IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 65545-1-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	
BRANDON ANTHONY BAKER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 29, 2011

Spearman, J. — Brandon Baker was convicted by a jury of domestic violence malicious mischief in the first degree for damaging his wife's sport utility vehicle. He challenges his conviction on the basis that the trial court erred in denying his CrR 3.6 motion to suppress evidence obtained from police officers' warrantless entry into his house. This evidence included the officers' photographs of and testimony about disarray they observed inside the house. We agree with Baker that the officers' entry was not permissible under either of the State's urged exceptions to the warrant requirement, but because any error in admitting the evidence was harmless beyond a reasonable doubt, we affirm.

FACTS

The facts as testified to during the CrR 3.6 hearing are as follows. On the morning of April 25, 2009, police officers Larry Groom and Ross Fryberg and

police sergeant Jeff Jira responded to a 911 call reporting that someone had rammed a pickup truck into a sport utility vehicle (SUV) in the driveway of a house in Tulalip. Jira was advised by dispatch that Christine Baker[1] called police after being contacted by a neighbor who informed her that her husband was destroying her car. Officers knew Christine was not at the scene. The day before, Fryberg had performed a "welfare check" at that house after Christine called police and said she was concerned that her husband might be suicidal. She said she and Baker were going through a divorce and she had moved out.

Groom arrived at the house and saw a truck parked across the driveway near a heavily damaged SUV. The passenger side of the SUV was crushed in and the window was shattered. Groom saw two men on the driveway and called them over. One of them, Peter Yarema, came but the other, Baker, ran behind the house. Officers Fryberg and Jira arrived and walked toward the rear of the house to look for Baker. Groom heard a door slam and advised the other officers he believed Baker was inside the house. An onlooker also called out that Baker had run into the house. Jira determined that the SUV was registered to Christine. Yarema told officers he was Baker's neighbor and saw Baker ramming his truck into the SUV, so he came over to try to calm him down.[2] He said he did not think Baker had any weapons.

[1] For clarity, Christine Baker will be referred to by her first name only.

[2] At trial, Yarema testified that he was inside his house when he heard a smashing sound. He looked out the window and saw Baker parking his truck in the driveway.

Officers believed Baker was inside the house, so they directed neighbors to move away. At that point, Jira felt he was facing a barricaded-suspect situation. He knew of no other people in the house. Officers heard a motor revving in the garage, which one officer thought was an all-terrain vehicle (ATV). Jira instructed Groom and Fryberg to approach the garage and pull out their tasers. The garage door opened and Baker drove out on an ATV headed in the officers' direction. Fryberg tased Baker, knocking him off the ATV. Baker was placed under arrest. Jira testified that he felt relief at that point because he knew he would be "going home for sure." Baker was read his Miranda[3] rights, but indicated that he did not understand, so Jira instructed the other officers not to ask him any questions. They brought evidence bags and a camera to collect evidence from the vehicles and from the deployment of the taser.

Officers called aid personnel to check Baker for injuries, but first Jira decided to clear the house. Officers testified their purpose was to safeguard the scene for aid personnel and ensure there was no one else inside, either injured or posing a threat. They testified aid personnel will not approach a scene until it is secured, because they are not armed. They further testified that because of the house's open door, the scene was not secure. Groom testified he had responded to many situations in which individuals he was unaware of were inside a residence. Furthermore, there was significant damage outside the house, so

[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

someone else may also have been responsible.

Aid personnel arrived and waited away from the house. Jira directed Groom and Fryberg to clear the house. Approximately seven minutes passed from when Baker was tased until officers entered the house. One officer entered and the other followed two minutes later. The front door was open and there was damage to the door casing, as well as footprints on the door. Officers could see a television lying on the floor through the doorway. They found no one inside, but observed disarray: appliances were on the floor, furniture upended, and light fixtures pulled out. They did not collect, touch, or move anything. Groom and Fryberg took approximately five minutes to conduct the sweep. About half a minute before they exited the house, fire department personnel approached Jira and Baker. When Groom and Fryberg apprised Jira of the damage, he directed them to go back inside the house to take pictures. Jira called Christine.

Baker was charged with one count of assault in the second degree and one count of domestic violence malicious mischief in the first degree. Regarding the latter, the State alleged that Baker knowingly and maliciously caused physical damage in excess of $1,500 to Christine's SUV and to property inside the house. Baker sought to suppress the results of the officers' entry into the house, in particular the photographs. The trial court denied the motion after a CrR 3.6 hearing, entering written findings of fact and conclusions of law. It concluded that the officers' initial entry was justified to ensure that the scene was secure and

that the second entry was a continuation of the first, with the officers merely documenting what they saw during the first entry.[4] It concluded that it was reasonable for the officers to enter without a search warrant because "in this situation, a dissolution, bad things could happen to both persons and property."

