IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. ALAN MARTIN SANCHEZ HERNANDEZ, Appellant.	No. 29965-1-III UNPUBLISHED OPINION

Sweeney, J. — This appeal follows convictions for alien in possession of a firearm and attempted first degree assault. The appellant argues, among other things, that the officer did not have grounds to draw his gun and stop him. We conclude that the officer had legally sufficient reasons to draw his gun and stop the defendant. And we conclude that the evidence was sufficient to show that the defendant possessed and tried to use a gun. We affirm the convictions but remand for resentencing to delete the sentencing restrictions related to gangs.

FACTS

Police Officer Kevin Glasenapp received a call from an unidentified caller who reported that a group of people appeared to be smoking marijuana on his property. The caller also believed that some of those gathered may have been involved in a burglary on the property the day before. Officer Glasenapp drove to the address and saw several men standing outside a car parked partially in a driveway. A man and a woman were in the car. The officer made a U-turn and noticed one of the men run toward an alley. Officer Glasenapp followed him but was unable to catch him. By the time Officer Glasenapp returned to the group, another officer had arrived. Both officers were aware that two of the individuals in the group were gang members and out on bail after being charged with violent crimes.

Officer Glasenapp got out of his patrol car, drew his gun, and held it in a "low ready" position. Report of Proceedings (RP) at 113. He ordered everyone to the ground. He also ordered the two occupants in the car to get out. The woman complied. Mr. Sanchez Hernandez, the other occupant, refused to get out. Officer Glasenapp then saw Mr. Sanchez Hernandez drop down toward the floorboard and move forward as if to try to conceal or retrieve something. And Mr. Sanchez Hernandez continued to ignore Officer Glasenapp's repeated requests to get out of the car. Mr. Sanchez Hernandez eventually got out of the car, but refused to comply with Officer Glasenapp's order to put

his hands on the car. Instead, he stood with his hands at his side and asked the officer what he wanted.

Officer Glasenapp held his gun near his chest and reached toward Mr. Sanchez Hernandez with his left arm to try to gain some control of his arm or waist. He then saw Mr. Sanchez Hernandez reach toward his waistband and grasp a pistol-shaped object with his right hand. Mr. Sanchez Hernandez had four fingers on one side and his thumb on the other. Mr. Sanchez Hernandez tugged upwards exposing a metallic object that the officer was "positive" was a firearm. RP at 118. Officer Glasenapp thought he was about to be shot, stepped back, and yelled, "gun!" RP at 119. Mr. Sanchez Hernandez continued to try to retrieve the gun from under his clothing, but was unable to do so and ran off.

Officer Glasenapp chased Mr. Sanchez Hernandez, but was unable to catch him. He returned to the car and saw a pistol barrel under the passenger side front seat close to where Mr. Sanchez Hernandez had been sitting. The car was impounded and searched and authorities found a firearm under the passenger seat.

The State charged Mr. Sanchez Hernandez with being an alien in possession of a firearm and attempted first degree assault with a firearm enhancement.

Mr. Sanchez Hernandez moved to suppress the evidence obtained after his arrest and argued that Officer Glasenapp did not have the necessary reasonable suspicion to

detain him. The court denied Mr. Sanchez Hernandez's suppression motion: "I think that at that point in time with the furtive movement, the officer had a responsibility to investigate further" and have a gun at the ready. RP at 53.

The jury found Mr. Sanchez Hernandez guilty on both counts, but answered the special verdict on the firearm enhancement in the negative.

Mr. Sanchez Hernandez moved for a mistrial on the attempted first degree assault charge. He argued that the general and special verdicts were inconsistent and this nullified the general verdict. The court denied his motion.

DISCUSSION

Reasonable Suspicion

Mr. Sanchez Hernandez contends that Officer Glasenapp did not have the necessary reasonable suspicion, that he was engaged in criminal activity, required to draw his gun and stop him. The State responds that the stop was justified by Mr. Sanchez Hernandez's noncompliance with the officer's orders and his furtive movements in the car.

The trial court here did not enter findings of fact or conclusions of law but the court's oral findings and conclusions are sufficient to permit review. *State v. Johnson*, 75 Wn. App. 692, 698 n.3, 879 P.2d 984 (1994). The parties do not dispute the essential

facts. And the issues raised are questions of law so formal findings and conclusions are less important. *State v. Tagas*, 121 Wn. App. 872, 875-76, 90 P.3d 1088 (2004).

