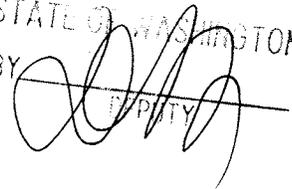


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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 39969-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Carl Stanley,**

Appellant.

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Lewis County Superior Court Cause No. 09-1-00438-7

The Honorable Judge Nelson E. Hunt

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial court erred by admitting evidence obtained in violation of Mr. Stanley's Fourth Amendment rights.
2. The trial court erred by admitting evidence obtained in violation of Mr. Stanley's right to privacy under Wash. Const. Article I, Section 7.
3. The police violated Mr. Stanley's right to privacy and his right to be free from unreasonable seizures by entering his home without a warrant.
4. The trial judge erred by adopting Finding of Fact No. 1.3, CP 28.
5. The trial court erred by entering Conclusion of Law No. 2.2, CP. 29.
6. The trial court erred by entering Conclusion of Law No. 2.4, CP. 29.
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9. The trial court erred by entering Conclusion of Law No. 2.8, CP. 29.
10. The trial court erred by entering Conclusion of Law No. 3.1, CP. 30.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Both the Fourth Amendment and Article I, Section 7 prohibit police officers from invading a home without a warrant or other authority of law. Here, Deputy McNight entered Mr. Stanley's house without a warrant while investigating a domestic violence call. Did the warrantless entry violate Mr. Stanley's rights under the Fourth Amendment and Article I, Section 7?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

A trailer park resident called the police and reported hearing a woman yelling for help, loud banging noises, and a man yelling and swearing. RP<sup>1</sup> 4-5, 9, 12. Lewis County Sherrif's Deputy McKnight was dispatched; while on his way, he was told that the woman had become quiet, and the man had said "oh god oh god." From this, the caller concluded that the woman was being choked. RP 5, 10. When the deputy arrived, he knocked and did not receive an answer. He walked around the trailer, which was quiet. RP 5, 11. He returned to the front, and found that the front door had been opened slightly. RP 5.

He saw a woman inside, Esther Guerra. RP 5-6. She was not visibly injured, crying, upset, or distraught. RP 6, 12. Ms. Guerra told the deputy that she was not hurt. RP 12-13. Deputy McKnight asked her if there was anyone else inside, and she responded that her boyfriend was there. The officer told her that he would need to come inside and check on the welfare of anyone in the residence. RP 6. He said this while examining Ms. Guerra for any signs of injury or choking. He asked her to open the collar of her top, and he saw no injuries. RP 13-14.

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<sup>1</sup> The only portion of the Verbatim Report of Proceedings that this brief cites to is from the hearing on October 2, 2009.

Deputy McKnight took a few steps inside the home and saw Carl Stanley in the hall, walking toward him. RP 7. Mr. Stanley had no apparent injuries and was calm and cooperative. RP 16, 19. Deputy McKnight noticed that Mr. Stanley seemed to be sidestepping and trying to obstruct the officer's view of a table, which caused the officer to suspect there was a weapon there. RP 7, 21.

McKnight walked past Mr. Stanley and saw marijuana, a pipe, and white powder on the table. RP 8. Both Mr. Stanley and Ms Guerra were charged with Possession of a Controlled Substance, Cocaine. CP 31.

Mr. Stanley moved to suppress the evidence, arguing that the deputy's warrantless entry into the home violated his rights. Motion and Memorandum to Suppress Evidence, State's Brief in Response to Defendant's Motion, Reply Memorandum, Supp. CP. At a hearing on the motion, Deputy McKnight testified that the law gives him the right to enter a home if there is an allegation of a domestic dispute. RP 16. He conceded that the only evidence he had of a domestic dispute was from the caller, who may not have seen anything. RP 18. Both Mr. Stanley and Ms. Guerra denied that they had been in any physical altercation. RP 22-38.

The court ruled that the entry into the home was lawful and that any evidence discovered once inside was admissible. RP 43-46. Among

other things, the judge found officer safety justified the deputy's action in stepping around Mr. Stanley to look at the table. Finding of Fact No. 1.17, Findings of Fact and Conclusions of Law, CP 29.

The parties entered a factual stipulation and Mr. Stanley waived his right to a jury and submitted the case to the court. CP 23-25. The court found Mr. Stanley guilty of Possession of Cocaine, and sentenced him. CP 26, 14-22. This timely appeal followed. CP 4-13.

### ARGUMENT

**I. DEPUTY MCKNIGHT VIOLATED THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7 WHEN HE ENTERED MR. STANLEY'S HOME WITHOUT A SEARCH WARRANT.**

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *In re Detention of Strand*, 167 Wn.2d 180, 217 P.3d 1159, 1162 (2009). Findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The validity of a warrantless search is reviewed *de novo*. *Id.*

B. Mr. Stanley's privacy interest in his home was protected by the Fourth Amendment and Article I, Section 7.

Under the Fourth Amendment to the U.S. Constitution,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

shall not be violated, and 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.

U.S. Const. Amend. IV.<sup>2</sup>

Similarly, 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. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.<sup>3</sup> *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). The provision applies with greatest force when officers intrude into a dwelling. *State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998).

Under both provisions, searches and seizures conducted without authority of a search warrant “are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.” *Arizona v.*

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<sup>2</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>3</sup> Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

*Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); see also *State v. Einfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). The state bears the heavy burden of showing that an exception applies. *Einfeldt*, at 584.

- C. The warrantless intrusion was not justified under the “community caretaking” exception to the warrant requirement because “community caretaking” is not an exception to Article I, Section 7.

The Washington Supreme Court has not explicitly adopted “community caretaking” as an exception to Wash. Const. Article I, Section 7. See *State v. Kinzy*, 141 Wn.2d 373, 387 n. 38, 5 P.3d 668 (2000); *State v. Moore*, 129 Wn. App. 870, 880, 120 P.3d 635 (2005). By contrast, the Court of Appeals has done so. *State v. Hos*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_ (2010). The court should revisit this issue, and hold that “community caretaking” cannot justify the admission of evidence seized following a warrantless search.

Any exception to the warrant requirement must be rooted in the common law. *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 310, 178 P.3d 995 (2008) (plurality). Federal common law exceptions do not suffice under Article I, Section 7. *Id.*, at 314 (citing *State v. Ladson*,

138 Wn.2d 343, 979 P.2d 833 (1999)). This is so because “the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, [while] Article I, Section 7, holds the line by pegging the constitutional standard to ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a *warrant*.’” *Ladson*, at 349 (emphasis in original) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

“Community caretaking” pits two competing interests against each other: (1) the benefit to society when officers are authorized to intrude on individual privacy interests for “community caretaking” reasons, and (2) the individual’s right to be free from unwarranted government intrusion. Our state constitution explicitly protects individual privacy interests; it does not specifically protect society’s interest in “community caretaking.” Wash. Const. Article I, Section 7. Furthermore, there is no existing common law exception in Washington for “community caretaking.” *See Kinzy*, at 387 n. 38. Finally, Article I, Section 7

explicitly protects the ‘home.’ ...[T]he home receives heightened constitutional protection [and is] a highly private place... In no area is a citizen more entitled to his [or her] privacy than in his or her home.

*State v. Young*, 123 Wn.2d 173, 184-185, 867 P.2d 593 (1994). This heightened protection applies here, because the warrantless intrusion occurred at Mr. Stanley's residence.

These authorities weigh against recognizing a "community caretaking" exception to Article I, Section 7. The court should continue to "hold[] the line by pegging the constitutional standard to 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass...'" *Ladson*, at 349 (quoting *Myrick*, at 511). Establishing a "community caretaking" exception to Article I, Section 7 would be a departure from this tradition of holding the line.<sup>4</sup>

Even without an exception to the warrant requirement, officers can still pursue legitimate "community caretaking" activities. The constitution prohibits the fruits of a warrantless intrusion from being introduced into evidence (absent an exception to the warrant requirement), but the officers need not fear civil liability. *See Reid v. Pierce County*, 136 Wn.2d 195, 213-214, 961 P.2d 333 (1998) (holding there is no private right of action for violation of Article I, Section 7). Criminal liability under RCW

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<sup>4</sup> Furthermore, a new exception could open the door to other exceptions, previously unrecognized under Article I, Section 7.

10.79.040 may be a different matter;<sup>5</sup> however, a statute cannot shape the contours of a constitutional provision—otherwise the legislature could effectively amend the constitution simply by amending the statute.

The court should revisit its decision in *Hos*, and hold that there is no “community caretaking” exception to Article I, Section 7. In the absence of such an exception, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *Eisfeldt*, *supra*.

D. The warrantless intrusion was not justified under the “community caretaking” exception because any such exception to Article I, Section 7 requires police to use the least intrusive means of performing their community caretaking function.

1. The Supreme Court has implicitly held that any “community caretaking” exception to the state constitution’s warrant requirement is narrower than its federal counterpart.

Although the Supreme Court has never explicitly adopted a “community caretaking” exception to Article I, Section 7, it has rejected a warrantless inventory search that would have been permitted under the

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<sup>5</sup> RCW 10.79.040 provides “It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.” Searches conducted pursuant to an exception to the warrant requirement are exempt from prosecution. *State v. Groom*, 133 Wn.2d 679, 686, 947 P.2d 240 (1997). Absent a “community caretaking” exception, criminal liability might attach to warrantless house searches that don’t fit within another exception.

federal constitution's "community caretaking" exception. *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). Article I, Section 7 was not mentioned in *Houser*; however, subsequent cases have since affirmed that *Houser* rested on state constitutional grounds.

In *Houser*, the court rejected an impoundment and inventory search justified under a "community caretaking" theory. First, it held that prior to impoundment, officers must consider available alternatives. *Id.*, at 153. The Court of Appeals has since explicitly relied on Article I, Section 7 to reaffirm this aspect of *Houser*. *State v. Hill*, 68 Wn.App. 300, 305-307, 842 P.2d 996 (1993). Under the federal "community caretaking" exception, by contrast, officers need not consider available alternatives prior to impound. *Colorado v. Bertine*, 479 U.S. 367, 93 L. Ed. 2d 739, 107 S. Ct. 738 (1987)). Thus one rule applies under the federal exception, and a different rule applies under state law. A warrantless search may fit within the federal exception, yet be unlawful under Article I, Section 7. Accordingly, *Houser* and *Hill* establish that any "community caretaking" exception in Washington differs from its Fourth Amendment counterpart.<sup>6</sup>

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<sup>6</sup> Apparently, the appellants in *Houser* and *Hill* did not argue that Article I, Section 7 prohibits warrantless intrusions for community caretaking purposes.

Second, the *Houser* court held that the officers could not search the vehicle's locked trunk under a "community caretaking" theory. *Houser*, at 155. This rule, too, diverges from federal law. See, e.g., *United States v. Wallace*, 102 F.3d 346 (8<sup>th</sup> Cir. 1996) (upholding inventory search of locked trunk pursuant to "community caretaking" function). The Supreme Court has since applied Article I, Section 7 to reaffirm *Houser's* rule prohibiting inventory searches of locked trunks, including those accessible by a trunk release inside the vehicle. See *White*, at 766 ("*Houser* is grounded in article I, section 7 of the Washington State Constitution.") *Houser* and *White* thus establish that any "community caretaking" exception in Washington is narrower than its Fourth Amendment counterpart.<sup>7</sup>

2. Article I, Section 7 requires that officers pursue the least intrusive means of achieving their "community caretaking" purpose.

Under federal law, a warrantless search or seizure performed for "community caretaking" purposes need not be limited to the least intrusive means: "The fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself,

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<sup>7</sup> The appellant in *White* apparently did not argue that Article I, Section 7 prohibits warrantless intrusions for community caretaking purposes.

render the search unreasonable.” *Cady v. Dombrowski*, 413 U.S. 433, 447, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973); *see, e.g., United States v. Johnson*, 410 F.3d 137, 146 (4th Cir. 2005).

By contrast, Article I, Section 7 requires exclusion of evidence unless discovered through the least intrusive means of achieving the “community caretaking” purpose. This can be inferred from the Supreme Court’s discussion of the permissible scope of the searches in *Houser* and *White*. In *Houser*, the court held that “the scope of the search should be limited to those areas necessary to fulfill its purpose.” *Houser*, at 156. The court inquired “whether it was necessary” for the police to open the locked trunk, and concluded that it was not. *Id.*, at 156. These principles were affirmed in *White*. *White*, at 766-768.

A “least intrusive means” standard upholds the core values protected by Article I, Section 7. First, “[i]n contrast to the Fourth Amendment, Article I, Section 7 protects privacy interests without express limitation and exceptions to the warrant requirement must be narrowly applied.” *York* at 323. Allowing officers to ignore the least intrusive means available would violate protected privacy interests, resulting in an exception that is not “narrowly applied.”

Second, in contrast to the Fourth Amendment’s “downward ratcheting mechanism of diminishing expectations of privacy,” Article I,

Section 7 “holds the line” against expanded government intrusion. *Ladson*, at 349. The Fourth Amendment’s concern is “reasonableness;” Article I, Section 7’s focus is privacy. *Eisfeldt*, at 639. This, too, suggests that any “community caretaking” exception in Washington requires exclusion of evidence not discovered through the least intrusive means of achieving the exception’s purpose. Otherwise, the privacy interests of Washington citizens would be subject to invasion upon a showing of mere reasonableness.

Third, Washington’s exclusionary rule “has a long history, independent from that of the federal rule... When an individual’s right to privacy is violated, Article I, Section 7 requires the application of the exclusionary rule.” *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 343, 945 P.2d 196 (1997). The objectives underlying Washington’s exclusionary rule are:

‘[F]irst, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.’

*State v. Boland*, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990) (quoting *State v. Bonds*, 98 Wn.2d 1, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831

(1983)).<sup>8</sup> The Washington exclusionary rule’s long history and underlying objectives favor application of a “least intrusive means” standard for searches and seizures justified by “community caretaking.”

3. The *Hos* court’s decision adopting the federal “community caretaking” standard is erroneous and should be re-examined.

The *Hos* court held that Wash. Const. Article I, Section 7 “does not require officers to pursue the least intrusive means available.” *Hos*, at \_\_\_\_ (citing *State v. Mackey*, 117 Wn.App. 135, 139, 69 P.3d 375 (2003), *review denied*, 151 Wn.2d 1034 (2004)). *Mackey* dealt with the permissible scope of investigation following a traffic stop, and addressed only the Fourth Amendment.

The *Hos* court also held that requiring police to use the least intrusive means to fulfill their “community caretaking” function “would defeat the purpose of the community caretaking exception – to protect the citizens and property of Washington.” *Hos*, at \_\_\_\_\_. This is incorrect. The “least intrusive means” standard is flexible—it allows officers to reject

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<sup>8</sup> By contrast, the Fourth Amendment exclusionary rule is subject to exceptions, which are justified when the rule would “not result in appreciable deterrence” of police misconduct. *United States v. Janis*, 428 U.S. 433, 454, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976). *See also e.g., United States v. Leon*, 468 U.S. 897, 919-920, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (exception where searching officer executes defective search warrant in “good faith”); *Arizona v. Evans*, 514 U.S. 1, 14, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (exception for clerical errors by court employees); *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954) (exception for impeachment purposes).

those options that are unworkable. If officers are unable to protect citizens and property through a particular means, that means is not “available” and the constitution does not require them to attempt it. The least intrusive means requirement only prohibits officers from intruding unnecessarily; it does not prohibit *necessary* actions. *Houser*, at 156. Thus, for example, an officer may not break down a door where knocking will suffice, but might enter with force if emergency circumstances warrant such a course of action.

E. The warrantless search in this case was unlawful even under the federal “community caretaking” exception.

In very limited circumstances, officers may enter a home to provide emergency aid as part of their “community caretaking” function. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). An intrusion under the emergency exception is permitted “only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.” *Id.*, at 802.

The exception applies only “where there is an imminent threat of substantial injury....” *State v. Leffler*, 142 Wn.App. 175, 184, 178 P.3d

1042 (2007). Furthermore, the officers must reasonably believe that a specific person or persons need immediate help for health or safety reasons. *Id.*, at 182.

In this case, Deputy McKnight unnecessarily entered Mr. Stanley's home. According to the deputy's testimony, Mr. Stanley was out of his view, but close enough that Ms. Guerra could see him.<sup>9</sup> RP 36. Mr. Stanley could have been summoned to the door without an intrusion by the deputy. The deputy did not have any information suggesting that a third party might be present, and he did not search for any third parties. RP 3-21. Although the initial call presented alarming information, any belief that someone needed assistance was quickly dispelled. Deputy McKnight was free to ask permission to enter, or to ask either party to step outside for an interview; such actions would be consistent with his duty to investigate the domestic violence call. However, he was not justified in crossing the threshold. *Thompson, supra.*

Accordingly, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *Id.*

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<sup>9</sup> Mr. Stanley and Ms. Guerra both testified that the deputy spoke to Mr. Stanley from outside the house, and entered after speaking to him. RP 26, 36-37.

