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

STATE OF WASHINGTON,	)	No. 64955-8-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
PETER JACOB INOUYE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 23, 2010
	)	

Ellington, J. — Peter Inouye was convicted of strangling and raping an 11-year-old girl. Inouye appeals on several grounds, including a confrontation clause challenge to the testimony of a deoxyribonucleic acid (DNA) expert who testified partially on forensic evidence developed by others. We reject the argument that his confrontation rights were violated by that testimony. Finding no error, we affirm.

FACTS

Soon after midnight on February 5, 2007, 11-year-old G.S. woke up, unable to breathe. Her dog was barking. A man was strangling her. G.S. struggled and managed to turn on the lamp on her nightstand. The stranger had a knife. He told G.S. to turn the light off, and she obeyed him. He put the knife up to the dog's face and told G.S. to call her dog's name. She did, and the dog left the room.

The man closed the bedroom door. He took off G.S.'s pants and underwear. He then proceeded to rape her. He inserted his finger in her vagina. G.S. grabbed his hand and told him it hurt, and the man told her to bite on her pillow, which she did. Then, "[h]e just kept on going."[1] At some point, the man inserted his penis into her vagina. He then penetrated her anus with his penis. He also inserted his tongue into her vagina.

During her ordeal, G.S. managed to turn on the light on her wristwatch. She hoped to get a better look at her aggressor, but she was too scared to face him, so she continued to look at her watch. The man raped her for 15 to 20 minutes. Before leaving, he ordered her to stay in her room for an hour and not to talk to anyone or he would come back and hurt her. G.S. stayed in bed for a minute, and then went to the bathroom and looked in the mirror. Her face was entirely red and burning and her eyes were bloodshot. She woke up her mother, who called the police.

In the morning, G.S. went to Providence St. Peter Sexual Assault Clinic in Olympia. Clinician Laurie Davies performed a sexual assault examination and collected oral, vulvar, anal, and epithelial swabs from her neck. G.S.'s face, including the whites of her eyes, was swollen and red with petechiae.[2] Her neck was heavily bruised and there was a very clear line marking the reddened and nonreddened areas.

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[1] Report of Proceedings (RP) (Nov. 18, 2008) at 57.

[2] Davies explained: "Petechiae is caused from ruptures of the blood vessels or the capillaries . . . that are right underneath the skin. And the main cause of petechiae is from excessive pressure. You can get it from coughing too much, too hard, from vomiting hard, from strangulation, from anything that puts pressure above that area." Id. at 107.

Her eyes were hurting and she was very sensitive to light.

Detective Amy King led the investigation. G.S. provided her with a drawing of her attacker. After an initial suspect was exculpated by DNA testing, King had G.S. work with a sketch artist to draw a portrait of her attacker. Based on tips received from the public, the investigation focused on Inouye. Inouye lived in the same neighborhood and had been at G.S.'s residence on a few occasions. DNA testing performed by a private company, Orchid Cellmark, confirmed that Inouye matched the DNA profile of G.S.'s attacker.

The State charged Inouye with burglary in the first degree with sexual motivation, assault of a child in the second degree with sexual motivation, and three counts of rape in the first degree with the special allegation that the victim was under 15 years of age. The information also alleged Inouye was armed with a deadly weapon when he committed the crimes and that his conduct manifested deliberate cruelty.

Over confrontation clause objections, the court allowed Dr. Rick Staub, laboratory director at Orchid Cellmark, to testify to the results of DNA testing done by employees of the laboratory. Dr. Staub testified the male genetic material found in G.S.'s anal and vulvar swabs matched Inouye's DNA profile and that he could not be excluded from the DNA mixture extracted from the neck swabs. The frequency of occurrence of the DNA profile found in the sperm fraction of the anal swabs was, in blacks, 1 in 154.4 trillion; in Caucasians, 1 in 57.44 trillion; in southwestern Hispanics, 1 in 621.5 trillion; in southeastern Hispanics, 1 in 35.24 trillion; and in Asians, 1 in 28.84 trillion.

Forensic scientist William Dean from the Washington State Patrol Crime Laboratory testified as to the results of his own DNA testing. In the vulvar sample, the male fraction matched Inouye and the female fraction matched G.S. The probability of a random male with a matching profile was 1 in 35 trillion. Dean explained the difference between his one result and those from Orchid Cellmark as resulting from Orchid's use of five population databases, whereas he used four and reported the most conservative number. The probability for Caucasians was 1 in 57 trillion; for blacks, 1 in 154 trillion; for southwestern Hispanics, 1 in 621 trillion; and for southeastern Hispanics, 1 in 35 trillion. In calculating probabilities, he only used the first two figures.

