

NO. 47572-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

HECTOR FRANCISCO SAAVEDRA RUIZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00814-5

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether even assuming Saavedra-Ruiz's claims regarding shaken baby syndrome were supported by the appellate record, they would be irrelevant here, where the infant's death was caused by a significant skull fracture?

2. Whether Saavedra-Ruiz's claim regarding appellate costs is moot where the State will not be seeking costs?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Hector Francisco Saavedra Ruiz was charged by information filed in Kitsap County Superior Court with the second-degree murder of his daughter Natalie. CP 9-12.¹ Special allegations of domestic violence, and aggravating circumstances of a particularly vulnerable victim and breach of a position of trust were also alleged. *Id.*

A jury found Saavedra-Ruiz guilty as charged, and also found that the special allegations had been proven. CP 163-66. The court imposed a sentence at the top of the standard range. CP 171.

B. FACTS

Kayla Des Rochers dated Hector Saavedra-Ruiz for about two and a half years. 2RP 277. Saavedra-Ruiz was the father of her daughter

¹ Although a the second amended information was filed, CP 102, Saavedra-Ruiz was not arraigned on it. 1RP 92-97.

Natalie, who was born on February 10, 2014. 2RP 277. Natalie was a normal happy baby. 2RP 278. She could sit up by herself, she played with toys and could stand with support. 2RP 278. She did not crawl or walk yet. 2RP 278. She had never had any significant illnesses. 2RP 364-65.

Natalie was born in California, and Des Rochers moved to Olympia to live with her grandmother when Natalie was about a month old. 2RP 278. She kept in contact with Saavedra-Ruiz via text after he moved to Washington. 2RP 279. She took Natalie to see Saavedra-Ruiz about once a week. 2RP 279. She would typically leave after work, drive to Kingston, pick Saavedra-Ruiz up at work and spend the night. 2RP 279.

Natalie was not often alone with Saavedra-Ruiz. 2RP 280. He would be alone with her when Des Rochers was showering, but otherwise not usually. 2RP 280. She usually went to Kingston on Wednesday night and went home on Thursday. 2RP 281. It was the day they were both off work. 2RP 281.

On July 15, 2014, Des Rochers, her grandmother, and Natalie went to the lake and went swimming. 2RP 281. Natalie was fine, normal. 2RP 281. She did not have any accidents or otherwise appear injured. 2RP 281. Des Rochers had taken Natalie to a wellness exam by her

pediatrician the day before. 2RP 299. The doctor told her Natalie was healthy. 2RP 332, 364.

After the lake, Des Rochers went home and did some housework and then went to Kingston. 2RP 282. Natalie rode in her car seat in the back of the car. 2RP 282. She played with her toys and slept. 2RP 282. She appeared normal. 2RP 282.

They went directly to Puerto Vallarta and waited for Saavedra-Ruiz to get off work. 2RP 283. He came out and they went to his apartment. 2RP 283. They arrived around 8:00. 2RP 284. They took Natalie out of her car seat and laid her on the bed and watched television. 2RP 284. After Natalie went to sleep, Saavedra-Ruiz and Des Rochers went into the bathroom and did some methamphetamine. 2RP 285. They were in the bathroom for 30 or 45 minutes, and when they came out, Natalie was still where they left her. 2RP 285.

Saavedra-Ruiz wanted to take Natalie to the restaurant, but Des Rochers did not want him to because the baby was asleep. 2RP 286. They argued for a bit about it, but eventually Des Rochers relented. 2RP 286. Saavedra-Ruiz had never been alone with the baby for a long period of time before. 2RP 286. He had never driven her anywhere by himself. 2RP 286. Des Rochers put the baby in the car seat, and Saavedra-Ruiz left with her, and Des Rochers waited for them to return. 2RP 287. Natalie

was upset at being woken up, but did not appear injured. 2RP 287.

