

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. IDENTITY OF PETITIONER.....1

II. COURT OF APPEALS DECISION1

III. ISSUES PRESENTED FOR REVIEW.....1

IV. STATEMENT OF THE CASE.....1

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....3

A. The Court should accept review of Issue 1 and hold that evidence of a verbal argument cannot justify warrantless entry into a home, even when one party appears upset and denies that anyone else is present in the home. This case presents a significant constitutional issue that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(4). 3

B. The Court should accept review of Issue 2 and hold that an officer may not enter a home to confer with another officer after both have determined that no domestic violence occurred within the home. This case presents a significant constitutional issue that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(4). 6

VI. CONCLUSION8

APPENDIX

Appendix: Court of Appeals Decision

TABLE OF AUTHORITIES

FEDERAL CASES

Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290
(1978)..... 7

WASHINGTON CASES

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998) 4

State v. Johnston, 107 Wn.App. 280 , 284, 28 P.3d 775 (2001)..... 4

State v. Kypreos, 110 Wn.App. 612, 624, 39 P.3d 371 (2002)..... 4

State v. Leffler, 142 Wn. App. 175, 173 P.3d 293 (2007)..... 5, 6, 7

State v. Loewen, 97 Wn.2d 562, 647 P.2d 489 (1982)..... 5

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999)..... 7

State v. Wheless, 103 Wn.App. 749, 14 P.3d 184 (2000)..... 4

CONSTITUTIONAL PROVISIONS

Wash. Const. Article I, Section 7..... 4, 6, 7

OTHER AUTHORITIES

RAP 13.4..... i, 4, 6, 7, 8

I. IDENTITY OF PETITIONER

Petitioner Patricia Schultz, the appellant below, asks the Supreme Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Patricia Schultz seeks review of the Court of Appeals opinion entered on September 16, 2008. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Does Article I, Section 7 prohibit warrantless intrusion into a home based on the sounds of an argument from within the home?

ISSUE 2: Is a police officer barred from entering a home to confer with another officer after both have confirmed that no domestic violence occurred inside the home?

IV. STATEMENT OF THE CASE

A neighbor of Patricia Schultz and Sam Robertson called the police, complaining that a man and woman were yelling in the upstairs apartment. RP (8/2/05) 12, 26, 60. Officers Malone and Hill went to the apartment and stood outside listening. RP (8/2/05) 11-13, 25. They heard a man and woman “talking loudly,” and the man said that he wanted to

leave and needed some space. RP (8/2/05) 13, 46. Officer Hill described it as not a yell, but a raised voice. RP (8/2/05) 61.

The officers knocked and Ms. Schultz opened the door. RP (8/2/05) 14. When asked, Ms. Schultz denied that anyone else was there. RP (8/2/05) 14. After the officers said that they heard a man's voice, Ms. Schultz "then stepped back and she called for Sam," who came out of a room in the back of the apartment. RP (8/2/05) 14-15. As Mr. Robertson came to the door, Ms. Schultz opened it wider and stepped back, and Officer Hill took Mr. Robertson outside. RP (8/2/05) 63. Officer Malone then entered the apartment. RP (8/2/05) 15, 77-78. According to Officer Malone, she did not ask permission and did not tell Ms. Schultz of her right to prevent entry because "I was going in to talk to her." RP (8/2/05) 28. Once inside, the officer did not see any signs of violence. RP (8/2/05) 29, 52-53.

Ms. Schultz was agitated and flushed, moving around the apartment and trying to pick up and move various items. Officer Malone ordered her to sit at the table. RP (8/2/05) 16, 56. Ms. Schultz explained that her neck gets red when she is upset, and she told the officer several times that the couple had been arguing verbally only, not physically. RP (8/2/05) 17-18, 32, 35. Officer Malone described Ms. Schultz as fidgeting while seated at the table, and the officer instructed her to sit still or she

would be handcuffed. RP (8/2/05) 18-19, 30-31. Officer Malone testified that this warning—that Ms. Schultz might be handcuffed—occurred early on in their interaction. RP (8/2/05) 29-30.