The jury returned guilty verdicts on all counts. The jury also found Inouye manifested deliberate cruelty in the commission of the rapes and was armed with a deadly weapon at the time he committed all crimes.

The verdict forms erroneously identified the three rape counts as rape of a child in the first degree instead of rape in the first degree with the special allegation that the victim was under 15 years of age. Inouye filed a motion to dismiss with prejudice, or, in the alternative, asked for a new trial on the rape counts, arguing that the error in the verdict forms deprived him of his right to know the charges against him. The court denied the motion. It also ruled the three rape counts did not qualify as the same criminal conduct and that the deadly weapon enhancements were to run consecutively to each other. After adjusting the standard sentencing ranges according to the sentencing enhancements, the court imposed an upward exceptional sentence on grounds of deliberate cruelty as to the first count of rape only. The court sentenced

Inouye to a total of 720 months of confinement.

DISCUSSION

Confrontation Rights Violation

Inouye argues that Dr. Staub's testimony violated his confrontation rights. The Sixth Amendment confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[3] This right renders testimonial statements by a nontestifying witness inadmissible unless the witness is unavailable and was previously subject to cross-examination by the defendant.[4] The confrontation clause is not implicated where testimonial statements are offered for some purpose other than establishing the truth of the matter asserted.[5]

In Melendez-Diaz v. Massachusetts,[6] a conviction was obtained based upon three notarized "certificates of analysis" stating that certain contraband tested positive for cocaine. The United States Supreme Court held the certificates constituted "testimonial" evidence, and were inadmissible in the absence of trial testimony from the analysts who performed the tests.[7] "The 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[8] The

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[3] U.S. Const. amend. VI.

[4] Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[5] See id. n.9.

[6] ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

[7] Id., 129 S. Ct. at 2532.

[8] Id. (quoting Davis v. Washington, 547 U.S. 813, 830, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

Court held the certificates were "quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'"[9] They were "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[10]

Four members of the Court dissented. Among other things, they argued that a forensic test result often involves multiple people, and one possible reading of the majority's opinion would require each of them to testify live.[11] The majority did not directly respond to this point, but explicitly rejected a requirement 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," or that "everyone who laid hands on the evidence must be called."[12] The court explained that "'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."[13]

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[9] Id. (alteration in original) (quoting Black's Law Dictionary 62 (8th ed. 2004)).

[10] Id. (quoting Crawford, 541 U.S. at 52).

[11] See id. at 2544–45 (Kennedy, J., dissenting).

[12] Id. at 2532 n.1.

[13] Id. (alteration in original) (quoting United States v. Lott, 854 F.2d 244, 250 (C.A.7 1988)).

We have previously considered Melendez-Diaz in State v. Lui,[14] a second degree murder case. There, the State presented expert testimony from the chief medical examiner and pathologist for King County, who had cosigned an autopsy report prepared by another pathologist who was unavailable to testify.[15] He explained that cosigning required him to review the report, the photographs and the evidence, and to discuss the case with the principal pathologist.[16] The State also presented the expert testimony of an associate director of a private DNA testing company who did not personally conduct the DNA tests but relied for her opinion on the notes and reports of the technicians who did.[17] She explained that the testing results are reduced to a machine printout that any expert can review and interpret.[18] She also testified to the laboratory's chain of custody procedures, the protocols and tests involved, laboratory technician training and certification, and other quality assurances measures.[19]

Relying principally on Melendez-Diaz, Lui renewed his objections to the forensic evidence on appeal. We noted that the autopsy and DNA reports were not offered in lieu of live testimony. The two witnesses testified extensively about their expertise and that of their employees, the protocols and procedures used in their respective offices, and the tests employed in analyzing the evidence in Lui's case. Most importantly, Lui

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[14] 153 Wn. App. 304, 221 P.3d 948 (2009).

[15] Id. at 307–08.

[16] Id.

[17] Id. at 310.

[18] Id.

[19] Id.

had the opportunity to challenge their assertions during cross-examination. We concluded, "This situation is fundamentally different from Melendez-Diaz . . . . Here, the very live testimony absent in Melendez-Diaz was present."[20]

Lui argued the testimony nonetheless violated his confrontation rights because it relied on testimonial reports made by others and related information from those reports to the jury and that his ability to cross-examine the two witnesses was not a constitutionally adequate substitute for confrontation of their sources.

