

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
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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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to support the jury's verdict that Mr. Graciano was guilty of first degree child rape or first degree child molestation.

2. The admission of a certified copy of Mr. Graciano's state issued identification card to establish his age violated his constitutionally protected right to confrontation.

3. The trial court erred in failing to find all the counts to be the same criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove every element of the charged offense(s) to the jury beyond a reasonable doubt. Non-marriage between the victim and the defendant is an essential element of first degree child rape and first degree child molestation. Here, the State provided no evidence regarding the non-marriage of E.R. and Mr. Graciano. Is Mr. Graciano entitled to reversal of his convictions with instructions to dismiss in light of the failure of proof?

2. The Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution guarantee a defendant the right to confront and cross-examine witnesses

against him. Testimonial hearsay statements made by a non-testifying declarant violate the right to confrontation. A clerk's certification of a copy of a state-issued identification card created for the sole purpose of providing evidence against the defendant is inadmissible testimonial hearsay. Here, the State introduced a certified copy of Mr. Graciano's state issued identification card, which was created by the prosecution for the sole purpose of proving his age. Did the admission of the certified copy violate Mr. Graciano's right to confrontation requiring reversal of his conviction and remand for a new trial?

3. Multiple concurrent offenses must be counted as a single offense in the defendant's offender score where the offenses constitute the same criminal conduct. Offenses are the same criminal conduct where they are committed against the same victim, occurred at the same time, and shared the same intent. Where the offenses involved the same victim, E.R., involved the same intent, and the State failed to prove the acts occurred at different times, did the trial court abuse its discretion in refusing to find all six counts were the same criminal conduct?

C. STATEMENT OF THE CASE

Julio Graciano was charged with two counts of first degree child molestation and four counts of child rape involving E.R. CP 1-4, 62-65. He was also charged with one count of first degree child molestation involving J.R. *Id.* The counts arose from a period of time when Mr. Graciano lived with his cousin Sergio Robles and Sergio's wife Martha Robles, and their two children nine year old E.R. and seven year old J.R. *Id.*

At trial and in order to prove the essential element of age required for first degree child rape and first degree child molestation, the State moved to admit a certified copy of Mr. Graciano's state issued identification card. RP 341, 366. Over a defense "right to confrontation" objection, the court admitted the copy. RP 366.

Following a jury trial, Mr. Graciano was convicted of the six counts involving E.R. and acquitted of the count involving J.R. CP 93-99. 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.

1/22/2010RP 34. The trial court refused, stating:

I'm going to deny the defense motion. I think that the Instructions were clear that there needed to be separate and distinct acts. And that that's – and based on the record of testimony, that there was certainly sufficient evidence for each and every one of the counts to be separate and distinct. I know this was repeatedly objected to or made a record of, in terms of defense point of view, and I appreciate that and the objection is still noted for the Court of Appeals. So that can still be an issue.

1/22/2010RP 6.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE JURY'S VERDICT

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The State failed to prove Mr. Graciano was not married to E.R. Mr. Graciano was convicted of first degree child rape of E.R. and first degree child molestation of E.R. First degree child molestation and first degree child rape share a common element which the State must prove to the jury beyond a reasonable doubt: the victim is not married to the perpetrator. RCW 9A.44.073(1) (first degree child rape); RCW 9A.44.083(1) (first degree child molestation). The trial court instructed on this element in the to-convict instructions and defined the term “marriage” in Instruction 10. CP 80-84, 87-89.

E.R. was never asked during the multiple circumstances of questioning to which she was subjected whether she and Mr. Graciano were married. Further, neither E.R.’s mother nor her father was asked whether E.R. and Mr. Graciano were married. On the element of non-marriage there was not a scintilla of evidence.

Thus, the State failed to prove Mr. Graciano was guilty of any of the counts of first degree child rape or first degree child molestation as each required proof of non-marriage and no proof was provided by the State.

c. This Court must reverse and remand with instructions to dismiss the convictions. Since there was insufficient evidence to support Mr. Graciano's conviction on any of the six counts, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE ADMISSION OF A CERTIFIED COPY OF MR. GRACIANO'S IDENTIFICATION CARD TO ESTABLISH HIS AGE VIOLATED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION

a. The Confrontation Clause bars admission of

testimonial hearsay absent an opportunity to confront the declarant.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross examine witnesses. The Confrontation Clause "applies to 'witnesses' against the accused - in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). It also "bars 'admission of testimonial statements of a witness who did not appear at trial unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), quoting *Crawford*, 541 U.S. at 53-54. The State has the burden of establishing the witness's statements were not testimonial. *United States v. Arnold*, 486 F.3d 177, 192 (6th Cir. 2007), cert. denied, 552 U.S. 1103, 128 S.Ct. 871, 169 L.Ed.2d 736 (2008).

