

70898-8

70898-8

NO. 70898-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHENG SAEPHAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An officer may make a warrantless entry into a home under the emergency aid exception when the officer reasonably believes that specific persons are likely in need of assistance for health or safety concerns and the need for assistance is reasonably associated with the place to be searched. Here, an officer with previous knowledge of the defendant's history of mental instability, drug use, domestic violence, and use of a knife the day before, responded to a call describing the exact same man being back at the family home, either armed with knives or known to carry knives, in a house with five people inside, and threatening his sister and her unborn child out of anger at her role in trying to involuntarily commit him the day before. Did the trial court properly find that the officer entered the home under the emergency aid exception to detain the defendant and address the immediate safety concerns of remaining family members inside?

2. A reviewing court may affirm the lower court's judgment on any ground within the pleadings and proof. The trial court here concluded that the officer had justifiably entered the home under the emergency aid exception as well as finding factors that would

support an entry under exigent circumstances. Given the interrelated factors in these two similar doctrines, does the record support the finding that both applied in the circumstances here?

3. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, the defendant is not prejudiced. Here, the findings of fact were entered by the trial court while the appeal was pending and the trial deputy submitted a declaration under penalty of perjury swearing that she had no knowledge of the issues on appeal. Does the record support the conclusion that the defendant did not suffer prejudice from the entry of the findings?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Cheng Saephan was charged by amended information with Violation of the Uniform Controlled Substances Act ("VUCSA") for possessing methamphetamine, and misdemeanor harassment for threatening his sister Fey Saephan.¹ CP 6-7. Trial

¹ Because Fey Saephan and Cheng Saephan share the same last name they will be referred to by their first names. No disrespect is intended.

began on September 4, 2013. RP 3.² On that date, after a hearing with testimony from responding police officers, the trial court denied Cheng's CrR 3.6 motion to suppress. CP170-72; RP 90-91. A jury convicted Cheng of VUCSA and acquitted him of harassment. CP 72-73. The court sentenced Cheng to six months in custody and 180 days of Enhanced CCAP. CP 74-80. The court entered findings of fact and conclusions of law on April 18, 2014, with both counsel appearing telephonically. CP 176. On April 24, 2014, the trial deputy filed a "Declaration of Deputy Prosecuting Attorney" outlining the procedures she took in filing the findings. CP 174-75.

2. 3.6 HEARING (SUBSTANTIVE FACTS).

On May 9, 2013, Seattle Police Officer Eric Beseler responded to the Saephan family residence on South Morgan Street after receiving information from dispatch that Cheng Saephan had been acting erratically, speaking in gibberish, smoking methamphetamine, swiping the air with a knife, and causing concern to his family. CP 170; RP 13. Once at the house,

² The verbatim report of proceedings consists of three volumes paginated consecutively: Volume I (September 4, 2013, pretrial hearings); Volume II (September 9, 2013, trial); and Volume III (September 10-12, 2013, trial/verdict/sentencing). They will be referred to as "RP."

Beseler removed Cheng, who was talking to himself in the shower, from the bathroom; this upset Cheng. CP 171; RP 22-23.³ Beseler had Cheng evaluated by the Seattle Fire Department after observing him speak in gibberish about spirits, claiming that the President of the United States had told Cheng to call him “lightning bolt.” RP 13. Beseler spoke to other family members, who lived in the house, including Cheng’s sister Fey, who told him that Cheng had been waving a knife around and stabbing it into the ground outside. RP 23-24. Beseler believed that medics took Cheng to Harborview for a mental health evaluation to determine whether to involuntarily commit him, but did not know what transpired there. CP 171; RP 14, 25.

On May 10, 2013, Beseler was again working patrol in the same area when he received another dispatch to the Saephan residence at 12:41 p.m., this time informing him that Cheng’s sister Fey was feeling threatened, harassed, and fearful of her brother. CP 171; RP 14, 28. Prior to entering the house, Beseler consulted the dispatch CADLOG, which stated that at 12:41 p.m. the “caller’s brother just came home from the hospital and was threatening to

³ Although Cheng did not testify at the 3.6 hearing, he confirmed his unhappiness during one of several outbursts during those proceedings about being “snatched” out of the shower. RP 11-13, 30-31, 62-67, 92-100, 109, 111.

kill them . . . was down in the basement smoking meth, known to carry knives” and that “there are five people in the house total, suspect is still in the basement.” RP 41-43. This information was also conveyed to the backup officer arriving later. CP 171. Beseler recognized the address as the same one from the previous day. RP 14. At that point, he had been to the house at least two other times including the knife incident from the day before. RP 18. The previous year, he had arrested Cheng for violating a court order against his father at the residence, during which Cheng had taken an aggressive posture against the protected party. RP 43-44.

