Supreme Court No. 99743-8
Court of Appeals No. 53529-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PETER JOSEPH MALDONADO,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Peter Joseph Maldonado requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Maldonado, No. 53529-7-II, filed on April 6, 2021. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

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

2. The "vulnerable victim" aggravator requires the jury to find the victim of the offense is atypical. But what makes a victim "typical" is speculative. And it is unclear what threshold level of vulnerability makes a victim atypical. Is the particularly vulnerable victim aggravator void for vagueness?

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

C. STATEMENT OF THE CASE

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

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

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

L.M.'s subdural hematoma was already resolving itself. RP 530. Although the nerve cells damaged by the ischemia will never

regenerate and people with such injuries can suffer long-term behavioral, intellectual or motor deficits, other people, especially those who sustain the injury during childhood, can recover the function of the affected area of the brain. RP 521-22, 531-32. And although a retinal hemorrhage can impair a person's vision and affect brain development, subsequent visits revealed that L.M.'s retinal hemorrhages had resolved and she had not lost her vision. RP 710, 715.

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

L.M. also received a full skeletal x-ray. The radiologist determined she had two rib fractures and a fracture of the tip of the index finger of her left hand.[1] RP 556-60. Like the above injuries, a baby who is shaken can sustain rib fractures. RP 720. Nothing else on the skeletal survey caused any concern. RP 563.

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

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

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

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

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

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

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

At trial, multiple witnesses testified that L.M., who was now almost two years old, had greatly improved and stabilized. RP 460, 593, 599, 609. She was not taking any medication and no longer experienced seizures. RP 462, 607. She had reached all of the normal milestones in her gross motor skills, although she reached them at a delayed rate, and she was still delayed in her fine motor skills. RP 452, 460-62. She wore glasses, as she was nearsighted in both eyes and one of her eyes had a shorter field of vision than the other. RP 450, 456.

Her language, cognitive, and social skills were delayed, and she was receiving speech and occupational therapy to work on those skills. RP 452-54, 596-99. But she was a happy and active toddler, and played and interacted with others. RP 453-54, 463.

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

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

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

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review and reverse the exceptional sentence because it is unsupported by the evidence and violates the void-for-vagueness doctrine.

Maldonado's exceptional sentence is predicated on the aggravating factor that he "knew or should have known that [L.M.] was particularly vulnerable or incapable of resistance." CP 41, 46; RCW 9.94A.535(3)(b). The aggravating factor was not supported by sufficient evidence and is unconstitutionally vague, requiring resentencing within the standard range.

This Court should grant review because Maldonado's exceptional sentence violates his right to due process. The Court of Appeals refused even to consider the argument that the aggravator was unconstitutionally vague. The Court of Appeals' opinion is contrary to United States Supreme Court precedent. Given that this is a significant constitutional issue that continues to recur, this Court should address it. RAP 13.4(b)(1), (3), (4).

1. Contrary to the Court of Appeals' conclusion, the void-for-vagueness doctrine applies to aggravating factors.

The Due Process Clause prohibits the deprivation of life, liberty, or property "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it

invites arbitrary enforcement." Johnson v. United States, 576 U.S. 591, 595, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015); U.S. Const. amend XIV.

The Court of Appeals ruled a defendant may not even *challenge* an aggravating factor as unconstitutionally vague. Slip Op. at 7. The court relied on its prior decision in State v. Brush, 5 Wn. App. 2d 40, 425 P.3d 545 (2018).

Contrary to the Court of Appeals' conclusion, the void-for-vagueness doctrine applies to aggravating factors just as it applies to the other elements of a crime. And it applies to "statutes fixing sentences." Johnson, 576 U.S. at 596 (invalidating "residual clause" of Armed Career Criminal Act as unconstitutionally vague).

