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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 BRIEF

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I. INTRODUCTION

Lico McKinnie was convicted of first degree robbery and attempted first degree assault arising from a carjacking. The question presented in this appeal is whether the merger doctrine requires the attempted first degree assault conviction to be vacated when it consists of the same conduct that elevated the robbery charge to the first degree.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: McKinnie's convictions for first degree robbery and attempted first degree assault on the same victim for the same conduct violate double jeopardy under the merger doctrine.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the legislature intended to separately punish a conviction for attempted first degree assault and first degree robbery arising from the same injurious acts.

IV. STATEMENT OF THE CASE

On the afternoon of August 31, 2016, Desirae McMichael was driving from her apartment to a job interview when she stopped and got

out of her car to throw her garbage away in the dumpster. RP (10/9/17)¹ 5-7. While she was about ten feet away, she saw a tall black man running toward the car and get into the driver's seat through the open door. RP (10/9/17) at 7-8. McMichael yelled at the man to stop and then she jumped on the hood of the car. RP (10/9/17) at 9. The driver swerved as he drove away, apparently trying to shake her off the car, but she held on for about two blocks before falling off. RP (10/9/17) at 9, 12. She had road rash abrasions on her face, a concussion, and lost feeling in her knee. RP (10/9/18) at 14-16.

Several witnesses saw the incident occur. Chris Reed was visiting his mom nearby when he heard a woman screaming and saw her on the hood of a car that was driving fast while jerking and swerving. RP (10/2/17) at 40-42. Mitchell Osorno was at work when he saw a car zoom around the corner at a high rate of speed with tires screeching and a woman holding onto the hood. RP (10/2/17) at 78-80. The car was swerving back and forth as it approached and nearly struck him, as well as

¹ The Verbatim Reports of Proceeding herein consist of four volumes of proceedings, non-consecutively paginated, transcribed by three different court reporters. For clarity of reference, each volume shall be referenced throughout this brief by the date of the proceeding, as "RP (Date of proceeding) at ____."

nearby parked cars. RP (10/2/17) at 80-81. He saw the woman fall off the hood and get struck by the front tire. RP (10/2/17) at 80.

A short time later, a state trooper was called out to a hit and run in north Spokane County. RP (10/2/18) at 17-18. Witnesses present at the scene pointed out a car driving by as being involved in the incident. RP (10/2/18) at 20. The driver parked the car, got out, and walked toward the trooper, limping. RP (10/2/18) at 21-22. When asked if he was okay, the man responded that he was not and wanted more police officers to respond. RP (10/2/18) at 23. He then described jumping out of a second story room where a bunch of men with guns were chasing him. RP (10/2/18) at 23-24. The car he had been driving belonged to McMichael. RP (10/2/18) at 26. The driver did not know McMichael but said that she had winked at him and nodded at him to get in the car when he was trying to escape. RP (10/2/18) at 24-25. The trooper transported the driver to the hospital, where he was placed under arrest. RP (10/2/18) at 27, 71.

Police obtained additional information from other witnesses. Harriet Herrera, the manager of the apartments where McMichael lived, reported passing a man in the parking lot wearing red basketball shorts and a t-shirt and saying hello. RP (10/2/18) at 46-49. After seeing the car zoom by outside her window with a person on the hood, she gathered a

baseball cap, shirt, and credit card that were left at the scene and gave them to police. RP (10/2/18) at 52-53. One of the cards bore Lico McKinnie's name. RP (10/2/18) at 63. The clothing McKinnie was wearing in the hospital matched the description given by Herrera. RP (10/2/18) at 74.

Lastly, a resident at the apartment complex was moving in when he saw a man fall from an upper floor. RP (10/9/18) at 26-27. He approached the man and offered to try to get him a ride. RP (10/9/18) at 28. He thought the man was trying to get away from his girlfriend and did not seem to have anybody chasing him. RP (10/9/18) at 29. When the man's cousin refused to come pick him up after being called, the man lingered around the parking lot for 10 or 15 minutes. RP (10/9/18) at 29-30. He did not see the man have contact with any other people or anyone threatening the man with a gun before the man jumped into the lady's car and drove off with her on the hood. RP (10/9/18) at 32-33, 39.