When Beseler arrived at the residence on May 10, he “absolutely” had concerns for the safety of the family members in the house based on his personal knowledge of the defendant’s past aggressiveness, mental instability, alleged drug use, and his knife play from the day before. CP 171-72; RP 15. Beseler was also concerned for his own safety and the health of the defendant. RP 15, 32-34. Beseler had been an officer for five years, had received training in domestic violence situations, and had responded to “easily hundreds . . . perhaps thousands” of domestic violence calls. RP 14-15. His specific concerns when responding to these calls is “safety first and foremost [of] . . . [e]verybody

involved: myself, fellow officers, everybody inside the house, victims, even suspects.” Id. at 15. Beseler was the lead officer during the incident on May 10. RP 38, 51.

Beseler arrived at the residence on May 10 at 12:44 p.m., three minutes after receiving the initial call. RP 27-28. He was joined by Seattle Police Officer Richard Bourns seven minutes later. RP 28. Bourns understood the call to be a domestic violence situation involving a family member who had threatened to kill another family member and was known to carry knives. RP 49-50. Bourns, who has 22 years of law enforcement experience, stated that he had been to so many domestic violence calls in his career that there was “no way to even estimate the number.” RP 50. Such calls are “dynamic scene[s]” in which his priority is to “render the scene safe.” Id.

Upon his arrival, Beseler spoke with Fey; she told him that she felt threatened by Cheng, who was upset that she’d called the police and gotten him involuntarily committed the day before, and had threatened to kill her and her unborn child. CP 171; RP 16. Although Beseler could not specifically remember when or where this conversation took place, he believed Fey was the first person

he met and that he would have been waiting outside the house for backup officers prior to entering the house. CP 171; RP 28, 30.

When Bourns pulled up to the house, he saw Beseler getting out of his car and walking toward a female in front of the house, whom Bourns presumed to be complainant Fey. CP 171; RP 51, 59. The female had a look of concern on her face. Id. Bourns followed on foot behind Beseler, who was speaking with the female; because Bourns was 15 feet away, he did not hear the content of the conversation. CP 171; RP 51, 59. Bourns estimated the conversation lasted about 30 seconds. RP 59. The court found that “Beseler spoke with [Fey] prior to the officers entering the home” based on the fact that Bourns “clearly observed [Beseler and Fey] having that initial conversation prior to entering the house.” CP 171. Beseler did not specifically recall whether or not Fey told him whether Cheng had a knife or access to knives on May 10 but was “more concerned about the fact that [Cheng] was allegedly armed with a knife earlier that [prior] day and plunging a knife into the dirt.” RP 33.

After speaking with Fey, Beseler headed toward the basement door with Bourns and pushed it open. At that time, Beseler did not know whether Cheng’s parents were upstairs or in

the basement as well. RP 16. Beseler stepped inside with Bourns behind him. RP 70. There were many items stacked inside. RP 69. Bourns heard Beseler call to Cheng inside the house, but no one responded.⁴ There were some noises inside that sounded like a voice, but Bourns could not tell what was being said. RP 53. Eventually, Cheng emerged from a back bedroom and started to walk out with his hands raised, but then stopped 20 feet away from the officers and appeared confused. CP 172; RP 37, 53.

From their vantage point, neither officer could tell whether Cheng had access to any weapons at that time. CP 172; RP 17-18, 53. At the time of entry, Bourns also had concerns about family members in the house and could not rule out Cheng's access to the house from the basement. CP 172; RP 53. Beseler kept trying to bring Cheng toward them; per Bourns, "We didn't want to get sucked into the residence unless we had to." RP 72. However, despite Beseler's continued requests to come out of the house, the defendant "just looked at us like he didn't understand." RP 54.

⁴ While Beseler did not recall whether he knocked, "typically [I] would announce Seattle Police before entering so that the person would know that a police officer was coming in." RP 36.

At that point, Beseler believed they had to “physically take control of [Cheng] and put him in handcuffs to make sure that he couldn’t access any weapons.” RP 18. Cheng “would have been placed in the handcuffs for safety reasons” but Beseler also acknowledged that “by the fact of being placed in handcuffs, it was [considered] an arrest.”⁵ RP 20. Beseler explained that before leaving a domestic violence call, he would “want to make sure that there’s a safe environment for the family. I don’t want to leave somebody in a house where they’re going to be in danger of being attacked by anybody. If there’s a suspect I can place in custody at least to detain them, I would do so.” RP 19. Because domestic violence situations can “change very suddenly” and “be calm one minute and chaos the next,” Beseler noted that “until you have people separated, isolated or under some kind of control, you’re not certain what they’re going to do.” RP 41.

