

65545-1

65545-1

NO. 65545-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON A. BAKER,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Officers responded to a report of a truck repeatedly ramming an SUV at a residence. As they approached the defendant ran into the residence, then emerged from the garage on an all terrain vehicle heading for the officers. They knocked him off the ATV with a taser and arrested him on the front lawn.

The door of the residence had been kicked open and officers could see some property damage through the open door. Police did not know if anyone else was in the house, and aid personnel would not approach to examine the defendant for any injuries until the scene was secured. Officers conducted a 2-3 minute "sweep" to secure the house. They did not find anyone else but encountered property damage throughout. They did not seize anything but reentered to photograph the damage. The SUV belonged to the defendant's estranged wife. A jury convicted the defendant of first-degree malicious mischief.

Was the entry lawful under these exigent circumstances?

2. Was any error harmless, when the defendant's estranged wife walked through the house later that day and testified at length to what she independently saw, and the State elected the defendant's ramming of the SUV as the act comprising the crime?

II. STATEMENT OF THE CASE

A. TESTIMONY AT THE SUPPRESSION HEARING.

On the morning of Saturday, April 25, 2009, police dispatch was notified that someone was using a large black pickup to ram into an SUV at a residence at 1413 77th St. NW, Tulalip, Washington. 4/2/10 CrR 3.6 Suppression Hearing Verbatim Report of Proceedings (hereafter "4/2/10 RP") 6, 38-39, 44; 1 CP 3 (finding of Fact #1). Three officers of the Tulalip Police Department responded within minutes of each other, starting with Officer Larry Groom at 9:21, followed by Officer Ross Fryberg and Sgt. John Jira. 1 CP 4 (Findings of Fact 6, 8); 4/2/10 RP 6, 11-13, 28-29, 33, 42, 63-65; Trial Ex. 55 (3.6. Hrg. Ex. 17) (police video, on DVD) at 9:21.¹

Officer Groom, arriving first, saw a black pickup parked across the driveway and a heavily damaged silver-colored SUV in the driveway. 1 CP 3 (Finding of Fact #1). He encountered two men walking up the driveway of the residence. When he called them over, one approached, while the other ran behind the house. 4/2/10 RP 11-12. 1 CP 34(Finding of Fact # 3).

¹ The citation is to the time signatures on the video.

The first man was a neighbor who had seen what was happening out of his window, and had come over to try to calm the defendant down. 4/2/10 RP 16, 18, 31. He'd taken the truck keys. Id. at 31. The other man, who ran, was the defendant. Officers walked toward the rear of the house to see where he'd gone. Id. at 14, 29-30, 42, 65-66. They heard a door slam, and a neighbor called out, "He ran into the house." Id. at 14, 43; 1 CP 4-5 (Finding of Fact # 10).

Outside, in the driveway, officers observed a large black pickup parked sideways, and a heavily damaged SUV. 4/2/10 RP 47, 66.

[T]he whole passenger side was crushed in, the windshield looked like somebody threw something through it. . . . [I]t appeared that that vehicle [the large black F-350 pickup] had struck the other vehicle in the driveway and pushed it over more than a couple feet and slammed it into a truck. . . . [T]here was broken glass, I could see marks in the front yard where the suspect took a run and smashed his wife's car. It literally looked to me like . . . a bomb went off There was debris everywhere.

4/2/10 RP 66-67 (testimony of Sgt. Jira); 1 CP 3 (Finding of Fact #2).

Officers quickly determined the SUV was registered to the defendant's wife, Christine Baker. 4/2/10 RP 68; Trial Ex. 55 (3.6 Hrg. Ex. 17) at 9:24; 1 CP 5 (Finding of Fact # 13).

The front door of the residence was wide open. It looked like it had been kicked in. There was a footprint on the door and the door jamb was broken. 4/2/10 RP 24, 52, 66, 68, 78, 89; Trial Ex. 2 (3.6 Hrg. Ex. 9 (photo of open door); Trial Ex. 3 (3.6 Hrg. Ex. 10) (photo of broken door jamb).

