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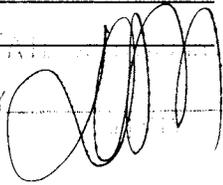
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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON  
BY 

STATE OF WASHINGTON, RESPONDENT

v.

JULIO CESAR ALDANA GRACIANO, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kitty-Ann van Doorninck

No. 09-1-01836-9

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the evidence at trial sufficient to support the jury's finding that defendant and the victim were not married where the victim was nine years old and referred to defendant as "uncle"?
2. Did the admission of a certified copy of defendant's State issued identification card violate the Confrontation Clause where the document was a non-testimonial public record?
3. Did the court abuse its discretion in finding that defendant's crimes did not constitute the same criminal conduct where the jury found they were separate and distinct?

B. STATEMENT OF THE CASE.

1. Procedure

On April 6, 2009, the State filed an information with the Pierce County Superior court charging defendant, Julio Cesar Aldana Graciano with four counts of rape of a child in the first degree and two counts of child molestation in the first degree involving E.R.<sup>1</sup> CP 1-4. In the same information defendant was also charged with one count of child molestation involving J.R.<sup>2</sup> *Id.* The State later filed an amended

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<sup>1</sup> Because E.R. is a minor, the State will use her initials rather than her full name.

<sup>2</sup> Because J.R. is a minor, the State will use his initials rather than his full name.

information changing the charging period of each count to be between June 1, 2007 and March 30, 2009. CP 62-65.

Trial began before the Honorable Kitty-Ann van Doorninck on November 24, 2009. Defendant was provided with a Spanish interpreter at each of his court appearances. RP-continuance 2, RP 1, 65, 260, RP-sentencing 2.<sup>3</sup> After a child competency and child hearsay admissibility hearing, the court found E.R. to be a competent witness, and E.R.'s child hearsay to be admissible. CP 109-111.

The jury found defendant guilty on all four counts of rape of a child in the first degree involving E.R., and both counts of child molestation in the first degree involving E.R. CP 93-98. The jury found defendant not-guilty of child molestation in the first degree involving J.R. CP 99.

At the sentencing hearing held on January 22, 2010, the trial court ruled that each of the counts had been shown to be separate and distinct, and calculated defendant's offender score as fifteen accordingly. RP-sentencing 6. Defendant was sentenced to 318 months to life for each count of rape of a child, and 198 months to life for each count of child molestation. CP 115-131. Each of these sentences was within the standard range. RP- sentencing 6-7.

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<sup>3</sup> The State will refer to the transcripts of the proceedings on 11/23/2009 as RP-continuance, the pre-trial motions and trial on 11/24/2009, 11/30/2009-12/3/2009, 12/7/2009-12/9/2009 as RP, and the sentencing hearing on 1/22/2010 as RP-sentencing.

## 2. Facts

Sergio Robles and his wife, Martha Robles, lived with their three children, Brian, who was thirteen years old at the time of the trial, E.R., who was nine, and J.R., who was seven, in Tacoma, Washington. RP 176, 177. The house was two-stories tall, and had a living room on each floor, a kitchen and three bathrooms. RP 176. The house also had three bedrooms; one that Mr. Robles and Mrs. Robles shared, one that Brian and J.R. shared, and one that E.R. slept in. RP 178.

In the summer of 2007, defendant, Mr. Robles's cousin, asked if he could stay with the family for a while, and the family agreed to help him. RP 281. While living with the family he stayed in the upstairs living room. RP 282. Defendant lived with the Robles family for a few months and then moved out for about eight months. RP 181, 282.

While defendant lived with them, he was "very friendly" with the children. RP 183-4. Defendant bought the children toys and candy. RP 184. He paid special attention to E.R., sometimes buying candy only for her. *Id.* E.R. began to have nightmares at that time, and would ask to sleep with her mother. RP 185. E.R. did not like to do anything alone in the house. RP 204.

In November of 2008 defendant moved back into the house with the Robles family again. RP 181. Defendant was only going to stay with the family for a couple of days, but ended up staying until March of 2009. RP 181-2, 282-3. Unlike the first time that defendant moved in, on the

second occasion, Mr. Robles asked that defendant contribute \$100.00 a month to help offset the family's costs. RP 283. Defendant was working during the day when he could, and also collecting Labor and Industries workman's compensation for a knee injury. RP 211. Defendant stayed with the family while he was looking for his own place, but repeatedly told the family that he could not find a place cheap enough for him. RP 211-212.

