69271-2

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NO. 69271-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES JOHNSON,

Appellant.

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

The Honorable David A. Kurtz, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
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A. ARGUMENT IN REPLY

THE PROSECUTION'S INTERPRETATION OF THE INTERPLAY BETWEEN RCW 9.94A.525(5) AND RCW 9.94A.589(1)(a) IS INCORRECT.

On appeal, Johnson challenges the offender score used to sentence him for attempted second degree robbery. This challenge is based on the court's failure to treat two sets of his prior convictions as single offenses for scoring purposes when a prior sentencing court had determined those sets of convictions each constituted "same criminal conduct" under RCW 9.94A.589(1)(a), and therefore were single offenses for offender score purposes, as required by RCW 9.94A.525(5)(a)(i). CP 196.

In response, the prosecution claims the opening phrase of RCW 9.94A.525(5)(a)(i) ("Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense . . ."), should only applies if that finding was made by the original sentencing court. Brief of Respondent (BOR) at 7-15. This claim relies on the existence of a subsequent reference to RCW 9.94A.589(1)(a) in the same provision ("using the 'same criminal conduct' analysis found in RCW 9.94A.589(1)(a)"), is couched slightly different than the first. The prosecution asserts that this difference in phrasing must

be given effect because otherwise the first reference to RCW 9.94A.589(1)(a) would be superfluous. BOR at 9-11.

The prosecution's claim is specious at best, and ultimately incorrect. It is based on the faulty assumption that the meaning of the phrase "same criminal conduct" is limited to such a finding under RCW 9.94A.589(1)(a). It is not.

The phrase "same criminal conduct" has legal meaning in several difference contexts. For example, the phrase is used routinely in the double jeopardy context. See e.g., State v. Chesnokov, __ Wn. App. __, __ P.3d __, 2013 WL 3421905 at 2 Slip Op. filed July 8, 2013); Com. v. Rivas, 466 Mass. 184, 187-88, __ N.E.2d __, 2013 WL 4017300 at 2 (2013); Haynes v. State, 743 S.E.2d 617, 619-20 (Ga. App., 2013.). It is also used in the context of the requirement for jury unanimity. See e.g., People v. Benavides, 35 Cal.4th 69, 105 P.3d 1099, 1119 (2005) ("when the evidence suggests more than one distinct crime either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal conduct." Emphasis added). Likewise, Illinois uses the phrase in the context of restitution in criminal cases. 730 ILCS 5/5-5-6.[1]

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[1] Subsection (a) of the Illinois statute provides:

> In fixing the amount of restitution to be paid in cash, the court shall allow credit for property returned in kind, for property damages ordered

The Washington legislature's use of the phrase "same criminal conduct" in the first sentence of RCW 9.94A.525(5)(a), is qualified by the preceding clause, which limits it to those determinations of "same criminal conduct" made in the context of RCW 9.94A.589(1)(a). This makes sense in light of the breadth of the criminal history that must be taken into account when calculating an offender score in Washington, such as convictions from other jurisdictions. Thus, for example, a defendant with multiple prior felony convictions from Illinois cannot successfully claim they should be treated as a single offense for purposed of calculating his offender score in Washington just because an Illinois court found they were "same criminal conduct" for purposes of restitution. Without the first reference to RCW 9.94A.589(1)(a) in RCW 9.94A.525(5)(a), that argument might succeed.

The prosecution's attempt to limit the binding effect of "same

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> to be repaired by the defendant, and for property ordered to be restored by the defendant; and after granting the credit, the court shall assess the actual out-of-pocket expenses, losses, damages, and injuries suffered by the victim named in the charge and any other victims who may also have suffered out-of-pocket expenses, losses, damages, and injuries proximately caused by the same criminal conduct of the defendant, and insurance carriers who have indemnified the named victim or other victims for the out-of-pocket expenses, losses, damages, or injuries, provided that in no event shall restitution be ordered to be paid on account of pain and suffering.

Emphasis added.

criminal conduct" findings to those made by the original sentencing court should be rejected. The opportunity to challenge the offender score used to resentence Johnson for second degree murder was within 30 days of that sentencing. RAP 5.2(a). Apparently the State did not do so and therefore should not be heard to complain about it now.

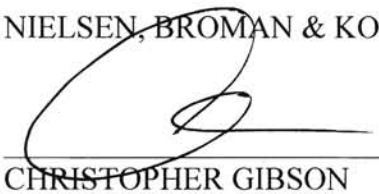
B. CONCLUSION

For the reasons stated herein and in the opening brief, this Court remand for resentencing on the correct offender score and with counsel who will advocate on Johnson's behalf.

DATED this 28th day of August, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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	)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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[X] JAMES JOHNSON
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CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF AUGUST 2013.

X Patrick Mayovsky