

NO. 68057-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSE CARDENAS-MURATALLA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HILYER

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. A law enforcement officer may make an investigatory stop if there are specific, articulable facts that would lead a reasonable officer to conclude that the person stopped is engaged in criminal activity. Here, Officers Myers and Lang responded to a 911 call of a man who had displayed a firearm. They found the man, Cardenas-Muratalla, in a dark doorway in an area known for drug and gun crimes; when he saw the officers, he appeared startled and moved his clothing at his waistband in a manner that Myers recognized as someone adjusting a firearm to ensure it is secure and available for immediate access. When Myers spotlighted him, Cardenas-Muratalla immediately left the doorway and walked away. Did the trial court properly conclude that the officers had reason to suspect that Cardenas-Muratalla either had committed or was going to commit a crime involving a gun?

2. A person may not use force to resist an unlawful police detention if he is only faced with a loss of liberty. When confronted by Officer Lang, Cardenas-Muratalla quickly turned away and reached into his waistband area where Officer Myers believed he had concealed a gun. He made a motion at his waist as if drawing the gun. Even if the officers' initial attempt to stop Cardenas-Muratalla was unlawful, did his

subsequent conduct in drawing a firearm provide the officers with probable cause to arrest him for attempted assault?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On December 15, 2010, the State of Washington charged Appellant, Jose Manuel Cardenas-Muratalla,<sup>1</sup> with one count of Unlawful Possession of a Firearm in the First Degree. CP 1. Pretrial, Cardenas-Muratalla brought a motion to suppress the firearm, alleging that it was discovered during an unlawful seizure of his person. CP 21-33. The court held an evidentiary hearing on the matter. 1RP.<sup>2</sup> After hearing testimony from the two officers involved in the stop and arrest of Cardenas-Muratalla, the trial court denied the motion to suppress and admitted the firearm. 2RP 3-6; CP 79-85.

The matter proceeded to trial. After a first trial resulted in a hung jury, Cardenas-Muratalla was convicted as charged in a second trial. 4RP 148-51; CP 95. On November 9, 2011, the trial court sentenced

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<sup>1</sup> The Information originally spelled his name "Cardenas-Muralta." CP 1. The Information was later amended to reflect the spelling of "Cardenas-Muratalla," with "Cardenas-Muralta" as an AKA. CP 91.

<sup>2</sup> This brief uses the following notation to refer to the nine-volume Verbatim Report of Proceedings: 1RP for June 13, 2011; 2RP for June 14, 2011; 3RP for June 15, 2011; 4RP for June 16-17, 2011; 5RP for July 13, August 23, October 11, and October 24, 2011; 6RP for August 29, 2011; 7RP for October 24, 2011; 8RP for October 25, 2011; and 9RP for October 26 and November 9, 2011.

Cardenas-Muratalla to 27 months in prison, a standard range sentence.

CP 121-28. This appeal timely followed. CP 129.

## **2. SUBSTANTIVE FACTS<sup>3</sup>**

On December 7, 2010, in Seattle, Washington, at approximately 10:00 p.m., an unidentified caller dialed 911. Ex. 8. The man reported that a short Mexican man, wearing a light blue hoodie, was at the bus stop at Third and Yesler and had a handgun. Ex. 8. The caller described the gun as having a silver handle, and although he denied that the man with the gun had threatened him, he said that that man had shown him the gun, and that he was calling the police to tell them about it. Ex. 8. The caller hung up. Ex. 8. The 911 dispatcher had the caller's phone number, however, and called him back to try to get more information; she was unsuccessful in reaching the original caller. Ex. 8.

The 911 dispatcher provided information about the call to officers in the area. 1RP 5. Seattle Police Department Officers Christopher Myers and Chris Lang, who were working in the area, heard the call. 1RP 5, 77-79. They responded. 1RP 5, 78-79. Although they did not know very much about the caller or the person with the gun, they inferred that if

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<sup>3</sup> Because Cardenas-Muratalla challenges only the trial court's denial of his motion to suppress, the bulk of the facts are drawn from the Criminal Rule 3.6 hearing, rather than the trial itself.

someone had called 911 to complain about a gun being displayed, then the display of the firearm was alarming to someone. 1RP 66-67, 103.

Myers, an officer with 21 years of experience, had been trained in weapons interdiction, including the characteristics of armed persons. 1RP 26-27. In fact, he had taken a class offered by the Federal Bureau of Investigation (“FBI”) that taught him about certain behaviors exhibited by people who were armed, and described some of that training for the trial court. 1RP 27-30.

Myers was also involved in a Seattle Police Department program working to get guns off of the street; as such, he was particularly familiar with the block of Third Avenue that he and Lang were responding to, where he had worked for many years. 1RP 28, 32-33, 36. He described the block as a high drugs, guns, and crime area, particularly during the evening, and that the crime level was so high on that particular block that it was an area of emphasis for his precinct. 1RP 32-33. He said that the sidewalk in front of the Downtown Emergency Services Center (“DESC”) had very active, ongoing crime, especially towards the south end of the building, and that there was dramatically less activity across the street in front of the courthouse. 1RP 32-33, 36; see also 1RP 105-06.