After the attempt to draw Cheng toward them failed, the officers grabbed Cheng’s arms and escorted him outside, where Beseler handcuffed him for officer safety reasons and handed him

⁵ Beseler testified that his decision to arrest Cheng was made after the investigation and noted that “if there was a reason to let him go after the investigation, if there had been no crime, then I would have had the sergeant respond to the scene and we would have released him from the handcuffs there.” RP 41. The court found that at the time of being handcuffed, Cheng was under arrest for the reported threats to family members. CP 172.

off to Bourns, who then escorted Cheng to the police car.⁶ CP 172; RP 18, 38, 40, 54-56. Beseler did not see the later search of Cheng, which Bourns performed next to his patrol car. RP 38, 56. During that search, Bourns found methamphetamine on Cheng's person. CP 172; RP 57.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS BECAUSE THE EMERGENCY AID EXCEPTION ALLOWED WARRANTLESS ENTRY INTO THE BASEMENT.

Cheng contends that the trial court should have granted his motion to suppress evidence because no legal exception applied to the warrantless entry into the house. This claim should be rejected. The officers' brief entry into the house was justified under the emergency aid exception.

a. Standard Of Review.

Substantial evidence exists to support the court's factual findings when there is "sufficient quantity of evidence in the record

⁶ Beseler believed that Cheng was placed immediately into handcuffs inside, RP 37; however, based on Bourns' testimony, the court found that the handcuffing occurred outside. CP 172; RP 56, 72.

to persuade a fair-minded, rational person of the truth of the finding.” State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). Unchallenged findings of fact are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The legal conclusions of the court are reviewed de novo. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

b. The Trial Court Properly Found That The
Emergency Aid Exception Justified Entry Into
The House.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). Article I, section 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” As a general rule, warrantless searches and seizures are per se unreasonable, unless the State can show that the search falls under one of the exceptions to the warrant requirement. Day, 161 Wn.2d at 893-94.

The emergency aid exception is a “well-established” exception to the warrant requirement. State v. Gocken, 71

Wn. App. 267, 274, 857 P.2d 1074 (1993); State v. Muir, 67 Wn. App. 149, 152, 835 P.2d 1049 (1992). This exception emerges from law enforcement's "community caretaking function" and "allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance." Schultz, 170 Wn.2d at 754 (quoting State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004)).

Under the emergency aid exception, an officer has traditionally been allowed to enter a home without a warrant when (1) the officer subjectively believes that someone likely needs assistance for health or safety reasons, (2) the belief is objectively reasonable, and (3) the officer has a reasonable basis to associate the need for assistance with the place searched. State v. Johnson, 104 Wn. App. 409, 16 P.3d 680 (2001) (citing Gocken, 71 Wn. App. at 276-77). In 2011, the Washington Supreme Court articulated three additional, somewhat overlapping requirements: "(4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search." Schultz, 170 Wn.2d at 754. The court

suggested the final three factors were prongs added by the Court of Appeals.⁷

The additional three factors in Schultz appear to be dicta, as the court did not apply any of those factors in that case, and the ruling turned solely on the original second factor of whether the belief that someone needed assistance for health or safety concerns was reasonable. 170 Wn.2d at 760-61 (majority), 763 (Fairhurst, J. dissenting). In the only Washington Supreme Court case to address the emergency aid exception since Schultz, the court returned to a three-factor test without addressing Schultz, holding that a warrantless search of a residence is lawful if (1) the

⁷ A close look at prior cases, however, does not support this proposition. The requirement of no pretext, for example, was described by the Court of Appeals as the ultimate *goal* that could be met by satisfying the first three factors, not a supplementary prong itself. See Gocken, 71 Wn. App. at 277 (“[T]he State can demonstrate that an officer’s warrantless entry is not merely a pretext . . . by proving” the first three prongs); State v. Lynd, 54 Wn. App. 18, 21, 771 P.2d 770 (1989) (stating that the court must be satisfied there was no pretext and “[t]o that end, the State must show” the subjective and objective reasonableness of the need for emergency assistance and the place searched) (emphasis added); Johnson, 104 Wn. App. at 414-15 (holding that the emergency aid exception requires a lack of pretext and “[t]hus. . . may be invoked only when” the first three prongs of the test are satisfied) (emphasis added). Furthermore, Schultz’s requirement of an “imminent threat” of injury, construed strictly, would exclude situations where emergency assistance is needed for injuries already inflicted. See Webster’s Third New International Dictionary 1130 (1993) (defining “imminent” as “ready to take place; near at hand; impending”). Finally, the two cases cited by Schultz as requiring “specific persons” in need were methamphetamine lab cases expressing reluctance to extend the [emergency aid] doctrine when officers “express only a generalized fear that methamphetamine labs and their ingredients are dangerous to people who might live in the neighborhood.” State v. Leffler, 142 Wn. App. 175, 182-83, 178 P.3d 1042 (2007); State v. Lawson, 135 Wn. App. 430, 438, 144 P.3d 377 (2006).

officer “has a reasonable belief that assistance is immediately required to protect life or property, (2) the search is not primarily motivated by an intent to arrest and seize evidence, and (3) there is probable cause to associate the emergency with the place to be searched.” State v. Smith, 177 Wn.2d 533, 541, 303 P.3d 1047 (2013).

