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Division II  
State of Washington  
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IN THE COURT OF APPEALS FOR THE  
STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,  
Respondent,

v.

MARIO MARSHAWN STEELE,  
Appellant.

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

Mr. Steele challenges his convictions and sentences for manslaughter and robbery as violating double jeopardy and merging at sentencing. The State argues that Mr. Steele cannot now make these arguments because he pleaded guilty.

Alternatively, the State argues, if the issues are cognizable, they are not meritorious.

The State is wrong.

Mr. Steele's accomplice assaulted the victim by shooting and killing him. Then, the accomplice stole the victim's property. The use of force that accompanied the theft was the homicide—charged here as manslaughter. Given how intertwined the law and facts are in this case, the multiple convictions and sentences either violate double jeopardy or merge.

## II. ARGUMENT

### Mr. Steele Did Not Waive His Double Jeopardy Challenge

Mr. Steele's double jeopardy claim is cognizable.

The law is clear. *In re Francis*, 170 Wash. 2d 517, 522, 242 P.3d 866, 869 (2010), holds that a double jeopardy challenge is not waived by a guilty plea. Where a double jeopardy violation is clear from the record, a conviction violates double jeopardy even

where the conviction is entered pursuant to a guilty plea. *State v. Knight*, 162 Wash. 2d 806, 812, 174 P.3d 1167, 1170 (2008).

The Facts Show a Double Jeopardy Violation

Of course, when a defendant pleads guilty, the factual record for the double jeopardy violation is limited. Here, Mr. Steele's guilty plea was factually premised on the probable cause statement. CP 2- 3, 5 -13.

In its response, the State asserts that the Steele was charged with first degree robbery only by the means that he was armed with a deadly weapon and was not charged with the alternative of inflicting bodily injury. The State is correct.

However, the robbery charge alleged that Steele (here, his accomplice) took the personal property of Lenard Masten, "by use or threatened use of immediate force, violence, or fear of injury" to Mr. Masten, "said force" being "used to obtain or retain possession of the property and in the commission thereof, the defendant was armed with a deadly weapon, to-wit: a firearm." The State further alleged in the amended information that the robbery and murder were "based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CP 50 - 51. As a result, the elements of the

charged robbery include the use of force which here was the homicide.

Factually speaking, the crimes are the same. The victim was shot and killed by the co-defendant, and then his property was taken. As a result, the “use” of “immediate force” charged in the robbery was the murder, which was then followed by a theft when “the shooting party rummaged through Mr. Masten's clothing and apparently took his cell phone, keys and perhaps other items.” CP 47-48.

The result would be different if the robbery was completed prior to the commission of the homicide. But those are not the facts. Here, the convictions for both robbery and murder violate double jeopardy.

#### Mr. Steele's Convictions Merge

Even if the two convictions do not violate double jeopardy, they merge for purposes of sentencing—an issue apparently not contested by the State.

Two offenses merge if, to prove a particular degree of crime, the State must prove that the crime “was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.” *State v. Vladovic*, 99 Wn.2d 413, 419 & n. 2, 662 P.2d

853 (1983). Merger applies “when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code.” *State v. Parmelee*, 108 Wash.App. 702, 710, 32 P.3d 1029 (2001). Where one crime is so factually intertwined with the other crime so that there is no “independent purpose,” the crimes merge for sentencing. *State v. Williams*, 131 Wn. App. 488, 499, 128 P.3d 98 (2006) (addressing the merger of attempted robbery and felony murder of the same victim).

For example, in *State v. Peyton*, 29 Wash.App. 701, 720, 630 P.2d 1362 (1981), the reviewing court determined that the underlying offense of robbery did not merge with first degree murder because the robbery was a “separate and distinct act independent of the killing.” 29 Wash.App. at 720 (where officer was shot when defendant was fleeing from robbing a bank). The robbery did not merge with the homicide because it was disconnected in time, place, and circumstances. 29 Wn. App. at 719-20. See also *Matter of Schorr*, 191 Wash. 2d 315, 318, 422 P.3d 451, 454 (2018) (homicide followed completed robbery so crimes did not merge).

However, in *State v. Saunders*, 120 Wash. App. 800, 821, 86 P.3d 232, 244 (2004), where the two crimes occurred almost

contemporaneously in time and place and the sole purpose of one crime was to enable the second, the crimes merged.

Here, like in *Saunders*, the force used to accomplish the robbery *was* the homicide. It was this same use of force which elevated the theft of property from the victim into a robbery. The robbery was completed only by the homicidal use of force. Unlike in the cases where the crimes did not merge, there was no “separate and distinct” act of threatened or actual force used to accomplish the robbery other than the homicidal act.

### III. CONCLUSION

This Court should reverse and remand for either for dismissal of the robbery or for the merger of that charge with the manslaughter and for resentencing.

DATED this 4<sup>th</sup> day of March 2019.

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