**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

DIVISION ONE
FILED: 09/13/2012
RUTH A. WILLINGHAM, CLERK
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| STATE OF ARIZONA, | ) | No. 1 CA-CR 11-0068 |
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| Appellee, | ) | DEPARTMENT C |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| FRANK GUTIERREZ MEDINA, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |
| | ) | |

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200801177

The Honorable Andrew W. Gould, Judge

**AFFIRMED IN PART; VACATED IN PART**

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Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
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Attorneys for Appellee

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Attorneys for Appellant

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**B R O W N**, Judge

**¶1** Frank Gutierrez Medina appeals his convictions and sentences on nineteen felonies. He argues the evidence was insufficient to establish armed robbery, several of the

convictions were multiplicitous and violated his double jeopardy rights, and the trial court erred in failing to vacate his second-degree murder conviction after the jury had convicted him of first-degree felony murder for the same homicide. For the following reasons, we vacate Medina's convictions and sentences on Count 1 for second-degree murder, Count 4 for armed robbery, Counts 10 and 13 for assisting a criminal street gang by committing murder and armed robbery, and Count 19 for theft. We affirm Medina's convictions and sentences on all remaining counts.

## BACKGROUND[1]

**¶2** On December 31, 2007, Medina and his girlfriend, Vanessa Rodriguez, attended a party at the home of Rodriguez's brother, Rafael Torres, where they all smoked methamphetamine ("meth"). Torres and Manuel Salazar, Jose Guzman, and Kimberly Rivera were gang members, but Medina was not. After midnight, Rodriguez drove Medina, Torres, Salazar, Guzman, and Rivera to an abandoned house to continue smoking meth. When they ran out of meth, they went to "go get more."

**¶3** They first drove to an apartment complex, but left after Medina reported seeing a security guard. Rodriguez then

[1] We view the evidence introduced at trial in the light most favorable to sustaining Medina's convictions. *See State v. Moody*, 208 Ariz. 424, 435, ¶ 2 n.1, 94 P.3d 1119, 1130 n.1 (2004).

drove them to G.S.'s trailer because they knew he had recently received a shipment of meth. Medina, Torres, Salazar, and Guzman got out of the vehicle, with Medina carrying a shotgun and Guzman a handgun. Guzman unscrewed the porch light and knocked on the door of the trailer. When G.S. opened the door, Medina told Guzman to shoot. Guzman fired one shot toward the door. Medina grabbed the handgun and fired one or two more shots at G.S., and the four men chased him inside the trailer. Guzman heard one or two more shots as he entered.

**¶4** While Medina and Torres followed G.S. down the hall, Salazar and Guzman began looking for things to steal. Medina fired another shot at G.S. using the handgun, gave Guzman the handgun, and then shot G.S. in the head with the shotgun. As Rodriguez drove the four men away, Salazar showed the others a pistol he had taken from the trailer.

**¶5** Medina was charged with first-degree premeditated murder (Count 1); first-degree felony murder (Count 2); two counts of armed robbery (Counts 3 and 4); aggravated robbery (Count 5); first-degree burglary (Count 6); aggravated assault (Count 7); two counts of conspiracy to commit first-degree murder (Counts 8 and 20); two counts of conspiracy to commit armed robbery (Counts 9 and 21); nine counts of assisting a

criminal street gang (Counts 10 though 18); and theft (Count 19).[2]

**¶6** Following a nine-day trial, a jury convicted Medina of the lesser-included offense of second-degree murder on Count 1, and of felony murder on Count 2, both for the murder of the victim. Additionally, he was found guilty of the charged offenses on Counts 3 through 19, with the armed robberies committed in Counts 3 and 4 classified as dangerous offenses. The trial court granted a judgment of acquittal on Counts 20 and 21.

**¶7** The court sentenced Medina to 22 years on Count 1; imprisonment for natural life on Count 2; 28 years on Counts 3, 4, 6, and 9; 20 years on Counts 5 and 7; 25 years on Counts 8 and 10 through 18; and 4.5 years on Count 19. The court ordered that the sentences be served concurrent to each other, but consecutive to the sentences Medina was serving for a prior conviction. Medina timely appealed.