At trial, the three officers testified substantially as they did at the suppression hearing. Yarema and Christine also testified. Christine testified about damage inside the house the day before the incident and damage she observed after Baker was taken to jail, using the officers' photographs in testifying about the latter. She testified about the damage to her SUV and how much it cost her to replace other personal items. A claims adjuster testified about the company's damage estimate based on cost to repair the SUV, which came to $7,000 in parts alone. The insurance company declared the car a total loss, paying Christine $700 and the credit union $6,900.

During closing argument, the prosecutor argued that the malicious mischief charge was based on damage to the SUV specifically and that damage to items in the house helped prove the element of malice. The jury found Baker guilty of malicious mischief in the first degree but acquitted him of assault. He was sentenced within the standard range.

DISCUSSION

[4] It is unclear which exception to the warrant requirement the trial court found was met, although it cited the "community caretaking and the officer and public safety exceptions," and then concluded that the entry "was a reasonable response to the exigencies and circumstances of this particular incident."

Baker's only claim on appeal is that the officers' warrantless entry into his house was unlawful and violated his rights under the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution. He argues the entry did not meet any exception to the warrant requirement, where he was arrested outside his house and officers had no specific reason to believe anyone was inside the house that posed a threat or needed immediate assistance. The State argues the entry was justified under the emergency aid exception and as a protective sweep incident to arrest. We conclude the entry did not meet either exception. Nonetheless, we hold the error was harmless beyond a reasonable doubt because the untainted evidence in this case was so overwhelming as to necessarily lead to a finding of guilt.

We review a trial court's denial of a CrR 3.6 motion to suppress "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." State v. Cole, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004) (citing State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Unchallenged findings of fact are verities on appeal. State v. Balch, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002). Conclusions of law, including mischaracterized "findings," are reviewed de novo. Cole, 122 Wn. App. at 323.

The United States and Washington Constitutions prohibit most warrantless searches of homes. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009).

Police may only search without a warrant under one of the "few jealously and carefully drawn exceptions to the warrant requirement." Id. (quoting State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000) (internal quotation marks omitted)). The State bears the burden of proving that any warrantless search fits within one of these exceptions. Id. Here, the State argues, the officers' entry was permissible under the emergency aid exception[5] and as a protective sweep incident to arrest. We consider those in turn.

Emergency Aid Exception

Under the emergency aid exception, 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. State v. Lynd, 54 Wn. App. 18, 21, 771 P.2d 770 (1989). The State must show that (1) the searching officer subjectively believed an emergency

[5] We note that the State's briefing of what it describes as the exigent circumstances exception mostly relates to the emergency aid exception. Accordingly, our analysis will focus on the emergency aid exception. The Washington Supreme Court has explained that although some older cases treat the emergency aid exception as a subset of the exigent circumstances exception, the more recent cases analyze it under the separate community caretaking exception. State v. Smith, 165 Wn.2d 511, 519, 199 P.3d 386 (2009). Moreover, we note that the exigent circumstances exception is not particularly relevant here. In determining whether exigent circumstances exist, the court looks at the totality of the situation in which the circumstance arose. Smith, 165 Wn.2d at 518. The court considers: (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) whether there is strong reason to believe the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) whether the entry can be made peaceably. Id. Not all of these must be met, but the circumstances must show that the officer needed to act quickly. State v. Cardenas, 146 Wn.2d 400, 408, 47 P.3d 127 (2002). Here, several of the six factors are not applicable because Baker was the only suspect at the time of the entry and he was arrested and in handcuffs. On the whole, the circumstances show that the officers did not need to act quickly in entering the house, because they did not in fact act quickly. Rather, they waited approximately seven minutes after tasing Baker to enter the house.

existed; (2) a reasonable person in the same circumstances would have thought an emergency existed; (3) there must be a reasonable basis for associating the need for assistance with the place that is entered; (4) 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. Id. at 21; State v. Schultz, 170 Wn.2d 746, 754-55, 248 P.3d 484 (2011) (adding the last three elements). The failure to meet any of these elements is "fatal to the lawfulness of the State's exercise of authority." Id. at 760 n. 5.

We conclude the officers' entry was not justified under the emergency aid exception because the State did not show there was an imminent threat of substantial injury to persons or property or that a specific person or property needed immediate help. The State's arguments that these elements were met are not well taken. It contends that Baker was in need of immediate medical attention because he had just been tased and could have been seriously injured. The State then cites the officers' testimony that aid personnel would not approach Baker unless the scene was secured. Accordingly, the State argues, the search of the house was necessary for Baker to receive immediate help. But none of the authorities cited by the State support the proposition that the emergency aid exception justifies entry into a home where the person allegedly in need of immediate assistance is outside the home.

Nor was there any evidence that the officers believed that any other persons were inside the house, either in need of immediate medical assistance or threatening imminent injury to persons or property. The officers were well aware that neither Christine nor the couple's children were present in the home.[6] Moreover, the officers did not conduct an immediate search of the premises. Instead, they waited approximately seven minutes after tasing Baker to enter the house, during which time they obtained evidence bags and a camera, took photographs, collected evidence, and read Baker his Miranda rights. This conduct is inconsistent with a belief that anyone else was inside the home that was either injured or threatening to cause imminent harm. The cases cited by the State in support of its position are distinguishable, presenting situations where the suspect had not been located or where there were other indications of a grave risk of danger to officers or others.[7]

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[6] During trial, Christine testified that before the incident, she and Baker lived with their two sons, who were five and two years old at the time. She testified she took them with her when she left the couple's home on April 23, 2009, two days before the incident. There was no testimony during the suppression hearing about these children. No officers testified that there was any reason to believe the Bakers' children were present.

[7] See Smith, 165 Wn.2d at 514-18 (upholding officers' safety sweep of house under exigent circumstances exception where they were investigating theft of tanker truck filled with 1,000 gallons of dangerous chemical, found it parked near house, and saw rifle-like object on living room floor but later saw it was gone); State v. Menz, 75 Wn. App. 351, 352-55, 880 P.2d 48 (1994), (upholding warrantless search under community caretaking exception where officers responded to anonymous call reporting domestic violence in progress inside home; caller believed two adults and one child lived at the house; officers found front door open, heard television playing inside, knocked several times with no response, entered to check on occupants, and found marijuana plants); State v. Nichols, 20 Wn. App. 462, 464-66, 581 P.2d 1371 (1978) (upholding officers' warrantless entry into garage while they were investigating report of fight at house and garage; six to eight subjects were reportedly armed with beer bottles filled with gasoline and chains; officers knocked at the house, received no response, entered open side door to seek suspects or victims, and found stolen vehicle); State v. Campbell, 15 Wn. App. 98, 99-101, 547 P.2d 295 (1976) (warrantless search upheld under emergency aid exception where

Protective Sweep Incident to Arrest

While making a lawful arrest, officers may conduct a reasonable "protective sweep" of the premises for security purposes. State v. Hopkins, 113 Wn. App. 954, 959-60, 55 P.3d 691 (2002) (citing Maryland v. Buie, 494 U.S. 325, 334–35, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)). This is not a search in the conventional sense but rather an extension of a Terry[8] frisk or pat-down. See Buie, 494 U.S. at 331-34. The scope of such a sweep is limited to a cursory visual inspection of places where a person may be hiding. Hopkins, 113 Wn. App. at 959. If the area immediately adjoins the place of arrest, the police need not justify their actions by establishing a concern for their safety. However, when the sweep extends beyond this immediate area, there must be articulable facts which, taken together with rational inferences, would warrant a reasonable and prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the scene. Id. at 959-60. The sweep "may 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 335-36.

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defendant's apartment was burglarized; neighbor saw burglary in process, observed fleeing suspect, and called police; officer discovered broken apartment window and open apartment door; officer entered to investigate, look for suspects, and aid any potential victims and found marijuana plants).

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

Baker argues that the officers' entry was not permissible as a sweep incident to arrest because he was arrested outside the home and officers lacked a reasonable basis to believe there was anyone else inside. The State concedes that generally such sweeps are only permissible incident to in-home arrests but contends that sweeps inside a home may sometimes be justified after an arrest takes place outside, citing several extra-jurisdictional cases.[9]

We agree with Baker and conclude the officers' entry was not justified as a protective sweep incident to arrest. Here, Baker was approximately 20 yards away from the front door of the house when he was arrested, so the house was well away from the area immediately adjacent to arrest. Furthermore, as we have noted in our analysis of the emergency aid exception, the evidence in the record does not support the conclusion that officers had a reasonable belief, based on articulable facts, that there was an individual inside the house posing a danger to themselves or the public.

