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NO. 53004-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARIUS MICHAEL BURGENS,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge Elizabeth Martin

No. 18-1-01484-2

BRIEF OF RESPONDENT

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I. INTRODUCTION

Darius Michael Burgens was convicted of one count of attempted theft of a motor vehicle and one count of making or possessing motor vehicle theft tools for attempting to steal Myong Kim's Chevrolet cargo van. Burgens argues the State failed to prove he intended to deprive the van owner of the vehicle. Viewing the evidence in the light most favorable to the State, the evidence proves Burgens intended to deprive the owner of the stolen van of his property. Lakewood Police Officer David Maulen witnessed Burgens tampering with the van's steering column late at night. When Officer Maulen approached, Burgens fled. When Officer Maulen detained Burgens, Burgens admitted he was planning on stealing the van, driving himself home to Renton, and abandoning the van there. Burgens was found with three flathead screwdrivers and four sets of shaved vehicle keys. Myong Kim testified he did not know Burgens, nor did he give Burgens permission to use the van. Sufficient evidence proves Burgens intended to deprive the owner of his van.

Burgens also argues his conviction for attempted theft of a motor vehicle is unconstitutional, alleging the statutes for theft of a motor vehicle and taking a motor vehicle are concurrent. Two statutes are not concurrent if there are any situations in which the specific statute can be violated

without violating the general statute. Taking a motor vehicle can be committed without committing theft of a motor vehicle, so the statutes are not concurrent. The State properly charged Burgens with theft of a motor vehicle. This Court should affirm Burgens' convictions.

II. RESTATEMENT OF THE ISSUES

- A. Viewing the evidence in the light most favorable to the State, does sufficient evidence prove Burgens intended to deprive the owner of the van of his property?
- B. Did the State properly charge Burgens with attempted theft of a motor vehicle where it is not concurrent with attempted taking a motor vehicle without permission?
- C. Should this Court remand for the trial court to strike the interest accrual provision from the judgment and sentence?

III. STATEMENT OF THE CASE

A. PROCEDURE

On April 16, 2018, the Pierce County Prosecuting Attorney charged Darius Michael Burgens with one count of attempted theft of a motor vehicle and one count of making or possessing motor vehicle theft tools. CP 5-6. The case proceeded to a bench trial before the Honorable Judge Elizabeth Martin on October 22, 2018. CP 47; RP 3-8.¹ The State presented two witnesses: Lakewood Police Department Officer David Maulen and Myong Kim (the victim). RP 15, 35. Burgens did not testify. CP 65; *see* RP

¹ RP refers to the Verbatim Report of Proceedings dated 10-22-18 (trial). 2RP refers to the Verbatim Report of Proceedings dated 11-09-18 (sentencing).

89, 111. Burgens argued in closing argument that the State failed to prove Burgens committed theft of a motor vehicle because he did not intend to deprive the victim of “lasting use” of the stolen vehicle. RP 125-26. Burgens argued he should have been charged with *taking* a motor vehicle because he merely intended to drive himself home in the stolen van and then discontinue use of it. RP 126. The court rejected Burgens’ argument, finding there is no temporal requirement to the intent to deprive element. RP 138.

The court stated:

[T]he intent was to deprive the owner, Mr. Kim, of the use of that vehicle, perhaps not permanently, but certainly by removing that vehicle from the premises where it was located and removing it to another location outside of the owner's control, and therefore, I do believe that the intent element is satisfied beyond a reasonable doubt.

Id. The court found Burgens guilty of attempted theft of a motor vehicle and making or possessing motor vehicle theft tools. RP 138-40; CP 66-67. The court sentenced Burgens to 40 months. 2RP 14; CP 78.

