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COA NO. 36466-6-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DWIGHT ELDON BACKHERMS,

Appellant.

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

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

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The evidence is insufficient to convict appellant of delivery of a controlled substance, methamphetamine.

2. The evidence is insufficient to convict appellant of delivery of a controlled substance, heroin.

3. The search and seizure of evidence inside the home violated appellant's right to privacy under article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution.

4. The court erred in denying appellant's CrR 3.6 motion to suppress evidence

5. The court erred in entering CrR 3.6 conclusions of law 3, 4, 5, 6, 7, 8.<sup>1</sup>

**Issues Pertaining to Assignments of Error**

1. Under the law of the case doctrine, the State must prove unnecessary elements in the to-convict instruction. The to-convict instruction for the delivery counts required the State to prove appellant knew the specific identity of the controlled substance. Must the

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<sup>1</sup> The trial court's CrR 3.6 written findings of fact and conclusions of law are attached as appendix A.

convictions be reversed due to insufficient evidence because the State failed to establish this element?

2. Police had a warrant to arrest appellant but not a warrant to search and seize evidence in his residence. Did the trial court err in denying the motion to suppress the drug evidence because (1) the arrest warrant did not provide authority of law to search and seize evidence of a crime in the home; (2) the plain view exception to the warrant requirement is inapplicable and, under the open view doctrine, police needed to obtain a warrant for the search and seizure of the drugs but failed to do so; and (3) the State did not prove the exigent circumstance exception to the warrant requirement?

**B. STATEMENT OF THE CASE**

Dwight Backherms appeals from his convictions for two counts of delivery of a controlled substance and two counts of possession of a controlled substance. CP 76-86.

**a. CrR 3.6 Suppression Hearing**

The defense moved to suppress evidence seized by police. CP 8-16. The State opposed the motion. CP 91-102. The following evidence was produced at the suppression hearing.

On May 3, 2018, Deputy Ray was emailed by his sergeant regarding an active felony arrest warrant for Backherms. RP<sup>2</sup> 9; CP 26 (FF 2). Ray knew Backherms from previous contacts. RP 9; CP 27 (FF 4). Deputy Ray and Deputy Gonzalez went to Backherms's residence. RP 9-10; CP 27 (FF 3). They approached the front door. RP 10; CP 27 (FF 5). The front door was open but a screen door was closed. RP 10; CP 27 (FF 5). Two occupants were visible as Ray looked through the screen door. RP 14-15, 17. Ray heard Backherms's voice but was uncertain that the male standing in the living room was Backherms, so Ray stood by the front door for 10-15 minutes until the male turned around and Ray was able to make a positive identification. RP 10, 17; CP 27 (FF 6).

Ray then knocked on the door and advised Backherms that they had a warrant for his arrest and that he needed to come outside. RP 10-11; CP 27 (FF 7). Backherms made a motion as if he was going to walk down the hallway. RP 11. Ray told Backherms that he would come in the residence and get him if Backherms walked down the hallway. RP 11. Backherms turned his back towards Ray. RP 11. During the turn, Ray saw Backherms reach into his pocket, pull out two baggies, and hand them to Mary Pebworth, who was sitting at the kitchen table. RP 11; CP 27 (FF

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<sup>2</sup> The verbatim report of proceedings is cited as follows: RP – one volume consisting of 7/9/18, 8/7/18, 11/7/18, 11/8/18, 11/14/18, 11/21/18.

9). Ray believed, based on his training and experience on how narcotics are stored, that the baggies contained controlled substances. RP 11-12; CP 27 (FF 9).

At this point, Ray entered the residence. RP 13. He explained that he entered because he saw Backherms hand narcotics to Pebworth. RP 19. Ray did not enter based on having an arrest warrant. RP 19. In entering the residence, his concern was to prevent Pebworth from destroying the narcotics. RP 13.

Ray asked Pebworth what Backherms gave to her. RP 12. Backherms immediately walked away from her. RP 12. Ray asked Deputy Gonzalez to take Backherms into custody. RP 12. Ray again asked Pebworth what Backherms gave her, and she responded that she did not know what he was talking about. RP 12. Ray asked Pebworth to stand up. RP 12. When she stood up, two small plastic bags were under her leg. RP 12.

The defense argued exigent circumstances did not justify entry into the residence. CP 8-16; RP 20-21. The State contended officers had a lawful basis to enter the home based on the arrest warrant and that exigent circumstances justified the seizure. CP 92-95; RP 22-24.

The court denied the suppression motion. CP 26-29; RP 26-29. It entered the following conclusions of law:

3. The Court finds that the Deputies had three lawful reasons to enter the home.

4. The first basis for entry into the home is to execute the felony arrest warrant that the Deputies originally were there to execute.

5. The second basis for entry into the home is plain view based on Deputy Ray's training and experience in identifying controlled substances and watching the defendant hand what he believed to be controlled substances to another individual in the home. This occurred in the Deputies [sic] plain view and while he was located in a place where he has a lawful right to be to execute the arrest warrant.