The Court of Appeals relied on an outdated opinion of this Court holding aggravating circumstances were not subject to vagueness challenges. Slip Op. at 5 (citing State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003)). Baldwin reasoned the void-for-vagueness doctrine did not apply to aggravating factors because they were just "sentencing guidelines" that did not "vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature." Baldwin, 150 Wn.2d. at 459. The Court of Appeals' decisions here and

in Brush continue to cite this logic, stating an aggravating factor "does 'not specify that a particular sentence must be imposed or require a certain outcome.'" Slip Op. at 6 (quoting Brush, 5 Wn. App. 2d at 62) (alterations and internal quotation marks omitted).

This statement is wrong. See RCW 9.94A.537; Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Following Blakely, our legislature amended the SRA such that the maximum punishment available absent a jury's finding of an aggravating circumstance is the top of the standard range—here, 41 months. CP 59; RCW 9.94A.537. Second degree assault of a child plus one or more aggravating factors can result in a sentence of up to 10 years in prison. RCW 9.94A.535; RCW 9.94A.537; RCW 9A.36.130; RCW 9A.20.021(1)(b). Because statutory aggravators significantly increase the available punishment, they are subject to due process limitations, including the prohibition on vague laws. Cf. State v. Allen, 192 Wn.2d 526, 534-35, 543-44, 431 P.3d 117 (2018) (recognizing aggravating factors are elements of a crime and therefore are subject to the constitutional protections applicable to elements).

In two opinions issued after Baldwin, this Court assumed without deciding that a defendant *may* challenge an aggravating factor

as unconstitutionally vague. State v. Murray, 190 Wn.2d 727, 732 n.1, 416 P.3d 1225 (2018); State v. Duncalf, 177 Wn.2d 289, 298, 300 P.3d 352 (2013). This Court should decide this issue definitively. Review is warranted. RAP 13.4(b)(3), (4).

2. The "vulnerable victim" aggravating factor is unconstitutionally vague.

The "vulnerable victim" aggravating factor used to increase Maldonado's sentence significantly beyond the standard range is unconstitutionally vague.

The "vulnerable victim" aggravator requires not just that the victim be "vulnerable," but that she be "more vulnerable to the commission of the crime than the typical victim" of the charged crime. CP 42. But at what point does a "typical" victim of second degree assault of a child become particularly vulnerable? People can only guess.

Johnson supports the conclusion that this aggravator is impermissibly vague. There, the Court applied the vagueness doctrine to the residual clause of the federal Armed Career Criminal Act. Johnson, 576 U.S. at 593. When applicable, this provision increased a sentence from a statutory maximum of 10 years to a minimum of 15 years. Id. The provision was triggered if the defendant had three or

more convictions for a "violent felony." Id. Under the residual clause, "violent felony" included a crime that "involves conduct that presents a serious potential risk of physical injury to another." Id. The Court held that imposing an increased sentence under this provision violated the prohibition against vague laws. Id. at 597.

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

Similarly here, the particularly vulnerable victim aggravator asks jurors to determine the characteristics of the typical victim of the crime and then compare that to the characteristics of the victim in the

present case. Similar to an inquiry about what is "ordinary," this atypicality inquiry is inherently speculative. Further, it is unclear what level of vulnerability is required. This indeterminacy makes juror determinations of the aggravator unpredictable and arbitrary. This Court should grant review and hold the aggravator is void for vagueness.

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

Aggravating factors (other than the fact of a prior conviction) are elements of a greater crime and due process requires the State to prove them beyond a reasonable doubt. Blakely, 542 U.S. at 303; Allen, 192 Wn.2d at 538-39; RCW 9.94A.537(3); U.S. Const. amend. XIV; Const. art. I, § 3. When a defendant challenges the sufficiency of the evidence on appeal, the question is whether, when the evidence is viewed in the light most favorable to the State, any rational trier of fact could have found the element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970).

The jury was instructed to decide whether Maldonado "knew or should have known that [L.M.] was particularly vulnerable or incapable

of resistance." CP 41; RCW 9.94A.535(3)(b). The jury was further instructed:

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

CP 42 (emphasis added).

