NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
MAY 10 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DELVIN TROY LONG, Appellant.	)	2 CA-CR 2010-0232 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092116001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Delvin Long was convicted of theft of a means of transportation, criminal damage, possession of a narcotic drug, possession of drug paraphernalia, and assault. On appeal he contends the trial court erred in refusing his request for an instruction on the offense of unlawful use of a means of transportation as a lesser-included offense of theft of a means of transportation. He also asserts the court should have vacated the verdicts on the ground that one of the jurors had not disclosed during voir dire that he had been a volunteer at the jail where Long had been housed pending trial. We affirm in part and reverse in part for the reasons stated below.

¶2 The evidence, viewed in the light most favorable to sustaining the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), established the following. After an evening of drinking in various establishments with friends, Long approached the victim, a hotel "Town Car" driver who was stopped at a stop sign, and asked him if he was "a taxi." The victim agreed to take Long to another location that was near Long's home, for $12.00. The victim began driving Long to that location and, after a while, Long began talking about a specific restaurant and asked the victim to stop there. The victim testified about comments Long had made that apparently had made the victim uncomfortable, adding he had been "happy" the victim wanted to stop at the restaurant; the victim testified, "I'm thinking I can just get rid of him [there]." The victim pulled into the driveway by the restaurant, "expecting that he will just get out." Long asked the victim if he was joining him and the victim said no. At this point, the victim testified, "he just started clobbering me on the right side of my face, as he's on my right side." To

get away from Long, the victim "fell out onto the . . . ground" while the car was "in gear." Long then "jumped into the seat and took off in the car."

¶3 An off-duty police officer saw the car coming out of the area by the restaurant, noting "it came on at such a rate of speed that the front of the vehicle took a dip and then bounced when it hit the road and came into the middle lane." He described more erratic driving and saw the car go over the median twice; he then called for assistance. Once the car stopped, the officer approached Long, who was out of the car, and asked if he needed help with his tires, two of which were flat. Long declined assistance and "jogged" or ran east, eventually going into his home, which was nearby. Other officers arrived at the scene, went to Long's house, and found him on the floor. After discovering what was subsequently identified as cocaine in his pocket, they arrested him. The victim was taken to the scene and identified Long as the person who had assaulted him and taken his car.

¶4 Long's version of what took place that evening is quite different. He claimed the victim had asked Long if the victim could "suck [his] dick," put his hand on Long's leg when the car had stopped at the restaurant and began moving towards his crotch. Long's defense at trial was that, in order to defend himself against being sexually assaulted, he had hit the victim and fled in his car. He testified he had done so because of "adrenaline[,] shock, panic and fright," that he did not know what to do, and that "the only thing that came to mind was to go home." He denied assaulting the victim in order to steal his car, claiming, "I attacked [him] because . . . I felt like my body was in jeopardy . . . and I wanted to get away." He added, "I just reacted with my instincts and I

attacked him." He claimed he had parked the car two houses away from his own, "jumped out," and "dropped [the keys] in somebody's yard" because he "didn't know what to do with [them]." He denied wanting to "control" the car, maintaining he simply wanted to get home and then wanted to "get rid of it."

¶5 Based in part on this defense and his contention that unlawful use of a means of transportation is a lesser-included offense of theft of a means of transportation, Long requested an instruction on the former offense. The trial court refused to give the instruction, and Long contends it did so "on the ground[] that unlawful use of a means of transportation is not a lesser-included offense of theft of [a] means of transportation." Long asserts this was reversible error because it denied him his constitutional right to a fair trial.

¶6 Whether an offense is a lesser-included one is a question of law we review de novo. *State v. Cheramie*, 218 Ariz. 447, ¶¶ 6-8, 189 P.3d 374, 375 (2008). But the decision whether any instruction is supported by the evidence and should be given is a decision left to the discretion of the trial court and, absent an abuse of that discretion, we will not disturb its ruling. *State v. Anderson*, 210 Ariz. 327, ¶ 60, 111 P.3d 369, 385 (2005). Lesser-included-offense instructions are given to reduce the risk of a jury "convicting a defendant of a crime, even if all of its elements have not been proved, simply because the jury believes the defendant committed some crime." *State v. Wall*, 212 Ariz. 1, ¶ 16, 126 P.3d 148, 151 (2006). A trial court, however, is required to give a lesser-included-offense instruction only if the evidence would allow a rational jury to find it "sufficient to support a conviction on the lesser offense." *Id.* ¶ 18.

