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Court of Appeals
Division III
State of Washington
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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 HENRY A. RAWSON, JUDGE
THE HONORABLE CHRISTOPHER CULP, JUDGE

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On May 3, 2018, Deputy Ray went to locate Mr. Backherms at his residence at 1193 Highway 7 on the Tonasket Oroville border. [RP 8-10]. Law enforcement wanted Mr. Backherms, and they were searching for him due to an active DOC felony warrant. [RP 9]. Deputy Ray already knew Mr. Backherms identity from prior contacts. He knew Mr. Backherms to be a drug user, and knew his address. [RP 8-9]. In fact, Deputy Ray was aware that Mr. Backherms had in the past, worked for the North Central Washington Narcotics Task Force. [RP 9]. With this information, Deputy Ray and Deputy Gonzalez approached Mr. Backherms home located at 1193 Hwy 7 in order to effectuate the arrest warrant.

The front door to the location was open. [RP 10]. The screen door to the location was made of wire mesh and it was closed. [RP 10]. Deputy Ray saw Ms. Pebworth in the home, he could hear Mr. Backherms voice coming from within the location, but could not see him. [RP 10]. While standing at the screen door, but still outside the home, Deputy Ray saw Mr. Backherms stand up and walk to the kitchen. [RP 11]. Once Deputy Ray saw Mr. Backherms, Deputy Ray knocked on the door, announced that Mr. Backherms had a warrant,

and that Mr. Backherms needed to come outside so he could arrest him. [RP 11].

Instead of complying, Mr. Backherms walked the opposite direction of Deputy Ray and headed down the hall. [RP 11]. Deputy Ray told Mr. Backherms if he continued down the hall then Deputy Ray would enter the home to detain him. [RP 11]. Mr. Backherms then turned back towards Deputy Ray. [RP 11]. Deputy Ray then observed Mr. Backherms reach into his left pocket, pulled out two baggies, and handed the baggies to Ms. Mary Pebworth who was also in the residence. [RP 11]. Based upon Deputy Ray's training, knowledge, and experience he believed the baggies to contain contraband. [RP 11].

Deputy Ray described the baggies as small wrapped up and twisted at the top. [RP 12]. Deputy Ray determined the baggies were consistent with the way he saw narcotics packaged in the past. [RP 12]. Deputy Ray testified that he immediately believed that Ms. Pebworth would destroy or ingest the narcotics, and therefore, he entered the residence and asked Ms. Pebworth what Mr. Backherms handed her. Mr. Backherms immediately walked away from Ms. Pebworth. [RP 12]. Ms. Pebworth denied being handed anything, and when Deputy Ray asked her to stand up, underneath her leg

was two small plastic baggies containing suspected narcotics. [RP 12, 13].

Deputy Ray testified that once he saw the two baggies handed off by Mr. Backherms, his concern became the destruction of those narcotics. [RP 13]. Deputy Ray testified that nothing obstructed his view when observing Mr. Backherms hand Ms. Pebworth the two baggies; Deputy Ray's view was clear and unobstructed. [RP 13]. Prior to making any entry or announcement of their presence, Deputy Ray and Deputy Gonzalez remained outside of the residence for ten to fifteen minutes to be sure that Mr. Backherms was inside of the residence. [RP 17]. Mr. Backherms was arrested for the DOC warrant and he was also charged with Possession of Methamphetamine and Heroin. [CP 6-7]. On or about July 3, 2018, the State moved to amend the information to add two counts; one count of Delivery of Methamphetamine and one count of Delivery of Heroin. [CP 17-23].

At trial Deputy Ray specifically described the contents of the baggie of suspected methamphetamine that he saw Mr. Backherms hand to Ms. Pebworth to contain crystal shards that he suspected to be methamphetamine based upon his training knowledge and experience. [RP 170, 182, 183, 187]. Furthermore, Deputy Ray

testified that the baggie containing suspected the suspected heroin was filled with a black tarry substance that he knew based upon his training, knowledge, and experience was heroin. [RP 170]. Once arrested, Mr. Backherms was booked into the jail, and Deputy Ray took the seized heroin and methamphetamine to the Sheriff' office in order to field test it. [RP 170]. Deputy Ray also filled out all forms to submit the substances to the Washington Crime Laboratory for testing. [RP 170]. Deputy Ray also preserved the chain of custody by sealing the container the methamphetamine and heroin were packaged in and placing the substances into evidence for delivery to the lab. [RP 170]. Chain of custody was preserved. [RP 170, 196, 197, 208]. He also testified that he was familiar with the sale packaging, identification, and manufacturing of narcotics. [RP 10-13].

At trial, the State called a forensic scientist to testify to the results of the laboratory analysis of both of the substances that Mr. Backherms was charged, and the forensic scientist concluded through laboratory testing that the substances that she tested were in fact Methamphetamine and Heroin. [RP 206-208]. The State called Deputy Ray as a rebuttal witness. His testimony to demonstrate that Ms. Pebworth acknowledged to Deputy Ray that

the methamphetamine and heroin under her leg were Mr. Backherms, but she did not want him to get in trouble. [RP 284].

ARGUMENTS

1. Mr. Backherms was Properly Convicted of Delivery of Methamphetamine and Heroin

The evidence in the record was more than sufficient to convict Mr. Backherms of Deliver of Heroin and Delivery of Methamphetamine. Specifically, the testimonial evidence presented during trial would allow, and in fact result in any rational trier of fact having found that Mr. Backherms knowingly tried to pass off his methamphetamine and heroin to his friend right before his arrest by Deputy Ray in order to avoid being charged with possession of those narcotics; therefore violating RCW 69.50.4012(1), Delivery of Methamphetamine and Delivery of Heroin.

When reviewing a challenge to the sufficiency of the evidence, we must determine “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant.

State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A to-convict jury instruction must include all of the essential elements of the crime charged. *State v. Clark EI*, 384 P.3d 627, 630, 196 Wash.App. 614 (2016). When the identity of a controlled substance increases the statutory maximum sentence which the defendant may face upon conviction, that identity is an essential element. *Id.* at 630. But, the to-convict instruction “did not require proof that the controlled substance delivered was methamphetamine.” *Id.* at 630. However, even if the specific drug is not proved at trial, “the error does not necessarily require reversal of the conviction for delivery of methamphetamine.” *Id.* at 630. This is because a “jury instruction that omits an essential element is harmless if it appears beyond a reasonable doubt the error did not contribute to the verdict.” *Id.* at 630.

In the instant case, the evidence was more than sufficient for the jury to find Mr. Backherms delivered methamphetamine and heroin to Mary Pebworth on May 3, 2018. At trial, the State submitted evidence that Deputy Ray observed Mr. Backherms hand

Mary Pebworth two items, which based upon his training, knowledge, and experience he knew to be narcotics. Deputy Ray specifically stated that he attended drug interdiction school in the academy, he had made prior arrests for controlled substance violations, and because of the way that the items that Mr. Backherms gave to Ms. Pebworth were packaged, and Deputy Ray believed the items to be narcotics. Furthermore, Deputy Ray recovered the items handed to Ms. Pebworth, and submitted them to the Washington State Crime Lab for analysis. The forensic analyst assigned to the matter, Ms. Jayne Aunan, tested the recovered substances using the protocols, procedures, and methods as determined by the Washington State Crime Laboratory. One of the items was determined at a chemical level to be methamphetamine, and the other was determined to be heroin.

Also, the State in its Amended Criminal Information, charged Mr. Backherms with Delivery of Methamphetamine and Delivery of Heroin. [CP 47]. The State also added as part of the to-convict instructions that the controlled substances were methamphetamine and heroin respectively. [CP 52-53]. The State was required to do this because Delivery of Methamphetamine has a different penalty in the sentencing phase than the crime of Delivery of Heroin.

