IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ISMAEL VASQUEZ-OCHOA,
Appellant.

No. 2 CA-CR 2015-0127
Filed January 7, 2016

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NOT FOR PUBLICATION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. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201302099
The Honorable Joseph R. Georgini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jana Zinman, Assistant Attorney General, Phoenix
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 After a jury trial, Ismael Vasquez-Ochoa was convicted of transportation of marijuana for sale and sentenced to 4.5 years' imprisonment. He argues the trial court erred by denying his post-verdict motion for judgment of acquittal. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Fontes*, 195 Ariz. 229, ¶ 2, 986 P.2d 897, 898 (App. 1998). Vasquez-Ochoa was arrested when a lawful traffic stop and consensual search of the pickup truck he was driving revealed a hidden compartment containing 184 pounds of marijuana. He was charged with one count of possession of marijuana for sale and one count of transportation of marijuana for sale. The jury returned a verdict of not guilty on the possession for sale count, and a verdict of guilty on the transportation for sale count. The jury was polled at both parties' request, and all verbally affirmed that these were their verdicts. At the sentencing hearing, Vasquez-Ochoa renewed his Rule 20 motion for a judgment of acquittal on the transportation count, *see* Ariz. R. Crim. P. 20(b), arguing that because possession of marijuana for sale is a lesser-included offense of transportation of marijuana for sale, his acquittal on the former necessitated his acquittal on the latter. The trial court denied his motion and sentenced him as described above. He timely appealed. We have jurisdiction pursuant to A.R.S. § 13-4033(A)(1).

Discussion

¶3 Vasquez-Ochoa argues because a person cannot "transport" marijuana without "possess[ing]" it under Arizona law, *see State v. Cheramie*, 218 Ariz. 447, ¶ 11, 189 P.3d 374, 376 (2008), his acquittal on the possession for sale charge entitled him to an acquittal on the transportation for sale charge as a matter of law, and thus, the trial court erred by denying his Rule 20(b) motion. We review a trial court's ruling on a Rule 20 motion for an abuse of discretion. *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007).

¶4 Vasquez-Ochoa is correct that possession of marijuana for sale is a lesser-included offense of transportation of marijuana for sale when the possession for sale charge is incidental to the transportation for sale charge. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d 94, 97 (App. 1998); *accord Cheramie*, 218 Ariz. 447, ¶¶ 10-12, 189 P.3d at 376. But the core of his argument rests on the assumption that a guilty verdict cannot stand if the jury's verdict on a related charge is inconsistent. Both the Arizona Supreme Court and the United States Supreme Court have held that consistency among the verdicts in various counts of an indictment is not required. *See, e.g.*, *Gusler v. Wilkinson ex rel. Cty. of Maricopa*, 199 Ariz. 391, ¶ 25, 18 P.3d 702, 707 (2001) ("Well-settled Arizona law permits inconsistent verdicts."), *citing State v. Zakhar*, 105 Ariz. 31, 32-33, 459 P.2d 83, 84-85 (1969); *accord United States v. Powell*, 469 U.S. 57, 62-63, 65 (1984).

¶5 In *Zakhar*, our supreme court expressly overruled earlier Arizona case law espousing the very rule Vasquez-Ochoa now urges. *See* 105 Ariz. at 32, 459 P.2d at 84 (overruling *State v. Fling*, 69 Ariz. 94, 210 P.2d 221 (1949), and *State v. Laney*, 78 Ariz. 19, 274 P.2d 838 (1954)). The court found Justice Holmes's reasoning persuasive:

> "The most that can be said [of a case with an inconsistent verdict] is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that

> they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Id., *quoting Dunn v. United States*, 284 U.S. 390, 393 (1932).

¶6 Regardless of whether the jury acquitted Vasquez-Ochoa of possession for sale because of "leniency," "compromise," "mercy," *id.* at 32-33, 459 P.2d at 84-85, or even "carelessness," *State v. Estrada*, 27 Ariz. App. 38, 40, 550 P.2d 1080, 1082 (1976), the inconsistency is not a legal basis for acquittal on the transportation for sale charge. Lower courts are bound to follow supreme court precedent; therefore, the trial court did not abuse its discretion by doing so. *See, e.g.*, *State v. Cooney*, 233 Ariz. 335, ¶ 18, 312 P.3d 134, 140 (App. 2013).

¶7 Vasquez-Ochoa relies on *Yeager v. United States*, 557 U.S. 110 (2009), for the proposition that an acquittal represents a "community's collective judgment" that the state lacks evidence needed to convict on the lesser charge, which necessarily means that the evidence is lacking for the greater offense. We do not read *Yeager* so broadly. That case considered whether the double jeopardy clause precluded retrial of the mistried counts when the jury acquitted the defendant of some counts and could not return a verdict on other counts. *Id.* at 115, 120. The narrow issue was whether *Dunn* applied to eliminate the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment. *Id.* at 112. In concluding that it did not apply, the court explained that inconsistent verdicts were fundamentally different from the circumstance where the jury acquitted on some counts and could not reach a verdict on related charges. *Id.* at 125. It reasoned that no inference could be made from the inability of a jury to reach a verdict, even assuming acquittal on certain charges logically required the jury also to acquit on the remaining charges. *Id.* This case only presents inconsistent verdicts; accordingly, *Yeager* does not vitiate *Dunn*'s holding that inconsistent verdicts are permitted.

¶8 Although neither party cites to our recent decision involving inconsistent verdicts, we consider whether *State v. Hansen*, 237 Ariz. 61, 345 P.3d 116 (App. 2015), applies. In that case, the jury found the defendant guilty of aggravated assault, but found him not guilty of its lesser-included offense of simple assault. *Id.* ¶ 3. The trial court failed to provide the not guilty verdict to the clerk for reading, which meant defense counsel had no notice of the discrepancy until the court discovered its oversight during the dangerousness phase of the bifurcated trial. *Id.* ¶ 4. Counsel was thus unable to make a timely objection to the inconsistency and request appropriate "[r]emedial efforts"—that the court either reinstruct the jury and send them back to deliberate further, or grant a mistrial. *See id.* ¶¶ 11, 14, 23.

¶9 In the present case, the trial court read both verdicts aloud, asked the jury if these were their verdicts and received affirmative responses, and then had the jury polled at the request of both parties. Unlike in *Hansen*, Vasquez-Ochoa was on notice of the inconsistency between the jury's completed verdict forms before the court accepted the verdict. "When it became known that the jury misunderstood the instructions, had the defendant made an issue of the problem, the trial judge might very well have explained the inconsistency to the jury and determined its true intent on the record[, but t]he defendant did nothing." *State v. Engram*, 171 Ariz. 363, 366, 831 P.2d 362, 365 (App. 1991). Absent any timely objection or motion, the trial court had no obligation to resolve the inconsistency in the complete verdicts forms sua sponte before finalizing the verdicts. *See Melendez v. United States*, 26 A.3d 234, 248 (D.C. 2011).

Disposition

¶10 For the foregoing reasons, we affirm the conviction and sentence.