

No. 38782-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

PETER JACOB INOUYE,

Appellant.

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STATE OF WASHINGTON
BY _____
DEFENDANT

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Gary R. Tabor, Judge
Cause No. 07-1-00376-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Inouye was denied his constitutional rights under the Confrontation Clause when Dr. Staub of Orchid Cellmark testified to the results of DNA testing instead of the numerous analysts who performed the tests.

2. Whether a reasonable jury could have found beyond a reasonable doubt that Inouye acted with deliberate cruelty in the commission the crimes charged in counts III, IV, and V.

3. Whether Inouye's Rape in the First Degree convictions should be reversed or a new trial be granted where the verdict forms mistakenly listed the crimes charged as Rape of a Child or whether the mistakes constituted a clerical error.

4. Whether the trial court abused its discretion in determining that Inouye's three convictions for rape in the first degree were not the same criminal conduct for sentencing purposes.

5. Whether Inouye's deadly weapon enhancements should run concurrently if the rapes Inouye's committed were "same criminal conduct."

B. STATEMENT OF THE CASE

The State accepts the appellant's statement of the case.

C. ARGUMENT

1. Inouye was not denied his constitutional rights under the Confrontation Clause when Dr. Staub of Orchid Cellmark testified to the results of DNA testing instead of the numerous analysts who performed the tests.

Acknowledging a defendant's Sixth Amendment right to confront witnesses, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), holds that "testimonial" statements made by a witness outside of court are inadmissible if 1) the witness is

unavailable to testify at trial, and 2) the defendant had no prior opportunity to cross examine the witness under oath. Crawford does not apply, however, to statements not offered for the truth of the matter as they are not hearsay.

Hearsay statements offered at trial, in light of Crawford, require the Court to determine whether the statements are “testimonial” in nature as only then would their admission violate the defendant’s right to confront witnesses. Id. at 26-33. Some guidance has been given recently toward making that determination. For example, a statement to police for the purpose of seeking protection from danger is not barred by Crawford as it is non-testimonial. State v. Mason, 127 Wn. App. 554, 110 P.3d 245 (2005). Statements made to a 911 dispatcher primarily to seek help due to an ongoing emergency situation are non-testimonial. State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005). Statements made to a physician to determine whether an injury is intentional or accidental, to prevent further abuse, and to allow for a proper diagnosis and medical treatment are non-testimonial. State v. Fisher, 130 Wn. App. 1, 108 P.3d 1262 (2005). Recently, the Supreme Court determined that “affidavits reporting the results of forensic analysis which showed that material seized by police and

connected to the defendant was cocaine” were testimonial statements. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527; 174 L. Ed.2d 314 (2009).

The Supreme Court’s holding in Melendez-Diaz does not, as Inouye argues, “put the matter to rest” regarding the admissibility of Dr. Staub’s testimony. Melendez-Diaz was charged with distributing and trafficking cocaine. Melendez-Diaz, 129 S.Ct. 2527, 2530. At trial, the state submitted certificates showing the results of the forensic analysis performed on the evidence. Id. at 2531. The sworn, notarized certificates showed that the substance was cocaine. Id. The Court held that certificates fell within in the “core class of testimonial statements” described in Crawford. Id. at 2532. The certificates are testimonial statements because they “are incontrovertibly ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” Id. at 2532 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)). The fact at issue was whether the substance was cocaine. Since the certificate was testimonial, its author, the analyst, had to appear in court to be cross examined. Id. at 2532. The present case is distinguishable from Melendez-Diaz.¹

¹ There is a line of California cases with facts similar to the present case that deals with the issue of whether Melendez-Diaz requires each analyst who