In response to the 911 dispatch, Myers drove his patrol car northbound on Third Avenue in the center lane; Lang was in the front

passenger seat. 1RP 6-7, 35, 106-09. It was dark, cold, and wet out. 1RP 83. Myers saw three people in a recessed doorway at the south end of the DESC building. 1RP 36. Myers was familiar with that specific doorway as being popular for drug use and other crime from dark until 5:00 or 6:00 a.m. because of its lack of exposure and the inability of police to see into it from a concealed location. 1RP 37.

As Myers's patrol car was stopped still facing northbound, he observed that the man in the middle, later identified as Cardenas-Muratalla, possibly matched the description provided by the 911 caller. 1RP 11. He watched as Cardenas-Muratalla, who had been looking down, brought his head up, saw the patrol car, and looked startled, with an "Oh, crap" look on his face. 1RP 11-12, 38. Cardenas-Muratalla then grabbed the front of his sweatshirt and pulled it down and away from his body rapidly and repeatedly (later referred to as "fluffing"), in a manner that the officer described as nervous and intentional. 1RP 11-14, 38. Based on his experience and training, Myers recognized the behavior as Cardenas-Muratalla both concealing a gun in the front of his waistband and ensuring the firearm was not tangled with his clothing so that it would be easily accessible. 1RP 38-39.

Myers turned his patrol car to the west, across traffic, and spotlighted Cardenas-Muratalla in the doorway. 1RP 40. Cardenas-

Muratalla immediately departed the doorway and headed to the north; the other two individuals in the doorway did not react. 1RP 40-41. It appeared to Myers that Cardenas-Muratalla, who was holding a cellphone to his ear with one hand, was keeping his arms close in to his body; Myers could not see both hands. 1RP 41.

Lang and Myers jumped from their patrol car and ordered Cardenas-Muratalla to get on the ground; he did not. 1RP 18, 90; Ex. 10.<sup>4</sup> Lang ran northbound to intercept Cardenas-Muratalla from the front. 1RP 42-43, 92-93, 111-14. Myers came around the patrol car and approached Cardenas-Muratalla from the east side. 1RP 42-43. As Lang rounded a bus shelter and faced Cardenas-Muratalla, Cardenas-Muratalla turned back. 1RP 93. Myers saw that Cardenas-Muratalla had his hands at his waistband and was using his left hand to pull up the hem of his hoodie sweatshirt in the area where Myers believed he had a gun. 1RP 45-46; see also 1RP 115-17, 122-23. He could see Cardenas-Muratalla drawing or reaching with his right hand, and could see an outline down the front of his pants that was consistent with a gun; Myers believed he was trying to draw it. 1RP 20-23, 48.

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<sup>4</sup> The three exhibits designated by Cardenas-Muratalla – one from pretrials, one from the first trial, and one from the second trial – are all called Exhibit 10. This brief's references to Exhibit 10 are exclusively to the exhibit from the second trial containing both the video from DESC and the video from the patrol car, presented side by side; it was denominated Exhibit 2 at the suppression hearing.

Because Myers had a taser in his hand, he quickly discharged the taser towards Cardenas-Muratalla, tossed the taser aside, drew his weapon, and fired once at Cardenas-Muratalla, hitting him. 1RP 22-23, 49-52; RP 112-13. Cardenas-Muratalla went to the ground. 1RP 23, 113. The officers were able to get Cardenas-Muratalla under control. 1RP 23. Once they did, Myers located a firearm in Cardenas-Muratalla's waistband. The gun was pulled to the right of center and was snagged on his clothing. 1RP 24, 54.

This incident was captured by two video cameras, one mounted on the DESC building and the other mounted inside the police car. The videos were presented to the jury side by side. Ex. 10. The DESC video is of poor quality, in that it only took pictures at a rate of one or two each second. The police car video is of better quality and has accompanying audio, but some of the relevant action takes place out of the camera's view.

Cardenas-Muratalla had a prior conviction for Conspiracy to Deliver Heroin, a serious offense prohibiting him from possessing a firearm. 5RP 33-34; RCW 9.41.040(1)(a).

**C. STANDARD OF REVIEW**

Cardenas-Muratalla appeals the trial court's denial of his motion to suppress the firearm recovered from his person. On review, unchallenged

findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Challenged findings of fact are reviewed for substantial evidence. Id. at 647. Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. Id. at 644. Conclusions of law are reviewed de novo. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

**D. ARGUMENT**

Cardenas-Muratalla complains that the trial court erred in denying his motion to suppress the handgun found on his person after he was seized by the police on December 7, 2010. He argues that the police lacked a reasonable and articulable suspicion to stop him, so all evidence recovered from him must be suppressed. But the totality of the facts known to the officers, including information provided by a 911 caller and the officers' own observations of Cardenas-Muratalla, supported a conclusion that he was engaged in unlawful conduct with a gun. Additionally, even if there was not a valid basis for a Terry stop at the time the police initially tried to detain him, Cardenas-Muratalla's illegal action in attempting to draw a gun on the police warranted an arrest for attempted assault at that time. The trial court's order denying Cardenas-Muratalla's motion to suppress the firearm should be affirmed.