6. The third lawful basis for entry into the home is based on the exigent circumstances exception to the warrant requirement due to what Deputy Ray observed when the defendant handed Mary Pebworth the controlled substances.

7. Under these circumstances, the Deputy did not have to withdraw from the residence and seek a search warrant because Mary Pebworth could have easily destroyed or disposed of the controlled substances with minimal effort while law enforcement was seeking a search warrant.

8. The entry into the home, the seizure of the defendant and the seizure of the controlled substances all occurred under a lawful basis and the defendant's motion is denied.

CP 27-28.

**b. Trial**

The State charged Backherms by amended information with possession of a controlled substance, methamphetamine (count 1), possession of a controlled substance, heroin (count 2), delivery of a

controlled substance, methamphetamine (count 3), and delivery of a controlled substance, heroin (count 4). CP 17-19.

Deputy Ray's trial testimony was consistent with his CrR 3.6 testimony. RP 161-68. When Ray told Backherms that he had a warrant and would come in if Backherms did not come out, Ray saw Backherms hand two plastic baggies of "what looked like narcotics" to Pebworth. RP 168-69. Ray described them as "two plastic bags with a twist." RP 169. After Ray recovered the bags, he took them to his patrol vehicle and examined them. RP 169. One bag had clear shards in it, which Ray believed was methamphetamine. RP 170. The other bag contained a black, tarry substance, which Ray believed was heroin. RP 170. Ray made these determinations based on his training and experience. RP 162, 170. A forensic scientist from the crime lab later tested the substances and confirmed their identity as methamphetamine and heroin. RP 192, 207-10, 216, 239.

After the State rested its case, the defense called Pebworth as a witness. RP 242-44. She testified that she went over to the residence to hang out and have dinner. RP 244-45. A single lantern lighted the house, which was insufficient to light the kitchen table area because it was dim and there was barely any light coming from it. RP 245-46, 252. She put baggies on the table and then tucked a baggie under her leg when Deputy

Ray came in. RP 248-49, 254. She did not know what was in the baggie but was sure there was "some drugs" in there. RP 250. She did not know where she obtained possession of it. RP 250. She had the baggies before she arrived at Backherms's residence. RP 250. She planned to get high with them. RP 251.

According to Pebworth, the baggies belonged to her. RP 251. No one else possessed the baggies. RP 251. She denied that Backherms handed her drugs while the deputy watched. RP 254. On cross examination, she denied telling Deputy Ray that the drugs belonged to Backherms. RP 253-54. Deputy Ray had earlier testified that Pebworth told him that she did not want to get Backherms in trouble, but that the drugs were his. RP 169. Ray reiterated the point in rebuttal.<sup>3</sup> RP 283. According to Ray, Pebworth never claimed ownership of the drugs. RP 283.

Jeffrey Herschlip was also at the residence. RP 256-57. He testified that a "little light" was used inside but did not entirely illuminate the kitchen table. RP 259. He had no recollection of baggies being on the table. RP 258, 263. He did not know how the baggies came to be under Pebworth's leg. RP 260, 263. No one handed anything to Pebworth when

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<sup>3</sup> Ray acknowledged he started to put her in handcuffs and only released her after she said the drugs belonged to Backherms. RP 283.

Deputy Ray announced his presence. RP 260. In rebuttal, Deputy Ray testified two lanterns were inside the residence, one on the kitchen table. RP 278. He had an unobstructed view of the table and could see the people there. RP 278. He had a clear line of sight to Pebworth before Backherms turned and handed her the drugs. RP 281.

The jury returned guilty verdicts on all counts. CP 60. Defense counsel moved to "arrest judgment" on counts 1 and 2, the possession counts, based on double jeopardy. CP 63-65. The court granted the motion and dismissed counts 1 and 2 with prejudice. CP 69; RP 343-44. On the remaining delivery counts, the court imposed a prison-based Drug Offender Sentencing Alternative, consisting of 45 months confinement followed by 45 months of community custody. CP 69. Backherms appeals. CP 76-86.

C. **ARGUMENT**

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

The to-convict instructions for delivery required the State to prove Backherms knew the specific identity of the controlled substance he delivered. Sufficient evidence does not establish such knowledge. The delivery counts must therefore be reversed and the charges dismissed with prejudice.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The sufficiency of the evidence is a question of law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

One element of delivery of a controlled substance is "guilty knowledge, an understanding of the identity of the product being delivered." State v. Clark-El, 196 Wn. App. 614, 625, 384 P.3d 627 (2016) (citing State v. Boyer, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979)). "Ordinarily, to be guilty of delivery of a controlled substance, the accused need only know that the substance was a controlled substance." State v. Hudlow, 182 Wn. App. 266, 285, 331 P.3d 90 (2014). "Requiring the State to show the defendant knew the specific identity of the substance he was delivering would present unnecessary and in many cases insuperable proof problems." Clark-El, 196 Wn. App. at 625.