An officer’s subjective belief is a critical component in emergency aid analysis: “[T]he officer’s motivation is the linchpin in the assertion of the emergency exception.” State v. Bakke, 44 Wn. App. 830, 837, 723 P.2d 534 (1986). Furthermore, the presence of domestic violence is an important factor to be considered when evaluating an officer’s subjective belief that someone likely needs assistance for health or safety reasons. Schultz, 170 Wn.2d at 756.

In order to meet the subjective belief requirement, there must be “some evidence to support that the officers believed they needed to enter a residence because of an ongoing risk to the health or safety of someone inside the residence.” State v. Williams, 148 Wn. App. 678, 686, 201 P.3d 678 (2009). In Williams, the court held that the emergency aid exception did not apply because “missing . . . is any indication that before entering,

officers actually believed that someone inside the hotel room might need medical assistance or be in danger.” Id. at 685. An officer’s testimony that he believed someone inside a residence likely needed assistance, on the other hand, will satisfy this prong. State v. Menz, 75 Wn. App. 351, 354, 880 P.2d 48 (1994).

Courts have long urged that the assessment of both an officer’s subjective belief in the existence of an emergency and the objective reasonableness of that belief must be made from the facts as they appeared to the officer at the time: “Whether an exigency existed and whether the response of the police was reasonable and therefore lawful are matters to be evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.” State v. Schlieker, 115 Wn. App. 264, 270, 62 P.3d 520 (2003) (quoting Bakke, 44 Wn. App. at 837; see also Lawson, 135 Wn. App. at 435 (2006) (“When analyzing these factors, we view the officer’s actions as the situation appeared to the officer at the time.”). The deference afforded to the officer’s judgment at the time of the event arises from the underlying goal of the emergency aid exception, which is to ensure prompt aid without delay:

When an officer believes in good faith that someone's health or safety may be endangered, particularly if that person is known to have physical or mental problems, public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer that assistance while a warrant is obtained. To the contrary, the officer could be considered derelict by *not* acting promptly to ascertain if someone needed help.

Gocken, 71 Wn. App. at 276 (italics in original).

Here, the State satisfied the subjective component of the emergency aid analysis. Officer Beseler, the lead officer who performed the seizure of Cheng in the basement, testified that he "absolutely" had concerns for the safety of the family members in the house prior to entry into the basement. CP 172; RP 15. This was based on his multiple personal experiences with Cheng, which demonstrated Cheng's significant mental health issues and violent proclivities, and the dispatch information on May 10 that Cheng had threatened his sister and was known to carry knives, which Beseler testified he took "very seriously." CP 171; RP 41-42, 44. Beseler had been told there were five people in the house, and he knew the siblings lived with their parents based on his prior contacts there. CP 171; RP 43, 141. Officer Bourns also testified that he "certainly" had concerns about family members who might have been in the house at the time. RP 53.

As noted above, when analyzing the second prong, the objective reasonableness of the officer's belief, a reviewing court must take into account the circumstances known to the officer at the time. At the very least, this includes some evidence to support an officer's belief that there is someone inside the dwelling who needs assistance. Muir, 67 Wn. App. at 157 (finding the entry unreasonable because dispatch informed officer no one was in the house and officer had no belief that anyone was present or in distress); Menz, 75 Wn. App. at 354 (finding the entry reasonable because police were responding to a domestic violence report and found the front door open on a winter night, with lights and television on, but no answer from inside).

The presence of domestic violence also affects the objective reasonableness of an officer's belief in the need for emergency assistance. Schultz, 170 Wn.2d at 756, 759. In domestic violence situations, factors that should be taken into account include "*past police responses to the residence, reports of threats, or any other specific information to support a reasonable belief that domestic violence had occurred or was likely to occur, or that the circumstances were volatile and could likely escalate into domestic violence.*" Id. at 761 (emphasis added). The presence of any of

these conditions “certainly. . . may have justified entry” in Schultz, where the information known to the officers prior to entry was limited to a 911 call about two people yelling, a man’s voice at the scene saying he wanted to be left alone, and an “agitated and flustered” woman who answered the door and claimed no one was there. Id. at 750.