The State charged McKinnie with attempted first degree assault and first degree robbery. CP 1. McKinnie waived a jury and the case was tried to the court. CP 41, 44-45. Testifying on his own behalf, McKinnie stated that he was at his friend Carla Ward's second-story apartment when he became aware of a short Hispanic man with a bandana around his face

holding a pistol outside the window. RP (10/9/18) at 43-45. In response, he jumped out of the window, popping his ankle. RP (10/9/18) at 45. He walked around toward the parking lot, not speaking to anybody, until he saw the Hispanic man in the bandana approaching him with some other people. RP (10/9/18) at 46-47. Thinking they were going to kill him, McKinnie threw his belongings across the parking lot, intending to leave evidence with his name and DNA on it to be found. RP (10/9/18) at 48. As he was backing away, a car pulled up and as the woman hopped out, he hopped in. RP (10/9/18) at 48-49.

McKinnie denied that he intended to injure McMichael or take her property, and only did so because he believed his life was in danger. RP (10/9/18) at 52, 59. He had already started to drive the car away when she jumped on, and he did not stop because two men in a truck were chasing him. RP (10/9/18) at 52. He was not sure where he went and he did not stop until his contact with the police. RP (10/9/18) at 53-54. He had not taken any drugs or alcohol. RP (10/2/18) at 29-30, 32, RP (10/9/18) at 59.

The trial court entered lengthy factual findings and found McKinnie guilty of attempted first degree assault and first degree robbery against McMichael. CP 61-66; RP (1/3/18) at 33, 36. McKinnie moved *pro se* for a new trial, alleging that exculpatory evidence existed that had

not been investigated or introduced at trial. CP 53-56. The evidence he alleged consisted of a recorded jail phone call and a declaration filed in a separate 2016 cause by Carla Ward, who did not testify at trial.² CP 53-54. McKinnie also contested the omission of McMichael's medical records and police dash and body cam footage, and contended that trial testimony of some of the State's witnesses was contrary to their recorded interviews. CP 54-55. None of the omitted evidence appears in the record.

Considering McKinnie's motion, the trial court first concluded that the motion was untimely. RP (3/14/18) at 15. Nevertheless, it considered each of the grounds for relief under CrR 7.5 and ruled that McKinnie's allegations did not satisfy any of them. RP (3/14/18) at 16-17, 19-20. The court reasoned that it found McKinnie's testimony inconsistent with the third-party witnesses, whom it found to be most credible, and the decision not to present the evidence at trial was tactical. RP (3/14/18) at 16-19.

At sentencing, the parties agreed to McKinnie's history and offender score. CP 69-70, RP (3/14/18) at 24, 26. The trial court imposed a sentence of 165 months on the robbery charge with a concurrent 120

² The record suggests Ward was "not receptive to testifying in this matter for either side." RP (10/2/18) at 66.

month sentence, the maximum term available, on the attempted assault. CP 74, 76. RP (3/14/18) at 24, 31-32. McKinnie now appeals, and has been found indigent for that purpose. CP 86, 88.

V. ARGUMENT

The sole issue raised in this appeal is a challenge to McKinnie's attempted first degree assault conviction. Because the acts that comprised the attempted assault – operating the car in an aggressive manner to attempt to shake McMichael loose – were the same acts that inflicted bodily injury on her, causing the robbery charge to be elevated to the first degree, both charges are the same offense within the meaning of double jeopardy jurisprudence. Accordingly, the lesser attempted assault conviction must be vacated.

Under the federal and Washington State constitutions, a person cannot receive multiple punishments for the same conviction without running afoul of the prohibition against double jeopardy. U.S. Const. amend. V; Wash. Const. art. I, § 9; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Alleged double jeopardy violations are reviewed *de novo*. *Id.* at 979-80.

