

68535-0

68535-0

NO. 68535-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ADREN COLEMAN,

Appellant.

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COURT OF APPEALS
DIVISION I
KING COUNTY
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. To prevail on a claim of ineffective assistance of counsel, a defendant must establish that he was prejudiced as a result of counsel's deficient performance. Here, trial counsel did not present the testimony of the apartment resident, Patricia Brown, at the CrR 3.6 hearing to testify regarding Coleman's prior visits to her apartment. Even if defense counsel had presented Patricia Brown's testimony at the hearing, Coleman could not have shown he had standing because he entered the apartment with Tara Brown, whom he was prohibited from contacting by court order, and because he did not have personal items at Patricia's apartment nor was he ever an overnight guest. The trial court also correctly found, if Coleman did have standing, then the emergency aid exception justified the officers' actions. Has Coleman failed to establish that he was prejudiced when he would not have prevailed on the motion to suppress regardless of defense counsel not presenting testimony at the CrR 3.6 hearing?

2. The emergency aid exception allows officers to enter a home when officers have a reasonable belief that a person inside is in need of immediate assistance for health or safety reasons. Here, officers entered Patricia Brown's apartment to check on the safety

of Tara Brown after learning from an eyewitness that Coleman had just assaulted Tara, Coleman had a history of domestic violence against Tara, Coleman was prohibited from contacting Tara by a no-contact order, Coleman and Tara had fled to Patricia's apartment, and it was not known if Tara had been injured. Did the trial court correctly find that the emergency aid exception justified the officers' entry to determine if Tara was injured?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State originally charged appellant Adren Coleman with one count of domestic violence felony violation of a court order for his actions on June 11, 2011. CP 1-5; RCW 26.50.100. The State charged Coleman under both the assault and two prior conviction prongs of the statute. Id. The State amended the information prior to trial to add the aggravating factor that this crime was a domestic violence offense and part of an ongoing pattern of abuse of the same victim. 1RP 11-12;¹ CP 17-18.

¹ The Verbatim Report of Proceedings consists of three volumes. The State adopts the reference system used by the appellant: 1RP (2/13/12), 2RP (2/15/12), 3RP (2/21/12).

The trial court held a CrR 3.6 hearing to determine the lawfulness of the officers' entry into Patricia Brown's apartment, which ultimately led to Coleman's arrest. 1RP 12-107.² The trial court denied Coleman's motion to suppress. 1RP 117-24; Supp CP __ (sub 81 at 3-4). The jury convicted Coleman of domestic violence violation of a court order based on two prior convictions. 3RP 90-91; CP 59. By special verdict form, the jury did not find that the State had proved the assault or the aggravating factor. 3RP 90-91, 124; CP 60, 67. The sentencing court imposed a first-time offender waiver and sentenced Coleman to 90 days confinement followed by 12 months of community custody. 3RP 134-43; CP 68-75.

2. SUBSTANTIVE FACTS FROM THE CrR 3.6 HEARING.

The State called Kent Police Officers Roger Kellams, Trevor Blake, and Chris Korus as witnesses at the CrR 3.6 hearing. The officers testified to the following facts. On June 11, 2011, Officers Kellams, Blake, and Korus responded to a report of a domestic

² The trial court also heard testimony and argument about the admissibility of the statements Coleman made to police and issued a ruling pursuant to CrR 3.5. 1RP.

violence assault at the Arbor Chase Apartments. 1RP 14, 52, 73, 117; Supp CP __ (sub 81 at 1). The 911 dispatcher informed the officers that the incident was a physical domestic assault and that the suspect, Coleman, was known to drive a green Jaguar, which was parked at the Arbor Chase Apartments. 1RP 57; Supp CP __ (sub 81 at 1-2). The 911 caller, Brittany Matthews, flagged down the officers as they arrived. 1RP 15. Matthews was visibly upset, and appeared on the verge of tears. 1RP 15, 53; Supp CP __ (sub 81 at 1). Officers testified that Matthews explained that she had called 911 to report that she had moments before witnessed Coleman assault her close friend, Tara Brown.³ 1RP 15, 53, 74; Supp CP __ (sub 81 at 1-2). She told officers she had gone to Tara's apartment because she had given Tara a ride home. 1RP 16; Supp CP __ (sub 81 at 1). Matthews told officers she saw Coleman, Tara's former boyfriend and the father of her two children, meet Tara at her apartment door. 1RP 16, 57; Supp CP __ (sub 81 at 1). Matthews reported that she saw Coleman and Tara argue and then Coleman grabbed Tara by her hair and pulled her into the apartment. 1RP 16, 57; Supp CP __ (sub 81 at 1-2).

