IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee,*

*v.*

CORY DE'SHAUN POE,
*Appellant*.

Nos. 2 CA-CR 2019-0262 and 2 CA-CR 2019-0263 (Consolidated)
Filed January 7, 2021

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

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Appeal from the Superior Court in Pima County
Nos. CR20185477001 and CR20190050001
The Honorable Catherine M. Woods, Judge

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Michael S. Catlett, Assistant Attorney General, Phoenix
*Counsel for Appellee*

Joel Feinman, Pima County Public Defender
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**MEMORANDUM DECISION**

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

**¶1** After a jury trial in two consolidated cause numbers, Cory Poe was convicted of three counts of theft of means of transportation[1] and sentenced to concurrent, 11.25-year prison terms. On appeal, Poe challenges two of his three convictions, contending that theft of means of transportation under A.R.S. § 13-1814(A)(5) "describes the same offense as the unlawful use of a means of transportation statute, A.R.S. § 13-1803(A)(1)." He maintains that because the jury was instructed on unlawful use as a lesser-included offense, under the rule of lenity, his convictions on those counts should be modified to unlawful use. For the following reasons, we affirm.

**Factual and Procedural Background**

**¶2** We view the facts and all reasonable inferences in the light most favorable to affirming Poe's convictions. *See State v. Molina*, 211 Ariz. 130, ¶ 2 (App. 2005). On three separate occasions within the span of nine days in November 2018, Poe stole unattended vehicles from auto dealerships.

**¶3** On the first occasion, Poe drove off in a vehicle that a dealership employee had left running while the employee went inside to tell the customer the vehicle was ready. Through its integrated GPS system, the customer's vehicle was found by the next morning, parked in the lot of an auto parts store.

**¶4** The second incident involved Poe driving off in a vehicle that a customer had left parked for service at another dealership. That vehicle was found several months later in another dealership's parking garage.

**¶5** On the third occasion, an employee of a car dealership saw Poe drive off in a vehicle owned by a co-worker. The employee who had

[1]In a severed matter, Poe pled guilty and was convicted of attempted possession of a narcotic drug. That conviction is not at issue here.

seen Poe drive away and a manager of the dealership called police and tracked down Poe with a geolocation application on the employee's cell phone that had been left inside the car. Poe was walking in the middle of the street, and the employee "recognized him immediately." When Poe saw the employee, he ran away. The employee chased Poe on foot, "put him on the floor," and detained him until police arrived within minutes and arrested him. The employee's cell phone "was on the street two feet away from where [they] were at." The vehicle was found nearby, parked on the street in front of a house.

**¶6** A jury found Poe guilty of three counts of theft of means of transportation—two of them under § 13-1814(A)(5) and the third under § 13-1814(A)(1)—and he was sentenced as described above. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

**Discussion**

**¶7** On appeal, Poe challenges the two convictions under § 13-1814(A)(5), contending that this statute "describes the same offense as the unlawful use of a means of transportation statute," A.R.S. § 13-1803(A)(1). He maintains that any ambiguity in construing § 13-1814(A)(5) must be resolved in his favor under the rule of lenity. And because the jury was instructed that § 13-1803(A)(1) was a lesser-included offense of § 13-1814(A)(5), Poe argues that his two convictions under that statute should be modified to the lesser-included offense. We review de novo issues of statutory interpretation, *State v. Chandler*, 244 Ariz. 336, ¶ 3 (App. 2017), and whether an offense is a lesser-included offense, *State v. Breed*, 230 Ariz. 462, ¶ 4 (App. 2012).

**¶8** Section 13-1814(A)(5) provides that "[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." And under § 13-1803(A)(1), 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." The word "stolen" is undefined in the context of § 13-1814(A)(5).

