IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JOSEFF POWELL,
aka Church Powell, aka Joseff Mykel Dean,
aka Joseff Mykaldean Powell,
Defendant-Appellant.

Multnomah County Circuit Court
14CR09300; A160450

Marilyn E. Litzenberger, Judge.

Argued and submitted April 5, 2017, Tillamook High School, Tillamook.

Andrew D. Robinson, Deputy Public Defender, argued the cause for appellant. With him on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Paul L. Smith, Deputy Solicitor General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Armstrong, Presiding Judge, and Shorr, Judge, and Wilson, Senior Judge.

SHORR, J.

Reversed and remanded.

SHORR, J.

Defendant appeals a judgment convicting him of unlawful possession of a firearm, ORS 166.250. On appeal, defendant assigns error to the trial court's denial of his motion to suppress evidence that a police officer found when he stopped and searched defendant without a warrant. Defendant contends that the trial court erred when it concluded that the search and seizure was justified under a variety of exceptions to the warrant requirement of Article I, section 9, of the Oregon Constitution, including the officer safety exception, voluntary consent, the emergency aid exception, and the school safety exception. Because we conclude that none of those exceptions apply, we reverse and remand.

I. FACTS AND PROCEDURAL HISTORY

We begin with the factual standard of review applicable in a review of a decision on a motion to suppress evidence. We are bound by the trial court's findings of historical fact that are supported by constitutionally sufficient evidence. *State v. Vasquez-Villagomez*, 346 Or 12, 23, 203 P3d 193 (2009). Further, "[i]n the absence of express factual findings, we presume that the trial court decided the disputed facts in keeping with its ultimate conclusion." *State v. Garcia*, 276 Or App 838, 839, 370 P3d 512 (2016). With that standard of review in mind, we state the following facts.

Defendant heard that a shooting had occurred at the high school where his younger sister was a student. Defendant rushed to the school to check on his sister. He had a handgun tucked into the waistband of his pants and concealed under his shirt and sweatshirt. When he arrived, defendant found an evacuation of students and staff underway. Students and staff were moving from the school to the church across the street. The evacuation was supervised by police officers. One officer, Sergeant Lofton, was supervising one of a number of patdown areas organized on the church property. There was an ongoing tactical response to the shooting at that time, and one purpose of the patdown areas was to ensure that the shooter or an accomplice did not escape by blending in with the evacuees. To that end, Lofton had arranged into an orderly line a disorganized mass of

students and staff who had gathered across the street from the school. Each person in the line was called forward in turn, ordered to put their hands on their head, and patted down by an officer. Officers patted down waistlines, lifted pant legs, lifted jackets or other baggy clothing, and patted or searched any other place that a weapon could have been concealed. Lofton's role was to "mak[e] sure that the kids [who] were searched went in front of me, and then went into the safe area," where they were interviewed by detectives and then cleared to leave.

During the evacuation process, Lofton spotted defendant, who had arrived at the scene and was standing apart from the organized line of evacuees. Lofton thought that defendant might have "left [the] search line for some unknown reason, [or] that he had never made it to my search line for some reason and he was an unknown." Lofton and defendant made eye contact, and defendant quickly looked off to the side. Lofton then approached defendant and asked him what he was doing. Defendant replied that he did not know where to go. Defendant did not explain why he was there. Lofton thought that defendant seemed nervous. At that point, Lofton was "concerned" that defendant "could have been involved in the shooting." Lofton told defendant, "I want you to come back with me this way," and directed defendant over to the patdown area. When they arrived at the patdown area, Lofton ordered defendant to lace his fingers behind his head. Defendant hesitantly raised his hands to the side of his head. Lofton touched defendant's hands together behind his head and said "put your hands together," which defendant did. Apart from that moment of hesitancy, defendant was "generally cooperative" with Lofton's instructions. Lofton "grabbed [defendant's] hands behind his head" to keep them together and walked defendant a few more steps forward. Lofton then decided to search defendant for weapons. Because Lofton was concerned that he would be unable to feel a weapon under defendant's baggy sweatshirt, he lifted defendant's sweatshirt and shirt with one hand while still gripping defendant's hands together behind his head with the other. Lofton made no attempt to patdown defendant first. Immediately upon lifting defendant's shirt, Lofton saw a handgun stuck into the waistband of

defendant's pants. Lofton later testified that he "maybe" would have felt the gun if he had conducted only a limited patdown over defendant's clothing. Lofton removed the gun and arrested defendant with assistance from other officers. The state then charged defendant with unlawful possession of a firearm, ORS 166.250.

