No. 97498-5

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MARIO MARSHAWN STEELE,
Appellant.

PETITION FOR REVIEW

Jeffrey E. Ellis #17139
Attorney for Mr. Steele
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
503.222.9830 (o)
JeffreyErwinEllis@gmail.com

I. IDENTITY OF PETITIONER

Mario Steele asks this court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed Mr. Steele's sentence by an opinion dated July 9, 2019, which is attached.

III. ISSUES PRESENTED FOR REVIEW

Where a defendant is convicted of robbery and manslaughter and where the homicide constitutes the only evidence of force used to obtain the victim's property do the crimes merge for purposes of sentencing? Does the Court of Appeals decision conflict with decisions of this Court, as well as other decisions of the Court of Appeals?

IV. STATEMENT OF THE CASE

Mr. Steele was charged and convicted of first-degree robbery and manslaughter. The State charged Steele with manslaughter based on Steele's "participa[tion] in the assault of Lenard Masten" thereby recklessly causing Masten's death and that in the commission of the crime, Steele, or an accomplice, was "armed with a firearm." CP at 2. The State

charged Steele with robbery based on Steele's "tak[ing of] personal property belonging to another with intent to steal from the person . . . by use or threatened use of immediate force, violence, or fear of injury . . . and in the commission therefore, or in immediate flight therefrom, [Steele] was armed with a deadly weapon." CP at 3.

When he pleaded guilty, Steele agreed that the court could establish a factual basis for the plea by reviewing the statement of probable cause. It provided:

> 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 [*sic*] 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. STELLE [*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.
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> 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 tiems [*sic*]. The shooter was observed running toward Masten's apartment door. Assailants eventually ran to a nearby dark colored SUV and drove away.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Introduction

In this case, the use of force elevating the theft of property to a robbery was the charged homicide. There is no evidence of any other use or threatened use of force. Mr. Masten's property was taken from him only after he had been shot and killed. This was not a case where the theft occurred after the threatened use of force but before the actual use of force.

Factually speaking, the use of force in both crimes is 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.

Legally speaking, Mr. Steele would have faced a lesser sentence if he had been charged with manslaughter and theft, rather than robbery. A felony theft would have counted as one, not two points.

Nevertheless, the Court of Appeals held that the crimes did not merge. The lower court held: "Because the degree of one offense is not raised by conduct separately criminalized by the legislature and each crime has an independent purpose or effect, the two convictions do not merge for sentencing purposes." *Opinion*, p. 3. The lower court was wrong on both points. The theft was raised to a robbery by the "separately criminalized" use of force, which here resulted in the victim's death and which was charged as manslaughter. Moreover, the facts reveal no independent purpose for that use of force. The victim was shot and killed and then his property was taken. If, on the other hand, there was evidence of the threatened use of force to obtain or attempt to obtain property from the victim or if the theft had occurred before the homicidal violence the result would have been

different. Under these facts, the crimes merge. Because the lower court's decision conflicts with other decisions, review is warranted.

The Merger Doctrine

"Merger" is a "doctrine of statutory interpretation used to determine whether the Legislature intended to impose multiple punishments for a single act which violates several statutory provisions." *State v. Vladovic*, 99 Wash.2d 413, 419 n. 2, 662 P.2d 853 (1983). The judiciary has developed the merger doctrine over time as an extension of double jeopardy principles. U.S. Const. amend. V. It represents an " 'aversion to prosecuting a defendant ... based on acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not fairly be attributed to them.' " *State v. Berg*, 181 Wash. 2d 857, 865, 337 P.3d 310, 313 (2014); *State v. Green*, 91 Wash.2d 431, 458–59, 588 P.2d 1370 (1979) (*Green* I) (Utter, J. dissenting) (quoting *People v. Cassidy*, 40 N.Y.2d 763, 765–67, 358 N.E.2d 870, 390 N.Y.S.2d 45 (1976)). Put another way, the merger doctrine is another aid in determining legislative intent, even when two crimes have formally different elements.

State v. Freeman, 153 Wash. 2d 765, 772, 108 P.3d 753, 757 (2005).

To illustrate, in *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), the defendant was convicted of first-degree rape, first degree kidnapping and first degree assault, all based on the same acts. This Court vacated the assault and kidnapping convictions, noting that to convict a defendant of first-degree rape, the state must prove not only the rape itself, but also the commission of a separate underlying felony. Proof of the underlying felony operates to enhance the punishment for the rape by converting what otherwise would have been a second-degree rape into a first-degree rape.

Accordingly, under the holding of *Johnson*, the State may not obtain a conviction for a lesser felony in addition to the greater felony unless it involves some injury to the victim which is separate and distinct from, and not merely incidental to, the greater felony. "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. In *In re Francis,* 170 Wash. 2d 517, 524–25, 242 P.3d 866, 870 (2010), where Francis was charged with robbery and assault, this Court presumed that the legislature intended to punish Francis' second degree assault through a greater sentence for the attempted first degree robbery.