One of the three officers had performed a "welfare check" on the residence the day before, based on a call from Christine Baker that she was concerned her husband might be suicidal. She had told police in that earlier contact that they were going through a divorce and that she had moved out. Officer Fryberg relayed this information to the other officers. 4/2/10 RP 39-43, 55-57; see Id. at 63-65. Officers had entered the residence on that "welfare check" the day before, and had found blood on the floor. Id. at 79. Police determined, however, that the defendant was not in peril. 1 CP 4 (Finding of Fact # 7).

Thinking they had a suspect barricaded in the house, officers assessed what to do. They pulled back, and warned neighbors away. 4/2/10 RP 43, 68-69, 71. But they then heard a motor

“revving” from the garage. One officer thought it could be chainsaw; a second answered that, no, it was an ATV. Id. at 15, 16, 19, 44, 71-72; 1 CP 5 (Findings of Fact # 14, 15). Sgt. Jira suggested they move forward, and pull out tasers. Id. at 15, 16, 19, 45.

The garage door opened and the defendant sped out on an ATV, headed straight for Officer Fryberg. 4/2/10 RP 19-20, 44-45, 47-48, 72, 74. Fryberg “tased” him, and the defendant fell off the ATV. Id. at 19-20, 48, 75; 1 CP 5 (Finding of Fact # 15). Officers handcuffed him. 4/2/10 RP 59-60. They then brought over evidence bags and a camera to collect evidence of the deployment of the taser. Id. at 20, 49-50, 75-76; 1 CP 6 (Finding of Fact #16).

The defendant for his part was uncooperative, and refused to answer questions. 4/2/10 RP 49, 84; Trial Ex. 55 (3.6 Hrg. Ex. 17) at 9:33.

Officers planned to call in fire and medics to check the defendant for injuries (and ultimately did so) but not without first conducting a “sweep” of the residence to ensure there was no one else inside, either injured, or posing a threat to officers or aid personnel. 4/2/10 RP 20-22, 26, 50-51, 53, 78, 80; 1 CP 6 (Findings of Fact # 17, 18). Officers testified that fire and aid will

not approach until a scene is thus secured. Id. This is because fire and aid personnel are unarmed. 4/2/10 RP 50-51. Officers testified they genuinely did not know if anyone else could be inside or not. 4/2/10 RP 21, 1 CP 6 (Finding of Fact #18). They were not going to rely on statements by a neighbor or bystander that no one else was inside, because, in police experience, it frequently turns out there will someone else in a residence that they hadn't known about. 4/2/10 RP 22. There was, after all, all that damage outside. Id. at 26. They thought maybe someone else could have had a hand in it. Id. at 53. And the front door had been kicked wide open. Id. at 78. Officers did not, however, believe that Christine Baker was inside. 1 CP 6 (Finding of Fact # 18).

Sgt. Jira accordingly ordered the other two officers to conduct a "sweep" of the residence. 4/2/10 RP 23-24, 50, 81; 1 CP 6 (Finding of Fact #17). Officers explained to the defendant what they were about to do, stressing they were just clearing the house for everyone's protection, and not looking for evidence. Trial Ex. 55 (3.6 Hrg. Ex. 17) at 9:37.²

² But see 4/2/10 RP at 54, 61 (Officer Fryberg indicating the sweep could be for evidentiary purposes too; yet compare Id. at 81 (Sgt. Jira saying entry was not to document damage, but merely a "sweep" for protection).

Meanwhile, as described above, the front door was wide open and the door jamb broken. 4/2/10 RP 24, 52, 66, 68, 78, 89; Trial Ex. 2 (3.6 Hrg. Ex. 9; Trial Ex. 3 (3.6 Hrg. Ex. 10). Without crossing the threshold, through the open door officers could see a TV lying on the floor in the living room. 4/2/10 RP 24.

Officers Groom and Fryberg conducted a “sweep” of the house, proceeding room by room. Id. at 23, 25, 53, 82; 1 CP 6 (Finding of Fact #19). Officer Fryberg described the procedure:

What you generally do is you find a corner, one officer ensures that there’s nothing coming towards you at that corner, and then you, in order, check every door, every corner until you’ve completed the entire sweep of the residence.

4/2/10 RP 52. The whole process took only 2 – 3 minutes. Id. at 55. They collected nothing, touched nothing, and moved nothing. Id. at 25, 53; 1 CP 6 (Finding of Fact #19). They did look in any space (such as closets) that could conceal a person. 4/2/10 RP 25.