But under the law of the case doctrine, "jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal" and are used to delineate the State's burden of proof. State v. Johnson, 188 Wn.2d 742, 755, 399 P.3d 507 (2017) (quoting Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005)). In criminal cases, "the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

The to-convict instruction for delivery of a controlled substance (count 3) provided:

To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 3, 2018, the defendant delivered a controlled substance, to wit: Methamphetamine; and

(2) *That the defendant knew that the substance was a controlled substance, to wit: Methamphetamine;* and

(3) That any of these acts occurred in the County of Okanogan, State of Washington.

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 of 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 52 (Instruction 13) (emphasis added).

The to-convict instruction for delivery of a controlled substance (count 4) was identical, except that the second element required the State to prove "That the defendant knew that the substance was a controlled substance, to wit: Heroin." CP 53 (Instruction 14). The State did not object to the to-convict instructions. Indeed, it proposed them. CP 117-18; RP 274. They therefore became the law of the case, with element (2) in each instruction requiring the State to prove Backherms knew the specific identity of the substance, to wit, methamphetamine for count 3 and heroin for count 4.

Backherms's case compares favorably to State v. Ong, 88 Wn. App. 572, 945 P.2d 749 (1997). In Ong, the State charged the defendant with "knowingly distribut[ing] by delivering a controlled substance, to wit: morphine, a narcotic drug, to a person under eighteen (18) years of age." Id. at 577. The to-convict instruction set forth the following element: "That the Defendant knew that the substance delivered was morphine." Id. Because the State did not except to the instruction, it became the law of the case, and the State was required to prove Ong knew the substance he delivered was morphine. Id.

The State presented evidence of, (1) Ong's five felony convictions; (2) Ong's drug paraphernalia of syringes, a straw, a smoking device, and

cotton; (3) small numbers marked on the tablets; (4) his testimony that he knew the pills were "pain medication"; (5) his testimony that he stole the pills; and (6) his flight to Bremerton, showing consciousness of guilt. Id. "But nothing in this evidence points to knowledge that the substance was morphine rather than any other controlled substance." Id. at 577-78. Thus, even viewing this evidence in a light most favorable to the State, it was insufficient to support Ong's conviction for delivery of a controlled substance, and the conviction was reversed. Id.

Looking at the evidence in the light most favorable to the State, there is even less evidence to suggest Backherms knew the specific identity of the controlled substances at issue than there was in Ong. There is no evidence of drug paraphernalia or other indicia of drug use. At most, his handing of the drugs to Pebworth showed consciousness of guilt. But like Ong, nothing in this evidence points to knowledge that the substance was methamphetamine or heroin "rather than any other controlled substance." Id. at 577-78.

Hudlow, where the evidence was sufficient to establish the defendant knew the substance was methamphetamine, is a study in contrast. Hudlow, 182 Wn. App. at 288-89. In that case, the to-convict instruction required the State to prove "That the defendant knew that the substance delivered was a controlled substance *methamphetamine*." Id. at

275. Evidence showed the defendant delivered a substance to a confidential informant. Id. A detective testified that methamphetamine typically sells for \$10 per decigram (0.1 grams), and, for the controlled buy, the detective handed the confidential informant \$110. Id. The substance, including its packaging, weighed 1.28 grams. Id. at 289. Hudlow and the informant agreed to the deal by shaking hands. Id. "Based on Hudlow accepting a price suitable for the amount of methamphetamine sold, the jury could reasonably infer that Hudlow knew the substance delivered was methamphetamine." Id.

There is nothing like that in Backherms's case. There is no controlled buy. There is no negotiated price corresponding to the price of a specific substance. There is only the barebones fact that Backherms passed the substances off to Pebworth. Under Ong, that is not enough to establish knowledge of the specific substance.

Also consider Division One's decision in State v. Sinrud, 200 Wn. App. 643, 403 P.3d 96 (2017). In that case, the to-convict instructions for both the possession and the possession with intent to deliver charges stated the defendant must have "knowingly" possessed methamphetamine or heroin. Id. at 647. Regarding methamphetamine, evidence showed: (1) Sinrud's roommate, Smith-Thomas, smoked methamphetamine with Sinrud; (2) all of Smith-Thomas's roommates gave methamphetamine to

her; (3) Sinrud kept a "big scale" in her room; (4) police found 14 grams of methamphetamine in the lockbox in the bathroom, where Sinrud was located when police arrived; (5) a police officer testified this was a "typical sale amount"; (6) police found \$3,800 in cash in Sinrud's room; (7) a drug task force member testified that amounts of cash such as this are often evidence of dealing. Id. at 647-48. From this, the jury could "infer that Sinrud was a user of methamphetamine, and accordingly, knew that the substance she possessed was in fact methamphetamine." Id. at 648. Further, Sinrud had the tools, cash, and product associated with drug distribution, so a jury "could reasonably infer that Sinrud knew the identity of the substance she was using and distributing." Id.

Regarding heroin, evidence showed: (1) Sinrud was in the bathroom when police entered; (2) police heard a flushing sound coming from the toilet and saw her emerging from the bathroom area; (3) police found 49.2 grams of heroin worth roughly \$2,400 in the toilet bowl; (4) Sinrud's roommate testified that she and her husband, who resided with Sinrud, never used heroin, and no evidence directly associated the heroin with Sinrud's mother; (5) a lockbox found beside the toilet contained hypodermic needles and alcohol swabs commonly used with injection of heroin; (6) the lockbox contained several pipes, including a type of pipe typically used for for smoking heroin or methamphetamine. Id. at 648.

