IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JOSHUAH SHAILEN BURNHAM,
Defendant-Appellant.

Lincoln County Circuit Court
130104; A155709

Mary Mertens James, Judge.

On respondent's petition for reconsideration filed October 12, 2017. Opinion filed September 7, 2017. 287 Or App 661, 403 P3d 466.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and David B. Thompson, Assistant Attorney General, for petition.

Before Ortega, Presiding Judge, and Lagesen, Judge, and Garrett, Judge.

GARRETT, J.

Reconsideration allowed; former disposition withdrawn; former opinion modified and adhered to as modified; convictions on Counts 2, 3, 5, 6, and 7 reversed and remanded; convictions on Counts 8 and 9 vacated and remanded; otherwise affirmed.

GARRETT, J.

The state petitions for reconsideration, requesting that we clarify the scope of our holding in *State v. Burnham*, 287 Or App 661, 403 P3d 466 (2017). We agree with the state that it is necessary to clarify the disposition, and we allow reconsideration.[1]

In *Burnham*, we held that the trial court erroneously denied defendant's motion to suppress evidence, and we reversed the judgment of conviction. We concluded that the search warrant was impermissibly overbroad because it authorized the search of "'[a]ny and all' of defendant's 'computer equipment' and 'electronic data devices'" without probable cause to believe that all such devices contained evidence of the crimes under investigation—trespassing and unlawful hunting. *Id.* at 665-66. We did not address whether the trial court should have suppressed the remainder of evidence seized pursuant to and during the execution of the search warrant.

On reconsideration, the state argues that the only evidence subject to suppression is the evidence recovered pursuant to that portion of the warrant that we held to be overbroad—that is, the GPS location data obtained from digital photographs discovered in defendant's laptop computer. The state argues that our disposition should not affect the admissibility of any other evidence seized at defendant's home, which includes two road signs that the state introduced as evidence of theft. We agree with the state that the impermissibly overbroad portion of the warrant "may be excised and the balance of the warrant upheld" and that only those items "seized under the invalid portion of the warrant must be suppressed." *See State v. Vermaas*, 116 Or App 413, 416, 841 P2d 664 (1992), *rev den*, 316 Or 142 (1993). Accordingly, we modify our opinion to conclude that the trial court only erred insofar as it did not suppress evidence seized under the overbroad portion of the warrant, and it did not err by admitting evidence covered by the valid portions of the warrant.

[1] Defendant did not respond to the state's petition.

Pursuant to the invalid portion of the warrant, the state discovered GPS evidence on a laptop that it relied upon to prove that defendant had trespassed, hunted without permission, and killed an elk while hunting without permission. Therefore, we adhere to our conclusion that that evidence should have been suppressed and that the error was not harmless with respect to Counts 2 and 3, hunting upon the cultivated or enclosed land of another without permission, ORS 498.120; Counts 5 and 6, second-degree criminal trespass, ORS 164.245; and Count 7, violating a provision of the wildlife laws or rules with a culpable mental state, ORS 496.992(1).

In its petition, the state does not account for the fact that the two road signs seized during the execution of the warrant were not seized under the warrant as evidence of either trespassing or unlawful hunting. The warrant did not authorize the seizure of the signs because, undisputedly, that evidence was not pertinent to any of the crimes covered by the warrant. Accordingly, the lawfulness of their seizure depends on whether the officers made an "'unaided observation'" of the signs from a "'lawful vantage point.'" *See* *State v. Foster*, 347 Or 1, 5, 217 P3d 168 (2009) (quoting *State v. Ainsworth*, 310 Or 613, 617, 801 P2d 749 (1990)). Whether the officers observed the signs from a lawful vantage point depends on whether they discovered the signs in the course of searching for items covered by valid portions of the warrant. *See State v. Sagner*, 12 Or App 459, 472-73, 506 P2d 510 (1973) (concluding that officers were "rightfully in defendants' home" because the warrant was partially valid and then evaluating whether officers encountered the challenged evidence "in the course of a search which was properly limited in scope"). In denying defendant's motion to suppress, the trial court neither explicitly nor implicitly made factual findings to support application of the plain-view doctrine or any other exception to the warrant requirement. Accordingly, we remand to the trial court for it to make factual findings in the first instance. *See* *State v. Carter*, 200 Or App 262, 268, 113 P3d 969 (2005), *aff'd*, 342 Or 39, 147 P3d 1151 (2006) (remanding to the trial court because "there remain[ed] issues of fact regarding whether the incriminating character of the evidence [was] 'immediately apparent'"

as is required by the plain-view exception (quoting *State v. Sargent*, 323 Or 455, 463 n 5, 918 P2d 819 (1996))). We modify our opinion to vacate the judgment as to Counts 8 and 9, the convictions for the theft of the two signs.[2]

Reconsideration allowed; former disposition withdrawn; former opinion modified and adhered to as modified; convictions on Counts 2, 3, 5, 6, and 7 reversed and remanded; convictions on Counts 8 and 9 vacated and remanded; otherwise affirmed.

[2] We note that defendant was also charged with an additional count of hunting upon the cultivated or enclosed land of another without permission (Count 1), second-degree criminal trespass (Count 4), and third-degree theft (Count 10). He was found not guilty of those counts.