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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARIO MARSHAWN STEELE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 11-1-00958-2

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant waive any argument that his convictions violate double jeopardy when he entered an *Alford* plea pursuant to a plea agreement to avoid prosecution for murder in the first degree? Alternatively, did defendant fail to show that his convictions for first degree manslaughter and first degree robbery violate double jeopardy when the two offenses are not the same in law or fact?

B. STATEMENT OF THE CASE.

Mario Marshawn Steele, hereinafter “defendant”, was charged by information with one count of murder in the first degree with a firearm sentencing enhancement on March 2, 2011. CP 1. An amended information was filed on February 23, 2012 adding murder in the second degree with a firearm sentencing enhancement as count II. CP 50 – 51. The murder in the second degree was alleged to have occurred during the commission of an assault in the second degree. CP 50 – 51.

On August 31, 2012, the defendant entered a plea of guilty to a second amended information charging one count of manslaughter in the first degree with a firearm sentencing enhancement and one count of robbery in the first degree. CP 2 – 3, 5 -13. The defendant’s statement reads as follows:

I do not believe I have committed these crimes. However, after review of the evidence with my attorney, I believe there is a substantial likelihood I would be convicted if I proceeded to a jury trial. I am pleading guilty merely to accept the State's agreement to reduce the charges against me and the favorable sentencing recommendation.

CP 5 – 13. Underneath his signed statement, the defendant agreed that the court could review the statement of probable cause supplied by the prosecution to establish a factual basis for the plea only not for sentencing purposes. CP 5 – 13. RP 4. The court reviewed the statement of probable cause and found facts supporting the guilty pleas to each of the counts.

RP 14. The declaration for determination of probable cause reads:

On January 16, 2011 at 20:32 hours, Lakewood Police were dispatched to 5510 Chicago Ave SW regarding a shooting. Lenard Masten, the victim, lived in an apartment at this address. En route dispatched advised the officers that the suspects were two black males in their 20s and one was armed with a gun. When the officers arrived, Lakewood Fire Department personnel was treating the Mr. Masten. Mr. Masten had a gunshot wound to his stomach. Mr. Masten was transported to St. Joseph Hospital, where he died in surgery.

Investigating detectives learned Mr. Masten had been dealing drugs. The detectives also learned STEELE had made several phone calls, both from his cell phone and landline, to Mr. Masten on the day of the murder. STEELE (sic) was interviewed by detectives and admitted to being involved in a drug deal with Mr. Masten at about 3:30 pm the day of the murder. STEELE told detectives he and a man known only as "Dre" purchased drugs from Mr. Masten. The defendant said that Dre was upset after the transaction because the drugs were bunk (fake).

Dre asked STEELE to set-up a meeting so he could confront Mr. Masten. STEELE told the detectives that Dre said "I'll get his ass." STEELE believed Dre would either rob or

assault Mr. Masten. STEELE admitted he set-up this meeting and phone records confirm there was a brief call between STEELE'S phone and Mr. Masten's phone minutes before the murder.

Witnesses at the murder scene described the victim being confronted by two black males: a taller darker skinned man and a lighter skinned, shorter man with a goatee. One witness said she saw the man with the goatee carrying a handgun in the moments after the shooting. Witnesses indicated that the shooting party rummaged through Mr. Masten's clothing and apparently took his cell phone, keys and perhaps other items (sic). The shooter was observed running toward Masten's apartment door. Assailants eventually ran to a nearby dark colored SUV and drove away. CP 47 -48. RP 14.

The court followed the agreed sentencing recommendation and imposed 125 months plus 60 months on the firearm sentencing enhancement for a total sentence of 185 months on count I. RP 16. CP 5 – 13. The court imposed 54 months on count II. CP 5 – 13.

The defendant filed a PRP that was later dismissed as time barred by the Court of Appeals. CP 52 – 53. A notice of appeal was filed by the defendant on February 20, 2018 seeking review of the judgment and sentence entered on August 31, 2012. CP 54 – 68.

C. ARGUMENT.

1. PETITIONER'S ROBBERY AND FELONY MURDER CONVICTIONS DO NOT VIOLATE THE PROHIBITION ON DOUBLE JEOPARDY.

The double jeopardy clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

U.S. Const. Amend. V. The double jeopardy clause applies to the states through the due process clause of the Fourteenth Amendment, and is coextensive with article I, § 9 of the Washington State Constitution. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998) (citing *Gocken*, 127 Wn.2d at 107). The double jeopardy clause encompasses three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same crime. *Gocken*, 127 Wn.2d at 100.

Appellate courts "review questions of law such as merger and double jeopardy de novo." *State v. Zumwalt*, 119 Wn. App. 126, 129, 82 P.3d 672 (2003), *aff'd sub nom. State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). When addressing a double jeopardy challenge, the court first considers whether the legislature intended cumulative punishments for the challenged crimes. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Legislative intent can be explicit as in the antimerger statute where it provides that burglary may be punished separately from

any related crime. *Freeman*, 153 Wn.2d at 772-73; RCW 9A.52.050.

However, there can also be sufficient evidence of legislative intent that the court is confident that the legislature intended to separately punish two offenses arising out of the same bad act. *Freeman*, 153 Wn.2d at 772 (citing *State v. Calle*, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (rape and incest are separate offenses)).

If the legislative intent is not clear, then the court will turn to the test from *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) to determine if double jeopardy has been offended by defendant's multiple convictions. *Freeman*, 153 Wn.2d at 772. Under the *Blockburger* test the court examines each crime to determine if one crime contains an element that the other does not. *Id.* This analysis is not done on an abstract level, but "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Freeman*, 153 Wn.2d at 772 (quoting *Blockburger*, 284 U.S. at 304). However, the *Blockburger* presumption may be rebutted by other evidence of legislative intent.

Additionally, merger is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple

punishments for a single act that violates several statutory provisions. *State v. Vladovic*, 99 Wn.2d 413, 419 n2, 662 P.2d 853 (1983). “The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court then asks if the Legislature intended only one punishment for the multiple convictions.” *State v. Michielli*, 132 Wn.2d 229, 238-239, 937 P.2d 587 (1997). With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. *Missouri v. Hunter*, 459 U. S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1982).

The merger doctrine can be used to determine legislative intent even when two crimes have different elements. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, the court will presume the legislature intended to punish both offenses through a greater sentence for the greater crime. *Freeman*, 153 Wn.2d at 772-73 (citing *Vladovic*, 99 Wn.2d at 419). However, the court may separately punish two crimes that otherwise appear that they should merge if there is an independent purpose or effect to each. *Freeman*, 153 Wn.2d at 773 (citing *State v. Frohs*, 83 Wn. App. 803 807, 924 P.2d 384 (1996)), *see also Vladovic*, 99 Wn.2d at 421-22).

The well-established exception allows for two convictions to stand even when they may formally appear to be the same crime under other tests. *Freeman*, 153 Wn.2d at 778. *Whittaker* states:

“Where two offenses would otherwise merge but have ‘independent purposes or effects,’ separate punishment may be applied.” When dealing with merger issues, we look at how the offenses were charged and proved, and do not look at the crimes in the abstract.”

*State v. Whittaker*, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016).

Stated another way, the offenses may 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.’” *Freeman*, 153 Wn.2d at 778 (citing *State v. Frohs*, 83 Wn. App. 803, 807, 924 P.2d 384 (1996) (citing *State v. Johnson*, 92 Wn.2d 871, 680, 600 P.2d 1249 (1979))). In evaluating this, courts must take a “hard look at each case” based on their facts and charged crimes.

*Freeman*, 153 Wn.2d at 774.

In *State v. Knight*, our Supreme Court held that a defendant can appeal on double jeopardy grounds his convictions entered pursuant to a guilty plea because the claim goes to “the very power of the State to bring the defendant into court to answer the charge brought against him.” 162 Wn.2d 806, 811, 174 P.3d 1167 (2008) (quoting *Blackledge v. Perry*, 417

U.S. 21, 30, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974)). The court distinguished double jeopardy from other constitutional protections that a defendant waives by pleading guilty, such as a right to a jury trial and the right to be free from self-incrimination. *Knight*, 162 Wn.2d at 811, 174 P.3d 1167.