We rejected this argument as well. We noted that a similar argument was implicitly rejected in Melendez-Diaz when the Court said that not all individuals involved in the chain of custody must appear as part of the State's case.[21] We also emphasized that the two witnesses were not acting as mere conduits for the testimonial assertions of their employees but rather testified to their own opinions based on their independent review of the data.[22] Finally, we explained that experts are not required to have personal, firsthand knowledge of the evidence on which they rely, and may rely upon otherwise inadmissible evidence to explain the bases for their opinions if it is of a type reasonably relied upon by experts in the particular field.[23] This is permitted under both the rules of evidence and the confrontation clause.[24] To the extent the two expert witnesses disclosed information provided by others, the information was offered to

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[20] Id. at 319.

[21] Id. at 320.

[22] Id.

[23] Id. at 322–23.

[24] Id.

explain the bases for their opinion and not for the truth of the matter asserted, so the confrontation clause was not implicated.[25]

Like the experts in Lui, Dr. Staub appeared at Inouye's trial. He testified as to the steps involved in DNA analysis, and explained that while the initial steps involving the receipt and screening of the samples are handled manually, the testing itself—extraction, quantification, amplification, and detection of DNA—is performed by robotics, under the supervision of lab technicians. The final step is the statistical analysis of the information created by robotics. Dr. Staub explained that his laboratory creates records, both computerized and manual, to document all the steps involved in DNA analysis, and those records are of such nature that other experts in the field can review and interpret them. He testified about the laboratory's chain of custody procedures, the protocol and tests involved, analyst training and certification, the multiprong review that each case is subject to before the final report is issued, and other quality assurance measures. The opinion he offered was his independent interpretation of the DNA test results based on the notes and reports of the 13 analysts who were involved in some manner in the case and the computer printouts resulting from the automated part of the DNA testing process.

On cross-examination, Dr. Staub acknowledged that his opinion necessarily assumes that the analysts' notes and reports are accurate and that procedures have been competently performed. But he also explained that the protocols and quality assurance measures that Orchid Cellmark employs ensure that errors are detected.

[25] Id. at 324.

Dr. Staub had no concerns regarding the accuracy or reliability of the results in Inouye's case.

This case is practically indistinguishable from Lui, and like Lui, is fundamentally unlike Melendez-Diaz. We hold there was no error.

Even if the admission of Dr. Staub's testimony were error, however, it was entirely harmless. Forensic scientist William Dean of the Washington State Crime Lab testified to the results of his own testing, which identified Inouye as G.S.'s rapist with the highest degree of probability. And although Inouye's brother and fiancé testified he was at home at the time of the attack, cell phone records showed that Inouye's fiancé called him four times around 1:00 a.m. The untainted evidence against Inouye was overwhelming, and any error in allowing Dr. Staub's testimony was harmless.

Aggravating Factor of Deliberate Cruelty

Inouye next argues there was insufficient evidence from which the jury could find he acted with deliberate cruelty in the commission of the rapes. Courts apply the same standard of review to a sufficiency challenge to an aggravating circumstance as to an element of the crime.[26] Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.[27]

"Deliberate cruelty consists of gratuitous violence or other conduct that inflicts physical, psychological, or emotional pain as an end in itself."[28] For deliberate cruelty

[26] State v. Bartholomew, 98 Wn.2d 173, 212–13, 654 P.2d 1170 (1982), vacated on other grounds, 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983).

[27] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

to justify an exceptional sentence, the cruelty must go beyond that "normally associated with the commission of the charged offense or inherent in the elements of the offense—elements of the crime the legislature contemplated in establishing the standard range."[29]

The evidence here amply supported the verdicts. Several witnesses testified as to G.S.'s extreme petechial and eye injuries caused by strangulation. Evidence technician Chet Mackaben testified that during his 11 years at the police department, he had never seen a live victim with that much petechiae. Sexual assault clinician Laurie Davis testified that she had never seen "such a severe case of abuse" [30] in her three and a half years at the sexual assault clinic. Davis described G.S.'s face after the attack as beet red from petechiae, with a very clear line marking the reddened and nonreddened areas. She further testified that G.S.'s right eye was also beet red from "a bleed . . . [caused by] pressure build-up in the eye and [then] blood vessels break."[31] The State asked Davis whether this was a common injury. She said that in her 30 years of experience, she had never seen it in a case of abuse, and in those one or two occasions when she saw it, it was the result of a direct injury to the eye, such as a metal object going into the eye. Asked about the significance of G.S. having that kind of injury to both eyes, Davies explained "[i]t just shows the great deal of force that was applied."[32]

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[28] State v. Tili, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003).