At Inouye's trial, there were no sworn affidavits presented in lieu of testimony. Dr. Staub appeared and was fully available for cross examination. The Confrontation Clause is not implicated when there is a witness in court making testimonial statements. In this case, the testimonial statement was that Inouye's DNA matched the DNA on the victim. Dr. Staub made this statement in open court and Inouye had every opportunity to cross examine him on the basis of this testimony, the 217-page Cellmark case file. The basis of Dr. Staub's opinion did not consist of a recitation of thirteen others' sworn statements. Rather, Dr. Staub gave his independent, expert opinion of the DNA match based on unsworn documentation of raw data generated by a combination of several analysts and machines.² An unsworn laboratory notation is not a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." The purpose of the notations is to document

participates in testing or evaluation to appear in court. In People v. Geier, the California Supreme Court upheld, over a Crawford challenge, the admission of laboratory reports prepared by analysts who did not testify where the analysts' supervisor testified to the tests performed, the accuracy of the tests, and the test results. 41 Cal. 4th 555; Coincidentally, Geier also involved Cellmark. Id. at 594. There is currently a split in among divisions of the California Court of appeals regarding whether Geier is still good law after Melendez-Diaz. See People v. Lopez, 117 Cal. App. 4th 202 (2009); People v. Gutierrez, 117 Cal. App. 4th 654 (2009). It is significant, however, that the U.S. Supreme Court denied certiorari in Geier after deciding Melendez-Diaz. Geier v. California, 129 S. Ct. 2856 (2009).

² See RP 191-210 for a description of how data is generated, the involvement of machines in the testing, and the ability of experts to form opinions on the evidence from lab documentation.

procedures to ensure accuracy and to provide a basis for the ultimate conclusion, i.e., that there was or was not a DNA match.

Contrary to Inouye's assertion, the Melendez-Diaz Court did not intend their holding to require each and every person who had a hand in scientific testing in a particular case to come to court and testify. The Court stated in footnote 1,

Contrary to the dissent's suggestion...we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[I]t is the obligation of the prosecution to establish the chain of custody...this does not mean that everyone who laid hands on the evidence must be called.

Melendez-Diaz 129 S.Ct. 2527, footnote 1. Inouye's assertion that each of the thirteen analysts must appear in court to satisfy the Confrontation Clause is a distortion of the holding in Melendez-Diaz.

Inouye's rule would also lead to absurd results. Cross examination of a parade of analysts would not be beneficial in furthering Inouye's Confrontation Clause rights. The numerous analysts who participated in the DNA testing are unlikely to have an independent memory of what they did on that particular day and would be relying on their laboratory notations. If the court were to

adopt Inouye's interpretation of Melendez-Diaz, the state would have to call every analyst, no matter how many, to affirm in court that each performed the tests they said they performed in the notes. They will unlikely be able to testify that "yes" they remember that particular test and "yes" they have an independent recollection that they performed the test correctly. The result would be a parade of witnesses coming in and essentially reading from their notes. This is cumulative, it would likely confuse the jury, and it would not enhance the truth-seeking function of the court. Based on documentation in the case file, Dr. Staub can testify to precisely what tests were performed and whether they appear to have been performed properly.³ This is exactly what the analysts would be testifying to if they were called. Finally, under Inouye's proposed rule, if even one of these analysts was deceased or was otherwise unavailable to testify, the DNA results would be excluded and highly accurate and incriminating evidence would be lost. This result would be truly absurd.

Even if this court were to find that Inouye's confrontation rights were violated by the admission of Dr. Staub's testimony, the

³ See RP 213-229 for Dr. Staub's testimony as to what procedures were followed for the DNA testing in the present case and the results of those tests. See RP 235-236 for Dr. Staub's testimony that there is nothing in the case file to cause him to have concern as to the accuracy and reliability of the test results.

error is harmless.

It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.

State v. Guloy, 104 Wn.2d 412, 425; 705 P.2d 1182 (1985) (internal citations omitted). Washington Courts apply the “overwhelming untainted evidence test” in harmless error analysis. Id. at 426. Applying this test, “the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” Id. In the present case, the evidence of Inouye’s guilt is overwhelming even without Dr. Staub’s testimony.

