

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 6

 1. THE TEMPORARY USE OF ANOTHER VEHICLE IS NOT SUFFICIENT TO PROVE THE DEPRIVATION OF PROPERTY REQUIRED FOR THEFT OF A MOTOR VEHICLE..... 6

 a. The prosecution must prove all elements of theft of a motor vehicle to sustain a conviction 6

 b. Theft of a motor vehicle requires the intent to permanently or substantially deprive the owner of the property, not a temporary taking..... 7

 c. A temporary taking does not prove theft of a motor vehicle 13

 2. THE COMPLETE OVERLAP BETWEEN THEFT OF A MOTOR VEHICLE AND TAKING A MOTOR VEHICLE REQUIRE THE PROSECUTION TO CHARGE THE LESSER SPECIFIC OFFENS..... 16

 a. Taking a motor vehicle is concurrent with theft of a motor vehicle 17

 b. Matthew’s conviction for theft of a motor vehicle must be dismissed..... 21

F. CONCLUSION 22

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984).....6

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997) 15

State v. Cann, 92 Wn.2d 193, 595 P.2d 912 (1979) 17

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000)6

State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982) 18, 20, 21

State v. Daniels, 119 Wash. 557, 205 Pac. 1054 (1922) 11

State v. Green, 4 Wn.2d 216, 616 P.2d 628 (1980).....7

State v. Hundley, 126 Wn.2d 418, 895 P.2d 403 (1995)..... 16

State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).....5

State v. Komok, 113 Wn.2d 810, 783 P.2d 1061 (1989).....9

State v. Shriner, 101 Wn.2d 576, 681 P.2d 237 (1984) 17, 18, 21

State v. Williams, 171 Wn.2d 474, 251 P.3d 857 (2011) 12

Whatcom Co. v. City of Bellingham, 128 Wn.2d 537, 909 P.2d
1303 (1996) 15

Washington Court of Appeals Decisions

In re Marriage of Olivares, 69 Wn.App. 324, 848 P.2d 1281, rev. denied, 122 Wn.2d 1009 (1993) 15

State v. Hupe, 50 Wn.App. 277, 748 P.2d 263, rev. denied, 110 Wn.2d 1019 (1988)..... 18

State v. Karp, 69 Wn.App. 369, 848 P.2d 1304 (1993)..... 17

<u>State v. Walker</u> , 75 Wn.App. 101, 897 P.2d 957 (1994) 8-10, 12, 18	
<u>State v. Walters</u> , 162 Wn.App. 74, 255 P.3d 835 (2011)	8

United States Supreme Court Decisions

<u>In re Winship</u> , 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)	6
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)	7
<u>Sandstrom v. Montana</u> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)	6

United States Constitution

Fourteenth Amendment	6
----------------------------	---

Washington Constitution

Article I, section 3	6
----------------------------	---

Statutes

RCW 9A.56.020	7, 8
RCW 9A.56.030	12, 18
RCW 9A.56.040	12
RCW 9A.56.065	7, 8, 18
RCW 9A.56.070	8
RCW 9A.56.075	8, 11

RCW 9.94A.525 12
RCW 13.40.380.....8, 12, 20

Other Authorities

2A C. Sands, *Sutherland's Statutory Construction* § 51.05 (4th ed.
1973) 17
Laws of 2007 11

A. SUMMARY OF ARGUMENT.

Matthew G. took another person's car for a drive and returned it to the same parking spot. The prosecution charged him with theft of a motor vehicle. It insisted that it did not need to prove Matthew intended to deprive the owner of his vehicle for any period of time, and argued that as soon as Matthew drove away in the car, he committed theft of a motor vehicle.

Theft of a motor vehicle is classified as a more serious offense with harsher penalties than taking a motor vehicle in the second degree. Theft of a motor vehicle is distinguished from taking a motor vehicle on the basis that theft contemplates the intent to deprive permanently, or for continued and substantial time, whereas taking a motor vehicle involves a temporary taking. Here, the State failed to prove and the court failed to find Matthew intended to deprive the owner of his car for a substantial or permanent duration.

Furthermore, if theft of a motor vehicle only requires the intent to temporarily take another person's car, it is concurrent with taking a motor vehicle in the second degree. If two offenses are concurrent, the prosecution was required to charge Matthew with the more specific lesser offense.

B. ASSIGNMENTS OF ERROR.

1. The prosecution did not prove all essential elements of theft of a motor vehicle.

2. The prosecution violated Matthew's right to equal protection of the law by charging an offense with a higher penalty instead of a concurrent, specific, and lesser offense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Theft of a motor vehicle requires the State to prove the perpetrator intended to deprive the owner of his or her car permanently or for a continued and substantial period of time. Matthew was accused of temporarily using a car and returning it to the same place, but the prosecution claimed it did not need to prove that he intended to deprive the owner of the car for any period of time to establish theft of a motor vehicle. Did the prosecution fail to prove Matthew's temporary taking of another person's vehicle constituted theft of a motor vehicle?

2. The prosecution must charge a specific offense if one applies, rather than a greater concurrent offense, because the prosecution does not have unfettered discretion to seek greater punishments over people who commit the same crimes and must respect the legislature's authority to define specific crimes. Here,

the prosecution told the court to ignore the lesser, concurrent offense of taking a motor vehicle in the second degree, because it sought a conviction for the greater offense of theft of a motor vehicle. Where there is no difference in the elements of two offenses, but one carries a substantially lesser penalty, does the prosecution violate the right to equal protection of the laws by only seeking a verdict on the greater offense?

