was committed. The crime at issue is luring. The independent evidence, however, fails to show any criminal act. Luring is committed when a person "orders, lures, or attempts to lure a minor . . . into any area or structure that is obscured from or inaccessible to the public . . . does not have the consent of the minor's parent or guardian . . . and is unknown to the child." Former RCW 9A.40.090 (1) (2015). Absent Mendoza Vera's own statements, there is no evidence that he ordered, lured, or attempted to lure the child. The only independent evidence is that he and the child were at the park, he spoke briefly with the child's mother, and later he was found in the child's company in front of his friend's home a short distance from the park. IRP 48-55.

This evidence is insufficient because it fails to demonstrate that a crime occurred. While the corpus delicti rule does not require proof of every element of the offense, it does require proof that a crime occurred. Angulo, 148 Wn. App. at 657. Mere opportunity to commit a crime is insufficient. State v. Ray, 130 Wn.2d 673, 681, 926 P.2d 904 (1996). When the independent evidence could support an inference of guilt or innocence, it is insufficient. Aten, 130 Wn.2d at 660.

The evidence here could support either guilt or innocence because it provides no indication of how K.P. came to be in Mendoza Vera's company. Merely being in the presence of a child is insufficient to show that a crime occurred. RCW 9A.40.090. There are many reasonable innocent inferences to be drawn. For example, perhaps he merely acquiesced when K.P. cried and asked to go with him, as Mendoza Vera told Hahn. Or perhaps K.P. wandered off and he found her. The only independent evidence is that K.P. was at the park and later was with Mendoza Vera. Even if assumed to be true and viewed in the light most favorable to the State, this fails to show that any crime occurred.

For these reasons, the State failed to establish the corpus delicti of luring and the evidence is insufficient to support admission of his statements. The trial court erred by denying Mendoza Vera's motion to exclude his statement. 1RP 80. Mendoza Vera's conviction must be reversed because,

without his statements, the State cannot overcome the presumption of innocence.

c. This error requires reversal for insufficient evidence.

Without Mendoza Vera's statements, the State cannot prove the charge, and Mendoza Vera's conviction must be reversed for insufficient evidence. Under the state and federal constitutions, a criminal conviction must be reversed where no rational trier of fact could have found that the State proved all of the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The luring statute requires proof that a person lured, ordered, or attempted to lure a child. RCW 9A.40.090. Luring is further defined by case law as consisting of both an invitation and an enticement. Homan, 191 Wn. App. at 764.

The element of "orders, lures, or attempts to lure" is entirely absent without Mendoza Vera's statement. The State relied on Mendoza Vera's statement that he "grabbed" K.P.'s hand to establish this element. 1RP 142, 244-45 (emphasizing statement that he grabbed her hand) 149-50, 173 (arguing grabbing the hand is akin to an order). Without the statement, there is no evidence Mendoza Vera did or said anything that could be construed as luring, ordering, or attempting to lure as the statute requires. RCW 9A.40.090. This Court should reverse the trial court's ruling and remand

with an order to dismiss with prejudice. See Brockob, 159 Wn.2d at 352 (“without Brockob’s incriminating statement there was insufficient evidence to support Brockob’s conviction. We reverse Brockob’s conviction[.]”).

5. THE PROSECUTOR’S MISCONDUCT DURING CLOSING ARGUMENT VIOLATED MENDOZA VERA’S RIGHT TO A FAIR TRIAL.

During closing argument, the prosecutor disparaged Mendoza Vera’s defense as an “excuse” and told the jury, “The State doesn’t buy it.” 2RP 171. This improper argument invited the jury to rely on the prosecutor’s personal opinion and the prestige of his office to convict Mendoza Vera, thereby depriving him of a fair trial.

Prosecutorial misconduct during closing argument has the potential to violate the accused person’s right to a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). Reversible error results when the prosecutor’s comments are improper and were substantially likely to affect the outcome. Id. Even without objection below, reversal is required when the prosecutor’s improper comments were flagrant and ill-intentioned and caused irremediable prejudice to the accused. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). That is the case here.

