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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TROY C. RESTVEDT,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUES..... 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT7

A. THE POLICE LAWFULLY ENTERED RESTVEDT’S
BACKYARD UNDER THE EMERGENCY AID
FUNCTION OF THE COMMUNITY CARETAKING
EXCEPTION TO THE WARRANT REQUIREMENT.....7

1. Standard Of Review 7

2. The Open Fire In Restvedt’s Backyard Required
The Police To Act Under The Community
Caretaking Exception To The Warrant Requirement
To Gain Entry To The Backyard To Quickly Ensure
The Fire Was Extinguished Due To The Conditions
That Prompted The Total Burn Ban.....8

B. THE STATE PRESENTED SUFFICIENT EVIDENCE
TO
SUSTAIN THE JURY’S VERDICT THAT RESTVEDT
COMMITTED THE CRIME OF RESISTING ARREST21

1. Standard Of Review 22

2. The State Proved, As It Is Required To, Each
Element Of Resisting Arrest22

C. THE STATE CONCEDES THERE WAS NOT
SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN
A CONVICTION FOR VIOLATION OF COUNTY
RESOLUTION, BURN BAN26

IV. CONCLUSION.....26

TABLE OF AUTHORITIES

Washington Cases

<i>In re Stranger Creek</i> , 77 Wn.2d 649, 466 P.3d 508 (1970).....	20
<i>State v. Boisselle</i> , 194 Wn.2d 1, 448 P.3d 19 (2019)	7, 10, 11, 12, 13, 14, 17, 18, 20
<i>State v. Byrd</i> , 178 Wn.2d 611, 310 P.3d 793 (2013)	10
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	23
<i>State v. Campbell</i> , 166 Wn. App. 464, 272 P.3d 859 (2011)	8
<i>State v. Colquitt</i> , 133 Wn. App. 789, 137 P.3d 893 (2006)	22
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	23
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008)	9
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.2d 410 (2004)	22
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	23
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	8
<i>State v. Hoke</i> , 72 Wn. App. 869, 866 P.2d 670 (1994)	10
<i>State v. Hornaday</i> , 105 Wn.2d 120, 713 P.2d 71 (1986)	25
<i>State v. Kinzy</i> , 141 Wn.2d 373, 5 P.3d 668 (2000)	10, 20
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	9, 11
<i>State v. Monaghan</i> , 165 Wn. App. 782, 266 P.3d 222 (2012).....	12
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997)	23
<i>State v. Ross</i> , 141 Wn.2d 304, 4 P.3d 130 (2000).....	9
<i>State v. Sadler</i> , 147 Wn. App. 97, 193 P.3d 1108 (2008)	8
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	22
<i>State v. Seagull</i> , 95 Wn.2d 898, 632 P.2d 44 (1981).....	10
<i>State v. Stevenson</i> , 128 Wn. App. 179, 114 P.3d 699 (2005).....	8

State v. Valentine, 75 Wn. App. 611, 879 P.2d 313 (1994)24

Federal Cases

In re Winship, 397 U.S. 358, 90 S. Ct 1068, 25 L.Ed.2d 368
(1970)22

Skinner v. Ry Labor Executives' Ass'n, 489 U.S. 602,109 S. Ct.
1402, 103 L. Ed.2d 639 (1989)9

Washington Statutes

RCW 9A.48.050 19

RCW 9A.76.04023

Constitutional Provisions

Const. art. I, § 79, 10

U.S. Const. amend IV9

U.S. Const. amend. XIV, § 122

Other Rules or Authorities

Lewis County Resolution 18-248 1, 26

WPIC 120.0624

WPIC 20.0724

I. ISSUES

- A. Did the law enforcement officers lawfully enter Restvedt's backyard without a warrant under the emergency aid function of the community caretaking exception to the warrant requirement?
- B. Did the State present sufficient evidence to sustain Restvedt's conviction for Resisting Arrest?
- C. The State concedes there was not sufficient evidence to sustain Restvedt's conviction for Violation of Lewis County Resolution 18-248.