**¶9** Relying on dictionary definitions of "steal," Poe argues that § 13-1814(A)(5) and § 13-1803(A)(1) describe the same offense, suggesting that the plain meaning of "steal" is so vague that any unlawfully used vehicle under § 13-1803(A)(1) is "stolen" under § 13-1814(A)(5). But "[a]

statute is not unconstitutionally vague solely because it fails to explicitly define one of its terms or because the provision is susceptible to more than one interpretation." *See State v. Lefevre*, 193 Ariz. 385, ¶ 18 (App. 1998). As the state points out, other, narrower definitions of steal or stolen exist. *See, e.g.*, *Steal*, Black's Law Dictionary (11th ed. 2019) ("[t]o take (personal property) illegally with the intent to keep it unlawfully"); *Stolen Property*, Black's Law Dictionary (11th ed. 2019) ("[g]oods acquired by larceny, robbery, or theft"); *see also State v. Johnson*, 243 Ariz. 41, ¶ 9 (App. 2017) ("We may also look to dictionary definitions, both legal and otherwise, to determine a word's meaning."). We disagree with Poe that these definitions do not show a meaningful distinction between § 13-1814(A)(5) and § 13-1803(A)(1). Consequently, we also disagree that the rule of lenity should apply. *See State v. Bon*, 236 Ariz. 249, ¶ 13 (App. 2014) (rule of lenity is "construction principle of last resort" that applies only if "statutory language is unclear and other forms of statutory construction have failed to reveal the legislature's intent").

**¶10** Moreover, as Poe acknowledges, we have previously addressed a similar challenge and concluded that § 13-1803(A)(1) and § 13-1814(A)(5) do not constitute the same offense. *See Breed*, 230 Ariz. 462, ¶ 8. In *Breed*, we determined that § 13-1803(A)(1) is a lesser-included offense of § 13-1814(A)(5), and that knowledge of the vehicle's stolen status distinguishes § 13-1814(A)(5) from § 13-1803(A)(1). *Id.* Although Poe contends that *Breed* is "mistaken," we decline his request to revisit that decision.

**¶11** Poe nevertheless suggests that the jury instruction for unlawful use "ma[de] the matter more confusing for the jury" by omitting the phrase "without intent to permanently deprive," which he contends "would tell the jury how to properly distinguish between the offenses." But Poe did not object to the jury instruction on this basis below. He has therefore forfeited review for all but fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶¶ 12, 21 (2018). And because he does not argue on appeal that the claimed error constitutes fundamental error, he has waived all review of any error regarding the omission of this language from the jury instruction. *See State v. Vargas*, 249 Ariz. 186, ¶ 22 (2020); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008).

**¶12** Even assuming the issue had been properly preserved, it is without merit. Poe acknowledges that in *State v. Kamai*, this court essentially rejected the argument, holding 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. [It] is simply included in

the statute to distinguish unlawful use from auto theft." 184 Ariz. 620, 622 (App. 1995). The trial court did not err in failing to include the phrase in the jury instruction for unlawful use.

**¶13** Finally, Poe contends that the word "stolen" is "limited to an intent to permanently deprive," as we decided in interpreting a since-repealed statute in *State v. Cain*, 27 Ariz. App. 441, 444 (1976). He urges us to "follow the *Cain* court's lead" in interpreting § 13-1814(A)(5). But again, Poe did not request an instruction that included this definition below, waiving all but fundamental error in failing to raise it. *See State v. Gendron*, 168 Ariz. 153, 154 (1991) (failure to request jury instruction waives all but fundamental error). Indeed, Poe requested an instruction below that materially differs from the one he now proposes—defining "stolen property" in terms of an intent to merely deprive, rather than permanently deprive. Nor does he mention in his opening brief the jury instruction defining "stolen property" that the trial court actually provided in this case, much less argue why it was erroneous.[2] *See State v. Johnson*, 247 Ariz. 166, n.3 (2019) (issue not raised in opening brief waived). And finally, he has waived any error because he does not explain how the court's failure to provide the instruction—which he now suggests for the first time on appeal—constitutes fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶¶ 12, 21; *Vargas*, 249 Ariz. 186, ¶ 22; *Moreno-Medrano*, 218 Ariz. 349, ¶ 17.

**Disposition**

**¶14** We affirm Poe's convictions and sentences.

[2]The trial court adopted the state's proposed instruction based on the definition of "stolen property" in A.R.S. § 13-2301(B)(2) as "property of another as defined in § 13-1801 that has been the subject of any unlawful taking."