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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/22/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0401
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
CHRISTOPHER JAMES PORTER,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-151026-001 DT

The Honorable Susan M. Brnovich, Judge

AFFRIMED

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J O H N S E N, Judge

¶1 Christopher James Porter was convicted of theft of means of transportation pursuant to Arizona Revised Statutes ("A.R.S.") section 13-1814(A)(5) (2011).¹ He argues his conviction should be reversed because the superior court erred by refusing to instruct the jury on the lesser-included offense of unlawful use of means of transportation, pursuant to A.R.S. § 13-1803(A)(1) (2011). We conclude Porter was not entitled to the lesser-included offense instruction and affirm his conviction.

FACTS AND PROCEDURAL HISTORY

¶2 Police arrested Porter after he was seen running from a stolen truck. At trial, Porter testified he did not know the truck was stolen and said someone named "Fred" had given him permission to borrow it. While settling jury instructions, Porter's counsel requested a lesser-included offense instruction on unlawful use of means of transportation, but the court denied the request. After the jury found Porter guilty, the court found that Porter had two historical prior felony convictions and sentenced him to a mitigated term of 10 years' imprisonment.

¶3 Porter filed a timely notice of appeal from the conviction and sentence. We have jurisdiction pursuant to

¹ Absent material revisions after the date of an alleged offense, we cite a statute's current version.

Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A) (2011).

DISCUSSION

¶4 We review the superior court's denial of a requested jury instruction for abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006). An instruction on a lesser-included offense is required "if an offense is, in fact, a lesser-included offense of another, and the evidence supports giving the lesser-included instruction." *State v. Brown*, 204 Ariz. 405, 408, ¶ 7, 64 P.3d 847, 850 (App. 2003); Ariz. R. Crim. P. 23.3.

¶5 "A lesser-included offense is one 'composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one.'" *State v. Miranda*, 200 Ariz. 67, 68, ¶ 2, 22 P.3d 506, 507 (2001) (quoting *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983)). Porter was charged with violating A.R.S. § 13-1814(A)(5). As set forth in that subsection, "A person commits theft of means of transportation if, without lawful authority, the person knowingly . . . [c]ontrols another person's means of transportation knowing or having reason to know that the property is stolen." Porter asked the court to instruct the jury under A.R.S. § 13-1803(A)(1), which states, "A person commits unlawful use of

means of transportation if, without intent permanently to deprive, the person . . . [k]nowingly takes unauthorized control over another person's means of transportation."

¶16 The State argues that because the definition of unlawful use includes the phrase "without intent to permanently deprive," while the definition of theft of means under A.R.S. § 13-1814(A)(5) does not reference this intent, unlawful use is not a lesser-included offense of theft of means. In *State v. Kamai*, 184 Ariz. 620, 911 P.2d 626 (App. 1995), however, this court held that "[t]he phrase 'without intent to permanently deprive' in the unlawful use statute does not describe an element of the crime which the state must prove," but "is simply included in the statute to distinguish unlawful use from auto theft." *Id.* at 622, 911 P.2d at 628.

¶17 Accordingly, the crime of unlawful use contains three elements - "that a person: (1) knowingly takes control; (2) without authority; and (3) of another person's means of transportation." *Id.* All three of these elements also are elements of theft of means under A.R.S. § 13-1814(A)(5). The distinguishing element between theft of means and unlawful use is that theft of means requires the defendant to "know[] or hav[e] reason to know that the property is stolen," while unlawful use only requires that the defendant know that the use is not authorized. If a person knows that the vehicle is

stolen, he necessarily knows that his use of it is unauthorized; the converse is not necessarily true. Therefore, contrary to the State's contention on appeal, unlawful use under § 13-1803(A)(1) is a lesser-included offense of theft of means under § 13-1814(A)(5).

¶18 From the transcript, the superior court denied Porter's request for the lesser-included instruction apparently based on its incorrect conclusion that unlawful use is not a lesser-included offense of theft of means. Nevertheless, we will affirm a decision by the superior court "if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). Although we have determined that unlawful use is a lesser-included offense of theft of means, we conclude the evidence did not support the lesser-included instruction in this case.

¶19 Evidence is sufficient to require a lesser-included offense instruction if the jury is "able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." *Wall*, 212 Ariz. at 4, ¶ 18, 126 P.3d at 151. "[T]he evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Id.*; see also *State v. Bearup*, 221 Ariz. 163, 168, ¶ 23, 211 P.3d 684, 689 (2009).

¶10 Porter's defense at trial was that he believed he was authorized to drive the truck; there was no evidence that he knew his use of the vehicle was unauthorized but did not know that the vehicle was stolen. He testified as follows:

Q: Now, when you say "[Fred] lent you the vehicle," did he give you the keys to the car?

A: Yes.

Q: And were you under the impression that he had the right to give you the keys to this car?

A: As far as I knew it was that way.

Porter also testified that he did not know the vehicle was stolen:

Q: Did you have any reason to suspect that this vehicle might have been stolen?

A: I had no reason at all.

Based on this evidence, the jury was presented with only two possible scenarios - either Porter believed he was authorized to use the truck, in which case he was innocent, or he did not. The jury was offered no evidence that Porter knew he was not authorized to use the truck but did not know the truck was stolen. "[W]hen a defendant asserts an all-or-nothing defense . . . there will 'usually [be] little evidence on the record to support an instruction on the lesser included offenses.'" *Wall*, 212 Ariz. at 6, ¶ 29, 126 P.3d at 153 (second

alteration in original) (quoting *State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984)).

¶11 Accordingly, on this record, we conclude that no reasonable jury could have found Porter guilty of unlawful use but not guilty of theft of means. Therefore, the superior court did not err by refusing an instruction on the lesser-included offense of unlawful use.

CONCLUSION

¶12 For the reasons stated above, we affirm Porter's convictions and sentences.²

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
PATRICK IRVINE, Judge

² Porter also was convicted of theft of a credit card, a Class 5 felony. On appeal, he does not challenge that conviction or the resulting sentence.