

65545-1

6554

No. 65545-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

BRANDON ANTHONY BAKER,

Appellant.

---

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

---

APPELLANT'S REPLY BRIEF

---

MAUREEN M. CYR  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

*Handwritten initials*

TABLE OF CONTENTS

A. ARGUMENT IN REPLY ..... 1

    1. THE WARRANTLESS SEARCH WAS NOT JUSTIFIED BY THE "EMERGENCY AID" EXCEPTION TO THE WARRANT REQUIREMENT ..... 1

    2. THE WARRANTLESS SEARCH WAS NOT JUSTIFIED AS A "PROTECTIVE SWEEP" INCIDENT TO ARREST ..... 7

    3. ADMISSION OF THE FRUITS OF THE SEARCH—THE INFLAMMATORY PHOTOGRAPHS AND OFFICER FRYBERG'S TESTIMONY ABOUT THE DAMAGE HE OBSERVED—WAS NOT HARMLESS BEYOND A REASONABLE DOUBT ..... 11

B. CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### **Cases**

<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) .....	11
<u>State v. Campbell</u> , 15 Wn. App. 98, 547 P.2d 295 (1976).....	4, 5
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	11
<u>State v. Lynd</u> , 54 Wn. App. 18, 771 P.2d 770 (1989).....	4
<u>State v. Menz</u> , 75 Wn. App. 351, 880 P.2d 48 (1994).....	4, 5
<u>State v. Nichols</u> , 20 Wn. App. 462, 581 P.2d 1371 (1978).....	4, 6
<u>State v. Schultz</u> , 170 Wn.2d 746, __ P.3d __ (2011) .....	1, 3
<u>State v. Smith</u> , 165 Wn.2d 511, 199 P.3d 386 (2009).....	4, 7
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	11
<u>United States v. Hutchings</u> , 127 F.3d 1255 (10th Cir. 1997). 7, 9, 10	
<u>United States v. Jackson</u> , 700 F.2d 181 (5th Cir. 1983).....	7, 8
<u>United States v. Kinney</u> , 638 F.2d 941 (6th Cir. 1981).....	9
<u>United States v. Oguns</u> , 921 F.2d 442 (2nd Cir. 1990) .....	7, 9, 10
<u>United States v. Soria</u> , 959 F.2d 855 (10th Cir. 1992).....	7, 9, 10

### **Statutes**

RCW 9A.04.110(12).....	13
------------------------	----

### **Other Authorities**

Wayne R. LaFave, <u>Search and Seizure: A Treatise on the Fourth Amendment</u> , § 6.4(c), at 385-86 n.102 .....	9
--	---

A. ARGUMENT IN REPLY

1. THE WARRANTLESS SEARCH WAS NOT JUSTIFIED BY THE "EMERGENCY AID" EXCEPTION TO THE WARRANT REQUIREMENT

The warrantless search of the house was not justified under the "emergency aid" exception to the warrant requirement, because officers had no affirmative information indicating that anyone was in the house who needed immediate aid. In fact, the only information the officers possessed was that *no one* else was involved in the incident or present inside the house.

The State acknowledges that the recent case of State v. Schultz, 170 Wn.2d 746, \_\_\_ P.3d \_\_\_ (2011) adds three more criteria to the emergency aid doctrine as applied under article I, section 7 of the Washington Constitution. To justify intrusion under the emergency aid exception, the State must show (1) the police officer subjectively believed someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe there was need for assistance; (3) there was a reasonable basis to associate the need for assistance with the place being searched; (4) there was an imminent threat of substantial injury to persons or property; (5) police believed a specific person or persons or property were in need of immediate

help for health or safety reasons; and (6) the claimed emergency was not a mere pretext for an evidentiary search. *Id.* at \*3. "[T]he failure to meet any factor is fatal to the lawfulness of the State's exercise of authority." *Id.* at \*7 n.5. Thus, an officer's subjective, good faith belief that entry was necessary "is not enough to satisfy article I, section 7." *Id.* at \*7.