A challenge to the admission of out-of-court testimony under the Confrontation Clause is reviewed *de novo*. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008).

b. The certified copy of Mr. Graciano's identification card was testimonial and its admission was barred by the Confrontation Clause. The admission of the certified copy of Mr. Graciano's state issued identification card which was used to prove his age at trial violated his right to confrontation.

The United States Supreme Court has ruled that admission of lab reports without the lab technician testifying violated the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). In *Melendez-Diaz*, the defendant was charged with distributing and trafficking in cocaine. To prove that the substance officers seized from him was in fact cocaine, the prosecutor submitted three "certificates of analysis" sworn to by laboratory analysts before a notary public. The certificates stated simply, "The substance was found to contain: Cocaine." *Melendez-Diaz*, 129 S.Ct. at 2531. The Supreme Court concluded under a "rather straightforward" application of *Crawford* that the certificates were inadmissible.

Melendez-Diaz, 129 S.Ct. at 2531. After determining the certificates were “quite plainly affidavits,” the Court held that they constituted “testimonial” statements because they were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’ ” *Melendez-Diaz*, 129 S.Ct. at 2532, quoting *Davis*, 547 U.S. at 830. Moreover, the statements were “ ‘made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.’ ” *Melendez-Diaz*, 129 S.Ct. at 2532, quoting *Crawford*, 541 U.S. at 52. Consequently, the analysts were “witnesses” for Confrontation Clause purposes and *Melendez-Diaz* had the right to confront them. *Melendez-Diaz*, 129 S.Ct. at 2532. Because he was not given this opportunity, the evidence should not have been admitted. *Melendez-Diaz*, 129 S.Ct. at 2542. The Court concluded, “The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against *Melendez-Diaz* was error.” *Melendez-Diaz*, 129 S.Ct. at 2542.

Regarding certifications or affidavits by clerks, the Court held that in some cases these can be testimonial: “A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible

record, but could not do what the analysts here did here: *create a record for the sole purpose of providing evidence against a defendant.*” *Id.* at 2539 (italics in original).

No cases from Washington have addressed the scope of *Melendez-Diaz* as it applies to DOL certifications. Two decisions from other jurisdictions have addressed this issue and concluded a DOL certification, similar to that admitted here, violates the Confrontation Clause in light of *Melendez-Diaz*. In *Washington v. State*, and relying on *Melendez-Diaz*, the Florida Court of Appeal ruled that a “certification of non-licensure” prepared by the State of Florida Licensing Division, Construction Industry Licensing Board, in a unlicensed contractor criminal matter violated the Confrontation Clause, because it

is accusatory, was introduced to establish an element of the crime, was prepared at the request of law enforcement as part of its investigation in this case, and is evaluative in the sense that it represents not simply production of an existing record, but an assertion regarding the individual’s search of a database or databases. As such, the admission of the document, over the defendant’s *Crawford* objection, was error and a violation of the defendant’s Sixth Amendment rights.

18 So.3d 1221, 1224 (Fla.App.Ct. 2009).

Similarly, in *Tabaka v. District of Columbia*, the District of Columbia Court of Appeals, again relying on *Melendez-Diaz*, ruled that the admission of a Department of Motor Vehicles (DMV) certification that a search of its records revealed no license for the defendant (CNR) in a prosecution for driving without a driver's license violated the Sixth Amendment. 976 A.2d 173, 175-76 (D.C.Ct.App. 2009). The Court ruled:

The Supreme Court's analysis [in *Melendez-Diaz*] conclusively shows that the CNR in this case, "a clerk's certificate attesting to the fact that the clerk searched for a particular relevant record and failed to find it," was inadmissible over objection without corroborating testimony by the DMV official who had performed the search. The contrary conclusion reached by a division of this court in an analogous setting, (CNRs attesting to no record of license to carry a pistol or registration of firearm not "testimonial"), cannot survive the holding and analysis of *Melendez-Diaz*. And, because the CNR was the sole and sufficient proof of appellant's non-licensure to operate a motor vehicle, her conviction for that offense cannot stand.

Id. at 176 (citations omitted).

In a slightly different scenario but still relevant to the issue here, in *United States v. Martinez-Rios*, the Fifth Circuit ruled the admission of a certificate of nonexistence of record (CNR) in a undocumented alien prosecution violated the Sixth Amendment. 595 F.3d 581, 585-86 (5th Cir. 2010).

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). These cases were decided before the decision in *Melendez-Diaz*, and, as the *Washington*, *Martinez-Rios*, and *Tabaka* decisions indicate, must be reexamined in light of *Melendez-Diaz*.¹

The clerk's action here is identical to the clerk's actions in *Takada* and *Washington*. The clerk's certification was not merely to the copy's authenticity, but was the result of a search by the clerk of the DOL database for "Julio Graciano" and an analysis to determine whether the "Julio Graciano" they found was indeed the "Julio Graciano" in this case. As a result, the admission of this certified copy violated Mr. Graciano's right to confrontation. *Melendez-Diaz*, 129 S.Ct. at 2539.