³ The State will refer to Tara Brown by her first name and Patricia Brown, Tara's mother, as Patricia to avoid confusion. No disrespect is intended.

Matthews reported she was very concerned for Tara's safety because Coleman had assaulted Tara on multiple occasions previously and she knew that there was a no-contact order prohibiting Coleman from contacting Tara.⁴ 1RP 16, 57; Supp CP __ (sub 81 at 1-2). Matthews expressed multiple times her fear that Coleman was "really going to do something bad this time" or seriously hurt Tara. 1RP 58; Supp CP __ (sub 81 at 1-2). Matthews reported that she saw Tara and Coleman had left Tara's apartment and walked to the adjacent apartment building, the Ventana Apartments, where Tara's mother lived. 1RP 16, 57; Supp CP __ (sub 81 at 2). Officers went to the Ventana Apartments to locate Tara and ensure that she had not been injured by Coleman. 1RP 16-17, 66; Supp CP __ (sub 81 at 2). At the Ventana Apartments, officers testified that Matthews showed them the two possible apartments where she believed Tara's mother, Patricia Brown, resided. 1RP 17, 58; Supp CP __ (sub 81 at 2).

⁴ Coleman had the following domestic violence convictions at the time he committed this crime: (1) Misdemeanor Protection Order Violation, 8/18/2010; (2) Assault in the Fourth Degree, 8/18/2010; (3) Malicious Mischief in the Third Degree, 8/18/2010; (4) Hit and Run of an Attended Vehicle, 8/18/2010; (5) Misdemeanor Protection Order Violation, 3/6/2011. Tara Brown had been the victim of each of these crimes. Supp CP __ (sub 62).

Officer Kellams heard a male and a female arguing as he approached the apartments. 1RP 17. After checking with the neighbor in the first possible apartment, officers determined that Patricia Brown's apartment was the second apartment. 1RP 17. Officers Kellams and Korus went to the second apartment, while Officer Blake positioned himself at the rear of the apartment. 1RP 17, 58; Supp CP ___ (sub 81 at 2). Officers Kellams and Korus knocked on the door and announced their presence. 1RP 18; Supp CP ___ (sub 81 at 2). There was no response. 1RP 18; Supp CP ___ (sub 81 at 2). They knocked again and heard the sound of someone within the apartment walking up to the door, but no one responded. 1RP 18; Supp CP ___ (sub 81 at 2). The third time the officers knocked, Officer Kellams said they were Kent Police and that they needed to speak to Tara Brown. 1RP 18; Supp CP ___ (sub 81 at 2). A young female voice responded from inside and asked, "who is it?" 1RP 18; Supp CP ___ (sub 81 at 2). Officer Kellams told her again it was the Kent Police and that he needed to speak with her. 1RP 18; Supp CP ___ (sub 81 at 2). The female did not respond. 1RP 18; Supp CP ___ (sub 81 at 2). Officer Kellams knocked again and said, "Tara, this is the Kent Police Department. We just need to make sure you're okay. Would you open the door?"

1RP 18; Supp CP __ (sub 81 at 2). There was no further response despite officers knocking yet again. 1RP 18; Supp CP __ (sub 81 at 2).

At this time, the officers testified they had determined they must enter the apartment to ensure Tara was not injured or being held against her will by Coleman. 1RP 18-19, 23, 41; Supp CP __ (sub 81 at 2). Officers did not know if Tara had suffered injuries or the extent of her injuries as a result of the assault witnessed by Matthews. 1RP 16-17; Supp CP __ (sub 81 at 2). They feared she was in danger based on several factors: 1) the eyewitness account of Matthews that Coleman had assaulted Tara moments before they arrived; 2) Coleman had a history of assaulting Tara; 3) there was a no-contact order in place; and 4) Coleman was in the apartment with Tara. 1RP 18-19, 23, 66; Supp CP __ (sub 81 at 2).

Their decision that it was necessary to enter Patricia's apartment was also based on Officer Kellams' and Korus' significant experience responding to domestic violence situations. 1RP 19, 77-80. Both understood the volatility of domestic violence situations: a situation can quickly evolve into one where a person is injured or at risk of serious injury. 1RP 19, 77-80. Officer Kellams also knew that victims of domestic violence may not respond to

police due to influence of the abuser. 1RP 19, 43. He explained that in those situations it was even more important to see someone “face-to-face” to determine if they were “truly in need” for their health or safety. 1RP 19.

The officers decided to contact the building manager to obtain a key rather than force entry. 1RP 19-20, 54; Supp CP ___ (sub 81 at 2). They expected the manager could bring them the key within minutes, as it was the middle-of-the-day, though it took approximately fifteen minutes. 1RP 20, 76-77; Supp CP ___ (sub 81 at 2). Officers opened the door and immediately found Tara. 1RP 23; Supp CP ___ (sub 81 at 2). She appeared to have been crying or about to cry. 1RP 59; Supp CP ___ (sub 81 at 2). She initially claimed that Coleman had left out the back window, but later admitted he was in the apartment. 1RP 22-23; Supp CP ___ (sub 81 at 2-3).

Eventually, Coleman emerged and the officers took him outside. 1RP 22-23, 59-60; Supp CP ___ (sub 81 at 3). Coleman was dressed in street clothes. 1RP 46. He did not have any belongings at Patricia’s apartment. 1RP 46. Coleman told officers, “I don’t know why you guys are here. I’m just visiting my kids.”

1RP 60. Officers confirmed the no-contact order and then placed Coleman under arrest. 1RP 60-61.

Officer Blake read Coleman his Miranda rights.⁵ 1RP 61. Coleman repeated what he had stated pre-arrest, but did not give a recorded statement. 1RP 62. While en route to the King County Jail, Coleman initiated conversation with Officer Kellams. 1RP 27. Coleman told Officer Kellams that he “didn’t understand why he was always getting arrested when Tara Brown was around or when he was visiting his children.” 1RP 28.

Officer Kellams testified that Coleman did not live at the apartment and he did not see any personal items or evidence that Coleman stayed as an overnight guest. 1RP 46; Supp CP ___ (sub 81 at 3). According to Coleman’s statements to Officer Blake, the no-contact order allowed third party contact with Tara to arrange child visitation, and Coleman arranged visits through Patricia. Supp CP ___ (sub 81 at 3). Coleman claimed to officers that he visited his children at Patricia’s apartment. 1RP 60.

Tara refused Officer Kellams’ request to take her formal written or recorded statement. 1RP 23. Patricia Brown, Tara’s mother, was also at the apartment, but avoided officers and

⁵ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

appeared disinclined to involve herself with the officers at her apartment. 1RP 47, 59, 70-71; Supp CP __ (sub 81 at 2). Officers did not see or hear any children while at Patricia's apartment. 1RP 49, 60; Supp CP __ (sub 81 at 3).

At the CrR 3.6 hearing, defense counsel argued that the State had the burden to show Coleman did not have standing to challenge the officers' entry into Patricia's apartment. 1RP 96. Alternatively, counsel relied on an offer of proof of Patricia Brown's expected trial testimony and relied on the statements Coleman made to officers in arguing the court should find Coleman had standing to contest the entry. 1RP 97-98. Next, defense counsel argued that the emergency aid exception did not justify officers' entry into Patricia's apartment, as they did not reasonably believe that Tara was in need of immediate help due to an imminent threat to her safety. 1RP 99-101. She further argued that the officers would not have contacted the manager for a key, but instead would have forced entry into the apartment, if they believed that Tara was in immediate need of help. Id.

The trial court denied Coleman's CrR 3.6 motion to suppress evidence of the officers' entry into Patricia Brown's apartment. 1RP 120-23. Specifically, the court first ruled that Coleman had the

burden to show he had standing to challenge the entry and that he had not met his burden. 1RP 120-21. The court found based on Coleman's statements to police, that Coleman was related to Patricia Brown because he was the father of her grandchildren and she was the person through whom he arranged visitation under the no-contact order. 1RP 120. The court also found that Matthews had seen Coleman and that his car had been seen at Tara's apartment immediately prior to the arrival of officers, and that he entered Patricia's apartment with Tara despite the no-contact order. 1RP 120. The court ruled that Coleman did not have standing to challenge the officers' entry into Patricia's apartment because he entered the apartment with the person with whom he was prohibited from contacting and there was no evidence of the frequency of his visits, that he stored items at Patricia's apartment, or that he was ever an overnight guest. 1RP 121.

The court further ruled that if Coleman did have standing, the emergency aid exception justified the officers' entry. 1RP 121. Specifically, the court found that the officers subjectively believed that Tara was in need of assistance for her health and safety based on: 1) the information from the eyewitness that Tara had been assaulted shortly before police arrived; 2) Coleman's prior violence

and assaults of Tara; 3) the no-contact order prohibiting Coleman from contacting Tara; 4) the loud arguing coming from the apartment; 5) knowledge that a female was in the apartment; and 6) the female refused to respond to their inquiries about her well-being. 1RP 122. The court acknowledged that domestic violence situations can quickly escalate into one where a victim is at risk of significant injury. 1RP 121. Therefore, it was reasonable for the officers to enter Patricia's apartment.

