STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CASE NO. 2009AP002690 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MIGUEL AYALA

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON JULY 24, 2008, AND FROM THE ORDER ENTERED ON MAY 9, 2008 DENYING AYALA'S MOTION TO SUPPRESS EVIDENCE, IN THE MILWAUKEE COUNTY CIRUICT COURT, THE HONORABLE JEFFREY WAGNER, PRESIDING

CRAIG S. POWELL
State Bar No. 1046248
Kohler & Hart, LLP
735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202
Telephone: (414) 271-9595
Attorney for Defendant-Appellant

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ISSUES PRESENTED

1. Did the circuit court err in finding that the police asked for and obtained consent to enter the residence?

2. Does the host of an overnight guest have authority to consent to the search of a bedroom used exclusively by the guest?

3. Can the warrantless entry of the guest's bedroom be supported by exigent circumstances, where any exigencies were created by the decision to proceed without obtaining a warrant?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested and publication of the opinion in this case is requested because the issues presented will result in an opinion that modifies or clarifies the law of third-party consent and will apply existing law regarding third-party consent and exigent circumstances to a factual situation different from that in published opinions.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of conviction for First Degree Intentional Homicide As Party To A Crime By Use Of A Dangerous Weapon, in violation of Wis. Stats. §§ 940.01(1)(a), 939.05, and 939.63(1)(b); and three counts of Armed Robbery With Use Of Force as Party To The Crime, in violation of Wis. Stats. §§ 943.32(2) and 939.05, entered on July 28, 2008. Following the circuit court's denial of his motion to suppress evidence and statements pursuant to an unlawful arrest, Ayala was convicted after a trial by jury on each of the above-mentioned counts. Ayala was sentenced to life in prison without eligibility for extended supervision for the homicide; 32 years for the robbery of the homicide victim, running concurrent to his life sentence; and 35 years for each of the other two robberies, running consecutive to all other sentences. (R.37; App. 101-03).

STATEMENT OF FACTS

In a criminal complaint filed on February 1, 2008, Miguel Ayala was charged with being party to the crime of first degree intentional homicide while armed, and three counts of being a party to the crime of armed robbery. (R.2: 1-2). In the same complaint, Carlos Gonzalez was charged with felony murder, and Irene Rodriguez was charged with being party to the crime of first-degree reckless homicide. (Id.: 2).

The complaint alleged that on January 26, 2008, Ayala and Gonzalez approached Jacqueline Heard, Vanessa Crawford, Rachel Leatherbury, and Lodewikus "Vic" Milford as they were standing near Milford's car in a parking lot at 201 W. Walker Street in Milwaukee. (Id.: 3-4). One of the men was armed with a gun and demanded money from Milford. (Id.: 3). After Milford turned over his money, the man with the gun turned to Crawford and demanded her money. (Id.: 4). At this point, Milford's car alarm went off and the man with the gun began yelling at Milford to turn it off. (Id.). Crawford gave the man $65 and sat in the car. (Id.). Milford got into the driver's seat. (Id.). The man then turned to Heard and asked what she had. (Id.). Heard turned over her purse and the man began walking away. (Id: 5). Heard dropped to her knees and then heard two gunshots. (Id.). After a few seconds, Heard stood up and saw that Milford was slumped over the driver's seat, shot. (Id.). Milford died on the scene. (Id.: 3). The complaint further alleges that Gonzalez, Ayala, and Rodriguez each gave statements implicating themselves in the robbery and shooting, with Ayala as the shooter, Gonzalez as the lookout, and Rodriguez as the driver. (Id.: 5-8).

In the immediate aftermath of the shooting, police had no suspects. Crawford, Heard, and Leatherbury, provided differing descriptions of the actors and could not identify them. (R.61: 26; 70,77; 103).

On January 29, 2008, an anonymous informant appeared at the Milwaukee Police Department Second District station and claimed that Carlos Gonzalez and a person named Wedo were involved in Milford's homicide. (R.62: 14). Police later determined that Miguel Ayala was known as "Wedo." (Id.: 14-15).

Police then talked to Irene Rodriguez, who at first implicated Ayala, and only Ayala. (R.62: 39). Rodriguez was not arrested initially, but after police determined that she had been untruthful about the

involvement of Gonzalez and herself, she was arrested and interviewed again. In all, Rodriguez was interviewed by police three times. (R.62: 41). During her final interview, Rodriguez admitted driving Ayala and Gonzalez to and from the crime scene and sharing in the robbery proceeds. (R.62: 26-32; 41).

Police arrested Gonzalez on January 29, 2008. (R.52: 27; App. 327). Gonzalez was then interviewed by police. Gonzalez initially blamed Ayala for the shooting and never mentioned the presence of Irene Rodriguez. (R.64: 45-46). After a break in questioning, police came back to Gonzalez and told him they had talked to Rodriguez and Ayala. (Id.: 67). Gonzalez then changed his story to reflect Rodriguez's role as the getaway driver. (Id.).

