No. 82238-7

FAIRHURST, J. (dissenting) — Because I believe the entry into Patricia Sue Schultz's apartment was justified under the emergency aid exception to the warrant requirement, I respectfully dissent. The emergency aid exception is derived from the "community caretaking function" of the police, which "allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). Both the rendering of emergency aid and a routine check on health and safety require police officers to render aid or assistance, but the emergency aid function in particular involves circumstances of greater urgency and searches resulting in a greater intrusion. *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000). The emergency aid exception to the warrant requirement may be invoked only when

> "(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched."

Id. at 386-87 (quoting *State v. Menz*, 75 Wn. App. 351, 354, 880 P.2d 48 (1994)).

Both Schultz and the State agree that the application of the emergency aid exception is determined under this three-part test. The State and Schultz disagree as to whether it was met here. Although not asked to by either party, the majority unnecessarily alters this three-part test and conflates the emergency aid exception with the issue of consent to a warrantless search.

The majority adopts three new "factors" to the exception and then proceeds to dismiss the emergency aid exception, apparently under one of the original elements without ever addressing these newly adopted factors. Majority at 7, 13-14. In addition to appearing to be dicta, the majority's new factors are unnecessary because they are subsumed in the original three-part test. For instance, whether the claimed emergency is "mere pretext for an evidentiary search" is subsumed in the requirement that the officers subjectively believe someone likely needs assistance for health or safety concerns. *Id.* at 7.

Limiting myself to the issues presented for review, I would hold, under the three original elements of the emergency aid exception, that the warrantless entry into Schultz's home was justified. First, the record reflects, and the majority concedes, that the police officers subjectively believed there was a likelihood

someone needed help for health or safety concerns. *Id.* at 13. Moreover, the trial court concluded that there was no evidence the search was a pretext, and Schultz has not challenged this conclusion. Clerk's Papers (CP) at 23.

Second, I would find the officers' beliefs that there was a need for assistance were objectively reasonable. When we determine whether an officer's beliefs were objectively reasonable, we look "to the scene as it reasonably appeared to the officer at the time." *State v. Lynd*, 54 Wn. App. 18, 22, 771 P.2d 770 (1989). Courts should consider the totality of the circumstances when determining the reasonableness of a government intrusion. *State v. Acrey*, 148 Wn.2d 738, 753, 64 P.3d 594 (2003).

While I am not adopting a domestic violence exception, the dynamics of domestic violence are distinct from those of other crimes and are a part of the circumstances the officer faces. The legislature has recognized "the importance of domestic violence as a serious crime against society" and legislatively has sought "to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010. The legislature has also recognized that the risk of repeated acts of violence is greater in the domestic context. RCW 10.99.040(2)(a). We have recognized the general

acceptance in the scientific community of the theory of battered person syndrome and the cycles of domestic violence. *State v. Allery*, 101 Wn.2d 591, 596-97, 682 P.2d 312 (1984). "'[V]ictims of domestic violence are sometimes uncooperative with police because they fear retribution from their abusers.'" *State v. Johnson*, 104 Wn. App. 409, 420, 16 P.3d 680 (2001) (quoting *State v. Jacobs*, 101 Wn. App. 80, 84, 2 P.3d 974 (2000)). "Police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants." *State v. Raines*, 55 Wn. App. 459, 465, 778 P.2d 538 (1989). The majority acknowledges the principle that police response to a situation likely involving domestic violence is an important factor to consider when determining the reasonableness of a police officer's belief that assistance is needed. Majority at 8. However, that principle appears to play little to no role in the majority's analysis.

Here, the officers were responding to reports of a possible domestic disturbance that was sufficiently raucous to concern a neighbor enough to call the police and report yelling and arguing. Upon their arrival, the officers heard the argument continuing in voices loud enough to be clearly heard through the apartment door. The officers specifically heard the man say that he wanted to be left alone and needed his space. When Schultz answered the door, the trial court

found that she "was highly emotional, talking fast, flushed in the face, and she told Officer [Kori] Malone that she was upset." Reporter's Tr. of Proceedings on Appeal (Aug. 2, 2005) at 138. Additionally, the court found that "[s]he appeared agitated, flustered and was not calm, [and] was clearly upset." *Id.*[1] When Officer Malone asked Schultz where the male occupant of the apartment was, Schultz denied that anyone else was in the apartment. In this context, Schultz's lie about Sam Robertson's presence would confirm an officer's fear that Schultz and Robertson were involved in a domestic violence emergency. Because Schultz and Robertson cohabitated, it was incumbent upon the officers to ensure that no violence had occurred or would occur after the officers' departure. Considering the totality of the circumstances, it was objectively reasonable for the officers to believe that Schultz or Robertson likely needed assistance.