¶7 Long was charged with theft of means of transportation, in violation of A.R.S. § 13-1814(A)(5); the offense is committed when, "without lawful authority, [a] person knowingly . . . [c]ontrols another person's means of transportation knowing or having reason to know that the property is stolen." Long requested an instruction for the lesser offense of "unlawful use of means of transportation," which is committed in violation of A.R.S. § 13-1803(A)(1) when, "without intent [to] permanently deprive, [a] person . . . [k]nowingly takes unauthorized control over another person's means of transportation." Relying primarily on *State v. Kamai*, 184 Ariz. 620, 622, 911 P.2d 626, 628 (App. 1995), Long contends the trial court erred, insisting unlawful use is a lesser-included offense of theft of an automobile under § 13-1814(A)(5) and that the evidence supported the instruction.

¶8 The reason the trial court refused to give the requested instruction is not entirely clear. The court stated, "I do believe, based on the Court's interpretation . . . of the cases, *State v. Kamai*, . . . and *State v. Lefevre*, 193 Ariz. 385[, 972 P.2d 1021 (App. 1998)], it appears that the interpretation of those two cases read together does preclude the Court from giving a lesser-included instruction of . . . unlawful use of means of transportation for the (A)(5) offense." Thus, it is unclear whether the court found unlawful use a lesser-included offense of theft of a means of transportation but concluded the evidence did not support the instruction, or instead concluded unlawful use is not a lesser-included offense of theft by control under § 13-1814(A)(5). In either case, the court erred by refusing to give the requested instruction.

¶9 In *Kamai*, the court held unlawful use of a means of transportation is a lesser-included offense of theft of property under A.R.S. § 13-1802(A)(1). 184 Ariz. at 622, 911 P.2d at 628. Section 13-1802(A)(1) is similar to § 13-1814(A)(1),[1] the automobile theft statute, enacted in 1998 as A.R.S. § 13-1813, 1998 Ariz. Sess. Laws, ch. 119, § 3, and subsequently renumbered as § 13-1814, 2007 Ariz. Sess. Laws, ch. 24, § 1 (reflecting renumbering). The court reasoned in *Kamai* that unlawful use of a means of transportation and theft of property under § 13-1802(A)(1) share three elements: (1) lack of lawful authority, (2) knowing control, and (3) property belonging to another. 184 Ariz. at 622, 911 P.2d at 628. The court concluded that the intent to deprive distinguishes the two offenses, noting that the term "deprive" is defined as, inter alia, taking "'the property interest of another either permanently or for so long a time . . . that a substantial portion of its economic value or usefulness or enjoyment is lost.'"[2] *Id.*, *quoting* A.R.S. § 13-1801(A)(4). The court explained that the "phrase 'without intent to permanently deprive' in the unlawful-use statute does not describe an element of the crime which the state must prove. 'Without intent to permanently deprive' is simply included in the statute to distinguish unlawful use from auto theft." 184 Ariz. at 622, 911 P.2d at 628,

[1]Under § 13-1814(A)(1), "[a] person commits theft of means of transportation if, without lawful authority, the person . . . [c]ontrols another person's means of transportation with the intent to permanently deprive the person of the means of transportation."

[2]Section 13-1814(A)(1), the subsection of the automobile theft statute most like § 13-1802(A)(1), the general property theft statute, not only contains as an element the intent to deprive but the "intent to permanently deprive."

quoting § 13-1803(A). Therefore, the court concluded, unlawful use under § 13-1803(A)(1) is a lesser-included offense of theft under § 13-1802(A)(1). *See id.*

¶10 Long argues that, "based upon the reasoning applied by the court in *Kamai*, unlawful use of [a] means of transportation is [also] a lesser-included offense of theft of means of transportation under § 13-1814(A)(5)." The state agrees. As we previously noted, a person commits theft pursuant to § 13-1814(A)(5) by controlling a means of transportation that the person knows or should know was stolen. Unlawful use includes the control of another person's means of transportation but only requires knowledge that the use is without authorization. *See* § 13-1804(A)(1). A person cannot commit the offense of theft of a means of transportation based on unauthorized control, in violation of § 13-1814(A)(5), without also committing the offense of unlawful use of a means of transportation, in violation of § 13-1803(A)(1). *Cf. State v. Griest*, 196 Ariz. 213, ¶ 5, 994 P.2d 1028, 1029 (App. 2000) (finding person cannot commit theft by conversion under § 13-1802(A)(2) without committing joyriding or unlawful use and concluding joyriding is lesser-included offense of theft by conversion). Thus, unlawful use is a lesser-included offense of theft by controlling another's means of transportation knowing or having reason to know it is stolen pursuant to § 13-1814(A)(5).