At approximately noon on January 30, 2008, Milwaukee police descended on 600 W. Maple Street in Milwaukee based on information that Ayala was there. (R.52: 5; App. 305). The building at that location contains Jo Jo's Tavern in the lower level and a residence in the upper level (Id.). Once there, police made contact with a Hispanic male through a window and asked someone to come outside. (R.52: 12; App. 312). The lessee, Rochelle Cervantes, came down to the door. (Id.: 13; App. 313). Police showed Cervantes a picture of Ayala and asked if he was there. (Id.: 6; App. 306). According to police, Cervantes pointed to a bedroom upstairs and, after officers said they would like to go get him, both Cervantes and her husband "both made a statement to the effect of go, go." (Id.). Officers went straight to the bedroom and opened the door without knocking or announcing their presence. (Id.: 16-17; App. 316-17). Ayala was found lying on a bed in the room and was taken into custody. (Id.: 17; App. 317). During a subsequent search of the bedroom in which Ayala was staying, a handgun was found between the mattresses. (Id. 18; App. 318). The gun was ultimately determined to be the gun used in the Milford homicide. (R.65: 61; 76-79). No fingerprints were found on the gun, and though swabbed for a DNA comparison, those swabs were never submitted to the crime lab for analysis. (R.65: 63-66).

After Ayala was arrested that afternoon, Milwaukee Police Detectives interrogated Ayala. (R.65: 83). During this interview, Ayala made inculpatory statements regarding his involvement in Milford's death and robbery. (R.69: Exh. 95, 2:20:00-2:52:00).

Ayala and Gonzalez were each bound over for trial after a preliminary hearing on February 8, 2008. (R.47: 84). On May 28, 2008, Ayala's trial counsel filed a motion to suppress Ayala's statements as well as the evidence seized based on Ayala's unlawful arrest. (R.1: Entry 11; App. 201-04). The motion alleged that the police entry of the residence and interior bedroom where Ayala was sleeping were unconstitutional, requiring the suppression of the gun and Ayala's statements as fruit of that unlawful action. A hearing on the motion was held on April 17, 2008.

At the start of the motion hearing, defense counsel requested a witness sequestration order. The prosecutor agreed, but requested that Detective Blaszak be allowed to assist at counsel table. Defense counsel did not object and the court approved both requests. (R.52: 3; App. 303).

Milwaukee Gang Crimes Intelligence officer Tim Bandt testified first. According to Bandt, at approximately noon on January 30, 2008, he was sent to 600 W. Maple Street to look for Ayala. (R.52: 4-5; App. 304-05). Bandt and other officers arrived at the residence at about 12:20 p.m. after gathering at a predetermined meet spot. (Id.: 10; App. 310). Bandt did not know the actual number of police officers there, but agreed that there were at least seven or eight others. (R.52: 11; App. 311). Bandt was in street clothes with his police identification card around his neck, but there were other officers there in police uniform. (Id.: 13-14; App. 313-14). Although Bandt could not say whether another officer knocked on a door or rang a doorbell, Bandt testified that he first made contact with an unknown Hispanic male inside the residence through a window in the upper part of the residence. (Id.: 12; App. 312). Bandt told that person to come down to the door, and Rochelle Cervantes came down. (Id.: 13; App. 313).

Bandt spoke with Mrs. Cervantes at the door, who said she and her husband rented both the bar downstairs and the apartment upstairs. (Id.: 6; App. 306). Bandt testified that he showed Mrs. Cervantes a photo of Ayala and asked if he was there. (Id.) According to Bandt, Mrs. Cervantes pointed to a bedroom and said he was up there. (Id.). Bandt asked if Ayala was armed, and Mr. and Mrs. Cervantes said they didn't know. (Id.: 24; App. 324). Neither she nor her husband expressed any fear of Ayala. (Id.). Bandt said "we would like to go get him" and Mrs. Cervantes and her husband "made a statement to the effect, go, go." (Id.: 6; App. 306). Bandt testified that he took

that as "consent to go upstairs and to arrest Mr. Ayala." (Id.: 6; App. 306). The conversation with Cervantes and subsequent entry to the residence happened "very quickly." (Id.: 15; App. 315). Bandt testified that he did not have his weapon drawn during the conversation, but he did not observe if any of the tactical officers or other officers behind him had their weapons drawn because he was in the conversation with Cervantes. (Id.: 22; App. 322).

Bandt testified that he had reason to believe that Ayala would have been armed because Bandt believed that the gun used in the Milford homicide had not been recovered. (Id.: 7; App. 307). Bandt also claimed in his testimony that he had "other information" that Ayala was involved in the homicide and "probably still armed with that firearm." (Id.). The source of this "other information" was not described or divulged in any manner.

