

No. 49332-2-II

---

IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH LEROY FUGLE

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY  
Cause No. 14-1-04016-6

---

BRIEF OF APPELLANT

---

WAYNE C. FRICKE  
WSB #16550

HESTER LAW GROUP, INC., P.S.  
Attorneys for Appellant  
1008 South Yakima Avenue, Suite 302  
Tacoma, Washington 98405  
(253) 272-2157

## **Table of Contents**

TABLE OF AUTHORITIES.....	ii
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE .....	3
A. Procedural History.....	3
B. Facts .....	4
IV. ARGUMENT .....	7
V. CONCLUSION .....	17

## TABLE OF AUTHORITIES

### Cases

<i>See State v. Graciano</i> , 176 Wn.2d 531, 295 P.3d 219 (2012).....	15, 16
<i>State v Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002) .....	11
<i>State v. Aguirre</i> , 168 Wn.2d 350, 229 P.3d 669 (2010) .....	12
<i>State v. Alexander</i> , 64 Wn.App. 147, 822 P.2d 1250 (1990) .....	8, 14
<i>State v. Allen</i> , 98 Wn.App. 452, 989 P.2d 1222(1999) .....	12
<i>State v. Baeza</i> , 100 Wn.2d 487, 488, 670 P.2d 646 (1983).....	12
<i>State v. Borg</i> , 145 Wn.2d 329, 36 P.3d 546 (2001).....	16
<i>State v. Calle</i> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	15
<i>State v. Clark</i> , No. 92021-4 (February 2, 2017).....	8
<i>State v. Colquitt</i> , 133 Wn.App 789, 137 P.3d 892 (2006).....	13
<i>State v. Froehlich</i> , 96 Wn.2d 301, 635 P.2d 127 (1981).....	8
<i>State v. Gallagher</i> , 112 Wn.App. 601, 612, 51 P.3d 100 (2002) .....	13
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	13
<i>State v. Haddock</i> , 141 Wn.2d 103, 3 P.3d 733 (2000) .....	15
<i>State v. Holland</i> , 77 Wn.App. 147, 822 P. 2d 1250 (1992).....	8, 10
<i>State v. Hummel</i> , 196 Wn.App. 329, 383 P.3d 592 (2016).....	13, 14
<i>State v. Hutton</i> , ____ Wn.App 726, 502 P.2d 1037 (1972).....	14
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P. 3d 1251 (2007).....	8
<i>State v. Neal</i> , 133 Wn.2d 600, 30 P.3d 1255 (2002).....	10, 11
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P. 2d 173 (1984).....	8, 10
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P. 2d 951 (1986).....	11
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P. 3d 970 (2004).....	11
<i>State v. Tili</i> , 139 Wn.2d 107, 895 P. 2d 365 (1999).....	16
<i>State v. Vasquez</i> , 178 Wn.2d 1, 309 P.3d 318 (2013) .....	13, 14
<i>State v. Weisberg</i> , 65 Wn.App. 721, 724, 829 P.2d 252 (1992).....	13

### Statutes

RCW 9.94A.589 .....	15
---------------------	----

### Rules

ER 607.....	12
-------------	----

**I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it allowed to the state to elicit testimony from a forensics investigator.

2. The trial court erred when it limited defense counsel's ability to attack the accuser's credibility.

3. The guilty verdict was not supported by sufficient evidence.

4. Mr. Fugle's offender score should be 6.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred when it allowed testimony from the Pierce County Prosecutor's forensic interviewer to corroborate the statements made by the alleged victim?

(Assignments of Error #1)

2. Whether the trial court erred when it when it limited the scope of cross-examination of G.M by preventing counsel to inquire of a list of other alleged abusers that were given to the investigators?

(Assignments of Error #2)

3. Whether the sufficient evidence was presented to convict Mr. Fugle of the charged crimes when a guilty verdict could only be based on speculation and guess work?

(Assignments of Error #3)

4. Whether the criminal history was correctly calculated?

(Assignments of Error #4)

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

On October 8, 2014, Joseph Fugle was charged with multiple counts of child rape/child molestation involving his stepson, M.G. After multiple delays resulting from significant efforts to obtain the alleged victim's medical records, trial finally commenced on May 31, 2016.