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

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

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

reverse the exceptional sentence, and remand for resentencing within the standard range.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 6th day of May, 2021.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PETER JOSEPH MALDONADO, JR., Appellant.	No. 53529-7-II UNPUBLISHED OPINION

GLASGOW, J.—Peter Joseph Maldonado Jr. was convicted of second degree assault of a child because he shook his infant, LM, who was less than three months old, causing head injuries, seizures, retinal hemorrhages, and other injuries. Based on a special verdict finding that LM was a particularly vulnerable victim, Maldonado received an exceptional sentence.

Maldonado appeals his sentence, arguing that the particularly vulnerable victim aggravating factor was unconstitutionally vague. He also contends that the evidence was insufficient to support the jury's finding that LM was particularly vulnerable. Under *State v. Brush*,[1] the particularly vulnerable victim aggravating factor is not subject to a constitutional vagueness challenge because it is a sentencing guideline statute. Accordingly, we do not consider whether the statute was unconstitutionally vague. And the evidence was sufficient for a rational jury to find beyond a reasonable doubt that LM was a particularly vulnerable victim. We affirm.

FACTS

LM was born in late August 2017. In November 2017, LM's parents brought her to the hospital because she was having seizures. LM was admitted and diagnosed with a subdural

[1] 5 Wn. App. 2d 40, 60, 425 P.3d 545 (2018).

hematoma, brain damage resulting from insufficient oxygen, seizures, retinal hemorrhages, broken ribs, and a broken finger.

The hospital contacted law enforcement because LM's injuries were consistent with child abuse. Maldonado agreed to participate in a formal investigative interview. During the interview, which was recorded and ultimately played for the jury at trial, Maldonado told Detective Christopher Bowl that he shook LM 10 times. Maldonado also described other events he thought could have accidentally caused LM's injuries, including dropping LM from chest height onto carpet, going for a run with her strapped to his chest, accidentally hitting her head with a baby carrier, and an incident in which she rolled off a futon.

Dr. Elizabeth Woods, a physician who specializes in evaluating child abuse, reviewed LM's medical records and sent law enforcement a report concluding that LM's injuries and symptoms appeared to be caused by nonaccidental internal head trauma.

The State charged Maldonado alternatively with first and second degree assault of a child. The charges included the particularly vulnerable victim aggravating factor.

At trial, the State presented the testimony of four doctors who treated LM at the hospital. Dr. Justin Shields, a child neurologist, testified that he could not make conclusions about the cause of LM's head trauma, he said LM's symptoms matched the symptoms of babies who have been shaken. Dr. James Bailey, an ophthalmologist, testified that LM had retinal hemorrhages in both eyes and noted, "[T]here are very few things that cause retinal hemorrhages in children, particularly infants -- so our main concern whenever we see something like that is for a [nonaccidental] trauma, what's also termed as shaken baby syndrome." Verbatim Report of Proceedings (VRP) (June 17, 2019) at 702. Bailey also told the jury that infants are particularly susceptible to injuries caused by shaking because "an infant's head is disproportionally large

compared to the rest of their body compared to . . . [an] older child," and "they don't have very strong neck musculature to support their head." *Id.* at 704.

Maldonado also testified at trial. He denied shaking LM. He acknowledged telling Bowl he shook LM, but said he did so only because Bowl would not accept any other explanation and Maldonado did not want his wife to be blamed. At trial, Maldonado did not dispute LM's injuries and diagnoses, but said he had no explanation for their cause.

The jury was instructed on first and second degree assault of a child. The jury was also instructed that it had to determine "[w]hether the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance." Clerk's Papers (CP) at 41. "'[P]articularly vulnerable'" meant the child was "more vulnerable to the commission of the crime than the typical victim." CP at 42. "A person commits the crime of assault of a child in the second degree if the . . . child is under the age of thirteen." CP at 33.

The jury found Maldonado guilty of second degree child assault and that LM was a particularly vulnerable victim.

At the sentencing hearing, the State asked the trial court to exercise its discretion to impose an exceptional sentence above the standard range for second degree assault of a child in light of the jury's special verdict finding. Both parties and the trial court agreed that the jury's finding permitted an exceptional sentence but that the trial court was not required to impose one. The trial court imposed an exceptional sentence of 60 months, which was above the standard range, but below the statutory maximum. The trial court also entered findings of fact and conclusions of law supporting its decision to enter an exceptional sentence.