The jury alone must determine issues of witness credibility. State v. Jungers, 125 Wn. App. 895, 901, 106 P.3d 827 (2005). Whether a

prosecutor's opinion of guilt is expressed directly or through inference, such opinion is improper and inadmissible because it invades the jury's province. Id. "Fair trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office, information from its records, and the expression of his own belief of guilt into the scales against the accused." State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). The rules of professional conduct also prohibit a lawyer from vouching for any witness's credibility or stating a personal opinion on the guilt or innocence of an accused. State v. Walker, 182 Wn.2d 463, 478, 341 P.3d 976 (2015) (discussing RPC 3.4(e)). Closing argument is an opportunity to argue reasonable inferences from the evidence, not an opportunity to present the prosecutor's personal opinion. Walker, 182 Wn.2d at 478 (citing Glasmann, 175 Wn.2d at 706-07, 712).

The court found a prosecutor improperly opined on the defendant's credibility in State v. Lindsay, 180 Wn.2d 423, 438, 326 P.3d 125 (2014). In that case, the prosecutor called the defendant's account of events "the most ridiculous thing I've ever heard" and referred to the defense theory of the case as a "crook." Id. The court determined both these comments were obvious expressions of personal opinion on the defendant's credibility. Id. The court found there was "no other reasonable interpretation" except the prosecutor's personal opinion that the defendant was lying. Id.

The prosecutor's comment here was less pervasive than the repeated comments in Lindsay, but it was no less a direct and obvious expression of his personal opinion that Mendoza Vera was lying. There is no other reasonable interpretation of the phrase, "The State doesn't buy it." 1RP 171.

Much like a police officer, a deputy prosecutor's special role in society is such that juries are likely to view his opinions as reliable. See, e.g., State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (police officer testimony may particularly affect a jury because of its "special aura of reliability"); see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) (because average juror is conscious of prosecutor's special role, "improper suggestions, insinuations, and . . . assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none"). Thus, the prosecutor's special role was likely to move the jury to credit his opinion of Mendoza Vera's veracity. The jury was likely to give short shrift to its consideration of Mendoza Vera's defense when it already knows the prosecutor "doesn't buy it." 2RP 171.

This improper prosecutorial opinion on credibility was likely to affect the verdict in this case because the State's case was contested. "When the evidence is disputed, the jury "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is

entitled.” State v. Weatherspoon, 410 F.3d 1142, 1148 (9th Cir. 2005). Id. at 1147 (quoting United States v. McKoy, 771 F.2d 1207, 1211 (9th Cir. 1985)). The error was not curable because, after jumping to this conclusion, the jury was not likely to be able to follow an instruction to disregard the prosecutor’s personal opinion. Prosecutorial misconduct violated Mendoza Vera’s right to a fair trial and requires reversal.

6. THE COURT LACKED AUTHORITY TO MODIFY MENDOZA VERA’S SENTENCE.

The court had no authority to disturb the finality of Mendoza Vera’s judgment and sentence by modifying it after the fact. The court discovered, several months after sentencing Mendoza Vera, that the law did not permit imposition of an exceptional community custody term. 1RP 225. Rather than striking the community custody term, the court resentenced Mendoza Vera entirely, increasing his confinement time from 364 days, the top of the standard range, to a 24-month exceptional sentence. 2RP 36, 41-42; CP 77, 167. The exceptional sentence should be vacated because the court lacked authority to modify it.

“Final judgments in both criminal and civil cases may be vacated or altered only in those limited circumstances where the interests of justice most urgently require.” State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989). After a final judgment, the sentencing court “loses jurisdiction to the

Department of Corrections.” State v. Harkness, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008) (citing January v. Porter, 75 Wn.2d 768, 773, 453 P.2d 876 (1969)). The sentencing court has “no inherent authority and only limited statutory authority to modify a sentence post-judgment.” Harkness, 145 Wn. App. at 685. Modification is “not appropriate merely because it appears, wholly in retrospect, that a different decision might have been preferable.” Shove, 113 Wn.2d at 88.

CrR 7.8 permits correction of certain types of errors in judgments. Under CrR 7.8(b), the court may relieve a party from a final judgment for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic, or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b). Here, the trial court relied on subsection (4), finding the judgment was void because the court lacked authority to impose a term of

community custody for luring, an unranked felony that does not meet the requirements of RCW 9.94A.701 or RCW 9.94A.703. 2RP 34; CP 161.

