IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JULIO CESAR ALDANA GRACIANO, Appellant.	No. 40289-1-II UNPUBLISHED OPINION

Johanson, J. — Julio C. A. Graciano appeals his convictions for first degree rape of a child and first degree child molestation. He argues that (1) there is insufficient evidence to support his convictions, (2) his right to confront witnesses was violated, and (3) his convictions for child molestation and child rape constituted the same criminal conduct. In a statement of additional grounds (SAG)[1], Graciano also raises ineffective assistance of counsel and prosecutorial misconduct claims. We affirm the convictions but remand for resentencing.

[1] RAP 10.10.

FACTS

E.R. lives in a two-story house in Tacoma with her parents and two brothers. The upstairs portion of the house has a living room and three bedrooms: one for the parents, one for their two sons, and one for their daughter, E.R. The downstairs portion of the house has a kitchen and another living room.

During the summer of 2007, the father's cousin, Graciano, moved in with the family. Graciano slept in the upstairs living room on the floor. He lived with the family for about two months, moved out for several months, and then returned and lived with them again from November 2008 through about March 2009. E.R. knew Graciano as "Uncle Julio." 2 Report of Proceedings (RP) at 226.

Soon after Graciano came to live with the family the second time, E.R. repeatedly asked her mother when he would move out. One day, E.R. told her mother, "I don't want him here. He's scary . . . [h]e's evil, and I just want him to move out and I hope he goes and he dies." 2 RP at 188. E.R. eventually confided in her mother and told her that Graciano touched her "privates" and had "put his . . . penis inside her butt." 2 RP at 190, 194.

The State charged Graciano with four counts of first degree child rape and two counts of first degree child molestation.[2] At the time of trial in late 2009, E.R. was 9 years old and Graciano had just turned 38 years old. To prove Graciano's age, the State introduced a copy of his driver's license by way of a certified letter from the Department of Licensing (DOL) records

[2] The State also charged Graciano with one count of first degree child molestation for alleged sexual contact with J.R., one of E.R.'s brothers. The jury ultimately entered a not guilty verdict on this count.

custodian:

> I, [name omitted], 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).

Ex. 1. Both the authentication letter and the copy of Graciano's license bore the official seal of the State of Washington DOL. Graciano objected to the admission of this exhibit at trial on confrontation clause grounds.

E.R. testified at trial and recounted at least four specific instances of rape that occurred in the following locations: (1) in the upstairs living room on a couch underneath a blanket, (2) in the area between the kitchen and downstairs living room, (3) in her bedroom, and (4) in the kitchen. During these four incidents, Graciano penetrated E.R.'s vagina, anus, or both with his penis, hands, or other objects.

E.R. testified about events that occurred on an upstairs living room couch. At one point during her testimony, E.R. stated that while she was on the couch with Graciano he placed her hand on his penis over his pants, and then he pulled out his penis and used E.R's hand to touch and squeeze his bare penis. Later in her testimony, E.R. described an encounter where her brother was also present on the couch and Graciano put his hands inside her body. During closing arguments, the State argued that evidence of Graciano touching E.R. on the couch on two different occasions served as the basis for the child molestation counts.

A jury found Graciano guilty of four counts of first degree child rape and two counts of

first degree child molestation. During sentencing, Graciano argued that his child molestation convictions constituted the same criminal conduct as his first degree rape convictions. The trial court disagreed and sentenced Graciano on all six convictions. The trial court imposed 318 months to life for each of the rape convictions and 198 months to life for each of the child molestation convictions, with all the sentences running concurrently. Graciano appeals.

ANALYSIS

I. Sufficiency

The first issue is whether the State presented sufficient evidence to sustain Graciano's convictions for child rape and child molestation. Graciano challenges only the sufficiency of the evidence supporting that he was not married to E.R. at the time of the offenses; an element that the State must prove to sustain his convictions for both crimes. RCW 9A.44.073(1) (first degree child rape); RCW 9A.44.083(1) (first degree child molestation).

We review a claim of insufficient evidence for "whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010) (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). An appellant challenging the sufficiency of evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Drum*, 168 Wn.2d at 35.