They left around 10:00. 2RP 288. Des Rochers waited about an hour. 2RP 288. She felt he was taking too long, so she texted him and called him, but he did not answer. 2RP 288. The following texts were on Des Rochers's phone:

Time	Folder	Message
10:48:23	sent	I let you taking Natalie, you can letting me look at your phone
	sent	You coming home
11:14:01	inbox	Ten minutos
	sent	Really
11:26:29	sent	Come home
	sent	You have a baby with you, you need to come home
	inbox	Yes
	sent	I
	sent	you here
11:52	sent	Come home. It's been an hour. You have a baby. Be responsible. See this is why I wanted to come with you. Come home!

1RP 188-95.

Katherine Raber was at the apartment across from Saavedra-Ruiz's when she heard footsteps banging up the stairs. 2RP 257. She knew the neighbors only vaguely and had seen them at the restaurant. 2RP 257. She looked through the peephole and saw Saavedra-Ruiz running quickly up the stairs and yelling. 2RP 258-59. The only specific word she made out was "baby." 2RP 261.

He had a nonresponsive baby in a baby carrier and banged on the neighbor's door. 2RP 258. She had never seen the baby before. 2RP 258. The baby looked like she was unconscious. 2RP 259. The door opened and Saavedra-Ruiz went in, hitting the carrier on the door frame as he went. 2RP 262. The baby did not react. 2RP 262. The door closed. 2RP 262.

While they were texting, Saavedra-Ruiz never told Des Rochers there was anything wrong with the baby. 2RP 297. Des Rochers first became aware of a problem when Saavedra-Ruiz banged on the bedroom door. 2RP 289. He had Natalie in the car seat, but she was not strapped in. 2RP 289. She was just kind of hanging there. 2RP 289. She appeared limp. 2RP 332. She was not moving and did not seem to be breathing. 2RP 291. She did not look like she was sleeping. 2RP 291. She was not responding to what was going on around her. 2RP 292. Des Rochers grabbed Natalie from the car seat. 2RP 292. Des Rochers's first thought was that she was not alive. 2RP 332.

They were both freaked out, and she tried to call 911. 2RP 292. Saavedra-Ruiz grabbed her phone and told her no. 2RP 293. Des Rochers laid Natalie on the bed and tried to revive her and then went to try to get someone else to call 911. 2RP 293, 329. She did not shake her or bang her head on anything. 2RP 329. Natalie never fell off the bed. 2RP 330.

Eventually someone called 911, but she did not know how long after Saavedra-Ruiz arrived. 2RP 293.

Between 10 and 30 minutes after Raber had seen Saavedra-Ruiz come up the stairs, someone knocked on her door. 2RP 262. It was not Saavedra-Ruiz. 2RP 267. They asked if they could use the phone. 2RP 263. She asked why, and one of them said that the baby was not breathing. 2RP 263. Raber told them she knew CPR and went over to attempt it. 2RP 263.

It was very hectic and people were screaming. 2RP 264. Saavedra-Ruiz was yelling loudly and Des Rochers asked Raber if she was a nurse. 2RP 264. Saavedra-Ruiz asked her to save his baby. 2RP 264. She went into the bedroom and began doing CPR. 2RP 265. She had been certified in it when she was at Olympic College. 2RP 265. Someone brought a phone in and Raber spoke with the 911 operator, who tried to assist her with instructions. 2RP 265. Des Rochers was crying, upset and hysterical. 2RP 266.

The paramedics arrived at the scene at 12:16 a.m. on July 16. 3RP 386. Natalie was on the bed in the back bedroom. 3RP 386. She had no pulse and was not breathing. 3RP 386. They performed CPR and then intubated her and inserted a line to administer medication to restart her heart. 3RP 387. They first registered a pulse at 12:30. 3RP 387. After

they obtained a pulse, they transported her to Harrison Hospital in Silverdale. 3RP 388.