The parties filed motions in limine, which were decided by the court prior to jury selection. Most significantly, the court ultimately ruled that the state would be allowed to call a forensic interviewer to testify for the reasons for delayed disclosure over the objection of the defense. RP 357-358 After an offer of proof, the court allowed the testimony. RP 383.

Additionally, the defense was unable to proceed with questions regarding a list of names that M.G. had provided to the detective regarding allegations that others had been abused by Mr. Fugle. RP 613:20-614:11. It was restricted to only asking if he had provided names and without being permitted to follow up with anyone that it was verified. RP 193:17-199:23.

M.G. had received counseling from numerous people and worked with all of them, as well as his mother and grandmother, to sort out what was described as the real from the fiction. RP 211:1-7.

After several days of testimony, the case was finally presented to the jury, which indicated they were unable to reach a verdict. CP 141. After being instructed to resume deliberations, the jury convicted Mr. Fugle of all of the counts and found several aggravating factors were applicable. CP 183-195.

Notwithstanding the aggravating factors and the state's recommendation for an indeterminate sentence, the court sentenced Mr. Fugle to a minimum term of the low end of the applicable guideline range, which was 240 months based on an offender score of 9. CP 218-239. Mr. Fugle had requested that his offender score be calculated to be a 6, rather than 9. CP 248-255. Mr. Fugle timely filed his notice of appeal. CP 275-293.

#### **B. Facts**

While the state and Mr. Fugle disagree as to the commission of these offenses, what is not in dispute is the fact that the alleged victim (M. G.) had no memory of anything occurring to him until he had a flashback/dream of abuse at the hands of Mr. Fugle in February or March of 2014. RP 166:10-25. He could not say anything about where he was when this happened other than he was awake. RP 168:7-24. His grandmother, who was the first person he told, stated that he came to her indicating he was having nightmares, not flashbacks. RP 321:19-25.

The "flashbacks" then turned to nightmares of the exact same conduct. RP 169:18-25. He referred to them as repressed memories. RP 171:4-13. He stated at one time that this was something he figured out with the help of the psychologists. RP 180:2-181:9. The recollections then all came back prior to the "amnesia". RP 192:19-25.

A couple of weeks afterwards, he had a "pseudo seizure" in which he lost all memories of his childhood up and until his pseudo seizure, with the exception of the alleged abuse by Mr. Fugle, which he described as dissociative amnesia. RP

167:1-12. The only things he remembered were the “bad memories”. RP 172:22-25. The abuse he described ranged from sexual and physical abuse and occurred over several years, but ended by the time he turned fourteen years of age. He was 18 years old when the “memories” came back to light. According to him, he was able to differentiate between those that were real from those that were not real through self-reflection. RP 185:8-187:5.

After making his initial disclosure, M.G. was taken to a number of counselors/physicians. Prior to these disclosures, he had numerous physical ailments, which could never be explained. Dr. Joy Jones noted that she did not rule out a diagnosis of “somatoform disorder”, which is a constellation of physical symptoms that could not be explained by any medical tests. RP 466:9-25. She did note the neurologist had diagnosed him with encephalopathy, which means an altered mental status/confusion. RP 470:18-25. While M.G. and his family described him being in a dissociative state, Dr. Jones acknowledged that typically means you don’t remember the event that caused the trauma as opposed to the trauma itself. RP 474:8-14. In her visit with M.G., most of the history was obtained from her family. RP 475:16-18. She acknowledged that nightmares and hallucinations that had been described could be based on fictional events. RP \_\_\_\_:10-25.

M.G.’s family physician, Dr. John Daniel, had been seeing him since the spring of 2013 and had previously diagnosed him with fibromyalgia in 2013, a poorly understood condition that typically runs in the family, which existed in his grandmother and mother. RP 497:3-498:17. Like others, he received the history of

sexual abuse, not from M.G. but from his grandmother, who described it being repressed, just like a former Miss America. RP 516:6-519:17. He also indicated that the notes reflected he “started having hallucinations and confused memory about sexual abuse he suffered from his step-dad several weeks ago”. RP 519:18-23. M. G. never told him that he had been sexually abused, and any memory up to his first pseudo seizure. RP 520:1-12.