Officer Hill had taken Mr. Robertson out onto the porch, and spoke to him while standing in the open doorway. RP (8/2/05) 63. He, too, learned quickly that no violence had taken place. RP (8/2/05) 79, 82. After learning there had been no violence, Officer Hill went into the apartment. After he entered, Ms. Schultz moved an item on the table, revealing a gun and a pipe. RP (8/2/05) 19, 65-68.

These items were seized, and after additional investigation (including a search authorized by a telephonic search warrant), the officers found methamphetamine in the apartment and arrested both parties. RP (8/2/05) 19-21, 24-25, 67, 71. Ms. Schultz was charged with Possession of Methamphetamine. CP 25. After her motion to suppress was denied, she was convicted based on stipulated evidence, and she appealed. CP 6-19, 5. The Court of Appeals affirmed her judgment and sentence in an unpublished opinion dated September 16, 2008.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- A. The Court should accept review of Issue 1 and hold that evidence of a verbal argument cannot justify warrantless entry into a home, even when one party appears upset and denies that anyone else is present in the home. This case presents a significant constitutional

issue that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(4).

Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. Because citizens are entitled to the greatest privacy in their own homes, Article I, Section 7 applies with greatest force when officers intrude into a dwelling. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

Searches conducted without a warrant are presumed to be unconstitutional. Wash. Const. Article I, Section 7; *State v. Wheless*, 103 Wn.App. 749, 14 P.3d 184 (2000). Courts have outlined a small number of narrowly drawn and jealously guarded exceptions to the warrant requirement. *Wheless, supra*. The burden is always on the state to prove one of these narrow exceptions. *State v. Kypreos*, 110 Wn.App. 612, 624, 39 P.3d 371 (2002). Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d 775 (2001). The validity of a warrantless search is reviewed *de novo*. *Kypreos*, 616 (2002).

There is no generalized “domestic violence exception” to the warrant requirement. In very limited circumstances, officers may enter a home under the so-called “emergency exception.” The emergency exception permits warrantless entry when “(1) the officer subjectively

believes that someone needs assistance for health or safety reasons, (2) a reasonable person in the same situation would similarly believe there was a need for assistance, and (3) the need for assistance reasonably relates to the place searched.” *State v. Leffler*, 142 Wn. App. 175, 173 P.3d 293 (2007); *see also State v. Loewen*, 97 Wn.2d 562, 647 P.2d 489 (1982). The exception applies only “where there is an imminent threat of substantial injury...” *Leffler, supra*. Furthermore, the officers must reasonably believe that a specific person or persons need immediate help for health or safety reasons. *Leffler, supra*.

In this case, Officer Malone entered Ms. Schultz’s home without a warrant, without a reasonable belief that a specific person needed immediate help, and in the absence of an imminent threat of substantial injury. Malone’s entry was based on three things: the verbal argument, Ms. Schultz’s lie (that no one else was present), and her flushed and agitated appearance. This entry was unlawful. *Leffler, supra*.

If Malone wished to investigate, nothing prevented her from asking both parties to step outside where they could be interviewed separately. In the alternative, Malone could have interviewed Ms. Schultz from the doorway, while Officer Hill interviewed Mr. Robertson outside. Under the circumstances, Malone’s warrantless entry violated Ms. Schultz’s

constitutional right to privacy. The fruits of this unlawful intrusion should have been suppressed. *Leffler, supra*.

The Court of Appeals' decision expanded the "emergency exception" beyond its constitutional underpinnings. The Supreme Court should accept review and hold that these facts—the sound of the argument, the initial lie, and Ms. Schultz's appearance—did not give rise to a reasonable belief that a specific person was in imminent danger of substantial injury and needed immediate assistance that required entry into the home. *Leffler, supra*. The case presents a significant constitutional issue that is of substantial public importance. RAP 13.4(b)(3) and (4).