Kitsap County Sheriff's Deputy Heather Wright responded to Saavedra-Ruiz's apartment shortly after midnight. 2RP 212-13. She first encountered Raber on the landing outside the apartment. 2RP 213. Raber identified herself as a neighbor. 2RP 213. Wright proceeded to the bedroom where numerous medical personnel were working on Natalie. 2RP 214. Saavedra-Ruiz was standing near her, holding an IV bag. 2RP 214. Des Rochers was in the back near the closet and appeared hysterical, sobbing uncontrollably. 2RP 215. Wright escorted her to the living room and sat her down, and tried to calm her down. 2RP 215.

Des Rochers told her that she and Saavedra-Ruiz were no longer a couple. 2RP 216. Des Rochers had brought Natalie from Olympia to see him. 2RP 216. After he came home from work, Saavedra-Ruiz wanted to take Natalie back to the restaurant to show her to his coworkers. 2RP 216. Des Rochers did not want him to because Natalie was asleep and they argued. 2RP 216. She eventually relented and helped secure Natalie into the baby seat. 2RP 216. There were no toys or blankets near Natalie in the car, and she was not sick or injured. 2RP 217. Natalie was intermittently sleeping and crying. 2RP 217. Saavedra-Ruiz was gone for about an hour, and when he returned, he came running in with Natalie,

panicked and hysterical because she was not breathing. 2RP 217.

About the time Wright finished speaking to Des Rochers, the medics came out with Natalie. 2RP 217. The medic stated that Natalie had a heartbeat but she was not breathing on her own and left with the baby. 2RP 218. Wright asked Raber to drive Des Rochers. 2RP 218. Saavedra-Ruiz wanted to go as well, but Wright convinced him to stay because Des Rochers was yelling at him about being gone for an hour. 2RP 218.

Saavedra-Ruiz agreed to stay and Wright spoke with him. 2RP 218. Saavedra-Ruiz was upset, and said that he had tried to do CPR, but did not know how to do it. 2RP 219, 225. Saavedra-Ruiz also told her that when he drove Natalie to the restaurant, she was crying on the way before she became quiet. 2RP 233, 239. He assumed she had fallen asleep on the way. 2RP 233.

On arrival, when he went to pick her up, she gasped and he became scared. 2RP 233. He said that at one point he grabbed her chin and it left a mark. 2RP 234. He saw blood coming from her nose and panicked even more. 2RP 234. There appeared to be a smudge of blood on one of the blankets retrieved from the car. 2RP 236. Wright collected the car seat from the bedroom. 2RP 223. She also checked the base of the seat and it was properly secured. 2RP 223.

Marvin Valrey was an emergency physician on duty when Natalie arrived at Harrison Hospital in an ambulance at Harrison around 1:00 a.m. 3RP 424, 427. She was intubated and was unable to breath on her own. 3RP 427. Her pupils were dilated and fixed, which meant that she was likely brain dead. 3RP 428. She had a pulse but required assistance to breathe. 3RP 428. They did blood work and a CAT scan of Natalie's head and cervical spine. 3RP 428-29. They did a chest X-ray and urine work. 3RP 429. Her white blood count was high, which could be due to an infection or the stress of the events. 3RP 429.

Kitsap County Deputy Sheriff Lori Blankenship was called to Harrison. 1RP 133. When she arrived, the baby, Natalie, who was five months old, was on oxygen and non-responsive. 1RP 133-34. She spoke to Des Rochers and Saavedra-Ruiz. 1RP 136.

Saavedra-Ruiz told her that Natalie had stopped breathing. 1RP 138. Saavedra-Ruiz stated that he saw Natalie and Des Rochers every other week. 1RP 145. On July 16, Des Rochers brought Natalie from Olympia to see him. 1RP 146. She was waiting for him when he got off work at the Puerto Vallarta restaurant in Kingston. 1RP 146. She had been waiting in the car and texting him. 1RP 146. They went to his apartment and then he took Natalie back to the restaurant to show her to his friends. 1RP 147.