The majority reduces the events of that day to four discrete facts and declares those facts to be insufficient for a reasonable person in the same situation to believe that there was a need for assistance. Majority at 14. When officers have obvious reasons to be concerned about a threat of domestic violence, "[c]ourts should be reluctant to rule after the fact that while there were reasons, they were not

[1]In the trial court's subsequent written findings of fact and conclusions of law, it found that "[Schultz] was highly emotional and agitated, talking quickly, was flushed and told the officer that she was upset." CP at 21.

sufficient." *Raines*, 55 Wn. App. at 466. "Whether a police officer's acts in the face of a perceived emergency were objectively reasonable is a matter to be evaluated in relation to the scene as it reasonably appeared to the officer at the time, 'not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.'" *Lynd*, 54 Wn. App. at 22 (quoting *State v. Bakke*, 44 Wn. App. 830, 837, 723 P.2d 534 (1986)). Based on the totality of these circumstances and the unique dynamics of domestic violence, I would hold Officer Michael Hill's and Officer Malone's entry into the home was objectively reasonable.

Turning to the final element of the emergency aid exception, I would hold there was a reasonable basis to associate the place searched with the need for assistance. Officers Malone and Hill wanted to separate Schultz and Robertson before they interviewed them to determine if there was a continuing threat of violence. Officer Hill testified that the porch was too small for two people to stand without crowding each other. By keeping Schultz in the apartment and Robertson outside, the officers could minimize any influence between the two of them to ensure that both felt safe to talk to the police officers, and the police officers could compare the stories for consistency. Consequently, there was a reasonable basis to associate the place searched with the need for assistance.

Under the emergency aid exception, the officers were lawfully in the apartment when they saw the marijuana pipe. The marijuana pipe was properly before the court when the court issued the telephonic search warrant. Consequently, the methamphetamine discovered pursuant to that warrant was admissible against Schultz. On the issue of the emergency aid exception, I would affirm the Court of Appeals.

Because the emergency aid exception justified the warrantless entry, I decline to reach the alternate basis of consent suggested by the Court of Appeals and the State. However, the majority, holding that the emergency aid exception does not apply, addresses whether acquiescence amounts to consent under article I, section 7 of the Washington Constitution. Majority at 8. The majority reads into the trial court decision a conclusion of law that Schultz consented to the officers' entry, when the trial court reached no such holding. The trial court merely "noted" that occupants "acquiesced" to the officer's entry. CP at 23. This acknowledgment was part of the trial court's paragraph concluding that the officers' entry was not a pretextual search for evidence. *Id.*

Before the Court of Appeals, Schultz understandably did not raise the issue of consent in her opening brief. *See* Appellant's Opening Br. 1-16. The first briefing

even remotely suggesting the issue of consent was made by the State in two short paragraphs inserted in its Court of Appeals argument regarding the applicability of the emergency aid exception. Br. of Resp't at 7. The Court of Appeals stated that Schultz's acquiescence amounted to consent under case law relying on the Fourth Amendment to the United States Constitution. *State v. Schultz*, noted at 146 Wn. App. 1057, 2008 WL 4216255, at *3. The Court of Appeals addressed consent as an alternative holding. Given its holding on the emergency aid exception, this was unnecessary and therefore dictum.

Although Schultz did not raise the issue of consent in her petition for review, the majority engages in an exploration into the issue of whether acquiescence amounts to consent for the purposes of article I, section 7 of the Washington Constitution. Even though neither party contends that the officers sought entry for the purpose of conducting a search, the majority spends significant effort discussing the knock-and-talk procedure in *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). Majority at 11-12. As the majority notes, *Ferrier* has been limited to situations where police request entry into a home to conduct a warrantless search. *See State v. Khounvichai*, 149 Wn.2d 557, 563, 69 P.3d 862 (2003). The majority ultimately reaches the significant holding that under article I, section 7, "officers

may not enter a home based upon acquiescence alone." Majority at 12. While we express no opinion regarding the majority's holding on the issue of consent, we are concerned with this court's willingness to draw a significant distinction between our constitution and the federal constitution on an issue not decided by the trial court, that was not raised in the petition for review, and that lacks proper briefing by the parties.

I would affirm the Court of Appeals and hold that the emergency aid exception justified the entry of Officers Hill and Malone into the home of Schultz and would uphold Schultz's conviction.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Barbara A. Madsen
Justice Susan Owens

Justice Gerry L. Alexander