Before trial, defendant moved to suppress the handgun as evidence. Following a hearing, the trial court denied the motion by a written opinion and order. The court first determined that defendant had been stopped and searched without a warrant. But the court concluded that, under the totality of the circumstances, "it was objectively reasonable to suspect [defendant] posed an immediate threat to the safety of [those in the vicinity, including police officers and students]. Therefore, it was reasonable for [Lofton] to take the safety precautions he did by stopping [defendant] and investigating further." The court also determined that the search was lawful under the school safety exception to the Article I, section 9, warrant requirement, citing *State ex rel Juv. Dept. v. M. A. D.*, 348 Or 381, 233 P3d 437 (2010). The trial court went on to conclude that defendant impliedly consented to the search, and that the emergency aid exception to the Article I, section 9, warrant requirement applied as well. The case then went to trial before a jury with the evidence of the discovered gun, and defendant was found guilty.

On appeal, defendant argues that the trial court erred in denying his motion to suppress. Specifically, defendant asserts that the record does not support the court's conclusion that the search fell under the officer safety, voluntary consent, emergency aid, and school safety exceptions to the Article I, section 9, warrant requirement.[1]

[1] In his opening brief, defendant also raises and rejects the idea that he was lawfully stopped and searched "pursuant to an appropriately tailored checkpoint procedure set up to apprehend a fleeing suspect," citing *State v. Gerrish*, 96 Or App 582, 773 P2d 793, *aff'd*, 311 Or 506, 815 P2d 1244 (1991). The state, for the first time on appeal, relies on *Gerrish* and argues that the stop and search were based on an appropriate checkpoint that was reasonable under the totality of the circumstances, and thus did not violate Article I, section 9. The state, however, expressly stated in the trial court that it was not relying on a theory that defendant was stopped pursuant to a narrowly tailored checkpoint or "roadblock" that complied with Article I, section 9. The trial court similarly did not rely on *Gerrish*

II. ANALYSIS

We review the trial court's decision to deny defendant's motion to suppress for legal error. *Vasquez-Villagomez*, 346 Or at 23. As noted, we are bound by the trial court's findings of fact if there is constitutionally sufficient evidence to support them. *Id.* To begin, there is evidence to support the trial court's finding that Lofton seized defendant when Lofton ordered him to raise his hands and grabbed his hands together behind his head. There is also evidence to support the trial court's finding that Lofton searched defendant when he lifted defendant's shirt. Ordinarily, a warrantless search is *per se* unreasonable, and therefore invalid, unless it comes within one of the few and carefully delineated exceptions to the warrant requirement that our courts have recognized. *State v. Meharry*, 342 Or 173, 177, 149 P3d 1155 (2006). In this case, the state acknowledges that it had no warrant to seize or search defendant but asserts that Lofton's actions were reasonable under a variety of recognized warrant exceptions. The state bears the burden of proving that an exception to the warrant requirement exists. *State v. Salisbury*, 223 Or App 516, 522, 196 P3d 1017 (2008) (citing *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991)). We conclude that the stop and search in this case do not fall under any of the warrant exceptions raised by the state. Therefore, the trial court should have granted defendant's motion to suppress.

A. *Officer Safety*

Defendant first argues that the trial court erred when it concluded that Lofton was entitled to stop and search defendant without a warrant because Lofton reasonably suspected that defendant might be armed and dangerous, and Lofton was concerned for the safety of himself, his fellow officers, and the students and staff gathered nearby. Under the officer safety exception, a police officer may take "reasonable steps" to protect the officer or others present

in its written order denying defendant's motion to suppress, nor did it reach a conclusion about whether defendant was stopped pursuant to a valid *Gerrish* checkpoint. Based on the considerations in *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001), we decline to address whether *Gerrish* and a checkpoint analysis applies or provides an alternative basis for affirmance.

if, "during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present." *State v. Bates*, 304 Or 519, 524, 747 P2d 991 (1987). To satisfy that standard, an officer's safety concerns "must be based on facts specific to the particular person searched, not on intuition or a generalized fear that the person may pose a threat to the officer's safety" or the safety of others nearby. *State v. Miglavs*, 186 Or App 420, 425, 63 P3d 1202 (2003), *aff'd*, 337 Or 1, 90 P3d 607 (2004).