Saavedra-Ruiz asserted that when he went to get her out of the car seat, she was coughing or choking and had a little blood coming from her nose. 1RP 147. Her arms were outstretched and her eyes were fixed straight ahead. 1RP 147. He tried to perform CPR but did not know how. 1RP 147. He laid her on his legs and hit her on the back, then turned her over. 1RP 147. He did was not able to get her breathing again. 1RP 148. He put her back in the car seat and took her back to the apartment. 1RP 148. The apartment was at most five minutes away. 1RP 148.

They transferred Natalie out around 3:00 a.m. to Mary Bridge Children's Hospital in Tacoma. 3RP 429. Her condition was grave and she still had no evidence of brain activity at that time. 3RP 429. Although she had a pulse, her blood pressure was starting to drop, and they medicated her to try to bring it up before they transferred her. 3RP 430. Her prognosis was bad, she was basically brain-dead at that point. 3RP 430.

John Whitt, the pediatric intensivist at Mary Bridge pediatric ICU treated Natalie there. 3RP 431-32. Natalie arrived at the Mary Bridge emergency room around 6:00 a.m. 3RP 437. Whitt examined her and was very pessimistic about her survival chances. 3RP 437. Whitt had never seen a child that severely injured survive. 3RP 442. She was in severe shock and had multisystem organ failure due to the lack of oxygen after

her cardiac arrest. 3RP 437.

Her pupils were not reactive, she had bruising on her jawline. 3RP 437. Her stomach was distended. 3RP 437. There were no signs of brain activity at all. 3RP 437. Her CT scan showed subdural bleeding. 3RP 438. The abdominal CAT scan showed damage to her kidney, liver and bowel from the lack of blood flow. 3RP 438. Her brain showed signs of a diffuse lack of oxygen. 3RP 438. She could only breathe with a ventilator. 3RP 440. Despite extensive treatment efforts, Natalie eventually died. 3RP 442.

Natalie had no diseases or infections that would have caused her state. 3RP 443. They did a workup to see if she could have had any heart issues. 3RP 445. There were no signs of any heart rhythm disturbance that would have caused her heart to stop. 3RP 445. They also ruled out ingestion. 3RP 446. Natalie tested negative for meth. 3RP 456. Des Rochers reported that Natalie had been normal and healthy with no recent illness or other symptoms. 3RP 455. Then Saavedra-Ruiz had taken Natalie and returned 75 minutes later. 3RP 455. Natalie was not unresponsive until Saavedra-Ruiz brought her back. 3RP 456.

Michele Breland, a pediatric nurse practitioner employed in the Child Abuse Intervention Department (CAID) at Mary Bridge Children's Hospital, was called by the social worker at the Mary Bridge pediatric

intensive care unit (PICU), where Natalie was admitted. 2RP 337, 341. Natalie was gravely ill when Breland saw her. 2RP 342. She had suffered catastrophic injuries complicated by difficult resuscitation and what looked like a lack of prompt medical attention. 2RP 342. She had significant injuries to her brain from lack of oxygen and her brain was swelling. 2RP 342.

The CAT scan showed a fracture of her skull at the back of her head, with some bleeding under the fracture site, an arachnoid lesion. 2RP 343, 346. She had a subdural hematoma on the top of her head. 2RP 343. Additionally, she had a “loss of gray-white differentiation.” 2RP 343. The latter indicated a “global event” to her brain. 2RP 343-44.

A subdural hematoma was not itself a brain injury, but a marker for a potential brain injury. 2RP 347. It is an accumulation of blood in the subdural space. 2RP 347. The mechanism is an acceleration/deceleration injury. 2RP 348. Essentially, the head moves back and forth and the brain does not keep up, causing the veins to shear off and rupture. 2RP 348.

In Natalie’s case the hematoma itself was relatively small. 2RP 348. However, in the context of the other injuries it was catastrophic. 2RP 349. She also had retinal injuries. 2RP 349. They were not minor. Several layers of her retinas had hemorrhages, and there was possible retinal detachment. 2RP 349. The injuries would have caused axons, the

connectors between neurons in the brain, to rupture. 2RP 351. Resulting symptoms could range from irritability, vomiting, all the way to seizure activity, stopping breathing, and death. 2RP 352. Natalie's symptoms were extreme; she eventually died. 2RP 352. Breland would not expect Natalie's injuries, the retinal hemorrhages, the hematoma, to be separately fatal, but the actual injury to the brain could be. 2RP 352.