¹ The Supreme Court has granted review of this Court's decision in *State v. Lui*, 153 Wn.App. 304, 221 P.3d 948 (2009), *review granted*, 168 Wn.2d 1018 (2010), which applied *Melendez-Diaz* and ruled reports by a non-testifying pathologist and laboratory technician did not violate the Sixth Amendment.

c. The error in admitting Mr. Graciano's state issued identification card was not harmless. Confrontational clause errors are subject to a harmless error analysis. *Lily v. Virginia*, 527 U.S. 116, 140, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Shafer*, 156 Wn.2d 381, 395, 128 P.3d 87, *cert. denied*, 549 U.S. 1019 (2006). Constitutional error is presumed to be prejudicial and the State bears the burden of proving beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

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.

3. THE COURT ABUSED ITS DISCRETION IN FAILING TO FIND THE OFFENSES CONSTITUTED THE SAME CRIMINAL CONDUCT

a. Where multiple current offenses constitute the same criminal conduct the trial court must count them as a single offense. A person's offender score may be reduced if the court finds two or more of the criminal offenses constitute the same criminal conduct. RCW 9.94A.589(1)(a). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id.* The State has the burden to prove the crimes did not occur as part of a single incident. *State v. Dolen*, 83 Wn.App. 361, 365, 921 P.2d 590 (1996) ("If the time an offense was committed affects the seriousness of the sentence, the State must prove the relevant time.").

The "same criminal intent" element is determined by looking at whether the defendant's objective intent changed from one act to the next. *Dolen*, 83 Wn.App. at 364-65. The mere fact that distinct methods are used to accomplish sequential crimes does not prove a different criminal intent. *State v. Grantham*, 84 Wn.App. 854, 859, 932 P.2d 657 (1997). The "same time" element does not

require that the crimes occur simultaneously. *State v. Porter*, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); *Dolen*, 83 Wn.App. at 365. Individual crimes may be considered same criminal conduct if they occur during an uninterrupted incident. *Porter*, 133 Wn.2d at 185-86; *Dolen*, 83 Wn.App. at 365, citing *State v. Walden*, 69 Wn.App. 183, 188, 847 P.2d 956 (1983) (court found a defendant's convictions for second degree rape and attempted second degree rape, committed by forcing the victim to submit to oral and attempted anal intercourse during one continuous incident, to be same criminal conduct).

The *Dolen* 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.*

b. The offenses shared the same intent, were committed at the same time, and involved the same victim. As in *Dolen*, the six counts of which Mr. Graciano was convicted involved the same intent (his sexual gratification), occurred during the same charging period, and involved the same victim, E.R. Thus, as in *Dolen*, all the counts constituted the same criminal conduct. See *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (multiple offenses against the same victim constitute the “same criminal conduct.”).

Mr. Graciano’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 six 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.

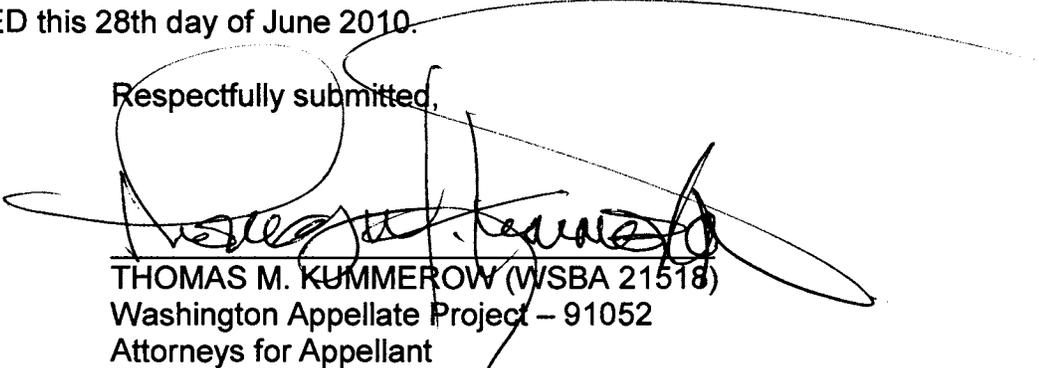
c. Mr. Graciano is entitled to remand for resentencing. The remedy for an incorrect offender score is reversal of the sentence and remand to the trial court for resentencing with a corrected offender score. *State v. Williams*, 135 Wn.2d 365, 366-67, 957 P.2d 216 (1998). Here, the court failed to conclude the offenses were the same criminal conduct. As a result, this Court must reverse Mr. Graciano's sentence and remand for resentencing.

E. CONCLUSION

For the reasons stated, 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 28th day of June 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 40289-1-II
v.)	
)	
JULIO GRACIANO,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING 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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