When defendant did not leave the house after a couple of days in November of 2008, E.R. began to persistently ask her mother when he was leaving. RP 212. E.R. wanted her "uncle" out of the house, and told her mother so. *Id.* The family continued to tell E.R. that defendant would be leaving soon, and each time one of the dates on which he was supposed to be leaving approached, she would ask her mother more frequently when he would be leaving. *Id.* After a while this began to worry Mrs. Robles because it was not something that kids normally do. RP 213. However, E.R. did not tell her mother why she wanted to know when defendant would leave. *Id.*

One Saturday in March of 2009, E.R. told her mother that she wanted defendant to move out. *Id.* When Mrs. Robles asked E.R. why she kept insisting that defendant move out, E.R. said, "Because I don't want him here. He's scary. He's evil, and I just want him to move out and I hope he goes and he dies." RP 188. Mrs. Robles asked why E.R. would say something like that, and E.R. told Mrs. Robles that she didn't

want to tell. *Id.* Mrs. Robles could see by her expression that E.R. had something to say, but E.R. would not tell her. RP 188, 190. Finally, E.R. told her mother, “He did things, bad things, to me.” RP 190. E.R. elaborated that defendant had touched her “privates.” *Id.* Mrs. Robles tried to get more detail out of her daughter, but E.R. wouldn’t tell her mother anything else. RP 191. Mrs. Robles testified that E.R. appeared to be afraid to say anything else. RP 191-2.

Mrs. Robles talked to Mr. Robles about what E.R. had told her. RP 289. That night Mr. Robles confronted defendant and asked, “Why did you do that to my daughter?” RP 290. Defendant “denied everything.” *Id.* Defendant said, “I didn’t want to tell you this, but I saw your son, your older son doing this.” *Id.* Mr. Robles testified that when he asked why defendant wouldn’t say something if Brian was abusing E.R., defendant “didn’t know what to say,” and “was just shaking.” RP 291. Mr. Robles asked defendant to leave, and defendant left right away. RP 291.

On the following Monday, after defendant had left and E.R. had calmed down, she told her mother that defendant had put his fingers inside of her and “put things inside of her” while the two of them were in the downstairs living room. RP 193-4. When Mrs. Robles asked E.R. where defendant had put things, she said, “In my butt.” RP 194. E.R. indicated that defendant had anal intercourse with her. *Id.* E.R. also told her mother

that this was not the first time he had touched her, and that defendant had touched J.R. as well. RP 195-6.

Mrs. Robles talked to J.R., who told her defendant had touched him also. Defendant had put his hands inside J.R.'s pants and "touched his pee-pee." RP 197. J.R. said it had hurt when defendant grabbed him, and he reacted by hitting defendant. RP 198.

Mrs. Robles called the police who responded right away. RP 198. They referred Mrs. Robles to the Child Advocacy Center. *Id.* Mrs. Robles set up an appointment for her children to be seen. *Id.* E.R. and J.R. were both interviewed individually, and were each given a medical evaluation. RP 200-1. E.R. also began counseling, which she was still attending at the time of trial. RP 204.

Michelle Breland, a pediatric nurse practitioner employed in the Child Abuse Intervention Department at Mary Bridge Children's Hospital performed the medical evaluations of J.R. and E.R. RP 305-6. At trial, Ms. Breland testified that there is generally no lasting injury from anal penetration in children. RP 310. Ms. Breland testified that E.R.'s exam was "essentially normal." She did have more tissue on her hymen on one side than on the other, but it was otherwise normal." RP 324. Ms. Breland also noted that her findings regarding E.R. were "consistent with the disclosures" that she was aware of. RP 235.

Cornelia Thomas, a social worker at the Child Advocacy Center in Pierce County and a child forensic interviewer, conducted an interview

with E.R. RP 349. A DVD was made of this interview, and was shown to the jury, with some omissions, during trial. RP 350-1; Exhibit 6.

At trial E.R. testified that her “Uncle Julio” had come to live in the house during her summer vacation after second grade and stayed for a couple of months. RP 226, 228. She identified defendant as Uncle Julio. RP 227. Defendant stayed in the living room “on top with the TV.” *Id.* Defendant moved out after a couple months, and then moved back in again. RP 228.

E.R. remembered that during the first time defendant lived in the house the two of them had gone downstairs while her father and brothers were upstairs and her mother was at work. RP 229. While they were between the living room and the kitchen downstairs, defendant pulled down her pants, and then pulled down his own pants. Defendant was behind E.R. and he took “his penis out.” RP 231. E.R. heard the zipper on defendant’s jeans, and felt defendant’s penis inside her anus, and then felt something wet. RP 231- 33. Then she heard her father’s footsteps coming down the stairs, and ran into the bathroom. RP 233-4. E.R. cleaned herself off with toilet paper and saw that she was bleeding from her anus. RP 234. She put her pants back on and left the bathroom. RP 235. Her father told her to go upstairs, so she did. RP 235.