Orchid Cellmark was not the only lab to have tested Inouye’s DNA. Forensic scientist William Dean testified from the Washington State Patrol Crime Laboratory. [RP 446]. Dean testified that DNA testing was performed in this case and Inouye’s DNA was found to match DNA from the peroneal sample in G.M.S.’s rape kit. [RP 456-59]. Given the WSP Crime Lab testing and the other evidence presented at trial, Inouye would certainly have been found guilty of

the crimes beyond a reasonable doubt even without Dr. Staub's testimony.

2. There was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Inouye acted with deliberate cruelty in the commission of the crimes charged in courts III, IV, and V.

The jury's finding that Inouye acted with deliberate cruelty is supported by sufficient evidence, and the deliberate cruelty finding constitutes a proper basis on which the trial court imposed an exceptional sentence. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220; 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). In the present case, any

reasonable jury could have found deliberate cruelty beyond a reasonable doubt.

Deliberate cruelty during the commission of a crime is included in the list of factors that may support an exceptional sentence. RCW 9.94A.535(3)(a). Deliberate cruelty is defined as gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself. State v. Faagata, Jr., 147 Wn. App. 236, 249; 193 P.3d 1132 (2008). The conduct must be significantly more serious or egregious than typical in order to support an exceptional sentence. Id. (citing State v. Scott, 72 Wn. App. 207, 214; 866 P.2d 1258 (1993)). The conduct must involve cruelty of a kind not usually associated with the commission of the offense in question. Id. (citing State v. Crane, 116 Wn.2d 315, 334; 804 P.2d 10 (1991)).

In the present case, Inouye assaulted G.M.S. with a degree of violence rarely seen by the testifying professionals. Detective Amy King was asked on direct examination whether, in her four and a half years as a sex crimes detective, it was unusual to see a sex crime against a child perpetrated with such violence. [RP 386]. King responded that this was the only time in her career that she had seen a child sex crime with that degree of violence, and that it is

very uncommon in general. [RP 387]. To the contrary, sex crimes against children are typically committed by people the children know, and such crimes do not usually hurt the children physically. [RP 387].

Other witnesses testified to the extreme degree of injury G.M.S. suffered as a result of the great physical force used in the strangulation. Evidence technician Chet Mackaben was asked in direct examination whether, based on his training and experience, the photographs of G.M.S. taken after the attack showed an “unusual degree of petechiae-related injury.” [RP 290]. Mackaben responded, “Well, in all my eleven years at the police department and all my years in the army, I have never seen a live victim with that much petechiae. I have only seen that much petechiae in corpses.” [RP 290]. Furthermore, sexual assault clinician Laurie Davis testified in detail to the causes of G.M.S.’s face, neck, and eye injuries. [RP 104-114]. Describing her initial impression of G.M.S.’s injuries, Davis said,

I was shocked. I’d never seen such a severe case of abuse in my three and a half years there. She walked in, and her face was red, swollen. Her eyes, all the whites of her eyes were just beet red and swollen. She was—she was in almost a state of shock, I believe.

[RP 104]. Describing a photograph of G.M.S. after the attack, Davis noted that G.M.S.'s face was beet red with petichiae, and there was a very clear line marking the red and non-red areas. [RP 105]. Davis testified that these injuries confirmed her diagnosis of strangulation. [RP 108].

Davis testified regarding G.M.S.'s eyes, noting that where her eyes were supposed to be white, they were beet red from bleeds in both eyes. [RP 109]. Such eye bleeds are caused by pressure build up in the eye which breaks the blood vessels. [RP 109-110]. The State asked Davis on direct examination whether this was a common injury that Davis had seen in her thirty years in the medical field. [RP 110]. Davis replied that she had never seen this injury in an abuse case; she had only seen it once or twice where there was a direct injury into the eye, such as metal object going into the eye. [RP 110]. According to Davis, bleeding in both eyes is significant because it "shows the great deal of force that was applied." [RP 113]. Davis testified that she had never seen this injury to both eyes in her thirty years of practice. [RP 113]. Davis said,

I have delivered over a thousand babies, and there's a lot of pushing and straining there and a lot of red faces pushing babies out, and I've never seen—I've possibly seen a little hemorrhage, but nothing to this

extent, not to both sides of the eyes and not to both eyes.