The State contends the officers' entry into the house was justified because: there was extensive damage outside the house; an enraged and possibly injured suspect was outside the house; the front door appeared to have been kicked in and was standing open; and the fire and aid crew would not approach unless the scene was secured. SRB at 14-15. These factors are not sufficient to satisfy the six criteria above. They are not sufficient to show the officers reasonably believed a specific person inside the house was in need of immediate aid. The criminal incident reportedly occurred *outside* the house, not inside. The State acknowledges the officers did not believe Ms. Baker was present at the scene or in immediate danger. SRB at 18. The officers had absolutely *no* information indicating that anyone else was involved in the incident or inside the house. It was therefore not reasonable for them to believe: there was a need for assistance (factor 2); any need for assistance

was associated with the interior of the house (factor 3); there was an imminent threat of substantial injury to persons or property (factor 4); or a specific person or persons or property were in need of immediate help for health or safety reasons (factor 5).

The State contends it was *Mr. Baker* who was in immediate danger and the officers were justified in searching the house in order to secure the scene for the aid crews. SRB at 18-19. Also, the State contends the house itself was in "need of help," because it was unsecured, with its front door kicked open. *Id.*

These reasons are not sufficient to satisfy the Schultz criteria. Even if Mr. Baker was in need of immediate assistance, there was no basis to associate that need for assistance with the place being searched (factor 3). Mr. Baker was not *inside* the house, he was *outside* the house. The officers could have taken other measures to secure the scene for the aid crew. They could have closed the front door of the house. They could have posted officers outside the door to guard the scene. And again, the officers had no affirmative basis to believe anything or anyone inside the house actually posed a potential danger to the aid crews.

Second, any apparent damage to the house was also insufficient to justify the warrantless intrusion. Police must believe

there is an *imminent* threat of substantial injury to property (factor 4). They also must believe specific items of property are in need of immediate help for health or safety reasons (factor 5). Neither of those criteria is satisfied here.

The State contends "damage within the house could be seen without crossing the threshold." SRB at 16. But Sergeant Jira, the officer in charge, testified he did not know there was damage inside the house when he directed the other officers to go inside; in fact, he said that was the farthest thing from his mind. 4/02/10RP 81.

The State relies on State v. Nichols, 20 Wn. App. 462, 464, 581 P.2d 1371 (1978); State v. Campbell, 15 Wn. App. 98, 99, 547 P.2d 295 (1976); State v. Menz, 75 Wn. App. 351, 880 P.2d 48 (1994); State v. Lynd, 54 Wn. App. 18, 771 P.2d 770 (1989); and State v. Smith, 165 Wn.2d 511, 199 P.3d 386 (2009). SRB at 16-18, 20. But those cases are readily distinguishable.<sup>1</sup>

In Menz, police responded to a report of domestic violence in progress at a residence. Menz, 75 Wn. App. at 352. The caller thought the participants were a man and woman and that a 10-year-old child lived with them. Id. When officers responded, they found the front door to the residence open and could not see into

---

<sup>1</sup> State v. Smith and State v. Lynd were distinguished in the opening brief.

the home but heard a television playing inside. Id. at 353. The officers knocked and announced and, receiving no answer, entered and searched the home for a person possibly hiding inside. Id. The Court held "a reasonable person facing this combination of circumstances would have thought that someone inside needed assistance." Id. at 354.

Menz is distinguishable because there, officers responded to a report of a domestic violence incident occurring *inside* the home. Also, the caller who reported the incident said two adults and a child lived in the residence. When officers responded, they had reason to believe someone was inside, as the front door was open and a television was playing. But here, officers had no reason to believe any crime occurred *inside* the home or that anyone was present inside.

Similarly, in Campbell, officers responded to a report of a burglary that had occurred *inside* a residence. Campbell, 15 Wn. App. at 99. The officers found a broken apartment window and a wide-open apartment door. Id. The Court held

[i]t is reasonable for officers, responding to a request for police assistance and with probable cause to believe that an open, unsecured dwelling has been recently burglarized, to immediately enter the dwelling without a warrant for the limited purposes of investigating the crime, rendering aid to any possible

victims of the felony, protecting the occupant's property, and searching for remaining suspects.

