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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35958-1-III

STATE OF WASHINGTON, Respondent,

v.

LICO LAVOR MCKINNIE, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Whether offenses merge so as to avoid double jeopardy is a manifest error affecting a constitutional right that can be raised for the first time on appeal under RAP 2.5(a)(3).

The State concedes that McKinnie's assignment of error raises a question of constitutional magnitude. *Respondent's Brief*, at 7. However, the State contends the error is not "manifest" because it did not result in an increased sentence. *Id.*

This contention is meritless. The prejudice to Mr. McKinnie is the conviction for an additional crime that the legislature did not intend. *State v. Ralph*, 175 Wn. App. 814, 823, 308 P.3d 729 (2013), *review denied*, 179 Wn.2d 1017 (2014) (two convictions violate double jeopardy even if the defendant receives only one sentence). Furthermore, conviction of a lesser offense that raises the degree of a greater conviction is a manifest error of constitutional magnitude under RAP 2.5(a)(3). *Id.* at 822-23.

McKinnie's assignment of error falls well within the established parameters of RAP 2.5(a)(3). The court should decline the State's invitation to refuse to review the issue.

B. The parties agree that *Freeman* controls, but the State misapprehends its application here because under *Freeman*, the legislature intended only first degree assault to be punished separately from a robbery committed by means of an assault.

In *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), the Washington Supreme Court considered whether separately punishing an assault committed in furtherance of a robbery violates double jeopardy. Because the legislature has the power to define offenses, when the same conduct violates multiple criminal statutes, whether the convictions offend double jeopardy depends on whether the legislature intended to separately penalize the act under both statutes. *Id.* at 770-71.

The merger doctrine is a method of discerning legislative intent, in which the increased punishment for the greater crime subsumes the punishment for the lesser crime that elevates it. *Id.* at 772-73 (citing *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983)). In *Freeman*, the Washington Supreme Court reviewed the traditional sources of legislative intent and determined they did not implicitly or explicitly authorize separate punishments for assault in furtherance of first degree robbery. *Id.* at 773, 775. The only exception was in the case of first degree assault and first degree robbery, because in that case, the longer standard range

sentence for first degree assault conflicts with the merger doctrine's presumption that the greater crime incorporates the lesser by inflicting an increased punishment. *Id.* at 775-76.

In the case of attempted first degree assault, the punishments fall in line with the ordinary application of the merger doctrine to assault and robbery. The State concedes that by charging McKinnie with attempted first degree assault, it capped his maximum penalty at 120 months. *Respondent's Brief* at 14. Because the maximum possible sentence for attempted first degree assault is less than the standard range sentence of 129-171 months McKinnie faced for first degree robbery, under *Freeman*, the court presumes that McKinnie's higher sentence for the robbery reflects the legislature's intent to punish the assaultive act only once.

That *Freeman* correctly reflects the legislature's intent is reflected in the legislature's decision not to amend the statutes to set forth a contrary intention since *Freeman* was decided in 2005. The legislature unquestionably possesses the power to overrule Supreme Court decisions interpreting statutory terms by amending its statutes. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Had the legislature disagreed that only first degree assault is intended to be separately punished, rather than all assaults, it has had 13 years to act to overrule *Freeman*. Its failure to

take corrective action is evidence that *Freeman* needs no correction, and that its reasoning applies here to bar McKinnie's separate attempted assault conviction.

C. Because the conduct that comprised the first degree assault caused the injuries that were necessary to prove the degree of the robbery, the crimes did not have independent purpose or effect.

Lastly, although the State seeks to distinguish the assaultive conduct by suggesting it had some independent purpose from the robbery, this argument is not borne out by the record. *See Respondent's Brief* at 15-17. The assaultive conduct caused McMichael's injuries, which were necessary to prove the degree of the robbery. Indeed, in its own closing argument, the State argued it established the elements of first degree robbery by showing McKinnie used force to take the car and inflicted injury on Desirae McMichael when she was thrown from the vehicle as the result of his driving. RP (Stovall) 76. Likewise, it argued that McKinnie's aggressive driving inflicted injuries on McMichael that constituted a substantial step toward committing a first degree assault. RP (Stovall) 77-78. These arguments are inconsistent with the position the State now asserts on appeal that it could have proven a first degree robbery without also establishing the aggressive driving that injured her.

Moreover, the State's argument here that it did not need to establish aggressive driving to prove the first degree robbery amounts only to an argument that McKinnie used more force than necessary to achieve the robbery, not that the assault had an independent purpose or effect. *See Respondent's Brief* at 15-16. The State has not asserted any independent purpose served by the assault other than furtherance of the robbery, and merely showing the defendant used more than the least amount of force required to accomplish the robbery does not establish an exception to the merger doctrine. *Freeman*, 153 Wn.2d at 779 ("The test is not whether the defendant used the least amount of force to accomplish the crime.").

The State has failed to show that *Freeman* does not apply or that its reasoning does not bar McKinnie's separate attempted assault conviction. Accordingly, the attempted assault conviction should be vacated.

II. CONCLUSION

For the foregoing reasons, McKinnie respectfully requests that the court VACATE the conviction for attempted first degree assault.

RESPECTFULLY SUBMITTED this 27 day of January, 2019.

TWO ARROWS, PLLC

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

ANDREA BURKHART, WSBA #38519
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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 Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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And, pursuant to prior agreement of the parties, by e-mail to the following:

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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 this 27 day of January, 2019 in Kennewick, Washington.



Andrea Burkhart

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