Officers described appliances on the floor, furniture upended, light fixtures pulled out, and things thrown everywhere. Id. at 24-25, 52. They did not find anyone else inside.

The neighbor whom Officer Groom had initially encountered had told police the defendant and his wife were going through a divorce. He added that he did not think the defendant had any

weapons. Id. at 68-70, 85-86. Officers did not take his word for it. Id. at 70.

At some point, the defendant's wife, Christine Baker, communicated with onscene officers. Id. at 84. Sgt. Jira indicated this was after the "sweep" had been conducted, but he also indicated that Mrs. Baker had talked to dispatch earlier. Id. at 90; see 1 CP 6 (Finding of Fact #18).

Apprised of the damage inside, Sgt. Jira sent officers back in the residence to take pictures. They did nothing else. 4/2/10 RP 23, 27-28; 1 CP 6 (Finding of Fact #20).

Once the "sweep" was done, Tulalip Fire Department personnel approached and evaluated the defendant. Id. at 83. The defendant told them he did not want to go to the hospital. Id.

The defendant sought to suppress the results of the "sweep" of the house, in particular the photographs. Both sides briefed the matter. 1 CP 84-88 (defense motion), 1 CP 79-83 (State's response). Testimony was elicited at a CrR 3.6 suppression hearing on April 2, 2010, as recounted above. The trial court, at the time, reserved ruling. 4/2/10 RP 82. On April 8, 2010, it rendered an oral ruling, 4/8/10 Oral ruling RP 2-13, which was reduced in

substantially verbatim form to written findings at 1 CP 3-11 (attached to appellant's brief).

The trial court ruled that the officers did not have a full and complete picture of what was happening. There was extensive damage, and the defendant was not giving them any additional information. The officers did not know what was going on inside the home, and could not know that there really was no one else involved – as a “perpetrator, co-perpetrator, or victim” – until they had done the sweep. 1 CP 9-10. They confined themselves to conducting a “sweep.” They did not collect evidence. Id. There was, moreover, the need to secure the scene before fire and aid approached:

The last thing anyone would want is for the aide [sic] crew to come into the scene and begin treating someone and then have someone in the house jump out at them and continue on with whatever destructive behavior had brought the officers there in the first place.

1 CP 10. The court found the initial entry was justified for these reasons. 1 CP 9-10. It found the second entry was just a continuation of the first, as it merely documented what officers saw during the first entry. Id.

B. TRIAL.

The defendant faced trial on one count of second-degree assault and one count of first-degree malicious mischief (domestic violence). 1 CP 71-72.

The neighbor and the three officers testified substantially as they had at the suppression hearing, with the latter three necessarily spending more time on the alleged assault with the ATV. 1 Trial RP 33-42 (neighbor); 2 Trial RP 23-55 (Officer Fryberg); 2 Trial RP 84-100, 110-135 (Sgt. Jira); 2 Trial RP 135-145 (Officer Groom). A second neighbor testified he saw the defendant ram his wife's SUV three times with his truck. 1 Trial RP 28-32. One of the officers testified about the damage he saw in the home. 2 Trial RP 37-39.

Christine Baker related that when she had gone over to the house the day before, she found many of her clothes had been ripped or had had bleach poured on them. 1 Trial RP 49; 2 Trial RP 3-6. She also found her husband sleepy and dazed on the bed. 1 Trial RP 49. She gathered up what she could of her and her children's effects and fled the house. 1 Trial RP 50.

Ms. Baker testified that on the day of the incident, after the defendant had been taken to jail, she arrived and did a walk-

through of the house to look at the damage. 1 Trial RP 51-52. (The defendant had specified, at the suppression hearing, that he was not objecting to this entry. 4/2/10 RP 84.) Ms. Baker described the damage she saw, in many cases using pictures that appear to have been taken by officers in the earlier entry. 1 Trial RP 53-66, 78-82, 92-94; 2 Trial RP 3-9. Defense counsel objected to admission of Ms. Baker's list of damaged items in the house, with her own estimated values; that objection was sustained and the list was not admitted. 1 Trial RP 90-91. Ms. Baker was permitted to orally give some estimates, based on replacing the refrigerator and two TV's. 1 Trial RP 65; 2 Trial RP 7-9.

