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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LICO LAVAR MCKINNIE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

Did the legislature intend to separately punish convictions for attempted first degree assault and first degree robbery?

II. STATEMENT OF THE CASE

On August 31, 2016, Desirae McMichael was at her home in the Deer Run Apartment Complex in north Spokane, preparing for a job interview. RP (1/3/18) 16.¹ Around 2:20 p.m., she left her apartment with a bag of garbage, got in her car, and stopped near the apartment complex's dumpster to dispose of the trash. RP (1/3/18) 16. Her car door was open and the engine was running as she walked about ten feet towards the bins. RP (1/3/18) 16; CP 63. Shortly after she exited her car, an unknown male ran towards her vehicle, got into the driver's seat, and began to drive away. RP (1/3/18) 16.

In response, Ms. McMichael jumped on the hood of her vehicle, a silver Toyota Scion. RP (1/3/18) 16-17. She told the driver multiple times to "stop," but he did not. RP (1/3/18) 17. Though the parking lot of the apartment complex had a speed limit of five miles per hour, the unknown driver sped through the lot at an estimated 30 or 40 miles per hour.

¹ As noted in Appellant's Brief, the Verbatim Report of Proceedings for this matter consists of four non-consecutively paginated volumes. For clarity of reference, each volume shall be referenced by the date of the hearing.

RP (1/3/18) 35. Multiple witnesses in the area heard Ms. McMichael's screams and observed the driver of the car aggressively swerve back and forth at high speeds. RP (1/3/18) 36. The witnesses believed the driver was attempting to shake the woman from the hood of the vehicle. RP (10/2/17) 42, 80-81. Eventually, the driver turned out of the parking lot and Ms. McMichael fell from the hood of the car; she sustained serious injuries including abrasions to her face and knee, a concussion, and nerve damage to her leg. RP (1/3/18) 17-18; CP 63. She was hospitalized for three days. RP (10/9/17) 16.

The driver of the car, later identified as Lico Lavar McKinnie, was involved in a hit-and-run collision about ten minutes after absconding with Ms. McMichael's Scion; Mr. McKinnie drove north on Highway 2, was involved in a crash near a McDonald's, and fled the scene. RP (10/21/17) 20-21. He was apprehended shortly thereafter by Trooper James Taylor of the Washington State Patrol. RP (10/21/17) 21.

Mr. McKinnie was charged with attempted first degree assault of Ms. McMichael and first degree robbery of her vehicle and its contents; he waived a jury and the matter was tried to the bench before the Honorable James M. Triplet. CP 1, 61. Mr. McKinnie's defense at trial was that he was running for his life from an unidentified armed assailant

when the opportunity to escape in Ms. McMichael's vehicle presented itself.
RP (10/9/17) 79-80.

The State's argument and theory of the case was that Mr. McKinnie intended to take Ms. McMichael's vehicle against her will and used force to accomplish this theft by driving away in her vehicle when she was still holding onto it. RP (10/9/17) 73-76. Specifically, the State argued, "he used force to accomplish the taking of the property in order to retain possession of the property ... the defendant did in fact inflict bodily injury towards Ms. McMichael's person ... being thrown from her vehicle."
RP (10/9/17) 76.

The State contrasted this charge with the charge of attempted first degree assault, by arguing:

[Were] the defendant's actions intentional? The state would submit, based on the witnesses that were able to observe it, that they believe that what they saw the defendant trying to do by swerving the car, by driving fast, was in fact to throw -- throw the female off the hood; and as a result, that person sustained injuries ... it goes back to the driving and the way he was doing it.

Was that a substantial step towards the commission of first degree assault? The state would argue that in fact it was. He got in that car. He sped off. He sped off at a high rate of speed, and then he continually maneuvered the car, swerving back and forth, as a means to throw Ms. McMichael off...

RP (10/9/17) 77-78.

The trial court found Mr. McKinnie guilty as charged and entered findings and conclusions on the record. RP (1/3/18) 3. These were later memorialized into written findings.² CP 61-66. After reviewing the testimony, the trial court found all the elements of first degree robbery proven beyond a reasonable doubt. CP 65. The trial court went on to find Mr. McKinnie guilty of attempted first degree assault, specifically concluding that the defendant's speeding and "swerving back and forth" demonstrated the intent to commit assault. CP 65.