Id. at 100.

But here, again, officers had no reason to believe a crime had occurred *inside* the residence. They had no affirmative information indicating a suspect or victim was present in the home.

Finally, in Nichols, officers responded to a report of a fight in progress in an alley near a residence; the caller said six to eight subjects armed with beer bottles and chains were involved, and they had departed a minute or two before police arrived. Nichols, 20 Wn. App. at 464. Some of the beer bottles were reportedly filled with gasoline. Id. The Court held officers were justified in entering and searching a nearby garage, as they had reasonable grounds to believe their assistance was necessary to protect life, and there was probable cause to associate the garage with the emergency. Id. at 466.

It is necessary to note that Nichols analyzed the issue only under the Fourth Amendment, not article I, section 7 of the Washington Constitution, which grants greater protection. See Nichols, 20 Wn. App. at 465. Also, in Nichols, officers responded to a report of a fight and found no suspects or possible victims when they responded to the scene. But here, there was no report of a

fight or assault. And again, officers had no reason to believe anyone but Mr. Baker, who was present *outside* the house, was involved in the incident.

Thus, the emergency aid exception does not apply, because officers had no reasonable basis to believe anyone was inside the house who needed immediate assistance.

2. THE WARRANTLESS SEARCH WAS NOT JUSTIFIED AS A "PROTECTIVE SWEEP" INCIDENT TO ARREST

The State argues that if the search cannot be justified under the emergency aid doctrine, the entry was lawful as a "protective sweep" incident to arrest. SRB at 21. The State acknowledges that here the arrest occurred outside the home and the general rule is that "sweeps" of a home are only permissible incident to in-home arrests. SRB at 21. But the State argues the arrest immediately outside the home justified the sweep in this case. SRB at 22 (citing Smith, 165 Wn.2d at 517-19; United States v. Jackson, 700 F.2d 181 (5th Cir. 1983); United States v. Hutchings, 127 F.3d 1255 (10th Cir. 1997); United States v. Soria, 959 F.2d 855 (10th Cir. 1992); United States v. Oguns, 921 F.2d 442 (2nd Cir. 1990)).

The cases on which the State relies are either distinguishable on their facts, involve questionable holdings, or do not conform to the broader protections of article I, section 7.

Jackson is distinguishable on its facts, as in that case, federal agents had reason to believe an armed suspect was inside the motel room that they searched. Jackson, 700 F.2d at 190. Responding agents had been told that *at least two* suspects of a drug deal were present in the motel room and that the suspects had a gun. Id. The agents saw two people outside the motel room fitting the description they were given and arrested them, but a pat-down search following the arrest did not reveal a weapon. Id. "Thus, the agents had reason to believe that a gun was somewhere in the motel." Id. Under those circumstances, the agents had a "reasonable belief that an immediate security sweep of the premises was required for their own safety and the safety of others at the motel." Id.

In contrast, here, police had no basis to believe any other suspect, or weapon, was inside the house. In order to justify a warrantless sweep of a home pursuant to a person's arrest, the State must show police had reasonable "grounds to believe that there were other persons inside the residence who were potentially

dangerous." United States v. Kinney, 638 F.2d 941, 944 (6th Cir. 1981) (holding warrantless search of residence not justified under Fourth Amendment where defendant was arrested on porch, agents had already arrested defendant's only accomplice, and no weapons were brandished by anyone in the house). The State cannot make that showing here.

The other cases on which the State relies are not only distinguishable on their facts but also involve questionable holdings that do not conform to the broader protections of article I, section 7.<sup>2</sup> In Hutchings, DEA agents observed the defendants watering marijuana plants some distance from a trailer. Hutchings, 127 F.3d at 1259. That night, agents entered the compound, ordered the defendants out of the trailer and arrested them, then briefly entered the trailer but did not seize anything. Id.

