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Division II
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NO. 53911-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Jose Angel Lopez-Flores,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Michael E. Schwartz

No. 19-1-00639-2

BRIEF OF RESPONDENT

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I. INTRODUCTION

After an argument between Jose Lopez-Flores and his girlfriend escalated into Lopez-Flores physically assaulting both of her foster parents, Lopez-Flores took his neighbor's vehicle without her permission and fled to California. A jury convicted Lopez-Flores of two counts of assault in the fourth degree and taking a motor vehicle without permission in the second degree. Viewing the evidence in the light most favorable to the State, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Lopez-Flores was guilty of taking a motor vehicle without permission in the second degree. The owner of the vehicle testified that Lopez-Flores did not have her permission to drive the vehicle. Lopez-Flores' girlfriend confirmed that he did not have permission to drive the vehicle and must have taken the car keys from the dresser. Although Lopez-Flores gave conflicting testimony at trial, the jury was free to disregard his testimony. Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of the witnesses. This Court should affirm.

II. RESTATEMENT OF THE ISSUE

- A. Was there sufficient evidence for a rational jury to find beyond a reasonable doubt that Lopez-Flores was guilty of taking a motor vehicle without permission in the second degree where he took a vehicle for two days without the owner's permission?

III. STATEMENT OF THE CASE

Jose Lopez-Flores engaged in a violent altercation with his entire household and fled the scene in a neighbor's vehicle without the owner's permission. *See* RP 87-92, 120-28, 139-44.¹ The State charged Lopez-Flores by amended information with taking a motor vehicle without permission in the second degree (count I), and three counts of assault in the fourth degree with domestic violence allegations (count II for Rebecca Herrera, count III for Carol Johnston, and count IV for Dayton Johnston). CP 7-8.

On February 21, 2019, Lopez-Flores and his girlfriend, Rebecca Herrera, were getting their children ready for school. RP 85-88. At the time, Lopez-Flores and Ms. Herrera were living with Ms. Herrera's foster parents, 67-year-old Carol Johnston and 70-year-old Dayton Johnston. *See* RP 80-83, 90, 125. After a disagreement over his daughter N.L.'s hairstyle for school, Lopez-Flores "nudged" Ms. Herrera out of his way, and they got into a loud verbal argument. RP 87-88.² Four-year-old N.L. was crying and distraught as she ran down the hall and jumped into Ms. Johnston's lap. RP

¹ The Verbatim Report of Proceedings (RP) are contained in three volumes and are consecutively paginated. They are referred to by page number.

² Ms. Herrera minimized the assault at trial. *See* RP 87-88, 91, 96. Her written statement from the day of the incident was admitted into evidence where she reported that Lopez-Flores shoved her and pushed her. RP 94-96. She testified that she and Lopez-Flores are engaged and that she is pregnant with his child. *See* RP 97.

88, 120-22. N.L. was shaking, crying, and holding her hands over her face. RP 121.

As Ms. Johnston was trying to figure out why N.L. was so upset, Lopez-Flores entered the room and grabbed at N.L. RP 121-22, 134. Lopez-Flores then attempted to punch Ms. Johnston in the face, a hit she avoided by ducking out of the way. RP 121-22; *see* RP 139. Mr. Johnston entered the room and told Lopez-Flores to leave his home. RP 122-23, 139. Lopez-Flores then attacked Mr. Johnston—a 70-year-old man with Parkinson's disease. RP 123, 139-42; *see* RP 90. He grabbed Mr. Johnston by the neck and put him in a chokehold position, causing them both to fall to the floor. *See* RP 96, 123-24, 139-41, 144. When Ms. Johnston attempted to pull Lopez-Flores off of her husband, Lopez-Flores shoved her into a table. RP 96, 123-24, 142. Lopez-Flores then grabbed a shoeless N.L. as she was screaming for Ms. Herrera and stormed out of the home barefoot. RP 124-25, 142. He had taken the keys to his neighbor's vehicle, which did not have a car seat, and fled the scene with N.L. in that vehicle. RP 91-92, 125, 142.

Karen Collett, a longtime friend of the Johnston family, lived in a trailer on the Johnston family's property for several years. RP 82, 107. Days before the altercation, Ms. Herrera had driven Ms. Collett (in Ms. Collett's vehicle) to the airport to visit her sick mother. *See* RP 110-11. Ms. Collett is the sole registered owner of her vehicle. *See* RP 72, 108-09. In Ms.

Collett's absence, the only person she had given permission to drive her vehicle was Ms. Herrera. RP 110-13.

Ms. Collett testified that she neither gave Lopez-Flores permission to drive her vehicle nor did he ask for permission to drive it. *See* RP 110-11. She believed that he knew he could not use her vehicle because he had never used it previously. *See* RP 110-14. The only exception was on one occasion in January 2019 when Ms. Collett injured her back, and he was the only person available to take her to the hospital. RP 110-12. Ms. Herrera also testified that Lopez-Flores did not have permission to drive Ms. Collett's vehicle and that he must have taken the keys from the dresser. RP 91-92. According to Ms. Johnston, to her knowledge, Lopez-Flores had never driven Ms. Collett's vehicle. RP 128-29.