This was also how his psychologist, Susan Poole, received information about any alleged sexual abuse. Dr. Poole first saw him on April 30, 2014, he gave no details at that time, only indicating that other people had told him he had started having memories of sexual abuse. RP 570:16-25. He actually had no memories of being sexually abused during that first meeting. RP 571:1-12. He then started having what were described as flashbacks after June 2014 and discussed them with Dr. Poole. RP 572:1-24.

Prior to experiencing these “memories/flashbacks,” M.G. was extremely frustrated that none of the doctors could come up with a medical reason for all of his ailments. Dr. Justin Steffner, M.G.’s therapist, started treating him in May 2014 for depression, anxiety, social challenges, and medical issues. RP 630:1-5. After many treatments, his mother and M.G. came to him in March 2014, wherein he indicated “he believed” that he had been sexually abused after now experiencing flashbacks. RP 638:5-22. He did not indicate why he believed he had been sexually abused. RP 645:12-17. Prior to this time, he never made any mention of being sexually abused and the revelation did not occur until Dr.

Steffner suggested that he come up with “logical, reasonable reasons for the things that were occurring to him.” RP 644:6-12.

Finally, in July of 2014, M.G. began meeting with Wendy Rawlings for Eye Movement Desensitization Reprogramming (EMDR), which is to have him think about a disturbing event and “rearrange” the feelings surrounding the event. RP 656:1-6. He would look at her fingers and then would go into a seizure, and would then start “recalling memories”. She did not know if he would go into a trance. RP 675:3-18. His conscious was not connected to his body. RP 676:1-2.

Daniel Reisberg, an expert on memory, called by the defense testified that the memories here were equivalent to false memories and if any memories were to be either suppressed or repressed, it would be the bad memories, which was the opposite that occurred in this case. RP 784:14-821. There was no explanation that was consistent within the field that would explain how M.G. could forget the trauma he experienced as he later described remembering it. RP 819:5-25. It alluded to the real possibility that the memories were false. RP 820:1-24. As Dr. Reisberg testified, there has never been a documented study where this has occurred. RP 821:3-11.

#### **IV. ARGUMENT**

##### ***A. THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO PRESENT IRRELEVANT EVIDENCE AGAINST MR. FUGLE AND RESTRICTED CROSS EXAMINATION OF HIS ACCUSER.***

The appellate courts review evidentiary rulings for abuse of discretion. The courts will defer to those rulings unless “no reasonable person would take the view adopted by the trial court.” *State v. Clark*, No. 92021-4 (February 2, 2017)

(quoting *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P. 3d 626 (2001)). A trial court abuses its discretion when it "...relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Lord*, 161 Wn.2d 276, 284, 165 P. 3d 1251 (2007). Questions of law are reviewed de novo. *Id.*

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED "DELAYED DISCLOSURE" TESTIMONY FROM AN EXPERT WITNESS.

During trial, the court allowed testimony from the forensics interviewer from the Pierce County Prosecutor's Office to give testimony regarding her observations of the reasons for delayed disclosure. While the trial court maintains the discretion to allow expert testimony to corroborate the testimony of a witness whose credibility is at issue, an expert may not offer an opinion on an ultimate issue of fact when it is based solely on the expert's perception of one's truthfulness. *See State v. Holland*, 77 Wn.App. 147, 154, 822 P.2d 1250 (1992); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992).

In the context of testimony relating to delayed disclosures, the courts in this state have allowed testimony once the credibility of the witness has been put into issue. *See State v. Petrich*, 101 Wn.2d 566, 575, 683 P. 2d 173 (1984); *State v. Holland, supra*. Under those situations, the evidence is relevant. As stated in *State v. Froehlich*, 96 Wn.2d301, 305-07, 635 P.2d 127 (1981):

Three different but related factors in this case make it clear Bliss' credibility was attacked: the cross-examination of Bliss; the obviousness of his disability; and the attack on his capacity to be a witness. It may be that any one of these standing alone would not have been enough to place his credibility in issue, but all three in conjunction clearly opened the door to corroborating testimony.