Based on these facts, a jury could infer Sinrud possessed the heroin and the paraphernalia necessary to use heroin, and that she was attempting to dispose of \$2,400 worth of heroin as police entered the residence. Id. at 648. The evidence was therefore sufficient to show Sinrud knew the identity of the substance to be heroin, and that she knowingly possessed heroin. Id. at 648-49.

Unlike in Sinrud, there is no evidence that Backherms was a user of methamphetamine or heroin or that he possessed paraphernalia typically used for either of these specific substances. The dispositive facts in Sinrud are missing from Backherms's case.

That being said, Division One in Sinrud made an analytical mistake in comparing its case to Ong. Sinrud distinguished Ong on the ground that the defendant in Ong had "stolen the *unknown* pills from a friend." Sinrud, 200 Wn. App. at 649 (citing Ong, 88 Wn. App. at 575) (emphasis added). Because no evidence suggested Sinrud stole the substances, "it was easier for the jury to draw the inference that Sinrud knew what she was using and/or selling." Id.

The analytical mistake is in crediting Ong's testimony that he did not know the nature of the pills as relevant to the sufficiency of evidence analysis and seeking to distinguish Sinrud's case on that basis. Ong testified that "[h]e believed the pills were pain medication, but he did not

know if it was a prescription drug because he had stolen the pills from a friend." Ong, 88 Wn. App. at 575. That he stole the pills was a piece of evidence used to determine whether the evidence was sufficient to show knowledge because it was inculpatory. Id. at 577. But the Ong court did not rely on the defendant's testimony that he did not know the substance was a prescription drug as part of its sufficiency of evidence analysis. Id. And rightly so. "When the sufficiency of evidence is challenged in a criminal case, we must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant." State v. Gatlin, 158 Wn. App. 126, 131, 241 P.3d 443 (2010), review denied, 171 Wn.2d 1020, 253 P.3d 393 (2011). In determining the sufficiency of evidence, a defendant's self-serving exculpatory testimony is not credited. See, e.g., State v. Kruger, 116 Wn. App. 685, 690, 67 P.3d 1147 (2003) (in prosecution for assault on police officer, evidence was sufficient to show defendant intentionally headbutted an officer, despite the defendant's claim that he lacked intent).

Sinrud is distinguishable from Ong on other grounds and, in that respect, arguably reached the right result in spite of itself. But, as argued above, the evidence in Backherms's case is not comparable to the evidence found to be sufficient in Sinrud. The mere fact that Backherms handed drugs off to another person in the room is insufficient to show he knew the

specific identity of the drugs. "Requiring the State to show the defendant knew the specific identity of the substance he was delivering" often presents "insuperable proof problems." Clark-El, 196 Wn. App. at 625. Such is the case here.

Backherms's convictions for delivery in counts 3 and 4 must be reversed and those charges dismissed with prejudice because the State failed to prove its case. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction). The prohibition against double jeopardy forbids retrial after a conviction is reversed for insufficient evidence. 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.**

Police did not have a warrant to search for and seize drugs inside the home. They had an arrest warrant, but the authority granted by an arrest warrant is strictly limited. An arrest warrant does not permit police to search and seize contraband. The trial court erred in concluding otherwise.

Further, the "plain view" exception to the warrant requirement is inapplicable because that exception involves an officer viewing

contraband after a lawful intrusion into a constitutionally protected area. The plain view exception itself does not provide authority for the initial intrusion into the home, a constitutionally protected area. Correctly understood, this is an "open view" case because the deputy observed the drugs while standing outside the door, a nonconstitutionally protected area. But while the observation itself violated no constitutional right, police still needed to obtain a warrant to look for and seize the drugs inside the home.

They failed to obtain that warrant, and the exigent circumstance exception does not render the search and seizure lawful because the intrusion was based simply on the police officer's generalized belief that Pebworth would possibly destroy the drugs before a warrant was obtained. The State did not prove this exception to the warrant requirement by clear and convincing evidence. The trial court therefore erred in denying the suppression motion and all four convictions must be reversed.<sup>4</sup>

**a. The standard of review is de novo.**

"When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law."

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<sup>4</sup> Backherms challenges all four convictions, even though the court dismissed the two possession counts based on double jeopardy, because if the delivery counts are reversed due to insufficient evidence (see section C.1., supra), the State might seek to reinstate the possession counts.

State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). There are no disputed findings of fact here. They are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Backherms disputes the conclusions of law, which are reviewed de novo. Garvin, 166 Wn.2d at 249.

**b. General principles of privacy law.**

The Fourth Amendment provides that, "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated[.]" Article I, section 7 commands "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Warrantless searches and seizures are per se unlawful under both the Fourth Amendment and article I, section 7 unless they falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000).

