DIVISION ONE
FILED: 02/08/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0959
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
JOAQUIN OTHON LEON, JR., Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-112591-001 DT

The Honorable Lisa M. Roberts, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Joaquin Othon Leon, Jr., ("Defendant") appeals from his conviction for Theft of Means of Transportation, a class 3

felony, on the ground that the trial court abused its discretion by refusing to instruct the jury on a lesser included charge and on Defendant's theory of the case. Because the requested instructions would not have been appropriate, we affirm.

FACTS[1] *AND PROCEDURAL HISTORY*

¶2 In December 2007, J.M. parked his school's silver-gray 1992 Toyota pickup truck in a lot owned by and in front of the school. Over the next few months, the truck's registration expired, and someone broke the passenger-side window and damaged the steering column. In response to the vandalism, J.M. covered the broken window with plastic and disabled the engine by removing a cable from it, in an attempt to prevent the truck from being stolen. On returning from vacation in June 2008, J.M. discovered the school's truck was missing. He reported it stolen to the police.

¶3 In November 2008, Phoenix Police Officer Ryan Phillips responded to a report of suspicious activity at a residential address. In the home's backyard, Phillips saw a "dismantled" maroon Toyota pickup truck. Phillips noticed that the truck had no license plate, and that the vehicle identification number ("VIN") plates were missing from the dash and door jamb.

[1] We view the facts in the light most favorable to sustaining the jury's verdict, resolving all reasonable inferences against the defendant. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

Phillips nonetheless managed to discover the truck's VIN, the license plate number registered to it, and that it was registered to K.B. Phillips also obtained information that led him to call Defendant, who said he owned the maroon truck. Phillips met Defendant and told him the truck was missing its VIN plates and license plate. Defendant claimed ignorance of this, and agreed to report that the VIN and license plates had been stolen. The license plate was later recovered, but the VIN plates were not.

¶4 On February 19, 2009, Phoenix Police Officer Timothy Tedesco pulled over a white Toyota pickup truck that bore the maroon truck's recovered license plate, because that license plate was linked to that truck's reportedly stolen VIN plates. Defendant was a passenger in the truck.

¶5 Phoenix Detective Rachael Rohkol came out to investigate, and discovered that the license plate and VIN plate belonged to the maroon pickup truck Defendant had claimed he owned, that the truck "had been newly painted white," that the truck had previously been silver or gray, and that the VIN plate was not attached to the dashboard. Investigating further, Rohkol determined the white truck's actual VIN, which identified it as the silver-gray truck taken from the school.

¶6 According to Rohkol, when she interviewed Defendant, he said the white truck was the maroon truck repainted, and that

he owned it. However, Defendant later changed his story and admitted that the white truck was the school's truck, which he had taken because he thought it was abandoned and he wanted to rebuild it. Defendant then said that he did not apply for an abandoned vehicle title because it was "too much trouble." Rohkol also testified that Defendant said the reportedly stolen VIN plate was on the school's truck because Defendant had replaced the school's truck's dashboard with that of the maroon truck, and said he put the maroon truck's license plate on the school's truck because his driver's license suspension prevented him from registering the school's truck.

¶7 However, Defendant testified at trial that he had never changed his story during his interview with Rohkol. He denied originally saying the school's truck was the maroon truck repainted, denied saying he had switched the dashboards, and denied having had any knowledge that the school's truck's VIN plate had been replaced with the maroon truck's. He admitted that he took the school's truck, testifying that he thought it was abandoned.

¶8 The State obtained an indictment charging Defendant with one count of Theft of Means of Transportation pursuant to A.R.S. § 13-1814(A)(5), a class 3 felony (Count 1), and one count of Conducting a Chop Shop pursuant to A.R.S. § 13-4702, a class 4 felony (Count 2). After a five-day trial, the jury

convicted Defendant of Count 1 but found him not guilty of Count 2. The trial court sentenced Defendant to 2 years' unsupervised probation. Defendant timely appeals, and we have jurisdiction under A.R.S. §§ 12-120.21(A), 13-4032 and -4033.

DISCUSSION

¶9 Defendant raises two issues on appeal: whether the trial court erred in refusing to give the requested jury instruction on the lesser included offense for Count 1 of Unlawful Use of Means of Transportation, and whether the court erred by not instructing the jury on Defendant's theory of the case. We review a trial court's refusal to give a jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006).

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GIVE THE LESSER INCLUDED OFFENSE INSTRUCTION.

