

No. 64418-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT RISE,

Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Hayden

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REPLY BRIEF OF APPELLANT

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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

DEFENSE COUNSEL WAS INEFFECTIVE FOR  
FAILING TO CHALLENGE THE CONVICTIONS AS  
SAME CRIMINAL CONDUCT

Robert Rise was convicted of three counts of child rape and one count of child molestation. At sentencing, defense counsel failed to move the trial court to find the two of the child rape counts and the child molestation count constituted the same criminal conduct 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 *Dolan* by contending the prosecutor at trial continually 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 9-12. 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 71-74. 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 13-15. 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. Rise's case to distinguish it from *Dolan*.

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. Rise for committing three offenses in a single incident or in separate incidents. J.P. testified Mr. Rise inappropriately touched him and also made him touch Mr. Rise inappropriately on many occasions during the two year charging period, but was unable to specify the time and place. The evidence 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.

Finally, to avoid the same criminal conduct issue, the State needed to show the incidents occurred at different times. *Id.* 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.

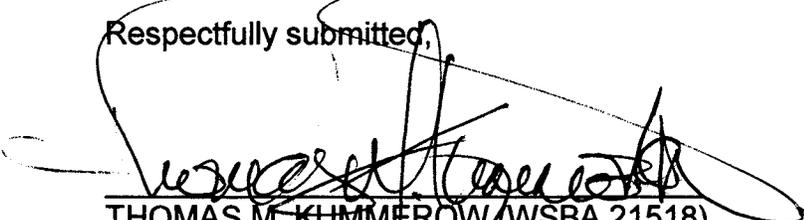
In sum, “the record [here] does not tell us whether the jury convicted [Mr. Rise] of committing the two offenses in a single incident or in separate incidents.” *Dolen*, 83 Wn.App. at 365. “[T]he State [then] failed to prove that [Mr. Rise] committed the crimes in separate incidents.” *Id.* Thus, the trial court erred in failing to count Mr. Rise’s convictions for second degree rape of a child and second 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. Rise submits this Court must reverse his child molestation conviction, and/or reverse his sentence and remand for resentencing.

DATED this 1st day of October 2010.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)  
tom@washapp.org  
Washington Appellate Project – 91052  
Attorneys for Appellant

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

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

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**SIGNED** IN SEATTLE, WASHINGTON THIS 1<sup>ST</sup> DAY OF OCTOBER, 2010.

X \_\_\_\_\_ *[Signature]*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710