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NO. 68874-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARK STILLER,

Appellant.

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

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

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DIVISION ONE

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A. ARGUMENTS IN REPLY

1. THE TRIAL COURT MISAPPLIED THE LAW IN CALCULATING STILLER'S OFFENDER SCORE.

As the State correctly notes, the recent decision in State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013), places the burden squarely on the defendant to prove crimes constitute 'same criminal conduct' for offender score purposes. Brief of Respondent (BOR) at 8. Graciano also reiterates the well-established rule that a trial court's 'same criminal conduct' determination is subject to reversal if it resulted from an abuse of discretion or misapplication of the law. 176 Wn.2d at 537.

Both the State in its response brief and the Washington Supreme Court in Graciano, however, failed to acknowledge much less discuss another well-established rule, which is that ambiguous jury verdicts must be interpreted in favor of the defendant. State v. Kier, 164 Wn.2d 798, 811, 194 P.3d 212 (2008); State v. Chesnokov, 175 Wn. App. 345, 305 P.3d 1103 (2013); State v. Lindsay, 171 Wn. App. 808, 288 P.3d 641, 660 (2012); State v. DeRyke, 110 Wn. App. 815, 824, n.22, 41 P.3d 1225 (2002) (citing State v. Taylor, 90 Wn. App. 312, 317, 950 P.2d 526 (1998) (interpreting ambiguous verdict in defendant's favor) and United States v. Baker, 16 F.3d 854, 857-58 (8th Cir.1994) ("When a defendant is convicted by an ambiguous verdict that is susceptible of two

interpretations for sentencing purposes, he may not be sentenced based upon the alternative producing the higher sentencing range.”).

When that rule is properly taken into consideration, it is clear Stiller’s sentencing court misapplied the law by failing to interpret the otherwise ambiguous jury verdicts in favor of finding that all counts constituted the same criminal conduct. Further support for this can be found in the State's inability to identify specific acts or times for the counts. CP 36-46 (Defendant's Sentencing Memorandum); 4RP 24. The State conceded some of the offenses occurred at the same time. 4RP 19. Indeed, at sentencing the trial court acknowledged the jury was not asked to and did not determine which specific date each individual act occurred. 4RP 36. Had the sentencing court properly interpreted the ambiguous jury verdicts in Stiller’s favor, he would have necessarily met his burden of proving all six of his offense constituted the 'same criminal conduct' for purposes of sentencing because it would have resolved the timing issue in his favor, which was the only element of the 'same criminal conduct' analysis in dispute. 4RP 24.

B. CONCLUSION

For the reasons stated here and in the opening brief, this Court should remand for resentencing based on a correct offender score.

DATED this 22ND day of November 2013

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68874-0-1
)	
MARK STILLER,)	
)	
Appellant.)	

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 22ND DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF NOVEMBER 2013.

X *Patrick Mayovsky*