Here, in contrast, Mr. Baker was not present inside the house when officers arrived, and officers did not order him out of the house in order to arrest him. Further, evidence was seized during the unlawful search of the house. Finally, even if the search

---

<sup>2</sup> In his treatise on the Fourth Amendment, Professor LaFave cites Hutchings, 127 F.3d 1255, Soria, 959 F.2d 855, and Oguns, 921 F.2d 442 for the principle that "such [warrantless] entries [into the home pursuant to arrest] have occasionally been upheld upon a less convincing showing." Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 6.4(c), at 385-86 n.102.

in Hutchings was justifiable under the Fourth Amendment, it would probably not be justifiable under the broader protections of article I, section 7.

In Soria, after Soria's arrest, which occurred a short distance from an auto body premises, officers proceeded to the auto body shop and conducted a "protective sweep." Soria, 959 F.2d at 856-57. The officers had reason to believe the auto body shop was being used for drug distribution purposes. Id. Here, in contrast, officers had no reason to believe the interior of the home was being used for criminal purposes. Also, again, even if the warrantless search was justifiable under the Fourth Amendment, it would probably not be justifiable under the broader protections of article I, section 7.

Finally, in Oguns, officers arrested Oguns just outside his apartment and then, seeing the door to his apartment was open, searched the apartment. Oguns, 921 F.2d at 446. The officers did not seize any evidence inside the apartment. Id. But again, here, officers *did* seize evidence inside the house. Also, even if the search was justifiable under the Fourth Amendment, it would probably not be justifiable under the broader protections of article I, section 7.

3. ADMISSION OF THE FRUITS OF THE SEARCH—  
THE INFLAMMATORY PHOTOGRAPHS AND  
OFFICER FRYBERG'S TESTIMONY ABOUT THE  
DAMAGE HE OBSERVED—WAS NOT HARMLESS  
BEYOND A REASONABLE DOUBT

The State must show beyond a reasonable doubt not only that admission of the photographs was harmless, but also that admission of Officer Fryberg's testimony describing the damage inside the home was harmless. In the motion to suppress, Mr. Baker challenged admission of both the photographs and the officers' descriptions of the damage. CP 88.

Error in admitting evidence in violation of the constitution is subject to harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Constitutional error is presumed prejudicial and the State bears the burden of proving it harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). "A constitutional error is 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. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Where the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. Id. at 426. But a conviction must be reversed "where

there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." Id.

The State contends any error in admitting the evidence was harmless given Ms. Baker's lawful entries into the home and her testimony based on what she independently saw. SRB at 24-26. But although Christine Baker described the damage in the home, that testimony was bolstered by the explicit and inflammatory photographs, as well as by the testimony of Officer Fryberg. The trial court admitted at least 24 inflammatory photographs of the damage inside the house. Exhibits 3-22, 26, 29-30, 32. Christine Baker described the damage depicted in the photographs extensively; the State used the photographs to structure her testimony. 4/12/10RP 52-82; 4/13/10RP 2-9. In addition, Officer Fryberg testified about the damage he saw inside the house during the warrantless search. 4/13/10RP 37-39. Finally, the deputy prosecutor relied heavily on the evidence of the damage inside the home to prove the element of malice. 4/14/10RP 50-51.

It is unlikely Ms. Baker would have testified in such detail and with such impact without the photographs. Without the photographs and the officer's testimony, the evidence of malice was not overwhelming. "Malice" means

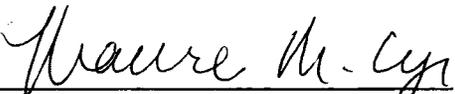
evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty.

RCW 9A.04.110(12). Without the tainted evidence, a reasonable jury might have concluded Mr. Baker destroyed the property, most of which he and Ms. Baker co-owned, out of despair over their pending divorce. It is possible the jury would have concluded he was temporarily unhinged and not acting with an evil intent. Thus, the error in admitting the tainted evidence is not harmless beyond a reasonable doubt.

**B. CONCLUSION**

The trial court erred in admitting evidence seized during an unlawful search of Mr. Baker's home. The error is not harmless and the conviction must be reversed.

Respectfully submitted this 14th day of March 2011.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project 91052  
Attorneys for Appellant