3. ADDITIONAL SUBSTANTIVE FACTS FROM TRIAL.

Patricia Brown was called to testify at trial by Coleman. Patricia testified that she had known Coleman for approximately 10 years, the length of his relationship with her daughter. 3RP 35-36. She said he visited his two children at her apartment because he was prohibited from contacting Tara by the no-contact order. 3RP 36. She stated that Coleman usually, but not always called prior to coming to her apartment. 3RP 30. Sometimes he brought food or groceries. 3RP 30. She did not remember whether he had called prior to visiting her apartment on this day. 3RP 37.

C. ARGUMENT

1. COLEMAN CANNOT DEMONSTRATE THAT TRIAL COUNSEL'S FAILURE TO OFFER EVIDENCE OF STANDING FOR THE CrR 3.6 MOTION PREJUDICED HIM.

Coleman asserts that trial counsel's failure to offer evidence to establish that he had standing to contest the officers' entry of Patricia Brown's apartment constituted ineffective assistance of counsel. Br. App. at 8-12. This claim should be rejected as Coleman has failed to show that he was prejudiced by counsel's deficient performance. Even had Patricia Brown testified at the CrR 3.6 hearing, Coleman would not have established that he had standing to challenge the officers' entry into Patricia's apartment because he entered with Tara, the person whom he was prohibited from by the no-contact order. In addition, Patricia Brown could not have established sufficient facts for the court to have found Coleman had standing. Finally, even if the court had concluded that Coleman had standing to challenge the entry, the court correctly found that the emergency aid exception justified the officers' entry.

Ineffective assistance of counsel occurs only where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show: 1) that trial counsel’s representation was deficient; and 2) but for this substandard performance, there is a reasonable probability that the trial’s outcome would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990). Appellate courts base their evaluation on the entire record rather than simply looking to the sections identified by a defendant. State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995) (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Trial counsel’s performance is deficient if the conduct falls below an objective standard of reasonableness based on consideration of all the circumstances. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing State v. McFarland, 127 Wn.2d at 334-35. This includes the requirement to research and apply relevant case law. Kylo, 166 Wn.2d at 862 (citing Strickland, 466 U.S. at 690-91, 104 S. Ct. 2052). Even if trial counsel’s

performance is deficient, the defendant must still establish he was prejudiced as a result. Id.

Here, Coleman's counsel, based on a misunderstanding of the law, failed to present testimony from Patricia Brown at the CrR 3.6 hearing to show that Coleman had a reasonable expectation of privacy at Patricia's apartment and, thus, standing to challenge the officers' entry. 1RP 119; Supp CP __ (sub 81 at 3). In order to prevail on his appeal, Coleman must demonstrate that there is a reasonable probability that the trial court's ruling on the motion to suppress would have been different if trial counsel had subpoenaed Patricia Brown to testify at the CrR 3.6 hearing. In other words, Coleman must show that if Patricia had testified at the CrR 3.6 hearing, her testimony would have caused the court to conclude that he had standing to challenge the entry and that the entry was unlawful.

A person may only challenge a search or seizure if he or she has a Fourth Amendment or Art. I, § 7, interest in the area searched. State v. Jacobs, 101 Wn. App. 80, 87, 2 P.3d 974 (2000); State v. Picard, 90 Wn. App. 890, 895-96, 954 P.2d 336 (1998); State v. Jackson, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996). The defendant bears the burden of showing that he or she

has standing to contest the invasion of privacy. Jacobs, 101 Wn. App. at 87.

"Standing 'to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" Jacobs, 101 Wn. App. at 87, citing Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). A defendant cannot claim and "...society does not recognize as reasonable the privacy rights of a defendant whose presence at the scene of the search is 'wrongful.'" Id. This includes when a defendant is present at the home of the person with whom he is prohibited from contacting by a no-contact order. Id. at 84-85.

Factors relevant to the court's evaluation of whether a party has standing to challenge the entry of another's home are:

- (1) the defendant's relationship with the homeowner or tenant;
- (2) the context and duration of the visit during which the search took place;
- (3) the frequency and duration of the defendant's previous visits to the home; and
- (4) whether the defendant kept personal effects in the home.

State v. Link, 136 Wn. App. 685, 693, 150 P.3d 610, 615 (2007).

These factors are not exhaustive, but establish the guidelines of facts necessary for a trial court to evaluate whether a party has standing. Id. at 693-94.

Jacobs is instructive. In Jacobs, James, the resident of the home called 911, but then hung up. 101 Wn. App. at 82. Dispatch called him back, but he claimed to no longer need assistance. Id. at 83. Police officers were dispatched and were informed that there had been multiple previous domestic violence calls and that James was the protected party in a no-contact order. Id. James met police outside and tried to assure them that he did not need any assistance. Id. He admitted that Jacobs “had been beatin’ on me,” but claimed Jacobs had left. Id. His story was not consistent and he refused to allow officers to search his residence to ensure that no one was injured. Id. at 84. Officers entered the residence and found Jacobs, who was prohibited from contacting James by a no-contact order, on the couch. Id. The Jacobs court held that the defendant had no standing to challenge the search where he was prohibited by court order from contacting the owner of the residence, even

though he kept clothing at the residence, and came over regularly with the owner's permission. Jacobs, 101 Wn. App. at 87-88.

However, in State v. Link, the court held that the defendant did have standing. 136 Wn. App. at 694. Link had been visiting his girlfriend and claimed he was there to help her move. Id. An officer entered the home, after smelling a chemical associated with methamphetamine and meeting two young children outside. Id. at 688. The children opened the door and the officer stood inside the door. Id. at 689. Link emerged from the bathroom half-dressed and had a methamphetamine pipe in his hand. Id. The Link court explained that Link did have a reasonable expectation of privacy and, thus, standing to challenge the search based on the following: it was his girlfriend's apartment, he had a key to the apartment, he had stayed at the apartment without his girlfriend, he kept personal items at the apartment, and he showered at the apartment and had emerged half-dressed. Id. at 694-95.

Here, similar to Jacobs and unlike Link, Coleman does not have standing to challenge the officers' entry of Patricia's apartment regardless of whether he ever visited his children there. Because Patricia Brown testified at trial and her testimony included facts about Coleman's visit to her home, this court can evaluate

and determine that even those additional facts would not have established Coleman had standing. 3RP 30-38. Moreover, the trial court also considered much of what would have been included in Patricia Brown's testimony based on Coleman's statements to the police. 1RP 120; Supp CP __ (sub 82 at 3). The trial court found that Coleman visited his children at Patricia's apartment and did so because she was the person through whom he was to arrange visitation per the no-contact order. 1RP 120. The trial court did not find that he had been at Patricia's apartment lawfully visiting his children at the time of the crime because Coleman was with Tara. 1RP 120-21.

An examination of the entire testimony at the CrR 3.6 hearing and Patricia's testimony at trial, shows that Coleman did not have the status of even an overnight guest, from which to argue standing. See Minnesota v. Olson, 495 U.S. 91, 96-97, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990). Unlike the defendant in Link, he did not emerge from the bedroom half-dressed. 1RP 46. Instead, he had fled from Tara's apartment likely to avoid police. 1RP 15. There was no evidence he had clothing or personal items from Patricia's apartment, unlike the defendant in Link who had personal items at the home. 1RP 46. Coleman entered Patricia's apartment with

Tara, whom he was prohibited from contacting by the no-contact order. He was not lawfully present in Patricia's apartment. In these circumstances, Coleman does not have standing to challenge the entry.

In support of his argument, Coleman cites to one case from the Eastern District of Pennsylvania, United States v. Wilcox, 357 F.Supp. 514 (E.D.Pa. (1973)), for the proposition that a party has standing to challenge the search of the place where he visits his children. Br. App. at 14. This case is not applicable because the facts are far different from those in Coleman's case.

In Wilcox, the defendant had a key to his wife's apartment and regularly visited his wife and children at the apartment. Id. at 518. There is no mention that the defendant in Wilcox was prohibited from contacting his wife due to a no-contact order. By comparison, Coleman did not have a key as he usually called prior to visiting Patricia's apartment. 3RP 31. The purpose of Coleman's visit on that day was not to visit his children. Instead, the purpose of

this visit was to flee from police after assaulting Tara. Coleman's situation is more analogous to that of the defendant in Jacobs. 101 Wn. App. at 87.

Thus, Coleman cannot establish that he was prejudiced by his trial counsel's failure to present Patricia's testimony at the CrR 3.6 hearing for two reasons. First, even if Patricia had testified consistently with her trial testimony, that evidence would have been insufficient to establish standing for Coleman to challenge the entry. Second, even if he were found to have standing, he has failed to establish prejudice as the trial court correctly ruled that the emergency aid exception justified the officers' entry. Because Coleman cannot show that there is a reasonable probability that the outcome of the proceedings would have been different, but for trial counsel's error, his conviction should be affirmed. See State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); Strickland, 466 U.S. at 693.