Therefore, the State placed Mr. Backherms on proper notice of the crimes charged pursuant to the 5th Amendment as applied to the States the Fourteenth Amendment of the United States Constitution. No error occurred in this case, and even if it did, it was harmless error under *Neder v. United States*, 527 U.S. 1 (1999).

A trial court's erroneous admission of evidence in a criminal trial constitutes harmless error if the error did not prejudice a substantial right of the defendant and the appellate court is able to conclude beyond a reasonable doubt that the error in no way affected the outcome of the case. *State v. Hines*, 87 Wash. App. 98 at 102, 941 P.2d 9 at 11 (1997). A defendant cannot avail himself of error as a ground for reversal unless it has been prejudicial. *State v. Cunningham*, 93 Wn.2d 823, 832, 613 P.2d 1139 (1980) citing *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974).

Appellate courts long ago rejected the notion that reversal is necessary for any error committed by a trial court. Our judicial system is populated by fallible human beings, and some error is virtually certain to creep into even the most carefully tried case. The ultimate aim of the system, therefore, is not unattainable perfection, but rather fair and correct judgments When a court blindly orders reversal of a judgment for an error without making any attempt to assess the impact of the error on the outcome of the trial, the court encourages litigants to abuse the judicial process and bestirs the public to ridicule it As a

practical response to the realities of the trial process, therefore, appellate courts have developed a series of doctrines for analyzing whether error in various types of cases was harmless. The fundamental premise of this sort of analysis is that a defendant is entitled to a fair trial but not a perfect one.

5 Wash. Prac., Evidence Law and Practice § 103.24 citing *United States v. Blevins*, 960 F.2d 1252 (1992).

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of unsubstantial errors.

State v. Jamison, 93 Wn.2d 794, 800-801, 613 P.2d 776 (1980) citing *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968). Even exclusion of witnesses is subject to harmless error review. *Jones v. City of Seattle*, 179 Wash. 2d 322 at 356, 314 P.3d 380 (2013). A violation of the defendant's right to control his own defense may be subject to

review for harmless error. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013).

If the error is of a constitutional nature, the error will be deemed harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wn.2d 626, 636, 160 P.3d 640 (2007). A constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is un-attributable to the error. *Id.* citing *Neder v. United States*, 527 U.S. 1, 19 (1999). The appellate court looks at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* citing *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

If the error is not of a constitutional magnitude, the error is not prejudicial unless, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Cunningham*, 93 Wn.2d at 832 citing *Rogers*, 83 Wn.2d 553; *State v. Rhoads*, 35 Wash. App. 339, 343, 666 P.2d 400 (1983), *aff'd*, 101 Wn.2d 529 (1984).

Even if the Court erred in admitting the to convict instruction, the error would have been harmless, only affecting Mr. Backherms sentence. However, the State properly proved each element in his to convict instructions for both delivery of heroin and the higher penalty crime of delivery of methamphetamine. The State committed no error in doing so. The State followed the law, but even if there was error it was completely harmless causing no prejudice to Mr. Backherms whatsoever.

2. The Trial Court Properly Denied Mr. Backherms' Motion to Suppress because Deputy Ray Properly Seized the Contraband from Mr. Backherms

The trial court properly denied Mr. Backherms' Motion to Suppress. The Court of Appeals will review the "trial court's evidentiary rulings for abuse of discretion." *State v. Stenson*, 132 Wn. 2d 668, 701, 940 P.2d 1239 (1997).

"Article I, section 7 of the Washington State Constitution provides for broad privacy protections for individuals and generally prohibits unreasonable police invasions into personal affairs." *State v. Brock*, 184 Wash.2d 148, 153 (2015). A warrantless search of an individual's personal items is presumed to violate these protections unless the search falls within "one of the few 'carefully drawn and

jealously guarded exceptions." *Id.* citing *State v. Byrd*, 178 Wash.2d 611, 616 (2013). One such exception to the warrant requirement is a search incident to arrest, in which an arresting officer has authority to search the arrestee's person and his or her personal effects. *Brock*, at 154. Although police generally need a warrant in Washington to search or seize persons or property, a few carefully drawn exceptions exist. *State v. Fuentes*, 352 P.3d 152, 156, 183 Wash.2d 149 (2015). An arrestee's person will include anything that the arrestee had "actual and exclusive possession at or immediately preceding the time of arrest." *Id.* citing *Byrd*, 178 Wash.2d at 623. This is known as the "time of arrest" rule. *Id.* at 154.