In addition to the trauma itself, Natalie had hypoxic or anoxic injuries, meaning from a lack or absence of oxygen. 2RP 353. Natalie's symptoms would have appeared immediately after the shaking and or skull fracture occurred. 2RP 354. After the injuries to her brain, Natalie would likely not have been able to eat or swallow. 2RP 360. In her opinion, Natalie's injuries were inflicted, that is, not accidental. 2RP 369.

Natalie died on July 18. 3RP 395. Pierce County Medical Examiner Thomas Clark performed Natalie's autopsy. 3RP 391. Before accepting his position with Pierce County in 2010, Dr. Clark was an associate professor of pathology at the University of North Carolina at Chapel Hill, and the Deputy Chief Medical Examiner of North Carolina. 3RP 392.

The physical examination showed bruises under each side of her jaw, which were likely caused by the intubation. 3RP 396. Natalie had a bruise on her left cheek that Clark attributed to a blunt force injury. 3RP

396.

She had a set of four bruises to the left side of her back, which appeared to have been inflicted by fingers. 3RP 397.

When Clark opened her scalp, there was abundant bleeding, both in the scalp itself and on the skull. 3RP 397. There was a small fracture to the skull under the hemorrhage. 3RP 398. The large amount of bleeding indicated that the fracture was caused by a large blunt force injury, such as impact with a wall. 3RP 399.

Clark explained that the brain is covered by three membranes. 3RP 399. The first is the pia, which is very thin and difficult to see. 3RP 399. The middle membrane is the arachnoid, and the outer is the dura, which is a thick protective covering. 3RP 399. The membranes normally contain only a very small amount of fluid. 3RP 399. In the case of an injury, blood can pool under the dura or arachnoid. 3RP 399. The brain is largely fluid and fills most of skull cavity. As such, the brain cannot be compressed. 3RP 400. If anything, such a blood displaces the brain, it can be forced into the foramen magnum, which is where the spinal cord leaves the skull. 3RP 400. Pressure on the brain will thus damage the area of the brain near the foramen, causing herniation of the brain. 3RP 400. This could often cause death, since that part of the brain regulates breathing. 3RP 400. Natalie's brain had such herniation. 3RP 407. It

would have caused her to stop breathing. 3RP 407.

Natalie had an acute subarachnoid hemorrhage, or bleeding under the arachnoid membrane, in the vicinity of the skull fracture. 3RP 401. She had a left-side subdural hemorrhage, or bleeding between the dura and arachnoid membrane. 3RP 401.

Natalie had hemorrhaging along the optic nerve, which runs from the brain into the eyes. 3RP 401. She also had hemorrhages within the eyes themselves, in her retinas. 3RP 401. There is a strong association between retinal hemorrhage and intentionally inflicted injury. 3RP 402. However, it can also result from unintentional injury. 3RP 402. The most well-known cause is the shaking of an infant. 3RP 402.

The extent of retinal hemorrhaging can depend on the cause. 3RP 403. Non-traumatic hemorrhages tend to be smaller and closer to the optic nerves. 3RP 403. Natalie's retinal hemorrhages were extensive and heavy; they were bilateral and occupied much of the retina. 3RP 403. The extent of the hemorrhages strongly supported a conclusion that they were the result of shaking or blunt force trauma to the head. 3RP 403-04.

Natalie also had a blunt force injury to her abdomen. 3RP 404. Her colon, the large bowel, was also injured. 3RP 404. The injury was severe enough to cause an infarction, or cell-death. The death of the cells resulted in air and colon contents to leak into Natalie's abdominal cavity.

3RP 404. The danger of this is that it leads to bacteria getting into the bloodstream. 3RP 404.

Natalie died as a result of her extensive head injuries. 3RP 406. If she had survived, she would not have been normal afterwards. 3RP 406.