2. THE TRIAL COURT CORRECTLY RULED THAT THE EMERGENCY AID EXCEPTION APPLIED WHERE AN EYEWITNESS REPORTED COLEMAN HAD JUST ASSAULTED TARA BROWN, COLEMAN HAD ASSAULTED HER IN THE PAST, COLEMAN WAS PROHIBITED FROM CONTACTING TARA BY A NO-CONTACT ORDER, IT WAS UNKNOWN IF TARA WAS INJURED, AND HE HAD RECENTLY FLED TO A NEARBY APARTMENT WITH TARA BROWN.

Coleman asserts that the trial court did not find all of the six factors necessary for the emergency aid exception and lessened the State's burden of proof because the incident involved domestic violence. Br. App. at 14-17. Coleman is incorrect. There is substantial evidence in the record to support the trial court's findings of fact and conclusions of law as to each of the factors of the emergency aid exception.⁶

The appellate court reviews the trial court's denial of a motion to suppress for substantial evidence. State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011) (citing State v. Hill, 120 Wn.2d 641, 644, 870 P.2d 313 (1994)). "Substantial evidence exists where there is a sufficient quantity of evidence in the record

⁶ Coleman does not cite to the facts known to the officers at the time of the entry or to the trial court at the time of ruling on the CrR 3.6 motion. Instead, Coleman cites to the majority of facts from the trial. Br. App. at 3-5. To do so is incorrect, as the appellate court should review the facts and the officer's actions "in relation to the scene as it reasonably appeared to the officer at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis." State v. Johnson, 104 Wn. App. 409, 420, 16 P.3d 680 (2001).

to persuade a fair-minded, rational person of the truth of the finding. Id. (citing Hill, 120 Wn.2d at 644). The trial court's legal conclusions are reviewed de novo. Id.

The emergency aid exception derives from an officer's community caretaking function. Id. at 754. Under community caretaking functions, an officer may "...invade constitutionally protected privacy rights when necessary to render aid or assistance or to make routine checks on health and safety." State v. Hos, 154 Wn. App. 238, 246, 225 P.3d 389 (2010), review denied, 169 Wn.2d 1008 (2010) (citing State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004)). The community caretaking exception to the warrant requirement originated in Cady v. Dombroski, 413 U.S. 433, 493, S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

In State v. Schultz, the Washington Supreme Court recognized that domestic violence considerations factor into determinations of whether the emergency aid exception applies. "We recognize that domestic violence presents unique challenges to law enforcement and courts. We hold that the likelihood of domestic violence may be considered by courts when evaluating whether the requirements of the emergency aid exception to the warrant requirement have been satisfied." 170 Wn.2d at 750. The

Schultz court further explained, “the fact that police are responding to a situation that likely involves domestic violence may be an important factor in evaluating both the subjective belief of the officer that someone likely needs assistance and in assessing the reasonableness of the officer's belief that there is an imminent threat of injury.” Id. at 756.

Schultz reiterated the test set forth in State v. Kinzy, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000), that the emergency aid exception applies when “(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.” Kinzy, 141 Wn.2d at 386-87. The Washington Supreme Court also cited three additional factors recognized from emergency aid exception cases from the Court of Appeals: (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search. Schultz, 170 Wn.2d at 755, citing State v.

Leffler, 142 Wn. App. 175, 181, 183, 178 P.3d 1042 (2007) (citing State v. Lawson, 135 Wn. App. 430, 437, 144 P.3d 377 (2006) (specific persons and imminent threat); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (pretext)). However, "in reviewing the reasonableness of such an entry...courts should balance the individual's privacy interests against the public's interest in having the police perform their community caretaking function." Hos, 154 Wn. App. at 246-47.

Here, Coleman asserts that the facts found at the CrR 3.6 hearing do not support factors (4) and (5), that there was an imminent threat of substantial injury or that a specific person was in immediate need of help. Br. App. at 17. An examination of the cases and the evaluation of the likely scenarios faced by officers shows that Coleman incorrectly interprets the immediacy and likelihood of injury required to justify entry under the emergency aid exception.