II. STATEMENT OF THE CASE

The summer of 2018 was extremely dry. 2RP 52-53, 61-62.¹ Due to the weather conditions the Lewis County Board of Commissioners effectuated a total burn ban in August, modifying their earlier burn ban. Ex. 1.² All outdoor burning was banned, even recreational fires, on all lands regulated by Lewis County. *Id.* The City of Centralia issued a total burn ban at the same time. Ex. 2.

Later that month, the Riverside Fire Authority (RFA) received a report, between three and four in the afternoon, of a fire at 500 East

¹ There are six volumes of verbatim report of proceedings in this matter, the State however will only be citing to three. The suppression motion held on 10/31/18 will be cited as 1R. The continually paginated, two volumes, that contains the jury trial (1/28/19, 1/29/19), the sentencing (3/20/19), and two motion hearings (12/6/18, 1/10/19) will be cited as 2RP.

² The exhibits from the trial, which have already been designated, the State will cite as "Ex. ___." The State is submitting a supplemental designation of Clerk's papers to include exhibits from the suppression motion hearing. The exhibits from the 10/31/18 hearing will be cited as "Motion Ex. ___."

Plum Street in Centralia. 2RP 53-54. RFA is responsible for responding to calls in both the unincorporated county and city of Centralia. 2RP 53. Captain Scott Weinert, of the RFA, located a small column of smoke behind a residence at the dead end of East Plum Street, up against Seminary Hill. 2RP 54-55; Ex. 4.

After making observations, Captain Weinert decided to attempt to contact the residents. 2RP 59. Restvedt came out and contacted Captain Weinert at the street, inquiring why the fire department was there. 2RP 59. Captain Weinert noted Restvedt was polite in tone and purposeful in posture. 2RP 59. Captain Weinert informed Restvedt they were at the residence due to the fire and that there was a burn ban in effect. 2RP 60-61. Restvedt said he would put the fire out and RFA cleared the scene. 2RP 62.

Later that same day, a call came in regarding a fire at the same residence. 2RP 62-63. Captain Weinert made the decision to have the call passed on to the police because Restvedt did not heed RFA's instructions regarding the fire. 2RP 63.

Centralia Police Officers Dorff and Huerta responded to Restvedt's residence. 2RP 71-72, 129. Officer Dorff also had a civilian ride along, Alysha Chandra, a deputy prosecutor. 2RP 72. The officers arrived with the information that the fire department was

requesting assistance from the police because RFA had been out to the residence earlier in the day, asked the resident to put the fire out, the resident put the fire out but was rude and/or aggressive in nature, and now the fire was relit. 1RP 16, 37; 2RP 72.

Officer Huerta and Officer Dorff exited their patrol cars and smelled smoke coming from the area of Restvedt's house. 2RP 74, 131. The officers walked down the road, got to the residence, and proceeded around the side of the residence. 2RP 75. There were two tarps in an "L" shape and Officer Dorff was able to see the fire through a small gap in one of the tarps. 1RP 44; 2RP 76. The officers could hear voices coming from the backyard, entered the backyard and observed a lit fire, two camp chairs with Restvedt in one, and another person sitting in the other chair. 2RP 76, 133.

The back of Restvedt's yard is adjacent to the Seminary Hill nature preserve. 2RP 83-84; Ex. 4; Motion Ex. 1. The open fire was approximately 20 feet from the trees. 2RP 84. Once the officers entered the backyard they also observed a lot of dry debris next to the fire pit and there was a compost pile full of dried brush and leaves about five to 10 feet away. 2RP 86-87.

Officer Huerta had a conversation with Restvedt. 2RP 134. Restvedt acknowledged the fire department had been out earlier that

day and told him to put the fire out. 2RP 136. Officer Huerta told Restvedt to put out the fire or he would be arrested. 2RP 136. Restvedt became agitated, was not sitting still, raised his voice, told the officers he was a red card firefighter, he had a bucket of water next to the fire, and he knew what he was doing. 2RP 136. Officer Huerta continued to request Restvedt dump the bucket of water on the fire due to the burn ban. 2RP 137.