Warrantless searches and seizures are presumed unreasonable under the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution. *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). Evidence obtained in violation of these constitutional principles must be suppressed, and evidence obtained as a result of any subsequent search must also be suppressed as fruit of the poisonous tree. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

There are exceptions, however, including the so-called *Terry* investigative stop. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). It permits police to briefly detain and question an individual if they have a reasonable suspicion of criminal activity. *Terry*, 392 U.S. at 21; *State v. Day*, 161 Wn.2d 889, 895-96, 168 P.3d 1265 (2007). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, 107 Wn.2d at 6. "In evaluating the reasonableness of [a *Terry*] stop, courts consider the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained." *State v. Acrey*, 148

Wn.2d 738, 747, 64 P.3d 594 (2003).

Also police may draw a gun in some circumstances. *Williams*, 102 Wn.2d at 740 n.2; *State v. Mitchell*, 80 Wn. App. 143, 146, 906 P.2d 1013 (1995). The test is whether a reasonable person in the same circumstances would believe he or others were in danger. *State v. Belieu*, 112 Wn.2d 587, 602, 773 P.2d 46 (1989). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

Of course, an officer need not be absolutely certain that a suspect is armed. *Terry*, 392 U.S. at 21-24. We are, and should be, reluctant to second guess a police officer in the field and substitute our judgment for that of the officer. *Belieu*, 112 Wn.2d at 601. "'A founded suspicion is all that is necessary.'" *Belieu*, 112 Wn.2d at 601-02 (quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966)). A suspect's reaction to police is something we can consider when evaluating the reasonableness of an officer's use of force during a *Terry* stop. *Belieu*, 112 Wn.2d at 600.

Here Officer Glasenapp saw Mr. Sanchez Hernandez shift and reach under a car seat as he approached. One man had run away as the officer approached. Two others in

the group were gang members with pending charges for violent crimes and out on bail. Mr. Sanchez Hernandez's movements made the officer concerned that Mr. Sanchez Hernandez might be hiding or retrieving a weapon in the back seat of the car. Mr. Sanchez Hernandez had easy access to what he was reaching for. Mr. Sanchez Hernandez had also refused repeated orders to get out of the car and refused to put his hands on the car as ordered.

We will not second guess Officer Glasenapp's actions here. He did not have to wait until he saw a gun fully displayed. Mr. Sanchez Hernandez's furtive movements in the back of the car, alone, justified the officer's stop and decision to draw a gun. *See State v. Watkins*, 76 Wn. App. 726, 730, 887 P.2d 492 (1995). We conclude that the officer acted reasonably and legally given the situation he faced. *See Mitchell*, 80 Wn. App. at 146; *State v. Wilkinson*, 56 Wn. App. 812, 815, 785 P.2d 1139 (1990) (an officer who properly stops a car may conduct a search for weapons when one of the persons in the car moves as if to hide a weapon). Officer Glasenapp's observations of Mr. Sanchez Hernandez's furtive movements in the back of the car coupled with his refusal to do as ordered were a sufficient basis for the *Terry* stop.

Sufficiency of the Evidence—First Degree Assault

Mr. Sanchez Hernandez next contends that the State failed to show that he was

armed with a gun during the assault and therefore failed to prove an element of attempted first degree assault.

We first view the evidence in the light most favorable to the State, and then decide whether any rational trier of fact could have found the elements of the crime based on that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). To do so we pass on whether the State met its burden of production. *State v. Pineda*, 99 Wn. App. 65, 77, 992 P.2d 525 (2000). The trier of fact, not this court, evaluates witness credibility and the persuasiveness of the evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The jury was correctly instructed that "[a] person commits the crime of First Degree Assault when, with intent to inflict great bodily harm, he assaults another with a firearm." Clerk's Papers (CP) at 116; *see* RCW 9A.36.011(1)(a). The court also instructed the jury that to convict Mr. Sanchez Hernandez of the crime of attempted first degree assault, it was required to find that he did an act that was "a substantial step toward the commission of First Degree Assault." CP at 119; *see* RCW 9A.28.020(1). A substantial step is conduct that strongly indicates a criminal purpose. *State v. Dent*, 67 Wn. App. 656, 660, 840 P.2d 202 (1992), *aff'd*, 123 Wn.2d 467, 869 P.2d 392 (1994).

Officer Glasenapp tried to grab Mr. Sanchez Hernandez. He saw Mr. Sanchez

Hernandez grip his hands around a pistol-shaped object under his shirt. Mr. Sanchez Hernandez struggled to free it, his shirt came up, and exposed what Officer Glasenapp was certain was a firearm. That is sufficient to show the use or attempted use of the firearm.