Bandt testified that he and "around 10" officers proceeded up the stairs into the apartment, and that Milwaukee Police Officer Richard Wearing quickly opened the door to the bedroom where Ayala was lying in bed. (Id.). Nobody knocked on the bedroom door or asked for permission to enter the bedroom. (Id.: 16-17; App. 316-17). According to Bandt, after he and Wearing entered the room, he asked the person to identify himself, and Ayala gave his name. (Id.: 8; App. 308). Bandt had his gun drawn, but did not know if Wearing did. (Id.: 19; App. 319). Ayala was then placed into custody. Bandt stated that "very simultaneous to that, as I stood him up, myself and Officer Wearing to continue the protective sweep of the bedroom lifted the mattress." (Id.: 8; App. 308). Bandt said he did this to "make sure there are no other persons that could harm us or no other persons in that bedroom." (Id.). Bandt also said they were looking for "anything, any contraband, any firearms, anything like that … if there was other persons present they could access those things." (Id.). Bandt testified that as Ayala was stood up from the bed, he was in handcuffs. According to Bandt, Ayala was cooperative when he was placed into custody. (Id.: 17; App. 317). Officer Wearing and Bandt then both lifted the mattress and found the gun. (Id.: 9; App. 309). Bandt claimed at the time he and Wearing conducted this search, Ayala was in the area of the bed, and Bandt and Wearing were the only officers in the room. (Id.: 9, 18-19; App. 309, 318-19). According to Bandt, after the gun was found, Wearing stayed in the bedroom to secure the evidence and Bandt escorted Ayala outside. (Id.: 9; App. 309). Bandt said that he was in the bedroom for only about 30 seconds before he brought Ayala out. (Id.: 18;

App. 318). As he brought Ayala out of the bedroom, he observed other officers throughout the residence, searching. (Id.: 19-20; App. 319-20).

Detective Christopher Blaszak, who had observed Bandt's testimony from his seat at the prosecutor's table, testified next. (R.52: 25; App. 325). Blaszak testified that police had determined that Ayala was a suspect in the Milford homicide through interviews with Irene Rodriguez, "Carlos," Rafael Rosales, and Gina Rodriguez. (Id.: 26-28; App. 326-28). According to Blaszak, he went to 600 W. Maple and requested additional squads, including Officer Bandt and members of the intelligence division, uniformed personnel from district two, and the tactical enforcement unit. (Id.: 28; App. 328). Blaszak claimed that he believed 600 W. Maple St. to be a Latin King hangout but, unlike Bandt's testimony, Blaskak stated that he had no specific information that Mr. Ayala was at that address; he just figured it would be a good place to check[1]. (Id.: 43; App. 343). Blaszak testified that he believed he had probable cause to arrest Ayala based on previous statements in the investigation indicating his involvement in the homicide. (Id.: 44; App. 344). Blaszak said police had most of this information the day before, but he did not attempt to obtain a search warrant or arrest warrant. (Id.: 44; App. 344).

Blaszak testified that he maintained a surveillance position across the street until the additional units arrived. He testified that "the location appeared as if it was becoming contained, meaning no one could run out as to -- if they knew the police were coming." (Id.: 28; App. 328). The additional units began arriving at 12:10 p.m., with about 25 total officers on scene. (Id.: 46; App. 346). Blaszak saw officers taking up positions outside the residence to contain it as Bandt appeared to be making contact with someone inside. (Id.: 30; App. 330). Blaszak testified that he followed the group of officers into the residence. (Id.: 32-33; App. 332-33). He saw Bandt and Ayala at the threshold of the bedroom door, and he escorted both of them down to a squad car. (Id.: 48-49; App. 348-49). This occurred at approximately 12:30 p.m. (Id.: 49; App. 349).

Blaszak further testified that he had a brief conversation with Rochelle Cervantes in her kitchen where he asked her if it was okay

[1] This contradicts Bandt's testimony, which was that they had received information from that Ayala was there, (R.52: 5), as well as Officer Todd Bohlen's testimony, which was that they had received information that Ayala was there. (R.54: 8).

"for police to be inside her house asking for her consent to search the residence for evidence." (Id.: 33-34; App. 333-34). Blaszak said she signed his memo book indicating consent to do so at 12:54 p.m. (Id.: 34-35; App. 334-35). Blaszak further testified that he spoke with Jose Cervantes, Steven Cervantes, and an Andy Hernandez, getting consent from each to search the bedrooms they occupied. (Id.: 37-38; 337-38).