Two days after Lopez-Flores fled the home in Ms. Collett's vehicle after assaulting the Johnston family, he returned in Ms. Collett's vehicle and was arrested. *See* RP 72-77, 126-27. He told the deputy that he did not "steal" the keys because they were on a dresser. *See* RP 77, 169. This was not the first time Lopez-Flores had fled the Johnston family home after a heated argument. RP 93, 129-30. Lopez-Flores agreed that he has a history of leaving the home after arguments in order to cool off. RP 186-87.

Lopez-Flores testified at trial and presented a necessity defense to the charge of taking a motor vehicle without permission in the second

degree. *See* RP 157-95; CP 30. According to Lopez-Flores, on the night prior to the incident, he saw N.L. sitting on Mr. Johnston's lap. RP 160-61. He claimed Mr. Johnston's pants were unbuckled, and N.L. was not wearing any underwear or pants. RP 161. Lopez-Flores did not say anything to anyone and simply took N.L. into a different room. RP 162-63. He claimed that Ms. Herrera also witnessed the incident with N.L., but he never discussed it with her. RP 163, 176-78. Instead, he concocted a silent plan to leave the home the following morning with Ms. Herrera, her child, and N.L. RP 162-63. Despite spending the evening concocting a plan to leave in the morning, Lopez-Flores did not explain why he and N.L. left without wearing any shoes in the middle of winter, with only the clothes on their backs, and without a car seat for his four-year-old daughter. *See* RP 93, 125, 142, 162-63.

Lopez-Flores claimed he had no choice but to leave in Ms. Collett's vehicle for his daughter's safety. *See* RP 173, 190. He also claimed that Ms. Collett handed him her car keys and told him he could use her car for work and emergencies while she was out of town. RP 169-170, 185. He took N.L. to his mother's home in California and then returned to take Ms. Herrera and her daughter to California. RP 171. But he was arrested when he arrived

at the Johnston home to “return the vehicle.” RP 171-72.³ According to Lopez-Flores, everyone in the household, including himself, knew of Mr. Johnston’s sexual misconduct “for a while,” but he never tried to remove N.L. from the home. RP 191-93.

Ms. Herrera and the Johnstons testified as rebuttal witnesses. *See* RP 212-18. Ms. Herrera denied ever witnessing any sexual misconduct between Mr. Johnston and N.L. RP 213. Neither she nor Ms. Johnston ever suspected Mr. Johnston of any sexual misconduct. RP 213-15. Mr. Johnston testified that he was working as a security guard on the night of the alleged molestation and that he did not sexually assault N.L. or any other children. RP 216; *see also* RP 143-44.

The jury convicted Lopez-Flores of taking a motor vehicle without permission in the second degree, and two counts of assault in the fourth degree as to Mr. and Ms. Johnston, with special verdicts finding that they were members of the same family or household. CP 42, 45-48; RP 257-58. The jury was unable to reach a unanimous decision regarding the assault against Ms. Herrera. *See* RP 257, CP 43.

At sentencing, the trial court adopted the joint recommendation of the parties and sentenced Lopez-Flores to credit for time served—146 days.

³ It is unclear how Lopez-Flores planned on taking Ms. Herrera and her daughter to California if he was returning Ms. Collett’s vehicle.

RP 266-69; CP 75-76, 81-84. The court imposed a \$500 crime victim assessment fee and a \$100 DNA database fee. CP 73; RP 268-69.⁵ Lopez-Flores filed a timely notice of appeal. *See* CP 94. He challenges only his conviction for taking a motor vehicle without permission in the second degree. *See* Br. of App. at 1.

IV. ARGUMENT

A. Standard of Review

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). Sufficiency of the evidence is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The applicable standard of review for sufficiency of the evidence is whether, “after viewing the evidence 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. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). 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). And all reasonable inferences are drawn in

⁵ In his Statement of the Case, Lopez-Flores incorrectly asserts that the State previously collected his DNA and implies that the trial court improperly imposed a DNA fee. *See* Br. of App. at 1. But because Lopez-Flores has no prior felonies, he conceded at sentencing that his DNA would not have been previously collected. *See* RP 268. Lopez-Flores does not challenge this issue on appeal.

favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are equally reliable. *Washington v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *see State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004) (the weight of the evidence is determined by the fact finder and not the appellate court.) “A jury is free to believe or disbelieve a witness, since credibility determinations are solely for the trier of fact.” *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

B. Viewing the evidence in the light most favorable to the State, there was sufficient evidence to convict Lopez-Flores of taking a motor vehicle without permission in the second degree.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence for a rational jury to find Lopez-Flores guilty of taking a motor vehicle without permission in the second degree. The State presented evidence that Ms. Collett, the owner of the vehicle, did not give Lopez-Flores permission to drive her vehicle and that she believed he knew

he was not permitted to use her vehicle. *See* RP 108-14. Ms. Herrera confirmed that Lopez-Flores did not have permission to drive the vehicle and that he must have taken the car keys from the dresser. *See* RP 91-92. Although Lopez-Flores provided conflicting testimony and claimed that he had permission to drive the vehicle, the jury was free to disregard his testimony. *See Camarillo*, 115 Wn.2d at 71. It was for the jury to decide whether Lopez-Flores had permission to drive Ms. Collett's vehicle, and the jury apparently decided that Lopez-Flores' version of events was not credible.