Maldonado appeals his sentence.

ANALYSIS

A. Unconstitutional Vagueness

1. Waiver

As an initial matter, we note that Maldonado did not object below to the particularly vulnerable victim jury instruction or propose a clarifying instruction. An issue not raised at the trial court generally may not be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). However, Maldonado does not challenge the jury instruction specifically, and illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Maldonado is challenging the imposition of an allegedly illegal or erroneous exceptional sentence, so we conclude his argument was not waived by his failure to object to the jury instruction.

2. Applicability of vagueness doctrine to sentencing guideline statutes

Maldonado asserts that the vagueness doctrine applies to the particularly vulnerable victim aggravating factor. Maldonado acknowledges that the Washington Supreme Court held in *State v. Baldwin*[2] that a defendant may not bring a vagueness challenge to a sentencing guideline statute such as the one at issue here. But Maldonado argues that the United States Supreme Court's ruling in *Blakely v. Washington*[3] and the Supreme Court's holding in *State v. Allen*[4] invalidated *Baldwin.* According to Maldonado, under *Blakely* and *Allen*, aggravating factors are now elements because "[o]nce found by the jury, they effectively prescribe a higher sentencing range." Br. of Appellant at 14. Thus, they are subject to constitutional vagueness challenges. *Id.* We disagree.

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[2] 150 Wn.2d 448, 459, 78 P.3d 1005 (2003).

[3] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[4] 192 Wn.2d 526, 538-39, 431 P.3d 117 (2018).

The particularly vulnerable victim aggravating factor is a sentencing guideline, not a requirement. If a unanimous jury finds beyond a reasonable doubt that "[t]he defendant knew or should have known that the victim of the . . . offense was particularly vulnerable or incapable of resistance" under RCW 9.94A.535(3)(b), then the trial court "*may* sentence the offender . . . to . . . confinement up to the maximum allowed . . . for the underlying conviction." RCW 9.94A.537(6) (emphasis added). To exercise its discretion to impose an exceptional sentence based on this statutory aggravating factor, the trial court must determine that "the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." *Id.*

In *Baldwin*, the Supreme Court held that sentencing guideline statutes that give courts discretion to impose an exceptional sentence were not subject to a vagueness challenge. 150 Wn.2d at 458-59. Sentencing guideline statutes "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State," and they do not "vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature." *Id.* at 459. Consequently, "[a] citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties." *Id.* This means "the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines." *Id.*

Then in *Blakely*, the Court held that under the Sixth Amendment to the United States Constitution, any fact that allows the imposition of a penalty above the standard range, other than prior convictions, must be found by a jury beyond a reasonable doubt. 542 U.S. at 301.

In *Brush,* we recently applied *Baldwin* and held that aggravating factors under RCW 9.94A.535(3) are still not subject to vagueness challenges post-*Blakely*. 5 Wn. App. 2d at 63. Like Maldonado, Brush argued that *Blakely* invalidated *Baldwin.* Brush asserted that aggravators under

RCW 9.94A.535(3) should be treated the same as aggravating factors that fix particular sentences subjecting them to vagueness challenges. *Id.* at 60-63. We rejected Brush's argument, holding that a jury's finding of an aggravating factor under RCW 9.94A.535(3) does "'not specify that a particular sentence must be imposed' or 'require[] a certain outcome.'" *Id.* at 62 (alteration in original) (quoting *Baldwin*, 150 Wn.2d at 461). We explained, "RCW 9.94A.535 still provides the trial court with discretionary authority to impose or not to impose an exceptional sentence even when the jury finds an aggravating factor." *Id.* For that reason, we concluded, "*Baldwin* remains good law" and held that the defendant could not assert a vagueness challenge under RCW 9.94A.535(3). *Id.* at 63. Our decision in *Brush* was consistent with Division Three's analysis of the same issue in *State v. DeVore*, 2 Wn. App. 2d 651, 665, 413 P.3d 58 (2018).