E.R. testified that defendant had also touched her in the upstairs living room on the couch while there was a blanket on top of them. On that occasion, defendant “grabbed [her] hand” and “put [her] hand on his

penis, with his pants on.” RP 236. Defendant squeezed her hand hard, and then removed his penis from his pants and underwear. RP 236. “[T]hen he grabbed [E.R.’s] hand and he started squeezing it again.” RP 236-7. E.R. said she knew she was feeling the skin on defendant’s penis because “it was all wet and it was kind of hairy.” RP 237. E.R. testified that defendant had touched her on the couch “more than just a couple times.” RP 258-9. On at least one occasion while sitting on the couch, defendant touched E.R.’s anus, causing it to hurt when she went to the bathroom for a couple of days. RP 321-2.

E.R. recalled that defendant also touched her in her bedroom. E.R. testified that he pulled her pants and underwear down, and he touched her “with his hands and his penis” and a “couple of [her] toys and [her] mirror.” *Id.* With the toys defendant touched her “on the front part.” E.R. testified that defendant “put it in my butt” and went on to describe anal penetration with the objects; telling the jury that defendant put these things inside her body “in the back.” RP 237-8. E.R. also described defendant penetrating her anus with his penis in her bedroom. *Id.*

On another occasion, defendant and E.R. were in the kitchen, and E.R.’s pants were down. RP 239. Everyone else was upstairs in the house at the time. *Id.* Defendant took a fork and touched E.R. with it. E.R. explained that defendant “put it on [her] butt and [her] front part.” *Id.* E.R. indicated that defendant penetrated her anus with the fork causing her to bleed. RP 250-1.

Defendant told E.R. not to tell anybody what he was doing to her. RP 239. He told her, "I'll kill your parents if you tell." *Id.* E.R. believed him because he told it to her "in a mean way," and she had seen him with an orange knife. RP 239-40.

At one point E.R. talked to a friend about what her uncle was doing to her. RP 240. Her friend told her she had to tell her mother. RP 240. After that, E.R. first told her mother what had happened. *Id.*

At the close of the State's case, the prosecutor moved for the admission of a certified copy of defendant's State issued identification card under ER 902.<sup>4</sup> RP 342. The court admitted the document over defendant's Confrontation Clause objection, finding that the document was not testimonial. RP 358-9, 361.

The defense did not call any witnesses, and defendant did not testify. RP 368.

C. ARGUMENT.

1. THE STATE PROVIDED SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICTS FOR FIRST DEGREE CHILD RAPE AND FIRST DEGREE CHILD MOLESTATION.

In determining whether the evidence presented at trial was sufficient to support a guilty verdict the question is whether any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Any reasonable inferences from the evidence must be interpreted most strongly against defendant in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Challenging a verdict based on insufficiency of the evidence admits all evidence presented by the State and any reasonable inferences as true. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial evidence is no less reliable than direct evidence. *State v. Lubers*, 81 Wn. App 614, 619, 915 P.2d 1157 (1996). “A conviction may be based wholly on circumstantial evidence even if the evidence is not inconsistent with the hypothesis of innocence.” *State v. Bailey*, 52 Wn. App. 42, 51, 757 P.2d 541 (1988) *citing State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975).

The jury was correctly instructed that in order to convict defendant of first degree child rape the jury must find:

- (1) That on or about the period between the 1<sup>st</sup> day of June, 2007 and the 30<sup>th</sup> day of March, 2009, the defendant had sexual intercourse with E.R.; separate and distinct from those acts alleged in [the other counts of the same offense];
- (2) That E.R. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than E.R.; and
- (4) That the acts occurred in the State of Washington.

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<sup>4</sup> A copy of the exhibit is attached as Appendix A for the Court’s convenience.

CP 81-84, jury instructions no. 11-14. The jury was also properly instructed that in order to convict defendant of first degree child molestation, the jury must find:

- (1) That on or about the period between the 1<sup>st</sup> day of June, 2007 and the 30<sup>th</sup> day of March, 2009, the defendant had sexual contact with E.R.; separate and distinct from those acts alleged in [the other count of the same offense];
- (2) That E.R. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least thirty-six months older than E.R.; and
- (4) That the acts occurred in the State of Washington.

CP 87-88, Jury Instructions No. 17-18. Defendant only challenges the sufficiency of the evidence proving he was not married to the victim at the time of the crimes. Appellant's brief, p. 4.