Christine Baker also testified about the damage to her SUV. 1 Trial RP 82-86. An insurance claims adjuster also was called to explain his company's damage estimate, based on cost to repair: this came to \$7,000 in parts alone. 2 Trial RP 59-75; Trial Ex. 58. In the end, as Ms. Baker explained, her insurance company declared the car a total loss. They paid her \$700 and paid off her credit union for \$6,900. 2 Trial RP 10-12.

The defendant did not testify. 2 Trial RP 146; 3 Trial RP 10.

The jury's instructions on malicious mischief indicated the State was relying upon evidence of a specific act to prove the

charge. 1 CP 59. In closing argument, the prosecution argued the malicious mischief charge based solely on the amount of damage done to the Acura. 3 Trial RP 27, 46-49, 81-83. In proving the mental state of malice, State's counsel cited the defendant's repeatedly backing into the SUV, 3 Trial RP 40, the damage to Ms. Baker's clothes the day before, 3 Trial RP 28, and damage to specific personal items in the house, such as family pictures and a handmade wooden valentine, 3 Trial RP 50-51 (compare Christine Baker's testimony at 1 Trial RP 55-57, 92-93 (framed family pictures destroyed), 1 Trial RP 57 (chandelier thrown onto children's toys), 1 Trial RP 63 (handmade wooden valentine broken in half and thrown into wall)).

The jury convicted the defendant of first-degree malicious mischief, and acquitted him of second-degree assault. 1 CP 58-59. The defendant was sentenced within the standard range. 1 CP 25-35. This appeal followed.

III. ARGUMENT

A. OVERVIEW.

1. There Was Never A Search For Evidence.

There was never a search of the residence in the conventional sense. Officers conducted a room-by-room "sweep"

that took 2-3 minutes, during which they touched nothing, took nothing, and moved nothing. 4/2/10 RP at 23, 25, 52-53, 55, 82. As the trial court noted, they did not collect any evidence. 1 CP 9-10. This is not a case where, for example, officers entered into a home to do a “sweep” and found a marijuana “grow op.” Officers frankly acknowledged they did not have probable cause to conduct a “regular” evidentiary search. 4/2/10 RP 15-16. While one officer said the purpose of the “sweep” included obtaining or documenting evidence, 4/2/10 RP at 54, 61, the officer in charge said this was not so, *Id.* at 81, nor is that what was said to the defendant at the time. Trial Ex. 55 (3.6 Hrg. Ex. 17) at 9:37. And the actual conduct of the officers inside the residence was limited to that appropriate for a “sweep.” This was not a ruse or excuse to do anything more than a “sweep” to check for any other persons.

2. There Were Multiple Entries, Including Two By Ms. Baker.

Secondly, there was not one entry but *four*, only two of which are even arguably improper. Ms. Baker went into the house the day before the incident to find her clothes ripped and bleach poured on them. 1 Trial RP 49; 2 Trial RP 3-6. She described what she found. *Id.* The defendant has not challenged this entry, nor the testimony based upon it. Next, on the day of the incident, officers

entered and conducted a quick “sweep,” as recounted above, before letting fire and aid approach. 4/2/10 RP at 20-23, 25, 50-53, 55, 78, 80-82. They then went in again a short time later and took photographs. 4/2/10 RP 23, 27-28. The defendant challenges the legality of these two entries. Lastly, Christine Baker entered the home after the defendant had been arrested and taken to jail and viewed the extensive damage. 1 Trial RP 51-52. She testified at length about what she saw after she entered. 1 Trial RP 53-66, 78-82, 92-94; 2 Trial RP 3-9. The defendant’s counsel had specified, at the suppression hearing, that she was not objecting to this entry into the home. 4/2/10 RP 84. The defendant’s analysis, and the remedy he seeks, completely ignores Ms. Baker’s two lawful entries into the home and her extensive testimony based on what *she* saw.