**1. THE TRIAL COURT PROPERLY DETERMINED THAT OFFICERS MYERS AND LANG ACTED LAWFULLY WHEN THEY SEIZED CARDENAS-MURATALLA BY ORDERING HIM TO STOP.**

Both the United States and Washington Constitutions protect individuals from unreasonable searches and seizures. U.S. CONST. amend. IV; WASH. CONST. art. I, § 7. A warrantless seizure is presumptively unreasonable, and the State bears the burden of proving that a warrantless seizure falls into one of the narrow exceptions to this rule. Doughty, 170 Wn.2d at 61.

A brief investigatory seizure, also known as a Terry<sup>5</sup> stop, is an exception to the warrant requirement. Id. at 61-62. Judging the reasonableness of such a stop requires a balancing of the nature and quality of the intrusion against the importance of the governmental interests justifying the intrusion. State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). Courts will accept a higher level of interference with personal security when a more serious crime or greater risk to public safety is involved than it will for a lesser crime or risk. Id. at 518-19. Further, preventing crime, not merely investigating a past crime, may be a valid basis for a Terry stop. Id. at 518; State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

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<sup>5</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

An investigatory detention must be supported by specific and articulable facts that would lead a reasonable officer to suspect that the defendant is engaged in criminal activity. Doughty, 170 Wn.2d at 61-62. In evaluating the validity of such a stop, which must be justified at its inception, Terry, 392 U.S. at 20, a court must examine the totality of the circumstances known to the investigating officer, including rational inferences that can be drawn from the known facts. Doughty, 170 Wn.2d at 61-62. Although courts apply an objective standard, Terry, 392 U.S. at 21-22, they should also be reluctant to substitute their judgment for that of police in the field, who may be responding quickly to rapidly evolving circumstances. State v. Arreola, \_\_ Wn.2d \_\_, 290 P.3d 983, 990 (2012).

Here, Officers Myers and Lang were attempting to make a lawful investigatory detention when they told Cardenas-Muratalla to stop.<sup>6</sup> A 911 caller had reported that Cardenas-Muratalla had a firearm and had displayed it to him. Myers and Lang reasonably concluded that people only call the police to report a crime or for some other reason warranting alarm. When the two officers went to investigate, they located Cardenas-Muratalla in a doorway, with two other people, at a location particularly known for drugs, illegal possession of guns, and other crimes, especially at

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<sup>6</sup> The State acknowledges that when the officers told Cardenas-Muratalla to “Get on the ground now!,” their actions constituted a seizure. See, e.g., State v. Hopkins, 128 Wn. App. 855, 862, 117 P.3d 377 (2005) (“An investigatory stop occurs at the moment when, given the incident’s circumstances, a reasonable person would not feel free to leave.”).

that time of night.<sup>7</sup> Cardenas-Muratalla looked startled and concerned upon seeing the police presence, and made a gesture towards his waistband that confirmed for Myers both that Cardenas-Muratalla had a gun and that he was ensuring that it was easily accessible. When Myers spotlighted Cardenas-Muratalla,<sup>8</sup> he immediately left. Under the totality of the circumstances, there were specific and articulable facts that led Myers and Lang to suspect that Cardenas-Muratalla had either committed a crime or was intending to do so.

Cardenas-Muratalla's complaints about the trial court's conclusion that the Terry stop was valid fall in to two broad categories. First, he alleges that some of the court's factual findings were not supported by substantial evidence. Second, he contends that some of the factors enumerated above are inadequate to support the officers' suspicion that

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<sup>7</sup> Cardenas-Muratalla complains that the area of the stop was "across from the King County Courthouse," and that to "broadly designate swathes of downtown Seattle 'high-crime areas' and in this way strip away constitutional protections sets a dangerous precedent." Brief of Appellant at 22, n.9. Cardenas-Muratalla's complaint is unwarranted. First, because it was across the street from the King County Courthouse, every individual in the courtroom had personal knowledge that Officer Myers's description of Third and Yesler was accurate as to the daytime, and that the situation is worse at night. Second, Myers hardly characterized broad swathes of downtown Seattle as high-crime areas. To the contrary, he described the west side of the street, especially towards the south end of the block, and the particular doorway in which Cardenas-Muratalla was standing, as areas known for drug and gun crimes. He carefully distinguished this proscribed area from the east side of the street, and from areas just to the north, which had fewer problems with these types of crimes.

<sup>8</sup> Shining a spotlight on someone is not, by itself, a seizure. State v. Young, 135 Wn.2d 498, 514, 957 P.2d 681 (1998).