3. The court's finding of fact 48 is not supported by substantial evidence in the record.¹

4. The court's finding of fact 50 is not supported by substantial evidence in the record.

5. The court's finding of fact 51 is not supported by substantial evidence in the record.

6. The court's conclusion of law as to Count I, to the extent it is considered a finding of fact, is not supported by substantial evidence.

D. STATEMENT OF THE CASE.

On January 24, 2011, at about 4 p.m., Steve Rubey parked his pickup truck in the Lopez Island ferry terminal parking lot and got on a ferry to leave the island. 5/2/11RP 10-11. He left the

truck's door unlocked and placed the key in the center console. Id.
He returned on the morning of January 27, 2011. 5/2/11RP 12.
His car was in the same place as he left it, with the key in the
center console. 5/2/11RP 16, CP 68.

However, he noticed mud on the passenger side of the car
and his floor mats were missing. He "thought somebody had taken
it for a joy ride." 5/2/11RP 15. He passed by the sheriff's office on
his way home but nobody was there and he did not attempt to
report the incident. Id. at 14-15.

One week later, Rubey met Anna Lease and her fiancé Luke
MacKinnon in a grocery store parking lot. 5/2/11RP 15. Lease and
MacKinnon had seen someone who they believed was Matthew G.
driving Rubey's truck in a reckless fashion on January 25, 2007.
Id. at 31-32, 90, 93-94. Lease had been walking her dog along the
road, and was nine months pregnant, when she saw Rubey's truck
pass her at a high rate of speed. Id. at 28, 30. Lease told
MacKinnon and MacKinnon chased after the truck, flashing its
lights in hopes the driver would pull over. Id. at 40, 101. They
thought the driver was Matthew, but he never stopped the car as
MacKinnon followed it. Lease and MacKinnon reported what they

¹ The findings of fact from the adjudicatory hearing are attached as

saw to police and Trooper James Taylor looked for the truck that day but did not find it. Id. at 41, 105, 132-34.

When Lease and MacKinnon learned that Rubey owned the truck, the three contacted the police and explained what they saw. 5/2/11RP 15. The State charged Matthew with one count of theft of a motor vehicle and one count of reckless driving. CP 1-2.

Matthew brought a Knapstad² motion, arguing that the prosecution could not prove theft of a motor vehicle based on a temporary taking of a car and instead Matthew should be charged with taking a motor vehicle in the second degree. CP 8-13. The court found it was a close question but denied the motion. 4/14/11RP 17. During the juvenile fact-finding hearing, the prosecution claimed it needed to prove only that Matthew intended to deprive the owner of the car of its use for any period of time, however short. 5/2/11RP 174-75, 191. The court agreed and found Matthew intended to deprive the owner of the car and thus committed theft of a motor vehicle. 5/2/11RP 205.

Matthew received a standard range sentence of 15 to 36 weeks in the juvenile detention facility (JRA). He timely appeals.

Appendix A.

² State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

E. ARGUMENT.

1. THE TEMPORARY USE OF ANOTHER VEHICLE IS NOT SUFFICIENT TO PROVE THE DEPRIVATION OF PROPERTY REQUIRED FOR THEFT OF A MOTOR VEHICLE

a. The prosecution must prove all elements of theft of a motor vehicle to sustain a conviction. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, section 3 of the Washington Constitution³ and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a

³ Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The prosecution charged Matthew with theft of a motor vehicle pursuant to RCW 9A.56.065 and RCW 9A.56.020(1)(a). CP 1. This charge required the State to prove that Matthew: (1) wrongly obtained or exerted unauthorized control; (2) of a motor vehicle; and (3) he intended to deprive the owner of the property. RCW 9A.56.020;⁴ RCW 9A.56.065.⁵ However, the prosecution did not prove he intended to deprive the owner of the property when he returned the car several hours after taking it.

b. Theft of a motor vehicle requires the intent to permanently or substantially deprive the owner of the property, not a temporary taking. Theft in Washington requires the specific intent to deprive another of property or services, combined with an

⁴ RCW 9A.56.020(1) defines "theft" as:
(a) To 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; or
(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
(c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

actual taking. State v. Walker, 75 Wn.App. 101, 106, 897 P.2d 957 (1994); RCW 9A.56.020(1). The deprivation must be of some duration: “the theft statute proscribes the continued or permanent unauthorized use” of property. Id. at 108; see also State v. Walters, 162 Wn.App. 74, 86, 255 P.3d 835 (2011) (“it is true that intent to permanently deprive is an element of a theft” involving a motor vehicle).

The elements of theft of a motor vehicle arise in the context the statutory scheme in which the legislature has dictated different levels of culpability based on the duration of the deprivation of the stolen automobile. Theft of a motor vehicle is a class B felony. RCW 9A.56.065. Taking a motor vehicle in the first degree, which involves taking another person’s car without permission and then engaging in further specified acts such as trying to sell the stolen car, is a separately defined class B felony. RCW 9A.56.070. Taking a motor vehicle in the second degree is a class C felony. RCW 9A.56.075. In a juvenile case, RCW 13.40.380 proscribes different mandatory minimum sentences for each of these motor

⁵ RCW 9A.56.065(1) states that “a person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.”

vehicle offenses, dictating far more stringent punishment for theft of a motor vehicle.⁶

Taking a motor vehicle without permission is “also known as the ‘joyriding’ statute.” Walker, 75 Wn.App. at 106. It is committed when a person intentionally takes or drives away a motor vehicle without the owner's permission. Id.⁷

The difference between theft of a motor vehicle and taking a motor vehicle without permission is “based on the duration of deprivation associated with the taking of another's automobile.” Id. at 107 (emphasis in original). Taking a motor vehicle contemplates a relatively brief use of another person's car without permission whereas theft requires that “the motor vehicle is taken for a substantial period of time.” Id.