B. THE OFFICERS’ ENTRY WAS LAWFUL.

The defendant presents the scene prior to the officers’ entry as static and safe, with no evidence of anyone else in the house, no need for medical aid for anyone, and no allegations of weapons. But, as the trial court found, the reality was much more fluid: things became clear to the officers only in hindsight. They were faced with extensive damage outside the home; an enraged and now possibly injured suspect (the defendant having been thrown off a

speeding ATV upon application of high-voltage probes); and a front door kicked wide open, with signs of forced entry. Uncontroverted testimony was that fire and aid would not approach unless the scene was secured. And the defendant was not answering questions. The question is whether, under these conditions, officers can secure the scene by conducting a 2-3 minute “sweep” of a house to check for anyone else inside, or whether they may enter, as appellant argues, only in response to victim- or suspect-specific imminent threats.

1. Based On Exigent Circumstances.

Exigent circumstances can justify a warrantless entry. State v. Nichols, 20 Wn. App. 462, 465, 581 P.2d 1371 (1978); State v. Sanders, 8 Wn. App. 306, 310, 506 P.2d 892 (1973). The court must be satisfied that any claimed emergency was not simply a pretext for conducting an evidentiary search, and instead was actually motivated by a perceived need to render aid or assistance. The State must show (1) the searching officer subjectively believed an emergency existed; (2) a reasonable person in the same circumstances would have thought an emergency existed, and (3) there must be a reasonable basis for associating the need for assistance with the place that is entered. State v. Lynd, 54 Wn.

App. 18, 21, 771 P.2d 770 (1989); State v. Menz, 75 Wn. App. 351, 354, 880 P.2d 48 (1994), review denied, 125 Wn.2d 1021 (1995); State v. Gocken, 71 Wn. App. 267, 277, 857 P.2d 1074 (1993), review denied, 123 Wn.2d 1024 (1994). Whether police encountered exigent circumstances permitting a warrantless entry is assessed on the specific facts presented. State v. Lynd, 54 Wn. App. at 22.

Here, officers conducted a “sweep” for no purpose other than to secure the scene. They had a possibly injured suspect; a house with a sign of forced entry; and damage within the house that could be seen without crossing the threshold. And fire and aid would not come to assist until the residence was secured.

In Nichols, officers responded to a report of a fight in an alley involving 6-8 people with bottles and chains. They found only the complainant when they arrived. She said the participants had fled in several cars, including a Camaro; that they had Molotov cocktails; and that one of the participants lived at the end of the alley. Officers approached the vicinity of the house and garage where the fight had allegedly occurred and checked the area. A side door to the garage was open. Officers entered and found a Camaro, this one stripped, that turned out to be stolen. State v.

Nichols, 20 Wn. App. 462, 464, 581 P.2d 1371 (1978). Division III of this Court upheld the entry as justified under exigent circumstances. Nichols, 20 Wn. App. at 465-66.

In Campbell, a neighbor saw the defendant's apartment being burglarized, saw a suspect flee, and summoned the police. Officers arrived and discovered a broken window and wide open door. They entered to investigate the recent crime, to look for any participants in that crime, and to aid any victims. State v. Campbell, 15 Wn. App. 98, 99, 547 P.2d 295 (1976). Once inside, they found marijuana plants. This Court upheld the search as an emergency or under exigent circumstances. Campbell, 15 Wn. App. at 99-100.

Cases in the domestic violence context yield similar results. E.g., State v. Menz, 75 Wn.App. at 354 (warrantless entry was justified after police received a phone call reporting domestic violence in progress; upon arrival officers observed that the door was ajar, the lights and television were on, and no one responded to knocks or announcements); Lynd, 54 Wn. App. 18, 771 P.2d 770 (911 hangup call, return calls met a busy signal, defendant admitted outside his home to assaulting the victim, defendant was

packing a car as if preparing to leave, and defendant did not want the officer to look in the house; warrantless entry justified).

These cases would uphold the entry here.

In a statement of additional authorities, the defendant cites the recent case of State v. Schultz, ___ Wn.2d ___, ___ P.3d ___ (2011), Supreme Court 82238-7, Slip Op. of Jan 13, 2011. To the three factors articulated in Lynd and Menz, Schultz adds three more: (4) that there is an imminent threat of substantial injury to persons or property, (5) police must believe a specific person, or specific property, are in need of immediate help; and (6) the claimed emergency is not a pretext for an evidentiary search. Schulz at ¶ 13.