The unique and “volatile” dynamics of domestic violence noted in Schultz place an obligation on officers acting under the emergency aid exception to secure the scene inside a home in a manner that ensures not only the present but future safety of victims inside. State v. Raines, 55 Wn. App. 459, 464-67, 778 P.2d 538 (1989); State v. Gibson, 104 Wn. App. 792, 799, 17 P.3d 635 (2001) (justifying officers’ entry into a bedroom to detain a distraught, high defendant who had been told her children would be taken into protective custody, holding that “the exigent circumstances had not ended”).

Raines involved a domestic violence call to a home where officers knew of the defendant’s violent tendencies and his victim’s history of recantation. Id. at 460. Although the victim in Raines insisted that the defendant was not present and closed the bedroom door to forbid the police from entering, the court held that

the officers' entry into the bedroom was justified under the emergency aid exception because of the "duty to ensure the present and *continued* safety and well-being of the occupants . . . by ensuring that Raines posed no continuing threat to them":⁸

Although the dispute had apparently subsided when the officers approached the apartment . . . given their past experience with Raines and Looney, there was a basis for the officers to reasonably believe that *conditions in the apartment were still volatile*. In these circumstances, *the officers had a duty to ensure that the child was safe and that conditions in the apartment had returned to a state of normalcy*. . . . entry into the bedroom was [therefore] justified by exigent circumstances. Recognizing the volatility inherent in domestic disturbances, some jurisdictions permit responding police to "use all reasonable means to prevent further abuse."

Id. at 463-65 (italics added). See also Gibson, 104 Wn. App. at 799 ("The test is whether the exigent circumstances were continuing and, if so, whether the officer's conduct was aimed at controlling these circumstances.").

Because of the special "volatility" of domestic violence situations, the same act that defuses the present threat to occupants in the home also necessarily eliminates the threat in the

⁸ Although the heading of the section examining the reasonableness of the entry is entitled "Exigent Circumstances," the analysis that follows is that of the subjective/objective prongs of the emergency aid exception, and the terms "emergency aid" and "exigent circumstances" are used interchangeably throughout the opinion. Id. at 463-67.

immediate future: the removal of the defendant from the home. This makes sense, because in most cases neutralizing the present and future threat in a domestic violence situation will require removing the defendant, because he is the threat. The court in Raines rejected the defendant's argument for a warrant in such situations because of the urgency of the officers' duty in the face of conditions that are so distinctively volatile: "Given the officers' awareness of Raines' presence in the apartment and his violent propensities, and that Raines had apparently threatened the child, we hold that the officers were justified in proceeding as far as reasonably necessary to ensure that Raines posed no present or continuing threat to [the victims]. A more restrictive holding would defeat the salutary purpose of our domestic violence law." Id. at 467.

Here, there was substantial evidence to support the reasonableness of Officer Beseler's belief that someone needed emergency assistance inside the home. He had been to the house to respond to domestic disturbances at least three times in the past year, once to arrest Cheng for violating a court order, during which Cheng also took an aggressive posture against the protected party (his father). RP 18, 43-44. This supported a reasonable belief that

the defendant would act in a hostile manner and would not comply with orders of the court or with law enforcement.

More significantly, Beseler knew Cheng had substantial mental health issues because he had just been there the day before to help take Cheng into custody for a potential involuntary commitment. RP 13. On that date, Beseler not only spoke with the family and learned that Cheng had been plunging a knife into the ground and waving it in the air outside while possibly high on methamphetamine, but personally witnessed him speaking incoherently and nonsensically. RP 13, 23-24. Beseler had also witnessed Cheng's anger at being removed from the shower and taken to Harborview, reinforcing Fey's claim on May 10 that Cheng was upset and making threats against her and her unborn child in retaliation for her attempt to have him committed. RP 16. When dispatch informed Beseler there were five people total in the house on May 10 including Cheng, the dispatcher also said Cheng was threatening to kill "them," implying that the threats were not solely limited to Fey. Furthermore, Beseler did not know at the time whether the parents were upstairs or downstairs with Cheng, adding to the sense of urgency. RP 16.

All of these factors support a finding that the officers believed that entry was necessary to provide emergency assistance. Much of the information from dispatch on May 10, in fact, complemented Beseler's prior knowledge of the family: that the parents lived in the house, that Cheng was known to carry knives, and that he used methamphetamine. RP 41-43. Given the accuracy of these details, it was reasonable for Beseler to take the information from dispatch "very seriously." RP 44. His past personal experiences with Cheng, the information from Fey at the scene, and the details from dispatch all supported "a reasonable belief that domestic violence had occurred or was likely to occur, or that the circumstances were volatile and could likely escalate into domestic violence." Schultz, 179 Wn.2d at 761. Because Cheng and the others were still in the house, the emergent circumstances were ongoing and the officers' conduct in trying to locate and apprehend Cheng was aimed at controlling those circumstances.