¶11 A defendant is entitled to a lesser-included-offense instruction when "the evidence [is] such that a rational juror could conclude that the defendant committed only the lesser offense." *Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151.[3] The state argued at trial

[3]Our analysis is somewhat complicated by the fact Long does not appear to have been charged under the most appropriate, applicable subsection of the statute, § 13-

that Long knew or had reason to know the vehicle was stolen because he, in fact, was the one who had stolen it, suggesting on appeal the jury could find him guilty only of the greater offense. But had the jurors believed Long, they reasonably could have concluded he had not stolen the car. Instead, they could have found he had reacted to something that had occurred without thinking, perhaps influenced by the amount of alcohol he had consumed that evening, and had taken the car from the victim only for the purpose of leaving the scene and getting home. And if the jurors accepted this, they would have to conclude Long did not know or have reason to know the victim's car was stolen because he had not stolen it. They could have concluded Long had used the car to get home, thereby controlling it, that he had done so without authority, but that he had not intended to permanently deprive the victim of the vehicle. *Cf. Wall*, 212 Ariz. 1, ¶¶ 31-32, 126 P.3d at 153.

¶12 Moreover, although there was no evidence Long had done anything to return the car to the victim, the jury nevertheless could have inferred he had not intended to keep it. The jury conceivably could have credited Long's claim he simply had left the car on the street not far from his home, and had abandoned the keys in a neighbor's yard,

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1814(A)(1). Section 13-1814(A)(5), in contrast, appears directed at a person who controls a means of transportation that the person knows or should know had been stolen by someone else when that person came into possession of and controlled it, not when the person in control of the vehicle is the same person who initially stole it. *See, e.g.*, *State v. Dixon*, 216 Ariz. 18, ¶ 10, 162 P.3d 657, 660 (App. 2007) (finding sufficient circumstantial evidence existed defendant had reason to know truck stolen to support conviction under § 13-1814(A)(5); jury could reject his testimony, explaining how he came to possess truck); *State v. Wright*, 214 Ariz. 540, ¶¶ 3-4, 6, 155 P.3d 1064, 1066 (App. 2007) (defendant came into possession of pickup truck after third person offered him money to drive vehicle to Mexico charged under § 13-1814(A)(1) and (A)(5)).

the latter arguably negating any intent to permanently deprive the victim of the vehicle. Ultimately, it was for the jury to draw whatever reasonable inferences the evidence permitted.

¶13 Here, as in *Kamai*, the trial court's failure to give the instruction on unlawful use warrants a new trial. 184 Ariz. at 624, 911 P.2d at 630; *see also Wall*, 212 Ariz. 1, ¶¶ 31-32, 126 P.3d at 153 (refusal of lesser-included-offense instruction supported by evidence warranted new trial). In *Kamai*, the state had presented evidence establishing the defendant had taken the truck for longer than he had been permitted and his "girlfriend returned [it] within a few days." *Id*. Thus, the court reasoned, "a properly-instructed jury could conclude that the Defendant did not intend to keep the truck permanently or for so long a time as to substantially decrease its value to the owner." *Id*. The vehicle in that case was returned to the victim, evincing the defendant's intent that the victim not be permanently deprived of his property. As noted above, there was no direct evidence Long had attempted to return the car to the victim. Nevertheless, because the jury could have found his conduct did not evince an intent to permanently deprive the victim of his vehicle, there was reasonable evidence to support an instruction on the lesser-included offense of unlawful use of a means of transportation. Having been deprived of the ability to present part of his defense, Long is entitled to a new trial on the theft charge. *Cf. State v. Valenzuela*, 194 Ariz. 404, ¶¶13, 15, 984 P.2d 12, 15 (1999) (failure to instruct jury on reckless manslaughter, lesser-included offense of first-degree murder, was fundamental error that "impede[d] the defendant's ability to present his defense").