[29] Id.

[30] RP (Nov. 18, 2008) at 104.

[31] Id. at 109–10.

Detective Amy King was asked how common sexual crimes against children involving that degree of violence are. King said they are "very uncommon across the board,"[33] and that typically, sex crimes against children are committed by people the children know and who do not usually hurt the children physically. King testified that in her four and a half years experience as a sex crimes detective, this was the only case she had encountered involving such violence.

Seen in the light most favorable to the State, this evidence supports the finding that the degree of violence used by Inouye to accomplish the rapes was well beyond that normally associated with first degree rapes. The evidence also supports a finding that the degree of violence was extreme, gratuitous, and employed to inflict physical pain as an end in itself, and was not necessary to subdue G.S.

The jury's finding of deliberate cruelty is supported by sufficient evidence.

In this context, Inouye argues that the strangulation was part and parcel of the charge of assault of a child in the second degree and thus cannot form the basis of a finding of deliberate cruelty as to the rapes. He also argues that deliberate cruelty is not a substantial and compelling reason to impose an exceptional sentence in his case, given the other charges and the length of the sentence he faces under the standard range sentencing options. Inouye did not include these arguments in his assignments of error or the statement of issues, and failed to support them with citation to legal authority or develop them beyond these assertions.[34] We therefore decline to address

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[32] Id. at 113.

[33] RP (Nov. 20, 2008) at 387.

[34] At oral argument, we granted Inouye's request to provide us with authority in

them.[35]

Due Process

Inouye contends the verdict forms convicting him of rape of a child in the first degree violated his right under the Washington State Constitution to be informed of the charge against him and to be tried and convicted only for the offense charged.[36]

Under CrR 7.8(a), "[c]lerical 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." In State v. Imhoff,[37] this 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, the jury was properly instructed on attempt, and the State's closing argument referenced only attempt. We concluded there was nothing in the record to indicate that the error on the verdict form caused prejudice and the trial court did not abuse its discretion in correcting the clerical mistake.[38]

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support of his first additional argument. Inouye cited to State v. McAlpin, 108 Wn.2d 458, 466–67, 740 P.2d 824 (1987) (holding that under the "real facts" policy, a court is barred from considering unproven or uncharged crimes as a reason for imposing an exceptional sentence except upon stipulation) and State v. Dunivan, 57 Wn. App. 332, 334–35, 788 P.2d 576 (1990) (same). Here, the assault of a child in the second degree was charged and proved. The real facts policy, and the two cases Inouye cited, are inapposite.

[35] See RAP 10.3(a)(4), (6); State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

[36] See Wash. Const. art. I, § 22; State v. Carr, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982).

[37] 78 Wn. App. 349, 351–52, 898 P.2d 852 (1995).

Similarly here, Inouye was charged with three counts of rape in the first degree while armed with a deadly weapon, with the special allegation that the victim was under 15 years of age. The jury was instructed as to rape in the first degree and separately as to special verdicts regarding the age of the victim. The State discussed rape in the first degree, and separately argued the special verdict issue. There is nothing on this record to suggest that the misworded verdict forms were anything other than a clerical mistake. This case is thus distinguishable from State v. Zwiefelhofer,[39] upon which Inouye relies to argue that the court could not remedy the error because it already excused the jury.

In Zwiefelhofer, after the jury returned not guilty verdicts on the two counts against the defendant, the trial court released the defendant from custody and discharged the jury. After the jury was discharged, the presiding juror informed the prosecutor that she had mistakenly entered "not guilty" rather than "guilty" on one of the defendant's verdict forms. When all of the jurors agreed that the presiding juror had made a mistake in completing the verdict form, the court vacated the not guilty verdict and entered a judgment of conviction.[40] The appellate court reversed, saying:

> Only under limited circumstances may a trial court, upon determining that the verdict form is inaccurate, correct the verdict to conform to the actual finding of the jury. The jury must not have passed from the trial court's control, jurors must not have had an opportunity to mingle with nonjurors, and the jurors must not have renewed their deliberations or discussed the merits of the case.[41]

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[38] Id. at 352.

[39] 75 Wn. App. 440, 880 P.2d 58 (1994).

[40] Id. at 443.

[41] Id. at 444.