Restvedt continued to argue with Officer Huerta, then after arguing, Restvedt stood up and dumped the bucket of water on the fire. 2RP 137. The fire was not extinguished and Officer Huerta politely asked Restvedt to put a second bucket of water onto the fire. 2RP 137. Restvedt became more agitated, argued, yelling that he could have a fire. 2RP 137. Officer Huerta continued to try to talk to Restvedt to get him to put a second bucket of water on the fire. 2RP 137. Restvedt eventually put a second bucket of water on the fire. 2RP 137.

Officer Huerta asked Restvedt for his name. 2RP 137. Restvedt told Officer Huerta, "fuck you and get the fuck off my property." 2RP 137-38. Officer Huerta determined there was probable cause for reckless burning because the fire was dangerous based on Officer Huerta's past experience, there was a fire in Bend,

Oregon, that had devastated the community, Officer Huerta grew up in the Centralia area, knew the area where the fire was located, the foliage was dry, and the wooded area was dry. 2RP 138-39. The officers decided to take Restvedt into custody because he delayed and hindered Officer Huerta's investigation by not giving his name, and because of the illegal burn. 2RP 138.

Officer Dorff advised Restvedt he was under arrest for reckless burning. 2RP 78. Officer Huerta walked towards Restvedt to place him in handcuffs. 2RP 111. Restvedt slapped Officer Huerta's hands while backing away and then engaged in a physical confrontation with Officer Huerta. 2RP 111, 116, 139-42. The other individual attempted to attack Officer Huerta and Officer Dorff stepped in and engaged in a physical confrontation with him. 2RP 115-16, 140. Restvedt resisted Officer Huerta by continuing to back away, trying to beat Officer Huerta's hold, and not cooperating. 2RP 141-42. Officer Huerta had to employ an LVNR technique, which causes the other person to lose consciousness, to get Restvedt to the ground and into handcuffs. 2RP 163-65. It took Officer Huerta approximately five minutes to place Restvedt into custody. 2RP 142.

The State charged Restvedt by information with Assault in the Third Degree and Resisting Arrest. CP 1-2. Restvedt filed a motion

to suppress, compel discovery, and disqualify the prosecutor's office. CP 4-85. The motion to suppress was based upon the alleged warrantless entry by police into Restvedt's backyard. CP 11-21. The State responded to the motion. CP 86-97. A hearing was conducted and the motions were denied. See 1RP; CP 102-04.

The State filed an amended information adding an additional count, Violation of County Resolution – Burn Ban. CP 98-99. Restvedt elected to exercise his right to a jury trial. See 2RP 11-285. The facts outlined above summarize most of the State's evidence elicited at trial. Ultimately, the jury convicted Restvedt of Resisting Arrest and Violation of County Resolution – Burn Ban. CP 69-70. The jury acquitted Restvedt of Assault in the Third Degree. CP 68. The trial court sentenced Restvedt to five days in jail, credit for five days served, the balance of the time (85 days and 359 days) suspended for 24 months. CP 157-58. Restvedt timely appeals his conviction. CP 159.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE POLICE LAWFULLY ENTERED RESTVEDT'S BACKYARD UNDER THE EMERGENCY AID FUNCTION OF THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT.

The officers' entry into Restvedt's backyard was lawful under the emergency aid exception to the warrant requirement. The trial court correctly concluded this exception applied when denying Restvedt's motion to suppress the evidence obtained from Restvedt's backyard. This Court should affirm the trial court.³ Further, this Court should find that any limitation *State v. Boiselle*, 194 Wn.2d 1, 448 P.3d 19 (2019), places on a law enforcement officer's ability to gain access to private property during a call regarding an open fire that threatens property or life is incorrect and harmful.