“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...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 statute provides two means by which the offense may be committed—by actually taking or driving away the motor vehicle or by riding in it, knowing it was unlawfully taken. *See State v. Toms*, 75 Wn. App. 55, 57, 876 P.2d 922 (1994). Lopez-Flores was charged under the taking or driving away provision of the statute. *See* CP 28-29; *see* WPIC 74.03.

In order for the jury to convict Lopez-Flores of taking a motor vehicle without permission in the second degree, the State was required to prove that he intentionally took or drove away a motor vehicle that was the property of another without the permission of the owner or person entitled to possession. *See* CP 29. A knowledge element is implicit in the phrase “without the permission of the owner or person entitled to possession.” *State v. Robinson*, 78 Wn.2d 479, 482, 475 P.2d 560 (1970); *State v. Simmons*, 30 Wn. App. 432, 435, 635 P.2d 745 (1981); *Toms*, 75 Wn. App. at 58. A jury may find actual subjective knowledge if there is sufficient information to lead a reasonable person to believe that a fact exists. *State v. Johnson*, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992). The State need only prove that the vehicle belonged to another person and that the defendant intentionally used it without permission. *State v. Hudson*, 56 Wn. App. 490, 494, 784 P.2d 533 (1990); *see Toms*, 75 Wn. App. at 59 (a person cannot intentionally take or drive a vehicle away without the permission of the owner without knowing that the vehicle is being unlawfully taken).

Here, Ms. Collett testified that she did not give Lopez-Flores permission to drive her vehicle. RP 110-14. During the two years that she was acquainted with Lopez-Flores, she only allowed him to use her vehicle on one occasion to take her to the hospital because no one else was available. *See* RP 107-12. Ms. Collett testified that Lopez-Flores did not ask

her for permission to use her vehicle, and she believed that he knew he was not permitted to take her vehicle. RP 111-12. Ms. Herrera confirmed that he did not have permission to use the vehicle and that he took the keys from the dresser. RP 91-92. Ms. Johnston testified that, to her knowledge, Lopez-Flores had never driven Ms. Collett's vehicle. RP 128-29. All reasonable inferences must be drawn in favor of the State and interpreted most strongly against Lopez-Flores. *See Salinas*, 119 Wn.2d at 201. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the State proved beyond a reasonable doubt that Lopez-Flores did not have Ms. Collett's permission to take her vehicle.

Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of the witnesses. *See Carver*, 113 Wn.2d at 604. The jury, as the sole judge of credibility, was free to disregard Lopez-Flores' testimony that he had permission to use the vehicle. The jury was also free to reject his necessity defense based on his molestation allegation. Although Lopez-Flores testified that he spent the evening concocting a plan to leave the home with his girlfriend and two children after witnessing an incident of sexual misconduct, the circumstances suggest a hasty, unplanned departure.

The reasonable inference is that Lopez-Flores left the home in anger after having a violent altercation with the entire Johnston family. First, he did not leave the home with either Ms. Herrera or her daughter despite his claim that this was his plan. *See* RP 91-93, 162-63. In fact, it was undisputed that Ms. Herrera knew nothing of his plan and that he never discussed it with her. *See* RP 92-93, 102-03, 162-68, 176-78, 190. Second, after getting into a physical altercation with the entire Johnston family, Lopez-Flores stormed out of the home barefoot in the middle of winter with just the clothes on his back. *See* RP 93, 124-25, 142; *see also* RP 88-93, 96, 120-25, 139-41. He took his screaming and shoeless four-year-old daughter with him in a car that was not equipped with a car seat. RP 124-25. Third, it was undisputed that Lopez-Flores had a history of leaving the home after heated arguments in order to cool off. *See* RP 93, 129-30, 186-87. Finally, Lopez-Flores' testimony that he had to immediately flee the home for his daughter's safety is simply not credible in light of his testimony that he knew of Mr. Johnston's sexual misconduct "for a while" but did nothing about it. *See* RP 173, 190-93. The jury was free to disregard his testimony as not credible.

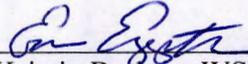
V. CONCLUSION

Viewing the evidence in the light most favorable to the State, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Lopez-Flores was guilty of taking a motor vehicle without permission in the second degree. This Court should affirm.

RESPECTFULLY SUBMITTED this 19th day of March, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

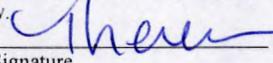
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