Clark further explained:

The symptoms would have appeared very quickly if not instantly. The child would have been not necessarily completely unresponsive but would have been noticeably different following these injuries. And then over a period of a short number of minutes, the child would have become progressively unresponsive, progressively sleepy to the point of being unresponsive.

3RP 406. In Clark's opinion, Natalie died because of blunt force injury to the head. 3RP 408. It could have been caused by hitting her head on a car seat, but she would have had to have been thrown forcefully against it.

3RP 408. He explained that such an injury would quickly become symptomatic:

Q. And just to clarify, in -- with the injuries in this particular case, how quickly would symptoms have appeared?

A. Symptoms would have appeared quickly. The symptoms onset would be measured in a small number of minutes.

Q. Thank you.

A. Or even seconds.

3RP 408.

Clark rejected as unlikely defense counsel's suggestion that she

could have been asymptomatic for hours:

Q. Isn't it possible that the child could have experienced the blunt force trauma to the head and gone as much as two, three, or four hours without going into unconsciousness?

A. That becomes a much harder question to answer when you put a specific number of hours into the question. And I don't think I can answer that, and I don't think anybody could. I think the answer to that is better expressed in more general terms, which is that there should have been a noticeable difference – there would have been a noticeable difference in a time frame measured in a small number of minutes.

I think the time to unresponsiveness would probably also be best measured in minutes. But it could conceivably go out to an hour. I'm not comfortable putting a specific number of minutes or a specific number on the hours as you asked in the question.

Q. Okay. So my question actually was, is it possible? Is it possible from a medical standpoint that the child could have gone as much as two or three hours between the trauma to the head and reaching unconsciousness?

A. I cannot exclude that possibility. So in that sense the answer to your question is probably "yes." But I don't think it very likely that -- the time to unconsciousness was measured in hours.

3RP 409-10.

However, Clark was clear that the fracture could not have been the result of shaking or an accidental impact. 3RP 419. It had to have been a forceful impact of a blunt object to the back of the head. 3RP 419. The bruising was quite large, so that the object must have been something

large like a wall or table. 3RP 419. He ultimately summarized his medical opinion:

I believe that the incident started with a significant blunt force injury to the head that resulted in brain swelling, probably in neuronal shearing and in bleeding under the two membranes, that I described, and likely in retinal hemorrhages that would have caused progressive lethargy or sleepiness until the point that herniation of the brain stem caused breathing to stop, or would have if it weren't for the fact that by this time the baby was intubated, had an endotracheal tube, and was on a breathing machine.

3RP 420-21. Clark acknowledged on cross-examination that he could not state how long it would have taken Natalie to become symptomatic:

Q. I guess I'm still a little confused about how long that process would have taken from the point of time of the trauma to the point of time where the breathing stops.

As I understand it, you cannot say with medical certainty how long that process could take? It could be a couple minutes, it could be as much as an hour or even maybe more than an hour?

A. Yes, you are confused about how long I said it would take, because I haven't said how long it would take.

Q. Okay. Fair enough.

And you can't say with medical certainty what the answer to that question is?

A. I cannot.

3RP 422. He nevertheless maintained that the symptoms would have appeared quickly after the injury. 3RP 423.

III. ARGUMENT

A. EVEN ASSUMING SAAVEDRA-RUIZ'S CLAIMS REGARDING SHAKEN BABY SYNDROME WERE SUPPORTED BY THE APPELLATE RECORD, THEY WOULD BE IRRELEVANT HERE, WHERE THE INFANT'S DEATH WAS CAUSED BY A SIGNIFICANT SKULL FRACTURE.

Saavedra Ruiz argues, based on the holding in *In re Fero*, 192 Wn. App. 138, 367 P.3d 588 (2016), that he is entitled to a new trial. This claim is without merit for a number of reasons. First, this is not a typical “shaken baby” case in that the infant here had a skull fracture. Second, unlike in *Fero*, this is a direct appeal, and there is no evidence whatsoever in the record that the expert testimony presented below was inaccurate. Finally, for the same reason, his central contention, that the State presented perjured testimony, is without any record basis.