The court was correct that a sentence in excess of the court's statutory authority is generally deemed void. State v. Soto, 177 Wn. App. 706, 716, 309 P.3d 596 (2013). But the court was mistaken to rely on this authority to vacate the lawful term of confinement the court had already imposed. "It is well established that the imposition of an unauthorized sentence does not require vacation of the entire judgment." State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980) (citing In re Pers. Restraint of Carle, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980)).

When a portion of a criminal sentence is unlawful, only that portion must be changed. Carle, 93 Wn.2d at 34. "[T]he finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced' is unaffected by the reversal of one or more counts." State v. Kilgore, 167 Wn.2d 28, 41-42, 216 P.3d 393 (2009) (quoting Carle, 93 Wn.2d at 34); see also State v. Rowland, 160 Wn. App. 316, 328, 249 P.3d 635 (2011), aff'd, 174 Wn.2d 150 (2012) ("When part of a sentence is erroneous, 'it does not undermine that part of the sentence that is otherwise valid.'") The remedy is to correct the erroneous portion of the sentence. Carle, 93 Wn.2d at 34. The correct remedy for the unauthorized community custody term in Mendoza Vera's case was to vacate it, but leave the valid

standard range confinement sentence unaffected. Kilgore, 167 Wn.2d at 41-42.

Eilts illustrates the correct outcome. In that case, Eilts had agreed to pay restitution to all victims of his alleged stock fraud (including victims of uncharged instances) in exchange for a lenient sentence including probation. Eilts, 94 Wn.2d 491-92. The State had recommended the maximum term of ten years. Id. at 491. But the court imposed one year in jail with nine months suspended on the condition that he pay the agreed restitution to all investors. Id. at 492.

At the time, the law did not permit the court to order restitution for uncharged offenses. Id. at 493-94. On appeal, this Court remanded with instructions to limit the restitution order to only the charged offenses. Id. at 493. The Washington Supreme Court affirmed that decision. Id.

The State argued Eilts had prompted the lenient jail sentence with his offer to pay restitution and should not be permitted to benefit from the error on appeal. Id. at 495. The court rejected this argument, holding, “Even assuming the court’s order may have been based largely upon defendant’s promise of repayment, a defendant cannot empower a sentencing court to exceed its statutory authorization. Id. at 495-96.

Additionally, the court determined that the probation order, as a whole, was not void. Id. at 496. The probation order was erroneous only to

the extent it was conditioned on restitution to victims of uncharged offenses. Id. Rather than striking the entire probation order, the court remanded to modify the restitution order to conform with the law. Id. The court explained, “The error is grounds for reversing only the erroneous portion of the sentence imposed.” Id. (emphasis added).

In this case, the only erroneous portion of the sentence was the order that Mendoza Vera serve a term of community custody. RCW 9.94A.702; RCW 9.94A.703. The confinement time, 364 days, was the top of the standard range for luring, which is an unranked felony. RCW 9.94A.505(2)(b); RCW 9.94A.515. A standard-range sentence generally may not be appealed. RCW 9.94A.585.

A decision on a CrR 7.8 motion is reviewed for abuse of discretion. State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. McAninch, 189 Wn. App. 619, 623, 358 P.3d 448 (2015), rev. denied, 184 Wn.2d 1038, (2016) (citing State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A decision is based on untenable grounds when it is based on an erroneous view of the law. McAninch, 189 Wn. App. at 623 (citing State v. Slocum, 183 Wn. App. 438, 449, 333 P.3d 541 (2014)). Underlying questions of law are reviewed de novo. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

Here, the court misapprehended the scope of its power to correct an erroneous sentence. The court had no authority to modify a final judgment except as necessary to correct the unauthorized part of the sentence. Shove, 113 Wn.2d at 88; Eilts, 94 Wn.2d at 496. The court was correct to vacate the community custody term. See Carle, 93 Wn.2d at 33 (“When a sentence has been imposed for which there is no authority in law, the trial court has the power and the duty to correct the erroneous sentence, when the error is discovered.”). But the remaining standard range sentence was valid and final, and the court had no authority to modify it after the fact. Shove, 113 Wn.2d at 88; Eilts, 94 Wn.2d at 496. This case should be remanded with instructions to vacate the exceptional prison term imposed in the amended judgment and sentence.

7. THE “PARTICULARLY VULNERABLE”
AGGRAVATING FACTOR IS UNCONSTITUTIONALLY
VAGUE.

- a. Since *Blakely*,⁴ a statute violates due process when it permits increased punishment based on a jury finding but is too vague to prevent the jury from making an arbitrary decision.