B. The Court should accept review of Issue 2 and hold that an officer may not enter a home to confer with another officer after both have determined that no domestic violence occurred within the home. This case presents a significant constitutional issue that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(4).

When Officer Hill entered the home to confer with Malone, both had confirmed that no domestic violence occurred. There were no additional facts suggesting an emergency requiring Hill's presence in the house. Furthermore, Malone was in the front room where she could communicate with Hill even if the latter remained outside the home. Under these circumstances, Hill's entry violated Article I, Section 7. *Leffler, supra*. Hill's warrantless entry led to discovery of the gun and

paraphernalia, which prompted additional investigation (including the decision to obtain a telephonic warrant.)

The Court of Appeals did not separately analyze Hill's entry, apparently under the theory that the initial justification immunized all subsequent intrusions from constitutional scrutiny. *See* Opinion, p. 9 (“[G]iven the legislative directive requiring police to investigate and report on domestic violence calls, the officers’ warrantless investigatory entry was justified...”)

But a warrantless search must be strictly circumscribed by the exigencies that justify its initiation. *Mincey v. Arizona*, 437 U.S. 385 at 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *see also State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). Accordingly, Ms. Schultz’s convictions must be reversed and the case dismissed. *Leffler, supra*.

The Supreme Court should accept review and hold that Officer Hill’s entry into the home violated Ms. Schultz’s constitutional right to privacy under Article I, Section 7. The case presents a significant constitutional issue that is of substantial public importance. RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State Constitution. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest, and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4)

Respectfully submitted October 9, 2008.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

FILED
COURT OF APPEALS
DIVISION II

08 OCT 10 PM 12:54

CERTIFICATE OF MAILING

I certify that I mailed a copy of the Petition for Review, STATE OF WASHINGTON
postage pre-paid, to: BY _____
DEPUTY

Patricia Schultz
303 S 5th Ave. #A-1
Sequim, WA 98382

and to:

Carol L. Case
Clallam County Prosecutor's Office
223 4th St.
Port Angeles, WA 98362

both on October 9, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON THAT
THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 9, 2008.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX

FILED
COURT OF APPEALS
DIVISION II

09 SEP 16 AM 8:52

STATE OF WASHINGTON

BY _____

DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

PATRICIA SUE SCHULTZ, aka PATRICIA
SUE PETERSON, aka PATRICIA SUE
ROBERTSON,
Appellant.

No. 36928-1-II

UNPUBLISHED OPINION

VAN DEREN, C.J.—Patricia Schultz appeals her conviction for drug possession, arguing that the trial court erroneously admitted drug evidence police officers found in her apartment. She argues that (1) the officers' initial entry into her apartment was invalid, (2) the officers' search warrant was overbroad, and (3) the officers arrested her without probable cause. We affirm Schultz's conviction and sentence.

FACTS

On April 4, 2004, Sequim police officers, Kori Malone and Michael Hill, went to an apartment complex to check on "a possible domestic disturbance of male and female yelling and arguing in their apartment" because a neighbor called and asked the police to investigate. When Malone and Hill arrived at the apartment, they waited on the porch outside the front door and listened to a male and female speaking loudly, and Malone heard the male say that he "just

wanted to leave and needed space.” Report of Proceedings (RP) at 12-13.¹ Hill also recalled that the male said he “wanted to be left alone.” RP at 61.

When Malone knocked on the door, Schultz answered it and appeared agitated and flustered. Malone asked her where the male occupant was located in the apartment, but Schultz replied that no one else was there. Malone “told her that [they had] heard a male voice [coming from the apartment].” “[S]he then stepped back [away from the door] and . . . called for Sam [Robertson], who then came from a second bedroom.”² RP at 14. As Schultz stepped away from the door, Malone followed her inside. Schultz did not object to Malone’s presence. Malone and Hill both testified that the focus of the investigation was the possible domestic violence situation between Schultz and Robertson. Malone testified that she entered the apartment with the intent to investigate the domestic disturbance.