Here, the question is whether the circumstantial evidence presented was adequate to support the jury's conclusion that Graciano and E.R. were not married. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94

Wn.2d 634, 638, 618 P.2d 99 (1980). In similar cases, Washington courts have recognized that circumstantial evidence can be used to prove lack of a marriage. *See, e.g., State v. Rhoads*, 101 Wn.2d 529, 532, 681 P.2d 841 (1984) (witness and victim testimony can support a conclusion that when the victim and defendant did not know each other they were also not married); *State v. Shuck*, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983) (it is reasonable to infer a lack of marital relationship when two victims were in ninth grade, their entire acquaintance with the defendant lasted only one month, one of the girls had a boyfriend, and neither girl had ever spent the night at the defendant's house); *State v. May*, 59 Wash. 414, 415, 109 P. 1026 (1910) (evidence that the victim was under 14 years old, lived at home with her father and mother, maintained her maiden name, and was "a mere school girl," adequately proved the absence of a marriage).

Adequate circumstantial evidence exists in this case for a jury to determine that the State proved the absence of a marital relationship between Graciano and E.R. The victim's father and Graciano are cousins, even though E.R. referred to Graciano as "Uncle Julio." 2 RP at 226. Our state prohibits marriages between any blood relationship closer than second cousins, which includes Graciano and E.R's first cousins once removed relationship. RCW 26.04.020(1)(b). Accordingly, when viewed in the light most favorable to the jury's verdict, we hold that sufficient evidence existed for a rational trier of fact to infer beyond a reasonable doubt that Graciano and E.R were not married.

II. Confrontation

Next Graciano argues that the trial court violated his right to confrontation when it admitted his state driver's license by way of a certified letter from the DOL records custodian to

prove his age. We discern no error.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses against them. A testimonial statement of a witness who does not appear at trial is inadmissible, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

We review de novo a confrontation clause challenge. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (2008). The State carries the burden to establish that a witness's statements are nontestimonial. *State v. Mares*, 160 Wn. App. 558, 562, 248 P.3d 140 (2011).

Graciano contends that the custodian's certification here did more than merely authenticate the identification card. He maintains the certification implicitly asserted that the records custodian performed a search to find the record for "Julio Graciano" and then analyzed the results to determine whether the "Julio Graciano" found was the "Julio Graciano" in this case. Br. of Appellant at 12. Division One recently considered and rejected an identical argument. *Mares*, 160 Wn. App. at 564.

In *Mares*, Mares was on trial for violating a no-contact order prohibiting him from being within 500 feet of Brittany Knopff. *Mares*, 160 Wn. App. at 560-61. Knopff did not attend the trial, so to prove that she was the person the no-contact order protected, the State introduced a certified copy of her driver's license by way of a certified letter from the DOL. *Mares*, 160 Wn.

App. at 561. Except for the name of the licensee, the language in the letter authenticating the copy of the license was verbatim to the letter here.

On appeal, Division One rejected the argument that the certification was testimonial. The court reasoned:

> 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. The certification here attests only to the authenticity of a public record. It offers neither an interpretation of the record nor any assertions about its relevance, substance, or effect. The custodian did not attest that the license belonged to any particular "Brittany Knopff," nor that the person pictured on the license was the victim of a crime. Other witnesses made those assertions, and Mares had a full opportunity to confront them.

Mares, 160 Wn. App. at 564 (citation omitted). The *Mares* court held, "The license was admissible as a public record, and the custodian who authenticated the copy provided no testimonial statements in doing so." *Mares*, 160 Wn. App. at 565. The court rejected Mares's argument that the custodian "searched the DOL database, analyzed the results of that search, and concluded a particular person's driver's license—among an unknown number of choices—was the one requested by the prosecutor." *Mares*, 160 Wn. App. at 566. The court stated that "this was neither the substance nor the implication of the custodian's affidavit." *Mares*, 160 Wn. App. at 566.

Because this issue is identical to the one before *Mares*, we adopt the reasoning there and hold that the custodian's certification here was not testimonial.

III. Same Criminal Conduct

The last issue is whether the trial court erred in finding that none of Graciano's

convictions were the same criminal conduct for the purpose of calculating his offender score. We remand for resentencing.