Maldonado claims *Brush* was wrongly decided because the aggravating factors under RCW 9.94A.535(3) "effectively prescribe a higher sentencing range" because "the existence of an aggravator is necessary to impose" the exceptional sentence. Br. of Appellant at 14. However, a jury's finding of an aggravating factor under RCW 9.94A.535(3) does not require the imposition of an exceptional sentence; it merely *permits* the judge to enter the exceptional sentence. RCW 9.94A.535(3), .537(6); *see Brush*, 5 Wn. App. 2d at 62.

Maldonado also suggests we must revisit *Brush* because, he claims, *Allen* established that "aggravating factors are elements." Br. of Appellant at 14 (citing *Allen*, 192 Wn.2d at 542-43). But in *Allen*, the Supreme Court held that "a fact other than proof of a prior conviction that *increases the minimum penalty* authorized by law must be treated as an element, not a sentencing factor, for Sixth Amendment purposes." 192 Wn.2d at 539 (emphasis added). In *Allen*, the aggravating factors increased the minimum penalty for first degree murder "from a term of years to mandatory life imprisonment without the possibility of release or parole." *Id.* at 530. Unlike

Allen, neither *Brush* nor this case involved an aggravating factor that increased the minimum penalty.

There is no reason to revisit the holding in *Brush* and, under *Brush*, Maldonado's vagueness challenge to RCW 9.94A.535(3)(b) fails. Accordingly, we do not reach the merits of Maldonado's vagueness argument.

B. Sufficiency of the Evidence

Maldonado argues the evidence was insufficient to support the particularly vulnerable victim aggravating factor because the State failed to prove that LM was more vulnerable than the "typical" victim of first or second degree assault of a child. Br. of Appellant at 8. He claims the State did not meet this requirement because it offered "*no evidence* concerning the 'typical' victim of second degree assault of a child." *Id.* at 9. We reject this argument.

We review a jury's special verdict under a sufficiency of the evidence standard. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P. 3d 621 (2018). Evidence is sufficient to prove the aggravating circumstance if, after viewing the evidence in the light most favorable to the State, any rational jury could find the facts to support an aggravating circumstance beyond a reasonable doubt. *Id.*; *see* RCW 9.94A.537(3). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any inferences the jury may reasonably draw from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact's resolution of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The jury was instructed to decide "[w]hether [Maldonado] knew or should have known that [LM] was particularly vulnerable or incapable of resistance." CP at 41. The instructions

defined a "'particularly vulnerable'" victim as someone who "is more vulnerable to the commission of the crime than the typical victim of [a]ssault of a [c]hild in the . . . [s]econd [d]egree" and provided, "The victim's vulnerability must also be a substantial factor in the commission of the crime." CP at 42. Relevant to this appeal, the jury instructions also stated, "A person commits the crime of assault of a child in the second degree if the . . . child is under the age of thirteen." CP at 33.

LM was younger than three months old at the time of the assault. Medical testimony at trial established that babies under three months cannot roll, crawl, pull themselves up to standing, or "be mobile at all" and "are entirely reliant upon their caregiver." VRP (June 17, 2019) at 729. One of the doctors testified that infants are more susceptible to injuries caused by shaking than older babies or young children because their heads are proportionately larger and their neck muscles are typically underdeveloped.

These facts supported the jury's verdict that LM was particularly vulnerable—more vulnerable than other children under 13—because she was completely unable to resist and uniquely vulnerable to an assault involving shaking. *See Yates*, 161 Wn.2d at 752; *see also* RCW 9.94A.537(3). Viewing the evidence in the light most favorable to the State and deferring to the jury's determinations about the persuasiveness of the evidence, this evidence was sufficient to support the jury's finding that LM was a particularly vulnerable victim. *See Thomas*, 150 Wn.2d at 874-75.

CONCLUSION

We affirm Maldonado's 60-month sentence for second degree assault of a child.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Sutton, A.C.J.

Maxa, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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