The State then called Detective Michael Braunreiter to testify about his interview with Rochelle Cervantes at the scene of the search. (Id.: 56-81; App. 356-81). This maneuver by the State was essentially an attempt at pre-emptive impeachment; Mrs. Cervantes was expected as a defense witness at the hearing. The State then called Detective Gust Petropolous to testify about his interview with Jose Cervantes at the scene of the search. (Id.: 82-85; App. 382-85). The hearing was then adjourned until later in the afternoon.

When the court reconvened later that afternoon, defense counsel informed the court that Detective Blaszak had violated the sequestration order. (R.53: 3; App. 403). Counsel alleged that Blaszak had approached Rochelle Cervantes in the hallway, where she was waiting to be called as a defense witness. (Id.). Counsel further alleged that during that conversation, Blaszak said something to the effect that "the defense was trying to prove that some kind of coercion occurred in giving the consent to enter, and that Blaszak told Cervantes that she was "a good woman and she should not lie and she should tell the truth when she comes in here." (Id.: 3-4; App. 403-04). Counsel asked the court to admonish Blaszak and to further order that none of the officers have any verbal contact with the defense witnesses. (Id.:4; App. 404). The following exchange occurred:

> The Court: Okay. Mr. Williams.
>
> Williams: How bizarre. He tells her to tell the truth and she says it's intimidation. You know, the cops have as much right to talk to these witnesses as they do. The defense doesn't owe those witnesses – own those witnesses. In fact, it's not – it's improper for the defense to say that the police cannot talk to those witnesses. Those witnesses can talk to whoever they want, whoever they choose to talk to. Detective Blaszak according to counsel simply told her to tell the truth, what's wrong with that.
>
> The Court: Well, she would be told to tell the truth anyway because the Court is going to swear—let's keep in

mind there's a sequestration order and I'm sure that everybody is going to abide by it.

Vishny: That's fine. Judge, I would be happy on a future occasion to provide counsel and the Court with ample case law which exists in federal law about law enforcement officers approaching defense witnesses somehow intimating that they may not testify truthfully and that she should , quote/unquote, tell the truth meaning adhere to the State's version. I don't think there's any other reasonable interpretation. Of course he can interview her about what occurred, but there is a sequestration order in effect here and I'm just saying that the defense will not tolerate any future conduct like this and we will take appropriate remedies if we think they need to be taken in the future.

The Court: And you should.

Williams: Now she's threatening us. How bizarre.

The Court: Wait a second. Let's move on with this.

Vishny: Okay.

The Court: And as you should.

Vishny: Thank you.

The Court: There's a sequestration order as to this hearing that should be kept.

Williams: Well, the police are going to talk to these witnesses again and they are entitled to do that.

The Court: This if for this hearing right here?

Williams: Right.

The Court: Right—right now?

Williams: Yes.

The Court: There's a sequestration order on this issue.

Williams: And I would like to see the case law that says the police cannot tell people that they should tell the truth.

The Court: Okay. Let's – what's your next – who is your next witness.

(R.53: 4-6; App. 404-06).

Absent from the prosecutor's bluster and stated intent to willfully disregard the court's sequestration order was any denial by the State or Detective Blaszak that he had spoken with Mrs. Cervantes as alleged.

The defense first called Steven Cervantes. Steven, who was 21 years old, lived in the upstairs of 600 W. Maple Street with his mother, father, and brother Andy Hernandez. (R.53: 7; App. 407). His other brother, Ricardo Cervantes, did not live at the residence. (Id.:

8; App. 408). Steven testified that at about midnight on January 29, 2008, he was at Jo Jo's tavern, which is in the lower level of 600 W. Maple St. (Id.: 8; App. 408). At that time he saw Ayala at the tavern. (Id.: 9; App. 409). Steven knew Ayala through his brother Ricardo, and had contact with Ayala two or three times during the "couple months" before January 28, 2008. (Id.: 15; App. 415). Ayala asked Steven if he could spend the night because he had been locked out of his house and had nowhere to go. (Id.: 9; App. 409). Steven said "Sure." (Id.). The two then went upstairs, had something to eat, and Steven directed Ayala to his brother Ricardo's old room. (Id.: 10; App. 410). The room had been vacant for a month. (Id.: 16-17; App. 416-17). Steven testified that he is allowed to have overnight guests at the apartment without asking his parents' permission first, and that he is allowed to have guests spend the night in his brother's room. (Id.: 10-11; App. 410-11). Steven watched Ayala go into the room and then Steven went back down to the bar. (Id.: 11; App. 411). Steven was in his room when police entered the following morning, and he observed nothing regarding the initial entry by police or Ayala's arrest. (Id.: 16; App. 416).