Appellant attacked the witness' credibility by use of a probing cross-examination designed to demonstrate his poor memory and suggestibility. This was proper. Cross-examination as to a mental state or condition, to impeach a witness is permissible. Annot., *Cross-Examination of Witness as to His Mental State or Condition, To Impeach Competency or Credibility*, 44 A.L.R.3d 1203, 1210 (1972) and cases cited therein. Cross-examination is one of several recognized means of attempting to demonstrate that a witness has erred because of his mental state or condition. In addition, in a proper case counsel may produce experimental evidence to indicate a mental infirmity, or he may call an expert witness to testify as to the witness' mental infirmity. Annot., 44 A.L.R.3d at 1208. In each of these methods the purpose is the same, i.e., to impeach the witness and put his credibility in issue by showing his mental condition and how it affects his testimony. See Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 Cal L. Rev. 648, 651-52 (1960) (hereafter Juviler).

Appellant employed this tool in an effort to destroy the witness' credibility. The entire thrust of the cross-examination was to show that Bliss had virtually no recollection of events, including those that occurred only a few days prior to trial. This was done to cause the jury to infer that since the witness did not remember these other matters he must be mistaken or lying when he said he remembered critical events. In so doing appellant attacked the credibility of the witness, and opened the door for corroborating testimony.

The trial court was correct in noting that the issue of credibility was also inherent in Bliss' testimony. A witness' credibility is always at issue, but it was particularly so in this highly unusual setting. The mental defects of the witness were clearly demonstrated to the trial court and jury by the extreme state of nervousness. A review of the record made by the trial court in expressing its concerns makes it equally obvious to this court on appeal. Where, as here, the mental disability of a witness is clearly apparent and his competency is a central issue in the case, the jury need not be left in ignorance about that condition or its consequences.

Another factor lends weight to our determination that appellant put Bliss' credibility in issue. Appellant argued strenuously at trial and on appeal that the witness was incompetent as a witness due to his claimed inability to recall, a problem which resulted from his mental condition. In a situation such as this competency shades into credibility. Once a trial judge determines a person with mental defects is competent, i.e., that he understands the nature of the oath

and is not incapable of giving a correct account of what he has seen or heard, *State v. Moorison, supra*, the jury must then determine the extent to which the witness has the required capacities to observe, recollect and communicate truthfully because they also affect credibility. Juviler, at 651. As stated in *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1972), Bazelon, C.J., speaking for the court at page 1131:

The dangers which must be considered in determining whether a mentally retarded rape prosecutrix is a competent witness must also be considered by the jury in assessing her credibility, particularly since "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence.

(Footnote omitted.) Challenging the competency of a witness, as was done here, necessarily puts his credibility in issue since both are ultimately concerned with the same matter. This is especially true where, as here, appellant submitted the same evidence to both judge and jury for making their respective determinations.

Conversely, the credibility of the witness was not in issue in this unique case. It was undisputed that the witness had no memory of the events in question until many years later and only after he had what he termed as a "flashback". The cross examination was not designed to address delayed disclosure, but only that he had no memory, and the memories that he did have were false memories based in fiction, not fact. Thus, the situation was far different than suggesting that he was not credible based on the delayed disclosure, which is the reason expert testimony was allowed in *Petrich* and *Holland*.

The next issue is whether the erroneous admission of the evidence was harmless. Any error in admitting evidence is grounds for reversal if it results in prejudice. *State v. Neal*, 133 Wn.2d 600, 611, 30 P.3d 1255 (2002). Prejudicial error occurs if "within reasonable probabilities had the error not occurred, the outcome of the trial would have been materially affected." 133 Wn.2d at 611

(quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Typically, the courts find the error harmless if the erroneously admitted evidence was of minor significance in the context of all of the evidence. *Neal*, at 611. See also *State v. Thomas*, 150 Wn.2d 821, 83 P. 3d 970 (2004)(“if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole” it is harmless error).

The issues in this case relate to whether the “memories” are based in fact or fiction. The evidence was hardly overwhelming. The jury initially indicated that it could not reach a verdict, only to change its position less than 24 hours later. Given that the evidence in the case was conflicting, any erroneously admitted evidence could have, within reasonable probabilities, changed the outcome of the trial and tipped the scales to guilty. Much like in *Neal*, as well as in *State v. Smith*, 106 Wn.2d 772, 725 P. 2d 951 (1986)(outcome of trial may have been materially affected had the evidence not been admitted), the outcome here may have been materially affected and sent an innocent man to prison based on a “memory” founded in fiction.