B. FACTS

At approximately 3 o’clock in the morning on April 14, 2018, Lakewood Police Officer David Maulen was on routine patrol on South Tacoma Way in the city of Lakewood when he noticed a person slouched under the steering column in the driver’s seat of a Chevrolet cargo van. RP 15-18, 20-23, 26. The man, later identified as Burgens, was “messaging

around” with the steering column. RP 20, 23, 31. There was a backpack on the ground next to the open driver’s side door. RP 20-21, 23-24.

The van was parked outside of several businesses, all of which were closed at that hour. RP 26-27. Officer Maulen testified that it was unusual to see someone at that van at that time of night. RP 21, 28. He routinely patrols that area and had strong suspicions that criminal activity was afoot based on the time of night, the fact that the nearby businesses were closed, and his knowledge that the area had experienced property damage, burglaries, vehicle prowls, and vehicle thefts. RP 27-29. Officer Maulen drove past the van so as to not alert the person that he noticed him. RP 23.

When Officer Maulen turned his vehicle around and pulled in behind the van, Burgens exited the van and took off running. RP 21, 23-24, 31. Officer Maulen chased Burgens on foot, identified himself as police, and ordered Burgens to stop multiple times. RP 31-32. The chase ended when Burgens hit a dead end behind the businesses. RP 32-33. Backup officers arrived and Burgens was detained in handcuffs. RP 41-42.

Burgens told Officer Maulen that he was stranded by his friends in Lakewood and was “tired of walking around” and trying to get home. RP 46. He said his feet hurt and he was upset that nobody would stop to give him a ride home when he came across the cargo van. RP 46. After unsuccessfully attempting to unlock the van with a set of shaved keys,

Burgens broke into the van using a screwdriver and tried to start the van with the keys. RP 46-47. Officer Maulen testified that shaved keys, also known as jigglers or burglary tools, are modified keys used to unlock and start vehicles they are not meant for. RP 56-57. When Burgens was unsuccessful with the keys, he used a hammer to break open the steering column and tried to start the van with the screwdrivers he had on him. RP 48, 58. That is when Officer Maulen pulled up behind the van and Burgens took off running. RP 48.

Officer Maulen recovered three screwdrivers, a hammer, and four sets of different shaved vehicle keys from Burgens' person and inside the van. RP 50-55, 59. In the backpack, which Burgens admitted belonged to him, Officer Maulen found a piece of the van's damaged ignition. RP 61-63. Burgens told Officer Maulen "he wasn't going to take [the van] for himself," he was just going to drive himself home to Renton, where he would then discontinue use of the van and "leave it up there." RP 48. Burgens claimed he had never stolen a vehicle before. RP 49. However, at sentencing, the State pointed out that Burgens has an extensive criminal

history of several theft and vehicle theft related convictions, spanning back to when he was a juvenile. 2RP 7-9.²

After questioning Burgens, Officer Maulen placed him under arrest and he was transported to jail. RP 49, 66. Because Officer Maulen could not reach the van's owner at the time, he left a business card and case number on the van. RP 66.

Later that morning, Myong Kim, the van's owner, arrived at work and found Officer Maulen's business card on the van. RP 36-39. When Kim opened the door to the van, he was shocked to see the damage inside. RP 39. The van was inoperable, and Kim had to have it towed to a repair shop. RP 39-40. Prior to April 14, 2018, there was no damage to the van. RP 38. Kim had the keys to the vehicle in his possession. RP 39. Kim testified that he did not know Burgens and that he never permitted Burgens to possess, alter, take, or drive his van. RP 40.

² Burgens stipulated to his criminal history at sentencing, which included eleven convictions for taking a motor vehicle without permission, three convictions for possession of a stolen motor vehicle, one conviction for theft of a motor vehicle, two convictions for making or having burglary tools, two convictions for possession of stolen property, one conviction for trafficking in stolen property, and other theft convictions. CP 68-70.

IV. ARGUMENT

A. Viewing the evidence in the light most favorable to the State, sufficient evidence proves Burgens intended to deprive the owner of the van of his property.