Of course, this Court has never ruled out the possibility that, in the course of a robbery, a separate assault on a victim may occur; and recognized as much in *State v. Tvedt*, 153 Wash.2d 705, 716 n. 4, 107 P.3d 728 (2005). See also *State v. Kier*, 164 Wash. 2d 798, 814, 194 P.3d 212, 219 (2008). If each crime has "an independent purpose or effect" they may be punished separately. *Freeman,* 153 Wn.2d at 773.

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.

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.

The main flaw in the analysis of the Court of Appeals in this case is that it examined merger only from the perspective of whether the robbery was part and parcel of the manslaughter. That analysis places the emphasis in the wrong place. The question posed by this case is whether the use of force, elevating the taking from theft to robbery, was independent from the manslaughter. It was not.

Because the decision below conflicts with the above-cited caselaw, this Court should accept review and reverse.

VI. CONCLUSION

This Court should grant review, reverse and remand for the merger of the charges and for resentencing.

DATED this 31st day of July 2019.

/s/ Jeffrey Erwin Ellis
Jeffrey E. Ellis #17139
Attorney for Mr. Steele
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
JeffreyErwinEllis@gmail.com

Filed
Washington State
Court of Appeals
Division Two

July 9, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARIO MARSHAWN STEELE, Appellant.	No. 51505-9-II UNPUBLISHED OPINION

MELNICK, P.J. — Mario Steele appeals his convictions for manslaughter in the first degree and robbery in the first degree. He argues that the convictions violate double jeopardy, requiring dismissal of the lesser offense (robbery in the first degree). In the alternative, he argues his convictions merged, requiring a remand for resentencing. In his statement of additional grounds for review (SAG), Steele alleges that sufficient evidence does not support his convictions and prosecutorial misconduct. We affirm his convictions and sentence.

FACTS

On the evening of January 16, 2011, Lenard Masten was shot and killed at his apartment complex in Lakewood. Earlier that day, Masten sold cocaine to Steele and another man who Steele knew as "Dre." Clerk's Papers (CP) at 47. Being dissatisfied with the quality of the cocaine, Steele and Dre decided they would rob Masten to get their money back. Steele set up a meeting to confront Masten. Steele's phone records show a brief call between Steele's phone and Masten's phone minutes before the murder. During a confrontation, Masten was shot. Witnesses saw one of the men rummaging through Masten's clothing and taking Masten's phone, keys, and other items.

The State originally charged Steele with murder in the first degree. Steele entered an *Alford*[1] plea to manslaughter in the first degree while armed with a firearm and robbery in the first degree. The State charged Steele with manslaughter based on Steele's "participa[tion] in the assault of Lenard Masten" thereby recklessly causing Masten's death and that in the commission of the crime, Steele, or an accomplice, was "armed with a firearm." CP at 2. The State charged Steele with robbery based on Steele's "tak[ing of] personal property belonging to another with intent to steal from the person . . . by use or threatened use of immediate force, violence, or fear of injury . . . and in the commission therefore, or in immediate flight therefrom, [Steele] was armed with a deadly weapon." CP at 3.

Steele agreed that, based on the evidence, there was a substantial likelihood that a trier of fact could find him guilty of the charges. Steele agreed that the court could establish a factual basis for the plea by reviewing the statement of probable cause. It provided:

> 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 [sic] Mr. Masten. Mr. Masten had a gunshot wound to his stomach. Mr. Masten was transported to St. Joseph Hospital, where he died in surgery.
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> 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. STELLE [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).
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> 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.

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

> 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 tiems [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.

On August 31, 2012, the trial court accepted Steele's plea and followed the agreed sentencing recommendation, which was 185 months (125 months plus 60 months on the firearm enhancement) on the manslaughter conviction and 54 months on the robbery conviction to run concurrently. On February 20, 2018, Steele appealed.[2]

ANALYSIS

Steele contends his convictions for manslaughter in the first degree and robbery in the first degree violate double jeopardy, requiring dismissal of the lesser offense (robbery in the first degree). In the alternative, he argues his convictions merge, requiring a remand for resentencing. We disagree with both assertions.

I. DOUBLE JEOPARDY

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution provide protections against double jeopardy. *State v. Brown*, 159 Wn. App. 1, 9, 248 P.3d 518 (2010). These double jeopardy clauses prohibit the State from punishing an offender multiple times for the same offense. *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006). We review double jeopardy claims de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

[2] A commissioner of this court granted Steele's motion to file a late notice of appeal.