## DISCUSSION

### A. Sufficiency of Evidence of Armed Robbery

**¶8** Medina argues the State offered insufficient evidence to support his convictions for armed robbery on Counts 3 and 4

[2] Counts 20 and 21 were based on the incident at the apartment complex; the remaining counts were in reference to the victim.

because the evidence showed that Medina and his accomplices intended to steal drugs, and it was only after the victim died and they had abandoned the search for drugs that Salazar stole the pistol. For this argument, he relies on cases in which our supreme court held the evidence was insufficient to support a robbery conviction because it failed to show the defendant intended to commit robbery at the time he used force against the victim. *See State v. Wallace*, 151 Ariz. 362, 365-66, 728 P.2d 232, 235-36 (1986) (noting that defendant stole ten dollars as an afterthought from wallet of person he murdered in order to get drunk); *State v. Lopez*, 158 Ariz. 258, 263-64, 762 P.2d 545, 550-51 (1988) (finding defendant's intent to steal the victim's property was formulated after the killing to delay identification and aid in defendant's escape).

**¶9** We review the sufficiency of the evidence to support a conviction de novo. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011). We view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted).

**¶10** A person commits armed robbery if: (1) "in the course of taking any property of another from his person or immediate presence and against his will," (2) "such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property," (3) while "armed with a deadly weapon" or "us[ing] or threaten[ing] to use a deadly weapon." Ariz. Rev. Stat. ("A.R.S.") §§ 13-1902(A) and -1904(A)(1), (2) (2010). To prove armed robbery, the State must therefore present evidence "establishing that defendant's intent to commit robbery was coexistent with his use of force." *State v. Comer*, 165 Ariz. 413, 420-21, 799 P.2d 333, 340-41 (1990) (citation and emphasis omitted) (holding evidence that defendant was out of funds, invited the victim for dinner, killed him, returned to the victim's campsite "as soon as practicable" afterward, and stole property was sufficient to support the inference that he intended to take property when he shot the victim).

**¶11** The evidence here demonstrates that Medina and his accomplices went to the victim's trailer to steal meth, shot at the victim as soon as he opened the door, and continued firing as he retreated down a hallway. The evidence does not support Medina's argument that Salazar grabbed the pistol on the way out of the trailer as an afterthought once it was clear the victim was dead. Guzman testified that he and Salazar were rummaging

through the victim's belongings while Medina and Torres followed the victim down the hallway. A jury could reasonably infer that Medina and his accomplices went into the trailer with the intent to steal, and Salazar stole the pistol while Medina was shooting at the victim.

**¶12** Nor is there any support for Medina's argument that robbery can only be established if the property actually taken was the same property the defendant intended to take when he used force against the victim. The robbery statute has no such requirement. *See* A.R.S. § 13-1902(A); *Comer*, 165 Ariz. at 416-17, 421, 799 P.2d at 336-37, 341 (affirming conviction for armed robbery although the property defendant actually took was not the money, gas, or food he lacked). Moreover, in light of the testimony that Medina's accomplices were "looking for things" while Medina and Torres followed the victim down the hall and shot at him, we cannot say that the intent to take the victim's property was limited to the intent to take meth. We conclude the evidence was sufficient to establish the elements of armed robbery.

**B. Multiplicity of Armed Robbery Counts**

**¶13** Medina argues the court fundamentally erred in not dismissing the conviction for armed robbery on Count 4 on grounds that his convictions on Counts 3 and 4 were multiplicitous and violated double jeopardy. The grand jury

indicted Medina on two counts of armed robbery: Count 3 alleged that he committed the offense "while armed with a deadly weapon," and Count 4 alleged that he committed the offense "using or threatening to use a deadly weapon." The court denied Medina's motion for judgment of acquittal on one of the counts, but noted that if the jury returned verdicts of guilt on both counts, Medina "could only be convicted of one. And I believe the remedy would be to dismiss either Count 3 or Count 4." At sentencing, however, Medina failed to seek dismissal of either of the convictions, and the court did not do so *sua sponte*.

**¶14** The State concedes error, and we agree. We review claims of multiplicity and double jeopardy de novo. *State v. Powers,* 200 Ariz. 123, 125, ¶ 5, 23 P.3d 668, 670 (App. 2001). "Multiplicity is defined as charging a single offense in multiple counts." *State v. Bruni*, 129 Ariz. 312, 318, 630 P.2d 1044, 1050 (App. 1981). Double jeopardy bars multiple punishments for the same offense. *Ohio v. Johnson,* 467 U.S. 493, 497-98 (1984). Because a conviction is considered "punishment," double jeopardy bars convictions of multiple counts for a single offense. *Ball v. United States,* 470 U.S. 856, 861-62, 864-65 (1985).