Here, Lofton based his decision to seize and search defendant on his concern that defendant acted, at least in a general manner, suspiciously. At the motion to suppress hearing, Lofton testified that he became suspicious of defendant when they made eye contact and defendant quickly looked away. When Lofton approached defendant and asked him what he was doing, defendant made a "vague response" about not knowing where to go. Defendant seemed nervous to Lofton. Based on those observations, Lofton became "concerned" that defendant "could have been involved in the shooting," and ordered defendant over to the patdown area to be searched.

Defendant's conduct and demeanor was not the sort that would objectively cause a police officer to develop a reasonable suspicion that defendant was a person that might be armed and dangerous. Defendant complied with Lofton's orders, did not act in an aggressive or threatening manner, and did not do or say anything that reasonably would allow Lofton to infer that he had been involved in the shooting or otherwise posed a threat to Lofton or others. Indeed, Lofton's testimony evokes the kind of generalized fear and intuition-based decision-making that the Supreme Court has declared insufficient to trigger the officer safety exception to the Article I, section 9, warrant requirement. *See, e.g.*, *Bates*, 304 Or at 526 ("[The officer's suspicions that defendant was armed] may have been an excellent guess—the kind resulting from a sixth sense that many officers develop over the years. But *** there is no objective quality to them that entitles them to any weight *** in the constitutional

calculus."); *see also State v. Smith*, 277 Or App 298, 305, 373 P3d 1089 (2016) ("[D]efendant's cooperative attitude, his lack of aggressive or threatening behavior, the mere possibility that defendant might have committed a violation and the fact that defendant's clothing might have been a suitable receptacle to hold a weapon were not sufficient to create a reasonable belief that defendant posed an immediate threat."); *State v. Rodriguez-Perez*, 262 Or App 206, 215-16, 325 P3d 39 (2014) ("Neither defendant's demeanor nor his physical actions *** would support a reasonable suspicion that defendant posed an immediate threat of serious physical injury."); *cf. State v. Ehly*, 317 Or 66, 69-70, 854 P2d 421 (1993) (concluding that the officer had reasonable suspicion to support an officer safety search of a gym bag when the defendant was a known methamphetamine user, appeared to be under the influence of methamphetamines, was recently seen in the company of someone the officer believed to be armed, and was rummaging through the gym bag, with both hands concealed, when the officers encountered him).

We recognize that, "in determining whether an officer's concern for safety was objectively reasonable, we consider the totality of the circumstances as they reasonably appeared to the officer at the time." *Smith*, 277 Or App at 303 (internal quotation marks omitted). As noted above, the officers were responding to a shooting at a school and were organizing students and staff into orderly lines for evacuation in order to ensure the safety of the school community. The officers were assisting in a difficult and dangerous situation. Nevertheless, the officer safety exception still requires that the officer develop an objectively reasonable suspicion that the particular "citizen might pose an immediate threat of serious physical injury to the officer or to others then present." *Bates*, 304 Or at 524. Because Lofton did not develop an objectively reasonable suspicion based on specific and articulable facts that defendant in particular posed an immediate threat, Lofton was not entitled to rely on the officer safety exception to the Article I, section 9, warrant requirement when he seized and searched defendant. Accordingly, the evidence found during that interaction cannot be admitted under that exception.

B. *Voluntary Consent*

Defendant next argues that the trial court erred when it concluded that defendant consented to the search. The state, acknowledging that defendant did not expressly agree to the search, claims that he impliedly consented when he voluntarily arrived at an active evacuation scene, stood in the general vicinity of evacuating students, and complied with Lofton's orders.

"When there is consent to [a] search, no warrant is necessary." *State v. Pogue*, 243 Or 163, 164, 412 P2d 28 (1966). When the state relies on consent to justify a warrantless search, it has the burden of proving by a preponderance of the evidence that, under the totality of circumstances, the consent was the product of the defendant's free will. *See State v. Marshall*, 254 Or App 419, 427, 295 P3d 128 (2013) (stating standard and citing *Stevens*, 311 Or at 137). Voluntary consent may be manifested by conduct. *State v. Brownlie*, 149 Or App 58, 62, 941 P2d 1069 (1997). Mere acquiescence to a police order, however, does not constitute voluntary consent. *State v. Ching*, 107 Or App 631, 634, 813 P2d 1081 (1991) (officer's request "was in the nature of a command"); *State v. Freund*, 102 Or App 647, 652, 796 P2d 656 (1990) ("[The officer's] statement cannot be characterized as a request for consent. The officer stated that 'he was there' to pick up the marijuana and 'he wanted' to do it calmly. *** Read together, the officer's statement told defendant that she had no choice whether a search would occur.").