F. The warrantless seizure was not justified as part of a “protective sweep.”

Police may perform a limited “protective sweep” to ensure their safety when making an arrest. *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). *State v. Boyer*, 124 Wn.App. 593, 600-602, 102 P.3d 833 (2004). The exception applies only to arrest situations; in Washington, it does not even extend to the execution of a search warrant. *Id.*

In this case, the trial court held that “[a]n officer has the right to conduct a brief sweep of an area to ensure officer safety,” and found that Deputy McKnight “was entitled to make a protective sweep...” Conclusions of Law Nos. 2.2, 2.5, 2.6, Findings of Fact and Conclusions of Law, CP 29. Because Deputy McKnight had made no arrest at the time of his entry into the home, his entry cannot be justified under the “protective sweep” exception.<sup>10</sup> *Id.*

G. The warrantless search was not justified under the “exigent circumstances” exception.

Police may search without a warrant when exigent circumstances justify the search. *State v. Smith*, 165 Wn.2d 511, 517-518, 199 P.3d 386

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<sup>10</sup> Furthermore, where evidence is observed in plain view during a legitimate protective sweep, the police may be required to obtain a search warrant to seize that evidence. *United States v. Murphy*, 516 F.3d 1117 (C.A.9 2008).

(2009). Such searches are permitted when obtaining a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. *Id.* A reviewing court examines the totality of the circumstances, including six factors outlined by the Supreme Court:

(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.

*Id.* (quoting *State v. Cardenas*, 146 Wn.2d 400, 406, 47 P.3d 127 (2002)).

Exigent circumstances do not justify the warrantless entry in this case. Nothing in the circumstances suggested a threat to officer safety, a possibility of escape, or a risk that evidence would be destroyed. The only factor arguably weighing in favor of Deputy McKnight's decision to cross the threshold was the "gravity or violent nature" of the alleged offense, given that the deputy suspected domestic violence. This case does not present the "unusual facts" necessary to justify a warrantless search under the 'exigent circumstances' exception to the warrant requirement. *Smith*, at 518.

Accordingly, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *Eisfeldt, supra*.

**II. THE TRIAL JUDGE MISCHARACTERIZED THE EVIDENCE IN ADOPTING FINDING OF FACT NO. 1.3.**

A trial court's findings are reviewed for substantial evidence.

*Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.*, at 391; *State v. Carlson*, 130 Wn.App. 589, 592, 123 P.3d 891 (2005). It is more than "a mere scintilla" of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

Findings of fact that are incorrectly designated conclusions of law are treated as findings, and analyzed for substantial evidence. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 557 n. 12, 132 P. 3d 789 (2006). Similarly, legal conclusions that have erroneously been labeled findings of fact are reviewed *de novo*. *Id.*, at 556.

Here, the trial judge found that dispatch told Deputy McKnight "that the reporting party heard a sound that sounded like someone was being strangled and then everything was silent." Finding of Fact No. 1.3, Findings of Fact and Conclusions of Law, CP 28. This finding mischaracterizes the evidence. The testimony was that the reporting party

“thought they heard the female being choked, there was a long, quiet pause, then heard a male say, oh, my God, oh, my God.”<sup>11</sup> RP 5. From this testimony, it appears that the neighbor did not hear “a sound that sounded like someone was being strangled;” instead, the neighbor heard silence, and interpreted it as choking because it was preceded by an argument and followed by the male’s distressed cry. RP 5.

Because Finding of Fact No. 1.3 is not supported by substantial evidence, it must be stricken. It cannot justify the warrantless intrusion in this case.

### **CONCLUSION**

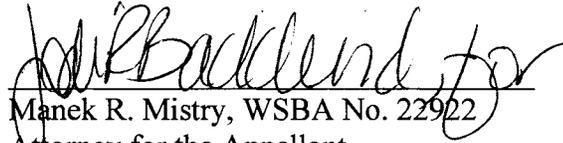
For the foregoing reasons, Mr. Stanley’s conviction must be reversed and the case dismissed.

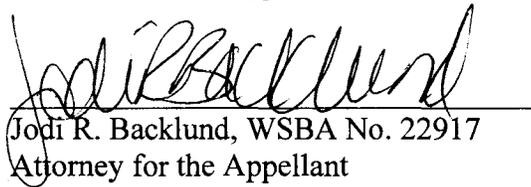
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<sup>11</sup> This information did not appear in the officers’ reports. RP 10. The prosecutor did not introduce the 911 call into evidence. RP 3-39.

Respectfully submitted on March 15, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Carl Stanley  
115 Lakewood Dr.  
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and to:

Lewis County Prosecuting Attorney  
MS:pro01  
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 15, 2010.

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 March 15, 2010.

  
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