

No. 40289-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JULIO CESAR ALDANO GRACIANO,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]

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

The Honorable Kitty-Ann van Doornick

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. THE SEARCH OF THE DOL DATABASE AND CERTIFICATION THAT THIS IS THE PERSON REQUESTED CONSTITUTED INADMISSIBLE TESTIMONIAL HEARSAY

a. The clerk was required to search the State

database in order to determine which identification card matched

Mr. Graciano rendering the copy of the identification card

“testimonial.” The State argues that the copy of Mr. Graciano’s

State issued identification card was merely a certified copy of a

public document, thus constituting a non-testimonial public record.

Brief of Respondent at 18. The State claims the clerk was not

creating a record but merely authenticating a copy. Brief of

Respondent at 15.

The clerk here did not merely attest to the accuracy of the copy of Mr. Graciano’s State issued identification card. The clerk here had to search the database for “Jose Cesar Aldano Graciano” and determine that this particular record for “Jose Cesar Aldano Graciano” was the person who was the person involved in this case. Thus, the certification was both an exercise in discretion, deciding among the “Jose Cesar Aldano Gracianos” that this particular one was the individual for whom he or she was

searching, and an opinion that this record is the “Jose Cesar Aldano Graciano” requested by the prosecutor. The certification under this analysis is no different than the lab report in *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

Regarding whether or not the copy of Mr. Graciano’s State issued identification card was testimonial, the State makes the incredulous statement that the copy of Mr. Graciano’s identification card “was not created for the purposes of establishing or proving some fact at trial.” Brief of Respondent at 15. If the copy was not established for the purposes of proving a fact, why was it necessary to be admitted at all? In fact, the copy of the State issued identification card was *in fact* used to establish a fact at trial: the age difference between the victim and Mr. Graciano, which was an element of the offenses. Further, while the State issued identification card was kept in the ordinary course of business, the copy of the State issued identification card was created specifically for the purpose of litigation and for providing proof of an element at trial.

Since the certification was testimonial and was admitted without Mr. Graciano being given the opportunity to cross-examine

the clerk who prepared the copy, it was error for the court to admit it.

b. Prior Washington cases are no longer valid in light of *Melendez-Diaz*. The Washington Supreme Court has held that admission of a clerk's certification to the absence of DOL record for a defendant does not violate the Confrontation Clause. *State v. Kirkpatrick*, 160 Wn.2d 873, 888-89, 161 P.3d 990 (2007). See also *State v. Kronich*, 160 Wn.2d 893, 903, 161 P.3d 982 (2007) (admission of certificated DOL statement regarding revocation status of defendant's license also not violative of Sixth Amendment).

Both *Kirkpatrick* and *Kronich* relied upon then existing decision of the United States Supreme Court interpreting the Sixth Amendment's Confrontation Clause. *Kronich*, 160 Wn.2d at 901-03; *Kirkpatrick*, 160 Wn.2d at 884-85, citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The State concedes that no Washington Court since *Kirkpatrick* and *Kronich* has decided whether a certificate of non-license is testimonial in light of *Melendez-Diaz*. Brief of Respondent at 16-17. Since these cases were decided before the subsequent decision by the United States Supreme Court in *Melendez-Diaz*, they are no

longer good law and must be reexamined in light of the *Melendez-Diaz* decision.

c. The error in admitting Mr. Graciano's state issued identification card was not harmless. Lastly, the State contends the error in admitting the copy of Mr. Graciano's driver's license was harmless. Brief of Respondent at 18-20. But, the certified copy of Mr. Graciano's state issued identification card was the *only* proof the State offered of his age. The copy of the identification card was generated for the sole purpose of this trial and was the result of the clerk searching the DOL database for the name of "Julio Graciano." Since the card was the *only* evidence of Mr. Graciano's age, the error in admitting the DOL copy of his identification card was not harmless. Mr. Graciano is entitled to reversal of his conviction and remand for a new trial.

2. THE OFFENSES CONSTITUTED THE SAME
CRIMINAL CONDUCT IN LIGHT OF THE
LACK OF A CLEAR RECORD TO THE
CONTRARY

Mr. Graciano was convicted of four counts of child rape and two counts of child molestation. At sentencing, Mr. Graciano moved the court to find all of the counts constituted the same criminal conduct in light of the State's inability to identify specific

acts or times for the counts under *State v. Dolen*, 83 Wn.App. 361, 365, 921 P.2d 590 (1996). In *Dolen*, the court looked at the evidence presented (six different incidents in which Mr. Dolen engaged in sexual intercourse and/or sexual contact with a child) and determined it was unclear from the record whether the jury convicted him of the two offenses in a single incident or in separate incidents. *Dolen*, 83 Wn.App. at 365. The Court reasoned that if Mr. Dolen had been convicted of two offenses from a single incident, then they would have encompassed the same criminal conduct. *Id.* The court held: “the State failed to prove that [Mr.] Dolen committed the crimes in separate incidents[,] [c]onsequently, the trial court’s finding that the two convictions did not constitute the same criminal conduct is unsupported.” *Id.*

In its response brief, the State attempts to distinguish *Dolen* by contending the prosecutor argued to the jury in closing argument that the jury had to find each conviction must be based on a separate incident. Brief of Respondent at 22-23. But, the prosecutor’s argument was just that: argument. Although the State would like to believe that the jury carefully followed the prosecutor’s urgings, there is no record that confirms that fact. To compound matters, the verdict forms merely required the jury answer guilty or

not guilty: the forms did not require the jury to state which acts constituted the basis for each conviction. CP 93-99. Thus, although the State would like to believe this case is different from *Dolan*, there is no evidence to confirm that.

Additionally, the State also argues that there was no need for a special verdict because it was clear from the record the acts were distinct. Brief of Respondent at 26-28. But once again, there is nothing to confirm this but the prosecutor's bald assertions. The prosecutor urges the court to trust them; that if a basis for concluding the counts shared an evidentiary basis to be combined, the State would have combined them. But there is nothing in the facts of Mr. Graciano's case to distinguish it from *Dolen*.

Mr. Rise's case is almost identical to *Dolen*. Although the testimony showed different means of committing the rape and molestation, and different dates, it is unclear from the record whether the jury convicted Mr. Graciano for committing the offenses in a single incident or in separate incidents. E.R. testified Mr. Graciano inappropriately touched her and also made her touch Mr. Graciano inappropriately on many occasions during the two year charging period, but was unable to specify the time and place.

The evidence as presented does not eliminate the circumstance of the acts occurring during a single incident. *Dolen*, 83 Wn.App. at 365. Without a special verdict setting out the specific times and places, it is impossible to find the State had proven the acts all occurred at different times.

To avoid the same criminal conduct issue, the State needed to show the incidents occurred at different times. *Id.* The defense had asked a number of times for specificity as to the acts charged and were denied that option. The fact the Court gave the unanimity instruction does not provide assurance that the offenses occurred at separate times. CP 65; *State v. Petrich*, 101 Wn.2d 566, 572-73, 683 P.2d 173 (1984). All that the *Petrich* instruction guaranteed is that the jury agreed the acts were separate acts. It did not eliminate the fact the acts could have occurred during a single incident as in *Dolen*. 83 Wn.App. 365.

In sum, “the record [here] does not tell us whether the jury convicted [Mr. Graciano] of committing the two offenses in a single incident or in separate incidents.” *Dolen*, 83 Wn.App. at 365. “[T]he State [then] failed to prove that [Mr. Graciano] committed the crimes in separate incidents.” *Id.* Thus, the trial court erred in failing to count Mr. Graciano’s convictions for first degree rape of a

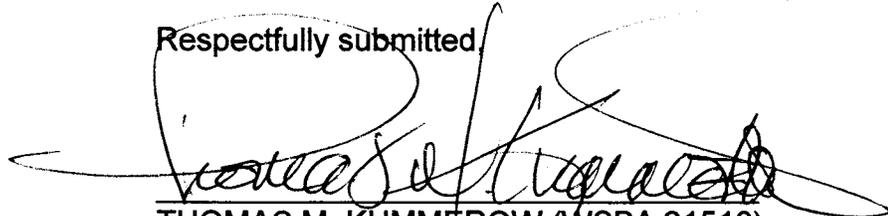
child and first degree child molestation as the same criminal conduct.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant and the instant reply brief, Mr. Graciano submits this Court must reverse his convictions with instructions to dismiss or for a new trial, and/or reverse his sentence and remand for resentencing.

DATED this 1st day of October 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is fluid and cursive.

THOMAS M. KUMMEROW (WSBA 21518)

tom@washapp.org

Washington Appellate Project – 91052

Attorneys for Appellant

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DIVISION TWO**

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v.)	NO. 40289-1-II
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JULIO GRACIANO,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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PO BOX 900		
SHELTON, WA 98584		

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF OCTOBER, 2010.

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711