1. *This is not a “shaken baby” case.*

The most salient difference between *Fero* and the present case is the nature of the injuries Natalie suffered before she died. In *Fero*, the child suffered a subdural hematoma and evidenced retinal hemorrhaging, which the experts at trial attributed to severe shaking. The child did not exhibit any external head trauma. They further extrapolated that the injury must have occurred during the time the baby was in Fero’s custody.

Likewise in *State v. Edmunds*, 308 Wis. 2d 374, 746 N.W.2d 590,

593 (App. 2008), cited by both Saavedra-Ruiz and the Court in *Fero*, “there was no evidence of an impact” to the child’s head. And again, in the article on which Saavedra-Ruiz relies, the author describes the paradigmatic shaken baby case:

In a typical case, an infant “is brought to the emergency room with the sudden onset of unconsciousness and respiratory irregularities or seizure. The given history suggests sudden and unprovoked symptoms ... [b]ut there is no external evidence to indicate that trauma caused their ailment.”

Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1, 3 n.15 (2009)² (quoting Stephen C. Boos, *Abusive Head Trauma as a Medical Diagnosis*, in *Abusive Head Trauma*, in *Infants And Children: A Medical, Legal, And Forensic Reference* 49, 50 (Lori Frasier et al. eds., 2006) (editing by Tuerkheimer, emphasis the State’s)). She further explained that the prosecutions impacted by the concerns raised in cases like *Edmunds* and *Fero* are those based on what she referred to as “triad-only”:

By this, I mean those whose convictions rest *exclusively* on the presence of retinal hemorrhage and/or subdural hematomas. In contrast, a sizeable number of SBS prosecutions rely on corroborative evidence beyond the triad; convictions which result in these cases are therefore less dramatically undermined by recent scientific developments.

Tuerkheimer, *Id.*, at 10 n.58 (emphasis supplied); *see also People v.*

² Available at: http://openscholarship.wustl.edu/law_lawreview/vol87/iss1/1.

Bailey, 47 Misc.3d 355, 999 N.Y.S.2d 713, 718 (N.Y. Co. Ct. 2014) (conviction based on “triad” discussed in Tuerkheimer); *Del Prete v. Thompson*, 10 F. Supp. 3d 907, 923 (N.D. Ill. 2014) (“absence of any signs of direct traumatic injury to [infant’s] head, skull, brain, or neck”).

Here, on the other hand, the medical experts testified that Natalie suffered a significant skull fracture. She was perfectly healthy at her well-baby exam the day before she the incident. 2RP 299, 332. There was no evidence of any trauma to her between then and when Saavedra-Ruiz took her to the restaurant. According to the medical examiner, Natalie’s “[d]eath was as a result of blunt force injury to the head.” 3RP 408. This conclusion was based on the presence of the skull fracture and the amount of large amount of bleeding around it, which indicated that it was caused by a “large blunt surface with some degree of force ... like a wall.” 3RP 398-99. The bleeding and swelling resulting from the fracture led directly to her death:

[T]he incident started with a significant blunt force injury to the head that resulted in brain swelling, probably in neuronal shearing and in bleeding under the two membranes, that I described, and likely in retinal hemorrhages that would have caused progressive lethargy or sleepiness until the point that herniation of the brain stem caused breathing to stop, or would have if it weren’t for the fact that by this time the baby was intubated, had an endotracheal tube, and was on a breathing machine.

3RP 420-21. Clearly this is not the type of “triad-only” diagnosis that is the concern of the research examined in Tuerkheimer’s paper.