Cardenas-Muratalla was involved in criminal activity. This brief will examine each in turn.

a. The Trial Court's Factual Findings Are Supported By Substantial Evidence.

Cardenas-Muratalla contends that certain of the trial court's factual findings were erroneous. Brief of Appellant at 3-6. Most significantly, he attacks the court's findings with respect to whether Officer Myers observed Cardenas-Muratalla "fluffing" his sweatshirt in a manner that indicated to Myers that Cardenas-Muratalla had a gun in his waistband and was attempting to conceal it and ensure its accessibility. Brief of Appellant at 23. The court's findings were based on the clear and uncontradicted testimony of Myers. This Court should conclude that the findings are supported by substantial evidence, and are therefore verities on appeal.

As stated above, a challenge to a trial court's findings of fact are reviewed for substantial evidence. Hill, 123 Wn.2d at 647. Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. Id. at 644. A trial court's credibility determinations are not reviewable on appeal, even if there may be other reasonable interpretations of the evidence. In re Davis, 152 Wn.2d 647, 680, 101 P.3d 1 (2004). "The party challenging a factual finding bears the burden

of proving that it is not supported by substantial evidence in the record.”

Id. (footnote omitted).

Here, Cardenas-Muratalla challenges the court’s factual findings with respect to Myers’s testimony by claiming that the testimony is inconsistent with the video from DESC (Ex. 10), Lang’s testimony, and the certification for determination of probable cause written by Detective Duffy. He also claims that Myers’s testimony is inherently incredible, and that from his vantage point, he “could not have seen much.” Brief of Appellant at 25 (quoting State v. Gatewood, 163 Wn.2d 534, 541, 182 P.3d 426 (2008)).

First, the DESC video is unhelpful in determining what Myers was able to see. See Ex. 10. The video is taken from above and behind Cardenas-Muratalla, and to his right; the view is partially obstructed by both the doorway in which he is standing and one of the men standing in the doorway with him. Myers, however, had a different view. 1RP 43. As Myers pointed out, and as is evident from the DESC video itself, it was capturing one or two frames per second, instead of a continuous view (unlike the police car video). 1RP 71-72. As a result, the scene is presented in jerky images that fail to capture significant action and detail. Moreover, the lighting is not good and the picture quality is grainy. In fact, when Myers was describing frame by frame what was occurring, he

had to explain to defense counsel that the picture was showing Cardenas-Muratalla's shoulder, not his elbow, and at one point was unable to answer a question about the video because of its pixilation and blurriness.

1RP 61, 63. It is hardly surprising that the "fluffing" gesture cannot be clearly seen on the video.

Second, Officer Lang did not contradict Myers. Although Lang did not see the "fluffing" motion that Myers did, 1RP 86, she did not have the same view. Myers saw Cardenas-Muratalla before Lang did.

1RP 109. When Lang looked towards Cardenas-Muratalla, Myers, the steering wheel, and the in-car computer all blocked her view.<sup>9</sup> 1RP 109.

Third, whatever a different detective wrote in her certification for determination of probable cause is irrelevant. The detective was not called to testify at the hearing. The certification was not offered into evidence. The trial lawyer never argued this point, and Officer Myers was never examined about any inconsistencies between his testimony and a writing prepared by another officer. In fact, it would have been entirely improper for the trial court to have considered a document not before him in making a factual determination.

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<sup>9</sup> As another example of Lang supposedly contradicting Myers, Cardenas-Muratalla repeatedly asserts that Lang testified that he moved out of the doorway in a "slow shuffle," while Myers characterized his movement as faster than a walk. Brief of Appellant at 9, 11, 24; 1RP 18. However, the words "slow shuffle" were offered by defense counsel; Lang agreed that he walked. 1RP 88. Moreover, Myers testified that Cardenas-Muratalla walked slowly at first, then picked up speed. 1RP 41-42.

Fourth, Myers's testimony was entirely credible. He explained his experience, his familiarity with the particular area in question, his training, and how his training with respect to recognizing when other individuals are armed was consistent with his own experience carrying a firearm daily. 1RP 26-33. He testified with detail and precision. 1RP 38-39. Moreover, Cardenas-Muratalla's assertion that Myers could not have seen much "from his vantage point in the passing patrol car" is not only speculative, it misstates the evidence. Myers and Lang both testified – and the police car video corroborates – that the patrol car was stopped in the road when Myers was observing Cardenas-Muratalla. 1RP 37, 109; Ex. 10.

In short, Cardenas-Muratalla's arguments are tantamount to saying the Officer Myers lied. But the trial court found Myers to be credible and relied on his testimony. CP 82. The other evidence Cardenas-Muratalla points to does not vitiate the trial court's findings. Substantial evidence supports the court's findings of fact. Accordingly, they are verities on appeal.<sup>10</sup>

- b. The Officers Had Reasonable Suspicion That Cardenas-Muratalla Was Involved In Criminal Activity.