The intent to permanently deprive the owner of her property was required to commit theft under the common law, but when the legislature created a theft statute and codified the common law, it did not expressly retain the intent to permanently deprive as an essential element. State v. Komok, 113 Wn.2d 810, 783 P.2d 1061 (1989). In Komok, the defendant claimed that theft required

⁶ See *infra*, at 12, 20, for discussion of punishments required by statute.

⁷ Alternatively, taking a motor vehicle may be committed by riding in a stolen vehicle knowing it was stolen. Walker, 75 Wn.App. at 106.

the State to charge and prove that he had the intent to permanently deprive when he stole clothes from a store. Id. at 817. The court concluded that the statutory definition of theft did not explicitly require the intent to permanently deprive the owner of property and therefore the prosecution did not need to allege or prove the intent to permanently deprive.

In the context of a stolen vehicle, the Komak Court acknowledged that at common law, theft involving a vehicle was distinguished from taking a motor vehicle based on the requirement that theft required the intent to permanently deprive. Id. at 814 n.2. It noted that cases drawing this distinction were decided before the theft statute was codified in 1975, implying that it may no longer be true. Id. However, as explained in Walker, the two offenses would be essentially concurrent but for the requirement that theft of a motor vehicle required the intent to permanently or substantially deprive the owner of her car. 75 Wn.App. at 106. Thus, to prove theft of a motor vehicle, the prosecution must establish the intent to deprive for a substantial and continued period of time. Id.

The current statutory scheme demonstrates that the legislature has not erased the common law distinction between theft of a motor vehicle and taking a motor vehicle. Walker, 75

Wn.App. at 107-08. The offense of taking a motor vehicle has existed in Washington for many years in essentially the same form.⁸ See e.g., State v. Daniels, 119 Wash. 557, 559, 205 Pac. 1054 (1922) (distinguishing larceny of car from taking a motor vehicle as “distinct crimes” based on larceny’s intent to deprive owner of property permanently).⁹

In the course of recent statutory amendments, the legislature maintained the separate offenses of theft of a motor vehicle and taking a motor vehicle, and demonstrated its intent to treat theft of a motor vehicle as a more serious offense meriting more severe punishment. In 2007, the legislature created the offense of theft of a motor vehicle. Laws of 2007, ch. 199, § 2. At the same time, it removed theft of a vehicle from the general theft statutes. Id. at § 3. It inserted language in first and second degree theft statutes that the property at issue must be something “other than” a motor vehicle. Laws of 2007, ch. 119, §§ 3, 4; see e.g.,

⁸ In 2007, the legislature added an aggravated offense taking a motor vehicle in the first degree, which requires proof of additional facts such as the intent to sell the vehicle or its parts. RCW 9A.56.070; Laws of 2007, ch. 199, § 16. These added elements do not apply to Matthew’s conduct or the charges in the case at bar.

⁹ The definition of taking a motor vehicle discussed in Daniels is essentially the same as that set forth in RCW 9A.56.075. 119 Wn.2d at 559 (whoever “shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle” is guilty of taking an automobile).

RCW 9A.56.030(1) (defining first degree theft as occurring when a person “commits theft of . . . [p]roperty of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle”); RCW 9A.56.040(1)(a) (defining second degree theft as theft of property over \$750 “other than . . . a motor vehicle”). In this statutory revision, the legislature imposed substantial mandatory minimum sentences for juveniles convicted of theft of a motor vehicle and changed the scoring of prior convictions for adults, triple counting prior convictions for theft of a motor vehicle and taking a motor vehicle for repeat offenders. Laws of 2007, ch. 119; see RCW 13.40.380; RCW 9.94A.525(20).

When the legislature enacted the separate offense of theft of a motor vehicle in 2007, it did not alter the elements of taking a motor vehicle in the second degree. It has never indicated it disagreed with the holding of Walker, that the intent to deprive the owner of her vehicle for a prolonged if not permanent duration is an essential element of theft of a motor vehicle. See State v. Williams, 171 Wn.2d 474, 483, 251 P.3d 857 (2011) (legislature is presumed to be aware of previous judicial decisions and enact amendments consistent with it). The intent to deprive the owner of

a motor vehicle permanently, or for a continued and substantial duration of time, is a necessary element of theft of a motor vehicle.

c. A temporary taking does not prove theft of a motor vehicle. Steve Rubey parked his pick-up truck at the Lopez Island ferry terminal and left it unlocked, consistent with local custom, and placed the key in the center console. 5/2/11RP 10. When he returned, his truck was in the same place as he left it. Id. at 16. While he was gone, Matthew drove it. Id. at 39. He drove it for at least 18 miles, and used at least one gallon of gas. Id. at 11, 207. Then he returned it to the parking spot where it had been, with the key placed back in the center console. Id. at 16.