This Court should affirm Burgens' convictions because viewing the evidence in the light most favorable to the State, sufficient evidence proves Burgens intended to deprive the van owner of his property. Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A challenge to the sufficiency of the evidence admits the truth of all of the State's evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). All reasonable inferences from the evidence must be drawn in the State's favor and interpreted most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Courts may infer the specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Appellate

courts must defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

“A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.” RCW 9A.56.065(1). “Theft” means, in relevant part, “[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[.]” RCW 9A.56.020(1)(a). To convict a defendant of theft, the State need not prove the defendant intended to “permanently” deprive the owner of his property. *State v. Komok*, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989). “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1). The trier of fact may infer the intent to commit a crime from all the facts and circumstances presented in the evidence. *State v. White*, 150 Wn. App. 337, 343, 207 P.3d 1278 (2009). A “substantial step” is conduct strongly corroborative of the actor's criminal purpose. *Id.*

Burgens claims the State failed to prove he intended to deprive the rightful owner of the stolen van of his property. Br. of Appellant at 12. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the State proved Burgens' intent to deprive

the owner of the van beyond a reasonable doubt. Officer Maulen testified he was patrolling South Tacoma Way at three in the morning when he observed Burgens tampering with the steering column of the van. RP 20-23. When Officer Maulen contacted Burgens, he fled. RP 23. Burgens admitted he was tired of walking around when he came across the van and decided to steal it. *See* RP 46. Burgens said he intended to drive the stolen van from Lakewood to Renton, where he planned to abandon it. RP 48. The owner of the van testified he does not know Burgens and did not give Burgens permission to use his van. RP 40. Sufficient evidence proves Burgens intended to deprive the owner of his van because Burgens intended to drive the van to a different city in a different county and abandon it in some unknown location without the owner's knowledge. *See* RP 130 (asking court to take judicial notice that Renton is not in Pierce County).

Viewing the evidence in the light most favorable to the State, Burgens' contradicting claims show he intended more than to merely take the van. Burgens claims he was not taking the van for "himself," yet he admits he intended to drive himself home to Renton from Lakewood. RP 48. Notably, Burgens provides no explanation for who else he would have taken the van for, if not himself. Further, Burgens allegedly suddenly incurred the need to take the van because he claimed he was stranded by his friends without a ride home. RP 46. However, when Officer Maulen

detained Burgens, Burgens had three screwdrivers and four sets of shaved vehicle keys. RP 50-56. Accordingly, his claim that he merely intended to take the van out of unexpected dire need for a ride home is incredible. Viewed in the light most favorable to the State, the evidence shows Burgens equipped himself with theft tools because he intended to steal the van, depriving the owner of its use.

In *State v. Ritchey*, 1 Wn. App. 2d 387, 405 P.3d 1018 (2017), the Court considered whether the offense of taking a motor vehicle without permission is a lesser included offense to theft of a motor vehicle. In deciding that it is not, the Court looked to whether one can commit theft of a motor vehicle without committing taking a motor vehicle. *Id.* at 390-92. The Court explained that theft of a motor vehicle requires the “intent to deprive the owner of the property” whereas taking a motor vehicle without permission does not require any such intent and can be committed by merely intentionally driving it away. *Id.* at 391-92.

The Court specifically pointed out that the intent to deprive could be proved where a defendant “hide[s] a lost vehicle so that the true owner could not find it.” *Id.* at 392. That is exactly what Burgens attempted to do in this case. Burgens explicitly admitted he intended to take the van, drive it to Renton, and abandon it there. *See* RP 48. Counsel for Burgens conceded, “[t]he evidence before the Court is certainly he is trying to take the car... I

can say that's not in dispute. He has shaved keys. He has tools. He's cracked open the ignition." RP 124. The van's owner testified he did not know Burgens or give him permission to use the van. RP 40. Burgens' own admission proves his intent to deprive because if he took the van without the owner's knowledge and drove it to Renton, even if he abandoned it, the owner would be deprived of the van. As discussed in *Ritchey*, Burgens intended to "hide a lost vehicle so that the true owner could not find it," thus proving the element of intent to deprive. *See Ritchey*, 1 Wn. App. 2d at 392. Thus, the State proved the element of intent to deprive beyond a reasonable doubt. Burgens does not challenge the sufficiency of any other elements. *See Br. of Appellant* at 12-13. Accordingly, sufficient evidence supports Burgens' conviction for attempted theft of a motor vehicle.