If the trial court enters a finding that two or more current offenses constitute the same criminal conduct, those current offenses are counted as one crime and the sentences are served concurrently. RCW 9.94A.589(1)(a). We review a trial court's determination of what constitutes the same criminal conduct de novo. *State v. Torngren*, 147 Wn. App. 556, 562, 196 P.3d 742 (2008).[3]

To constitute the same criminal conduct for purposes of determining an offender score, two or more criminal offenses must involve (1) the same criminal intent, (2) the same time and place, and (3) the same victim. RCW 9.94A.589(1)(a). If any one of these elements is missing, the multiple offenses do not encompass the same criminal conduct, and the trial court must count each offense separately in calculating the offender score. *State v. Lessley*, 118 Wn.2d 773, 778,

[3] We recognize that many courts have applied the abuse of discretion standard to same criminal conduct questions on appeal. *E.g.*, *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006); *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *State v. Davison*, 56 Wn. App. 554, 558, 784 P.2d 1268, *review denied*, 114 Wn.2d 1017 (1990). But we find this standard unpersuasive in light of the excellent reasoning in *Torngren*:

> The statutory elements for "same criminal conduct," however, are clear. And the test is described as "objective." [*State v.*] *Dunaway*, 109 Wn.2d [207,] at 216-17[, 743 P.2d 1237, 749 P.2d 160 (1987)] (referring to the criminal intent element). It seems to us, then, that we are in as good a position as the sentencing court to apply these objective standards to uncontroverted facts. A de novo standard of review of the question "same criminal conduct" would, then, seem more appropriate. *See State v. Ustimenko*, 137 Wn. App. 109, 115, 151 P.3d 256 (2007) (applying de novo standard to objective custodial interrogation test); *see also In re Marriage of Hunter*, 52 Wn. App. 265, 268, 758 P.2d 1019 (1988)[, *review denied*, 112 Wn.2d 1006 (1989)] (appellate court reviews uncontroverted written record independently).

Torngren, 147 Wn. App. at 562-63.

827 P.2d 996 (1992).

When examining intent, the proper focus is "the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). This often includes an examination of "whether one crime furthered the other and if the time and place of the two crimes remained the same." *Dunaway*, 109 Wn.2d at 215.

Graciano argues that the record is not clear on whether the jury convicted him for committing six offenses in a single incident or in separate instances. We are confident that the record contains evidence that Graciano raped E.R. on at least four separate occasions. The record is not clear, however, with regard to whether Graciano molested E.R. on two occasions separate and distinct from the four times he raped her.

The State relied on events that happened in the upstairs living room on a couch to form the basis for one child rape charge and both child molestation charges.[4] If the jury convicted Graciano of child rape and both child molestation charges for the same incident, the victim, time, and place of the crimes were the same. The only remaining question is whether Graciano had the same criminal intent.

Based on this record, we hold that Graciano did not form an intent to molest E.R. on the

[4] We note that the State's closing arguments that E.R. testified about two separate living room couch incidents may not be supported by the evidence admitted at trial. At trial, E.R. discussed sexual contact that occurred on the couch in two different lines of questioning, but nothing in the record clarifies if the two parts of her testimony described different parts of the same incident or described two different events. E.R. did testify that she was "on the couch with [her] uncle" two times, but in our opinion this testimony alone does not adequately clarify that the events she had previously described occurred at separate times, which would alter our same criminal conduct analysis. 2 RP at 254.

upstairs living room couch, separate from his intent to rape her. Instead, the incident took place through continuous sexual behavior over a short period of time and involved the same objective criminal intent of present sexual gratification. The jury could have relied on the incident on the couch to form the basis for a child rape and both child molestations convictions, therefore both child molestations convictions and the related child rape conviction should be considered same criminal conduct for sentencing. We remand for resentencing on this issue.

IV. Statement of Additional Grounds

A. Ineffective Assistance of Counsel

Graciano argues that his counsel was ineffective for refusing to allow him to plead guilty, not calling his mother as a witness at trial, and failing to visit him while he was in jail awaiting trial. Graciano's arguments rely on evidence outside the record on review. On direct appeal, we do not consider matters outside the record. *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

B. Prosecutorial Misconduct

Graciano next argues that the prosecutor acted improperly when he did not offer a plea agreement for less time. To prove prosecutorial misconduct, Graciano must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004).

Prosecutorial misconduct is intended to remedy prejudice *at trial* and does not apply to Graciano's claim. Prosecutors have broad discretion to charge a crime or enter into a plea

bargain. *State v. Crawford*, 159 Wn.2d 86, 102, 147 P.3d 1288 (2006). And a prosecutor is not required to plea bargain with a criminal defendant. RCW 9.94A.421 ("The prosecutor and the attorney for the defendant, or the defendant when acting pro se, *may* engage in discussions with a view toward reaching [a plea] agreement." (emphasis added)). Accordingly, we discern no error.

We affirm the convictions but remand for resentencing to recalculate Graciano's offender score consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Van Deren, J.

Penoyar, C.J.