Mr. Sanchez Hernandez tried to pull the gun while he faced the officer. And he continued to try to retrieve the firearm from under his clothing as he ran away. The evidence is sufficient to show that Mr. Sanchez Hernandez possessed a firearm and that he took a substantial step toward using it, when that evidence is viewed in a light most favorable to the State.

Mistrial—Inconsistent Verdicts

Mr. Sanchez Hernandez next contends that the court should have granted his motion for a mistrial because the special verdict (not armed with a firearm) was inconsistent with the general verdict (attempted first degree assault with a firearm).

Whether those verdicts are inconsistent is a question of law that we will review de novo. *State v. Goins*, 113 Wn. App. 723, 729-31, 54 P.3d 723 (2002) (no standard of review mentioned but reviewed de novo), *aff'd*, 151 Wn.2d 728, 732-33, 92 P.3d 181 (2004) (no standard of review mentioned but reviewed de novo).

The court denied Mr. Sanchez Hernandez's motion for a mistrial, noting that for

purposes of the special verdict, the jury had been instructed that the firearm had to be "easily accessible and readily available for offensive or defensive use." RP at 321; CP at 121. The court thought that the jury likely found that Mr. Sanchez Hernandez possessed a firearm for purposes of the assault charge, attempted to use it, but that ultimately he had not been able to draw the weapon. Thus, it had not been "readily available" under the language of the special verdict. The court then concluded from this that the verdicts were not inconsistent.

"[J]uries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity." *Goins*, 151 Wn.2d at 733. And "[d]espite the inherent discomfort surrounding inconsistent verdicts," both the United States Supreme Court and Washington Supreme Court have held that a general or special verdict adverse to a defendant will not be vacated merely because it is inconsistent with a general or special verdict favorable to the defendant. *Id.*; *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988). A defendant is protected from jury error upon an evaluation by the trial and appeal courts of "whether the guilty verdict rested on sufficient evidence." *Goins*, 151 Wn.2d at 733. Here, we have concluded that it did.

In *Ng*, our Supreme Court adopted the *Powell*[1] rule. *Ng*, 110 Wn.2d at 34-35. In *Ng*, the defendant was charged with first degree assault and 13 counts of first degree

[1] *United States v. Powell*, 469 U.S. 57, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984).

felony murder. *Id.* The elements instruction on each charge of felony murder required that the jury find that Ng participated in a robbery and caused a particular victim's death. *Id.* at 36. The instructions also allowed the jury to find Ng guilty of (1) first degree robbery as a lesser included offense of felony murder and (2) second degree assault as a lesser included offense of first degree assault. *Id*. The jury convicted Ng of the lesser included offenses. *Id.*

Ng argued that the jury's verdicts on the robbery crime charges should be reversed because they were inconsistent with the felony murder acquittals. *Id*. at 45. The court refused to "second guess" the jury's reasoning and upheld the "'unreviewable power of a jury to return a verdict of not guilty for impermissible reasons.'" *Id.* at 48 (internal quotation marks omitted) (quoting *United States v. Powell*, 469 U.S. 57, 63, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)).

Here, the jury was instructed:

> For purposes of the special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count 2.
>
> A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use.

CP at 121.

The verdicts here are not necessarily inconsistent given the instructions. As the court noted, the jury could have concluded

that Mr. Sanchez Hernandez was armed for purposes of the attempted first degree assault charge, but that the firearm was not "easily accessible" and "readily available" under the language of the special verdict. But the evidence was sufficient to support the jury's verdict on the attempted first degree assault charge, in any event. The court then properly denied Mr. Sanchez Hernandez's motion for a mistrial.

Conditions of Sentence

Mr. Sanchez Hernandez contends that the sentencing court abused its discretion by imposing community custody conditions that prohibited Mr. Sanchez Hernandez from (1) knowingly associating with or communicating with other criminal street gang members, (2) wearing clothing associated with gang membership, or (3) getting tattoos, brands, burns, or piercings related to gang membership. *See* CP at 141-42 (Judgment and Sentence). He contends that these conditions are not reasonable crime-related prohibitions and that they violate his First Amendment rights. The State agrees.

The court concluded that gang membership would be irrelevant to the charges against Mr. Sanchez Hernandez and granted his motion to exclude any reference to his gang membership. So necessarily then there is no reasonable relationship between Mr. Sanchez Hernandez's crimes and the gang-related community custody prohibitions. Given the absence of evidence that Mr. Sanchez Hernandez's crimes were gang related,

the sentencing court had no tenable grounds for imposing the gang-related prohibitions here.

We affirm the convictions but reverse the sentencing enhancement.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to

RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Siddoway, A.C.J.

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Kulik, J.