The state relies upon *Brownlie*, 149 Or App 58, as support for its claim that defendant's presence in the area immediately after the shooting, when he knew there was a significant police response, constituted consent to be searched. That comparison is inapt. In *Brownlie*, the defendant allowed security personnel at a courthouse entrance to screen the contents of her purse using an x-ray machine. *Id.* at 60. Signs posted outside and inside the sole public entrance to the courthouse notified the public that they would be subject to security screening upon entry. *Id.* The defendant had the option to leave the courthouse rather than submit to the screening. *Id.* at 62-63. Instead, she chose to enter and placed her purse into the machine. *Id.*

A reasonable person would know that an x-ray machine would reveal the contents of a closed container. By choosing to enter the courthouse with her purse and willingly submitting to the x-ray screening process, the defendant effectively consented to courthouse security examining the contents of her purse. *Id.*

In this case, by contrast, the link between defendant's conduct—his purported consent—and the search that occurred is far more removed. Defendant surely knew or should have known that there would be a significant police presence at the school when he arrived, and perhaps a person in defendant's position would know that, by arriving outside the school, "police contact * * * was bound to happen." But the state failed to establish that defendant reasonably would have believed that he would be subjecting himself to search and seizure simply by arriving outside the school to check on his sister. Most "police contact," after all, is entirely benign and does not result in search or seizure. Defendant was not a student at the school, did not arrive from school property, and had no knowledge of how the police were organizing their response efforts to the shooting, including the protocols in place for searching possible suspects. It is not reasonable to infer that defendant knew when he arrived that he would be stopped and searched and therefore implicitly consented to those procedures.

In addition, we conclude that defendant's later submission to Lofton's orders was "mere acquiescence" to police authority, which does not constitute voluntary consent. *Ching*, 107 Or at 634. Unlike in *Brownlie*, where the defendant had a clear choice between submitting to the x-ray screening or leaving the building, nothing in the record suggests that defendant had the option to walk away or refuse Lofton's instructions. To the contrary, Lofton's words and conduct unambiguously informed defendant that he had no choice but to comply with Lofton's orders. *See Freund*, 102 Or App at 652.

Because defendant did not voluntarily agree to the search, we conclude that the voluntary consent exception to the Article I, section 9, warrant requirement does not apply to this case.

C. *Emergency Aid*

Defendant next argues that the trial court erred when it concluded that Lofton was entitled to stop and search defendant without a warrant under the emergency aid exception. The emergency aid exception to the Article I, section 9, warrant requirement applies in only limited circumstances. The Supreme Court has explained that

> "an emergency aid exception to the *** warrant requirement is justified when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm."

State v. Baker, 350 Or 641, 649, 260 P3d 476 (2011). Put differently, the emergency aid exception applies only if the state can prove that, at the time of a warrantless search, the officers held a subjective belief that there was an immediate need to assist a person who had suffered, or was imminently threatened with suffering, "serious physical injury," and that that belief was objectively reasonable. *See State v. Stanley*, 287 Or App 399, 404, ___ P3d ___ (2017); *State v. Hamilton*, 285 Or App 315, 321, 397 P3d 61 (2017).

We have never established that the emergency aid exception applies in cases like this one, where an officer, while responding to an emergency situation, stops and searches a person in public who, based on the officer's general suspicion, might have been involved in some capacity in the events giving rise to the emergency. Rather than rendering aid to those in need of immediate assistance, the purpose of that latter kind of search is to investigate and mitigate a potential threat. Lofton's testimony at the motion to suppress hearing demonstrates that he was acting out of a desire to determine whether defendant was *involved* in the shooting and not, as our case law construing the emergency aid exception requires, out of a subjective belief that a person was in need of immediate assistance and that searching defendant would aid in providing such assistance. *See, e.g.*, *Hamilton*, 285 Or App at 322 (explaining that the emergency aid exception requires the subjective belief that the

search is necessary "because there is an immediate need to aid or assist a person who has suffered (or is imminently threatened with suffering) serious physical injury or harm, not the belief that a search is necessary *to discover if* there is an immediate need to aid or assist a seriously injured person" (emphasis in original)).