Hopkins is instructive. There, officers went to Cheryl Hopkins' property to arrest her on outstanding warrants. They also had a search warrant to enter Hopkins' property "and there diligently search for [her], to include any and all out buildings or trailers located on the property and any document, paperwork, identification cards, mail and/or personal property pertaining to Cheryl Hopkins." Id. at 956. Officers saw two men standing and talking near a shed. One man

[9] The State cites United States v. Hutchings, 127 F.3d 1255 (10th Cir. 1997); United States v. Soria, 959 F.2d 855 (10th Cir. 1992); United States v. Oguns, 921 F.2d 442 (2d Cir. 1990); and United States v. Jackson, 700 F.2d 181 (5th Cir. 1983).

went inside the shed and came back out. Officers announced they had a warrant and secured both men by putting handcuffs on them. They went to Hopkins' mobile home and arrested her there. They then went inside the shed to conduct a security check and ensure there were no other individuals inside. Inside the shed they found a freezer, opened it, and discovered methamphetamine lab-related items. Hopkins, 113 Wn. App. at 957. Officers proceeded to go to the back side of the shed and enter a trailer whose door was wide open. They testified they wanted to clear the shed to ensure nobody else was hiding inside. Inside the trailer they found more methamphetamine lab-related items. They requested and received a telephonic warrant to search for controlled substances. In Hopkins' trial for manufacture and possession of controlled substances, she moved to suppress evidence found during the sweeps of the shed and trailer. Id. at 958. The trial court denied the motion, ruling that officers conducted a valid protective sweep.

We reversed and held that a protective sweep outside the immediate area where an arrest occurred cannot be based solely on a general desire to be sure no one is hiding.[10] Id. at 960. We observed that the State presented no facts that would have led officers to reasonably believe that other persons were present. "Indeed, the facts suggest the deputies did not have even a subjective

[10] The existence of a warrant in that case was not determinative, because we noted that where the warrant was issued only on the basis of probable cause to arrest Hopkins, it authorized searches only in areas authorized by the arrest warrant. The State did not contend that arrest warrant alone justified the officers' entry into the shed and trailer, so we concluded that the burden was on the State to establish that the officers' entry was reasonable. Hopkins, 113 Wn. App. at 959.

fear that other, dangerous persons were in the shed or trailer: One officer was left to watch the two men, who were being restrained near the shed, while the remaining six went to Ms. Hopkins' residence to arrest her." Id. at 960-61.

Here, as in Hopkins, the officers' actions suggested that they did not actually believe there were other dangerous persons inside the house. Instead, the sweep of Baker's house was based on a general desire to guarantee no one else was inside. We do not address the extra-jurisdictional cases cited by the State given our conclusion that the officers' entry was impermissible under our own precedent.

Harmless Error

Error in admitting evidence in violation of the constitution is subject to harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error is harmless if a court on appeal is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Washington uses the "overwhelming untainted evidence" test, under which error is harmless if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426 (quoting State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981).

Baker argues that the error was not harmless beyond a reasonable doubt. He contends Christine's testimony was bolstered by the "explicit and

inflammatory" photographs and by Officer Fryberg's testimony. He notes that at least 24 photographs were admitted and contends it was unlikely Christine would have testified in such detail and with such impact without the photographs. Without the photographs and Fryberg's testimony, he argues, the evidence of malice was not overwhelming.

The State argues that even if improperly admitted, the photographic evidence of damage inside the house was harmless because it was offered for the limited purpose of proving that Baker acted with malice and because there was other, abundant, overwhelming, and unchallenged evidence on that issue. In particular, it cites Christine's testimony regarding her observations of damage inside the house and her interactions with Baker and evidence of Baker's repeated ramming of Christine's SUV with his truck.

We agree with the State that the untainted evidence was so overwhelming as to necessarily lead to a finding of guilt. Baker does not dispute that the State's use of the evidence at issue was only to support the malice element. Malice is "evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty[.]" RCW 9A.04.110(12).

Here, evidence of malice was overwhelming. Christine testified that a couple days before the incident, she and Baker fought and he accused her of

sleeping with their neighbor. Baker drove over her backpack and said, "[T]his will take the whore smell out of your clothes." The day before the incident, she went to her house and found Baker lying on the bed in a daze and saw a substance on the carpet that looked like feces. Underwear and pajamas in her dresser were ripped to shreds and had bleach poured on them. Finally, Christine testified extensively and in detail about the same damage in the house about which Fryberg testified. Baker did not object to the admission of evidence about her entry into the house. She described, among other things, holes in the wall, photographs of their family that were destroyed, food from the refrigerator all over the floor, and a wooden valentine she and the couple's children made for Baker that was broken in half. This evidence overwhelmingly proved the element of malice beyond a reasonable doubt even in the absence of the improperly admitted photographs.

Affirmed.

Spearman, J.

WE CONCUR:

Edlington, J.

Cox, J.