The prosecution does not need to address the issue of the victim's marital status specifically in order for the jury to reasonably determine that the victim was not married to defendant. *State v. Bailey*, 52 Wn. App. 42, 50-1, 757 P.2d 541 (1988). "The nonmarriage of a rapist and complainant may be proved by circumstantial evidence, like other material facts." *State v. Shuck*, 34 Wn. App. 456, 458, 661 P.2d 1020(1983) citing *State v. Dorrough*, 2 Wn. App. 820, 470 P.2d 230 (1970). "The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case." CP 73, Jury Instruction No. 3.

Under circumstances similar to the present case, Washington courts have repeatedly held that the evidence was sufficient to support the jury verdicts. *Bailey*, 52 Wn. App. 42, *Shuck*, 34 Wn. App. 456, *State v. May*, 59 Wash. 414, 109 P. 1026 (1910). In *Bailey*, while the prosecution did not present any direct evidence of the non-marriage of the three-year-old victim and Bailey, this Court held that the victim's age coupled with testimony that the defendant had lived with the family for only a short period of time was sufficient evidence to prove non-marriage. 52 Wn. App. at 50-1. In *Shuck*, the court found that the defendant having known the two victims for only a short period of time, and the victims being only fourteen years old was "more than sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that Shuck was not married to either of the girls." 34 Wn. App. at 458. Finally, in *May*, the court found that evidence that the victim was less than fourteen years old, living at home with her parents, and using her maiden name was sufficient to prove non-marriage. 59 Wash at 415.

This case is comparable to each of those. Defendant lived with E.R.'s family for two short periods of time. RP 179-81. E.R. was born in 2000, making her seven years old at the beginning of the charging period, and nine years old at the end of the charging period. CP 62-65. E.R. had just finished the second grade when defendant moved in the first time. RP 227. Defendant was born in 1971, making him thirty-eight years old at the end of the charging period. A juror could reasonably conclude that E.R.,

who was in elementary school and living with her parents, was not married to anyone, let alone to someone twenty-nine years her senior who only lived with her family for two periods of only months.

Additionally, both of E.R.'s parents told the jury that defendant is E.R.'s father's cousin. RP 179, 280. E.R. and her younger brother referred to defendant as "Uncle Julio." RP 226, 273-4. Given all of the information the jury had regarding the family relationship between E.R. and defendant, the jury was able to conclude beyond a reasonable doubt that E.R. was not married to defendant.

The jury was instructed that "circumstantial evidence refers to evidence which, based on your common sense and experience, you may reasonably infer something that is at issue in this case." CP 73. Jury Instruction No. 3. Common sense and experience tells us that elementary school students are too young to be married. Law tells us that children under 18 are too young to be married. RCW 26.04.010(1) provides:

Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable.

Any marriage between E.R. and defendant would be void, as the victim does not meet the age requirement, thus any rational jury could reasonably conclude beyond a reasonable doubt that defendant and E.R. were not married.

2. ADMISSION OF A CERTIFIED COPY OF  
DEFENDANT'S STATE ISSUED  
IDENTIFICATION CARD DID NOT VIOLATE  
HIS RIGHT TO CONFRONTATION.

Every criminal defendant is afforded the right “to be confronted with the witnesses against him.” U.S. Const. amend. VI. Under the Confrontation Clause, testimonial evidence cannot be admitted at trial without proof of the declarant’s unavailability and defendant having had an opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 117 (2004). Not all evidence is testimonial, however, and non-testimonial evidence is not subject to the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). If evidence is not testimonial, then no Confrontation Clause concerns are raised. *State v. Kirkpatrick*, 160 Wn.2d 873, 882, 161 P.3d 990 (2007), citing *Crawford*, 541 U.S. at 53-4. Challenges to admission of evidence based on a violation of the Confrontation Clause are reviewed *de novo*. *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999).

- a. A certified copy of the existent Department of Licensing record is non-testimonial, and does not raise Confrontation Clause concerns.

By their nature, most business and public records are not testimonial and therefore do not raise Confrontation Clause concerns:

Business and public records are generally admissible absent confrontation... because-- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial--they are not testimonial.

*Melendez-Diaz v. Massachusetts*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2527, 2539-40, 174 L. Ed. 2d 314 (2009); *see also Crawford*, 541 U.S. at 56 (“Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy.”). In this case, the State issued identification card was a public record, and was not created for the purpose of establishing or proving some fact at trial.