Hill interviewed Robertson on the front porch; Malone interviewed Schultz in the main living area of the apartment. Malone asked Schultz to sit down at the dining table with her because Schultz “was moving around a lot and talking fast and agitated and trying to pick things up inside the apartment[,] and [Malone] wanted her to sit down for officer safety reasons and to try to get her to focus so [they] could talk.” RP at 16. But Schultz continued to move around, grabbing things in the apartment. Malone cautioned Schultz that if she did not sit still, Malone would have to handcuff her for officer safety reasons. Malone noticed that Schultz’s skin was red and blotchy, an indication of a possible assault. Malone asked Schultz if Robertson had

¹ All report of proceedings citations are to the CrR 3.6 hearing, held on August 2, 2005.

² Schultz gave a slightly different account: “Malone and Hill said they heard [Robertson’s voice] through the door and they were coming in.” At that point, she testified that “[t]hey were coming in, I stepped to the side.” She also testified that she “yelled, ‘Sam, they’re coming in.’” RP at 93-94.

assaulted her. Schultz denied any assault and insisted her neck was red only because she was upset. Schultz explained that she and Robertson argued because he had not changed the locks on the door to the apartment.

When Hill came into the apartment to confer with Malone, Schultz leaned out of her chair and grabbed more items off the table. Hill noticed a gun and marijuana pipe that Schultz had uncovered. Hill removed, unloaded, and secured the gun. Schultz said that the pipe belonged to her son who lived in Vermont. Hill asked Schultz if he could check the table for other narcotics. Schultz initially agreed, but then stood up and began grabbing items off the table. Malone handcuffed her to prevent the removal of narcotics evidence or other weapons, but did not place her under arrest.

Schultz asked for her anti-anxiety medication and Hill and Robertson went to look for it. While Hill and Robertson were looking, Robertson admitted that he had smoked marijuana with the pipe earlier that day.³ Hill then arrested Robertson for possession of drug paraphernalia and handcuffed him. Schultz next insisted that the officers obtain a search warrant before they

³ There was no testimony about this during the CrR 3.6 hearing. But the trial court made this oral finding, and Schultz's attorney neither objected nor appealed it.

looked at the items on the table. After Hill obtained a warrant,⁴ Malone and Hill searched the apartment and discovered methamphetamine and marijuana.⁵

The State charged Schultz with unlawful possession of a controlled substance, methamphetamine. Schultz unsuccessfully moved to suppress the evidence seized from her apartment. The trial court ruled that Hill was in a lawful position to observe the drug paraphernalia which served as the basis for the search warrant because he and Malone were investigating a domestic disturbance. Schultz's counsel told the trial court that the State first provided him with a copy of the search warrant at the CrR 3.6 hearing and that he would now challenge it as overbroad. In a memorandum opinion, without further argument, the trial court denied Schultz's second suppression motion, in which she challenged the scope of the warrant and Hill's affidavit of expertise, finding that the warrant was not overbroad and that Hill's affidavit was adequate.

The trial court convicted Schultz of one count of unlawful possession of a controlled substance on stipulated facts. It sentenced her to 30 days of community restitution, under RCW

⁴ When Hill telephonically applied for a search warrant, he told the judge that he also saw "a small tin container with burnt residue and a bloody . . . band-aid inside[, that he] recognized from [his] training and experience as consistent with narcotic use, mainly methamphetamine." Clerk's Papers at 41. There was no testimony about these items during the CrR 3.6 hearing. But Schultz did not object to Hill's inclusion of these items to obtain a search warrant, and Schultz even uses her possession of these items as support in her reply brief.

⁵ Again, there was no testimony about the officers' discovery of methamphetamine and marijuana during the CrR 3.6 hearing. But the trial court made this finding of fact and Schultz's attorney did not object nor does she appeal it.

9.94A.680,⁶ giving her credit for 10 days she had already served,⁷ and ordered 4 months of community custody.