1. Standard Of Review.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law.

³ Restvedt asserts his convictions should be reversed because his "convictions rested on evidence gathered during the unlawful search and must therefore be reversed." The State will reserve its argument below regarding the possible reversal of convictions.

State v. Campbell, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

Restvedt has not assigned error to any of the findings of fact entered by the trial court following the suppression hearing. Brief of Appellant 1; CP 102-03. Therefore, the findings of fact are verities on appeal.

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

2. The Open Fire In Restvedt's Backyard Required The Police To Act Under The Community Caretaking Exception To The Warrant Requirement To Gain Entry To The Backyard To Quickly Ensure The Fire Was Extinguished Due To The Conditions That Prompted The Total Burn Ban.

Officer Huerta and Officer Dorff entered Restvedt's backyard after receiving a call for assistance by the fire department regarding a citizen who had relit a fire after previously being told to put it out. The tinder dry conditions, the close proximity of a large nature

preserve, and the risk Restvedt's open fire posed to property were sufficient reasons to support the emergency aid exception to the warrant requirement.

Citizens have the right to not be disturbed in their private affairs except under authority of the law. U.S. Const. amend IV; Const. art. I, § 7. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

Generally, a search is not reasonable unless it is based on a warrant issued upon probable cause. *Skinner v. Ry Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989). Constitutional protections against warrantless searches apply most strongly to a person's home. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The Fourth Amendment's umbrella of protection extends to a home's curtilage. *Ross*, 141 Wn.2d at 312 (internal quotations and citations omitted). However, police may enter areas of the curtilage, while on legitimate business, which are

impliedly open. *Id.*, citing *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Areas of curtilage which are impliedly open to the public may include a walkway, driveway, or access route that leads to the residence. *State v. Hoke*, 72 Wn. App. 869, 874, 866 P.2d 670 (1994) (internal citations omitted). “An officer is permitted the same license to intrude as a reasonably respectful citizen.” *Seagull*, 95 Wn.2d at 902.

“Under article 1, section 7, a warrantless search is per se unreasonable unless the State proves that one of the few carefully drawn and jealously guarded exceptions applies.” *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013) (internal quotations and citations omitted). One of exceptions to the warrant requirement is the community caretaking exception. *Boiselle*, 194 Wn.2d at 10. This exception recognizes that law enforcement officers frequently perform tasks not associated with criminal investigations but are rather community caretaking functions. *Id.* at 11. A police officer can perform community caretaking functions in a multitude of circumstances, including routine checks on health and safety and emergency aid. *Id.*, citing *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000).

To determine if the community caretaking exception applies

“a court must determine the threshold question of whether the community caretaking exception was used as a pretext for a criminal investigation before applying the community caretaking test.” *Id.* at 14-15 (internal citations omitted). A search is pretextual when a legal authorization is relied upon as a pretense by an officer to forgo a warrant when the actual “reason for the seizure is not exempt from the warrant requirement.” *Id.* at 15, *citing State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). This Court considers the totality of the circumstances when it determines whether a search is pretextual. *Id.* The Court considers “the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” *Id.* (internal quotations and citations omitted).

If the Court is satisfied the community caretaking exception was not used as a pretext, then it moves on to apply the community caretaking exception test. *Boiselle*, 194 Wn.2d at 11. A warrantless search that falls under the general community caretaking function, such as routine checks for safety or health, must be reasonable. *Id.* at 11-12. The reasonableness of a general community caretaking search “depends upon a balancing of a citizen’s privacy interest in freedom from police intrusion against the public’s interest in having police perform a community caretaking function.” *Id.* at 12 (internal

quotations and citations omitted).

In contrast, the emergency aid function arises when there is a present emergency necessitating an officer render immediate assistance for health or safety reasons. *Id.* at 13-14. “Compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion.” *Id.* at 12 (internal quotations and citations omitted). The community caretaking emergency aid function exception applies when the following three-part test is met:

(1) the officer subjective believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury, (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.

