To: Edward Hudak, Chief of Police

From: Miriam Soler Ramos, City Attorney for the City of Coral Gables MSR
Israel Reyes and Christopher Reyes, Police Legal Advisors

Date: May 6, 2019

Re: Legal Opinion Regarding Attempted Burglary

The City of Coral Gables Police Department has requested guidance as to the applicable laws regarding the crime of attempted burglary.

I. QUESTION PRESENTED

Does the act of pulling the door handle of a car door without making entry into the car by an individual who is not licensed or invited to enter said vehicle constitute the crime of attempted burglary?

II. SHORT ANSWER

No, unless there is additional evidence that the act was done with the intent to commit an offense within the vehicle. However, based on Florida Statutes and decisional law, the action of pulling on the handle of a car door by a person who is neither licensed or invited to enter the motor vehicle may constitute attempted burglary depending on other factors such as the time of day, location of the motor vehicle, and additional actions of the subject. These factors must be considered to determine whether the requisite specific intent to commit an offense within is present. Additionally, Florida Statues Section 810.07 states that prima facie evidence of a

intent to commit attempted burglary is present if a subject is acting "stealthily" when he or she attempts to enter a motor vehicle without the consent of the owner or occupant. In other words, if a person is acting stealthily when he or she attempts, but fails, to enter into a motor vehicle without consent, then an attempted burglary has occurred. Therefore, in order to support a charge of attempted burglary, there needs to be specific facts or factors other than the simple act of attempting but failing to open a car door without being invited or licensed to do so.

III. LEGAL ANALYSIS AND ANSWER TO THE QUESTION PRESENTED

a. Elements of Burglary and Attempted Burglary

Under Florida Statutes Section 810.02(b), a "burglary" means:

> 1. Entering a dwelling, a structure, or a conveyance[1] with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
> 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
>
> a. Surreptitiously, with the intent to commit an offense therein;
> b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
> c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

In other words, "[t]he essential elements of burglary are: (1) entering or remaining in, (2) a structure or conveyance, and (3) with intent to commit an offense therein." *Wilkes v. State*, 123 So. 3d 632, 636 (Fla. 4th DCA 2013) (internal citations and quotations omitted). Burglary is a "specific-intent crime" whose critical element is that a "defendant entered or remained in the premises with the intent to commit an offense therein." 16A Fla. Jur 2d Criminal Law—Substantive Principles/Offenses § 1013.

[1] "'Conveyance' means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car; and "to enter a conveyance" includes taking apart any portion of the conveyance. § 810.011, Fla. Stat. (2019).

Under Florida Statutes Section 777.04(1), an "offense of criminal attempt" is when "[a] person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof . . . ." More succinctly stated, "[a]n attempted burglary involves a person who attempts, but fails, to gain entrance to a dwelling, structure, or conveyance." *Pepitone v. State*, 846 So. 2d 640, 642 (Fla. 2d DCA 2003); 16A Fla. Jur 2d Criminal Law—Substantive Principles/Offenses § 1008. Furthermore, "attempted burglary requires the specific intent to commit the crime of burglary and an overt act towards its commission." *Wilkes*, 123 So. 3d at 636 (Fla. 4th DCA 2013); 16A Fla. Jur 2d Criminal Law—Substantive Principles/Offenses § 1008.

b. <u>The Element of Intent</u>

Pepitone, 846 So. 2d at 642-43 (Fla. 2d DCA 2003), illustrates the importance of the element of intent when analyzing a burglary case:

> It may be that Mr. Pepitone attempted unsuccessfully to steal something from the study, but it is undisputed that he successfully entered the condominium unit. If he did so with an intent to commit an offense, his crime was a completed burglary. *See* § 810.02, Fla. Stat. (1999). If he did so with no such intent, the crime was trespass. Attempted burglary simply is not a middle ground that exists between these two options in this case.

In other words, without the requisite intent, what may seem like a burglary or attempted burglary is a wholly different crime. Florida Standard Jury Instruction 13.1 for burglary provides guidance on determining intent: "[t]he intent with which an act is done is an operation of the mind and, therefore, is not always capable of direct and positive proof. It may be established by circumstantial evidence like any other fact in a case." For this reason, "[w]hether one had intent is generally a question given to a jury; reasonable persons may differ in determining intent *when taking into*

consideration the surrounding circumstances." 16A Fla. Jur 2d Criminal Law—Substantive Principles/Offenses § 1013 (emphasis added).

Furthermore, Florida Statutes Section 810.07—titled Prima Facie Evidence of Intent—provides an additional method of proving intent: "[i]n a trial on the charge of attempted burglary, proof of the attempt to enter such structure or conveyance at any time stealthily and without the consent of the owner or occupant thereof is prima facie evidence of attempting to enter with intent to commit an offense." Numerous Florida courts have determined what constitutes "stealthily" for the purposes of Section 810.07:

- In *State v. K.N.*, 66 So. 3d 380 (Fla. 5th DCA 2011), the police department received a phone call at 2:00 a.m. of a suspicious incident wherein a vehicle and its passenger were going from house to house, peering into vehicles and checking door handles. The court ruled that this behavior under Section 810.07 warranted a high-risk traffic stop procedure. *Id.*

- In *Baker v. State*, 622 So. 2d 1333 (Fla. 1st DCA 1993), *approved*, 636 So. 2d 1342 (Fla. 1994), the defendant made stealthy entry onto the curtilage of a home by entering a fenced yard and seeking to enter the house through a rear window. Furthermore, the front of the house was hidden from the road by trees and shrubbery, and the yard was secluded due to fencing and shrubs. *Id.* The court also found that "[C]hoosing a secluded location calculated to avoid discovery may constitute stealth." *Id.*
- In *Irvin v. State*, 590 So. 2d 9, 10 (Fla. 3d DCA 1991), the defendant argued that the breaking of a window in broad daylight is not considered "stealthily" under Section 810.07. However, the court found that simply parking the vehicle in a parking lot and the victim being nowhere in the vicinity of the van constituted stealthy behavior. *Id.* Additionally, the Court

also found that other factors, although not needed, would constitute stealthy behavior: deserted parking lot, van was parked at the edge of the parking lot next to a wall, and defendant peered into two of the van's windows and then broke the window. *Id.*

Therefore, the requisite intent necessary when evaluating an attempted burglary case is dependent on the various factors specific to each case.[2] As Florida Standard Jury Instruction 13.1

[2] Of note is *T.B. v. State*, 145 So. 3d 147 which provides various examples of insufficient evidence for a crime of loitering and prowling. There are two elements in a crime of loitering and prowling:

> First, the State must show the arresting officer observed the defendant *loitering and prowling in a manner not usual for law-abiding citizens*....
>
> The second element requires the arresting officer to articulate specific facts which, when taken together with rational inferences from those facts, reasonably warrant a finding that a breach of the peace is imminent or the public safety is threatened. Circumstances to be considered in determining whether a breach of the peace is imminent or public safety is threatened are whether the person takes flight, refuses to identify himself, or *attempts to conceal himself or an object.*

Id. (emphasis added) (internal quotations and citations omitted).

In *T.B.*, the court found that the following facts were insufficient evidence for a crime of loitering and prowling:

> Late one summer night, a police officer received a report of a possible burglary of a vehicle at an apartment complex. After entering the complex through the manned guard gate, he patrolled the area and observed T.B. and another male walking between two buildings. The boys exhibited a "[s]ort of prowling demeanor, kind of creeping slowly through between the buildings, kind of looking around." The officer directed the boys to "stop for police," and T.B. made eye contact with the officer and stopped. However, the boys then started to walk backward toward an area that was not illuminated. The officer renewed his order that the boys stop and they did. In response to the officer's questions, T.B. identified himself and claimed he was returning from a party and scaled a wall to gain entry to the complex in order to take a shortcut home.

Id. The court then analyzed a set of cases where stronger facts than in *T.B.* were also insufficient evidence for a crime of loitering and prowling:

> Our courts have found that behavior even more suspicious than T.B.'s did not constitute sufficient evidence of loitering and prowling. *See, e.g., E.F.*, 110 So.3d at 104 (finding that even in the light most favorable to the state, juvenile's morning activity of "walking slowly while looking into carports and sides of houses in an *150 area where burglaries had occurred, and ... carrying a large satchel bag along with a yellow flashlight hanging out of his pants pocket" was "not unusual or indicative of incipient criminal activity," and "was not the type [of conduct] that would warrant a finding that a breach of the peace was imminent or the public safety was threatened"); *A.L. v. State*, 84 So.3d 1272, 1273–74 (Fla. 3d DCA 2012) (finding insufficient evidence of loitering and prowling where juvenile and his friend were observed in the early evening hours in the alleyway between two apartment buildings looking into windows but were not observed carrying tools or attempting to pry open windows, and where the juvenile briefly concealed himself in a

states, intent is an "operation of the mind," but Section 810.07 provides an additional avenue in proving intent where a suspect, without consent of an owner or occupant, attempts to enter a motor vehicle.