ANALYSIS

I. WARRANTLESS ENTRY

When reviewing a trial court's denial of a suppression motion, "we review challenged findings of fact for substantial supporting evidence." *State v. Lawson*, 135 Wn. App. 430, 434, 144 P.3d 377 (2006). Substantial evidence is evidence in the record sufficient "to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review de novo the legal conclusions of the trial court. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

Shultz argues that the trial court erred in concluding that the officers' entry into her apartment was legal because the State did not prove that Malone and Hill were facing exigent circumstances. The officers, she contends, could not have subjectively believed that someone needed assistance for health or safety reasons because they quickly discovered no domestic

⁶ RCW 9.94A.680 provides in relevant part:

Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include[:]

.....
(2) In addition, for offenders convicted of nonviolent offenses only, eight hours of community restitution may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days.

⁷ Although the trial court convicted Schultz on February 3, 2006, it did not sentence her until October 5, 2007. It appears that Schultz had another case pending, so sentencing was set over numerous times, and then the parties lost track of the fact that she had been found guilty under this cause number. She does not appeal this delay.

No. 36928-1-II

violence had occurred; thus, the officers' warrantless entry into her apartment was unjustified. While the State argues that the officers had a subjective and reasonable belief that someone in the apartment needed assistance, and that belief met the requirements for the exigent circumstances exception.

The Fourth Amendment of the United States Constitution establishes the peoples' right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Article I, section 7 of the Washington State Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under the Washington State Constitution, "the home receives heightened constitutional protection." *State v. Kull*, 155 Wn.2d 80, 84, 118 P.3d 307 (2005). "The heightened protection afforded state citizens against unlawful intrusion into private dwellings places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement." *State v. Chrisman*, 100 Wn.2d 814, 822, 676 P.2d 419 (1984). And "[u]nder article I, section 7, warrantless searches are per se unreasonable." *Kull*, 155 Wn.2d at 85.

Of course, we recognize certain exceptions to the warrant requirement, but the State must show how a warrantless search falls within one of these exceptions. *Kull*, 155 Wn.2d at 85. To assure that exceptions do not abrogate the rule, we "jealously and carefully" draw those exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563 (1996) (internal quotation marks omitted) (quoting *State v. Bradley*, 105 Wn.2d 898, 902, 719 P.2d 546 (1986)). One important exception to the search warrant requirement allows officers to enter a building when they encounter exigent circumstances. This exception recognizes that police officers have a caretaking function to assist and protect citizens. *Lawson*, 135 Wn. App. at 434.

The caretaking or emergency exception permits a warrantless search when “(1) the officer subjectively believe[s] that someone likely need[s] assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.” *State v. Kinzy*, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000) (internal quotation marks omitted) (quoting *State v. Menz*, 75 Wn. App. 351, 354, 880 P.2d 48 (1994)). In addition, the “exception only applies where there is an imminent threat of substantial injury to persons or property.” *State v. Leffler*, 142 Wn. App. 175, 184, 178 P.3d 1042 (2007).

We determine whether the police encountered an exigent circumstance negating the need for a warrant based on the specific facts involved. *State v. Raines*, 55 Wn. App. 459, 464, 778 P.2d 538 (1989). We decide whether the police officer acted in an objectively reasonable manner by viewing those actions in light of what the officer reasonably knew at the time. *State v. Lynd*, 54 Wn. App. 18, 22, 771 P.2d 770 (1989). To benefit from this exception, “the State must show that the claimed emergency is not merely a pretext for conducting an evidentiary search.” Police must reasonably believe that “a specific person or persons needed immediate help for health or safety reasons.” *Leffler*, 142 Wn. App. at 182.