In *Broce*, the Court held that when a criminal defendant pleads guilty to two separate conspiracy charges and later files a collateral attack on the convictions and sentences on double jeopardy grounds, the challenge will be rejected if it relies on proof of factual similarities between the two charges that are not apparent from the record. *United States v. Broce*, 488 U.S. 563, 573-75, 109 S.Ct. 757, 102 L.Ed. 2d 927 (1989). (“[A] defendant who pleads guilty to two counts with facial allegations of distinct offenses concede[s] that he has committed two separate crimes.”). A double jeopardy violation following a guilty plea must be clear from the record presented on appeal or it is waived. *Knight*, 162 Wn.2d at 811–12, 174 P.3d 1167.

- a. Defendant’s Double Jeopardy claim fails as the status of his *Alford* plea and the ambiguity of the record below ensures that appellant cannot meet his burden to show he has been convicted and punished twice for the same offense.

Appellants asserting double jeopardy’s issue-preclusive protection bear the “demanding” burden of proving they were “actually and

necessarily” several times convicted of or punished for the same offense. *See Currier v. Virginia*, \_ U.S. \_, 138 S. Ct. 2144, 2150 (2018); *Bravo-Fernandez v. United States*, \_ U.S. \_, 137 S.Ct. 352, 357 (2016); *Schiro v. Farley*, 510 U.S. 222, 233, 114 S.Ct. 783 (1994). That burden cannot be overcome if ambiguities in the judgment or incorporated charging document result in uncertainty about what the convictions necessarily decided. E.g., *Schiro*, at 236; *Cook v. United States*, 379 F.2d 966, 971 (5th Cir. 1967).

At the same time, a defendant can plead guilty to amended charges for which there is no factual basis. *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (2006); *In re Barr*, 102 Wn.2d 265, 270, 684 P.2d 712 (1984). Such dispositions are allowed as “[d]oing so supports a flexible plea bargaining system through which a defendant can choose to plead guilty to a related charge that was not committed, in order to avoid near certain conviction for a greater offense. *Zhao*, at 200. This in turn ensures a defendant is able to determine the course of action that he or she believes is in his or her best interest. *Id.*

Pleas to lesser offenses without a factual basis, i.e., crimes that never actually occurred, means there are no facts to evaluate under the same evidence rule used to assess if a defendant was several times convicted or punished for the same offense. *See State v. Calle*, 125 Wn.2d

769, 777, 888 P.2d 155 (1995). For under that rule, a defendant's double jeopardy rights are not violated if he or she is convicted of offenses that are distinct in law or fact. *Id.*

Yet in the context of an *In re Barr* plea, the selected lesser crimes may have no tie to reality. *Zhao*, 157 Wn.2d at 200. They need not be factually derivative of the avoided greater offense for which there is a factual basis as would be the case if a plea to a lesser included or lesser degree offense was required. *Id.*; *Barr*, 102 Wn.2d at 270. By definition lesser crimes expediently contrived for an *In re Barr* plea could not result in a double jeopardy violation as a matter of law since they could not be the same in fact being complete legal fictions without any basis in fact. A contrary rule would needlessly complicate *In re Barr* pleas by requiring parties to select an array of never committed crimes with different elements (e.g., theft second, assault third, riot) or include in each charge made up details to further differentiate them.

Under an *Alford* plea, a defendant may take advantage of a plea agreement without acknowledging guilt. *See North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976). In *In re Barr*, the Supreme Court of Washington held that a plea can be voluntary and intelligent absent a factual basis for the ultimate charges, so long as the plea is based on

informed review of all the alternatives and the defendant understands the nature of the consequences of the plea. 102 Wn.2d 265, 684 P.2d 712 (1984).

In order for a defendant to raise a double jeopardy claim after a guilty plea, the violation must be clear from the record that was before the judge at the time of accepting the plea; otherwise, the double jeopardy claim is waived. *In re Delgado* 160 Wn. App. 898, 251 P.3d 899 (2011). In the *Newlun* case, the court found that the defendant waived his appellate argument that alleged his convictions for identity theft violated double jeopardy; the record did not establish a violation as it did not establish the particular means of identification or financial information. *In re Newlun*, 158 Wn. App. 28, 240 P.3d 795 (2010).