The court in *Melendez-Diaz* noted that,

A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

*Melendez-Diaz*, 129 S. Ct. at 2539 (italics in original). In the case at hand, the clerk was not *creating* a record, but was *authenticating* a copy of a pre-existing public record, namely a copy of a State issued identification

card. This identification card was not issued by the State in order to prove any element of any crime; it was issued as an official documentation of identity for general purposes.

The Supreme Court held in *Crawford* that evidence is testimonial in nature if it was produced “with an eye toward trial,” or contained a statement that the declarant “would reasonably expect to be used prosecutorially.” 541 U.S. at 51, 56. In *Melendez-Diaz* the court used this same analysis, noting that documents “kept in the regular course of business” are non-testimonial, while documents “calculated for use essentially in the court” were testimonial in nature. 129 S. Ct at 2538 citing *Palmer v. Hoffman*, 318 U.S. 109, 114, 63 S. Ct. 477, 87 L. Ed. 645 (1943). In this case, the identification card was not issued by the Department of Licensing for the purposes of prosecution. It was issued for the purposes of identification. The identification record was kept in the ordinary course of business for Washington State. Thus a copy of the document is non-testimonial, and does not raise Confrontation Clause concerns.

Washington State courts have not decided whether certificates of non-licensure are testimonial since *Melendez-Diaz*, however, such certificates have been found to be non-testimonial under *Crawford*. *Kirkpatrick*, 160 Wn.2d at 887. Defendant cites two cases from other jurisdictions to support his argument that DOL certifications are

testimonial in nature: *Washington v. State*, 18 So.3d 1221 (Fla. App. Ct. 2009) and *Tabaka v. District of Columbia*, 976 A.2d 173 (D.C.Ct.App. 2009). Appellant's brief, p. 10. *Washington* and *Tabaka* applied *Melendez-Diaz* to certificates of non-licensure. 18 So.3d 1221, 976 A.2d 173. Such certificates are essentially a certified letter stating that a search of State records databases revealed that no license is on file for the defendant.

Even if certificates of non-licensure are testimonial under *Melendez-Diaz*, certified copies of existent public records are distinguishable from certificates of non-licensure. As such, this case is distinguishable from the cases cited by defendant. Rather than a certificate stating that no identification record was on file, the document in this case was a certified copy of the pre-existent public record. Even the court in *Washington v. State* noted that a certification of non-licensure "represents not simply production of an existing record, but an assertion regarding the individual's search of a database or databases." 18 So.3d 1221, 1224 (Fla.App.Ct. 2009). The certificate in this case was the production of a copy of an existing record already on file with the State. The certification provided was only to state that the copy was true and correct.

The differences between a certificate of non-licensure and a certified copy of a State issued identification card abound. Primarily, the certificate of non-licensure lacks any actual documentation to confirm the

clerk's findings. A certified copy, while resulting from a search of a database allows the jury to confirm the clerk's finding. In this case, the certified document contained defendant's photograph, which the jury members could compare to the man sitting in front of them. The jury was free to evaluate whether the identification record was correctly assigned to defendant or not. Thus, it is not testimonial, and its admission did not violate defendant's right to confrontation.

- b. If admission of defendant's DOL identification card was error, such error was harmless, and does not warrant reversal.

Confrontation Clause errors are subject to harmless error analysis. *Lily v. Virginia*, 527 U.S. 116, 140, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999). A federal Constitutional error is harmless when there is no reasonable doubt that the verdict would have been different if the error had not occurred. *Chapman v. California*, 386 U.S. 18, 23-4, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Even if the certified copy of defendant's State issued identification card was admitted in error, such error was harmless. There was substantial evidence presented at trial from which the jury could infer that defendant was more than thirty-six months<sup>5</sup> older than his

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<sup>5</sup> In order to be convicted of rape of a child in the first degree defendant must be twenty-four months older than the victim. Because child molestation requires the larger age difference of thirty-six months, the State will use this age difference in its discussion of the evidence presented.

nine-year-old victim, and there is no reasonable probability that the jury's verdict would have been different had the evidence been excluded.

While the evidence presented at trial did not give defendant's exact age without the admission of his State I.D. card, it did allow the jury to infer that he was more than thirty-six months older than E.R. In order to be thirty-six months older than E.R. defendant needed to be only thirteen years old at the time of trial. The jury was able observe both the victim, who told the jury that she was nine, and defendant whose appearance clearly indicated he was older than thirteen.