2. THE TRIAL COURT VIOLATED MR. FUGLE’S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES WHEN IT LIMITED THE SCOPE OF CROSS EXAMINATION OF HIS ACCUSER DURING TRIAL

The right to confront and cross-examine adverse witnesses is guaranteed by the federal and state constitutions. *State v Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)(citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). The decision to limit cross-examination is reviewed for abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361-62, 229 P.3d 669

(2010). As part of this right, ER 607 allows any party to attack a witness's credibility. Impeachment evidence is relevant if it tends to cast doubt on the credibility of the person being impeached, and the credibility of the person being impeached is a consequence to the action. *State v. Allen*, 98 Wn.App. 452, 459-60, 989 P.2d 1222(1999).

During the trial, the defense attempted to cross examine the accuser and the officer regarding the other names that M.G. indicated were also victims. The trial court allowed questions to be asked regarding the list, but, it was restricted to that question. Given that the question was restricted, the defense was unable to impeach the witness regarding his other allegations that were no less suspect than the allegations involving himself and Mr. Fugle. In a situation where all created memories were suspect, it was even more important that the defense was afforded the opportunity to question the accuracy of M.G.'s memory in order to impeach the credibility of the very memory. As it was, the defense was unable to demonstrate that those accusations were false and maybe even had some credibility; thus worsening his position. Consequently, Mr. Fugle's constitutional guarantees to confront witnesses against him were denied.

***B. THE COURT SHOULD REVERSE THE CONVICTIONS  
BECAUSE THE ELEMENTS THAT THE STATE WAS  
REQUIRED TO PROVE WERE BASED ON NOTHING MORE  
THAN SPECULATION AND GUESSWORK.***

As this court is aware, due process requires the state to prove its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). It protects an accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *State v.*

*Hummel*, 196 Wn.App. 329, 333, 383 P.3d 592 (2016). As it is a question of constitutional law, a challenge to the sufficiency of the evidence is reviewed *de novo*. 100 Wn.App. at 333. As stated in *Hummel*:

This inquiry impinges on the discretion of the fact finder to the extent necessary to guarantee the fundamental protection of due process of law and focuses on whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Where sufficient evidence does not support conviction, such a conviction cannot constitutionally stand.

*Id.*(citations omitted).

When challenging the sufficiency of evidence, this court must determine:

Whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

*State v. Weisberg*, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Gallagher*, 112 Wn.App. 601, 612, 51 P.3d 100 (2002) (citations omitted). "A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence." 112 Wn.App. at 613 (citations omitted). Importantly, however, "the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn.App 789, 796, 137 P.3d 892 (2006) (citing *State v. Hutton*, 7 Wash.App. 726, 728, 502 P.2d 1037(1972). See also *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The courts have not hesitated to reverse convictions where the evidence supporting the conviction requires one to speculate or guess as to the proof of the

elements. *See Hummel, supra; Vasquez, supra; State v. Alexander*, 64 Wn.App. 147, 822 P.2d 1250 (1990).

In *Alexander*, the Court of Appeals reversed the defendant's conviction because the alleged victim's testimony was so filled with extreme inconsistencies that the jury could not possibly have found the elements of the charge beyond a reasonable doubt. In that case, the alleged victim directly contradicted herself about whether an incident ever occurred. 64 Wn.App at 589. Her testimony also was contradicted by her mother's testimony as it related to the time frames she was even in contact with the alleged abuser. *Id.*

Similarly, the Washington State Supreme Court reversed the defendant's conviction in *Vasquez* when the proof of the element of intent to injure in a fraud case was based on nothing more than "rank speculation". 178 Wn.2d at 16. *See also State v. Hutton*, \_\_\_\_ Wn.App 726, 502 P.2d 1037 (1972)(reversing defendant's convictions where no expert testimony presented to support identity of the controlled substance).

Likewise, Mr. Fugle's conviction is based on nothing more than rank speculation and guess work. The expert testimony presented by the defense conclusively established that the alleged memories presented in this case—memories that operated contradictory to the scientifically accepted literature—did not conform to known processes. This testimony was not rebutted by the state. Even without the expert testimony, the so-called memories are so subject to inconsistencies much like in *Alexander*, the verdict cannot be based on anything more than rank speculation, leading to an unconstitutional conviction.