Before being called back, the jurors had mingled with nonjurors and several jurors had discussed the case with others. The court concluded that "more than a mere clerical error tainted the proceedings below."[42] The court held that vacation of the not guilty verdict and entry of the conviction had violated the defendant's double jeopardy rights.

The errors at issue here and in Zwiefelhofer are fundamentally different. Zwiefelhofer involved the jury's findings, whereas here, the jury's findings are not at issue. The clerical error did not prejudice Inouye. He had knowledge of the charges against him, the jury was instructed as to those charges, the State sought to have him convicted of those charges only, and the jury verdicts were clearly "guilty." The jury could not have been confused about the fact that G.S. was a child. The court did not abuse its discretion in correcting the clerical mistake under CrR 7.8(a).

Same Criminal Conduct for Sentencing Purposes

Inouye argues the three rape counts constitute the same criminal conduct for sentencing purposes. "'A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law.'"[43]

"For multiple crimes to be treated as the 'same criminal conduct' at sentencing, the crimes must have (1) been committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent."[44] "The relevant

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[42] Id.

[43] Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999) (quoting State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993)).

inquiry for the intent prong is to what extent the criminal intent, when viewed objectively, changed from one crime to the next."[45] This can be measured by determining whether one crime furthered another.[46]

Inouye's offenses involved the same victim, occurred at the same place, and were successive. The issue is therefore whether the three acts of rape involved the same objective criminal intent.

In State v. Grantham,[47] the defendant beat the victim, removed her clothes, and anally raped her.[48] He then kicked her multiple times, grabbed her, and ordered her not to tell.[49] The victim cried and asked defendant to stop, but he slammed her head into the wall and forced her to perform oral sex on him.[50] The appellate court affirmed the finding that the two rapes were not the same criminal conduct for sentencing purposes:

> Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act. He chose the latter, forming a new intent to commit the second act. The crimes were sequential, not simultaneous or continuous. The evidence also supports the trial court's conclusion that each act of sexual intercourse was complete in itself; one did not depend upon the other or further the other.[51]

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[44] Id. at 123; see also RCW 9.94A.589(1)(a).

[45] Id.

[46] State v. Lessly, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

[47] State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997).

[48] Id. at 856.

[49] Id.

[50] Id.

[51] Id. at 859.

Grantham was distinguished in the Washington Supreme Court's opinion in State v. Tili.[52] After beating his victim into submission, Tili "proceeded to use his finger to penetrate [her] anus and vagina. Tili inserted his finger into these two orifices separately, not at the same time. Tili told [the victim] to say she liked it. She complied. Tili then tried to penetrate [the victim]'s anus with his penis, but stopped, and instead inserted his penis into her vagina."[53] The court explained:

> In contrast to the facts in Grantham, Tili's three penetrations of [the victim] were continuous, uninterrupted, and committed within a much closer time frame--approximately two minutes. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration.[54]

The court held the trial court abused its discretion in failing to treat Tili's three first degree rape convictions as one crime.

Inouye argues there is nothing in G.S.'s description of the attack about the length of the pauses between the rapes to allow the court to infer that Inouye formed a new intent each time.

But Inouye's assault of G.S. lasted 15 to 20 minutes and involved three different manners of penetration. Each rape was complete in and of itself and did not depend on or further the others. Inouye assaulted G.S. for a long time, giving him significant opportunity to reflect about his next step. This opportunity to reflect, coupled with the

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[52] 139 Wn.2d 107, 985 P.2d 365 (1999).

[53] Id. at 111.

[54] Id. at 124.

fact that he necessarily paused between the assaults, supports the court's implicit finding that he formed a new intent before each rape. The case is thus different than Tili, where the court emphasized that the extremely short time frame made it unlikely that Tili formed a new intent between each penetration.

The court did not abuse its discretion in ruling that the three rape acts constitute separate crimes.[55]

Affirmed.

WE CONCUR:

[55] Inouye argues that because the three rape counts should constitute the same criminal conduct for sentencing purposes, the deadly weapon sentence enhancements must run concurrently, not consecutively. In light of our resolution of the case, we find it unnecessary to adress this issue. We nonetheless point out that the Washington Supreme Court rejected a similar argument in its recent decision in State v. Mandanas,168 Wn.2d 84, 90, 228 P.3d 13 (2010), wherein it held that a court must impose multiple firearm enhancements where a defendant is convicted of multiple enhancement-eligible offenses that amount to the same criminal conduct under the sentencing statute.