IV. CONCLUSION

The mere act of pulling the door handle of a car door without making entry into the car by an individual who is not licensed or invited to enter said vehicle, alone, does not constitute the crime of attempted burglary because there is a lack of evidence showing intent to commit an offense within the vehicle. However, other factors such as the time of day, location of the vehicle, and additional actions of the subject must be considered because these factors may show that the subject had the intent to commit an offense within the vehicle. Additionally, Section 810.07 explicitly states that prima facie evidence of this intent is present if the subject is acting "stealthily" when he or she attempts to enter a motor vehicle without the consent of the owner or occupant. Therefore, it is integral that law enforcement officers provide all available facts and factors when determining if an attempted burglary has been committed to ensure that all elements of the crime are present.

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staircase); *K.H. v. State,* 8 So.3d 1155, 1156 (Fla. 3d DCA 2009) (finding officer had no probable cause of loitering and prowling where juveniles were observed peering into a vehicle at 11:00 p.m. but they did not try the door handles and had nothing in their hands); *G.G.*, 903 So.2d at 1032–34 (holding evidence that two male juveniles emerged from behind a shopping plaza at 3:45 a.m., ran upon seeing the police car, and that one of them was carrying an object later determined to be a piece of brick was not sufficient evidence of loitering and prowling where the charged juvenile initially gave a false name but then provided his correct name, date of birth, and address).

Id.

From:	Ramos, Miriam
To:	Paulk, Enga
Cc:	Suarez, Cristina
Subject:	Opinion for publishing
Date:	Monday, May 6, 2019 9:29:26 AM
Attachments:	Legal Opinion - Attempted Burglary (5-3-19)(RLF FInal).docx image003.png

Enga, please conform and publish.

The opinion should be issued to the Chief of Police from me and Police Legal Advisors Israel Reyes and Christopher Reyes.

Miriam Soler Ramos, Esq., B.C.S.
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Board Certified by the Florida Bar in
City, County, and Local Government Law
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Coral Gables, FL 33134
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(305) 460-5084 direct dial

LEGAL OPINION

To: Edward Hudak
Chief of Police

Via: Miriam Ramos
City Attorney
City of Coral Gables

From: Israel U. Reyes, Managing Partner
Christopher Reyes, Partner
The Reyes Law Firm, P.A.
Police Legal Advisors

Date: May 3, 2019

Re: Attempted Burglary

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I. QUESTION PRESENTED

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II. SHORT ANSWER

No, unless there is additional evidence that the act was done with the intent to commit an offense within the vehicle. However, based on Florida Statutes and decisional law, the action of

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pulling on the handle of a car door by a person who is neither licensed or invited to enter the motor vehicle may constitute attempted burglary depending on other factors such as the time of day, location of the motor vehicle, and additional actions of the subject. These factors must be considered to determine whether the requisite specific intent to commit an offense within is present. Additionally, Florida Statues Section 810.07 states that prima facie evidence of a person's intent to commit attempted burglary is present if a subject is acting "stealthily" when he or she attempts to enter a motor vehicle without the consent of the owner or occupant. In other words, if a person is acting stealthily when he or she attempts, but fails, to enter into a motor vehicle without consent, then an attempted burglary has occurred. Therefore, in order to support a charge of attempted burglary, there needs to be specific facts or factors other than the simple act of attempting but failing to open a car door without being invited or licensed to do so.

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In other words, "[t]he essential elements of burglary are: (1) entering or remaining in, (2) a structure or conveyance, and (3) with intent to commit an offense therein." *Wilkes v. State*, 123 So. 3d 632, 636 (Fla. 4th DCA 2013) (internal citations and quotations omitted). Burglary is a "specific-intent crime" whose critical element is that a "defendant entered or remained in the premises with the intent to commit an offense therein." 16A Fla. Jur 2d Criminal Law—Substantive Principles/Offenses § 1013.

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