The ability to search these items when located on an arrestee's person flows from "safety concerns associated with the officer having to secure those articles of clothing, purses, backpacks, and even luggage, that will travel with the arrestee into custody." *Id.* at 156. Washington Supreme Court has stated that "[b]ecause those items are part of the person, we recognize the practical reality that the officer seizes those items during the arrest. From that custodial authority flows the officer's authority to search for weapons, contraband, and destructible evidence." *Id.* Additionally, property seized incident to a lawful arrest may be used to prosecute the

arrestee for a crime other than the one for which he was initially apprehended. *State v. White*, 44 Wash.App. 276, 278 (1986) citing to *State v. Smith* 102 Wash.2d 449 (1984).

The recent Washington Supreme Court case of *State v. Brock* is instructive. *Brock*, 184 Wn.2d 148 (2015). In that case an Officer saw an individual exit a bathroom wearing a backpack. The Officer took the backpack and placed it in his patrol car, and spoke to the individual while the backpack was secure in the patrol car. The suspect there was questioned some 12 to 15 feet away from the car and the backpack. He was eventually arrested for providing false information. The Officer then searched the backpack incident to arrest, which revealed drugs and evidence of thefts. The Supreme Court found that even though the backpack was not on the suspect at the time of the arrest, it was searched incident to arrest. *Id.* at 152.

Abandonment of property is also an exception to the warrant requirement. "A warrantless search or seizure may be permitted within the confines of a few specifically established and well delineated exceptions to the warrant requirements." *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). "One such exception permits a law enforcement officer to conduct a warrantless search of

property that has been voluntarily abandoned.” *Id.* at 407-408. “Another exception to the warrant requirement is a search of misplaced property for the purpose of identifying the true owner.” *State v. Kealey*, 907 P.3d 319, 80 Wash. App. 162 (1995). To determine whether one has a reasonable expectation of privacy for a backpack, briefcase, or other container, the Defendant must satisfy a two-fold test, “(1) Did he exhibit an actual subjective expectation in privacy by seeking to preserve something as private, and (2) does society recognize that expectation as reasonable.” *Evans* at 109.

Washington also recognizes the Plain View Doctrine and it applies to a “situation where an officer inadvertently sees an item immediately recognizable as contraband, after legitimately entering an area with respect to which a suspect has a legitimate expectation of privacy.” *State v. Kennedy*, 107 Wn.2d 1, 9, 726 P.2d 445 (1986); citing *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). “The plain view doctrine, however, does not justify the initial intrusion into the protected area.” *Id.* at 9. In addition to the Plain View Doctrine, Washington recognizes the Open View Doctrine, which involves situations where is standing from the vantage point of a non-constitutionally protected area when observing criminal activity afoot. *Id.* at 10. An arrest warrant founded on probable cause implicitly

carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. *State v. Hatchie*, 166 P.3d 698 (2007).

Even though Washington does not recognize the Inevitable Discover Rule, if unlawful police action occurs in the search or seizure of potentially criminal items, “evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.” *State v. Green*, 312 P.3d 699 (2013). Washington recognizes a *Terry* stop as a valid exception to the warrant requirements of Article 1, section 7. *Id.* at 156. “A valid *Terry* stop requires that the officer have reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop. *Id.* In order to determine whether the stop was reasonable, Washington Courts employ a totality of the circumstances known to the officer at the time of the stop. *Id.* And, the “totality of the circumstances includes the officer’s training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect’s liberty. *Id.* at 156.

