IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 64892-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
CAMINO[1] ORION GAHAGAN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: January 3, 2012
	)	

Lau, J. — A jury convicted Camano Gahagan of second degree assault and attempted first degree robbery committed while armed with a firearm. Gahagan argues that tips from informants lacked sufficient reliability to justify an investigatory stop of the vehicle in which he was traveling. He also argues the trial court erred when it instructed the jury it must be unanimous to answer "no" on the firearm special verdict form. Because the instructions misinformed the jury on the unanimity requirement for a special verdict, we vacate the special verdicts and firearm enhancements. And

[1] We use the correct spelling of Camano's name in this opinion.

because his statement of additional grounds lacks merit, we otherwise affirm Gahagan's conviction and sentence and remand for proceedings consistent with this opinion.

FACTS

At trial, witnesses testified to the following events. On December 29, 2008, Mallorey Brixey lived with Devin Durand in a Days Inn hotel room in Everett, Washington. Brixey used OxyContin and Durand sold it. Brixey's friend, Laura Pearson, also used the drug. Early in the morning on December 29, Pearson visited Brixey.

Robert Koppel regularly purchased drugs from Durand. On December 28, Koppel and Gahagan discussed robbing Durand to obtain drugs and money.

Koppel called Durand early in the morning on December 29. Durand told Koppel to come to the Days Inn and call when he arrived. Koppel and Gahagan obtained disguises and restraints, and Koppel had a gun. Courtney and a man unknown to Koppel gave Koppel and Gahagan a ride to the Days Inn. Durand ran to the hotel lobby when he saw Koppel wearing a mask and pulling out his gun. Koppel and Gahagan ran off after their attempt to rob Durand failed.

The man who drove Koppel and Gahagan agreed to set up another drug deal in a second attempt to rob Durand. Durand directed the man to Top Foods. Courtney drove the car to a nearby Jack in the Box restaurant. Brixey and Pearson drove Pearson's car to Top Foods while Durand walked there. Durand conducted the drug deal with the man and then met Brixey and Pearson inside the store. Koppel and

Gahagan discussed their next move. Koppel and Gahagan hid in Pearson's car with restraints and a gun.

Durand, Brixey, and Pearson bought groceries and then returned to Pearson's car. Pearson got in first. Koppel grabbed her and pointed a gun at her head. Koppel and Gahagan ordered Durand into the car. Durand and Brixey ran back into the store. Koppel fired his gun near Pearson's head, leaving a hole in Pearson's windshield. Koppel and Gahagan ordered Pearson to drive them away. She drove out of the parking lot and turned right onto Everett Mall Way.

Brixey, who appeared panicked and frightened, told grocery checker Stephanie Rigger to call 911 because a man had a gun to her friend's head. Rigger asked co-worker Tanya Schmidt to find out what was happening outside. Schmidt saw Pearson's car leaving. She related details to the 911 operator.

Durand told customer John Glezer that Pearson was held at gunpoint in a white Dodge Intrepid. Glezer looked outside, saw a Dodge Intrepid leaving the parking lot, and called 911. Glezer followed the Intrepid in his car while providing details to the 911 operator, including the Intrepid's location. Within a few minutes, the police located the Intrepid at the location reported by Glezer.

Police stopped the car and ordered Pearson out first and then Koppel, and Gahagan followed. Police patted down Gahagan. During the pat down, police found a .45 expended shell casing that fell from Gahagan's pant leg near his ankle. Pearson consented to a search of her car. Police found a Glock 38 .45 caliber semiautomatic handgun and restraints.

Gahagan was charged with first degree kidnapping in count 1, second degree assault in count 2, attempted first degree robbery of Durand in count 3, and attempted first degree robbery of Pearson in count 4. The State also alleged firearm enhancements for all four counts.[2]

Gahagan moved to suppress evidence obtained from the stop, arguing that the informants' tips established no reasonable suspicion to stop the vehicle. The trial court denied the motion. The court also entered detailed findings of fact, unchallenged on appeal, and conclusions of law.

The jury failed to agree on the kidnapping charge, acquitted on the attempted robbery of Pearson, and convicted on the second degree assault and attempted first degree robbery of Durand. The jury answered "yes" to special verdicts for each of those two charges.

ANALYSIS

Investigatory Stop

Gahagan argues police lacked reasonable suspicion to detain him during an investigatory stop because the information provided to police lacked sufficient reliability to justify the stop.[3] Gahagan argues the trial court improperly refused to suppress

[2] Koppel pleaded guilty to one count of first degree attempted robbery with a firearm enhancement and one count of second degree assault with a firearm enhancement. Koppel testified at trial, but Gahagan did not.

[3] In accordance with Gahagan's request, we consider his Statement of Additional Grounds (SAG) arguments in conjunction with his counsel's arguments on this issue. See SAG, at 18.

evidence from the stop because it applied the "totality of the circumstances" test rather than the "Aguilar-Spinelli"[4] test to the informants' tips. Gahagan acknowledges we recently held that the totality of the circumstances test applies but urges us to reconsider, arguing our recent decisions misapply our Supreme Court's precedent. The State counters that the trial court properly held the investigatory stop valid under the totality of the circumstances test. We agree.