[RP 113]. Finally, Davis noted that G.M.S. had blackening under both of her eyes. [RP 111]. Blackening under the eyes is caused by too much pressure and breakage of the blood vessels. [RP 112]. Davis testified that black eyes can be caused by strangulation, but “a lot’ of force would need to be applied to cause the injuries. [RP 112].

These extreme petechial and eye injuries are evidence of the great force applied by Inouye when he strangled G.M.S. in her sleep. Such force is over and above that which is usually seen in child rape cases, and probably in all rape cases. The degree of violence used by Inouye to accomplish the rape of an eleven year old child was shocking and gratuitous. Any reasonable jury could have found that such violence was used to inflict physical pain as an end in itself. The evidence is sufficient to support the jury’s finding of deliberate cruelty beyond a reasonable doubt.

3. Where Inouye was charged with Rape in the First Degree, the jury was instructed on the law of that charge, the attorneys argued the issues relating to that charge, and there was no dispute that the victim was a child, mistakes on the verdict forms listing the charges as Rape of Child were mere clerical errors which do not require reversal or a new trial.

Verdict forms III, IV, and V were incorrect in that they each listed the charge as Rape of a Child in the First Degree instead of Rape in the First Degree; however, the clerical errors do not require reversal of the convictions or a new trial. Art. 1 § 22 of the Washington State Constitution provides that the accused shall have the right to “demand the nature and cause of the accusation against him” among other rights. It is undisputed that “no one can legally be convicted of an offense not properly alleged.” State v. Ackles, 8 Wash 462, 464; 36 P. 597 (1894).

Despite errors on the verdict forms, Inouye was properly convicted of the crimes for which he was charged. “After a jury has been discharged, the authority of the court to amend or correct its verdict is limited strictly to matters of form or clerical error.” Beglinger v. Shield, 164 Wash. 147, 153; 2 P.2d 681 (1931) (civil rule applied to criminal cases by State v. Badda, 68 Wn.2d 50; 411 P.2d 411 (1966)). In State v. Imhoff, the court held that a mistake on the verdict form listing the crime as Possession with Intent to Deliver instead of Attempted Possession with Intent to Deliver was a clerical error where the defendant was charged with attempt and where the jury was properly instructed on attempt. 78 Wn. App. 349, 351; 898 P.2d 852 (1995) (published in part). Such an error is

properly corrected under Superior Court Criminal Rule 7.8(a) which states,

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

The error on verdict forms in this case could have been corrected under the same court rule.

The verdict form error in Imhoff is virtually the same type of mistake made on the verdict forms in the present case. Inouye was charged with Rape in the First Degree for counts III, IV, and V. [CP 25]. The jury was properly instructed as to the law regarding charges III, IV, and V. [RP 699-703]. Additionally, the prosecution and defense argued the issues with regard to those crimes. [RP 708-777]. Finally, the term “rape of a child” was unlikely to prejudice Inouye or confused the jury. It was undisputed that G.M.S. was a child. The jury made a specific finding that G.M.S. was less than fifteen years of age at the time the rapes were committed. [RP 783]. Although the verdict forms for those charges read Rape of Child instead of Rape in the First Degree, this was a mere clerical error that does not require reversal.

4. The trial court did not abuse its discretion in determining that Inouye's three convictions for rape in the first degree were not the same criminal conduct for sentencing purposes.

Each time Inouye raped G.M.S., he committed a separate act of invasion into her body; therefore, the rapes should not be considered "same criminal conduct" pursuant to RCW 9.94A.589. The question of whether a court includes all current convictions as separate criminal acts in calculating an offender score is addressed in RCW 9.94A.589. The general rule is found in RCW 9.94A.589(1)(a):

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That *if the court enters a finding that some or all of the current offenses encompass the same criminal conduct* then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. . .