The distinction between a search to render aid and a search to mitigate a threat is what differentiates the emergency aid exception from the officer safety and school safety exceptions to the Article I, section 9, warrant requirement, discussed elsewhere in this opinion. Because the search in this case is not supported by the specific, narrowly tailored concerns that justify a warrantless emergency search to render emergency aid, we determine that the emergency aid exception is inapplicable in this case.

D. *School Safety*

Defendant finally argues that the trial court erred when it concluded that Lofton was entitled to stop and search defendant without a warrant under the school safety exception. In *M. A. D.*, the Supreme Court established that "the public school setting and the obligation of schools officials to provide a safe learning environment requires that [those officials] be able to respond quickly to credible information *** about immediate threats of serious harm to students and staff." 348 Or at 393. When a school official develops a "reasonable suspicion, based on specific and articulable facts, that a particular individual on school property *** poses an immediate threat to the safety of the student, the official, or others at the school," the official "must be allowed considerable latitude to take safety precautions." *Id.* at 392-93 (internal quotation marks omitted). To that end, public school officials are entitled to take "reasonable precautions," including, in certain situations, conducting a limited warrantless search of students and their belongings. *Id.* at 394-95.

Whether the school safety exception applies is based on the particular facts of each case. *Id.* at 393. In *M. A. D.*, a school official conducted a limited search of a student's belongings, on school grounds, based on specific, articulable,

and credible evidence about an immediate threat of serious harm to students and staff, namely the presence of illegal drugs on school grounds. *Id.* at 384. The search was narrowly tailored to exploring that threat, and was based on a reasonable suspicion that the particular student singled out for the search possessed illegal drugs. *Id.* Likewise, in *State v. A. J. C.*, 355 Or 552, 326 P3d 1195 (2014), the Supreme Court determined that the school safety exception applied to a school principal's warrantless search of a student's backpack where "the totality of the information known to [the principal] was sufficient for him to reasonably suspect that [the particular student] possessed a firearm for the purpose of shooting one or more students." *Id.* at 564.

Here, the state argues that there is "no principled reason" to limit the school safety exception to cases where students are searched on school grounds by school officials. Even assuming the exception applied to a search of a nonstudent conducted by the police just outside school grounds, the search in this case was based on no more than Lofton's general "concern" that defendant "could have been involved in the shooting." That general degree of suspicion falls short of the reasonable suspicion, based on "credible information [and] specific and articulable facts," that the Supreme Court required in *M. A. D.* and *A. J. C.*

While we are sensitive to the needs of law enforcement officers to respond swiftly and effectively to violent events in our schools, we conclude that, considering its limited application in prior cases, the school safety exception is not so broad as to encompass the search in this case. Certainly, it is not our role to "uncharitably second-guess" the actions taken by school officials in the name of protecting students from threats of serious harm. *M. A. D.*, 348 Or at 443-44. But the school safety exception must be seen in its proper context, as a narrow and carefully constrained exception to the right secured by Article I, section 9, to be free from "unreasonable search or seizure." As the Supreme Court explained in *A. J. C.*, "school officials are not licensed to engage in an unlimited search of students and their belongings on campus based on generalized threats to safety. Sanctioning such searches would fail to safeguard the Article I, section 9, rights of students that this court has

recognized." 355 Or at 566. The school safety exception does not permit police officers to conduct a warrantless search of any individual who, like defendant, happens to be near a school during an incident that threatens school children and staff, and provokes only general, unsubstantiated suspicion in an officer responding to that incident. While Lofton was acting in a difficult situation near school grounds to ensure the safety of students, his search of defendant was not based on a reasonable suspicion, based on specific and articulable facts, that defendant posed an immediate threat to safety.

Because the nature of the search in this case does not fall within the narrow framework established by *M. A. D.*, the school safety exception is not applicable, and the search of defendant cannot be upheld on that basis.

III. CONCLUSION

Lofton seized and searched defendant without a warrant or an applicable exception to the Article I, section 9, warrant requirement. Therefore, the trial court erred when it denied defendant's motion to suppress evidence found during that search.

Reversed and remanded.