¶14 Long also contends the trial court erred when it denied his motion to vacate the judgment, which had been based on newly discovered evidence pursuant to Rule 24.2(a)(2), Ariz. R. Crim. P. After trial, Long saw the foreman of the jury at the jail. The juror was a volunteer for the jail chaplain but had not mentioned this during voir dire. Long asserted in the motion that, had he known this at the time his jury was being empanelled, he would have stricken the juror for cause or used a peremptory challenge to have him removed from the panel.

¶15 The trial court denied the motion after a hearing at which the juror testified. When questioned by defense counsel, the juror admitted he had seen Long at the jail after the trial while volunteering there. He explained he volunteered a few hours a week or every other week, depending on the need, distributing eyeglasses to inmates, and that he worked with the jail chaplain. The juror stated he had begun volunteering about a year earlier and had never seen Long until after the trial. He recalled the judge asking the jury panel before trial whether anyone had worked with law enforcement but explained that because he did not work for law enforcement, he had not responded; he did not recall the court having asked whether any panel member "c[a]me into contact" with law enforcement. He also testified that, when he first saw Long at trial, he believed Long was in custody at the time because of the presence of a sheriff's deputy, not because of his experience as a volunteer at the jail. He denied discussing this belief or anything relating to his experience at the jail with the other jurors.

¶16 Defense counsel then asked the juror, "There was nothing in your mind then that weighed upon your forming an opinion as to the guilt or innocence of Mr. Long

other than the evidence you heard in the case?" The juror responded, "That's correct." The prosecutor asked similar questions, eliciting the same responses and then asked, "And given that now we all know you volunteer over there, is there anything about that that you think would in any way affect your ability to be fair and impartial?" The juror responded, "No."

¶17 In ruling on the motion, the trial court first noted it was not cognizable as a claim of newly discovered evidence, concluding the only possible basis for the motion was that Long's rights under the state and federal constitutions had been violated. Defense counsel did not dispute this characterization of the motion. Essentially finding the juror credible and concluding he had not responded deceptively during voir dire, given the questions asked, the court denied the motion. We will not disturb the court's ruling on a motion to vacate a conviction absent an abuse of discretion. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 90, 25 P.3d 717, 743 (2001).

¶18 Long contends the trial court abused its discretion, arguing his "right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article 2 §§ 4 and 24 of the Arizona Constitution," was violated. He relies on cases that stand for the proposition that jurors who have an interest and are biased for any reason should be removed from the jury before or during trial. He also relies on A.R.S. § 21-211 for a similar proposition. Long contends the juror knew Long was in custody, he might have seen Long there before, and it was "plausible" the juror knew Long was in custody at the time of trial "because he subconsciously recognized [Long] from one of [the juror's] jail visits." Long also suggests the juror had not been

forthright during voir dire when the venire was asked if anyone worked in law enforcement because the question was broad enough to include his volunteering at the jail.

¶19 Long has not established the trial court abused its discretion. It was for the trial court to assess the juror's credibility. *Cf. State v. Hoskins*, 199 Ariz. 127, ¶ 37, 14 P.3d 997, 1009 (2000) ("In assessing a potential juror's fairness and impartiality, the trial court has the best opportunity to observe prospective jurors and thereby judge the credibility of each."). It did so here and clearly found the juror credible. So credited, the juror's testimony belies Long's arguments. The juror not only insisted he never had seen Long until after the trial, he also asserted unequivocally that his volunteering had not influenced in any respect his evaluation of the evidence and determination that Long was guilty of the charges. Long's suggestion the juror might have seen Long before the trial is purely speculative and contrary to the evidence. And even assuming, arguendo, the juror had, without realizing it, seen Long in the jail before trial, that fact is of no moment in light of the juror's testimony he had assumed Long was in custody because of the deputy's presence and the juror's insistence that this had not influenced his deliberations in any respect.

¶20 We agree with the state that § 21-211 is not implicated here. The juror was not "interested directly or indirectly in the matter," § 21-211(2), as contemplated by the statute. *See generally State v. Eddington*, 226 Ariz. 72, 244 P.3d 76 (App. 2010) (exploring definition of "interested person"; finding peace officer employed by same agency office or department that conducted criminal investigation had at minimum

indirect interest and must be stricken for cause). Based on the foregoing, the trial court did not abuse its discretion by denying the motion to vacate the judgment of conviction.

¶21 The conviction for theft of a means of transportation is reversed and the matter is remanded for a new trial. The remaining convictions and the sentences imposed are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge