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Court of Appeals
Division II
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IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON
DIVISION II

**STATE OF WASHINGTON,
Respondent,**

v.

**MARIO MARSHAWN STEELE,
Appellant.**

APPELLANT'S OPENING BRIEF (Corrected)

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I. ASSIGNMENTS OF ERROR

1. Mr. Steele's convictions for manslaughter and robbery violate double jeopardy.
2. Mr. Steele's convictions for manslaughter and robbery merge for purposes of sentencing.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Do Mr. Steele's two convictions violate double jeopardy where neither had an independent purpose?
2. Do Mr. Steele's two convictions merge for the same reason?

II. STATEMENT OF THE CASE

The State charged Mario Steele by an amended information with one count of manslaughter with a firearm enhancement and one count of first-degree robbery. CP 2-3. The information charged Steele with first-degree manslaughter for recklessly causing the death of Lenard Masten and first-degree robbery alleging that Steele or his accomplice stole from Masten "by use or threatened use of immediate force, violence, or fear of injury to Lenard Masten, said force or fear being used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, and in the commission thereof, or in immediate flight

therefrom, the defendant was armed with a deadly weapon, to-wit: a firearm.” CP 2-3; Supp CP.¹

Mr. Steele entered an *Alford* plea of guilty, acknowledging that there was a substantial likelihood that a jury would convict him of the charged crimes based on the information contained in the probable cause statement. CP 5-13; RP 1-17.

The probable cause statement recited that a man known as “Dre” purchased drugs from the victim, Mr. Masten. Dre was upset because Masten sold Dre fake drugs. Dre asked Mr. Steele to set-up a meeting so Dre could confront Mr. Masten. Mr. Steele believed Dre would either rob or assault Mr. Masten. Supp CP.

Instead, Dre shot and killed Masten. *Id.*

After that, Dre rummaged through Mr. Masten's clothing and took several items including Dre's cell phone and keys. CP There was no allegation that Mr. Steele personally threatened or caused harm to Mr. Masten or that he had any expectation that Dre would kill Masten. Supp CP.

At sentencing, each of the two current convictions was scored as 2 points against the other conviction giving Steele, who had no previous felony convictions, a score of 2. CP 14-16. On

¹ Contemporaneous with the brief, Steele has filed a supplemental designation of clerk's papers.

the manslaughter (the crime with the highest standard range)

Mr. Steele received a total sentence of 185 months. *Id.*; RP 17-30.

III. ARGUMENT

Introduction

Mr. Steele's convictions for manslaughter and robbery had a singular purpose. Put another way, based on the manner in which the State charged Steele and its probable cause statement there was no independent purpose to the force used by the co-defendant to cause the death of the victim as compared to the force used to obtain property from the victim. According to the probable cause statement, the co-defendant took the victim's property only after causing his death.

Mr. Steele's separate sentences violate double jeopardy. Alternately, the two counts merge for purposes of sentencing. Steele can raise these claims in this direct appeal despite pleading guilty and not contesting the offender score. *In re Francis*, 170 Wash. 2d 517, 522, 242 P.3d 866, 869 (2010); *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

Mr. Steele's Double Jeopardy Claim is Cognizable

Article I, section 9 of the Washington State Constitution "provides the same protection against double jeopardy as the fifth

amendment to the federal constitution.” *In re Orange*, 152 Wash.2d 795, 815, 100 P.3d 291 (2004). Both the state and federal double jeopardy clauses protect against multiple punishments for the same offense. *Id.* The double jeopardy provisions bar multiple punishments for the same offense. *N. Carolina v. Pearce*, 395 U.S. 711 (1969); *State v. Kelley*, 168 Wash. 2d 72, 76, 226 P.3d 773, 775 (2010).

Pleading guilty does not waive a double jeopardy challenge. A guilty plea, by its nature, admits factual guilt—and thus waives any challenge on that ground. *State v. Knight*, 162 Wash.2d 806, 811, 174 P.3d 1167 (2008). However, a guilty plea does not waive a challenge to “ ‘the very power of the State to bring the defendant into court to answer the charge brought against him,’ ” *id.* (quoting *Blackledge v. Perry*, 417 U.S. 21, 30, (1974)), nor does it waive a challenge when the court enters multiple convictions or sentences for the same offense. *State v. Hughes*, 166 Wash.2d 675, 681 n. 5, 212 P.3d 558 (2009).

Here, Steele challenges the latter—the court's ability to enter convictions and sentence him for duplicative charges. He did not waive that challenge by pleading guilty. *In re Francis*, 170 Wash. 2d 517, 522, 242 P.3d 866, 869 (2010).