When Rubey got back into his car and noticed mud on the car, he “thought somebody took it for a joy ride.” 5/2/11RP 15. He did not report the incident to the police at that time because it “seemed to be fine,” although it was dirty and missing its floor mats. Id.

The court found merely that Matthew took the car and intended to deprive the owner of its use during this temporary period of time. 5/2/11RP 205; CP 70. The prosecution insisted this intent was all it needed to prove. 5/2/11RP 175, 191. It conceded it could not prove Matthew intended to permanently

deprive Rubey of his car. Id. at 175. The prosecutor claimed that the evidence showed Matthew had “the intent to deprive [Rubey] of his property. I am not saying permanently deprive, this is not what we are talking about.” Id. 175.

The prosecution argued that the intent to deprive required for theft of a motor vehicle included the temporary, short-term deprivation of its use. 5/2/11RP 173-75. It contended that, “from the moment that someone got in that vehicle, in this case [Matthew] got those keys [and] took the vehicle out of the parking space,” the owner could not exercise control of it and “the defendant intended to do that,” which constituted the elements of theft. Id. at 173-74.

The prosecutor said in his closing argument that the legislature has probably let the taking a motor vehicle statute remain in existence because the legislature itself did not know whether the common law requirement of a permanent deprivation still applied. 5/2/11RP 173. He argued that the court should disregard the taking a motor vehicle statute because it had no bearing on the meaning of theft. Id. Contrary to the prosecution’s preference that the court ignore the existence of the taking a motor vehicle statute and deem the legislature to be unsure of the elements of theft of a motor vehicle, courts presume that the

different statutes are not superfluous. Whatcom Co. v. City of Bellingham, 128 Wn.2d 537, 548, 909 P.2d 1303 (1996) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”). Statutory construction requires ascertaining the intent of statutes as a whole. Id. The difference between the statutes is that theft of a motor vehicle requires the intent to deprive the owner of the vehicle for a continued and substantial time, while taking a motor vehicle requires the intent to drive another person’s car without permission for a temporary time.

Here, the State did not prove and the court did not find Matthew intended to deprive Rubey of his truck for a permanent or substantial duration of time. The court’s written findings of fact state that Matthew intended to deprive Rubey of use of the truck, but do not find that Matthew intended to do so for any substantial period of time. The absence of findings of fact is interpreted as a finding against the party with the burden of proof. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); In re Marriage of Olivares, 69 Wn.App. 324, 334, 848 P.2d 1281, rev. denied, 122 Wn.2d 1009 (1993).

Indeed, the State conceded the taking was intended to be temporary, and the evidence showed Matthew took the truck on a joy ride and returned it, but the State claimed it did not matter that Matthew only intended to drive the car briefly. When the prosecution fails to prove the essential elements of a charged offense, the adjudication must be dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). The State did not prove the essential elements of theft of a motor vehicle, requiring dismissal.

2. THE COMPLETE OVERLAP BETWEEN
THEFT OF A MOTOR VEHICLE AND TAKING
A MOTOR VEHICLE REQUIRE THE
PROSECUTION TO CHARGE THE LESSER
SPECIFIC OFFENSE

The prosecution charged Matthew with theft of a motor vehicle, a class B felony, and directed the court to disregard the offense of taking a motor vehicle in the second degree, a class C felony. It argued that use of another's car for any period of time constitutes theft. Under this definition, there is no meaningful distinction between taking a motor vehicle and theft of a motor vehicle. Accordingly, charging Matthew with the greater offense violates his right to equal protection of the law and is contrary to the

doctrine that the prosecution must give effect to a specific statute by charging that offense when it is concurrent with another crime.

a. Taking a motor vehicle is concurrent with theft of a motor vehicle. Where a specific statute punishes conduct which is also punished under a general statute, the specific statute applies and the accused may be charged only under that statute. State v. Shriner, 101 Wn.2d 576, 681 P.2d 237 (1984). Charging a defendant with violating a general statute when a concurrent special statute is applicable can also result in an equal protection violation. State v. Karp, 69 Wn.App. 369, 373, 848 P.2d 1304 (1993).

This rule of statutory construction is designed 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); see also 2A C. Sands, Sutherland's Statutory Construction § 51.05 (4th ed. 1973). When making a charging decision, if the State could select between two concurrent statutes that proscribe the same conduct, it could control the degree of punishment for identical criminal elements. Cann, 92 Wn.2d at 196; see also State v. Hupe, 50 Wn.App. 277, 280, 748 P.2d 263, rev. denied, 110 Wn.2d 1019

(1988) (rule protects the defendant's constitutional right to equal protection under the law by preventing the prosecution from obtaining varying degrees of punishment while proving identical criminal elements).

This rule ensures that courts do not interpret statutes in such a way as to impliedly repeal existing legislation. Shriner, 101 Wn.2d at 582-83; State v. Danforth, 97 Wn.2d 255, 258-59, 643 P.2d 882 (1982). “[S]ound principles of statutory interpretation and respect for legislative enactments require that the special statute prevails to the exclusion of the general.” Shriner, 101 Wn.2d at 583.