Due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution requires that statutes give citizens fair warning of prohibited conduct and protect them from “arbitrary, ad hoc, or discriminatory law enforcement.” State v.

⁴ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A statute is void for vagueness if either: (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). When a challenged provision does not involve First Amendment rights, it is evaluated as applied. Douglass, 115 Wn.2d at 182.

Prior to the landmark decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Washington's Supreme Court held that the void-for-vagueness doctrine did not apply to aggravating factors used to increase criminal sentences beyond the standard range. State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003). The Baldwin court reasoned that the aggravating factors detailed in the Sentencing Reform Act to limit judicial sentencing discretion did not implicate due process vagueness concerns because there is no constitutional right to sentencing guidelines and because the guidelines do not set penalties. Id. at 459-61.

But since Blakely, the Baldwin rationale no longer stands. Aggravating factors are now the equivalent of elements of a more serious offense and, therefore, must be found by a jury beyond reasonable doubt. Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556

(2002) (quoting Apprendi v. New Jersey, 530 U. S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); State v. Benn, 161 Wn.2d 256, 263, 165 P.3d 1232 (2007). Blakely made clear that Ring and Apprendi apply to aggravating circumstances that allow the court to exceed the standard sentencing range under the SRA. Blakely, 542 U.S. at 303-04.

Blakely, Apprendi, and their progeny rest on the Sixth Amendment right to a jury trial, applied to the states via the right to due process of law under the Fourteenth Amendment. Apprendi, 530 U.S. at 476. Fourteenth Amendment due process also requires striking down statutes that are so vague as to permit arbitrary enforcement. Halstien, 122 Wn.2d at 116-17. This line of cases makes clear that Fourteenth Amendment due process applies, not merely to elements of the offense, but to additional facts that increase the punishment that can be imposed. As the court explained regarding the sentencing enhancement at issue in Apprendi:

New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label “sentence enhancement” to describe the latter surely does not provide a principled basis for treating them differently

Apprendi, 530 U.S. at 476.

The Supreme Court again rejected the distinction between elements of an offense and so-called sentencing factors in United States v. Alleyne, ___ U.S. ___, 133 S. Ct. 2151, 2158, 186 L. Ed. 2d 314 (2013). In Alleyne, the court overruled its 2002 decision in Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), and determined that any fact that increases the punishment for an offense must be proved to a jury even if the factor only relates to a mandatory minimum sentence. Alleyne, ___ U.S. at ___, 133 S. Ct. at 2158.

The Alleyne pointed out that various historical treatises “defined “crime” as consisting of every fact which “is in law essential to the punishment sought to be inflicted.” Id. at 2159. In other words, “If a fact was by law essential to the penalty, it was an element of the offense.” Id.

The Court next noted early cases determining that any fact that increased the potential penalty must also be charged in the indictment. Id. at 2159-60. The purpose of this rule was to enable the accused to prepare a defense. Id. at 2160. This notice rationale is akin to the notice rationale of the void for vagueness cases. See Douglass, 115 Wn.2d at 178 (criminal statutes must provide notice of what conduct is prohibited).

The court explained that the ultimate inquiry for purposes of the Sixth Amendment right to a jury trial is “whether a fact is an element of the crime.” Id. at 2162. The court concluded that any fact that alters the legally

prescribed range of sentences is an element. Id. at 2162. Aggravating factors such as particular vulnerability under RCW 9.94A.535(3)(b) permit a court to impose a longer sentence than would otherwise be permitted. Blakely, 542 U.S. at 303-04. Therefore, under Alleyne, and Apprendi, the fact that the victim was particularly vulnerable is an element of the crime. Alleyne, ___ U.S. at ___, 133 S. Ct. at 2159, 2162; Apprendi, 530 U.S. at 476.

Under due process vagueness principles, the elements of a crime must be clear enough to prevent arbitrary enforcement. Halstien, 122 Wn.2d at 116-17. The same due process concerns that apply to the elements of an offense also apply to aggravating factors because, under Alleyne, aggravating factors are elements. ___ U.S. at ___, 133 S. Ct. at 2162. As the Court has noted, the requirements of due process may not be avoided simply by labeling the statute differently:

Whatever label be given the 1860 Act, there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property. Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague

Giaccio v. Pennsylvania, 382 U.S. 399, 402, 86 S. Ct. 518, 520, 15 L. Ed. 2d 447 (1966) (discussing a Pennsylvania statute permitting juries to require

acquitted defendants to pay court costs on pain of imprisonment). The aggravating factor under RCW 9.94A.535(3)(b) provides the State with a procedure for depriving a defendant of liberty. Therefore, it must meet the challenge that it is unconstitutionally vague. Giaccio, 382 U.S. at 402.