Steele's Multiple Punishments Violate Double Jeopardy

This Court reviews whether multiple punishments violate double jeopardy *de novo*. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005); *Francis*, 170 Wn.2d at 523.

Although the double jeopardy generally requires a fact-bound, case-by-case approach, convictions for robbery and assaultive behavior generally “will merge unless they have an independent purpose or effect.” *Freeman*, 153 Wn.2d at 780; *Francis*, 170 Wn.2d at 524. Under the independent purpose rule: “The offenses may in fact be separate when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” An example is when a person strikes another after the robbery is completed, which evinces a separate intent and justifies a separate conviction, “especially since the assault did not forward the robbery.” *Freeman*, at 779.

In *Francis*, the Washington Supreme Court found a double jeopardy violation for charges of assault and robbery:

Francis caused Jacobsen bodily injury. The State charged that conduct as the second degree assault. The State also used that conduct to elevate Francis' attempted robbery to the first degree. "Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *Freeman*, 153 Wash.2d at 772–73, 108 P.3d 753.

170 Wash. 2d at 524–25. The *Francis* court found this presumption was overcome by first examining how the offenses were charged and then whether the offenses Francis committed had an independent purpose or effect. "[O]ffenses may in fact be separate when there is a separate injury to the [sic] 'the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.'" *Id.*; *Freeman* at 778–79 (quoting *State v. Frohs*, 83 Wash.App. 803, 807, 924 P.2d 384 (1996)).

In *Francis*, the reviewing court concluded the sole purpose of the second degree assault was to facilitate the attempted robbery. The assault was not "separate and distinct" from the attempted robbery; it was incidental to it. *Francis*, 170 Wash. 2d at 525.

Likewise, in *Freeman*, a second degree "assault committed in furtherance of a robbery merges with robbery," unless "there is

a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.” *Freeman*, 153 Wash.2d at 778 (quotations omitted).

Similarly, in *State v. Hart*, 188 Wash. App. 453, 459, 353 P.3d 253, 256 (2015), the court found a double jeopardy violation:

A person who intends to cause death also intends to assault a person. By showing Mr. Hart intentionally caused Mr. Lincoln's death with a knife, the State necessarily proved Mr. Hart also intentionally assaulted Mr. Lincoln with the knife, a deadly weapon.

In contrast, the Washington Supreme Court found separate and distinct conduct and no double jeopardy violation in *Matter of Schorr*, __ Wn.2d __, 422 P.3d 451, 454 (2018), where the defendants handcuffed the victim and stole his personal property. One or both also pulled a plastic bag over the victim's head and duct-taped it at his neck. As a result, the victim suffocated and died. On these facts, there was a clear independent purpose to the homicide. And, while Schorr was charged with felony murder, when he pleaded guilty his plea included a premeditated murder alternative. *Schorr*, 422 P.3d at 458.

This case is like *Francis* and different from *Schorr*.

Steele was charged with a robbery, not a theft. The robbery charge included the use of force with a firearm. Likewise, the murder charge alleged the use of force with a firearm. Factually speaking, the use of force occurred and was completed before any taking occurred. As a result, the State cannot argue that the use of force used to accomplish the theft was separate and distinct from the homicide. Instead, the alleged use of force in the robbery is indistinguishable from the homicide. Put another way, the alleged fact that transforms the theft into a first-degree robbery is the homicide.

Multiple sentences violate double jeopardy.

For the Same Reasons, Steele's Convictions Merge

Merger, a component of double jeopardy analysis, prevents “pyramiding the charges” to obtain greater punishment. *State v Johnson*, 92 Wn.2d 671,678 -80, 600 P. 2d 1249 (1979); see also *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P. 2d 853 (1983). Here, the State increased the seriousness level of a theft by alleging assaultive conduct (*i.e.*, the homicide) to charge a first-degree robbery. As a result, the charges also merge for purposes of sentencing. Waiver does not apply where the alleged sentencing

error is a legal error leading to an excessive sentence. *In re Goodwin*, 146 Wash. 2d 861, 874, 50 P.3d 618, 625 (2002).

IV. CONCLUSION AND PRAYER FOR RELIEF

The appropriate remedy for a double jeopardy violation is vacating the offending conviction. *Francis*, 170 Wash. 2d at 532. Based on the above, this Court should reverse and remand for dismissal of one of the courts and for resentencing.

DATED this 22nd day of September 2018.

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that on today's date I efiled the attached corrected opening brief causing a copy to be sent to opposing counsel. I also certify that I mailed a copy via US Postal Service to Mr. Steele.

September 25, 2018//Portland, OR

/s/Jeffrey Ellis

ALSEPT & ELLIS

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