There was also substantial evidence to support a reasonable belief associating the need for assistance with the place being searched. Dispatch reported at 12:41 p.m. that Cheng was "still" in the basement, and Beseler arrived only three minutes later at 12:44. RP 27-28, 41-43. Bourns arrived ten minutes after the initial

dispatch, at which point the officers went to locate Cheng. RP 28, 35. Given the short timespan between the initial call and the entry, it was reasonable to believe Cheng was still in the basement. Furthermore, the record is clear that for safety reasons the officers did not engage in an extensive exploration of the basement, and in fact tried to draw the defendant out from inside the threshold in an effort to avoid getting “sucked into the residence unless we had to.” RP 69-70, 72. The area searched was therefore very limited.

Finally, although Smith fails to mention the “additional” three factors listed in Schultz, those factors are still met in this case. The same facts supporting the reasonableness of the place to be searched also provide substantial support for a finding of imminent threat of substantial injury. The 911 call was fresh and officers arrived within minutes, descending to the basement approximately ten minutes after the initial request for assistance. RP 27-28, 35, 41-43. Given the recency of the alleged threat made by a man with demonstrated mental health issues, whose erratic behavior and knife play the day before had brought him to Harborview for potential involuntary commitment, and the presence of family members (including a past victim) inside the house with him,

there was sufficient evidence to establish an imminent threat of substantial injury to persons.

Because dispatch stated that there were five people total in the home and Beseler had prior knowledge that Cheng lived with his family, there was also substantial evidence to find that there were specific persons in need of immediate help. RP 45. Given the satisfaction of the subjective and objective prongs of both the Schultz and Smith requirements, there was also sufficient evidence supporting the lack of a pretext. See n.6, *supra*.

c. Cheng's Detention Did Not Render The Contact A Criminal Investigation "Antithetical" To The Emergency Aid Exception.

Cheng appears to argue that his detention in this case renders the entire contact a criminal investigation, thus negating the applicability of the emergency aid exception. App. Br. 13-14. This argument fails for several reasons. First, the emergency aid exception is not limited to entries made for the sole purpose of locating victims; in some cases, it may involve entries to locate suspects who are perpetrators of the emergency, in order to end the threat to the safety of others inside. Second, the existence of multiple goals when entering a residence is permissible under the

emergency aid exception, as long as the *primary* motivation is not to make an arrest.

Courts have consistently held that entry under the emergency aid exception is not strictly limited to police trying to locate victims.⁹ In Raines, where officers reasonably believed that the suspect was hiding in the bedroom, the court characterized the officers' entry into a bedroom to locate the suspect as a proper extension of the emergency aid exception to "ensure that Raines posed no present or continuing threat to [victim] Looney or her child." 55 Wn. App. at 467. In State v. Jacobs, an officer arrived after receiving a hang-up call from a man who she knew was a past domestic violence victim with a history of recantation. 101 Wn. App. 80, 83, 2 P.3d 974 (2000). When the officer arrived, the man was going in and out of the house and gave inconsistent stories about being beaten; the officer was concerned that the man

⁹ Numerous cases involving potential burglaries in progress also support an entry with the multiple goals of assisting possible victims and apprehending suspects under the emergency aid exception. See State v. Campbell, 15 Wn. App. 98, 99, 547 P.2d 295 (1976) (holding that officers properly entered "to investigate the recent crime, to look for possible participants in the burglary, to search for evidence of the burglary, and to aid any victims"); Menz, 75 Wn. App. at 353 (upholding entry to look in spaces big enough to hide suspects after responding to an anonymous DV call and finding a house with lights on, door open, and no one responding to officers); Bakke, 44 Wn. App. at 838-39 (upholding entry under the emergency aid exception to "look for suspects and preserve the property . . . [s]afeguarding the life and property of the citizenry is an integral part of the police function").

could either be a victim or a suspect and entered the house, where she found the defendant sitting on the couch in violation of a no contact order. Id. Even though the officer's purpose in entering was equivocal in terms of whether she was rendering aid or apprehending someone "in there with a gun . . . waiting for [the victim]," that did not proscribe use of the emergency aid exception. Id. at n.3.