The Fourth Amendment provides the minimum protection against unlawful searches. State v. Young, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994). Article I, section 7 of the Washington Constitution generally provides greater protection. State v. Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). "Thus, where the Fourth Amendment precludes only 'unreasonable' searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs 'without

authority of law." State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). "This language not only prohibits unreasonable searches, but also provides no quarter for ones that, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional." Id. "This creates 'an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions.'" Id. (quoting State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), overruled in part by State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986)). The State "must establish the exception to the warrant requirement by clear and convincing evidence." Garvin, 166 Wn.2d at 250.

A person's home is generally a highly private place. Young, 123 Wn.2d at 185. "In no area is a citizen more entitled to his privacy than in his or her home." Id. "For this reason, 'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" Id. (quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)).

**c. The arrest warrant gave police authority to arrest Backherms but did not give them authority to search for and seize the drugs.**

The trial court concluded "[t]he first basis for entry into the home is to execute the felony arrest warrant that the Deputies originally were there to execute" and therefore the seizure of the drugs was lawful. CP 27-28 (CL 4, 8). The conclusion is infirm.

An arrest warrant "constitutes 'authority of law' which allows the police the *limited* power to enter a residence for an arrest, as long as (1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the time of the entry." State v. Hatchie, 161 Wn.2d 390, 392-93, 166 P.3d 698 (2007).

Deputy Ray testified that he did not enter the residence to execute the arrest warrant. RP 19. Rather he entered the residence to seize the drugs he saw Backherms hand off to Pebworth. RP 19. Because the deputy did not rely on the arrest warrant as the basis for entering the home, but instead actually relied and was motivated by his observation of the drugs, the trial court erred in relying on the existence of the arrest warrant to justify the intrusion.

Even if Deputy Ray's actual basis for entering the home is disregarded, the arrest warrant still does not provide authority for what police did here. Police exceeded the limited authority provided by the arrest warrant in entering the home to search for and seize the drugs.

Hatchie shows why. In Hatchie, police had an arrest warrant for Schinnell and entered Hatchie's house looking for him. Id. at 392. While searching for Schinnell, they saw evidence of methamphetamine

manufacturing in plain view. Id. at 392, 393-94. Based upon these observations they obtained a search warrant for Hatchie's house and seized the evidence. Id. at 392, 594. Hatchie was prosecuted for unlawful manufacture of a controlled substance. Id. at 394. Hatchie argued police lacked lawful authority to enter the house. Id.

The Supreme Court held the arrest warrant provided authority for police entry. Id. at 392. "The police entered the home, found Schinnell hiding under a truck, arrested him, and then promptly left to secure a second warrant (this time a search warrant) based on what they had seen. Entering a residence for this limited purpose does not violate the scope of an arrest warrant, and the police had authority of law for such a limited intrusion." Id. a 402. Under these circumstances, the "entry and plain view observation of Hatchie's methamphetamine manufacturing equipment was under authority of law." Id. at 406.

In reaching this holding, the Supreme Court "[took] pains to point out an arrest warrant does not allow for a general search of the premises. Rather, it allows the police only the limited ability to enter the residence, find the suspect, arrest him, and leave. *Police action that deviates from the narrow bounds of this authority has no authority of law.*" Id. at 400 (emphasis added). "After the police obtain a valid warrant they have lawful authority for a limited intrusion to enter a residence, execute the

arrest, and then promptly leave." Id. at 402. "[T]he police cannot use an arrest warrant—misdemeanor or otherwise—as a pretext for conducting a search or other investigation of someone's home." Id. at 401.

Here, police deviated from the narrow bounds of the authority provided by an arrest warrant. An arrest warrant does not provide authority of law to enter a residence to look for and seize evidence of a crime. Police, after entering the home, needed to search for the drugs. They did so by questioning Pebworth and then ordering her to stand up, at which point the drugs were found on the seat beneath her. RP 12. Under the authority of law provided by an arrest warrant, police may enter a residence *only* to seize the person and must immediately leave. Hatchie, 161 Wn.2d at 400. The warrant for Backherms's arrest therefore did not provide authority for police to enter the residence to search for and seize the drugs.

Arrest warrants and search warrants serve different functions. Arrest warrants differ from search warrants in that a search warrant "is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police." Hatchie, 161 Wn.2d at 398 n.4 (quoting Steagald v. United States, 451 U.S. 204, 213, 101 S. Ct. 1642, 68

L. Ed. 2d 38 (1981)). Here, police did not obtain a search warrant prior to intruding into the home to search for and seize the drugs. The arrest warrant does not provide authority of law for this action.

- d. This is an "open view" case, not a "plain view" case, and under the open view standard police lacked authority to search for and seize the drug evidence without a warrant permitting them to do so.**

The trial court concluded "[t]he second basis for entry into the home is plain view based on Deputy Ray's training and experience in identifying controlled substances and watching the defendant hand what he believed to be controlled substances to another individual in the home. This occurred in the Deputies [sic] plain view and while he was located in a place where he has a lawful right to be to execute the arrest warrant." CP 28 (CL 5). This conclusion of law confuses the law. The conclusion is flawed because it applies a "plain view" standard instead of the correct "open view" standard, leading to the incorrect conclusion that police could seize the drugs without an authorizing search warrant.

The open view doctrine and plain view doctrine are "legally distinct." State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981). "In the 'plain view' situation 'the view takes place after an intrusion into activities or areas as to which there is a reasonable expectation of privacy.' The officer has already intruded, and, if his intrusion is justified, the objects in

plain view, sighted inadvertently, will be admissible." Id. at 901-02 (quoting State v. Kaaheena, 59 Haw. 23, 28-29, 575 P.2d 462, 466-67 (Haw. 1978)). Plain view is an exception to the warrant requirement. State v. Weller, 185 Wn. App. 913, 922, 344 P.3d 695 (2015). But the plain view doctrine "does not justify the initial intrusion into the protected area." State v. Kennedy, 107 Wn.2d 1, 9, 726 P.2d 445 (1986).

"In the 'open view' situation, however, the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public." Seagull, 95 Wn.2d at 902. No warrant is required to justify the observation. State v. Rose, 128 Wn.2d 388, 392, 909 P.2d 280 (1996). Rather, "[s]uch an observation may provide the basis for a search warrant." State v. Ferro, 64 Wn. App. 181, 182, 824 P.2d 500, review denied, 119 Wn.2d 1005, 832 P.2d 488 (1992). The open view observation is "not a search at all but may provide evidence supporting probable cause to constitutionally search; in other words, a search pursuant to a warrant." State v. Lemus, 103 Wn. App. 94, 102, 11 P.3d 326 (2000).

Deputy Ray, standing outside the doorway, looked through the screen door and observed what he believed to be illegal drugs being passed from Backherms to Pebworth. Deputy Ray's observation was not a

search because he observed what was in open view. The porch to a home is not a constitutionally protected area. Rose, 128 Wn.2d at 392. When an officer enters an area impliedly open to the public, such as the porch or other access route to a home, looks through a window of the house, and sees evidence of a crime inside, no search has occurred. Id. at 392-93. The open view doctrine applies here because Deputy Ray, the government agent, was "on the outside looking inside to that which is knowingly exposed to the public." Seagull, 95 Wn.2d at 902.

Crucially, "[t]he open view doctrine protects the view of items located in constitutionally-protected areas. It does not provide authority to enter constitutionally-protected areas to take the items without first obtaining a warrant." State v. Posenjak, 127 Wn. App. 41, 52-53, 111 P.3d 1206 (2005). "Absent a warrant, the observation of contraband is insufficient to justify intrusion into a constitutionally protected area for the purpose of examining more closely, or seizing, the evidence which has been observed." Ferro, 64 Wn. App. at 182. In an open view situation, "the officer's right to *seize* the items observed must be justified by a warrant or valid exception, if the items are in a constitutionally protected area." State v. Swetz, 160 Wn. App. 122, 134, 247 P.3d 802 (2011), review denied, 174 Wn.2d 1009, 281 P.3d 686 (2012).

The police in Backherms's case did not obtain a warrant to search for and seize the drugs inside the home. Deputy Ray's observation from his vantage point outside the home did not legally justify entry into the home to seize the contraband. Ferro, 64 Wn. App. at 182.

The trial court erroneously treated this as a "plain view" case. It isn't. The "plain view" doctrine "does not justify the initial intrusion into the protected area." Kennedy, 107 Wn.2d at 9. "Whereas a 'plain view' situation involves an officer viewing an item *after a lawful intrusion into* a constitutionally protected area, 'open view' involves an observation from a nonconstitutionally protected area." Id. at 10. Deputy Ray did not view the contraband *after* he entered a constitutionally protected area. He observed the contraband from a nonconstitutionally protected area. This is an open view case. The observation is permissible. Seagull, 95 Wn.2d at 902. The seizure is not, absent a warrant authorizing seizure or an exception to the warrant requirement. Swetz, 160 Wn. App. at 134.

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

The trial court concluded "[t]he third lawful basis for entry into the home is based on the exigent circumstances exception to the warrant requirement due to what Deputy Ray observed when the defendant handed Mary Pebworth the controlled substances." CP 28 (CL 6). According to

the trial court, "[u]nder these circumstances, the Deputy did not have to withdraw from the residence and seek a search warrant because Mary Pebworth could have easily destroyed or disposed of the controlled substances with minimal effort while law enforcement was seeking a search warrant." CP 28 (CL 7).

Backherms challenges these conclusions as well. The facts do not show exigent circumstances. The State did not meet its burden of proving this exception to the warrant requirement by clear and convincing evidence. Garvin, 166 Wn.2d at 250.

The exigent circumstances exception applies where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). "The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action." State v. Hinshaw, 149 Wn. App. 747, 754, 205 P.3d 178 (2009). "Exigent circumstances involve a true emergency." State v. Cruz, 195 Wn. App. 120, 380 P.3d 599, 602 (2016).