Id. at 14. If the State cannot meet its burden to show the exception applies, the remedy for an unconstitutional search or seizure is exclusion of the evidence that was uncovered and obtained. *State v. Monaghan*, 165 Wn. App. 782, 789, 266 P.3d 222 (2012).

In *Boiselle*, law enforcement was dispatched to a duplex after receiving two anonymous 911 calls reporting their friend, Mike, shot and possibly killed a person at the duplex. *Boiselle*, 194 Wn.2d at 5. The officers learned, while responding to the calls, that there was an

ongoing missing person and/or homicide investigation related to that residence. *Id.* Two deputies responded to the duplex, knocked on the front door, and after multiple attempts and receiving no response, walked around the duplex. *Id.* The deputies heard a dog barking aggressively from inside the duplex unit. *Id.* The inside of the unit was not visible, as the blinds were drawn and the lights were off. *Id.*

Two sergeants arrived shortly after the deputies, and determined they wanted, as best they could, to confirm if there had been a crime and if they may or may not have been a victim in the unit. *Boiselle*, 194 Wn.2d at 5. One of the sergeants walked around the unit and smelled a foul odor coming from the garage. *Id.* The sergeant believed the smell could either be a decomposing body or rotting garbage. *Id.* The sergeants approached a sliding glass door and the dog inside came to the door, pushing the blinds, which allowed the sergeants to view inside the unit. *Id.* at 5-6. What the sergeants observed made them very suspicious, as there appeared to be signs of struggle and missing carpet. *Id.* at 6.

The sergeants learned a man named Zomalt lived in the duplex with Mike Boiselle, and Zomalt had not been seen in several weeks. *Id.* The sergeants also learned Zomalt was part of a missing person case in Auburn. *Id.* One of the sergeants spoke to an Auburn

detective, learned about a roadside fire, possible homicide/missing person investigation, and was told the detective would be interested in knowing if there was any carpet missing from the unit. *Id.* The sergeants decided to enter the unit without a warrant under the emergency aid exception, noting there was someone either hurt or dead, it was suspicious welfare check, and given all the information they had, the scene could not simply be walked away from. *Id.* at 6-7. Zomalt's body was located in the garage. *Id.* at 7.

The Supreme Court concluded the warrantless search of Boiselle's unit was pretextual. *Boiselle*, 194 Wn.2d at 16. The record showed the officers were minimally suspicious, if not convinced, a crime had occurred in the unit. *Id.* The officers could not confirm an immediate emergency existed at the unit, and were not solely motivated to enter by a need to provide immediate aid to someone therein. *Id.* Therefore, the search the officers conducted was "associated with the detection and investigation of criminal activity." *Id.*

On August 2, 2018, the Lewis County Board of County Commissioners and the Lewis County Fire Marshal made a determination it was necessary to expand the burn ban restrictions already in place. CP 94. The Board and Fire Marshall upgraded the

ban to include all outdoor burning, including recreational fires. *Id.* The ban even included the use of charcoal briquettes, as only liquid gas or propane camp stoves equipped with an on/off switch were permitted for use. *Id.* The decision was due to the continued, and in some areas, worsening, dry season conditions. *Id.* “[T]he decision to expand the burn restriction to a total burn ban reflects the county’s priority of public safety and the protection of personnel, as well as property.” *Id.*

Officer Huerta was aware there was a total burn ban in effect on August 17, 2018, when he arrived at 500 East Plum as a secondary officer to assist Officer Dorff. 1RP 6-7. Officer Dorff was similarly aware. 1RP 37. The officers were responding because the fire department requested police assistance in dealing with Restvedt. 1RP 16, 37, 44. The fire department had previously been dispatched to Restvedt’s residence earlier in the day regarding a fire, asked Restvedt to put the fire out, and now the fire was relit. 1RP 6, 16, 37. The officers had been informed the fire department had reported Restvedt had acted rude, aggressive, and not particularly responsive during the earlier contact and now the fire department did not want to return to the residence. 1RP 16, 37.