Burgens incorrectly claims the element of intent to deprive requires deprivation for a substantial period of time. *See Br. of Appellant* at 9. In *State v. Walker*, 75 Wn. App. 101, 879 P.2d 957 (1994), the Court concluded the offenses of first degree theft and taking a motor vehicle are not concurrent offenses. *Id.* at 106. The Court distinguished the offenses in part by the duration of deprivation associated with each offense. *Id.* Taking a motor vehicle, commonly known as the "joyriding" statute, "would be violated by taking a motor vehicle without permission for a spin around the block." *Id.* In contrast, the theft statute "would be violated only if the

defendant intended to deprive the owner of its use, *as is the case* when the motor vehicle is taken for a substantial period of time.” *Id.* (emphasis added). In that statement the Court acknowledged theft requires proof of the additional element of “intent to deprive.” While the intent to deprive element implies that the deprivation be of a greater duration than that required for taking a motor vehicle without permission, proof of intent to permanently deprive is not required. *Id.* at 107. The Court did not impose a requirement that the intent to deprive be for a “substantial period of time.” The Court merely gave the example of intent to deprive “as in the case” where a vehicle is taken for a substantial period of time. *Id.* at 106. The Court did not say intent to deprive can be proved *only* when the deprivation lasts a substantial period of time.

Even if *Walker* had established a requirement of deprivation for a substantial period of time, viewing the evidence in the light most favorable to the State in this case, the State nonetheless proved Burgens’ intent to deprive beyond a reasonable doubt. If Burgens had followed through with his plan to drive the van from Lakewood to Renton and abandon it without the owner’s knowledge, the owner would have been deprived of the van for a substantial amount of time. *See* RP 48. Burgens characterizes the drive from Lakewood to Renton as a “short trip,” arguing Burgens would have “merely” deprived the owner of the van for “a 45 minute trip.” Br. of

Appellant at 12. But there is no telling how long, if ever, it would have taken the rightful owner to regain possession of the van after Burgens stole it and drove it to an unknown location across county lines. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found Burgens attempted theft of a motor vehicle. This Court should affirm Burgens' conviction for attempted theft of a motor vehicle.

B. The State properly charged Burgens with attempted theft of a motor vehicle because this crime is not concurrent with attempted taking a motor vehicle without permission.

The State properly charged Burgens with attempted theft of a motor vehicle because the offenses are not concurrent. Courts review de novo the question of whether two statutes are concurrent. *State v. Wilson*, 158 Wn. App. 305, 314, 242 P.3d 19 (2010). When a specific statute and a general statute punish the same conduct, the statutes are concurrent and the State must charge the defendant under the more specific statute. *Id.* at 313-14. This is to promote equal protection of the laws by subjecting persons committing the same misconduct to the same potential punishment. *State v. Cann*, 92 Wn.2d 193, 196, 595 P.2d 912 (1979). If a person can violate the specific statute without violating the general statute, the statutes are not concurrent. *Wilson*, 158 Wn. App. at 314. Two statutes are not concurrent if there are any situations in which the specific statute can be violated

without violating the general statute. *State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630 (2006).

In determining whether two statutes are concurrent, courts examine the elements of each of the statutes to determine whether a person can violate the specific statute without violating the general statute. *Wilson*, 158 Wn. App. at 314. Under RCW 9A.56.065(1), “A person is guilty of *theft* of a motor vehicle if he or she commits theft of a motor vehicle.” RCW 9A.56.065(1) (emphasis added). “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; ...” RCW 9A.56.075(1) defines the offense of *taking* a motor vehicle without permission in the second degree, as follows:

A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

RCW 9A.56.075(1).