The only limitation placed by courts is that an officer's *primary* motivation may not be to arrest. Gocken, 71 Wn. App. at 275; Williams, 148 Wn. App. at 683 ("Where an officer's primary motivation is to search for evidence or make an arrest, the caretaking function does not create any exception to the search warrant requirement."). Contrary to Cheng's contention that "probable cause to arrest is antithetical to the emergency aid exception because it necessarily indicates a primary purpose of criminal investigation rather than to provide aid to imperiled persons," the need to assist victims and to apprehend suspects often overlap. App. Br. 16. The existence of probable cause that a crime has been committed does not automatically preclude officers from entering a home to locate and apprehend the suspects. Bakke, 44 Wn. App. at 839-40 (holding that the emergency aid

exception justified entry into the defendant's home "given probable cause to believe that [his] home had been burglarized"); Campbell, 15 Wn. App. at 100 ("It is reasonable for officers . . . with probable cause to believe that an open, unsecured dwelling has been recently burglarized, to immediately enter the dwelling . . . [to search] for remaining suspects").

Here, Beseler's primary concern was ensuring the safety of the family inside, not a desire to investigate inside the home. RP 18, 20. Because of the chaotic and unpredictable nature of domestic violence situations, especially one involving a mentally ill person who had recently been using knives aggressively and had been taken involuntarily to Harborview for evaluation, it was reasonable for Beseler to handcuff Cheng to get the scene under control.

Cheng further states that the emergency aid exception must be "strictly circumscribed by the exigencies which justify its initiation." App. Br. 14. The State does not disagree. However, Cheng appears to use this tenet to argue that the apprehension of a suspect and the assistance of potential victims are necessarily mutually exclusive. To say that they may never coexist is not only incorrect but, as shown in burglary and domestic violence

situations, impossible. If one were to follow this principle to its logical conclusion, the emergency aid exception would have permitted the officers in this case only to enter the house to look for the remaining four persons inside, whose location they did not know, as opposed to drawing out and detaining the single suspect in the basement, whose location they did know. This conflicts with the very purpose of the emergency aid exception to effectively render aid in an emergency situation.

Furthermore, in this case, the “investigation” was, as required in State v. Kinzy, “necessary and strictly relevant to performance of the community caretaking function” and “end[ed] when reasons for initiating an encounter [were] fully dispelled.” 141 Wn.2d 373, 388, 5 P.3d 668 (2000). The officers entered briefly to remove Cheng from the basement for safety concerns; they did not go farther into the house to look for evidence such as drugs, and no search of the premises was conducted. RP 19, 56.

d. Any Error In Not Explicitly Addressing All Six Schultz Factors Was Harmless.

The trial court’s conclusion that the officers’ entry was lawful under the emergency aid exception is reviewed de novo.

Garvin, 166 Wn.2d at 249. This Court therefore looks at the record and the trial court's findings of fact to decide for itself whether that decision was legally correct. Id. Even assuming that the trial court did err in not explicitly addressing all six of the Schultz factors in its ruling, the error is harmless if this Court determines that the emergency aid exception does in fact apply on the facts before the trial court.

The officers in this case entered Cheng's home after receiving a report that he was on methamphetamine and had threatened to kill his sister and her unborn baby. Officer Beseler had had prior contacts with Cheng, including an arrest for violation of a court order the prior year and a mental health call the day before during which Cheng was babbling, stabbing a knife into the ground and waving it in the air, and had to be taken to Harborview for potential involuntary commitment. Beseler also had information that there were still four other people in the house with Cheng. Based on these facts and the officers' training and experience, the officers reasonably believed that they were dealing with a volatile domestic violence incident, and that there was an imminent threat of substantial injury to specific persons inside. The trial court

therefore correctly ruled that the officers' entry into the basement was lawful under the emergency aid exception.

2. THE TRIAL COURT PROPERLY FOUND THAT PROBABLE CAUSE TO ARREST FOR FELONY HARASSMENT ALLOWED ENTRY INTO THE HOUSE; ENTRY COULD HAVE BEEN JUSTIFIED BY EXIGENT CIRCUMSTANCES.

Even if this Court finds that the emergency aid exception did not apply here, the entry was still lawful because there was not only probable cause to arrest Cheng for the crime of felony harassment, but exigent circumstances existed to justify a warrantless entry.

The trial court elucidated some of the factors that would allow entry under the exigent circumstances doctrine as well as the emergency aid exception in its findings. This overlapping of issues by the court is not unwarranted, due to the similarity of the two doctrines and the fact that the record supports either conclusion.

The exigent circumstances doctrine states that police may make a warrantless nonconsensual entry into a home in order to search for and arrest a suspected felon if there is probable cause and exigent circumstances. Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); State v. Welker, 37 Wn. App. 628, 632, 638 P.2d 110 (1984).