For sentencing purposes, neither party requested the trial court make a finding that the two counts encompassed the same criminal conduct or counted as one crime when determining Mr. McKinnie's offender score. *See* CP 73. Mr. McKinnie's offender score was already "9+" so it was not necessary to determine if attempted assault and robbery would count for one or for two additional "points" for sentencing purposes. CP 74; RP (3/14/18) 30-31. Similarly, Mr. McKinnie never requested the trial court consider merger of his two convictions, and he never argued each crime was based upon the same act.

² The trial court did not incorporate its oral ruling into its written findings and conclusions. A trial court's oral ruling "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment. *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966). When findings of fact following a bench trial are unchallenged, they are verities on appeal. *State v. Rodgers*, 146 Wn.2d 55, 61, 43 P.3d 1 (2002).

The trial court noted that based on Mr. McKinnie’s offender score of 9+, “the standard range on the attempted first degree assault is 180 to 230.5 months.³ However, the maximum penalty is ten years in prison,⁴ and I’m going to order that maximum penalty of 120 months.” RP (3/14/18) 30-31. On the robbery charge, the trial court sentenced Mr. McKinnie to 165 months, with the 120 months on the attempted assault running concurrently. CP 76; RP (3/14/18) 31.

Mr. McKinnie now appeals his conviction for attempted first degree assault.

III. ARGUMENT

A. THE STANDARD OF REVIEW.

Appellate courts review claims of double jeopardy de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

B. A PARTY MAY NOT GENERALLY RAISE A NEW ARGUMENT ON APPEAL THAT IT DID NOT PRESENT TO THE TRIAL COURT; THIS COURT SHOULD DECLINE REVIEW OF MR. MCKINNIE’S CLAIMS.

“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.”

³ The Felony Judgment and Sentence indicates a range of 180 to 238.5 months. CP 74.

⁴ Attempted first degree assault, a class B felony, has a statutory ten-year maximum. RCW 9A.20.021(1)(b).

State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). It is a waste of judicial resources for a party to fail to “point out at trial an error which the trial court, if given the opportunity, might have been able to correct.” *Id.* at 685.

Nevertheless, RAP 2.5(a)(3) permits an appellate court to review an unpreserved claim of error if it involves a “manifest error affecting a constitutional right.” The RAP 2.5(a)(3) analysis involves a two-prong inquiry. First, the alleged error must truly be of constitutional magnitude. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Second, the asserted error must be manifest. *Id.*

It is the constitutional guaranty against double jeopardy that protects a defendant against multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9. A double jeopardy violation occurs when, absent clear legislative intent to the contrary, the evidence required to support a conviction for one offense would have been sufficient to warrant a conviction for the other offense. *In re Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005).

Manifestness requires a showing of actual prejudice. *Kalebaugh*, 183 Wn.2d at 583. “To demonstrate actual prejudice, there must be a ‘plausible showing ... that the asserted error had practical and identifiable consequences.’” *Id.* In addition, such consequences “‘should have been

reasonably obvious to the trial court,’ and the facts necessary to adjudicate the claimed error must be in the record.” *Id.* at 588. Therefore, this Court should limit its review to unpreserved constitutional errors to those that are obvious, adjudicable from the record, and resulting in actual prejudice. Even so, the general rule remains that a criminal defendant may not obtain a new trial whenever he or she can identify a constitutional error not litigated below; the manifest error exception is a narrow one. *Scott*, 110 Wn.2d at 685.

Here, the claimed error, based in the right to be free from double jeopardy, is of constitutional magnitude, and the record is sufficient to permit review. Even so, Mr. McKinnie may not be able to establish actual prejudice. Though the claimed error resulted in an additional conviction, Mr. McKinnie’s offender score was already “9+” so additional convictions do not prejudice him in sentencing. Similarly, because by law his sentences in this case run concurrently, his conviction for attempted second degree assault did not result in a higher sentence or longer period of incarceration; it was his lengthier sentence for first degree robbery that set his term of conviction, so the sentence for attempted assault does not prejudice him in this instance. *See Kalebaugh*, 183 Wn.2d at 583. Additionally, though this case was tried before the bench, and not a jury, neither party raised this issue as an “obvious” one before the trial court. The trial court is the proper venue

to raise merger concerns, for that is where they can most easily be corrected. If Mr. McKinnie had raised this issue before the trial court, that court could have addressed it at sentencing, and avoided an unnecessary appeal. *See Scott*, 110 Wn.2d at 685.

Finally, Mr. McKinnie has not argued to this Court that his appeal represents manifest error affecting a constitutional right worthy of review; therefore, this Court should decline review of Mr. McKinnie's appeal.

C. SEPARATE SENTENCES FOR ATTEMPTED FIRST DEGREE ASSAULT AND FIRST DEGREE ROBBERY DO NOT VIOLATE DOUBLE JEOPARDY: THE LEGISLATURE INTENDED SEPARATE PUNISHMENTS, THE CONVICTIONS DO NOT RELY ON THE SAME EVIDENCE, AND THE SENTENCES SHOULD NOT MERGE.

Mr. McKinnie appeals asserting that “the acts that comprised the attempted assault – operating the car in an aggressive manner 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,” and therefore the sentence for attempted first degree assault should merge into the charge of first degree robbery. Br. of Appellant at 7. The State disputes this contention.

Our Supreme Court has adopted a three-part test for determining whether the legislature intended multiple punishments in a particular case; this test is clearly elucidated in *Freeman*. In *Freeman*, Mr. Freeman drove

his victim to a dead-end street, drew a handgun, and ordered the victim to hand over his valuables. 153 Wn.2d at 769. When the victim did not quickly comply, Mr. Freeman gratuitously fired a single shot; the victim was severely injured, robbed, and left for dead. *Id.* The victim lived, and a jury later convicted Mr. Freeman of both first degree assault and first degree robbery. *Id.*

In *Freeman*, the Washington Supreme Court analyzed the question of “whether, and if so, when, the legislature intended to punish separately both a robbery elevated to first degree by an assault, and the assault itself.” *Id.* at 771. In so doing, it addressed the three tests: legislative intent, the *Blockburger*⁵ “same evidence” test, and the merger doctrine.

Where a defendant is convicted under multiple criminal statutes for what he alleges is a single act, a reviewing court must first determine if the offenses are in fact a single act by determining if they are same in fact and in law; if they are the same, the court should determine if the legislature still intended multiple punishments. *In re Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007). It was in its analysis of the first test, looking at legislative intent, the *Freeman* court held that the legislature intended to punish first degree assault and first degree robbery separately; though the

⁵ *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

statute does not explicitly authorize separate punishments, legislative intent to punish these crimes separately may be inferred “in the fact that the two statutes are directed at different evils.” *Freeman*, 153 Wn.2d at 774.

[T]here is an important piece of evidence that recent legislatures intended to punish first degree assault and first degree robbery separately, at least under some circumstances. As the legislature is well aware, when a court vacates a conviction on double jeopardy grounds, it usually vacates the conviction for the crime that forms part of the proof of the other ... This is because the greater offense typically carries a penalty that incorporates punishment for the lesser included offence. But when a first degree assault raises a robbery to first degree robbery, the case is atypical. The standard sentence for first degree assault ... is considerably longer than the standard sentence for first degree robbery...

Id. at 775-76 (internal citations and punctuation removed). Assigning a lesser sentence for first degree robbery than for first degree assault is “anomalous because, in theory, the robbery elevated by assault should carry the greater penalty.” *State v. S.S.Y.*, 170 Wn.2d 322, 330, 241 P.3d 781 (2010). This “anomaly” signifies the legislative intent to punish the offenses separately. *Id.* This is especially true in a case like *Freeman*, where the assault was not necessary to raise the robbery to a robbery in the first degree.

If the legislature is silent on the question of separate punishments, reviewing courts apply the second test, the “same evidence” test, to

determine whether the offenses are the same, and if multiple punishments are authorized. *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). The “same evidence” test arises from the Supreme Court holding in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). This test determines whether two crimes are the same offense by seeing if each crime requires proof of elements not found in the other. *Id.* at 304. “Under the same evidence test, double jeopardy is deemed violated if a defendant is ‘convicted of offenses that are identical both in fact and in law.’” *Louis*, 155 Wn.2d at 569 (quoting *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). If each crime contains an element that the other does not, this court should presume that the crimes are not the same offense for double jeopardy purposes. *Calle*, 125 Wn.2d at 777.

In addition to comparing elements of the offenses, Washington courts also look at whether the evidence proving one crime also proved the second crime. *In re Orange*, 152 Wn.2d at 820-21. Elements are compared by looking to the charging theories of the case in addition to examining the statutory elements. *Id.* at 819-20. Even so, the fact that the same conduct is used to prove each crime is not proof that the crimes are the same. *Freeman*, 153 Wn.2d at 776.

The third test, the merger doctrine, helps courts avoid double punishment by merging a lesser offense “into the greater offense when one

offense raises the degree of another offense.” *State v. Collicott*, 118 Wn.2d 649, 668, 827 P.2d 263 (1992). Merger is a “tool for determining legislative intent in the context of double jeopardy.” *Freeman*, 153 Wn.2d at 776. “The merger doctrine is relevant only when a crime is elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code.” *State v. Parmelee*, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001). When two crimes merge, the trial court convicts the defendant only of the one offense into which the other offense merges. *Id.* at 711. An exception to the merger doctrine applies if one of the crimes involves an injury that is separate and distinct from that of the other crime; in such a case, they are separate and a person may be punished for both. *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983).

In *Freeman*, the Supreme Court determined that first degree assault and first degree robbery convictions do not merge, even when the assault forms the basis for elevating robbery to the first degree. *Freeman*, 153 Wn.2d at 776. The Court reasoned, “the legislature specifically did not intend that first degree assault merge into first degree robbery ... the sentence for the putatively lesser crime of assault is significantly greater than the sentence for the putatively greater crime of robbery.” *Id.* at 778. Ultimately, “even if on an abstract level two convictions appear to be for the same offense or for charges that would merge, if there is an independent

purpose or effect to each, they may be punished as separate offenses.” *Id.* at 776. It is therefore necessary to survey the elements of the crimes of attempted first degree assault and first degree robbery.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime; an attempted crime is a class B felony when the crime attempted is a class A felony. RCW 9A.28.020(1), (3)(b).

A person is guilty of assault in the first degree if, with intent to inflict great bodily harm, he assaults another by any force or means likely to produce great bodily harm or death. RCW 9A.36.011(1)(a), RCW 9A.04.110(6), (29). Consequently, an attempted assault in the first degree occurs when a person does an act that is a substantial step towards intentionally inflicting great bodily harm on another person. Assault in the first degree is a class A felony; therefore, attempt to commit that crime is a class B felony. RCW 9A.36.011(2).

A person commits robbery when he unlawfully takes personal property from the person of another or in her presence against her will by the use or threatened use of immediate force, violence, or fear of injury to that person or her property; force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. RCW 9A.56.190.

A person is guilty of robbery in the first degree if in the commission of a robbery or of immediate flight therefrom, he inflicts bodily injury on another. RCW 9A.56.200(1)(a)(i)(iii). Intent to cause bodily injury is not an element of robbery in the first degree. *State v. Decker*, 127 Wn. App. 427, 431, 111 P.3d 286, 288 (2005). Robbery in the first degree is a class A felony. RCW 9A.56.200(2).

As stated above, *Freeman* controls Mr. McKinnie's case. Looking first to legislative intent, Mr. McKinnie's standard range sentence for attempted first degree assault, like in *Freeman*, is significantly longer than the standard range sentence for first degree robbery. *See Freeman*, 153 Wn.2d at 775-76. The trial court noted that Mr. McKinnie's standard range sentence for first degree assault was 180 to 238.5 months and his standard range sentence for first degree robbery was 129 to 171 months; as in *Freeman*, this demonstrates the legislature's intent that the punishment for the first degree assault not be subsumed into the punishment for the first degree robbery. In this case, it was only the State's decision to charge Mr. McKinnie with *attempted* first degree assault that capped the maximum term to 120 months as a Class B felony.

Regarding the *Blockburger* analysis, the parties agree that, here, the offenses are not legally identical. *See Br. of Appellant* at 8. The trial court found Mr. McKinnie intended to commit assault and took a substantial step

towards doing so. The crimes of robbery and assault are not the same in fact or in law; first degree robbery requires the intent to deprive, with no intent requirement for causing bodily harm. First degree assault requires the specific intent to cause bodily harm. Because each crime contains an element that the other does not, the presumption is that they are not the same offense for double jeopardy purposes. *See Calle*, 125 Wn.2d at 777. Mr. McKinnie provides this Court with no basis upon which to overcome this presumption, other than to baldly assert that the aggressive swerving satisfied the bodily injury element of the first degree robbery and comprised the basis of the attempted first degree assault. However, the aggressive swerving, like the gunshot in *Freeman*, was not necessary to raise the robbery to a robbery in the first degree.

Neither were the State's charging theories identical. *See In re Orange*, 152 Wn.2d. at 819-20. The State never argued the two crimes were based on the same act. The State argued that Mr. McKinnie's aggressive swerving formed the evidence of attempted first degree assault; what caused the robbery to be elevated to the first degree was merely his driving until Ms. McMichael fell off the vehicle. Even if Mr. McKinnie had driven slowly, reasonably, and in a straight line, driving with a screaming woman hanging off the hood demonstrates Mr. McKinnie's intent to take the car from its owner by use of force. The simple act of driving with

Ms. McMichael on the hood until she fell is what raised the seriousness of the crime of robbery to first degree: it was not necessarily the aggressive swerving.

Even if this Court determines that the aggressive swerving constitutes the basis for elevating the robbery charge to robbery in the first degree, *Freeman* teaches that merely because the aggressive swerving was a basis for both the assault and the robbery, this is still not proof that the crimes are the same; in such an instance, this Court should again turn to legislative intent, which, as stated above, clearly mandates separate punishments. *See Freeman*, 153 Wn.2d at 776.

Contrary to Mr. McKinnie's contentions, the merger doctrine is not relevant here because the attempted first degree assault is not a lesser offense that elevated his robbery to first degree robbery. *See Parmelee*, 108 Wn. App. at 710. Merger is a tool pointing the courts back towards legislative intent, and as discussed above, Mr. McKinnie's intentional attempts to harm Ms. McMichael represented a "different evil" that the legislature intended to punish separately from his theft of her motor vehicle; this is borne out by the higher standard range for the assault than for the "greater" crime of robbery. *Freeman*, 153 Wn.2d at 774, 776.

Even if on an "abstract level" the convictions for attempted first degree assault and for first degree robbery appear to be for the same offense

or form the basis for charges that would otherwise merge, “if there is an independent purpose or effect to each, they may be punished as separate offenses.” *Id.* at 776. Such an abstraction is exactly what this Court is presented with in this case: Similar to the gratuitous gunshot in *Freeman*, Mr. McKinnie could have effectuated a first degree robbery of Ms. McMichael’s vehicle without intentionally trying to throw her from the car with aggressive swerving. *See Id.* at 769. Even without Mr. McKinnie’s gratuitous attempts to dislodge her from the hood of the car, she might still have been injured, and the trial court still would have convicted Mr. McKinnie of first degree robbery. The fact that he did make that intentional attempt to cause bodily injury raises the seriousness of his actions in the eyes of the law, and thus merits separate condemnation and separate punishment. This Court should affirm the trial court’s sentences for both the attempted first degree assault and first degree robbery.

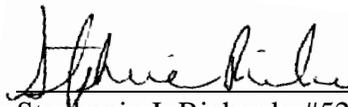
IV. CONCLUSION

If this Court accepts review of Mr. McKinnie’s claim of error, it should reject his contention that the same act that comprised his assault on Ms. McMichael caused the robbery to be elevated to robbery in the first degree and that merger should apply. Based on the facts, and guided by *Freeman*, it is clear that separate sentences for attempted first degree assault and first degree robbery do not violate double jeopardy principles. Because

this State's Legislature intended separate punishments in a case such as this, because the convictions do not rely on the same facts or rise from the same legal basis, the sentences should not merge, and this Court should affirm.

Dated this 27th day of December, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Stephanie J. Richards", is written over a horizontal line.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

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v.

LICO L. MCKINNIE,

Appellant.

NO. 35958-1-III

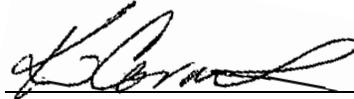
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 27, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

12/27/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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