Cardenas-Muratalla challenges the trial court's conclusion that the officers were engaged in a lawful Terry stop by arguing that there was no

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<sup>10</sup> The other complaints that Cardenas-Muratalla makes with respect to the trial court's factual findings are subject to the same rebuttal.

evidence of criminal activity, that the 911 call was inadequate to support the seizure, and that the officers' own observations were insufficient to permit a stop. In attacking these points individually, Cardenas-Muratalla ignores the principle that the reasonableness of a stop is to be judged by the totality of the circumstances known to the officers and the reasonable inferences drawn therefrom. Doughty, 170 Wn.2d at 61-62. Further, although a series of acts may each, individually, be innocent enough, taken together they may warrant further investigation. Terry, 392 U.S. at 22.

- i. Myers and Lang had a reason to suspect Cardenas-Muratalla was committing a crime.

Cardenas-Muratalla first attacks the trial court's denial of his suppression motion by claiming that there was no evidence that he had committed or was about to commit a crime. He is correct that a valid Terry stop of a pedestrian requires suspicion of activity – either in the past or future – that is criminal in nature; a mere infraction is insufficient to warrant a stop. Duncan, 146 Wn.2d 166. Here, however, Myers and Lang were warranted in their belief that criminal activity was afoot, due to the fact of the 911 call, the location of the events, and Cardenas-Muratalla's evasive action upon seeing the police focus their attention on him. Moreover, because gun crimes pose a greater risk to public safety than other offenses, a greater degree of intrusion on lesser suspicion may be

permissible. E.g., State v. McCord, 19 Wn. App. 250, 253, 576 P.2d 892 (1978).

First, the facts surrounding the stop provided Myers and Lang with a reasonable belief that Cardenas-Muratalla was engaged in criminal activity. The officers began to look for Cardenas-Muratalla in response to a 911 call reporting that he was at the bus stop at Third Avenue and Yesler with a weapon that he had shown to the caller. Ex. 8. The 911 caller clarified that although Cardenas-Muratalla had not threatened him, he had shown him the gun, which he described as silver. Ex. 8.

While it is not illegal to possess a firearm in Seattle, it is illegal to carry, exhibit, or display a firearm in a manner that warrants alarm for the safety of others.<sup>11</sup> RCW 9.41.270. Myers and Lang both testified that they inferred from the fact that someone called 911 that there was reason to be alarmed for the safety of others. 1RP 67 (Myers: “You are not allowed to display a firearm in a manner that causes alarm. So by the time somebody feels strongly enough to call 911, a reasonable officer would think that was alarming to somebody.”), 103 (Lang explaining that somebody calls 911 “to report a crime or they are alarmed about the

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<sup>11</sup> It is also unlawful to carry a concealed firearm without a license, RCW 9.41.050, or to possess a firearm if disqualified by prior conviction or commitment, by age, by pending charge, or by lack of citizenship, RCW 9.41.040, .171. And of course, there are numerous additional crimes that could be committed with the aid of a firearm, such as assault and robbery.

behavior of somebody”). Indeed, in ordinary experience, citizens do not call 911 to report on the mundane and lawful activities of their compatriots. Moreover, Myers observed Cardenas-Muratalla “fluffing” the lower front of his hoodie sweatshirt to ensure that the gun was concealed yet readily accessible, a further reason to warrant alarm for the safety of others. It was a rational inference from the facts to suspect that Cardenas-Muratalla was engaged in illegal activity with a firearm, either unlawful possession, unlawful display, or preparing to commit a crime of violence.

Cardenas-Muratalla’s location gave rise to further concern that he was involved in criminal activity. He was at Third and Yesler, on the west side of the street, towards the south end of the building, in a doorway with two other men, at approximately 10:00 p.m. Myers testified that that block, that side of the street, the south end of that building, and that doorway in particular were associated with high levels of drug and gun crimes, especially after dark. While presence in a high crime area late at night is not alone sufficient to give rise to a reasonable suspicion supporting an investigative detention, Doughty, 170 Wn.2d at 62, it is certainly a factor that weighs in the analysis.

Then, when Myers illuminated Cardenas-Muratalla with his spotlight, he immediately left.<sup>12</sup> Flight from the police has long been considered a circumstance that, along with other factors, may justify an investigatory stop. State v. Sweet, 44 Wn. App. 226, 230-31, 721 P.2d 560, 563 (1986). This is because flight, along with evasive action and furtive movements, “are circumstantial evidence of guilt.” State v. Graham, 130 Wn.2d 711, 726, 927 P.2d 227, 234 (1996) (emphasis added). In short, it is reasonable to suspect that a person who responds as Cardenas-Muratalla did is not legally entitled to possess a gun. A person with a valid concealed weapon permit and a lawful purpose would not have provoked a call to 911 nor reacted to the presence of the police as Cardenas-Muratalla did.