(Emphasis added). If any element is not present, the crimes cannot be considered "same criminal conduct." State v. Grantham, 84 Wn. App. 854, 858; 932 P.2d 657 (1997) (citing State v. Vike, 125 Wn. 2d 407, 410; 885 P.2d 824 (1994)). In addition, another important factor is whether the one act furthered the other; where one act

further's another, they are more likely to be considered "same criminal conduct." State v. Dunaway, 109 Wn.2d 207, 215-18; 743 P.2d 1237 (1987). Washington courts will review a trial court's finding of "same criminal conduct" for abuse of discretion.⁴ State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

The three separate rapes Inouye committed against G.M.S. do not constitute "same criminal conduct." It is undisputed that the rapes were committed in the same place and against the same victim. The only element in dispute is whether the rapes were committed with the same criminal intent. In State v. Grantham, the victim went to an apartment with the defendant; once inside, he beat her, forcibly removed her clothes, and anally raped her. 84 Wn. App. 854, 856; 932 P.2d 657 (1997). After the anal rape, the defendant kicked the victim multiple times, grabbed her, and ordered her not to tell. Id. The victim cried and asked him to stop, but the defendant slammed her head into the wall and forced her to

⁴ If the facts, objectively viewed, can only support a finding that the defendant had the same criminal intent with respect to each count, then the counts constitute the same criminal conduct. If the facts, objectively viewed, can only support a finding that the defendant had different criminal intents with respect to each count, then the counts constitute different criminal conduct. If the facts are sufficient to support either finding, then the matter lies within the trial court's discretion, and an appellate court will defer "to the trial court's determination of what constitutes the same criminal conduct when assessing the appropriate offender score." State v. Rodriguez, 61 Wn. App. 812, 816; 812 P.2d 868 (1991) (internal citations omitted).

perform oral sex on him. Id. The Grantham Court agreed with the State's argument that "the two intents differed because Grantham's intent to commit the first rape was complete when he stopped and withdrew. He then formed a second, new objective intent, which was completed with the accomplishment of the second rape." Id. at 859. Grantham completed the crime of rape and "had time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." Id. at 859. Grantham did proceed, forming a new criminal intent to commit the second rape. Id. The court found that the crimes were "sequential, not simultaneous or continuous." The sequence of events in Grantham is similar to the events in the present case.

Inouye committed three different rapes using three different methods, one after the other.⁵ None of the rapes were committed in furtherance of the others. The Grantham Court held that the use of different methods to accomplish rape is "significant" in proving different intents. Id. at 859. After removing G.M.S.'s pants and underwear, Inouye inserted his finger into her vagina. G.M.S. grabbed his hand and told him he was hurting her. He told her to bite on her pillow. After he removed his finger from her vagina,

⁵ See RP 56-61 for G.M.S.'s description of the sexual assault.

Inouye forced his penis into her vagina, committing another rape. After withdrawing from her vagina, Inouye proceeded to rape G.M.S. anally with his penis. G.M.S. then testified that these rapes occurred over a period of fifteen or twenty minutes. G.M.S. also testified that Inouye inserted his tongue into her vagina. Similarly to Grantham, the rapes in this case occurred sequentially, not simultaneously, thereby creating a window in which Inouye could have reconsidered his actions and chosen not to commit a second and third rape.

During each of the pauses, Inouye formed a new intent to commit the acts which constitute rape. In Grantham, the defendant paused long enough between the two rapes to make threats and use new physical force to obtain the victim's compliance; however, the absence of additional threats and physical force between the rapes inflicted on G.M.S. is not significant. Inouye did not need additional threats and physical force to gain G.M.S.'s compliance. G.M.S. was an eleven year old girl, not an adult woman, and Inouye had already inflicted such force in the strangulation that nothing more was needed to gain her compliance. This court should not punish Inouye less by finding "same criminal conduct"

because he inflicted sufficient injury on the victim at the outset of the attack to ensure her compliance with all three rapes.