In addition to defendant's appearance, the jury had many factors from which to determine that defendant was more than thirty-six months older than E.R. Mr. and Mrs. Robles testified that defendant was living with them while he looked for a place of his own. RP 187, 211, 282-3, 302. E.R.'s mother testified that defendant was collecting Labor and Industries workman's compensation after a work related knee injury. RP 211. Mrs. Robles also testified that defendant worked during the day one or two days a week until he "got on L&I." *Id.* Defendant contributed \$100 a month to the family's costs during his second stay in the house. RP 283. It is highly unlikely that a thirteen year old boy would be employed outside the home, especially during the day when most children are in school. While some thirteen year olds are employed for small amounts of time under the table, that type of job would not allow defendant to collect L&I after an injury. Additionally, a thirteen year old

boy would not normally live on his own, and it is unlikely that a thirteen-year-old boy's family would charge him rent to stay with them. Taken together these facts provide ample evidence from which the jury could conclude that defendant was more than thirty-six months older than E.R. even without the admission of his State identification record, making any error in admitting the exhibit harmless. Harmless error does not justify reversal.

3. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE OFFENSES WERE NOT THE SAME CRIMINAL CONDUCT.

RCW 9.94A.589(1)(a) provides that a defendant's sentencing range will be calculated using all prior offenses and all current offenses except those which the court finds to be the same criminal conduct to determine his offender score. Two crimes consist of the same criminal conduct when they (1) require the same criminal intent, (2) are committed at the same time and place, (3) and involve the same victim. *Id.* If any one of these elements is missing, the offenses are not the same criminal conduct and must be counted separately in determining the defendant's offender score. *State v. Dolen*, 83 Wn. App. 361, 364, 921 P.2d 590 (1996), citing *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Crimes have the same criminal intent when the defendant's objective intent does not change from one act to the next. *Dolen*, 83 Wn.

App. at 364-5. A change in the method of commission of the crime does not necessarily prove that the criminal intent was different for sequential crimes. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). In order to be considered to have taken place at the same time criminal acts must occur during an uninterrupted incident. *State v. Porter*, 133 Wn.2d 177, 185-6, 942 P.2d 974 (1997).

A trial court's determination of whether the crimes constituted the same criminal conduct is reversed only for an abuse of discretion or misapplication of the law. *Dolen*, 83 Wn. App. at 364-5. Defendant does not contend that the trial court misapplied the law in this case, nor does he challenge the jury instructions or the State's decision to pursue multiple counts. Appellant's brief, p. 14.

Where the record supports only a finding that the crimes involved the same criminal conduct, the trial court abuses its discretion in finding they did not. *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991), *internal citations omitted*. The same is true if the record only supports a finding that the crimes did not involve the same criminal conduct and the trial court finds that they did. *Id.* If the record supports either conclusion, the court cannot be said to have abused its discretion in entering either finding. *Id.*

- a. The offenses for which the jury found defendant guilty were not committed at the same time.

That two or more crimes were committed within the same charging period does not mean they were necessarily committed at the same time.

Here, the jury was instructed that:

The State alleges that the defendant committed acts of rape of a child in the first degree (counts I, II, IV, and V) on multiple occasions. To convict the defendant of any count of rape of a child in the first degree, one or more particular act of sexual intercourse must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved beyond a reasonable doubt. The particular act for each count must be separate and distinct from any other count. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

The State alleges that the defendant committed acts of child molestation in the first degree (counts III, VI and VII) on multiple occasions. To convict the defendant of any count of child molestation in the first degree, one or more particular acts of sexual contact must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved for that count. The particular act for each count must be separate and distinct from any other count. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

CP 77.

In addition to this instruction, the “to convict” instructions for each count of child molestation and each count of rape of a child stated that the jury must find that defendant had committed the act “separate and distinct from those acts alleged in [the other counts of the same crime]. CP 81-84, 87-88. Moreover, the jury was further instructed that, “A separate crime is

charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.”

CP 76. Given all of these instructions, the jury was thoroughly aware of the necessity that they find each count to have occurred separately and distinctly from any other act on which a guilty verdict was based.

Furthermore, the prosecution explained these requirements in closing argument, stating:

The state has to prove to you four separate and distinct instances of sexual intercourse... You have to be unanimous about the act of sexual intercourse with respect to each count.

RP 393. The prosecutor went on to attach specifically described incidents to each count for the jury to consider. RP 394-395. Given the jury’s verdicts on each count, and the clear instructions showing that they must unanimously agree as to each of the acts that accompanied each of the counts, the trial court did not abuse its discretion in finding that the crimes did not constitute the same criminal conduct. In fact, the trial court would have abused its discretion if it found otherwise. Such a decision would substitute the court’s decision for that of the jury. Defendant has failed to show that the court abused its discretion in calculating defendant’s offender score. Therefore the court’s calculation should be upheld.

- b. The offenses for which the jury found defendant guilty were not committed with the same criminal intent.