**¶15** Whether Counts 3 and 4 charged a single offense or multiple offenses requires interpretation of the armed robbery statute. Armed robbery under § 13-1904(A)(1), as charged in

Count 3, requires proof that the defendant committed a robbery while "armed with a deadly weapon." Armed robbery under § 13-1904(A)(2), as charged in Count 4, requires proof that the defendant committed a robbery and "[u]se[d] or threaten[ed] to use a deadly weapon."

**¶16** To determine whether the statute describes a single offense that might be committed in more than one way, or several distinct offenses, each constituting armed robbery, we assess whether: 1) "there is a readily perceivable connection between the various acts set forth"; 2) "the acts are consistent with and not repugnant to each other," i.e., whether proof of one would disprove another; and 3) "the acts may inhere in the same transaction." *State v. Dixon,* 127 Ariz. 554, 561, 622 P.2d 501, 508 (App. 1980) (holding that theft was a single offense that might be committed in more than one way). We also look to the statute's title as a "summary of the offenses the legislature intended to create." *State v. Brown*, 217 Ariz. 617, 620, ¶¶ 8, 10, 177 P.3d 878, 881 (App. 2008) (holding that the acts of sale and transfer of narcotic drugs in A.R.S. § 13-3408(A)(7) describe a single offense).

**¶17** The elements of armed robbery as defined in the separate subsections of the same statute are not materially different from each other, supporting an interpretation that armed robbery is a single offense that might be committed in two

ways. The different subsections share a connection in that they both involve a deadly weapon: in (A)(1), the defendant must be only armed with it, and in (A)(2), the defendant must use or threaten to use it. The fact of being armed with a deadly weapon is consistent with using the deadly weapon or threatening to use it. The same proof might satisfy both of the subsections; it is likely that a robber is armed with the deadly weapon for the purpose of being able to use it or threaten to use it if necessary to forcibly take property from the victim, and it would be impossible to use a deadly weapon if one is not armed with it. Finally, the title of the section, "Armed Robbery; classification," further suggests that the legislature intended to create a single offense that might be committed in two different ways. For these reasons, we conclude that the two subsections of A.R.S. § 13-1904 describe a single offense that might be committed in two different ways.

**¶18** Medina's conviction for two counts of armed robbery against the same victim, based on the same conduct, violates double jeopardy. *See Ball*, 470 U.S. at 864. Generally, when two convictions cannot stand under the governing legal standards, we vacate the conviction resulting in the lesser sentence. *See State v. Jones,* 185 Ariz. 403, 407, 916 P.2d 1119, 1123 (App. 1995). Because the trial court imposed

identical sentences for the armed robbery convictions on Counts 3 and 4, we vacate the conviction and sentence on Count 4.

**C. Theft**

**¶19** Medina also argues the court erred in permitting the conviction for theft on Count 19 to stand, because it was a lesser-included offense of the armed robbery convictions on Counts 3 and 4. The court noted in denying Medina's motion for judgment of acquittal on the theft conviction that "if the jury were to come back and convict on armed robbery, the theft as a lesser included offense would be dismissed." Following his conviction on both the armed robbery and theft charges, however, Medina failed to seek dismissal of the theft conviction, and the court did not do so *sua sponte*.

**¶20** We agree with the State's concession of error on this issue. Theft is a lesser-included offense of armed robbery. *State v. Kinkade*, 147 Ariz. 250, 253, 709 P.2d 884, 887 (1985). An offense and its lesser-included offense are considered the same offense for double jeopardy purposes. *Brown v. Ohio*, 432 U.S. 161, 168 (1977). Medina's convictions on theft and armed robbery based on the same conduct therefore violate double jeopardy. *See Ball,* 470 U.S. at 864-65. A double jeopardy violation constitutes fundamental error. *State v. Price*, 218 Ariz. 311, 313, ¶ 4, 183 P.3d 1279, 1281 (App. 2008). Thus, we vacate the theft conviction and sentence. *See id.*

### D. Second-Degree Murder

**¶21** Medina next argues the court fundamentally erred at sentencing in failing to vacate his second-degree murder conviction on Count 1 after the jury had convicted him of first-degree felony murder for the same homicide. We agree.