Second, a long line of cases supports the notion that when the potential danger posed by an individual is significant, a greater intrusion on lesser suspicion will be tolerated. E.g., Duncan, 146 Wn.2d at 177

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<sup>12</sup> Cardenas-Muratalla claims that he did not flee from the police until after he was commanded to stop, so that his flight cannot be considered a factor in analyzing the propriety of the stop. Brief of Appellant at 24 n.11. This claim is belied by the testimony of both officers and the video. Ex. 10; 1RP 17-18, 87-91, 110-11. Indeed, Cardenas-Muratalla failed to assign error to the trial court’s finding of fact on this point, so it is a verity on appeal. CP 80 (“Officer Myers aimed his spotlight at the doorway to illuminate the scene. The defendant immediately started walking northbound, away from the light.”). Moreover, Cardenas-Muratalla’s citation to Gatewood, 163 Wn.2d 534, in relation to this point is inapposite. In that case, the court acknowledged that flight from police was relevant, but concluded that Gatewood did not flee from the police because the officer could not say that the defendant saw the police car returning when he left the bus shelter. Id. at 540. Here, Cardenas-Muratalla left the doorway as soon as the police spotlighted him, while the others present did not react at all.

("[W]e place an inversely proportional burden in relation to the level of the violation. Thus, society will tolerate a higher level of intrusion for a greater risk and higher crime than it would for a lesser crime."); State v. Sieler, 95 Wn.2d 43, 50, 621 P.2d 1272 (1980) ("[T]he seriousness of the criminal activity reported by an informant can affect the reasonableness calculus which determines whether an investigatory detention is permissible."); State v. Randall, 73 Wn. App. 225, 868 P.2d 207 (1994) (relaxing the informant reliability requirement in cases involving violent offenses, because requiring an in-depth analysis of the reliability of the information would "greatly increase the threat to public safety"); State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991) ("Officers may do far more if the suspect conduct endangers life or personal safety than if it does not."); McCord, 19 Wn. App. at 253 ("A determination of the reasonableness of an officer's intrusion depends to some degree on the seriousness of the apprehended criminal conduct. An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not."). Here, the officers were investigating a complaint of a person with a gun. Gun crimes are inherently more dangerous than nearly all others. State v. Wakeley, 29 Wn. App. 238, 242, 628 P.2d 835 (1981) ("The officers' decision to adopt an immediate response was reasonable because crimes involving firearms present a serious threat of physical

injury.”). Here, taking into account that the complaint involved a firearm and that Myers himself observed evidence that Cardenas-Muratalla was armed with a firearm, the officers’ actions in attempting to stop Cardenas-Muratalla to further investigate was reasonable.

- ii. The fact that the identity of the 911 caller was unknown does not invalidate the Terry stop.

Cardenas-Muratalla argues that an anonymous tip “is, without more, insufficient to justify a police officer’s stop and frisk of that person.” Brief of Appellant at 18 (citing Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000)). While plainly correct, Cardenas-Muratalla ignores the fact that this is not a case of an anonymous tip, without more. To the contrary, the caller was not entirely anonymous, the informant explained how he knew that Cardenas-Muratalla had a gun, and the police observed conduct corroborating the information that the 911 caller provided.

In general, information supplied by an informant can provide police with a basis to make a Terry stop. State v. Hopkins, 128 Wn. App. 855, 862-63, 117 P.3d 377 (2005). While the reliability of a citizen informant is presumed, the reliability of information provided by an

anonymous informant is not. Sieler, 95 Wn.2d 43; Hopkins, 128 Wn. App. at 863-64. Accordingly, reasonable and articulable suspicion adequate to justify an investigatory detention may not be based solely on an anonymous tip devoid of information about the tipster's basis of knowledge or veracity. J.L., 529 U.S. at 270.

Here, however, Officers Myers and Lang did not base their stop of Cardenas-Muratalla solely on a bare-bones anonymous tip. First, the 911 caller was not wholly anonymous. Although he did not provide his name or identifying information to the police during his call, the 911 call center recorded his phone number, and in fact called him back, although it did not immediately reach him. Ex. 8. Thus, although the tipster was unknown, his identity was not unknowable. See J.L., 529 U.S. at 275-76 (Kennedy, J., concurring) (observing that where it is a crime to make a false report to the police and instant caller identification is available, the ability of the police to trace the identity of anonymous telephone informants may lend reliability to their tips); Hopkins, 128 Wn. App. at 869 (Quinn-Brintnall, J. dissenting) (concluding that 911 calls have heightened reliability because 911 calls are recorded, information about

the source of the call is obtained, and it is a crime to make false statements to law enforcement).<sup>13</sup>

Second, “the amount and kind of detailed information given by an informant may also enhance his reliability.” State v. O’Connor, 39 Wn. App. 113, 122, 692 P.2d 208 (1984). In particular, providing a factual basis for a tip lends reliability to it. Sieler, 95 Wn.2d at 48. Here, the 911 caller provided detail and a basis for his knowledge: he told the 911 center that Cardenas-Muratalla had in fact taken out his gun and shown it to him, and he described the weapon for the police, in addition to providing a detailed description of Cardenas-Muratalla and his current location. Ex. 8. Contrast J.L., 529 U.S. at 271 (“All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L.”).