Rochelle Cervantes testified next. Rochelle testified that in the early afternoon of January 30, 2008, she was in her kitchen drinking a cup of coffee with her husband when she heard a tap. (Id.: 20; App. 420). She went to the window and saw officers in plain clothes and uniforms outside with their guns drawn. (Id.: 20-21; App. 420-21). She then went downstairs and asked who was there. (Id.). The officers identified themselves as Milwaukee Police and told her to open the door, which she did. (Id.: 20; App. 420). Rochelle testified that when she opened the door she "had all these guns pointed at me." (Id.). She also testified that some officers had something in their hand where it looked like they were going to break the door down[2]. (Id.: 21-22; App. 421-22). She said she asked what the problem was and they told her to step outside. (Id.). Rochelle testified that an officer gently grabbed her arm and told her to step to the side. The officers were asking where Miguel was. When she said "Miguel who?" they showed her a picture and asked if he was there. Rochelle said yes, but that she knew him as "Wicked." (Id.: 21, 23; App. 421, 423). They asked her "Where?" Rochelle testified that she pointed up to the window where he was at and they went inside. (Id.: 21; App. 421). Rochelle testified that the officer

[2] Her testimony on this observation was allowed to stand, despite the prosecutor's interjection that this observation somehow showed her "bias." (R.53: 22).

talking to her at the door did not ask if they could enter the residence. (Id.: 24; App. 424). After officers entered she was told to sit on the stairs. (Id.: 25-26; App. 425-26). While she was sitting there, she could see at least two officers searching in the bar. (Id.: 25; App. 425). After police took Ayala from the residence, Rochelle was allowed back upstairs. (Id.: 26; App. 426). She spent a short amount of time in the kitchen, during which she observed officers "looking around" her residence.[3] (Id.: 27; App. 427). Detective Blaszak then asked Rochelle if she gave permission to search the residence. (Id.: 27-28; App. 427-28). Rochelle said she gave them permission, signed something, and that Blaszak did not threaten her to sign it, "Not at all." (Id.: 28; App. 428).

Rochelle further testified that on the morning of January 30, 2008, she did not know that Ayala was in the house. (Id.: 31; App. 431). She discovered that Ayala was in there when she peaked into the room he was staying in. She guessed that the door was cracked four to five inches. (Id.: 31; App. 431). She saw Ayala on the bed but did not wake him up or ask him to leave. (Id.). On cross-examination, the prosecutor largely did not try to challenge what she said occurred during the initial police entry, but chose to badger her about whether her sons are Latin Kings and whether she knows her bar is a Latin King hangout. He demanded that the record reflect that Rochelle "smiled" when he asked her if she let criminals or Latin King members rummage through her house. (R.53: 38; App. 438). He did ask if she told Detective Braunreiter that she had given police consent to enter the apartment, and she said no, because they didn't ask. (Id.: 42; App. 442). The hearing was continued to April 28, 2008 for the State's rebuttal testimony and the *Miranda/Goodchild* portion of the hearing. The sequestration order was not lifted.

At the continued hearing on April 28, 2008, the State first called Officer Todd Bohlen. Bohlen testified that on January 30, 2008, he went to 600 W. Maple St. (R.54: 4; 504). Bohlen stated that police had information that Ayala was located at the residence. (Id.: 8; App. 508). Bohlen said he went to the door on the west side of the building with Tim Bandt and other officers and knocked on the door. (Id.: 5; App. 505). Bohlen testified that a hispanic female opened the door, and that her husband was behind her. (Id.). Bohlen said he

[3] The prosecutor again asked the court to take note of her "bias," apparently for testifying that she saw officers looking around her apartment. The court at least appeared to decline the invitation, noting that she was testifying about what she observed. (R.53: 27).

heard the conversation between Bandt and both of the Cervantes. (Id.: 6; App. 506). Bohlen stated that Bandt asked Rochelle if they could "go in and get him; and she said, 'Go. Go. Go.'" (Id.: 7; App. 507). Bohlen testified that the other officers entered the residence and he then led Mr. and Mrs. Cervantes up the gangway to a "safe area." (Id.).

The State next called Officer Richard Wearing. Wearing testified that he was at 600 W. Maple St. on January 30, 2008 at around noon. (R.54: 14; App. 514). Wearing said that upon arrival, officers "contained the building because there was a suspect inside." (Id.). Wearing testified that he was at the west door when an officer knocked on the door. (Id.: 15; App. 515). According to Wearing, Rochelle Cervantes answered the door and was talking to Officer Bandt. When Cervantes pointed up the stairs, Wearing looked up and saw a man standing on the stairs and a dog barking. (Id.: 16; App. 516). Wearing testified that he told the man to grab the dog because he did not want the dog to come out and bite anybody. (Id.: 17; App. 517). The man said the dog would not pose a problem, but then the man told his son to take the dog and put it away. (Id.). This all took place before officers entered the residence. (Id.). According to Wearing, the man asked him if they "were there for my son's friend." (Id.). Wearing said the man pointed directly above him and said "He's in there. You can go get him." (Id.: 17-18; App. 517-18). Wearing said after this comment, the officers went up the stairs to the bedroom. (Id.: 18; App. 518). Despite Officers Bandt, Bohlen, and Wearing all being present at the door and able to hear the conversation, Wearing is the only officer who testified to this exchange. (Id.).