The sixth factor is met on these facts. As to (4) and (5), it is true the officers did not believe Ms. Baker was in immediate danger, because she was not onscene and at some point they were aware she had been talking to dispatch. But the defendant had been “tased” and thrown off a speeding ATV. Injuries and even fatalities from application of tasers are not unknown. E.g., Oliver v. Fiorino, 586 F.3d 898, 906 (11th Cir.2009). Yet an aid crew would not examine the defendant unless the house was secured. And the

house, as a piece of property, was “need of help,” in that it was unsecured, with its front door kicked open.

Schultz articulates the standard for *when* officers can enter to render aid and assistance to someone identified. But it does not address how officers are to assess *whether* they need to render aid and assistance to anyone in the first place. Officers investigating a burglary or other crime in progress will often not have the kind of specificity that Schultz’s factors (4) and (5) seem to envision. It is precisely the *lack* of specificity that was so troubling to the officers here. They did not know who else or what else was in that house, and they could not bring unarmed medical personnel onscene until they did.

The officers faced potential liability if someone *had* lain injured in the house and, lacking specificity, they had not gone to check to see. In Robb v. City of Seattle, a lawsuit brought by the mother of a murder victim against a city and its police, this Court recently held that officers’ failure, hours before the murder, to detain a known mentally ill and violent suspect after a brief Terry stop could give rise to a negligence action, as an affirmative act negligently performed. Robb v. City of Seattle, ___ Wn. App. ___, ___ P.3d ___, COA 63299-0-I, Slip Opinion of Dec. 27, 2010 (affirming

trial court's denial of summary judgment). A failure to act here could have similarly exposed officers to liability.

Lastly, Schultz was a 5-4 decision in which the deciding vote was cast by a judge pro tem. It may not reflect the majority of the current court. And, as the dissent notes, given the Schultz court's holding on a separate consent issue, the additional three factors are not necessary for the holding. Schultz at ¶ 27 (dissent). For all these reasons, Schultz should be narrowly construed.

In State v. Smith, officers were investigating the theft of a tanker truck of anhydrous ammonia. They found it parked near a two-story house. Officers secured the truck and knocked at the house, announcing their presence. Through a window they could see what looked like a rifle on the living room floor. Two individuals came out and said they were squatting in the house, no one else was inside, and that they knew nothing about the tanker. Officers detained them. Looking through the door, they could no longer see the rifle-like object. A protective sweep of the house under these circumstances was upheld by the Supreme Court as justified under exigent circumstances. State v. Smith, 165 Wn.2d 511, 199 P.3d 386 (2009). The same result obtains under the rather unique facts here.

2. As A Protective Sweep.

However, if the six Schultz factors apply and if they cannot be met on these facts, the entry was lawful as a “protective sweep” incident to arrest.

When making an arrest within the home, police can conduct a “protective sweep” of the residence when they have the reasonable belief that others may be present who would pose danger to officers on scene. Maryland v. Buie, 494 U.S. 325, 332-333, 335, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990); State v. Hopkins, 113 Wn .App. 954, 959-60, 55 P.3d 691 (2002). The sweep “many extend only to a cursory inspection of those spaces where a person may be found” and may last “no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” Buie, 494 U.S. at 336. This is not a search in the conventional sense, but rather, an extension of a Terry³ frisk or pat-down. See Buie, 494 U.S. at 331-34.

As appellant points out, however, here the arrest was outside the home, and the general rule is that “sweeps” are only permissible incident to in-home arrests. But this does not mean

³ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

“that a protective sweep of a home is never justified after an arrest which takes place outside the home.” United States v. Colbert, 76 F.3d 773, 776-77 (6th Cir. 1996) (but finding it unlawful there). In some situations, courts have allowed brief protective sweeps when the arrest occurred immediately outside, as here. In Smith, the ammonia tanker truck case cited above, occupants were detained (not even arrested) outside the home, yet the protective sweep upheld, under exigent -circumstances analysis. Smith, 165 Wn.2d at 517-19. Treatises cite other examples. E.g., United States v. Jackson, 700 F.2d 181 (5th Cir. 1983) (entry of motel room proper after two persons arrested outside room, as was not known how many involved in drug transaction, and police had report persons were armed yet these two were not); United States v. Hutchings, 127 F.3d 1255 (10th Cir. 1997) (where, after midnight, police order defendants out of trailer because latter had been seen watering marijuana plants nearby, one-minute protective sweep for officer safety lawful); United States v. Soria, 959 F.2d 855 (10th Cir. 1992) (protective sweep of auto body shop upheld after arrest a short distance away, to protect officers from possible gunshot from within); United States v. Ogens, 921 F.2d 442 (2d Cir. 1990) (arrest of person scheduled to receive drugs in hallway, and door to

apartment remained open; protective sweep upheld as any third person inside would have posed a threat to police); LaFave, 3 Search & Seizure § 6.4(c) at 185-86 (4th ed. 2004).