We first address Gahagan's contention that this court should evaluate investigatory stops based on information obtained from police informants under the Aguilar-Spinelli test rather than the totality of the circumstances test. We recently addressed this challenge in State v. Lee, 147 Wn. App. 912, 916-21, 199 P.3d 445 (2008). "Police may conduct an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity." State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Specifically, "[t]he reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991).

The totality of the circumstances test allows the court and police officers to

[4] See Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), abrogated by Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), abrogated by Gates, 462 U.S. 213.

consider several factors when deciding whether a Terry[5] stop based on an informant's tip is allowable, such as the nature of the crime, the officer's experience, and whether the officer's own observations corroborate information from the informant. Kennedy, 107 Wn.2d at 8, 726 P.2d 445; State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975). Moreover, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). But "[a]n informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient 'indicia of reliability.'" Sieler, 95 Wn.2d at 47 (quoting Adams v. Williams, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)). When deciding whether this "indicia of reliability" exists, we generally consider several factors, primarily (1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip. Sieler, 95 Wn.2d at 47; Lesnick, 84 Wn.2d at 944.

Information from a citizen-witness or crime victim generally provides greater reliability than from a paid police informant.

> A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described. Indeed, "victim-witness cases usually require a very prompt police response in an effort to find the perpetrator, so that a leisurely investigation of the report is seldom feasible." 2 [Wayne R.] LaFave, [Search and Seizure: A Treatise on the Fourth Amendment § 3.4(a),] at 210. Moreover, courts should not treat information from ordinary citizens who have been the victim of or witness to criminal conduct the same as information from compensated informants from the criminal subculture.

[5] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Lee, 147 Wn. App. at 918-19 (citation omitted).

Applying the totality of the circumstances test here, police officers clearly had reasonable suspicion to conduct an investigatory stop. Gahagan makes no challenges to the trial court's detailed findings of fact, and they are, thus, verities on appeal. State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d 363 (1997). The initial informants were crime victims, and the callers were citizens, not paid police informants. The store clerks identified themselves by name, phone number, and place of business. The second clerk provided specific details regarding what happened, stating, "she said that a guy has a gun to her friend's head." The clerk provided specific information about the type of vehicle Gahagan and Pearson drove and what direction they were going. Both clerks reported that the robbery eyewitnesses were in a highly emotional state.

John Glezer provided information consistent with what the two store clerks reported. He also confirmed the vehicle description and its direction of travel through direct observation. Police corroborated Glezer's description when they observed the vehicle. Here, the informants, including both citizen and victim informants, were more reliable than a paid informant. Police obtained this information from 911 dispatch and corroborated Glezer's vehicle description. We further note that police responded to an extremely dangerous situation—Pearson's alleged kidnapping at gunpoint—and conducted a "high risk" stop. See finding of fact 7; State v. Randall, 73 Wn. App. 225, 229, 868 P.2d 207 (1994) ("An important factor comprising the totality of circumstances which must be examined is the nature of the suspected crime."). Under the totality of

the circumstances, police clearly had reasonable suspicion to make the investigatory stop. This claim fails.

Special Verdict Instructions

For the first time on appeal, Gahagan argues that the court erred in instructing the jury that in order to answer the special verdict form, "all twelve of you must agree." We review this claimed error of law de novo. State v. Sublett, 156 Wn. App. 160, 183, 231 P.3d 231 (2010). Instruction 25 stated:

> If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

He relies on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). There, the Supreme Court held that for purposes of a special verdict , "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146. The court reasoned, "Though unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error." Bashaw, 169 Wn.2d at 147 (citation omitted).

And in State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, review granted, 172 Wn.2d 1004 (2011), we also addressed this issue. As in Bashaw, the special verdict instruction stated, "'Because this is a criminal case, all twelve of you must agree in

order to answer the special verdict forms.'" Ryan, 160 Wn. App. at 947 (quoting clerk's papers). Applying Bashaw, we held that the special verdict form was erroneous. Under Bashaw and Ryan, the special verdict instruction here misstated the law.

The State maintains that Gahagan waived the issue by failing to object to the instruction below. A panel of this court addressed the identical argument in Ryan. There, we held that the issue is of constitutional magnitude and can be raised for the first time on appeal and that Bashaw requires reversal. Ryan, 160 Wn. App. at 948. But a different panel of this division and one Division Three panel have held that this claim of error may not be raised for the first time on appeal.[6] Because two members of this panel adhere to the view expressed in Ryan, we review the claimed error even though Gahagan failed to raise it below.

As to the harmless error question and the appropriate remedy, we adhere to our opinion in State v. Reyes-Brooks, No. 64012-7-I, slip op. at 8 (Wash. Ct. App. Dec. 5, 2011). On harmless error, we held:

> In State v. Campbell, this court applied the logic of Bashaw and Williams-Walker to conclude that when a jury is instructed that it must be unanimous in order to answer "no" to a special verdict question, that error can never be harmless. Following Campbell, we hold that the court's instructional error was not harmless.