Upon arriving at the scene, Officer Huerta could smell wood

burning smoke in the air. 1RP 8-9. Officer Huerta did not initially see where the smoke was coming from, but was made aware by Officer Dorff. 1RP 9. While the officers were walking up to the residence, Officer Dorff saw through a gap between two tarps that were hanging up, the fire in Restvedt's backyard. 1RP 10, 44. The officers heard voices in the backyard and directly contacted the persons in the backyard, rather than go to the front door. 1RP 10-11, 23, 25, 43.

Officer Huerta explained his purpose for going onto the property and contacting Restvedt, "I wanted the defendant to put the fire out due to the risk of fire, due to the high risk of fire season, I wanted to prevent a fire in the area." 1RP 11. The fire in Restvedt's backyard was right behind a white shed, with a rust colored roof. Motion Ex. 1, 2. The fire pit was approximately 15 to 20 feet from the large fir trees, which are part of the thick forest that makes up the Seminary Hill nature preserve. 1RP 9, 38-39; Motion Ex. 1, 2. Officer Huerta was concerned the fire could spread to foliage of the Seminary Hill nature preserve. 1RP 31. If the trees caught fire, they would "burn as if they have gasoline on them" due to the extremely dry conditions. 1RP 39; Motion Ex. 1. Officer Huerta simply wanted Restvedt to comply with the fire department's earlier request and extinguish the fire. 1RP 13.

While neither officer brought firefighting equipment with them, such as a fire extinguisher, failing to do so does not mean an open fire burning in such conditions does not meet the emergency aid requirement. 1RP 17, 44. The threshold question of whether the entry into Restvedt's backyard, the curtilage of his home, was pretextual is more complex question than *Boiselle*. See, 194 Wn.2d at 14-17. The officers are called out for a report of an illegal burn or burn ban violation. Any fire during a burn ban is going to be a potential criminal violation. The officers arrived on the scene understanding Restvedt has likely committed a criminal violation. One officer states his main purpose and concern is the safety of the area because of the fire and simply wanted Restvedt to put the fire out. 1RP 11. The other officer stated his purpose for being there was to enforce the laws and when a law is broken he investigates it. 1RP 46. Does the second officer's subjective intent when arriving on the scene negate the other officer's subjective intent? Officer Huerta's reasons for entering Restvedt's backyard were not based on a desire to pursue criminal action, but to find some way to get Restvedt to put out a fire that could potentially light a forest, which stood mere feet away, on fire, a reasonable action. Therefore, entry into Restvedt's backyard was not a pretextual search.

Employing the three-part test to the facts of this case, the emergency aid function of the community caretaking exception applies. First, Officer Huerta had a subjective belief that an emergency existed, an open fire, which required he provide immediate assistance to protect property. *See, Boiselle*, 194 Wn.2d at 14. Second, a reasonable person knowing the dry conditions, the total burn ban, and the close proximity of the fire to a large nature preserve, would similarly believe there was a need for assistance. *Id.* Finally, there was a reasonable basis for Officer Huerta to associate the need for assistance with Restvedt's backyard, as that was where the fire was located. *Id.*

Restvedt argues while the officers believed the fire posed a threat, due to the dry conditions, they were not solely motivated by the need to render aid. Brief of Appellant 13. The fact that violating a burn ban is technically a criminal citation should not be a determining factor in this case either, as setting such precedent would chill law enforcements ability to render emergency aid during fire situations. While the State acknowledges the Supreme Court's decision in *Boiselle* requires the officers' actions to be "totally divorced from the detection and investigation of criminal activity," officers must be able to respond to reports of burning ban violations and reckless burning,