In 2007, the legislature enacted theft of a motor vehicle, RCW 9A.56.065. Previously, theft of a motor vehicle could be prosecuted under the general theft statute with the degree of theft depending upon the value of the vehicle, or prosecuted as taking a motor vehicle without permission. See e.g., Walker, 75 Wn.App. at 106; RCW 9A.56.030. At the time Walker was decided, a prosecution for theft involving a car was different from taking a motor vehicle because the degree of theft depended on the value of the property. Id. at 106. However, the separate offense of theft of a motor vehicle has no element involving the value of the

vehicle. Accordingly, the offenses are essentially the same, unless theft of a motor vehicle is construed as requiring the intent to permanently deprive the owner of the car:

Offense	Act	Intent
Theft of a motor vehicle	Obtaining or controlling a vehicle without the owner's permission	Intent to deprive the owner of the vehicle
Taking a motor vehicle in the 2 nd degree	Taking or driving a vehicle without the owner's permission	Intent to take or drive the vehicle without permission

The elements are the same notwithstanding the different language describing the intent required because a person who intentionally takes a car without the owner's permission necessarily intends to deprive the owner of its use. The intent to take a car for one's own use is simply another way of saying the intent to deprive the owner of the opportunity to use the car.

If there is no difference in the intent to deprive the owner of the car for a period of duration, as the State argued in the case at bar and as the court found, then any use of another person's car proves the intent to deprive the owner of use of the car as required for theft. 5/2/11RP 175-75, 191, 205. Therefore, it is impossible to commit the lesser offense and not also commit the greater. From the moment a person gets in and begins driving another person's car without permission, he or she has committed both offenses.

Despite the similarity in elements, the offenses have very different punishments. Matthew's standard range sentence for theft of a motor vehicle was a mandatory minimum of 15-36 weeks in the JRA, 90 hours of community restitution, four months of parole supervision, and a \$400 fine. RCW 13.40.380(2)(c).

But if he was convicted of taking a motor vehicle in the second degree, Matthew's mandatory minimum was three days in detention. RCW 13.40.380(3)(c). He would also be required to complete a minimum of six months of community supervision, 45 hours of community restitution, a \$150 fine, and seven days of home detention. Id.

The palpable difference in punishment for these two concurrent offenses demonstrates the unfairness in giving the prosecution unfettered discretion to charge either crime based on the identity of the elements. If theft of a motor vehicle contains no more substantial intent requirement than a momentary intent to deprive the owner of use of a vehicle, then the prosecution is free to charge the greater offense and demand significantly higher mandatory sentences at its whim. "This result is an impermissible potential usurpation of the legislative function by prosecutors." Danforth, 97 Wn.2d at 259.

b. Matthew's conviction for theft of a motor vehicle must be dismissed. Where concurrent statutes exist the defendant can only be charged under the specific statute. Danforth, 97 Wn.2d at 257-58. The remedy where the defendant has been convicted under the general statute instead of the specific statute is dismissal of the conviction. Id.

Here, Matthew was convicted under the general statute of theft of a motor vehicle instead of the specific statute of taking a motor vehicle. Under the rule announced in Shriner and Danforth, this Court must reverse his adjudication with instructions to dismiss. Shriner, 101 Wn.2d at 580; Danforth, 97 Wn.2d at 257-58.

F. CONCLUSION.

For the reasons stated above, Matthew G. respectfully asks this Court to reverse his adjudication for theft of a motor vehicle because the State did not prove the essential elements beyond a reasonable doubt and did not charge him with the specific statute of taking a motor vehicle.

DATED this 30th day of September 2011.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

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COUNTY CLERKS OFFICE
FILED
MAY 12 2011
JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF SAN JUAN
JUVENILE COURT

STATE OF WASHINGTON,) NO. 11 8 05006 1
)
Plaintiff,) FINDINGS: ADJUDICATORY
) HEARING
v.)
)
MATTHEW GALLAGHER,)
)
Respondent.)

This matter having come before the above-entitled court for adjudication hearing, and the and the court having heard the testimony and reviewed the exhibits presented and having read the memoranda submitted and heard the argument of counsel, makes the following:

FINDINGS OF FACT

1. On January 24, 2011 at approximately 4:00 p.m., Steven Rubey parked his maroon-colored 1996 Toyota Tacoma with matching canopy, Washington License Number B22671D, in the parking lot of the Lopez Island ferry terminal on Lopez Island, Washington.

This is based on the testimony of Steven Rubey and exhibits #2 and #3..

2. Mr. Rubey left his truck unlocked and hid the key in a closed console between the front seats.

This is based on the testimony of Steven Rubey

1 3. Mr. Rubey did not give his permission to anyone, including the respondent, to use
2 his truck during the period between January 24-27, 2011 while he was on the
3 mainland.

4 This is based on the testimony of Steven Rubey

5 4. The respondent had never driven Mr. Rubey's pickup truck prior to this incident.

6 This is based on the testimony of Steven Rubey

7 5. Anna Lease has known Respondent for approximately 3 years and has seen him
8 around the island, at the island grocery store when she worked as a clerk, at the
9 Lopez Island School, and has seen the respondent walking past her house on
10 Fisherman Bay Road on a regular basis. Ms. Lease was aware that Respondent had
11 a reputation for committing crimes on Lopez Island and she believed Respondent
12 had stolen her mother's iPod.

13 This is based on the testimony of Anna Lease.

14 6. Luke MacKinnon has known Respondent for approximately 2 years and has seen
15 him around the island, and walking on Fisherman Bay Road in front of his house on
16 a regular basis. Mr. MacKinnon was aware that Respondent had a reputation for
17 committing crimes on Lopez Island and he believed Respondent had stolen the iPod
18 of his fiance's mother.

19 This is based on the testimony of Luke MacKinnon.

20 7. The Lease-Mackinnon residence is located in the 1400 block of Fisherman Bay
21 Road, Lopez Island, Washington, and it has three large windows that provide
22 unobstructed views of Fisherman Bay Road as it passes front of their house.

23 This is based on the testimony of Luke MacKinnon and Anna Lease and
24 exhibits # 6 and #7.

25 8. On January 25, 2011 at approximately 5:19 p.m. Anna Lease, who was 9 months
26 pregnant, was walking north on the west shoulder of Fisherman Bay Road with her
27 dog, which was on a leash. This was approximately 15 minutes before the end of
28 civil twilight, which occurred at 5:34 p.m.

1 This is based on the testimony of Anna Lease and the stipulation of the
2 parties

3 9. Ms. Lease saw a truck heading south on Fisherman Bay Road at 50 to 55 mph in a
4 posted 25 mph zone as it approached a 90 degree curve on Fisherman Bay Road.
5 Ms. Lease believed the truck was going too fast to make it around the 90 degree
6 curve in the road.

7 This is based on the testimony of Anna Lease and exhibit #8.

8 10. As the truck approached the 90 degree curve in the road, it crossed the fog line and
9 onto the shoulder of the roadway, across a gravel driveway in the curve that was
10 beyond the shoulder, and it continued along the shoulder of the road.

11 This is based on the testimony of Anna Lease and exhibit #8.

12 11. Ms. Lease was able to see the operator through the driver's window as it
13 approached the curve, and through the windshield as it came around the curve and
14 came at her. She observed that the driver was a young white male who appeared to
15 be too young to be driving.

16 This is based on the testimony of Anna Lease.

17 12. Ms. Lease jumped out of the path of the truck and onto a berm and pulled her dog
18 onto the berm to avoid being struck by the truck. As the truck passed by her at
19 approximately 40 mph, Ms. Lease looked through the passenger window and
20 recognized the driver to be Matt Gallagher;

21 This is based on the testimony of Anna Lease.

22 13. As the truck passed her at approximately 40 mph, Ms. Lease saw that the truck had
23 a yellow sticker on the right side of the tail gate.

24 This is based on the testimony of Anna Lease and exhibit #4.

25 14. Ms. Lease had sufficient light and a clear enough view for her to observe the driver
26 of the truck.

27 This is based on the testimony of Anna Lease and inferences drawn from the
28 facts stipulated by the parties.

1 15. Ms. Lease observed that the truck was a Toyota Tacoma pickup truck, maroon or
2 red in color with a matching canopy and a vehicle license plate number that started
3 with the letter "B".

4 This is based on the testimony of Anna Lease and exhibits # 3, 5 and #6.

5 16. The truck continued southbound on Fisherman Bay Road.

6 This is based on the testimony of Anna Lease.

7 17. Ms. Lease continued walking north along Fisherman Bay Road and arrived at her
8 house at approximately 5:24 p.m., which was approximately 5 minutes after the
9 truck passed her.

10 This is based on the testimony of Anna Lease.

11 18. When she arrived home, Ms. Lease was scared and was crying as she told her
12 fiancé, Luke MacKinnon, that she had almost been hit by a maroon or red colored
13 Toyota Tacoma pickup truck that was southbound on Fisherman Bay Road. Ms.
14 Lease did not have the opportunity to tell her fiancé the identity of the driver before
15 he ran out the door to pursue the pickup truck.

16 This is based on the testimony of Anna Lease and Luke MacKinnon.

17 19. Mr. MacKinnon left the house approximately 1 minute after Ms. Lease arrived
18 home, which would have been approximately 5:25 p.m.

19 This is based on the testimony of Anna Lease and Luke MacKinnon.

20 20. Ms. Lease called the sheriff's office at approximately two minutes after she arrived
21 home, which was approximately 5:26 p.m.

22 Testimony of Anna Lease and the stipulation of the parties

23 21. While she was on the telephone with the dispatcher, Ms. Lease said that she did not
24 know the identity of the driver. However, during the telephone call Ms. Lease told
25 her step-daughter that, although she did not want to say it, the driver looked like
26 Matt Gallagher; she also said words to the effect that Gallagher must have stolen the
27 truck. Ms. Lease's statement to her step-daughter was recorded up by the sheriff's
28 equipment.

1 This is based on the testimony of Anna Lease and exhibit #16 [tape
2 recording of the dispatch tape and the testimony of Anna Lease]

3 22. Mr. MacKinnon drove south on Fisherman Bay Road. Approximately one minute
4 after leaving his home, at approximately 5:27 p.m., Mr. MacKinnon saw the truck
5 described by Ms. Lease stopped on Milagra Lane at the intersection with Fisherman
6 Bay Road. This occurred approximately 7 minutes before the end of civil twilight.

7 This is based on the testimony of Luke MacKinnon and the stipulation of the
8 parties.

9 23. Mr. MacKinnon pulled over to the shoulder of the road, got out of this car, and
10 stood in the roadway. At this point, the driver of the truck turned north onto
11 Fisherman Bay Road and drove past Mr. MacKinnon. Mr. MacKinnon looked
12 through the driver's window as the truck passed a few feet from him and recognized
13 that Matthew Gallagher was the driver.

