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COA NO. 36466-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

DWIGHT ELDON BACKHERMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Christopher Culp, Judge
The Honorable Henry Rawson, Judge

REPLY BRIEF OF APPELLANT

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A. **ARGUMENT IN REPLY**

1. THE EVIDENCE IS INSUFFICIENT TO CONVICT ON BOTH DELIVERY COUNTS UNDER THE LAW OF THE CASE DOCTRINE.

The State swings and misses. It does not engage Backherms's sufficiency of evidence argument based on the law of the case doctrine. This Court is not in the business of constructing arguments for litigants. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). So there is little to respond to here.

At one point, though, the State suggests it had no choice but to word the to-convict instruction as it did. Brief of Respondent (BR) at 7. The suggestion does not negate the State's added burden of proof under the law of the case doctrine. When the instruction adds an element, the legal consequence of needing to prove it inexorably follows. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). But on a practical level, a to-convict instruction that avoids adding a superfluous element is easily achieved. The second element concerning knowledge could simply require that the defendant knew the substance was a controlled substance, without specifying the specific substance. The first element concerning delivery could specify the specific substance at issue, thus satisfying the State's statutory burden of proof when a particular substance must be proven to elevate the criminal penalty. See State v. Clark-El, 196 Wn.

App. 614, 617, 384 P.3d 627 (2016) ("When a defendant is charged with delivering a controlled substance, the identity of the substance is an essential element that must be stated in the to-convict instruction if it increases the maximum sentence the defendant will face upon conviction.").

The State, by submitting the to-convict instructions it did, created an element of proof that otherwise would not exist. The State makes no meaningful attempt to counter Backherms's argument that it failed to prove he knew the specific substances being delivered. The delivery convictions must therefore be reversed due to insufficient evidence under the law of the case doctrine. State v. Ong, 88 Wn. App. 572, 577-78, 945 P.2d 749 (1997).

The State argues harmless error. BR at 11. The State's failure to prove an element of a charged crime is never harmless. If the evidence is insufficient to convict, at it was here, then the remedy is reversal of the convictions and dismissal of the charge with prejudice. Hickman, 135 Wn.2d at 103.

2. THE TRIAL COURT ERRED IN DENYING THE SUPPRESSION MOTION BECAUSE THE SEIZURE OF DRUGS WAS NOT JUSTIFIED BY A WARRANT OR ANY EXCEPTION TO THE WARRANT REQUIREMENT.

The State tosses out various theories to show the search and seizure of the drugs in Backherms's home complied with constitutional requirements. None work.

a. The State's new theories cannot be used to affirm the trial court.

The State contends Backherms voluntarily abandoned the substances and therefore cannot claim a privacy interest in them. BR at 18. Although unclear, the State also seems to suggest the search incident to arrest exception to the warrant requirement applies. BR at 12-13. The State advanced neither theory below and the trial court therefore made no requisite factual findings or rulings on them. In considering the merits of a suppression issue, appellate courts do not rely on arguments not advanced by the State at the trial level. State v. Samalia, 186 Wn.2d 262, 279, 375 P.3d 1082 (2016) ("We disapprove the Court of Appeals' additional reliance on the exigent circumstances and the attenuation doctrines because the State did not raise these doctrines at the trial court in response to Samalia's motion to suppress."). "Courts should not consider grounds to limit application of the exclusionary rule when the State at a

[motion to suppress] hearing offers no supporting facts or argument." Id. (quoting State v. Ibarra-Cisneros, 172 Wn.2d 880, 885, 263 P.3d 591 (2011)); see also State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997) (refusing to consider State's argument based on search incident to arrest exception because it was not raised below); State v. Carter, 79 Wn. App. 154, 162-63, 901 P.2d 335 (1995) (same).

Moreover, voluntary abandonment is a factual determination, and "[d]etermining the reasonableness of an inference of intent from proven facts is the province of the fact finder, not the appellate court." Samalia, 186 Wn.2d at 276. The trial court did not find Backherms voluntarily abandoned the substances, so there is no factual basis for the State to prevail on appeal. Further, "the area of the search is of critical importance." Id. at 279. "Generally, no abandonment will be found if the searched item is in an area where the defendant has a privacy interest." State v. Hamilton, 179 Wn. App. 870, 885, 320 P.3d 142 (2014) (citing State v. Evans, 159 Wn.2d 402, 409, 150 P.3d 105 (2007) (no voluntary abandonment when briefcase belonging to third party was in defendant's car)). "Conversely, abandonment generally will be found if the defendant has no privacy interest in the area where the searched item is located." Hamilton, 179 Wn. App. at 886. Backherms left the substances in his own residence, a place where he undeniably has a privacy interest. CP 27 (FF

3) (identifying address as Backherms's residence). The voluntary abandonment theory thus fails. See Hamilton, 179 Wn. App. at 886 (no voluntary abandonment where defendant "left the purse on the counter in her house, where she did have a privacy interest.").