both potential criminal investigations, and deal with the more immediate threat to persons or property. *Boiselle*, 194 Wn.2d at 11. A person commits the crime of reckless burning in the second degree, a gross misdemeanor, when they “knowingly causes a fire or explosion, whether on his or her own property or that of another, and thereby recklessly places a building or other structure, or any vehicle, railway car, aircraft, or watercraft, or any hay, grain, crop or timber, whether cut or standing, in danger of destruction or damage.” RCW 9A.48.050. Therefore, under the Supreme Court’s holding in *Boiselle*, an officer called out to a scene where a reporting party has claimed their neighbor has set a compost pile on fire and it is burning near their shed, could not upon arriving at the scene and seeing flames from the backyard, enter into the yard and take immediate action. See, 194 Wn.2d at 16-19. Instead, the officer is required to contact the fire department and/or apply for a search warrant to gain entry. The very nature of an open fire call to police demand the ability of law enforcement officers to be able to take immediate action if it is necessary to protect the property or life of others, even if there is a possible simultaneous criminal investigation.

The doctrine of stare decisis precludes the alteration of precedent without a clear showing that the established rule is harmful

and incorrect. *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.3d 508 (1970). The policy behind stare decisis is to promote stability in court made law. *Stranger Creek*, 77 Wn.2d at 653. It does not preclude this Court from consideration of arguments to the contrary, however, as it does not require this Court to continue to uphold a law in perpetuity that is incorrect and harmful. *Id.* The rule of law is a fluid thing, and must change when reason requires it to do so. *Id.* Law enforcement's "jack of all trade" role has been recognized as a reason why the community caretaking exception exists. *Boiselle*, 194 Wn.2d at 10, *citing Kinzy*, 141 Wn.2d at 387. This type of role does not always fit neatly into separate compartments, and requiring it to do so is contrary to public policy and common sense when it comes to calls for law enforcement to respond to open fires. This Court should find any limitation that *Boiselle* places on a law enforcement officer's ability to gain access to private property during a call regarding an open fire that threatens property or life is incorrect and harmful.

The trial court concluded "[t]he officers had a legitimate emergency concern in ensuring the defendant's fire was out during a county-wide burn ban." CP 103. The trial court also concluded the fire department's report to dispatch coupled with "the smell of smoke

the officers noticed when they got out of their vehicles” was sufficient to justify the officers’ warrantless entry into Restvedt’s backyard. *Id.* The trial court’s conclusions are legally sound and consistent with the evidence presented, the unchallenged findings, and grounded in sound legal reasoning. The emergency aid function to the community caretaking exception to the warrant requirement allowed the officers to gain entry into Restvedt’s backyard once it was established there was an open fire located in the backyard. There has been no dispute the officers were able to confirm the open fire existed from outside the constitutionally protected area. Therefore, the officers acting in their capacity to ensure the safety of property, a large stand of trees in a nature preserve, from being burned to the ground, entered Restvedt’s backyard and attempted to have him comply with a county-wide burn ban. This falls within the recognized exception the warrant requirement. This Court should affirm the trial court’s denial of the motion to suppress.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY’S VERDICT THAT RESTVEDT COMMITTED THE CRIME OF RESISTING ARREST.

There was sufficient evidence presented to show beyond a reasonable doubt Restvedt committed the crime of Resisting Arrest. Contrary to Restvedt’s assertion, the State proved the essential

element that Restvedt's arrest was lawful. Therefore, the facts taken in the light most favorable to the State sustain all of the essential elements of the charged offense. The Court should sustain the jury's verdict.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Proved, As It Is Required To, Each Element Of Resisting Arrest.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable

as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Restvedt of Resisting Arrest, the State was required to prove, beyond a reasonable doubt, that Restvedt intentionally attempted to prevent or did prevent a peace officer from lawfully arresting him. RCW 9A.76.040; CP 2.