14 This is based on the testimony of Luke MacKinnon

15 24. Mr. MacKinnon turned his car around and pursued the truck north on Fisherman
16 Bay Road. Mr. MacKinnon caught up with the truck just before Cross Road and
17 followed the truck at a distance of one car length as it turned onto Cross Road.

18 This is based on the testimony of Luke MacKinnon.

19 25. On several occasions, Mr. MacKinnon moved his car to the middle of the roadway
20 and into the line of sight of the driver's side-view mirror of the truck, flashed his
21 high beams to get the attention of the driver, saw the face of the driver as he looked
22 into the driver's side-view mirror, and recognized that the driver was Matt
23 Gallagher;

24 This is based on the testimony of Luke MacKinnon

25 26. Mr. MacKinnon followed the truck south on Port Stanley Road, east on Bakerview
26 Road to a turn-around, west on Bakerview Road, south on Port Stanley, south on
27 Lopez Sound Road, and west on School Road

28 This is based on the testimony of Luke MacKinnon

1 27. Respondent drove at speeds varying between 35 and 65 miles per hour on roads that
2 were mostly posted 35 mph zones.

3 This is based on the testimony of Luke MacKinnon and Deputy Scott Taylor

4 28. As they approached Lopez Island School, which is at the intersection of School and
5 Center Roads, Mr. MacKinnon saw Deputy Taylor's marked patrol car in the school
6 parking lot. He pulled into the parking lot and found Deputy Taylor in the
7 gymnasium, watching a basket ball game.

8 This is based on the testimony of Luke MacKinnon and Deputy Scott Taylor

9 29. Deputy Taylor and Mr. MacKinnon spoke for less than a minute. Mr. MacKinnon
10 told Deputy Taylor that his fiancé had almost been hit by a maroon colored Toyota
11 Tacoma pickup truck and he handed a note bearing the license number of the truck
12 to Deputy Taylor.

13 This is based on the testimony of Luke MacKinnon and Deputy Scott Taylor

14 30. Deputy Taylor treated the report as a reckless driving offense

15 This is based on the testimony of Deputy Scott Taylor

16 31. Deputy Taylor went to look for the suspect truck. He drove to the Lopez Ferry
17 terminal and searched for the described pickup truck, which was not at the terminal.
18 Deputy Taylor twice drove onto Hilltop Road and past the Respondent's house,
19 which is located near the Lopez Island Ferry Terminal, and did not find the pickup
20 truck there.

21 This is based on the testimony of Deputy Scott Taylor.

22 32. As Mr. MacKinnon headed north on Fisherman Bay Road, he again saw the suspect
23 truck stopped on Milagra Lane at the intersection of Fisherman Bay Road. Mr.
24 MacKinnon stopped his car at the intersection, and waited while the truck turned
25 north onto Fisherman Bay Road. Mr. MacKinnon was not able to identify the driver
26 of the truck at this time.

27 This is based on the testimony of Luke MacKinnon.

28

1 33. Mr. MacKinnon followed the truck until it passed his residence. He then stopped at
2 his house to get his cellular telephone.

3 This is based on the testimony of Luke MacKinnon

4 34. Mr. MacKinnon searched the Lopez ferry terminal lanes and parking lot and did not
5 see the truck at the terminal.

6 This is based on the testimony of Luke MacKinnon.

7 35. Mr. MacKinnon searched Hilltop Road, where Respondent lived with his family,
8 and did not see the truck.

9 This is based on the testimony of Luke MacKinnon.

10 36. On the morning of January 27, 2011, Steven Rubey returned to Lopez Island and
11 went to the parking lot of the Lopez ferry terminal to retrieve his truck. He
12 discovered that the passenger side of the truck was smeared with mud and that there
13 was mud on the dash board on the passenger side of the cab. The two floor mats
14 were missing and the key was in the center console.

15 This is based on the testimony of Steve Rubey.

16 37. Mr. Rubey went to the sheriff's office to report the theft of his truck, but gave up
17 when no one was at the office.

18 This is based on the testimony of Steve Rubey.

19 38. On February 2, 2011, Anna Lease saw the same truck pass her house, heading south
20 on Fisherman Bay Road. She called Luke MacKinnon, told him about her
21 observation and that she was heading to Lopez Village to search for the truck.

22 This is based on the testimony of Anna Lease and Luke MacKinnon.

23 39. Ms. Lease found the truck parked at the Lopez Island Market; Luke MacKinnon
24 joined her and they waited for the driver of the truck to appear.

25 This is based on the testimony of Anna Lease and Luke MacKinnon

26 40. Mr. Rubey's truck, which was parked at the Island Market on February 2, 2011, is
27 the same truck that Anna Lease observed on January 25, 2011.

28 This is based on the testimony of Anna Lease, Luke MacKinnon, Steven

1 Rubey and exhibits #2, #3, #4 and #5.

2 41. Deputy Taylor was called. He responded to the scene and interviewed all of the
3 witnesses.

4 This is based on the testimony of Anna Lease and Deputy Taylor.

5 42. The following route is 11 miles long: From the Lopez Island Ferry Terminal parking
6 lot to Milagra Lane; north on Fisherman Bay Road to Cross Road; east on Cross
7 Road; south on Port Stanley Road; east on Bakerview Road to the turnaround;
8 west on Bakerview Road; south on Port Stanley Road; south on Lopez Sound
9 Road; then east on School Road to Center Road.