The offenses of theft of a motor vehicle and taking a motor vehicle without permission in the second degree are not concurrent offenses

because a person can violate the more specific statute—taking a motor vehicle—without violating the general statute—theft of a motor vehicle. In *Walker*, the Court considered whether every violation of the taking a motor vehicle statute would result in the commission of first degree theft. *Walker*, 75 Wn. App. at 106-07. The Court concluded those two statutes are not concurrent because taking a motor vehicle can be committed, for example, “by taking a motor vehicle without permission for a spin around the block” without committing first degree theft, because “the intent to deprive” would be lacking. *Id.*

In this case, the relevant question is whether the taking a motor vehicle in the second degree statute can be violated without violating the theft of a motor vehicle statute. The theft of a motor vehicle statute requires intent to deprive, whereas the taking a motor vehicle without permission in the second degree statute requires only that a defendant intentionally take or drive away a motor vehicle without the owner's permission. RCW 9A.56.065(1); RCW 9A.56.020(1)(a); RCW 9A.56.075(1). Thus, taking a motor vehicle can be committed without committing theft of a motor vehicle because the former does not require an intent to deprive the owner of the vehicle. *See Walker*, 75 Wn. App. at 106-07. Because the intent to deprive is an additional element that is not present in every case of taking a motor vehicle in the second degree, the two statutes are not concurrent.

Burgens' incorrectly claims he should have been charged with attempted taking a motor vehicle without permission in the second degree because the defendant in *State v. Howerton*, 187 Wn. App. 357, 348 P.3d 781 (2015), was convicted of attempted taking a motor vehicle without permission in the second degree under similar circumstances. *See* Br. of Appellant at 16. First, Howerton never contemplated the question of whether taking a motor vehicle without permission in the second degree and theft of a motor vehicle are concurrent offenses. Second, the facts of *Howerton* are distinguishable from those in this case. In *Howerton*, a witness saw Howerton breaking into a van, and when police contacted Howerton, he had a bread knife and screwdriver, and the van had damage to the passenger window, steering column, and ignition. *Howerton*, 187 Wn. App. at 362-63. There were no facts indicating Howerton's intent. *See id.* In the instant case, however, there is evidence that Burgens intended to deprive the van's owner of his property. Burgens admitted he intended to drive the van across county lines without returning it, which would deprive the van's owner of his property for an indeterminate amount of time. RP 48. As a result, Burgens' conduct rose from the level of taking a motor vehicle to theft of a motor vehicle. Thus, the State was not required to charge Burgens with attempted taking a motor vehicle without permission in the second degree. This Court should affirm Burgens' convictions.

C. This Court should remand for the trial court to strike the interest accrual provision from the judgment and sentence.

The State concedes this Court should remand for the trial court to strike the interest accrual provision from Burgens' judgment and sentence in light of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). Recent legislative amendments to the legal financial obligation (LFO) statutes prohibit sentencing courts from imposing interest accrual on the nonrestitution portions of LFOs. RCW 10.82.090(2)(a); *Ramirez*, 191 Wn.2d at 746-47. The judgment and sentence in this case contains the provision "INTEREST: The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090." CP 77. The court imposed \$500 in non-restitution legal financial obligations. CP 76. Under amended RCW 10.82.090, those costs shall not accrue interest. In light of the legislative amendments, this Court should strike the interest accrual provision from the judgment and sentence.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm Burgens' conviction for attempted theft of a motor vehicle and

remand to strike the interest accrual provision from the judgment and sentence.

RESPECTFULLY SUBMITTED this 15th day of October, 2019.

MARY E. ROBNETT
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BRENNAN L. QUINLAN
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The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below:

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