- b. The “particularly vulnerable” aggravator is unconstitutionally vague because the jury has no frame of reference for a typical luring victim.

A criminal statute that “leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case,” violates due process. Giaccio, 382 U.S. at 402-03. A statute fails to guard against arbitrary enforcement when it fails to provide ascertainable standards or invites “unfettered latitude” in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974). To survive a vagueness challenge, a sentencing factor must have a “common-sense core of meaning . . . that criminal juries should be capable of understanding.”⁵ Tuilaepa v. California, 512 U.S. 967, 973, 114 S. Ct. 2630, 2635-36, 129 L. Ed. 2d 750 (1994) (citing Jurek v. Texas, 428 U.S. 262, 279, 96 S.Ct. 2950, 2959, 49 L.Ed.2d 929 (1976) (White, J., concurring in judgment)).

A statute is unconstitutionally vague when “persons of common intelligence must guess at its meaning and differ as to its application.”

⁵ Tuilaepa held that aggravating factor justifying a death sentence must not be unconstitutionally vague. 512 U.S. at 972.

Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990). Due process also requires ascertainable standards of guilt to protect against arbitrary enforcement. Id. at 178. Such ascertainable standards are lacking with the particularly vulnerable victim aggravator.

For a jury, the “particularly vulnerable” aggravator in RCW 9.94A.535(3)(b) lacks ascertainable standards and, therefore, invites unfettered latitude in its application. The statute permits a court to depart from the standard range if “The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” RCW 9.94A.535(3)(b). This aggravator requires the jury to decide whether the victim in a given case was more vulnerable to the particular offense than the typical victim of that offense. State v. Jackmon, 55 Wn. App. 562, 566-67, 778 P.2d 1079 (1989). But a jury is not instructed as to how vulnerable the typical victim of a given offense is. In the days before Blakely, when a judge found the aggravating factors supporting an exceptional sentence, judges could perhaps be supposed to have a bank of knowledge upon which to determine whether a given victim was more vulnerable than was typical for that offense. But a juror cannot be presumed to have such a bank of knowledge.

For a jury, there is no “common-sense core of meaning” regarding the typical victim of a given offense. Tuilaepa, 512 U.S. at 973. The only

way for the jury to make this determination is on an arbitrary, ad hoc, or entirely subjective basis. Jurors are often encouraged to apply their common sense and their every day experience when evaluating evidence. But unless the juror has been extremely unlucky or happens to have a career in the criminal justice field, the juror has no common sense or daily experience of what a typical victim looks like or how vulnerable that person might be.

This state of affairs opens the door to arbitrary, discriminatory, or ad hoc decisions about which cases should result in enhanced sentences. The opportunity for this type of selective or random enforcement violates both the vagueness doctrine of constitutional due process and the Sentencing Reform Act's goal of bringing coherence and consistency to Washington criminal sentences. See, e.g., State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001) (purpose of vagueness doctrine is to protect against arbitrary, ad hoc, or discriminatory law enforcement); RCW 9.94A.010 (purpose of Sentencing Reform Act includes ensuring sentences are "commensurate with the punishment imposed on others committing similar offenses"). The lack of any way to ascertain a "typical" luring victim renders this factor unconstitutionally vague as applied. Goguen, 415 U.S. at 578.

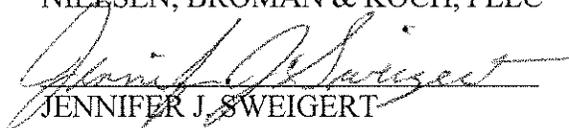
D. CONCLUSION

Mendoza Vera's conviction should be reversed. Alternatively, the exceptional prison term imposed in the amended judgment and sentence should be vacated.

DATED this 28th day of June, 2017.

Respectfully submitted,

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No. 33988-2-III

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Cause No. 33988-2-III, in the Court of Appeals, Division III, 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.



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06-29-2017

Date

Done in Seattle, Washington

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