(Footnote omitted.) And on the remedy for a Bashaw violation we held, "[W]here a Bashaw instructional error compels vacation of an exceptional sentence, the trial court

[6] State v. Morgan, 163 Wn. App. 341, 351-53, 261 P.3d 167 (2011) (error is not of constitutional magnitude and cannot be raised for the first time); State v. Guzman Nunez, 160 Wn. App. 150, 153-54, 165, 248 P.3d 103 (error is not of constitutional magnitude and cannot be raised for the first time on appeal), review granted, 172 Wn.2d 1004 (2011). Our Supreme Court has granted review in Ryan and Nunez.

may impanel a jury upon remand to consider the aggravating factor with proper instructions." Reyes-Brooks, No. 64012-7, slip op. at 8.

Statement of Additional Grounds

Gahagan also argues that the tactics and force employed by police at the stop's initial inception constituted an arrest rather than an investigatory stop. He cites the number of officers and squad cars and their authoritative commands. He also argues probable cause did not support the arrest.

The degree of physical intrusion must be appropriate to the type of crime under investigation and to the probable dangerousness of the suspect. State v. Duncan, 146 Wn.2d 166, 177, 43 P.3d 513 (2002) (recognizing that a higher level of police intrusion is allowed for a greater risk and a more violent crime than would be acceptable for a lesser crime). Under certain circumstances, measures such as drawing guns, handcuffing, and secluding the suspect may be appropriate to accomplish a Terry stop. State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984); State v. Knighten, 109 Wn.2d 896, 909-10, 748 P.2d 1118 (1988) (recognizing that police went beyond a valid Terry stop by handcuffing and secluding the defendant when the defendant was thought to be unarmed and not involved in a violent crime). The investigative methods used by the police must be the least intrusive means reasonably available to verify or dispel the officers' suspicions in a short period. Williams, 102 Wn.2d at 738.

Here, officers were investigating a potential kidnapping committed with a firearm. Witnesses advised that multiple individuals were involved in the shooting. Officers had every reason to suspect that Gahagan was armed and dangerous when they

discovered him. While not part of a typical Terry stop, the drawing of firearms, the use of handcuffs, and Gahagan's seclusion in a patrol car was proper in light of the facts known to the officers at the time of his detention. And shortly after his detention, a frisk revealed a spent shell casing at the base of Gahagan's pants and a search of the car revealed a gun. These facts supplied probable cause sufficient to arrest Gahagan at that time. See, e.g., State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995) (pat down revealing contraband may supply probable cause for arrest).

Gahagan next argues his assault conviction merges with his attempted robbery conviction. We reject this argument, finding that State v. Esparza, 135 Wn. App. 54, 143 P.3d 612 (2006), controls. Here, Gahagan was convicted of assaulting Pearson and attempted robbery of Durand, and the charging documents identified them in the separate counts. Like in Esparza, here "it is not clear that the assault [of Pearson] was the substantial step taken toward the attempted crime of first degree robbery [of Durand]." Esparza, 135 Wn. App. at 64. And in State v. Kier, 164 Wn.2d 798, 807, 194 P.3d 212 (2008), a case relied on by Gahagan, our Supreme Court explained the important difference between robbery and attempted robbery for merger purposes. The Kier court approvingly cited Esparza and a passage in State v. Beals, 100 Wn. App. 189, 997 P.2d (2000). "'A completed second degree assault is not necessary to prove attempt to commit first degree robbery, and it is unlikely the legislature intended . . . the merger doctrine to so apply here.'" Kier, 164 Wn.2d at 807 (quoting Beals, 100 Wn. App. at 193-94. Gahagan's argument fails.

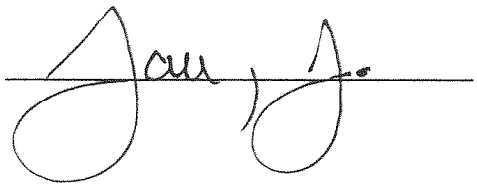
Gahagan next argues the court should have granted his counsel's mistrial

motion when jurors saw his suit carried through the court house. A court should grant a mistrial only when a defendant has been so prejudiced that nothing short of a new trial would insure the defendant be tried fairly. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). Gahagan demonstrates no such prejudice here.

Gahagan next argues ineffective assistance of counsel, citing his counsel's failure to request a continuance when police officers allegedly failed to respond to subpoenas for a CrR 3.6 hearing seeking to suppress fruits from the investigatory stop discussed above. To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong, the court need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). There is a strong presumption of effective assistance. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Based on our review of the record, defense counsel ably argued the suppression motion and Gahagan has not overcome the presumption that counsel's representation was effective. Gahagan also demonstrates no cumulative error.

CONCLUSION

For the reasons discussed above, we vacate the special verdicts and firearm enhancements. We otherwise affirm Gahagan's conviction and sentence and remand for further proceedings consistent with this opinion.



WE CONCUR:

Leach, A.C.J. _____