Furthermore, in a potential domestic violence situation, RCW 10.99.030(6)(b) requires that a responding police officer “take a complete offense report including the officer’s disposition of the case.” “Police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants.” *Raines*, 55 Wn. App. at 465. Within these legal bounds, the exigent circumstances exception allows police officers to enter a building to provide immediate assistance to likely victims of domestic violence. *See, e.g., State v. Johnson*, 104 Wn. App. 409, 412-13, 16 P.3d 680 (2001) (The emergency exception

No. 36928-1-II

justified warrantless entry when officers received a domestic violence report from the victim's relative that the victim had locked herself in the bathroom; the defendant was slow to acknowledge victim's presence; the victim was still in the bathroom; and the defendant had a bloody cut on his wrist.); *Raines*, 55 Wn. App. at 460-61, 464-66 (The emergency exception justified warrantless entry into an apartment when officers received a neighbor's report of domestic violence; officers knew the male defendant had a violent temper; officers saw a man in the apartment window; the adult female and her child appeared to be unharmed; she lied about the defendant's presence; and the defendant was hiding in the bedroom when officers arrived.); *Lynd*, 54 Wn. App. at 22-23 (The emergency exception justified warrantless entry into defendant's home to investigate the well-being of the wife when a police officer had knowledge of a 911 hang-up call from defendant's home; the phone line remained busy after the 911 call; a domestic violence incident between spouses had just occurred; the defendant was loading his things into his vehicle and preparing to leave; and the defendant did not want the officer to enter the home to check on his wife.).

Here, Malone and Hill responded to a neighbor's call reporting possible domestic violence and police do not need to warn a homeowner of the right to refuse entry when they are seeking entry for legitimate investigative purposes. *See State v. Khounvichai*, 149 Wn.2d 557, 563-64, 69 P.3d 862 (2003). Upon their arrival at the apartment, the officers heard raised male and female voices arguing about how the male occupant needed time apart from the female occupant. When Schultz answered the door, she initially lied about Robertson's presence. Furthermore, she appeared flushed, nervous, and upset. Therefore, under these circumstances, it was likely that (1) the officers subjectively believed that Schultz needed assistance for health or safety reasons, (2) a reasonable person in the same situation would similarly believe there was a

need for assistance, and (3) the need for assistance reasonably related to the place searched—the apartment. *See Kinzy*, 141 Wn.2d at 386-87. Moreover, the trial court concluded that there was “no indication that the officers’ entry into the apartment was in any way a pretextual search for evidence” and Schultz does not challenge this conclusion on appeal. Clerk’s Papers (CP) at 23, We hold that in this situation, given the legislative directive requiring police to investigate and report on domestic violence calls, the officers’ warrantless investigatory entry was justified and the trial court did not err.

Alternatively, the State argues that Schultz invited the officers into the apartment.

If a householder is in a position to communicate his refusal of admittance and circumstances leading to and surrounding his entry . . . are such that a police officer can reasonably conclude he is not being refused entry, then no invitation, express or implied, is necessary to make the officer’s entry lawful.

State v. Sabbot, 16 Wn. App. 929, 937-38, 561 P.2d 212 (1977). Schultz asserts that the trial court did not find that she voluntarily consented to entry and that, even if it had, it would have had to examine whether police properly advised her of her right to refuse consent under *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998).

When a homeowner gives police consent to enter and conduct a warrantless search, officers need not obtain a search warrant, but “the State bears the burden of establishing the exception.” *Khounvichai*, 149 Wn.2d at 562. Our Supreme Court has “clarified that the *Ferrier* requirement is limited to situations where police request entry into a home for the purpose of obtaining consent to conduct a warrantless search and have declined to broaden the rule to apply outside the context of a request to search.” *Khounvichai*, 149 Wn.2d at 563. “[T]here is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes.” *Khounvichai*, 149 Wn.2d at 564.

Here, the trial court found that Schultz consented to the officers' entry; she "stepped away from the door, opening it further, and the officers entered." CP at 21. And it concluded as a matter of law that "neither party told them to leave and that the defendant initially acquiesced to their entry, stepping back and opening the door further, and at no time told or asked them to leave." CP at 23-24. This constitutes an affirmative act and conveys implied consent to allow the officers' entry. *See State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999); *Raines*, 55 Wn. App. at 462.