"To prove that exigent circumstances are present, the State must be able to 'point to specific, articulable facts and the reasonable inferences

therefrom which justify the intrusion.'" State v. Coyle, 95 Wn.2d 1, 9, 621 P.2d 1256 (1980) (citation omitted). "We measure exigency, in part, by considering whether it was feasible for the police to guard the premises while seeking a warrant." State v. Wolters, 133 Wn. App. 297, 303, 135 P.3d 562 (2006). Police must "show reasons why it is impractical, or unsafe, to take the time to acquire a warrant or why a warrant would, other than for constitutional reasons, be unavailable." State v. Besette, 105 Wn. App. 793, 798, 21 P.3d 318 (2001).

No person in the residence attempted to flee. RP 16. But Deputy Ray believed Pebworth was going to destroy the contents of the bags. RP 12. Ray had cell service at the residence but claimed he could not have obtained a search warrant over the phone because he believed Pebworth "would have either ingested – or went to the bathroom and – and flushed - -." RP 13. The court acknowledged "no one attempted to run, flee, or anything like that." RP 29. It maintained there are "any number of ways that she could have gotten rid of it while officers were going to get a search warrant," such as by ingestion, flushing it down the toilet, or washing it down the sink. RP 29.

The exigent circumstance exception is applicable only within the narrow range of circumstances that present a real danger of lost evidence. State v. Counts, 99 Wn.2d 54, 63, 659 P.2d 1087 (1983). The police must

reasonably fear imminent destruction of evidence. Id. at 62. Deputy Ray did not articulate a basis for his belief that Pebworth would destroy the evidence if he took the time to secure a warrant. He simply asserted his belief. The trial court, too, did not point to any specific facts that showed Pebworth was about to destroy the evidence or that she had a propensity to do so. Exigent circumstances "must be based upon specific facts learned prior to execution of the warrant or observed at the scene, in contrast to a generalized speculation by law enforcement officers that their safety may be endangered or contraband destroyed." State v. Jeter, 30 Wn. App. 360, 362, 634 P.2d 312 (1981), review denied, 96 Wn.2d 1027 (1982). Thus, "[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." Id. at 362. Mere suspicion is not enough. Coleman v. Reilly, 8 Wn. App. 684, 687, 508 P.2d 1035 (1973). "No blanket exception exists for narcotics cases, in spite of the relative ease of disposal of drugs." Jeter, 30 Wn. App. at 362.

There was no evidence that Pebworth made any suspicious movement indicating she was about to destroy the drugs. There was no evidence that police knew Pebworth had a propensity to destroy drugs. Deputy Ray's belief that Pebworth would destroy the drugs is nothing

more than a "generalized speculation," which is insufficient to satisfy the exigent circumstance exception. Jeter, 30 Wn. App. at 362.

State v. White, 76 Wn. App. 801, 888 P.2d 169 (1995), aff'd, 129 Wn.2d 105, 915 P.2d 1099 (1996) is instructive. In White, a police officer testified that he searched a bathroom stall to prevent destruction of evidence. Id. at 806. "He further testified that, in his experience, people involved in drug transactions sometimes dispose of drugs by flushing them down the toilet." Id. The officer, however, did not testify to any circumstances to indicate that the defendant was destroying evidence and nothing indicated he would attempt to destroy evidence. Id. Rather, the officer's testimony "was based solely on his observation that some people involved in drug transactions attempt to dispose of drugs." Id. This was insufficient to support an objective belief that the defendant "was likely to destroy evidence." Id. The trial court erred in concluding the officer's search of the stall was justified by "the possibility" that the defendant would destroy evidence. Id.

Here, too, there is no more than a speculative possibility that Pebworth would destroy the drug evidence. No specific facts back up the officer's concern that she would do so. And "the police could have maintained surveillance while obtaining the requisite warrant." State v. Counts, 99 Wn.2d 54, 62, 659 P.2d 1087 (1983). Deputy Ray

acknowledged he had cell service, so there is no question of warrant unavailability. RP 13. Exceptions to the warrant requirement are jealously guarded "lest they swallow what our constitution enshrines." State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). The State did not meet its heavy burden of showing exigent circumstances demanded intrusion into the home to search for and seize the drugs without waiting for a warrant to authorize such action.

**f. The evidence gathered because of the unlawful search and seizure must be suppressed, requiring reversal of the convictions.**

"The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). Evidence obtained directly or indirectly from an unlawful search or seizure must be suppressed under the fruit of the poisonous tree doctrine. State v. Mayfield, 192 Wn.2d 871, 888-89, 434 P.3d 58 (2019); Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The unlawfully seized drugs in this case, the officer's post-seizure observation of the drugs, and the lab test results must therefore be excluded from evidence.

Admission of evidence obtained in violation of either the federal or state constitution is a constitutional error requiring reversal unless the State proves the error is harmless beyond a reasonable doubt. State v.

Keodara, 191 Wn. App. 305, 317-18, 364 P.3d 777 (2015). The State cannot prove harmlessness here because, without the drugs, there is no basis to convict. For this reason, all four convictions must be reversed and the charges dismissed with prejudice. See State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted); State v. Valdez, 167 Wn.2d 761, 778-79, 224 P.3d 751 (2009) (same).