C. *THE COURT SHOULD REVERSE THE SENTENCE BECAUSE THE COURT FAILED TO TAKE INTO CONSIDERATION THAT SOME OF THE CONDUCT SHOULD HAVE BEEN CONSIDERED THE SAME CRIMINAL CONDUCT RESULTING IN A LOWER OFFENDER SCORE.*

As the court is aware, in calculating the offender score, those offenses which encompass the “same criminal conduct” as defined in our RCW 9.94A.589(1)(a) count as a single point. The inquiry as to what counts as “same criminal conduct” is governed by the above statute and the case law interpreting it. *See State v. Haddock*, 141 Wn.2d 103, 109, 3 P.3d 733 (2000). It is within the court’s discretion to determine whether the offenses constitute the same criminal conduct. *See State v. Graciano*, 176 Wn.2d 531, 295 P.3d 219 (2012).

“Same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed to same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Here, counts 2 and 3 address conduct between Mr. Fugle and his stepson over the same time period. It is apparent that the court must conclude that the conduct occurred during the same time period and against the same victim.

The only question is whether they involve the same criminal intent. This issue was addressed in *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995), in the context of a double jeopardy argument.

In *Calle*, the Washington State Supreme Court upheld defendant’s convictions for both first degree incest and second degree child rape against a double jeopardy challenge where the sentences were to be served concurrently and because they did not raise the offender score of the other. 125 Wn.2d at 772;

*State v. Tili*, 139 Wn.2d 107, 895 P. 2d 365 (1999) (three rapes with same victim, occurring almost simultaneously counted as a same criminal conduct); *See also State v. Borg*, 145 Wn.2d 329, 337, 36 P.3d 546 (2001) (citing *Calle* for the proposition that rape and incest arising out of a single act are same criminal conduct). Other than the main charge being child molestation, as opposed to forcible rape, the court cannot say that the conviction for child molestation and incest for the same victim did not arise out of the same conduct.

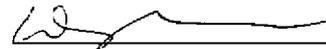
Here, as in *Graciano*, the convictions for counts 2 and 3 can be interpreted to be the same criminal conduct. Given that the testimony included statements that the conduct was ongoing and included the same acts both together and separate, it is within the court's discretion to find that the conduct was the same for sentencing purposes. Thus, the defense would request that the court hold that the proper offender score is 6, with a corresponding range of 98-130 months on the first degree molestation conviction, a range of 162-216 to the first degree child rape conviction and a range of 146-194 months on the second degree rape conviction should be imposed.

V. CONCLUSION

Based on the foregoing Mr. Fugle requests that the court reverse his convictions in this matter.

DATED this 28th day of February, 2017.

HESTER LAW GROUP, INC., P.S.  
Attorneys for Appellant



---

WAYNE C. FRICKE  
WSB #16550

*CERTIFICATE OF SERVICE*

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served via e-mail to the following:

Counsel for Respondent

Kathleen Proctor  
Deputy Prosecuting Attorney  
930 Tacoma Avenue South, #946  
Tacoma, WA 98402

I certify that on the day set forth below, I mailed a copy of said brief to the following:

Appellant

Joseph L. Fugle  
DOC #391887  
Coyote Ridge Corrections Center  
P. O. Box 769  
Connell, WA 99326

Signed at Tacoma, Washington this 28<sup>th</sup> day of February, 2017.

  
LEE ANN MATHEWS

**HESTER LAW GROUP**

**February 28, 2017 - 11:10 AM**

Transmittal Letter

Document Uploaded: 5-493322-Appellant's Brief.pdf

Case Name: State v. Fugle

Court of Appeals Case Number: 49332-2

**Is this a Personal Restraint Petition?**    Yes     No

**The document being Filed is:**

Designation of Clerk's Papers  
Papers

Supplemental Designation of Clerk's

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Leeann Mathews - Email: [leeann@hesterlawgroup.com](mailto:leeann@hesterlawgroup.com)

A copy of this document has been emailed to the following addresses:

[pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us)