In this case, the trial court properly denied Mr. Backherms' Motion to Suppress for the following reasons. First, Deputy Ray and law enforcement went to 1193 Hwy 7 to execute and arrest warrant on Mr. Backherms. Deputy Ray knew Mr. Backherms from prior contacts and knew that there was a good chance he would be at the address. When executing the felony arrest warrant, Deputy Ray had the legal authority to be on the premises and once he knew that Mr. Backherms was inside, Deputy Ray knew he had the legal authority to enter the residence to arrest Mr. Backherms. Deputy Ray testified that he waited ten to fifteen minutes outside of the residence listening to make sure that Mr. Backherms was inside, and once he heard Mr. Backherms voice he announced his presence.

Second, Deputy Ray, gave Mr. Backherms an opportunity to come outside to be arrested. Deputy Ray announced his presence and told Mr. Backherms he was there to serve him the felony warrant. Mr. Backherms chose to ignore his commands and turned to walk away. At that point, Deputy Ray did not want to lose sight of Mr. Backherms for safety reasons. If he let Mr. Backherms walk out of sight to another room, he could abandon or conceal narcotics or even arm himself, and Deputy Ray could not allow that.

Third, based upon Deputy Ray's training, knowledge, and experience in the sale, identification, and packaging of narcotics, he watched Mr. Backherms hand two baggies of narcotics to Ms. Pebworth right in plain view. Deputy Ray had the legal right to be where he was when he witnessed this felony in his presence.

Third, Deputy Ray also effectuated or participated in several controlled substance arrests. On May 3, 2019, Deputy Ray went to arrest Mr. Backherms for a felony arrest warrant at the location of 1193 Hwy 7 in Oroville, Washington. Deputy Ray knew Mr. Backherms from prior contacts. Deputy Ray approached the home and observed the front door to be open, but the screen door was closed. Nevertheless, Deputy Ray could see through the screen door and he could hear the occupants inside the location. Deputy Ray heard Mr. Backherms in the home, and eventually he announced his presence. Deputy Ray told Mr. Backherms that he had a felony warrant for his arrest and that he was there to arrest him.

Second, Deputy Ray then observed Mr. Backherms move down the hall and put his hand in his pocket removing two baggies handing them to Mary Pebworth. Based upon his training, knowledge, and experience, Deputy Ray reasonably believed that

Mr. Backherms was handing controlled substances to Ms. Pebworth. Deputy Ray had to enter the residence in order to get Mr. Backherms to comply with his command to stop walking away. Deputy Ray was concerned that Mr. Backherms, Ms. Pebworth, or another occupant may attempt to destroy the controlled substances Mr. Backherms handed her. Ms. Pebworth denied that the baggies were hers, and eventually acknowledged that they were controlled substances belonging to Mr. Backherms. All of these events occurred in front of Deputy Ray in his presence, while he lawfully stood at the door or in the residence to effectuate the felony arrest warrant.

Third, the moment that Mr. Backherms removed the baggies from his pocket in front of Deputy Ray and handed them to Ms. Pebworth, he voluntarily abandoned the controlled substances he now claims to have a privacy interest in. Although Mr. Backherms abandoned the property inside the home, he did so in front of Deputy Ray who in plain view witnessed the delivery, Deputy Ray was executing a felony arrest warrant at the time and had a legal right to be present in the home to arrest Mr. Backherms. In addition, the totality of circumstances, provided the five plus year veteran officer reasonable articulable suspicion to believe that Mr. Backherms just delivered controlled substances to Ms. Pebworth because he saw

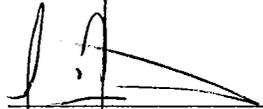
the two baggies and how they were packaged as they were handed to Ms. Pebworth. Finally, Ms. Pebworth could have easily ingested, flushed, concealed, or destroyed the evidence Deputy Ray witnessed, and he testified that he was concerned the evidence would be destroyed if he did not immediately seize it. Therefore, the situation was exigent. The State submits the seizure of the narcotics was constitutional and the motion to suppress was properly denied.

CONCLUSION

Based on the foregoing, Respondent requests that this court affirm Appellant's convictions.

Dated this 3rd day of October, 2019.

Respectfully Submitted,



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