Third, corroboration of an informer’s tip may justify a Terry stop. Id.; State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975). Here, the

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<sup>13</sup> Judge Quinn-Brintnall also correctly observed, quoting at length from the Ninth Circuit’s decision in United States v. Terry-Crespo, 356 F.3d 1170 (9th Cir.2004), that the police must take 911 calls seriously and respond with dispatch or the usefulness of the 911 system would be seriously compromised. Thus, it is impractical to require the police to verify a 911 caller’s identity or seek corroboration of an emergency; doing so would prove costly to public safety. “The constitution ‘is not a suicide pact’ which bars considerations of exigency and public safety in evaluating the reasonableness of police conduct.” Hopkins, 128 Wn. App. at 868-70 (Quinn-Brintnall, J., dissenting) (citations omitted). See also Randall, 73 Wn. App. at 230 (acknowledging that requiring officers acting in response to a tip regarding a violent offense to make an in-depth analysis of the reliability of the informant would greatly increase the threat to public safety).

information provided by the informant was corroborated. Officers Myers and Lang responded to a call about a man with a gun. When they arrived, Officer Myers observed Cardenas-Muratalla move his body and clothing in a way that strongly suggested he was concealing a firearm in his waistband, and was ensuring that it was available for immediate use. Because the caller was unknown but not unknowable, because he provided the basis for his knowledge, and because the police corroborated the tip with their own observations, Officers Myers and Lang properly conducted an investigative detention of Cardenas-Muratalla.

- iii. The totality of the circumstances supported a Terry stop.

After arguing that there was no evidence that Cardenas-Muratalla was engaged in a crime and that the tip provided by the 911 caller must be discounted, Cardenas-Muratalla claims that there was insufficient additional observations to warrant his seizure by law enforcement. However, Cardenas-Muratalla's "divide and conquer" approach must be rejected. Caselaw mandates that the reasonableness of a stop be based on the totality of the circumstances, rather than the sufficiency of each circumstance standing alone and divorced from the whole.

First, citing Doughty, 139 Wn.2d 57, Cardenas-Muratalla points out that a person's presence in a high-crime area at a late hour does not, by

itself, support an inference of reasonable suspicion. Similarly, citing Gatewood, 163 Wn.2d 534, he posits that startled reactions to seeing the police are not a basis for a Terry stop. These are correct statements of law. However, it does not follow that, because Officers Myers and Lang saw Cardenas-Muratalla in a high crime area and he responded to the officers' presence by quickly departing, there was no basis for an investigative detention in this case. To the contrary, as discussed above, the reasonableness of the stop must be judged by the totality of the circumstances known to the officers, and the reasonable inferences drawn therefrom. Doughty, 170 Wn.2d at 61-62.

Here, Cardenas-Muratalla was not just in a "high-crime" area, but in a doorway popular for drug and gun crimes because of its lack of exposure, and he was there after dark, when the crime levels in the area were highest. He appeared startled and evasive upon seeing the police.<sup>14</sup> As soon as the police spotlighted him, he fled. Before being spotlighted, Cardenas-Muratalla had "fluffed" his clothing in a manner that Myers recognized, from both specific training and his own experience carrying a

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<sup>14</sup> Cardenas-Muratalla claims that "it is hardly surprising that a person might look startled when illuminated by a police s[pot]light, even if the person is entirely innocent of criminal activity." However, this misstates the evidence. Cardenas-Muratalla displayed an "Oh, crap" look before being spotlighted by the police. IRP 12-14, 38-41. Moreover, Officers Myers and Lang had first noticed a different person who partially met the description provided by the 911 caller, but they discounted him as the person of interest because he was wholly indifferent to the police presence. IRP 10. And, the other two people in the doorway did not respond to the police spotlighting. Ex. 10.

concealed firearm, was consistent with both concealing a weapon and ensuring it was available for immediate use. As Cardenas-Muratalla walked away from the spotlight, Myers saw his arms were kept close in to his sides, and he was unable to see his hands. And, Myers and Lang were responding to the area in response to a complaint of a man who had been displaying a firearm. Taking all of these facts together, as this Court must, there was a reasonable basis for Myers and Lang to suspect that Cardenas-Muratalla was engaged in criminal activity involving a gun, which could pose a significant risk to public safety. They were warranted in initiating an investigative stop.

