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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36601-4-III

STATE OF WASHINGTON, Respondent,

v.

GERALD ANTHONY BROWN, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The State concedes that separate convictions for second degree assault and first degree robbery arising from the same conduct violate double jeopardy. *Respondent's Brief*, at pp. 7-9. However, the State contends that the legislature intended to separately punish charges of third degree theft and theft of a firearm both from each other, and from a robbery in which the conduct constituting the taking of property is the same conduct constituting the thefts. *Respondent's Brief*, at pp. 8-9.

The State addresses its argument to the theft of a firearm statute and does not argue that the legislature intended to separately punish third degree theft from robbery. *See generally Respondent's Brief*, at pp. 9, 10-14. Although Washington courts have not ruled on the question in any published case, multiple other jurisdictions have held that theft merges into a robbery involving the same property. *See, e.g., State v. Hayes*, 7 S.W.3d 52, 56 (Tenn. Ct. App. 1999) (theft is lesser-included offense of robbery and therefore subsumed into it for double jeopardy purposes); *Hamilton v. State*, 487 So.2d 407, 408 (Fla. Ct. App. 1986) (grand theft merges into robbery for single incident); *State v. Ford*, 738 A.2d 937, 944 (N.H. 1999) (double jeopardy violated where same conduct underlies theft and robbery convictions); *Clayton Motors v. Commonwealth*, 417 S.E.2d 314, 315 (Va. Ct. App. 1992) (larceny of same property involved in

robbery barred by double jeopardy); *Wethington v. State*, 655 N.E.2d 91, 97 (Ind. Ct. App. 1995) (auto theft conviction merges with robbery of same vehicle); *Tomomitsu v. State*, 995 P.2d 323, 327 (Hawaii Ct. App. 2000) (robbery and theft of same property prohibited by double jeopardy); *Norris v. U.S.*, 585 A.2d 1372, 1373 (D.C. Ct. App. 1991) (agreeing that theft merges into robbery); *Lloyd v. Commonwealth*, 324 S.W.3d 384, 390-91 (Ky. 2010) (legislature did not intend to separately punish robbery and same underlying theft); *but cf. Southwell v. State*, 740 S.E.2d 725, 726 (Ga. Ct. App. 2013); *Spitzinger v. State*, 665 A.2d 685, 688 (Md. Ct. App. 1995); *Collins v. Lockheart*, 771 F.2d 1580 (8th Cir. 1985).

Indeed, in many of these decisions, courts have reasoned that because theft is a lesser included offense of robbery, the offenses are the same in law and therefore may not be separately punished. *See e.g. State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 6, 304 P.3d 906 (2013), *affirmed*, 180 Wn.2d 975 (2014) (vacating conviction of lesser assault on double jeopardy grounds when defendant was also convicted of greater assault); *State v. Hancock*, 190 Wn. App. 847, 854, 360 P.3d 992 (2015), *review denied*, 185 Wn.2d 1032 (2016) (recognizing lesser included offenses receive double jeopardy protection). Although not binding, an unpublished opinion of the Court of Appeals concluding that theft may be a lesser included offense of robbery may be considered for persuasive

value under GR 14.1. *State v. Mings*, 8 Wn. App. 2d 1028 at *2 (2019) (agreeing that the wrongful taking of property constituting a theft is the same wrongful taking of property necessary to prove a robbery). Indeed, the Washington Supreme Court has recognized that the distinction between theft and robbery is the use or threatened use of force – one is an unlawful taking, and one is an unlawful taking by force. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

Thus, contrary to the State's argument, there is nothing in the structure of the theft and robbery statutes indicating an intent to separately punish the taking of property by force under both sections. Both offenses are the same in law – the taking of property is elevated to a robbery by the use of force. The State cites no legislative history concerning the adoption of the theft and robbery statutes to support its argument that separate punishments were intended. Thus, there is no basis for departing from the ordinary application of the merger doctrine, which is itself a method of discerning legislative intent based upon the adoption of increased punishment for a greater crime subsuming the lesser crime that is also committed. *See State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

The State presents a stronger argument for separately punishing theft of a firearm based upon the legislature's decision to distinguish and impose greater punishment for that offense than for other forms of second degree assault. *See Respondent's Brief* at 13-14. Nevertheless, the State's argument overlooks that the legislature's intent to punish theft of a firearm more harshly than other thefts does not establish the legislature's intent to punish the taking of a firearms separately from all other chargeable offenses, particularly when the legislature imposes a greater sentence for the greater crime of robbing a person of a firearm. *See State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983).

Indeed, the State's generalized argument that the legislature intended to punish theft of a firearm separately from all other offenses would permit the State to obtain separate convictions for theft and theft of a firearm for taking the same gun. But nowhere did the legislature express such an intent, which would be an extraordinary exception to the presumption that the legislature does not intend to separately punish a lesser crime necessarily committed in carrying out the greater one. *See Freeman*, 153 Wn.2d at 773. Indeed, the legislature defined theft of a firearm by reference to the same statute defining other types of thefts, such that the distinguishing feature between the offenses is the type of property taken. RCW 9A.56.300(4). And while the statute states that each firearm

taken is a separate offense, it does not require separate punishments for each offense. *State v. Roose*, 90 Wn. App. 513, 517, 957 P.2d 232 (1998). Again, this statutory structure offers no support for the State's position that the legislature intended a separate punishment when a gun is taken during a robbery, when the punishment for robbery is already significantly greater than the punishment for stealing a firearm.

Consequently, the State's argument that Brown's separate convictions for third degree theft and theft of a firearm are permitted when he was separately convicted for robbing the victims of the same property is contrary to the interpretations of other jurisdictions, the recognition that theft may be a lesser included offense of robbery, and the presumption inhering in the merger doctrine that separate punishments are not intended. This court should hold that a defendant who unlawfully takes a gun by force necessarily unlawfully takes a gun, and the punishment for taking the gun is subsumed into the greater robbery conviction. Accordingly, Brown's convictions for third degree theft and theft of a firearm should be vacated on double jeopardy grounds.

II. CONCLUSION

For the foregoing reasons, Brown respectfully requests that the court VACATE his convictions for second degree assault, theft of a firearm, and third degree theft as violative of double jeopardy.

RESPECTFULLY SUBMITTED this 26 day of December,
2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 26 day of December, 2019 in Kennewick, Washington.



Andrea Burkhart

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