

67228-2

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No. 67228-2-I

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

STATE OF WASHINGTON, Respondent,

v.

MATTHEW G., (D.O.B. 8/25/1994), Appellant

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

BRIEF OF RESPONDENT

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INTRODUCTION

This appeal concerns the difference between two crimes: (1) theft of a motor vehicle and (2) taking a motor vehicle without permission in the second degree, commonly called joyriding. In 2007, the Legislature created the crime of theft of a motor vehicle by separating it from the general theft statute. Unlike general theft, theft of a motor vehicle does not have degrees based on the value of the stolen property. Defendant Matthew G., a juvenile, argues that this change eliminated any distinction between theft of a motor vehicle and second degree taking a motor vehicle.

But the two crimes remain distinct — they require different types of intent. As this Court explained in State v. Walker,

while proof of intent to *permanently* deprive is not necessary under the theft statute, the “intent to deprive” element nevertheless implies that the deprivation be of a greater duration than that required for taking a motor vehicle without permission. Accordingly, the joyriding statute proscribes *the initial* unauthorized use of an automobile, while the theft statute proscribes *the continued or permanent* unauthorized use of an automobile.

State v. Walker, 75 Wn. App. 101, 107-108, 879 P.2d 957 (1994).

Matthew G. took a truck from the Lopez Island ferry parking lot without the owner’s permission. Although the exact length of time and mileage is unknown, defendant drove the truck for at least

a day and for at least 18 miles. This was more than temporary joyriding. Because defendant drove the truck for more than a few minutes and a few miles, substantial evidence establishes that he intended to deprive the owner of the continued use of the truck. The trial court appropriately found him guilty of theft of a motor vehicle.

I. RESTATEMENT OF ISSUES PRESENTED.

Defendant's appeal raises two issues:

A. "[F]or [criminal] statutes to be concurrent, each violation of the special statute must result in a violation of the general statute." State v. Walker, 75 Wn. App. 101, 105, 879 P.2d 957 (1994). The Court in Walker concluded that taking a motor vehicle and first degree theft were not concurrent because first degree theft requires: (1) a car worth \$1500; and (2) intent to deprive the owner of its use for a substantial period of time. Walker, 75 Wn. App. at 106. By eliminating the \$1500 requirement in 2007, did the Legislature make the two crimes concurrent?

B. "Theft means...to wrongfully obtain or exert unauthorized control over the property...of another, with intent to deprive him or her of such property." RCW 9A.56.020(1)(a). Defendant Matthew G. took Steve Rubey's truck without permission

for at least one day, and drove at least 18 miles on Lopez Island. Does substantial evidence support the trial court's finding that defendant "had the intent to deprive Mr. Rubey of the use of his vehicle?" (Finding of Fact ¶ 48; CP 70).

II. STATEMENT OF FACTS.

Defendant's statement of facts provides a fair summary of the events leading to his convictions for theft of a motor vehicle and reckless driving. But defendant understandably avoids discussing the duration of his illegal activity. He was not merely joyriding, but stole the truck intending to drive it extensively.

A. Defendant Took the Truck for a Substantial Period

On January 24, 2011, Steve Rubey parked his 1996 maroon Toyota pickup truck in the parking lot for the Lopez Island Ferry. (5/2/11 VRP 7, 10-11). It was 4:00 in the afternoon. (5/2/11 VRP 11). Mr. Rubey did not return until 10:00 am on January 27, 2011, three days later. (5/2/11 VRP 12).

Witnesses observed Matthew G. driving the truck the afternoon of the 25th. Ana Lease, defendant's neighbor, was walking along Fisherman Bay Road with her dog "early evening about 4:00." (5/2/11 VRP 27). Ms. Lease was nine months'

pregnant, and described her fear as she saw the maroon truck approaching.

Q. What was it that first brought your attention to Mr. Gallagher?

A. I was walking and I heard a car that sounded like it was going really fast.

Q. What was there about the sound that made you think that that was a possibility?

A. Well normally when cars are coming down that hill they don't sound like that. I can't really describe the sound other than a fast car. And I heard the car and I looked up and I saw this truck coming extremely fast towards me.

(5/2/11 VRP 31).

Ms. Lease estimated the truck was traveling at 50 miles per hour -- twice the speed limit. (5/2/11 VRP 32). She had to jump out of the way when the truck skidded toward her.

A. I saw the vehicle coming and I wasn't sure what he was doing and as he came towards me I jumped out of the way. I wasn't, I thought maybe he would correct himself and go past me but when I saw he didn't is when I jumped.

Q. What did you jump to?

A. There was a berm on the side of the road that I kind of ran up to get out of the way.

(5/2/11 VRP 36). As the truck drove by, she recognized her neighbor, Matthew G., as the driver. (5/2/11 VRP 37).

In tears, Ms. Lease walked home as quickly as she could. (5/2/11 VRP 40). She told her fiancé, Luke MacKinnon, what had happened, and he took off after the truck.

Q. Do you have an idea about how long it was that you actually were with Ana from the time she walked in through the door until the time you left?

A. Less than a minute.

Q. And why were you so quick to leave?

A. Because I knew the only way I was going to find that truck is if I left immediately to look for it.

(5/2/11 VRP 87). Mr. MacKinnon drove towards Lopez Village and saw the truck parked on Milagra Lane. (5/2/11 VRP 88).

When MacKinnon pulled up next to the truck, he saw Matthew G. drive off.

Q. So you have indicated that you are in your vehicle before you opened the door, you looked over to the vehicle and you could see who it was?

A. Yes.

Q. Okay. And you indicated you opened your door and were able to get out of your vehicle before the vehicle started or what ended up happening?

A. I stood up, and as I stood up, he peeled out and went north again.

(5/2/11 VRP 91). This began a chase with MacKinnon pursuing Matthew G. throughout Lopez Island.

At speeds ranging from 35 to 65 miles per hour, Matthew G. tried to elude MacKinnon.

Q. Do you recall approximately how fast the two of you were traveling on the road?

A. Between the whole thing it was varying between 65 and 35.

Q. And why was it varying, what was going on?

A. He would speed up and then slow down and a lot of the times he was looking in the mirror and would swerve, he was driving kind of erratically the whole time.

(5/2/11 VRP 95). MacKinnon followed defendant across Lopez Island, driving down:

- Milagra Road (5/2/11 VRP 90);
- Fisherman Bay Road (5/2/11 VRP 90);
- Cross Road (5/2/11 VRP 94);
- Port Stanley (5/2/11 VRP 95);
- Bakerview Road (5/2/11 VRP 97);
- Back to Port Stanley (5/2/11 VRP 98);
- Lopez Sound Road (5/2/11 VRP 100); and
- School Road (5/2/11 VRP 101).

At School Road, MacKinnon saw a sheriff's car in the school parking lot and went inside to find the deputy.

Mackinnon spoke briefly with San Juan County Sheriff's Deputy James Taylor, telling him,

he had been following a pickup truck that had almost struck Ana Lease and that it had been driving very, very fast and that it would not stop for him and he wanted me to go and locate it and stop it.

(5/2/11 VRP 132). For the rest of his shift, Deputy Taylor searched for the truck without success.

I kept looking for it throughout my shift, as far as keeping my eyes out, open for it, as far as actively looking for it. I ended up leaving that location, you know, driving and keeping my eyes open and I eventually ended up deciding to make contact directly with the reporting person at that point which had been, there had been a call made to dispatch prior to my contact with Luke Mackinnon and Ana Lease.

(5/2/11 VRP 133). He specifically checked the ferry landing and did not see the truck there. (5/2/11 VRP 133).

Two days later, on January 27, 2011, Steve Rubey returned to Lopez Island and saw his pickup in the ferry parking lot. He immediately noticed something was different.

- A. I was carrying some packages so I went to the passenger side of the vehicle and when I went there I noticed that the whole side of the vehicle was muddy.
- Q. When you say muddy, when looking at it, what did you see? What was the distribution?

A. It was from the front of the vehicle all the way to the back and the side of the vehicle was muddy and it looked like that a lot of the mud had been sort of wiped off or smeared off the windows and the window on the canopy in the back.

Q. And had there been mud on it when you last saw it on the 24th of January?

A. No.

(5/2/11 VRP 13). Someone had driven his truck without his permission.

B. Defendant Used a Third of a Tank of Gas

In addition to the mud, Mr. Rubey also noticed his gas gauge.

Q. What did you notice about the fuel?

A. And it was below half. Probably a third.

Q. Probably a third down?

A. Yeah, I mean that is a rough estimate.

(5/2/11 VRP 14). As the trial court found, "more than a gallon of gas was used by the respondent when he drove Mr. Rubey's truck." (Finding of Fact ¶ 46; CP 69).

Given that Mr. Rubey averaged 18 miles a gallon on Lopez Island, the gas level confirmed that Matthew G. drove at least 18

miles. (Finding of Fact ¶ 47; CP 69). The trial court drew the inference that defendant intended to deprive Mr. Rubey of his truck.

During the time between January 24, 2011 and January 27, 2011, Mr. Rubey's truck was driven over 18 miles. The fact that 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.

(Finding of Fact ¶ 48; CP 70).

Defendant now appeals, arguing that the trial court erred by finding him guilty of theft of a motor vehicle. Because defendant acted with sufficient intent, the State of Washington respectfully requests this Court to affirm defendant's conviction and dismiss his appeal.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews defendant's concurrency argument *de novo*. State v. Wilson, 158 Wn. App. 305, 314, 242 P.3d 19 (2010) ("we review the question of whether two statutes are concurrent *de novo*").

The Court reviews the trial court's findings on intent for sufficiency of the evidence.

In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A defendant claiming insufficiency of the evidence "admits the truth of the State's evidence." State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). It makes no difference whether the evidence is direct, circumstantial, or a combination of the two, so long as the evidence is sufficient to convince a jury of the defendant's guilt beyond a reasonable doubt.

Wilson, 158 Wn. App. at 316-317 (citations omitted).

IV. THE TWO STATUTES ARE NOT CONCURRENT

This Court recently repeated the standard for deciding whether two statutes are concurrent.

In determining whether two statutes are concurrent, we examine the elements of each of the statutes to ascertain whether a person can violate the specific statute without necessarily violating the general statute. Statutes are concurrent if all of the elements to convict under the general statute are also elements that must be proved for conviction under the specific statute. Whether statutes are concurrent involves examination of the elements of the statutes, not the facts of the particular case.

Wilson, 158 Wn. App. at 314 (citations omitted).

In 1994, the Court concluded that first degree theft and taking a motor vehicle without permission were not concurrent.

We conclude that the statutes are not concurrent because every violation of the joyriding statute will not result in the commission of first degree theft. First, if a person intentionally takes without permission an automobile that is less than \$1,500 in value, he or she cannot be charged with first degree theft. Consequently, the joyriding statute can be violated without violating the first degree theft statute.

Second, the two offenses are distinguishable based on the *duration* of deprivation associated with the taking of another's automobile. In other words, the statutes proscribe different conduct. For instance, the joyriding statute would be violated by taking a motor vehicle without permission for a spin around the block. 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.

State v. Walker, 75 Wn. App. 101, 106, 879 P.2d 957 (1994).

In 2007, the Legislature enacted the Elizabeth Nowak-Washington Auto Theft Prevention Act, substantially amending the criminal code.

It is the intent of this act to deter motor vehicle theft through a statewide cooperative effort by combating motor vehicle theft through tough laws, supporting law enforcement activities, improving enforcement and administration, effective prosecution, public awareness, and meaningful treatment for first time offenders where appropriate. It is also the intent of the legislature to ensure that adequate funding is provided to implement this act in order for real, observable reductions in the number of auto thefts in Washington State.

2007 Laws of Washington c. 199 § 1.

Section 2 of the Act created a new crime — theft of a motor vehicle.

(1) A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.

(2) Theft of a motor vehicle is a class B felony.

RCW 9A.56.065. The new statute relies on the definition of theft in RCW 9A.56.020 (“wrongfully obtain or exert unauthorized control over...property... with intent to deprive”). By creating a separate crime for theft of a motor vehicle, the Legislature eliminated degrees of the offense based on the value of the stolen car.

This change does not make theft of a motor vehicle, on the one hand, and taking a motor vehicle without permission, on the other, concurrent. In other words, Walker remains good law. To commit taking a motor vehicle without permission, a person need only intend to take or drive a car without permission.

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) (emphasis added).

The required intent is to take or drive the car, not to deprive the owner of its use. As the Walker court stated, “the joyriding statute proscribes *the initial* unauthorized use of an automobile, while the theft statute proscribes *the continued or permanent* unauthorized use of an automobile.” State v. Walker, 75 Wn. App. at 107-108 (emphasis original). If a person only wants to take the car for a quick drive, a true joyride, he or she can violate the joyriding statute without committing theft of a motor vehicle. Furthermore, to prove joyriding, the State need not show defendant intended to deprive the owner – only that the defendant took the car without permission.

On the other hand, if a person takes a car *intending to keep it for a while*, that is not joyriding. The crime has escalated to theft of a motor vehicle. Even though the initial physical action is the same – taking a car without the owner’s permission – the intent is different. A joyrider takes the car only for a short ride to abandon it later. A thief takes the car intending to keep it.

Under the test for concurrent statutes, it is possible to violate the special statute (taking a motor vehicle without permission in the second degree) without violating the general statute (theft of a motor vehicle). The difference is the element of intent. When a person takes a car intending to keep it for a substantial period, he or she has committed theft of a motor vehicle. If the person took the car only intending to take a joyride, they have not committed theft.

V. SUFFICIENT EVIDENCE SUPPORTS THE COURT'S FINDING ON INTENT

The evidence of defendant's intent is circumstantial. Matthew G. had Steve Rubey's truck for at least a day, drove it at least 18 miles, and continued to drive it after Luke MacKinnon confronted him. A reasonable jury could find beyond a reasonable doubt that defendant intended to deprive Mr. Rubey the use of his truck.

In his opening brief, defendant contends that he took Mr. Rubey's truck for a temporary, not substantial, period. (Opening Brief at 7, 13). A day and 18 miles is not temporary. Instead, viewing the evidence in favor of the State, Matthew G. took the truck for a substantial period and kept it despite having many

opportunities to stop. A reasonable juror could conclude that defendant's actions proved an intent to deprive.

Next, defendant argues that neither the prosecutor nor the trial court required proof that "Matthew intended to deprive Rubey of his truck for a permanent or substantial duration of time." (Opening Brief at 15). But that is not an element of theft. As this Court ruled in State v. Crittenden,

Crittenden's proffered instruction reads as follows: " 'Intent to Deprive' means intent to permanently deprive or intent to deprive for a continued and substantial period of time."

The crime of theft requires as one element an "intent to deprive." The common law element of intent to *permanently* deprive has been purposefully omitted by the Legislature and is no longer required. Crittenden's proposed instruction was not a fully accurate reflection of the law.

State v. Crittenden, 146 Wn. App. 361, 369-370, 189 P.3d 849 (2008).

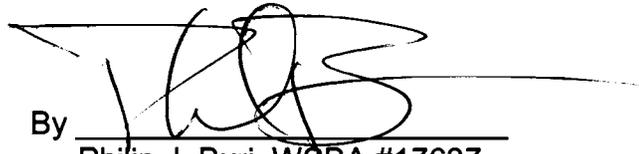
The trial court appropriately found that Matthew G. had an intent to deprive Mr. Rubey of his truck. (Finding of Fact ¶ 48; CP 70). This was all that the crime of theft required. And this element is not part of taking a motor vehicle without permission.

CONCLUSION

Theft of a motor vehicle and taking a motor vehicle without permission in the second degree are not concurrent crimes. They require different elements of intent. Because the trial court appropriately found defendant Matthew G. guilty of theft of a motor vehicle, the State of Washington respectfully requests the Court to affirm his conviction and dismiss this appeal.

DATED this 22nd day of December, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

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DATED this 22nd day of December, 2011.


HEIDI MAIN