Wearing then testified about Ayala's arrest. According to Wearing, the bedroom door was open about "four or five inches." (Id.: 20; App. 520). Ayala originally did not want to be placed into handcuffs; it took "several officers" to get control of him and put him in handcuffs[4]. (Id.: 18; App. 518). Wearing then testified that he and Bandt searched the bed "immediately" after arresting Ayala. (Id.: 19; App. 519).

The State then recalled Detective Braunreiter, who had originally testified on April 17, 2008. (Id.: 24; App. 524). The prosecutor

[4] Officer Bandt testified that Ayala was "cooperative" while he was being arrested and that he and Officer Wearing were the only two officers in the room when Ayala was taken into custody.

asked him if Rochelle Cervantes had told him on January 30, 2008 that she had given consent for police to enter her house and search it. Braunreiter said she had. (Id.: 24; App. 524). Braunreiter also testified that Rochelle had said that her son Ricardo was a Latin King and she believed that Ayala was as well. (Id.: 25; App. 525). On cross, counsel reminded Braunreiter that at the previous hearing he had no recollection of what Mrs. Cervantes had said to him, and that he had read his report into the record. (Id.). After some interjections from the prosecutor about improper impeachment, Braunreiter agreed that he was not there when Cervantes allegedly gave consent, and that he had destroyed the notes of his conversation with Cervantes after he filed his report. (Id.: 27; App. 527). The hearing then moved into the *Miranda* and *Goodchild* inquiries.

The court issued an oral decision from the bench on the motion to suppress on May 9, 2008. (R. 55; App. 601). The court began with a recitation of the testimony, but made few explicit findings of fact. (Id.: 1-6; App. 601-06). In reviewing the testimony of Rochelle Cervantes, the court stated: "She had indicated in her testimony that there was no request to let the police in." (Id.: 6; App. 606). The court then assessed her credibility, taking its cue from the prosecutor:

> And what the court had noticed during her testimony when she stated she didn't give permission for the defendant to stay there or at least prior to that she was actually – her demeanor wasn't – *she was smiling as far as what the court had seen*, as far as the court's observations. And based upon what she said in court and how she said it, the court believes that she wasn't, quite frankly, very credible based upon the court's observation.

(R. 55: 6-7; App. 606-07)(emphasis added). The court then made its legal conclusions as to the arrest and search:

> The arrest took place without a warrant, obviously, and that's why we are here and the court will conclude that the entry of the residence was certainly with consent based upon the totality of the circumstances and the entry into the room may have not been with consent but was – there was probable cause. There was probable cause to establish exigent circumstances that were certainly present.
>
> You have to take into consideration the gravity of the offense and why the police were there. There has to be a determination as to the existence of those circumstances known to the officer at the time that they were there. They knew that there was a

> homicide, that there was also individuals that were in the premises at the time whose life could have been in danger or the destruction of evidence could have begun or in fact escape. They couldn't just sit there and wait based upon the totality of the circumstances of what was going on for the defendant, as was said some place in the testimony, to wait for this person to get out or come out of the residence. Who knows what would have happened if they would have done so and what the reaction would have been by the defendant if the police would have just waited there for the time being.
>
> So you have to analyze the situation from the perspective of the officers at the time they were there, and there was a compelling need to act at that time and they did so. And the court believes that they did so certainly reasonably.
>
> As far as the consent of Ms. Cervantes, the court would believe based upon what the court heard and assessing the credibilities of the witnesses that that consent was given freely, intelligently, unequivocally and there was a specific waiver for that.
>
> Whether or not he had a guest relationship I guess is somewhat moot. I would really question whether or not he had a guest relationship there to take him to that status of privacy because of the crack in the door, the money and the fact they didn't have – his contact with the premises was so minimal. And then certainly since there was probable cause in order to make the arrest, what was taken was the gun incident to arrest. As to that, the search can be as broadly and reasonably necessary to prevent any type of resistance or escape. . . . The arrest was certainly proper based upon what the court stated on the record. That they did, in fact, the police did in fact have to act right away.

(R.55: 7-10; App. 607-10). The court cited no case law in support of its decision.