These cases, and the holding in Smith, would uphold the “protective sweep” here.

3. Officers’ Second Entry.

As discussed above, officers took 2-3 minutes to secure the home. They did not take anything. They reentered shortly thereafter and merely photographed what had been in plain view the first time. If the first entry was lawful, the second – that simply documented what they had seen earlier – is lawful as well.

In Stevenson, officers approached a triple-murder scene and could see one body through a window. They entered to see if anyone else was alive. Officers found two more bodies. They then retreated and waited for investigators, who arrived and took numerous photographs and evidentiary samples. The defendant argued that while the initial entry was lawful, the subsequent one, for evidence, was not. Division Two of this Court disagreed, holding that there is no requirement that evidence in plain view be seized when it is observed. State v. Stevenson, 55 Wn. App. 725, 730, 780 P.2d 872 (1989). The later entry was “no more than an

actual continuation of the first.” Id. at 731. That is the case here, too: if the initial entry is lawful, a subsequent entry, merely to document what was seen the first time, is lawful as well.

C. EVEN IF ADMISSION OF THE PHOTOGRAPHS WAS ERROR, ANY ERROR WAS HARMLESS GIVEN MS. BAKER’S LAWFUL ENTRIES INTO THE HOME AND HER TESTIMONY BASED ON WHAT SHE INDEPENDENTLY SAW.

Even if the officers’ entry was unlawful, such that any “evidence” – the photographs they took – should have been suppressed, any error was harmless.

Errors even of constitutional magnitude may be so insignificant as to be harmless. Chapman v. California, 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d 705, 24 A.L.R.3d 1065, reh’g denied, 386 U.S. 987 (1967). Harrington v. California, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969).

The constitutional harmless error standard has been applied by the Washington Supreme Court. E.g., State v. Guloy, 104 Wn.2d 412, 423-26, 705 P. 2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986) (admitting statements of co-conspirator, while proper exception to hearsay rule, violated Confrontation Clause on these facts; error held harmless because of other overwhelming untainted evidence). 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 at 425.

In performing this analysis, courts in our state use the "overwhelming untainted evidence" test. Guloy, 104 Wn.2d at 426. Under this test, the appellate court looks only at the other, "untainted" evidence; error is harmless if this remaining evidence affords overwhelming evidence of guilt. Guloy, 104 Wn.2d at 426.

Here, the crime of malicious mischief was premised solely on the dollar-value of damage to the Acura SUV. All of that damage occurred *outside* the home. None of the evidence of that was objectionable, nor challenged here. The extent of damage inside the home, together with the defendant's repeated ramming of the SUV with his truck, was elicited only to show the accompanying mental element of malice. Christine Baker, who legally entered her own home twice, described the damage that she saw on those occasions to the jury. 1 Trial RP 49-50; 2 Trial RP 3-6 (clothes ripped and bleached the day before); 1 Trial RP 53-66, 78-82, 92-94; 2 Trial RP 3-9 (walk-through on day of incident). She did so extensively. Id. She testified in far greater detail than the officer at trial. Compare 2 Trial RP 37-39. Her evidence was "untainted"

because she had obtained knowledge of the damage inside the home independently of any improper police intrusion.

It is true that Ms. Baker used photographs that had been taken, or appeared to have been taken, by officers when they entered the home. But her testimony was based on what she had seen, not someone else's photographs. And she could testify, independently of any error, that the photographs accurately depicted what *she* saw. And there was plenty of damage outside the house, too. Even if one eliminates the photographs and the officer's testimony from the inquiry, the remaining evidence -- of the damage to the Acura, of Ms. Baker's ripped and bleached clothes, and what she saw on the day of the incident -- affords overwhelming evidence of guilt. Any reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425-26.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on February 8, 2011.

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by: 
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