The guarantee against double jeopardy protects persons from multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d

769, 776, 888 P.2d 155 (1995). Punishments are unconstitutionally cumulative when two offenses are legally identical and are based on the “same act or transaction.” *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (quoting *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932)). Offenses are not legally identical if each offense contains an element not contained in the other. *Gocken*, 127 Wn.2d at 101. However, even where offenses are not legally identical, as in the present case, the merger doctrine may apply.

Merger is a doctrine of statutory interpretation “used to determine whether the Legislature intended to impose multiple punishments for a single act that violates several statutory provisions.” *State v. Michielli*, 132 Wn.2d 229, 238, 937 P.2d 587 (1997) (quoting *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983)). The court looks to the language and intent of the statutes proscribing the offenses to determine whether multiple offenses may be punished cumulatively. *Calle*, 125 Wn.2d at 777. When the conduct of one offense elevates the degree of the second offense, the offenses merge to avoid double jeopardy. *Vladovic*, 99 Wn.2d at 419. This is because the court presumes the legislature intended to punish both offenses through the greater punishment for the greater crime. *Id.*

Courts have already considered the constitutionality of separately charging a robbery elevated to the first degree by an assault, and the assault itself, concluding that the legislature did not intend separate punishments for an assault that facilitates a robbery. *State v. Freeman*, 153 Wn.2d 765, 771, 776, 108 P.3d 753 (2005). An exception to this rule is assault in the first degree, which is penalized more harshly than a first degree robbery, so the presumption that the sentence for the first degree robbery incorporates the sentence for the lesser assault does not hold. *Id.* at 775-76. Accordingly, convictions for first degree robbery and second degree assault merge, while convictions for first degree robbery and first degree assault do not. *Id.* at 778; *see also In re Francis*, 170 Wn.2d 517, 525, 242 P.3d 866 (2010).

Although *Freeman* and *Francis* did not address the merger question as to attempted first degree assault, the merger rule applies because the attempted first degree assault carries a lower penalty than first degree robbery. *Freeman*, 153 Wn.2d at 776; CP 74 (maximum term for attempted first degree assault is 120 months, range for first degree robbery is 129-71 months).

Here, the trial court found that McKinnie used force to take McMichael's car and inflicted bodily injury on her when he drove the car

away erratically. CP 65. The same acts that satisfied element (6) of the robbery charge – the infliction of bodily injury by aggressive driving – also comprised the basis of the attempted assault charge. CP 65-66. The infliction of bodily injury is an additional element that elevates a robbery to the first degree. RCW 9A.56.200, 9A.56.210. Thus, because the same acts that elevated the robbery charge also supported the assault charge, *Freeman* is directly on point and the convictions merge.

The remedy is to vacate the lesser assault conviction. *Francis*, 170 Wn.2d at 532. Based upon his agreed criminal history, the offender score of 9+ would not change. CP 69-70 (one prior violent conviction scores as 2 points, eight prior nonviolent convictions score as 1 point each, and an additional point is added because McKinnie was on community custody). Accordingly, resentencing is not required.

Pursuant to the General Court Order dated June 10, 2016 and RAP 14.2, McKinnie respectfully requests that due to his continued indigency, the court should decline to impose appellate costs in the event he does not prevail. His report as to continued indigency is filed contemporaneously with this brief and shows that he has no assets, substantial debt, and receives food assistance. He was previously found indigent for appeal, and that presumption continues throughout review. RAP 15.2(f). In the

absence of some evidence showing a substantial change in his financial circumstances, a cost award is not appropriate. RAP 14.2.

VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 29 day of September,
2018.

TWO ARROWS, PLLC



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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 Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Lico Lavar McKinnie, DOC #840864
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And, pursuant to prior agreement of the parties, by e-mail to the following:

Brian O'Brien
Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

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

Signed this 28 day of September, 2018 in Walla Walla,
Washington.



Andrea Burkhart

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