2. ***Fero and the other cases cited were collateral attacks that presented actual evidence that contradicted that presented at trial.***

The cases cited in *Fero* and in Saavedra-Ruiz's brief were all post-conviction collateral attacks. As such, they were based on the presentation of non-record evidence that contradicted the evidence presented at trial. *See Fero*, 192 Wn. App. at 142 (personal restraint petition where *Fero* presented "new material facts"); *Edmunds*, 746 N.W.2d at 593 (relief granted on appeal following evidentiary hearing on motion for new trial); *Bailey*, 999 N.Y.S.2d at 714-15 (relief granted after evidentiary hearing on motion to vacate judgment); *Del Prete*, 10 F. Supp. 3d at 921 (federal habeas corpus relief granted after a nine-day evidentiary hearing); *Ex parte Henderson*, 384 S.W.3d 833, 833 (Tex. Crim. App. 2012) (state habeas corpus relief granted after an evidentiary hearing).

Here, on the other hand, there is no evidence that in any way contradicts the evidence presented at trial. Indeed, Saavedra-Ruiz did not even call a conflicting expert at trial. It is well-settled that arguments that rest on allegations that are outside the record cannot be considered on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995). Moreover, the alleged controversy over shaken baby diagnoses may be more manufactured than real. *See e.g.*, Joelle A. Moreno and Brian Holmgren, *The Supreme Court Screws Up the Science: There Is No Abusive Head Trauma/Shaken Baby Syndrome "Scientific" Controversy*,

2013 Utah L. Rev. 1357, 1368 n.47 (2013)³ (“According to Dr. Daniel Lindberg, Brigham and Women’s Hospital, the AHT/SBS ‘controversy’ has been manufactured based ‘exclusively on the opinions and work of ‘experts’ who derive substantial income from lucrative court testimony on behalf of the accused perpetrators of child abuse’ and ‘rarely, if ever, provide medical care for children.’”) The Court would thus be ill-advised to consider such a claim in the context of a direct appeal. Because the record fails to support his claim, it should be denied.

3. *Saavedra-Ruiz fails to show the State presented perjured testimony.*

Apparently recognizing that he has no new evidence, and could not properly present such evidence in a direct appeal, Saavedra-Ruiz instead accuses the State of presenting perjured testimony. This contention, however, also lacks any record support.

A “conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (footnote omitted). In Washington, that due process analysis is triggered only if there has been a “knowing use of perjured testimony.” *In re Rice*, 118 Wn.2d 876, 887 n.2, 828 P.2d 1086 (2001);

³ Available at: http://collections.law.fiu.edu/faculty_publications/31.

In re Benn, 134 Wn.2d 868, 936-37, 952 P.2d 116, 151 (1998).

This Court thus recently rejected this very claim in a “shaken baby” case:

Finally, Morris argues that his due process rights were violated “by the State’s presentation of evidence it knew, or should have known was false and misleading.” We disagree.

Morris cites federal cases either involving *Brady* violations or cases where a witness lied on the stand. But unlike those cases, the facts of this case do not support the conclusion that the evidence was either false or misleading. Rather, the record shows that there were differences in opinion about the issue of causation. This does not give rise to a due process violation.

We deny his petition for relief.

In re Morris, 189 Wn. App. 484, 507-08, 355 P.3d 355, 367 (2015). Here, of course, the record does not even claim a “difference of opinion.” Instead there is no record evidence that contradicts that presented at trial at all.

Moreover, even if this court were to take the unprecedented step of reversing a conviction on direct appeal based on expert testimony in other utterly unrelated cases, as noted above, this is simply not a shaken baby case in the sense disputed in the Tuerkheimer paper or in the cases on which Saavedra-Ruiz relies. As such, even if the Court were to consider the non-record “evidence,” Saavedra-Ruiz would fail to establish his claim that the evidence presented was false, or that it was presented knowing it

was false. The claim should be rejected.

B. THE STATE WILL NOT BE SEEKING APPELLATE COSTS.

Saavedra Ruiz next argues that appellate costs should not be awarded. Given the current state of the law, the State will not be seeking appellate costs.

IV. CONCLUSION

For the foregoing reasons, Saavedra Ruiz's conviction and sentence should be affirmed.

DATED June 20, 2016.

Respectfully submitted,

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KITSAP COUNTY PROSECUTOR

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