Trial began on May 27, 2008, with jury selection, and testimony began on May 28, 2008. After a series of police officers testified about the crime scene and collection of evidence, the State called the robbery victims. Vanessa Crawford testified that she, Rachel Leatherbury, Jacqueline Heard, and Vic Milford were out for the evening having dinner. (R.61: 13-14). As they were standing near Milford's car in a parking lot across the street from the Crazy Water restaurant, two men came running towards them. (Id.: 15-18). One of the men had a gun, put it to Milford's temple, and demanded money. (Id.: 19). Crawford testified that she was not looking at the gunman. (Id.). As this was going on, the other man was behind Crawford. (Id.: 20). She said she only got a look at him briefly as

he crossed the road. (Id.: 21). After the gunman was done with Milford, he turned and faced Crawford and asked for her money. (Id.: 21). The car alarm went off and the gunman demanded that Milford turned it off. (Id.). Milford was trying but could not turn it off. (Id.). They got back into the car and closed the doors, and Crawford heard two gunshots. (Id.: 23). She saw that Milford was shot. (Id.). Crawford said the gunman was stockier than the other person, who was more "slim and slight." (Id.: 26). She also said the gunman wore a white track-type suit with colorful designs on it. (Id. 27). Crawford was not asked in court if she recognized Ayala as the gunman.

Rachel Leatherbury gave a similar story to Crawford about the events leading up to the shooting. She described the shooter and the second person as having similar builds in terms of height and weight. (Id.: 70). She believed the general tone of the outfit worn by the shooter was dark. (Id.: 77). She said she could not look at the robbers faces so she could not identify them with any certainty. (Id.: 81). Leatherbury was not asked in court whether she recognized Ayala as the gunman.

Jacqueline Heard also testified consistent with Crawford and Leatherbury about the events leading up to the robbery and shooting. Heard told police that the gunman was hispanic and short. (Id.: 103). Heard later viewed a lineup at the police station. Heard identified Ayala as someone that she "had a reaction to," but she could not be 100% sure he was the gunman. (Id.: 104). Heard was not asked in court whether she recognized Ayala as the gunman.

The remainder of the State's case rested primarily on the testimony of co-defendants Gonzalez and Rodriguez, who were testifying under plea deals with the State, expert testimony connecting the gun found at Ayala's arrest with the homicide, and Ayala's admission to police. During deliberations, the jury asked to see the transcript of Ayala's confession along with phone records. (R.67: 1). Ayala's confession was then re-played for the jury. (Id.: 3). The jury returned guilty verdicts on all counts. (Id.: 4-5).

On July 23, 2008, Ayala was sentenced to life in prison without extended supervision for the homicide, 32 years for the armed robbery of Milford, concurrent to the homicide sentence, and 35 years prison for each of the other two armed robberies, to be served consecutively to all other sentences. (R.68: 52-53).

Ayala now appeals.

ARGUMENT

I. Police Did Not Have Valid Consent to Enter the Residence

The circuit court found that police asked for consent to enter the Cervantes residence to arrest Miguel Ayala, and that Rochelle Cervantes gave that consent. In light of the totality of the circumstances found in the record, including the inconsistent testimony of the police officers, the circuit court's factual findings on the consent issue are clearly erroneous. The record demonstrates that the State failed to meet its heavy burden in establishing that officers received lawful consent to enter the residence.

1. Ayala had a reasonable expectation of privacy in the residence and the bedroom

In its decision on the motion to suppress, the trial court implicitly found that Ayala had a reasonable expectation of privacy. After the court had ruled that the entry was with valid consent, it appeared to comment on the issue of expectation of privacy:

> Whether or not he had a guest relationship I guess is somewhat moot. I would really question whether or not he had a guest relationship there to take him to that status of privacy because of the crack in the door, the money and the fact they didn't have – his contact with the premises was so minimal.

(R.55: 9-10; App. 609-10). The court's description of the relationship as "moot" suggests the court conceded that Ayala had standing to challenge the actions of the police and was relying on its consent and exigent circumstances analysis to validate Ayala's arrest. Ayala asserts that the court was correct in its implicit decision on this issue. However, Ayala recognizes that this court will review *de novo* whether the facts satisfy constitutional requirements, See State v Whitrock, 161 Wis. 2d 960, 973, 468 N.W.2d 696 (1991).

The Fourth Amendment to the United States Constitution protects people, not places. Katz v. United States, 389 U.S. 351, (1967). The capacity to claim the protection of the Fourth Amendment depends upon whether the person claiming that protection has an expectation

of privacy in the invaded place. Rakas v. Illinois, 439 U.S. 128, 143 (1978); State v Whitrock, 161 Wis. 2d 960, 973, 468 N.W.2d 696 (1991). The United States Supreme Court has held that an overnight guest has a reasonable expectation of privacy in his host's home. Minnesota v. Olson, 495 U.S. 91, 98 (1990).