Both Malone and Hill testified that they entered the apartment with the intent only to check on Shultz's and Robertson's welfare. Therefore, Malone and Hill did not need to warn Schultz of her right to refuse their entry because they were seeking entry to investigate the report of possible domestic violence. *See Khounvichai*, 149 Wn.2d at 563-64. Because Schultz consented to the officers' entry, we agree with the State that it is additional support for the trial court's conclusion that the officers' entry was legal.

II. SEARCH WARRANT

Schultz argues that the search warrant was overbroad only because Hill did not establish probable cause to search the apartment for evidence of drug sales. She does not argue that the officers lacked probable cause to search her apartment for marijuana and methamphetamine. In fact, she concedes "the telephonic affidavit provided probable cause to seize drug paraphernalia and associated residue." Br. of Appellant at 15.

Under the Fourth Amendment to the United States Constitution, "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). "The purposes of the search warrant particularity requirement are the

prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact." *Perrone*, 119 Wn.2d 545. The search warrant particularity requirement limits the officers' discretion and informs the person subject to the search warrant of the items the officer may seize. *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993). "Whether a search warrant contains a sufficiently particularized description is reviewed de novo." *Perrone*, 119 Wn.2d at 549.

The severability doctrine may be used to save parts of the search warrant when other parts of the warrant are insufficiently particular or are overbroad. *Perrone*, 119 Wn.2d at 556; *State v. Griffith*, 129 Wn. App. 482, 489, 120 P.3d 610 (2005), *review denied*, 156 Wn.2d 1037 (2006). "Under the severability doctrine, 'infirmary of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant." *Perrone*, 119 Wn.2d at 556 (quoting *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir. 1983)). But we will not apply the doctrine "where to do so would render meaningless the standards of particularity which ensure the avoidance of general searches and the controlled exercise of discretion by the executing officer." *Perrone*, 119 Wn.2d at 558.

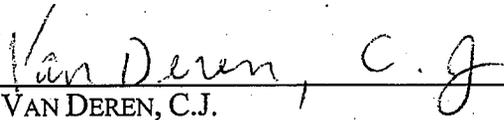
Here, the warrant described the evidence to be seized as follows:

Methamphetamine and Marijuana in their various forms, items commonly used in the ingestion of methamphetamine and marijuana, including but not limited to pipes, bongs, straws and hypodermic needles; items associated in packaging and sales of controlled substances including monies, plastic sandwich baggies, envelopes; or other containers used to hold controlled substances and indicia of occupancy.

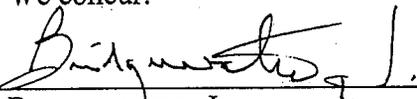
CP at 37. We treat the warrant as overbroad because it allowed Hill to search for evidence of drug sales, but excision of the phrase—“items associated in packaging and sales of controlled substances including monies, plastic sandwich baggies, envelopes”—does not render the particularity requirement meaningless. CP at 37. As excised, the warrant did not allow Hill unfettered discretion to search Schultz’s apartment. Furthermore, methamphetamine, marijuana, and specific drug paraphernalia were identified in the warrant and the State introduced only the drug evidence in prosecuting Schultz. Thus, the officers validly seized the evidence supporting her conviction. Schultz’s overbreadth argument fails.⁸ We hold that the trial court did not err in admitting the drug evidence.

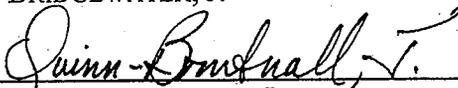
We affirm Schultz’s conviction and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


VAN DEREN, C.J.

We concur:


BRIDGEWATER, J.


QUINN-BRINTNALL, J.

⁸ Schultz also argues that Malone arrested her without probable cause and, therefore, we should suppress the drug evidence. But the basis of the arrest has no bearing on admission of the drug evidence found as a result of the search warrant, not a search incident to arrest. Furthermore, the warrant was based, in part, on the officers’ discovery of drug paraphernalia and Robertson’s admission that he used drugs that day. The search warrant was not obtained based on Schultz’s arrest.