On facts similar to this case, the court in Menz upheld an officers' entry into a home following an anonymous call reporting domestic violence. State v. Menz, 75 Wn. App. 351, 354, 880 P.2d 48 (1994). The caller reported domestic violence in progress, the names of the man and woman, that she believed a 10-year-old

child lived with them, and she was unsure if either had weapons. Id. at 353. Officers arrived to find the front door open six inches on a January night and the lights and television on in the home. Id. at 354. No one responded the three separate times the officers knocked and announced their presence. Id. Officers searched the home to ensure there was not a person injured and incapable of responding, or someone hiding who may be a victim of domestic violence and ashamed of their injuries. Id. at 354, note 1. The Menz court held that the entry was justified by the emergency aid exception because a reasonable person in these circumstances would have believed that someone inside was likely in need of assistance for health or safety reasons. Id. at 354-55. The court also noted that the duty of officers responding to reports of domestic violence is to ensure the present and continued safety and well-being of those in the home. Id. at 355.

In citing factors (4) and (5) to the emergency aid exception, Schultz cited to State v. Leffler, 142 Wn. App. 175, 178 P.3d 1042 (2007), and State v. Lawson, 135 Wn. App. 430, 144 P.3d 377 (2006). 170 Wn.2d at 754. Both cases involved officers responding to anonymous reports of chemical smells, confirming the smells as those associated with methamphetamine manufacturing, and then

entering the structure. Leffler, 142 Wn. App. at 178; Lawson, 135 Wn. App. at 432. In neither case did officers have a specific concern for any specific person's safety, only a general concern of potential danger to the community. Leffler, 142 Wn. App. at 185; Lawson, 135 Wn. App. at 438. Leffler and Lawson held a general concern for the community that is not of an imminent nature is not sufficient. Leffler, 142 Wn. App. at 178; Lawson, 135 Wn. App. at 438.

By contrast, an officer's concerns that a specific person has been injured or is in danger justified entry in State v. Lynd, 54 Wn. App. 18, 22-23, 771 P.2d 770 (1989), and State v. Gocken, 71 Wn. App. 267, 277, 857 P.2d 1074 (1993). Both Lynd and Gocken are much more similar to the facts presented to the officers in this case.

In Lynd, officers were dispatched to a 911 hang-up call. Lynd, 54 Wn. App. at 19. A return call resulted in only a busy signal. Id. The officer arrived and found the man outside his residence packing items in his car as if he were leaving and he had a cut on his face. Id. The man explained the cut was as a result of his wife hitting him in the face during an argument. Id. The man refused the officer's request to check inside the residence to ensure

his wife's safety. Id. This Court concluded that it was reasonable, given all the information, for the officer to enter the home to ensure the man's wife was not injured. In fact, the officer "would have been derelict in her duty as a police officer in not entering the residence to check on Mrs. Lynd." Id. at 23.

In Gocken, an officer responded to a residence with the owner's niece who had not seen the owner for several weeks. Gocken, 71 Wn. App. at 271. The niece looked through a window and believed furniture was missing. Id. The officer received no response when he knocked and announced his presence. Id. He then entered the residence through an unlocked window and immediately smelled the strong odor of decaying flesh. Id. Another officer responded and kicked open the locked bedroom door, where they found coagulated blood on the floor. Id. at 272. Police then secured a warrant. Id. They later discovered the woman's body in her bathroom. Id. Gocken upheld the officer's entry to check on the woman's health and safety. Id. at 277.

When an officer believes in good faith that someone's health or safety may be endangered... public policy does not demand that the officer delay any attempt to determine if assistance is needed... To the contrary, the officer could be considered derelict

by not acting promptly to ascertain if someone needed help.

Id. citing Lynd, 54 Wn. App. at 23.

Also instructive is the Ninth Circuit case of United States v. Black, 482 F.3d 1035 (9th Circuit 2006). In Black, police were dispatched to an apartment after Black's ex-girlfriend called 911 and reported that he had beaten her up earlier that day in the apartment and he had a gun. Id. at 1039. She told the 911 dispatcher that she intended to return to the apartment and get her clothes and that she would wait outside the apartment, in her truck, for officers to arrive before entering. Id. When the officers arrived a few minutes later, there were no signs of the ex-girlfriend or the truck. Id. When the officers knocked on the door of the apartment they received no response. Id. They circled the building and found Black, who identified himself and said he knew the police were investigating a domestic violence call. Id. The officers patted him down and found the key to the apartment. Id. They used the key to enter the apartment, did a sweep and found no one inside. Id. However, they saw a gun sitting on the bed. Id. Without touching the gun, the officers left and obtained a warrant for the gun. Id. The Ninth Circuit held that the warrantless entry was justified by exigent

circumstances because the officers reasonably feared that the victim could have been inside in need of medical assistance. Id. at 1039-40. The court noted that “the exigencies of domestic abuse cases present dangers that, in an appropriate case, may override considerations of privacy.” Id. at 1040.