The question of whether two or more crimes involved the same criminal intent is answered by considering whether there was a change in the objective criminal intent from one crime to another. *State v. Dolen*, 83 Wn. App. 361, 364-5, 921 P.2d 590 (1996), citing *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). Whether the objective criminal intent has changed or not depends in part on whether one crime was committed in furtherance of another. *Id.*

The first step to determine whether the crimes involved the same criminal intent is to objectively view whether the underlying statutes of each crime involve the same required intent. *State v. Rodriguez*, 61 Wn. App. at 816, citing *State v. Collicott*, 112 Wn.2d 399, 405, 771 P.2d 1137 (1989) (plurality opinion), *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987); *State v. Lewis*, 115 Wn.2d 294, 301, 797 P.2d 1141 (1990). “If the required intents are different, then the offenses will count as separate crimes.” *Rodriguez*, 61 Wn. App. at 816. If, on the other hand, the underlying intent requirement is the same, the second step is to determine if the defendant’s intent was the same for each count when objectively viewed. *Id.* Thus the criminal intent is different where defendant intends to commit the same crime in two different transactions. *State v. Rodriguez*, 61 Wn. App. 812, 817, 812 P.2d 868 (1991).

The criminal intent required for child molestation in the first degree is to cause sexual contact, which is *touching* “for the *purpose* of gratifying sexual desires of either party or a third party.” CP 86, RCW 9A.44.010(2). The touching does not require the intent to penetrate. The criminal intent required for rape of a child in the first degree is to have sexual intercourse with the child. Sexual intercourse requires intentional “*penetration* of the vagina or anus however slight,” but does not require any underlying motive of sexual gratification. CP 79, RCW 9A.44.010(1). The objective underlying criminal intents of the two counts of child molestation are different from the four counts of rape of a child because of the required motivation behind the actions.

The underlying criminal intent for each of the counts of rape of a child is the same, and the underlying criminal intent for each of the counts of child molestation is the same, therefore the intent must be viewed objectively as to each individual incident. If the Court determines that the statutory intent of rape of a child and of child molestation are the same, this same analysis must be done. When each of these incidents is analyzed objectively and individually, the intent for each is distinct from the intent of the other.

The fact that crimes took place in quick succession does not preclude a finding of distinct criminal intents for each act. This Court held that two counts of rape against the same victim did not constitute the same criminal conduct even where the crimes happened in short succession

when the evidence showed the defendant had formed a new intent between the crimes, and the crimes were committed using a different means. *State v. Grantham*, 84 Wn. App. 854, 856, 932 P.2d 657 (1997).

Grantham brought his victim to an apartment where he forced her into a corner and removed her clothing. *Id.* At 856. He then raped his victim anally. *Id.* During a short pause, Grantham told his victim to get up, which she did not do. *Id.* He used renewed force in compelling her to perform oral sex on him despite her pleas for him to stop. *Id.* He also threatened her not to tell. *Id.* This Court found that despite the very short time period between rapes, the evidence that he had to use new force, had threatened her not to tell, and had used a new means of raping the victim were sufficient to show that Grantham had developed a new objective criminal intent before the second rape. *Id.* at 859. This Court explained that if the defendant “has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment...” *Id.* at 861, quoting *Irby v. United States*, 390 F.2d 432, 437-38 (1967).

In the case at hand the exact amount of time between incidents is unclear, however, none of these incidents occurred simultaneously. After each incident the victim cleaned herself up and dressed again. RP 234-5. This clearly indicates that one rape or molestation was completed, and that the successive sexual intercourse or sexual contact was the beginning of a new incident. Between each act of sexual intercourse or sexual contact

defendant had time to, and did, form a new intent. Therefore none of the counts consisted of the same criminal conduct and each must be counted separately in calculating defendant's offender score. The trial court's calculation should be upheld.

- c. The offenses for which the jury found defendant guilty were not committed at the same time and place.

For two offenses to be considered to have occurred at the same time the criminal acts must occur during an uninterrupted incident.

*Porter*, 133 Wn.2d at 185-6. In this case, the criminal acts were not one uninterrupted chain, but rather each act was separated by time and place.

E.R. testified that her father came down the stairs and interrupted defendant when he raped her in the hallway off the kitchen. RP 233-4. This clearly separates that rape from any of the others. Defendant raped E.R. once in her bedroom with his penis and with toys, and once in the kitchen with a fork. RP 237-9. Defendant put his hands "inside her body" while he and E.R. were on the couch on one occasion. RP 252. The amount of time it takes to move from area of the house to another and change the implement used in the rape is sufficient to *interrupt* the incident. Thus, even if the rapes happened in quick succession, none of them took place at the same time as any other. These acts each took place in a different area of the house, making the place of each crime distinct.