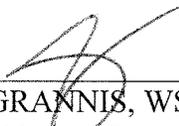
**D. CONCLUSION**

For the reasons stated, Backherms requests reversal of the convictions.

DATED this 30<sup>th</sup> day of August 2019

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
CASEY GRANNIS, WSBA No. 37301  
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Attorneys for Appellant

# APPENDIX A

Record Certification: I certify that the electronic copy is a correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control. Okanogan County Clerk.



By cmalett - # pages 4 August 31, 2018

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Okanogan County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,

Plaintiff,

vs.

DWIGHT ELDON BACKHERMS

Defendant

NO. 18-1-00170-4

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FOR  
DEFENDANT'S MOTION TO  
SUPPRESS EVIDENCE

This matter came on before the Undersigned Judge on July 9, 2018, for Defense Motion to Suppress Evidence and Dismiss pursuant to CrR 3.6. The Defendant was represented by counsel Jason Wargin and the State represented by Melanie Bailey. The Court, after hearing testimony from Okanogan County Deputy Robert Ray, argument from counsel and considering the written briefing from both parties, now makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

1. Deputy Ray has been a law enforcement officer for 5 ½ years. He received training regarding controlled substances while at the basic law enforcement academy, as well as specific training with the Washington State Patrol. He has conducted several arrests that involved controlled substances. He has training and experience in identifying controlled substances, how they are packaged, and can differentiate between a controlled substance other common everyday packaged materials.
2. On or about May 3, 2018, Deputy Ray was emailed by his sergeant regarding an active felony arrest warrant for defendant, Dwight Backherms.

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- 1 3. Later that day, based on this information, Deputy Ray and Deputy Gonzalez both  
2 went to the location that they know the defendant to reside, 1193 Highway 7,  
3 Oroville, to execute the felony arrest warrant.
- 4 4. Deputy Ray knows the defendant, Dwight Backherms, from other contacts.
- 5 5. When the deputies arrived at the defendant's residence, they approached the front  
6 door. The front door was open but there was a screen door in place that was closed.
- 7 6. Deputy Ray could hear the defendant's voice but was uncertain that the male standing  
8 in the living room was the defendant so he stood by the open front door until the  
9 defendant turned around and he was able to positively identify the male as the  
10 defendant, Dwight Backherms.
- 11 7. Deputy Ray makes a visual identification of the defendant and then knocks and  
12 advises the defendant that they have a warrant for his arrest and that he needs to come  
13 outside.
- 14 8. Instead of complying with the request and coming to the door, the defendant instead  
15 turns as if he is going to go in another direction.
- 16 9. During the turn, Deputy Ray observes the defendant hand what he believes, based on  
17 his training and experience, to be controlled substances to the female in the home,  
18 Mary Pebworth.

## 20 B. CONCLUSIONS OF LAW

- 21 1. The first issue before the Court is whether the Deputies had a right to be at the front door  
22 of the residence to observe whether the person inside was the Defendant. This is an area  
23 that is impliedly open to the public and the Deputies have a right to be there to  
24 execute the felony arrest warrant.
- 25 2. The second issue before the Court is whether the Deputies could lawfully enter the  
26 residence.  
27
- 28 3. The Court finds that the Deputies had three lawful reasons to enter the home.

- 1 4. The first basis for entry into the home is to execute the felony arrest warrant that the  
2 Deputies originally were there to execute.  
3  
4 5. The second basis for entry into the home is plain view based on Deputy Ray's training  
5 and experience in identifying controlled substances and watching the defendant hand  
6 what he believed to be controlled substances to another individual in the home. This  
7 occurred in the Deputies plain view and while he was located in a place where he has a  
8 lawful right to be to execute the arrest warrant.  
9  
10 6. The third lawful basis for entry into the home is based on the exigent circumstances  
11 exception to the warrant requirement due to what Deputy Ray observed when the  
12 defendant handed Mary Pebworth the controlled substances.  
13  
14 7. Under these circumstances, the Deputy did not have to withdraw from the residence and  
15 seek a search warrant because Mary Pebworth could have easily destroyed or disposed  
16 of the controlled substances with minimal effort while law enforcement was seeking a  
17 search warrant.  
18  
19 8. The entry into the home, the seizure of the defendant and the seizure of the controlled  
20 substances all occurred under a lawful basis and the defendant's motion is denied.  
21

22 C. ORDER

23 IT IS ORDERED, ADJUDGED AND DECREED that the Defendant's motion to suppress  
24 is denied.

25 DATED THIS 29<sup>th</sup> DAY OF August, 2018.

26  
27   
28 CHRISTOPHER E. CULP  
JUDGE

1 Presented by:

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MELANIE R. BAILEY, WSBA 38765  
Deputy Prosecuting Attorney

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Copy received, approved as to  
form, and presentation waived this

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29<sup>th</sup> day of August, 20 18.

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By: Jason Wargin, WSBA # 30167  
Attorney for Defendant

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**NIELSEN, BROMAN & KOCH P.L.L.C.**

**August 30, 2019 - 12:56 PM**

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