The to-convict jury instruction required the jury to find:

To convict the defendant of the crime of resisting arrest, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 17, 2018, the defendant prevented or attempted to prevent a peace officer from arresting him;
- (2) The defendant acted intentionally;
- (3) That the arrest or attempt to arrest was lawful; and
- (4) That this act occurred in the County of Lewis.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 148 (Instruction 13), *citing* WPIC 120.06. The jury was instructed on what makes an arrest lawful. CP 149 (Instruction 14), *citing* WPIC 120.07, *State v. Valentine*, 75 Wn. App. 611, 618 879 P.2d 313 (1994).⁴

Restvedt argues his arrest was not lawful, due to the officers violating his constitutional rights by entering onto his property without a warrant. Brief of Appellant 19-20. As argued above, the entry into Restvedt's backyard by the officers was lawful, due to the emergency aid function of the community caretaking exception applying because of Restvedt's open fire. Officer Huerta had probable cause to place

⁴ Court's Instruction 14 is the State's proposed 18, which cites WPIC 120.07 and *Valentine*, 75 Wn. App. at 618 as its authority.

Restvedt into custody for reckless burning. 2RP 138-39. Contrary to Restvedt's assertion, he did not have the right to resist Officer Huerta's attempts to place Restvedt in handcuffs. See, Brief of Appellant 18, *citing* State v. Hornaday, 105 Wn.2d 120, 130-31, 713 P.2d 71 (1986).

When Officer Huerta decided to place Restvedt under arrest, he walked towards Restvedt, who immediately put his hands up then took a step or two backwards. 2RP 139. Officer Huerta's hands were also raised as he stepped towards Restvedt. *Id.* Restvedt slapped Officer Huerta's hands down. *Id.* Officer Huerta continued to attempt to place Restvedt in handcuffs by turning Restvedt around. 2RP 140. Restvedt was uncooperative with Officer Huerta, attempting to defeat Officer Huerta from placing handcuffs on him, and trying to beat Officer Huerta's hold. 2RP 141. Restvedt resisted for two to five minutes, and only when Officer Huerta employed an LVNR technique was Officer Huerta able to get Restvedt to the ground and in handcuffs. 2RP 163-65, 167.

Restvedt intentionally attempted to prevent Officer Huerta from lawfully arresting him. In the light most favorable to the State, with all reasonable inferences drawn in favor of the State, there was sufficient evidence presented for a reasonable jury to find Restvedt

guilty of Resisting Arrest beyond a reasonable doubt. This Court should affirm Restvedt's conviction.

C. THE STATE CONCEDES THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION FOR VIOLATION OF COUNTY RESOLUTION, BURN BAN.

The State charged Restvedt with violating Lewis County Resolution 248. CP 99, 150. Lewis County Resolution 18-248 is titled, "MODIFY RESTRICTIONS ON OUTDOOR BURNING TO FULL BAN THROUGHOUT UNINCORPORATED LEWIS COUNTY." Ex. 1. Restvedt's residence is within the incorporated city limits of Centralia, therefore it is not possible for Restvedt to have committed the crime charged, as the State did not charge Restvedt with violating the City of Centralia's burn ban. 2RP 53-54, 58; CP 99; Ex. 2. The State did not present sufficient evidence to sustain Restvedt's conviction for Violation of County Resolution, Burn-Ban, and therefore is conceding the conviction should be reversed and the matter remanded to the trial court to vacate the conviction.

IV. CONCLUSION

The Court should affirm the trial court's denial of Restvedt's motion to suppress the evidence due to the alleged warrantless search. The officers entered Restvedt's backyard lawfully. The officers had the right to enter Restvedt's backyard pursuant to the

emergency aid function of the community caretaking exception to the warrant requirement. This Court should affirm Restvedt's conviction for Resisting Arrest because the State presented sufficient evidence to prove beyond a reasonable doubt Restvedt attempted to prevent Officer Huerta from lawfully arresting him. The State concedes there was not sufficient evidence to sustain Restvedt's conviction for Violation of County Resolution, Burn Ban and it must therefore be reversed and remanded back to the trial court to vacate the conviction and sentence for Count III.

RESPECTFULLY submitted this 20th day of December, 2019.

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by: _____
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