E.R. testified that defendant made her touch his penis on the couch in the upstairs living room more than just a couple of times. RP 258-9. On at least one of these occasions Mr. Robles pulled E.R. away from defendant interrupting the incident. RP 285-6. This interruption from Mr. Robles is sufficient to separate the time at which the two counts of child molestation occurred.

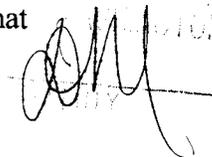
Because none of the acts of rape or child molestation occurred during an uninterrupted incident, the crimes did not take place at the same time. Therefore, the acts are not the same criminal conduct for the purposes of determining defendant's offender score. The trial courts calculation should be upheld.

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COUNTY APPEALS

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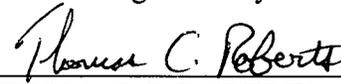
D. CONCLUSION.

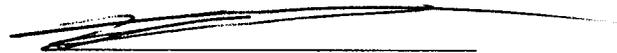
For the aforementioned reasons, the State respectfully requests that the Court affirm defendant's convictions and sentences.

BY 

DATED: August 25, 2010

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

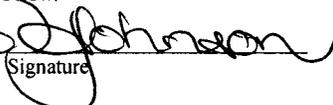
  
THOMAS C. ROBERTS  
Deputy Prosecuting Attorney  
WSB # 17442



Margo Martin  
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/25/10   
Date Signature

## **APPENDIX “A”**

*Exhibit No. 1—Certified Copy of Driver’s License*



STATE OF WASHINGTON  
 DEPARTMENT OF LICENSING  
 P. O. Box 9030 • Olympia, Washington 98507-9030

September 28, 2009

rk

I, Randi Kane, certify that I have been appointed Custodian of Records by the Director of the Department of Licensing and that such records are official and maintained by the Department of Licensing, Olympia, Washington. I further certify that the attached photocopy of the negative file and/or attached document(s) for ALDANA GRACIANO, JULIO CESAR, is a true and correct copy(s).

Randi Kane  
 Custodian of Records  
 Place: Olympia, Washington  
 Date: September 28, 2009



STATE OF WASHINGTON, County of Pierce  
 ss: I, Kevin Stock, Clerk of the above  
 entitled Court, do hereby certify that this  
 foregoing instrument is a true and correct  
 copy of the original now on file in my office.  
 IN WITNESS WHEREOF, I hereunto set my  
 hand and the Seal of said Court this  
 30th day of August, 20 10  
 Kevin Stock, Clerk  
 By: Deputy

# Department Of Licensing - IDL System

Picture Number: ALDANJC297RA

Control Number: 090794H1419

Name: ALDANA GRACIANO, JULIO CESAR

Issue Date: 03-20-2009

Production Status: Mailed - 03-24-2009

Report Date: Sep 28, 2009 1:46:46 PM

## WASHINGTON IDENTIFICATION CARD

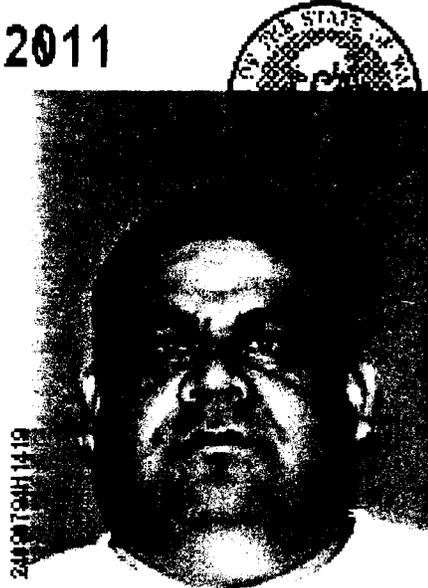
LIC # ALDANJC297RA EXP 12-01-2011

ALDANA GRACIANO, JULIO CESAR  
10119 YAKIMA AVE S  
TACOMA WA 98444-5952

SEX	HT	WT	EYES
M	5-06	160	BRN

ISSUE DATE 03-20-2009

DOB 12-01-1971



STATE OF WASHINGTON, County of Pierce  
ss: I, Kevin Stock, Clerk of the above  
entitled Court, do hereby certify that this  
foregoing instrument is a true and correct  
copy of the original now on file in my office.  
IN WITNESS WHEREOF, I hereunto set my  
hand and the Seal of said Court this  
30TH day of AUGUST, 2010  
by Kevin Stock Clerk  
[Signature] Deputy