**2. THE TRIAL COURT'S ORDER DENYING  
CARDENAS-MURATALLA'S MOTION TO  
SUPPRESS SHOULD BE UPHELD BECAUSE HIS  
CONDUCT IN TRYING TO DRAW A GUN ON THE  
OFFICERS SUPPLIED PROBABLE CAUSE TO  
ARREST HIM FOR ATTEMPTED ASSAULT.**

Even if Myers and Lang acted improperly in attempting to stop Cardenas-Muratalla to investigate further, the trial court's order denying his motion to suppress should still be affirmed. A trial court's order denying a motion to suppress may be upheld on any basis supported by the facts and law. State v. Day, 7 Wn. App. 965, 969, 503 P.2d 1098 (1972). Here, Cardenas-Muratalla's additional illegal conduct of attempting to

draw a gun when confronted by the police provides an independent basis to stop and arrest him.

If this Court concludes that Myers and Lang acted unlawfully when they ordered Cardenas-Muratalla to stop, Cardenas-Muratalla still had a legal duty to comply. A person being arrested or detained – even illegally – does not have the right to use force against the detaining officers when faced solely with a loss of freedom. State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294, 1304 (1997). Nor does a person have a right to react unreasonably to an illegal detention. State v. Mather, 28 Wn. App. 700, 703, 626 P.2d 44 (1981); see also State v Brown, 40 Wn. App. 91, 97-98, 697 P.2d 583 (1985) (applying Mather in the context of a charge of Attempting to Elude).

Here, Cardenas-Muratalla unlawfully used force against Myers and Lang – by trying to draw his gun – when faced only with the potential loss of his freedom. The trial court found that when Cardenas-Muratalla walked north away from the doorway and was confronted by Lang, he brought his hands to his waistline, where Myers believed he had concealed the gun, and spun around back to the south (towards Myers). He held up the hem of his sweatshirt with his left hand and reached towards a gun-shaped object in the front of his waistband with his right hand. The

officers believed that he was trying to draw his weapon.<sup>15</sup> CP 79-83.

These acts were an unreasonable response to the officers' attempt to detain him – even if illegal – and thus gave rise to probable cause to arrest Cardenas-Muratalla for assault or attempted assault.<sup>16</sup>

As such, the officers were entitled to arrest and search Cardenas-Muratalla, as they did. State v. Rousseau, 40 Wn.2d 92, 93, 241 P.2d 447 (1952), overruled on other grounds by Valentine, 132 Wn.2d 1; State v.

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<sup>15</sup> Cardenas-Muratalla assigns error to several of these findings of fact. However, each of them is supported by substantial evidence in the form of testimony from Officers Myers and Lang, outlined in section B.2, supra. The court's findings regarding the officers' credibility are not subject to challenge on appeal. Davis, 152 Wn.2d at 680. Moreover, as discussed in section D.1.a, supra, the video is not of sufficient quality to warrant discounting the officers' testimony.

<sup>16</sup> Cardenas-Muratalla argues that the trial court's statement that "whether or not the Def[endant] in fact intended to draw his weapon, which was later determined to be unloaded, the court cannot determine," is somehow significant. CP 82; Brief of Appellant at 29-30. However, probable cause is determined by examining the totality of the facts and circumstances known to the officers at the time of arrest. State v. Gillenwater, 96 Wn. App. 667, 670, 980 P.2d 318 (1999). The facts known to Myers and Lang were that Cardenas-Muratalla was obstructing their investigation and attempting to draw a firearm. Officers are not required to guess that someone drawing a gun when commanded to stop by police officers does not intend to shoot them. The fact that the firearm turned out to be unloaded, and that Cardenas-Muratalla may have intended to discard the firearm rather than assault the officers, is irrelevant to whether there was probable cause at that moment in time to believe that he was intending to commit an assault. Id. (describing probable cause as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty" (internal quotation marks and citations omitted)).

For the same reasons, the prosecutor's later decision not to file assault charges is wholly irrelevant to the question of whether Myers and Lang had probable cause at that time to believe Cardenas-Muratalla was about to commit an assault. Likewise, Cardenas-Muratalla's citation to State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997), for the proposition that this Court must presume that the State failed to sustain its burden of proof in the absence of a factual finding, is irrelevant. The trial court was unable to make a factual finding as to what Cardenas-Muratalla's actual intent was. The question of probable cause, however, is not a factual finding, but a conclusion of law subject to de novo review. State v. Grande, 164 Wn.2d 135, 140, 187 P.3d 248 (2008). The factual findings that the trial court did make support such a conclusion.

Mann, 157 Wn. App. 428, 237 P.3d 966 (2010). Accordingly, the firearm recovered from his waistband was found during a lawful search incident to arrest, and was properly admitted at trial. Cardenas-Muratalla's conviction should be affirmed.

**E. CONCLUSION**

For all of the foregoing reasons, the trial court's denial of Cardenas-Muratalla's motion to suppress the evidence against him was correct. Cardenas-Muratalla's conviction should be affirmed.

DATED this 26<sup>th</sup> day of February, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan F. Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. JOSE CARDENAS-MURATALLA, Cause No. 68057-9 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27<sup>th</sup> day of February, 2013

U Brame

Name

Done in Seattle, Washington