Initially, the State argues that by pleading guilty in 2012, Steele waived his right to collaterally attack his convictions based on double jeopardy grounds. "A guilty plea generally insulates the defendant's conviction from collateral attack." *State v. Knight*, 162 Wn.2d 806, 811, 174 P.3d 1167 (2008). However, there are exceptions to the general rule, and particularly where "on the face of the record the court had no power to enter the conviction or impose the sentence." *United States v. Broce*, 488 U.S. 563, 569, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989). Therefore, our review in this case is limited to whether a double jeopardy violation is apparent from our record. *In re Pers. Restraint of Schorr*, 191 Wn.2d 315, 324, 422 P.3d 451 (2018). This means that we look solely to the probable cause statement, which Steele agreed provided the factual basis for his pleas.

To determine if a defendant has been punished multiple times for the same offense, we traditionally apply the "same evidence" test. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). "The same evidence test mirrors the federal 'same elements' standard adopted in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)." *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). Under the same evidence test, double jeopardy is violated when a defendant is convicted of offenses which are the same in law and in fact. *Calle*, 125 Wn.2d at 777-78. If each offense, as charged, includes elements not included in the other, or requires proof of a fact that the other does not, the offenses are different and multiple convictions can stand. *Calle*, 125 Wn.2d at 777-78. The inquiry requires a case-by-case determination. *State v. Freeman*, 153 Wn.2d 765, 780, 108 P.3d 753 (2005).

As charged in this case, manslaughter in the first degree occurs when a person "recklessly" causes the death of another person. RCW 9A.32.060(1)(a). Robbery in the first degree occurs when a person takes personal property belonging to another with intent to steal from the person by

use or threatened use of immediate force, violence, or fear of injury and in the commission therefore, or in immediate flight therefrom, he or she was "armed with a deadly weapon." RCW 9A.56.200(1)(a)(i).

Proving robbery in the first degree, as charged here, does not establish manslaughter in the first degree because robbery in the first degree by means of being armed with a deadly weapon does not require actual injury to the victim. Indeed, a robbery can occur even though the taking is not completed until after the victim's death. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). 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). Thus, the two offenses are not the same in law.

The offenses are also not the same in fact. 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. Separate facts support each conviction. Therefore, Steele's convictions for manslaughter in the first degree and robbery in the first degree do not violate double jeopardy.

II. MERGER

Turning to Steele's merger argument, like double jeopardy, we review alleged merger violations de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

"The merger doctrine, independent of double jeopardy concerns, evaluates whether the legislature intended multiple crimes to merge into a single crime for punishment purposes." *State v. Novikoff*, 1 Wn. App. 2d 166, 172-73, 404 P.3d 513 (2017). "The merger doctrine applies only

when, in order to prove a more serious crime, the State must prove an act that a statute defines as a separate crime." *Novikoff*, 1 Wn. App. 2d at 173.

The merger doctrine applies when the legislature clearly indicates that it did not intend to impose multiple punishments for a single act that violates several statutory provisions. *State v. Vladovic*, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983). "[W]hen 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 Wn.2d at 772-73 (legislature intended to punish assault in the first degree and robbery in the first degree separately). If each crime has "an independent purpose or effect" they may be punished separately. *Freeman*, 153 Wn.2d at 773. We determine whether convictions merge on a case-by-case basis. *State v. Saunders*, 120 Wn. App. 800, 821, 86 P.3d 232 (2004).

Here, Steele pleaded guilty to manslaughter in the first degree and robbery in the first degree. As discussed above, Steele recklessly caused the death of Masten by setting up a meeting between Steele, Masten, and Dre. Masten admitted that he believed Dre was going to "rob or assault" Masten. CP at 48. Masten was then shot. After the manslaughter, witnesses saw one of the men take personal property from Masten.

Because the degree of one offense is not raised by conduct separately criminalized by the legislature and each crime has an independent purpose or effect, the two convictions do not merge for sentencing purposes.

III. SAG ISSUES

In his SAG, Steele first expresses his remorse for his actions and then appears to argue that sufficient evidence does not support his convictions and prosecutorial misconduct. A defendant waives a sufficiency of the evidence arguments when he or she pleads guilty. *In re Pers. Restraint*

of Bybee, 142 Wn. App. 260, 268, 175 P.3d 589 (2007). Moreover, Steele does not provide meaningful argument to explain his prosecutorial misconduct argument to warrant review. *See* RAP 10.10(c) (appellate court not obligated to search record in support of claims made in SAG); *see also State v. Meneses*, 149 Wn. App. 707, 716, 205 P.3d 916 (2009) (although a defendant is not required to cite to the record or authority in his SAG, "he must still 'inform the court of the nature and occurrence of [the] alleged errors.'"). Accordingly, we decline to reach Steele's SAG issues.

CONCLUSION

Because Steele's convictions for manslaughter in the first degree and robbery in the first degree do not violate double jeopardy or merge and because he raises no meritorious issues in his SAG, we affirm Steele's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, P.J.

We concur:

Sutton, J.

Glasgow, J.

ALSEPT & ELLIS

July 31, 2019 - 2:16 PM

Filing Petition for Review

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