The search incident to arrest theory, if it is indeed being advanced on appeal, fares no better. "Under article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest." State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489, 501 (2003) (quoting State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999)). "[T]he fact of arrest itself . . . provides the 'authority of law' to search." Parker, 139 Wn.2d at 496. Without it, a search cannot be made, regardless of the exigencies. Id. at 497.

It is the State's burden to produce and prove the facts showing an exception to the warrant requirement exists. State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008). And the State bears the "heavy burden" of establishing any exception by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). There must be "an actual custodial arrest before a search occurs," O'Neill, 148 Wn.2d at 585, but the trial court here entered no such finding, which is unsurprising because the State did not advance this theory below and defense counsel thus had no incentive to litigate the issue. The search

incident to arrest exception is inapplicable because the trial court did not find Backherms was placed under custodial arrest before the search and seizure of the drugs occurred.

- b. The arrest warrant gave police authority to arrest Backherms but did not give them authority to search for and seize the drugs, and the plain view exception to the warrant requirement is inapplicable.**

The State otherwise relies on the arrest warrant as the lawful basis to search and seize the drugs. As set forth in the opening brief, this claim fails because an arrest warrant does not permit police to search and seize evidence of a crime under these circumstances. Although police had a warrant for Backherms's arrest, they did not rely on that authority to enter the residence. Deputy Ray expressly denied entering the residence to execute the arrest warrant. RP 19. Instead, he entered the residence to seize the drugs, unambiguously confirming that he entered the resident to secure evidence of a crime. RP 19. The deputy's motivation is fatal to the State's position. Police cannot use an arrest warrant to conduct a search or other investigation of someone's home for evidence of a crime. State v. Hatchie, 161 Wn.2d 390, 401, 166 P.3d 698 (2007). The authority of law provided by an arrest warrant permits police to enter a residence *only* to seize the person and immediately leave. Id. at 400. "Police action that deviates from the narrow bounds of this authority has no authority of law."

Id. Police here deviated from the narrow bounds of the arrest warrant authority by conducting a search and seizure of drugs.

In Hatchie, police saw evidence of methamphetamine manufacturing in plain view while searching for the defendant to execute a warrant for his arrest. Id. at 392. Based on this observation, police obtained a search warrant for the defendant's house and seized the suspected evidence. Id. at 392, 402. Under these circumstances, the entry and plain view observation of the methamphetamine manufacturing equipment was under authority of law. Id. at 406.

Unlike in Hatchie, police did not enter Backherms's residence to execute the arrest warrant. RP 19. Police were not searching for Backherms inside the residence and happened to stumble across evidence of a crime in plain view. Rather, police entered his residence with the intent to search for evidence of a crime. Unlike Hatchie, police did not see the drugs in plain view when they were inside the residence. Police observed the drugs while inside the residence only once Deputy Ray ordered Pebworth to stand up from her seat, whereupon the drugs were observed to have been under her leg. RP 12. The drugs were not found until police deliberately searched for them by ordering Pebworth's movement. Properly understood, this is an "open view" case, not a "plain view" one. The deputy observed the drugs while standing outside the door,

a nonconstitutionally protected area, but still needed to obtain a warrant to enter the home, a constitutionally protected area, to look for and seize the drugs inside. State v. Posenjak, 127 Wn. App. 41, 52-53, 111 P.3d 1206 (2005).

c. The search and seizure of the drugs was not justified under the exigent circumstance exception to the warrant requirement.

Finally, the State, like the trial court, relies on the exigent circumstance exception to the warrant requirement. But like the trial court, it can only point to a generalized fear that Pebworth would dispose of the drugs before a warrant could be obtained without specific facts to back it up. The State ignores State v. Jeter, 30 Wn. App. 360, 362, 634 P.2d 312 (1981), review denied, 96 Wn.2d 1027 (1982), which holds "[a] belief that contraband will be destroyed must be based upon sounds or activities observed at the scene or specific prior knowledge that a particular suspect has a propensity to destroy contraband." "No blanket exception exists for narcotics cases, in spite of the relative ease of disposal of drugs." Id. No doubt police knew, based on experience, that people involved with drug transactions sometimes dispose of drugs to avoid detection, but that is not good enough to satisfy the exigent circumstance exception. State v. White, 76 Wn. App. 801, 806, 888 P.2d 169 (1995), aff'd, 129 Wn.2d 105, 915 P.2d 1099 (1996). Nor does the State attempt to explain why police

could not have controlled the scene by maintaining surveillance while the requisite search warrant was obtained. State v. Counts, 99 Wn.2d 54, 62, 659 P.2d 1087 (1983). If, in guarding the scene, Pebworth had left her seat or otherwise made a move to dispose of the drugs, then police at that point would have been justified by an exigency to enter the home and seize the drugs. But not before. The exigent circumstance exception is not satisfied here.

B. CONCLUSION

For the reasons stated above and in the opening brief, Backherms requests reversal of the convictions.

DATED this 12th day of November 2019

Respectfully Submitted,

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