In this case, the defendant entered an *Alford* plea to take advantage of the State's offer to reduce his exposure from a murder in the first degree conviction to two counts stemming from the incident that took place on January 16, 2011. The defendant pled guilty to First Degree Manslaughter by way of participating in an assault on Lenard Masten and to robbery in the first degree by way of use or threatened use of force while he was armed with a deadly weapon to wit; a firearm. CP 2-3.

The court read the declaration for determination of probable cause in finding a factual basis for the defendant's plea. CP 47 -48. RP 14. In

the declaration for determination of probable cause, the defendant stated that “Dre” wanted him to set up the meeting so Masten could be confronted. The defendant stated that he believed “Dre” would either rob or assault Masten. CP 47 – 48.

From the record below, any violation of double jeopardy would not have been clear. The record is insufficient for the defendant to overcome waiver in this case. The trial judge could not have made the determination that entering judgement upon the defendant’s *Alford* plea would result in a double jeopardy violation from the existing record.

b. First Degree Manslaughter and First Degree Robbery are not the same in law or fact.

Should this court find that defendant has not waived his double jeopardy challenge, defendant’s argument that his convictions violate double jeopardy fails because defendant’s convictions for first degree manslaughter and first degree robbery are not the same in law or fact.

“Offenses are legally identical unless each offense contains an element not contained in the other.” *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995). Here, the charge of manslaughter in the first degree as charged in the second amended information was committed as follows:

That Mario Mashawn Steele, in the State of Washington, on or about the 16<sup>th</sup> day of January, 2011, did unlawfully and feloniously participate in the assault of Lenard Masten, thereby recklessly

causing the death of Lenard Masten, a human being, on or about the 16<sup>th</sup> day of January, 2011...

CP 2 – 3.

Manslaughter is not a specific intent crime and does not require an intent to cause a particular result. *State v. Red* 105 Wn. App. 62, 18 P.3d 615 (2001), *reconsideration denied, review denied* 145 Wn.2d 1036, 43 P.3d 20. “Recklessly,” in the context of a charge for manslaughter, means that a person knew of and disregarded a substantial risk that a homicide may occur. *State v. Jameison*, 4 Wn. App. P.2d 184, 421 P.3d 463 (2018).

The second amended information charged robbery in the first degree as follows”

...That Mario Marshawn Steele, in the state of Washington, on or about the 16<sup>th</sup> day of January, 2011, did unlawful and feloniously take personal property belonging to another with intent to steal from the person or in the presence of Lenard Masten, the owner thereof or a person having dominion and control over said property, against such person’s will by use of 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 there of, or in the immediate flight therefrom, the defendant was armed with a deadly weapon, to wit; a firearm...

CP 2 – 3.

Steele was charged with first degree robbery by the statutory alternative means that he was “armed with a deadly weapon, to-wit: a firearm.” and was not charged by the alternative means of infliction of bodily injury or display of an apparent deadly weapon. The second amended information omitted those alternatives. The evidence of the shooting or an assault as being part of the “reckless” act that caused the death of Masten does not conflict with robbery in the first degree based on being armed with a firearm.

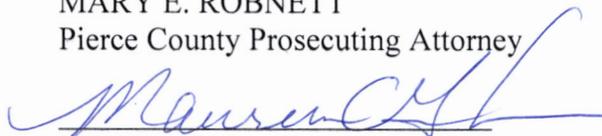
The two offenses are not the same in fact. The offenses also are not the same in law. The test is whether, as the offenses are charged, proof of one necessarily constitutes proof of another. *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Proving the first degree robbery, as charged here, does not establish first degree manslaughter because first degree robbery by means of being armed with a deadly weapon does not require actual injury to the victim. Conversely, proving manslaughter does not prove the robbery because manslaughter contains no theft element. *See State v. Cole*, 117 Wn. App. 870, 875, 73 P.3d 411 (2003) (attempted robbery by use of a knife and second degree assault not the same offense in law). Additionally, the robbery is not required to elevate the degree of manslaughter as it can be in a felony murder conviction. The two offenses in this case do not merge and do not violate double jeopardy.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests this court to affirm defendant's convictions for first degree manslaughter and first degree robbery.

DATED: January 31, 2019.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney



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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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