**¶22** First-degree murder of one victim is one crime regardless of the theory underlying the guilty verdict. *See State v. Tucker,* 205 Ariz. 157, 167, ¶ 50, 68 P.3d 110, 120 (2003) ("That felony murder and premeditated murder contain different elements does not make them different crimes, rather they are simply two forms of first degree murder."); *State v. Schad,* 163 Ariz. 411, 417, 788 P.2d 1162, 1168 (1989) ("[F]irst degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder"). Because Medina was charged with committing the murder of a single victim, he could not be convicted of two murder offenses. We therefore vacate Medina's second-degree murder conviction and sentence.[3]

[3] This situation could have been avoided if the State had charged Medina with only one count of murder, based on the alternative theories of premeditated murder and felony murder. *See State v. Canion*, 199 Ariz. 227, 233, ¶ 22, 16 P.3d 788, 794 (App. 2000) (explaining that indictment was "imprudently worded" by charging both theories of first degree murder in alternative counts, "rather than simply charging first degree murder under two alternative theories in the same count"); *State v. Kelly*, 149 Ariz. 115, 116, 716 P.2d 1052, 1053 (App. 1986) (explaining why it is proper to charge both premeditated and felony murder alternatively in one count). Additionally, the jury could have been instructed that it should only consider the offense of

### E. Aggravated Assault

**¶23** Medina argues his aggravated assault conviction on Count 7 "merged" with his felony murder conviction on Count 2 under the merger doctrine outlined in *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965), and its progeny. We disagree. In *Essman,* our supreme court reversed a conviction for felony murder predicated on assault because of error in instructing the jury on second-degree felony murder, reasoning that "the felony-murder doctrine does not apply where the felony is an offense included in the charge of homicide. The acts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support a conviction for felony murder." 98 Ariz. at 235, 403 P.2d at 545 (citation omitted). Medina's argument fails on the facts of this case: the State alleged burglary and/or robbery, not aggravated assault, as the predicate offenses for felony murder in this

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second-degree murder if it was unable to unanimously agree that Medina committed felony murder or premeditated murder. *See Canion*, 199 Ariz. at 233, ¶ 22, 16 P.3d at 794 (App. 2000) ("Properly instructed, the jury would have been required to consider both theories of first degree murder before moving on to consider the lesser-included offenses on the premeditated murder count.").

case.[4] The merger rule outlined in *Essman*, to the extent it has any continuing viability,[5] has no application here. *See id.*

**F. Assisting A Criminal Street Gang**

**¶24** Medina argues his convictions for assisting a criminal street gang by committing the second-degree murder of which he was convicted on Count 1 (Count 10), the armed robbery of which he was convicted on Count 4 (Count 13), and the aggravated assault of which he was convicted on Count 7 (Count 16) should be vacated because the underlying convictions cannot stand. The jury convicted Medina on Counts 10 and 11 of assisting a criminal street gang by murdering the victim; on Counts 12 and 13 of assisting a criminal street gang by committing the armed robbery of the victim; and on Count 16 of assisting a criminal street gang by committing the aggravated assault of the victim.

**¶25** We agree that the convictions on Counts 10 and 13 must be vacated, because the underlying convictions cannot stand under Arizona law as outlined *supra* in sections B and D. Moreover, the offenses of which Medina was convicted on Counts 10 and 11 (assisting a criminal street gang by murdering the

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[4] The legislature has not identified aggravated assault as a predicate offense for felony murder. A.R.S. § 13-1105(A)(2) (2010).

[5] *See State v. Moore*, 222 Ariz. 1, 13, ¶¶ 59-60, 213 P.3d 150, 162 (2009).

victim), and the offenses of which he was convicted on Counts 12 and 13 (assisting a criminal street gang by committing the armed robbery of the victim), each constituted a single offense. The convictions on Counts 10 and 13 therefore also violated double jeopardy. *See Ball,* 470 U.S. at 864-65. We accordingly vacate the convictions and sentences on Counts 10 and 13. *See id.* The conviction on Count 16 for assisting a criminal street gang by committing the aggravated assault of the victim, however, survives because the underlying conviction for aggravated assault survives, as outlined *supra* in section E.

### G. Waiver of Attorneys' Fees Assessment

**¶26** Medina finally argues the trial court reversibly erred when it issued a written sentencing order imposing a $750 fee for attorneys' fee reimbursement after stating at the oral pronouncement that the fee would be waived. Medina is mistaken, as both the oral pronouncement and the written sentencing order state that the $750 fee for attorneys' fee reimbursement is waived.

## CONCLUSION

**¶27** For the foregoing reasons, we vacate Medina's convictions and sentences on Count 1 for second-degree murder, Count 4 for armed robbery, Counts 10 and 13 for assisting a criminal street gang by committing murder and armed robbery, and Count 19 for theft. We affirm Medina's remaining convictions and sentences.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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PATRICIA K. NORRIS, Judge

/s/

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PHILIP HALL, Judge