¶10 Whether an offense is a lesser included offense is a question of law we review de novo. *State v. Cheramie*, 218 Ariz. 447, 448, ¶¶ 6-8, 189 P.3d 374, 375 (2008). The purpose of requiring a lesser included offense instruction is 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." *Wall*, 212 Ariz. at 4, ¶ 16, 126 P.3d at 151. But the trial court is only required to give a lesser included offense instruction if the

evidence would allow a rational jury to find "that the evidence is sufficient to support a conviction on the lesser offense." *Id.* at ¶ 18, 126 P.3d at 151. If the jury could only find the defendant guilty of the offense charged or completely innocent, depending on what evidence they believed, then the lesser included offense instruction is not required. *State v. Bearup,* 221 Ariz. 163, 170, ¶ 29, 211 P.3d 684, 691 (2009).

¶11 Defendant was charged with committing "theft of means of transportation" ("theft") in violation of A.R.S. § 13-1814(A)(5), which occurs 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." Defendant sought an instruction for "unlawful use of means of transportation" ("unlawful use") under A.R.S. § 13-1803(A)(1), which occurs when "without intent [to] permanently deprive, [a] person . . . knowingly takes unauthorized control over another person's means of transportation."

¶12 "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 theft." *State v. Kamai*, 184 Ariz. 620, 622, 911 P.2d 626, 628 (App. 1995). There are three elements to

unlawful use –- knowing control, the absence of authority, and means of transportation owned by another –- and all are also elements of theft. *See id.* at 622, 911 P.2d at 628. Therefore, unlawful use is a lesser included offense to theft.

¶13 But our inquiry does not stop there: we must also determine whether there was sufficient evidence to support a conviction for unlawful use. *Wall*, 212 Ariz. at 4, ¶ 18, 126 P.3d at 151. For unlawful use, the evidence is sufficient if "a properly instructed jury could conclude that the defendant did not intend to keep the [vehicle] permanently or for so long a time as to substantially decrease its value to the owner." *Kamai*, 184 Ariz. at 624, 911 P.2d at 630. Unlike in *Kamai*, where the truck involved was returned to the owner after a few days of unauthorized use, *id.* at 624, 911 P.2d at 630, Leon intentionally kept the school's truck for months, and does not contend that he intended to return it, but rather that he thought it was abandoned. On this evidence, a reasonable, properly instructed jury could not find Defendant guilty of unlawful use. Therefore, the trial court did not err by refusing to give the unlawful use instruction.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GIVE THE INSTRUCTION ON ABANDONMENT.

¶14 Defendant asserts that the trial court abused its discretion by refusing to give an instruction on Defendant's

theory of the case. A defendant is entitled to an instruction on any theory reasonably supported by evidence. *State v. Gomez*, 211 Ariz. 494, 501, ¶ 30, 123 P.3d 1131, 1138 (2005). We find the trial court did not err in refusing to give the instruction.

¶15 Defendant's theory of the case was that his "belief that the truck was abandoned would negate that he knew or had reason to know the truck was stolen." In support of this theory he sought instructions on sections of A.R.S. Title 28 that pertain to abandoned vehicles. However, Defendant's theory of the case is not reasonably supported by the evidence.

¶16 A vehicle is stolen if a person other than the owner 1) without lawful authority, 2) knowingly controls it, 3) with the intent to permanently deprive the owner of it. A.R.S. § 13-1814(A)(1). Whether the vehicle was abandoned can only affect whether Defendant had lawful authority for his actions.[2]

¶17 If a vehicle is abandoned on private property, a person has lawful authority to remove it only if they "[o]btain written authorization from the owner or lessee of the property" and submit that written authorization to the state motor vehicle registration department. A.R.S. § 28-4834(D). Additionally, "[e]xcept if acting under the direction of a peace officer, a

[2] Abandonment does not affect whether the vehicle still has an owner. *See, e.g.,* A.R.S. § 28-4802(D) ("The department . . . [s]hall notify the owner of an abandoned vehicle . . . .").

person who moves or tows a vehicle . . . on private property without the consent of the vehicle owner or the owner's agent shall notify the law enforcement agency of the jurisdiction where the vehicle was located before the moving or towing," or be guilty of a class 1 misdemeanor. A.R.S. § 28-4836.

¶18 Defendant admitted he removed the school's truck from private property. Defendant's testimony establishes that he did not obtain written authorization to remove the school's truck, and that he did not notify the police. Because he did not fulfill the statutory requirements, Defendant knew or had reason to know he lacked lawful authority to remove the truck, regardless of whether it was abandoned. Therefore Defendant's belief that the truck was abandoned had no bearing on whether he knew or had reason to know he had stolen it. Because the evidence does not support Defendant's theory of the case, the trial court did not err by refusing to give the requested instruction.

CONCLUSION

¶19 Because we find that the evidence does not support either of Defendant's requested jury instructions, we hold that the trial court did not abuse its discretion by refusing to give them. We therefore affirm.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge