NO. 32390-1-III
(consolidated with 32391-9 and 32392-7)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

LYZETTE VARGAS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NOS. 13-1-00715-4; 13-1-01077-5; 13-1-00926-2

BRIEF OF RESPONDENT

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II. STATEMENT OF FACTS

The defendant pled guilty to the crime of Theft of a Motor Vehicle in Benton County Superior Court Cause No. 13-1-00926-2 (COA No. 32392-7) on October 9, 2013. CP 208-17. The defendant's Statement on Plea of Guilty form required that the defendant state in her own words what made her guilty of the crime to which she was pleading guilty. CP 215. The defendant wrote, "This is my statement: On 8/16/13 I had borrowed a 1997 Ford Explorer + I did not return it when requested." *Id.*

On that same date, the defendant also pled guilty to charges of Unlawful Possession of a Controlled Substance and Possession With Intent to Manufacture or Deliver a Controlled Substance in Benton County Superior Court Cause Nos: 13-1-00715-4 (COA No. 32390-1) and 13-1-01077-5 (COA No. 32391-9), respectively. CP 30-39, 124-33. As part of a plea agreement encompassing all three matters referenced above, the defendant entered into a contract with the Tri-City Metro Drug Task Force to work as a confidential informant. The terms of the Tri-City Metro Drug Task Force Contract were as follows:

> The contractor will plead guilty to Unlawful Possession of a Controlled Substance – Methamphetamine in Benton

> County Superior Court Cause No.: 13-1-00715-4, Theft of a Motor Vehicle in Benton County Superior Court Cause No.: 13-1-00926-2 and Possession With Intent to Manufacture/Deliver a Controlled Substance in Benton County Superior Court Cause No.: 13-1-01077-5. Contractor will waive speedy sentencing and the sentencing in said matters will be continued for 90 days for contractor to successfully complete the terms of this contract. Upon successful completion of this contract, the State will recommend an exceptional sentence downward of 36 months in prison on the Theft of a Motor Vehicle and Possession With Intent to Manufacture/Deliver a Controlled Substance charges and 24 months on the Unlawful Possession of a Controlled Substance case to run concurrent, 12 months of community custody on both drug offenses, restitution, and standard fines and fees. If the contractor fails to successfully complete the conditions of this contract, the State will recommend 80 months in prison on the Possession With Intent to Manufacture/Deliver a Controlled Substance charge, 57 months on the Theft of a Motor Vehicle charge and 24 months on the Unlawful Possession of a Controlled Substance charge to all run concurrent, 12 months of community custody on both drug offenses, restitution, and the standard [fines] and fees. The contractor also agrees not to seek any DOSA sentence.

CP 94.

The defendant failed to make any attempt to complete the terms of her Tri-City Metro Drug Task Force Contract. Report of Proceedings (RP) 03/21/2014 at 15. Prior to sentencing in the three matters referenced above, the defendant filed motions to withdraw her guilty pleas, claiming there was no factual basis for the Theft of a Motor Vehicle plea. CP 45-78, 135-68, 229-33. The defendant's motions were denied after hearing on April 2, 2014, by the Honorable Judge Bruce Spanner and Findings of

Fact and Conclusions of Law setting forth the basis for said denial were entered on the same date. CP 93-96, 185-88, 247-50.

The defendant was sentenced in accordance with the plea agreement listed in her Tri-City Metro Drug Task Force contract on April 2, 2014. CP 79-92, 169-80, 234-46; RP 03/21/2014 at 33-34. The defendant filed timely appeals of each of the denials of motions to withdraw guilty pleas on the same date. CP 98-99, 182, 251.

III. ARGUMENT

A. The trial court properly denied the defendant's motions to withdraw her guilty pleas.

A trial court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).

CrR 4.2(f) governs a defendant's prejudgment withdrawal of a guilty plea and states:

> (f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.431 that the agreement is not consistent with (1) the interests of

> justice or (2) the prosecuting standards set forth in RCW 9.94A. 401 to.411, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

CrR 4.2(f) requires that the trial court allow a defendant to withdraw his or her guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." "Manifest injustice" means "an injustice that is obvious, directly observable, overt, [and] not obscure." *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974) (citing Webster's Third International Dictionary (1966)). Because of the many safeguards that precede a guilty plea, the manifest injustice standard for plea withdrawal is demanding. *Taylor*, 83 Wn.2d at 596.

Nonexclusive criteria as to what constitutes manifest injustice include: (1) the denial of effective counsel; (2) the defendant or one authorized by the defendant did not ratify the plea; (3) the plea was involuntary; or (4) the prosecution breached the plea agreement. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996); *see also*, *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991).

Pursuant to CrR 4.2(d), the court "shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." *Wakefield*, 130 Wn.2d at 472. There is a strong public interest in

enforcement of plea agreements that are voluntarily and intelligently made. *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). A defendant's signature on a plea agreement is "strong evidence" that the plea is voluntary. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Additionally, when the trial court has inquired into the voluntariness of the plea on the record, as it did here, the presumption of voluntariness is warranted. *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982); RP 10/09/2013 at 7-8.

The defendant asserts that her guilty plea to Theft of a Motor Vehicle was not voluntarily made because there was not a factual basis for the plea and thus she should be allowed to withdraw it. Specifically, she argues that there was insufficient evidence to show that she intended to deprive the owner of the motor vehicle. The factual basis required by CrR 4.2(d) must be developed on the record at the time the plea is taken. *In re Keene*, 95 Wn.2d 203, 210, 622 P.2d 360 (1980). The factual basis need not be established from the defendant's admissions; any reliable source may be used, so long as the material relied upon by the trial court is made a part of the record. *Id.* at 210 n.2 (citing *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976)).

Under RCW 9A.56.065, "[a] person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle." "Theft" is defined,

in pertinent part, in RCW 9A.56.020(1)(a) as "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services . . . ."

The language "wrongfully obtained" contained within the theft statute has a statutory definition, which is:

> (22) "Wrongfully obtains" or "exerts unauthorized control" means:
> (a) To take the property or services of another;
> (b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; or
> (c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement.

RCW 9A.56.010(22).

Thus, in order to violate the statute, all a defendant has to do is be a person granted authority to use the car who exceeds that authority. That is "wrongfully obtained." Here, in the defendant's Statement on Plea of Guilty, she admitted that she obtained possession of the car (borrowed it)

and then did not return it when asked and arranged to do so (withheld it). CP 215. As a result, she wrongfully obtained the car. The defendant focuses on the word "borrowed" and fails to take into account the fact that she did not return the vehicle when her license to use it expired. *Id.* By keeping the vehicle beyond the time in which she was allotted to return it, she wrongfully obtained it. Thus, the first of the elements was demonstrated by the defendant's own admissions.

The defendant also alleges that the evidence did not show intent to deprive the owner of the automobile. However, the defendant took the automobile, and did not return it when it was time for the defendant to do so. The facts give rise to the impression that the defendant had converted it to her own use. "Specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (quoting *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). "Also, '[t]he factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty;' there must only be sufficient evidence, from any reliable source, for a jury to find guilt." *State v. Zhao*, 157 Wn.2d 188, 198, 137 P.3d 835 (2006) (quoting *Newton*, 87 Wn.2d at 370). In this matter, the judge who accepted the defendant's plea of guilty not only relied on the

defendant's statement contained in her plea of guilty, he also incorporated the State's Affidavit of Probable Cause. CP 191; RP 10/09/2013 at 8. The court, when accepting the defendant's plea, was well justified in determining that the defendant did not intend to return it based upon the statement contained in her Statement on Plea of Guilty coupled with the State's Affidavit of Probable Cause. CP 191, 215.

Furthermore, the defendant need not have intended to permanently deprive the defendant of the automobile. Theft in Washington does not require such. "The language of our theft statute, RCW 9A.56.020, and the legislative history indicate that the legislature, in its 1975 revision of the criminal code, did not intend to retain the common law requirement of intent to 'permanently deprive' in the offense of theft by taking." *State v. Komok*, 113 Wn.2d 810, 817, 783 P.2d 1061 (1989). It is only necessary to prove that the defendant intended to deprive the owner of the rights of ownership (such as the use of his automobile) for any period of time.

Additionally, the Court in *State v. Clark*, 96 Wn.2d 686, 691, 638 P.2d 572 (1982), held that Theft is the appropriate charge when a defendant exceeds the initial authorized use of a vehicle as opposed to the charge of Taking a Motor Vehicle Without Permission. In *Clark*, the Court stated,

> We think the appellant was clearly a bailee of Noll's vehicle since he was entrusted with the car to do certain errands and return. Also, the above theft statute clearly covers the appellant's conduct without having to interpret RCW 9A.56.070(1) expansively. It would seem logical that RCW 9A.56.070(1) is intended only to prevent the initially unauthorized use of a vehicle. . . . Since we hold that once a person obtains permission to use an automobile he cannot violate RCW 9A.56.070(1) even if he exceeds the scope of that permission, the appellant was improperly charged under the statute in question. We therefore reverse his conviction.

Id. at 691-92.

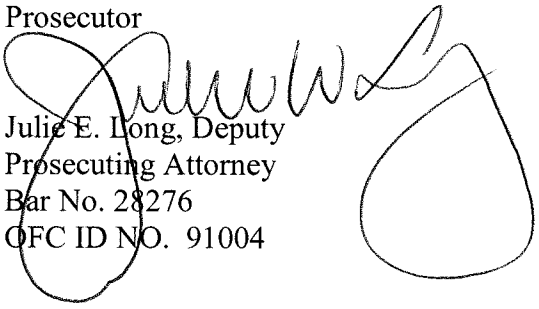
In the instant matter, the defendant had permission, initially, to use the true owner's automobile. As a result, no matter how long she determined it best to keep it, she could not violate the "Taking a Motor Vehicle" statute, as it only penalizes unlawful taking. When, as is the case for the defendant here, an individual has permission initially, but exceeds the license knowingly, the individual is guilty of theft, but not taking of a motor vehicle. The defendant intended to deprive the true owner of ownership, for at least some period of time, when she did not return the vehicle as asked, and arranged to do so. In doing so, she committed theft. It is not necessary to show that the defendant intended to deprive the true owner of the automobile permanently, only for a period of time, no matter how long. As such, borrowing it and not returning it clearly shows that intent.

IV. CONCLUSION

Based upon the aforementioned rationale, the defendant should not be allowed to withdraw her guilty plea and the convictions should stand.

RESPECTFULLY SUBMITTED this 16th day of July, 2015.

ANDY MILLER
Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on July 17, 2015.

Courtney Sheafer
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