The present case is distinguishable from State v. Tili, where a defendant penetrated his victim three times in a very short time period. 139 Wn. 2d 107; 985 P.2d 365 (1999). The court described the rapes in Tili as follows:

Tili proceeded to use his finger to penetrate L.M.'s anus and vagina. Tili inserted his finger into these two orifices separately, not at the same time. Tili told L.M. to say she liked it. She complied. Tili then tried to penetrate L.M.'s anus with his penis, but stopped, and instead inserted his penis into her vagina.

Id. at 111. The sexual attack lasted approximately two minutes. Id. at 111. Citing this extremely short time period, and the continuous, uninterrupted conduct, the court deemed the rapes in Tili “same criminal conduct.” Id. at 124. In the present case, the evidence is that the attack on G.M.S. occurred over a relatively much longer period to time. Unlike Tili, Inouye had time to reflect on his actions and form the new intent to commit the new crimes. Although fifteen minutes may not seem like a long time, in Grantham, where “same criminal conduct” was not found, the rapes were also “relatively close in time.” 84 Wn. App. 854, 858; 932 P.2d 657 (1997). Therefore, a finding of “same criminal conduct” is not mandated if the rapes occur relatively close together in time.

Inouye formed the intent three times to commit the acts that constitute rape on three separate occasions with each separate rape. Although Inouye's purpose or objective for each act of rape may have been the same, to achieve sexual intercourse, that does not mean that Inouye had only one criminal intent throughout the attack. See Id. at 860 (distinguishing State v. Walden, 69 Wn. App. 183; 847 P.2d 956 (1993)). Intent is not the same thing as objective or purpose. Id. "Rather, the defendant's intent, viewed objectively as the law requires, is to act "with the objective or purpose to accomplish a result which constitutes a crime." Id. (citing RCW 9A.08.010(1)(a)). Inouye formed a new intent to rape prior to each penetration of G.M.S.'s body. After each penetration Inouye could have chosen to stop and leave G.M.S. alone. But instead he chose to rape her three different times in three different ways. According to the Grantham Court,

Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, --an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Id. (quoting Harrell v. State, 88 Wis. 2d 546; 277 N.W.2d 462, 466 (1979)). Inouye should be punished for each separate, intentional act of invasion into G.M.S.'s body. The three rapes should not be considered "same criminal conduct" for sentencing purposes.

5. Inouye's deadly weapon enhancements should all run consecutively regardless of whether the underlying offenses are found to constitute "same criminal conduct."

Inouye was convicted of a three counts of Rape in the First Degree, each with an accompanying deadly weapons enhancement. All three of these enhancements should run consecutively. RCW 9.94A.533(4)(e) states, "Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and *shall run consecutively* to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter." (emphasis added) The Court of Appeals has held that the enhancements should run consecutively even where multiple offenses are considered "same criminal conduct." State v. Callihan, 120 Wn. App. 620; 85 P.3d 979 (2004). This is the law as it currently stands. Therefore, Inouye's deadly weapon enhancements should run consecutively.

D. CONCLUSION.

Inouye's Confrontation Clause rights were not violated by the introduction of Dr. Staub's testimony regarding Orchid Cellmark DNA testing, there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Inouye acted with deliberate cruelty in the commission of the crimes charged in counts III, IV, and V, mistakes on the verdict forms were clerical errors that do not require reversal, the charges of Rape in the First Degree were not "same criminal conduct," and Inouye's deadly weapon enhancements should all run concurrently. Therefore, the State respectfully requests that Inouye's convictions be affirmed.

Respectfully submitted this 3d of November, 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

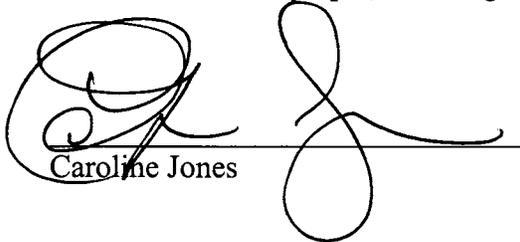
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DEPUTY _____

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 4 day of November, 2009, at Olympia, Washington.



Caroline Jones