A comparison of these cases to the specific facts in Schultz shows that factors (4) and (5) do not require a greater specificity regarding the degree of injury or immediate need of help than the information presented to the officers in this case. In Schultz, there was no indication anyone might be injured. The officers responded only to a report of a man and a woman yelling. Id. at 760. They knocked on the door to the apartment and a woman answered the door, appearing flustered and agitated, but not injured. Id. Officers asked about the man in the home. Id. She at first denied any male was present, then admitted he was there and called him out from the bedroom. Id. He did not appear injured, either. Id. Officers then entered the apartment based on the woman’s acquiescence. Id. Schultz held that the officers could not rely on the woman’s mere acquiescence to justify their entry. Id. Importantly, and unlike in this case, the officers did not have information regarding past domestic violence.

Here, Officers Kellams and Korus had an eyewitness that had seen Coleman assault Tara by pulling her by her hair into her apartment immediately before she called police, they knew Coleman had assaulted Tara in the past, and they knew there was a no-contact order in place. Further, they knew both Tara and Coleman were likely inside Patricia's apartment. No one responded to repeated knocks at the door and inquiries regarding Tara's well-being although they knew a woman was inside. In these circumstances, any reasonable person would have believed that it was necessary to enter the apartment to ensure Tara was not injured or in danger.

This situation is far more similar to those in Black, Menz, Lynd and Gocken. Officers had information which led them to the reasonable belief that Tara may be injured and in need of assistance.

Officers did not need specific information about the possible degree of injury to Tara. Schultz does not require officers to have such information prior to entering to check on a person's health and safety. Instead, factor (4) from Schultz, an imminent threat of substantial injury to persons or property, appears to derive from concern that with a generalized concern for the community's

welfare is insufficient. While generalized concern for the community's safety is not sufficient to justify entry, however, specific concern about injury to a specific person who may be in need of assistance is sufficient.

No case has held officers must have a belief that a specific person has suffered a certain degree of injury, as Coleman urges here. In fact, to so require would destroy the very purpose of the emergency aid exception. Such an interpretation would require officers to have a reasonable belief someone has suffered a fracture or some other more serious injury rather than simply an injury or a threat of injury. Most calls to 911 contain only brief information, as illustrated by the above cases. Officers must piece together the information known to them and act on it at the time. When officers have information of a threat of violence or actual violence and that someone may be injured to any degree, then they must act to ensure that person's safety. Officers do not have the luxury of a thorough examination and cross-examination to all possible parties.

Coleman asserts that the officers' actions in calling the manager to obtain a key rather than kicking down the door negates the imminence required to justify the entry. Br. App. at 17.

However, Coleman fails to view the facts as known to the officers at the time. The officers believed by contacting the manager that they would receive the key within minutes, though it seemed to take a bit longer. 1RP 20,76. It was not unreasonable for the officers to try to avoid property damage to Patricia Brown's home, when doing so would only slightly delay their investigation.

The trial court specifically found that the officers reasonably believed that Tara was in need of assistance and that they needed to check on the safety of Tara. Supp CP ___ (sub 81 at 4). The findings noted that the officers did not believe it was safe to leave the scene for more than a few minutes due to the potential danger to Tara. Supp CP ___ (sub 81 at 4). The trial court also noted the facts known to the officers at the time regarding the assault immediately before Matthews called 911 and the history of assaults and domestic violence. In noting the volatility of domestic violence situations, as in Schultz, the trial court noted that domestic violence situations "may quickly escalate into situations where a person suffers significant injury." Supp CP ___ (sub 81 at 4). All of these findings of facts and conclusions support factors (4) and (5) of the emergency aid exception, even though the trial court did not separate out and explicitly find factors (4) and (5) in its written

conclusions of law. Thus, there is substantial evidence in the record from which the court can conclude that the court properly found the six balancing factors and ruled that the emergency aid exception justified the officers' entry into Patricia's apartment.

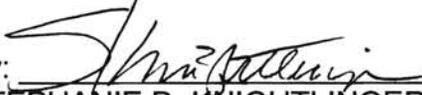
D. CONCLUSION

For the foregoing reasons, the State respectfully requests that Coleman's domestic violence violation of a court order conviction be affirmed.

DATED this 16th day of November, 2012.

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 Jennifer Dobson and Dana M. Nelson, the attorneys for the appellant @, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ADREN COLEMAN, Cause No. 68535-0-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.

Holly Gilmore

Name Holly Gilmore
Done in Kent, Washington

11.16.2012

Dated: 11/16/2012

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