10 This is based on the testimony of Deputy Taylor and exhibit #1.

11 43. It is a total of 14.5 miles if one drives the route set forth in #43, supra, and then
12 north on Center Road; west on Hummel Lake Road; and then north on Fisherman
13 Bay Road to Milagra Lane.

14 This is based on the testimony of Deputy Taylor and exhibit #1

15 44. It is a total of 18.1 miles if one drives the route set forth in #43 and #44, supra, and
16 then continues north on Fisherman Bay Road from Milagra Lane to the Lopez ferry
17 landing parking lot.

18 This is based on the testimony of Deputy Taylor and exhibit #1.

19 45. The gas tank of Mr. Rubey's truck has a total capacity of approximately 18 gallons.
20 When he left his truck at the Lopez ferry terminal on January 24, 2011, it had over
21 ½ tank and close to 2/3 of a tank of gas. When he returned to the island on January
22 27, 2011, the truck had less than ½ tank and close to 1/3 of a tank of gas left.

23 This is based on the testimony of Steven Rubey

24 46. More than a gallon of gas was used by the respondent when he drove Mr. Rubey's
25 truck.

26 This is based on the testimony of Steven Rubey

27 47. Mr. Rubey's truck gets approximately 18 - 20 miles per gallon when he drives it on
28 Lopez Island.

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This is based on the testimony of Steven Rubey

48. During the time between January 24, 2011 and January 27, 2011, Mr. Rubey's truck was driven over 18 miles. The fact that the Respondent drove Mr. Rubey's truck at least 18 miles under the circumstances set forth above, allows a reasonable inference that the respondent had the intent to deprive Mr. Rubey of the use of his vehicle.

This is based on the testimony of Steven Rubey.

49. By (a) driving a vehicle he was not familiar with, (b) at approximately 50 to 55 miles per hour in a posted 25 mile per hour zone, (c) towards a 90 degree turn in the road, (d) at a time when it was getting dark, (e) driving over the fog line and onto the shoulder of the road and into the gravel of a driveway that was off shoulder of the road, (f) driving at Ms. Lease, who was walking with her dog between the fog line and the edge of the roadway, causing her to have to jump off the roadway and onto a dirt berm to avoid being struck by the truck, the respondent drove the truck in wanton or willful disregard for the safety of persons or property

This is based on the testimony of Anna Lease, Steven Rubey and exhibits #8 and #12

50. On January 25, 2011, the respondent wrongfully obtained or exerted unauthorized control over the Toyota pickup truck belonging to Mr. Steven Rubey.

This is based on the testimony of Mr. Steven Rubey, Anna Lease, Luke MacKinnon and Deputy Scott Taylor and exhibit #1

51. During the period between January 24, 2011 to January 26, 2011, the respondent acted with the intent to deprive Steven Rubey of his truck.

This is based on the testimony of Mr. Steven Rubey, Anna Lease, Luke MacKinnon and Deputy Scott Taylor and exhibit #1

1 Based upon the above findings of fact, the court finds that the State has shown,
2 beyond a reasonable doubt as follows:

3
4 As to Count I:

- 5 A. That during the period between on January 24-26, 2011, the respondent wrongfully
6 obtained or exerted unauthorized control over a motor vehicle: the Toyota pickup
7 truck, Washington License B22671D, belonging to Steven Rubey;
- 8 B. That the respondent acted with intent to deprive Mr. Rubey of his motor vehicle;
- 9 C. That the acts occurred in the State of Washington.

10
11 As to Count II:

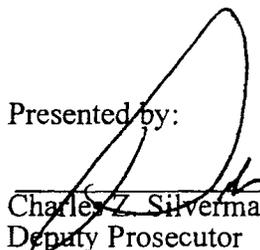
- 12
13 A. That on January 25, 2011, the respondent drove a motor vehicle;
- 14 B. That the respondent drove the vehicle in willful or wanton disregard for the safety
15 of persons or property; and
- 16 C. That the act occurred in the State of Washington.

17
18 Based upon the above findings, the court hereby finds that the respondent is guilty of the
19 crimes of Count I: Theft of a Motor Vehicle and Count II: Reckless Driving

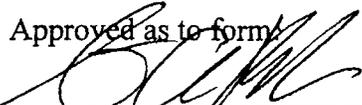
20 DONE IN OPEN COURT THIS DAY OF MAY, 2011

21
22 
23 Judge Stewart Andrew

24 Presented by:

25 
26 Charles Z. Silverman, WSBA #8654
27 Deputy Prosecutor

24 Approved as to form:

25 
26 Stephen A. Brandli, WSBA # 38201
27 Attorney for Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 67228-2-I
)	
MATTHEW S. G.,)	
)	
JUVENILE APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, DECLARE THAT ON THE 30TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] CHARLES SILVERMAN, DPA	(X)	U.S. MAIL
SAN JUAN COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
PO BOX 760	()	_____
FRIDAY HARBOR, WA 98250-0760		
[X] MATTHEW S.G.	(X)	U.S. MAIL
116 HILL TOP WAY	()	HAND DELIVERY
LOPEZ ISLAND, WA 98261	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF SEPTEMBER, 2011.

X _____ 

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STATE OF WASHINGTON
2011 SEP 30 PM 4:54

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