In order to uphold a warrantless arrest under exigent circumstances, a reviewing court will examine whether the following elements were present: (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect is reasonably believed to be armed; (3) 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) the suspect is likely to escape if not swiftly apprehended; (6) the entry is made peaceably; (7) hot pursuit; (8) fleeing suspect; (9) danger to arresting officer or to the public; (10) mobility of the vehicle; and (11) mobility or destruction of the evidence. State v. Muir, 67 Wn. App. 149, 152, 835 P.2d 1049 (1992). The elements are analyzed under the totality of the circumstances. Welker, 37 Wn. App. at 633.

The similarity of the two doctrines is such that their names are often used interchangeably, with courts declaring justification under one but invoking the elements of the other.¹⁰ Indeed, early cases indicated that the emergency aid exception was an

¹⁰ See e.g. Raines, 55 Wn. App. at 459 (applying the factors for the emergency aid rule under the heading of "Exigent Circumstances" yet holding that "exigent circumstances" justified entry); Bakke, 44 Wn. App. at 830, 832, 837, 839-40 (stating the question presented as whether the "emergency exception" applies and resolving under that test, but holding that "exigent circumstances" justified the warrantless entry, while citing caselaw for both throughout); Leffler, 142 Wn. App. at 181 ("officers may enter a building without a warrant when facing exigent circumstances (emergency exception)").

offspring of the exigent circumstances principle. State v. Sanders, 8 Wn. App. 306, 310, 506 P.2d 892 (1973) (“The emergency rule could be justified under the well recognized exigent circumstances exception to the rules of search and seizure”); State v. Nichols, 20 Wn. App. 462, 465, 581 P.2d 1371 (1978) (holding that “exigent circumstances, including the emergency rule, can justify exception to the general rule that a warrant is necessary for a valid search”).

This Court has held that both doctrines can coexist and apply to the same fact pattern. Muir, 67 Wn. App. at 152. In Muir, this Court comprehensively explored the intersection of the two, especially in the case of burglaries where exigent circumstances allow warrantless entry since the burglars could still be present inside the residence, but the emergency exception also applies because of victims inside who may be in need of aid. 67 Wn. App. at 153-54. “[T]o the extent that [the emergency aid exception] is distinguishable from exigent circumstances,” the court held that the former did not require probable cause, only the lesser standard of a “perceived need to render aid or assistance.” Id. at 156. In doing so, Muir reiterated the holding in prior cases that the existence of probable cause does not preclude the applicability of the

emergency aid exception, but rather that probable cause is not *required* for it to be used. Id.

A court can affirm a lower court's judgment on any ground within the pleadings and proof. State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997); Ertman v. City of Olympia, 95 Wn. 2d 105, 108, 621 P.2d 724 (1980) ("where a judgment or order is correct, it will not be reversed merely because the trial court gave the wrong reason for its rendition").

Here, the totality of the circumstances supports a finding that the exigent circumstances exception also justified entry. Cheng's threat to kill his sister and her unborn baby constitutes a grave offense. He was reasonably believed to be armed based on the information from dispatch and Officer Beseler's discussion with Fey about Cheng's recent waving and stabbing of the knife into the ground the day before. There was reasonably trustworthy information that Cheng was guilty of the crime alleged, based on the consistent statements from dispatch and Cheng's sister, and Beseler's past knowledge of Cheng's behavior.

There was also strong reason to believe that Cheng was on the premises and in the basement. Furthermore, although Beseler drew his gun when he entered the basement, the entry was brief

and not made unpeaceably so as to involve a broken door or physical harm to Cheng. Based on his mental instability, possible drug use, and recent use of a knife, Cheng presented a danger to the arresting officer such that Beseler did not go down to the basement until backup arrived. Although there was no evidence that Cheng was likely to escape or that evidence was evanescent, the exigent circumstances test is viewed under totality of the circumstances, and thus does not require that every element be found. The record thus supports this exception for warrantless entry and this Court may affirm on this basis.

3. CHENG WAS NOT PREJUDICED BY THE DELAY IN ENTRY OF CrR 3.6 FINDINGS.

Cheng argues that his case should be remanded for entry of findings of fact and conclusions of law under CrR 3.6(b). This argument is no longer necessary because the trial court entered written findings on April 18, 2014, and moreover, Cheng cannot show any prejudice. CP 170-73.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and

conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, the court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Cheng's appeal. No prejudice results.

Nor can Cheng establish prejudice resulting from the content of these findings. The trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal and signed an affidavit indicating the protocol she followed to isolate herself from those issues. CP 174-75.

In light of the above, Cheng cannot demonstrate prejudice. The trial court's CrR 3.6 findings of fact and conclusions of law are properly before this Court.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Cheng's conviction.

DATED this 27 day of May, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CHENG SAEPHAN, Cause No. 70898-8-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/27/14
Date

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