Like the defendant in Olson, Ayala's presence at 600 W. Maple Street was as a welcome, overnight guest. In Olson, the defendant was suspected of participating in the armed robbery of a gas station, during which the gas station manager was shot and killed. 495 U.S. at 91. The morning following the robbery and shooting, police received a phone call from a woman stating that Olson had confessed to being the getaway driver; the woman then provided an address of another woman named Louanne Bergstrom, to whom Olson had confessed his role in the crime. Id. at 93-94. The police went to the address and discovered it was a duplex, and that Louanne lived in the upper unit. Id. at 94. Police spoke to Louanne's mother, Helen Neiderhoffer, who resided in the lower unit. She confirmed that Olson had been staying upstairs but was not there at the time. Id. Later that afternoon, Neiderhoffer called police to say that Olson had returned. Police surrounded the house and called Julie, another resident of the upper, and told her Olson should come out of the house. Id. When he refused, officers entered the house and arrested him. He later made inculpatory statements about the offense. Id. Olson challenged the warrantless entry of the home, and the Minnesota Supreme Court ruled that Olson had a sufficient interest in the Bergstrom home to challenge the legality of his arrest there. Id. at 94.

The United States Supreme Court agreed, ruling that an overnight guest has a legitimate expectation of privacy for purposes of claiming the protections of the Fourth Amendment while in his host's home. Id., 98-100. In so ruling, the Court stated:

> From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth.

495 U.S. at 99 (referencing Katz, 389 U.S. at 361). Ayala's situation is analogous to Olson, and presents and even stronger claim that Ayala had a reasonable expectation of privacy in the residence.

Ayala, like Olson, was a suspect in a robbery/homicide, and spent one night as a legitimate guest in the residence in which he was arrested after a warrantless entry by police. Olson, 495 U.S. at 97, n. 6 (Olson had been staying at Ecker's home before the robbery, but spent the night of the robbery at Bergstrom's). Unlike Olson, however, Ayala was given a bedroom to sleep in at the Cervantes' apartment. Olson slept on the floor of the Bergstrom residence. Olson, 495 U.S. at 97, n. 6. This difference in sleeping arrangements suggests that Ayala's expectation of privacy is even more reasonable that Olson's would have been, and Olson's lesser expectation was enough to provide him with the protections of the Fourth Amendment. Given the striking similarities to Olson in terms of the type of suspected criminal activity and the length of the stay as a guest, it cannot reasonably be argued that Ayala did not have a reasonable expectation of privacy in the residence.

2. Police did not have valid consent to enter the residence

Warrantless searches are "per se" unreasonable and are subject to only a few limited exceptions. See Katz v. United States, 389 U.S. 347, 357, (1967). One of those exceptions is valid third-party consent. See United States v. Matlock, 415 U.S. 164, 171, (1974); Kelly v. State, 75 Wis. 2d 303, 314, 249 N.W.2d 800 (1977). The State has the burden to prove that a warrantless search was reasonable and in compliance with the Fourth Amendment. See State v. Boggess, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983). The State bears that burden of proof by clear and convincing evidence. See Illinois v. Rodriguez, 497 U.S. 177, 181, (1990); Kelly, 75 Wis. 2d at 316, 249 N.W.2d 800.

When reviewing a circuit court's denial of a suppression motion, the appellate court will uphold the circuit court's findings of historical fact unless they are clearly erroneous, but it reviews *de novo* the application of constitutional principles to those facts. State v. Eason, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629, N.W.2d 625.

3. The circuit court's determination that police received valid consent was based on factual findings that are clearly erroneous

In its decision, the court did not explicitly state its "findings of fact." To the extent its recitation of the testimony is construed as its findings, the court made no effort to address discrepancies in the testimony of the officers. For example, the court stated:

> The officer's [sic] testimony including Bandt, Siller and Wearing asked whether or not Ayala was in fact in the residence upstairs. [Police] were told by Rochelle Cervantes that [Ayala] was upstairs and she told them to go, go, go and go get them. To go get them.
>
> They went upstairs, entered the room and then subsequently there was apparently a short struggle and the gun was found within the vicinity of where the defendant was sleeping.

(R.55:7; App. 607). These findings are problematic in at least two respects. First, an Officer Siller did not testify at the hearing. Second, these findings do not reconcile the conflicting testimony between Officers Wearing and Bandt. Wearing testified that he was standing at the door with Bandt, and that Jose Cervantes asked if they were here for his son's friend. (R.54: 17-18; App. 517-18). When Wearing said yes, Jose Cervantes told them "He's in there. You can go get him." (Id.). According to Wearing, officers then entered the apartment. Bandt, on the other hand, testified that he was talking to Rochelle Cervantes at the door and that he showed her a picture of Ayala. According to Bandt, after Rochelle Cervantes pointed towards a window and said Ayala was up there, Bandt asked if they could go get him and Rochelle Cervantes said "go, go." (R.52: 6; App. 306). Further, Bandt testified unequivocally that he and Wearing were the only two officers in the bedroom when Ayala was taken into custody, and that Ayala was cooperative during that process. (R.52: 17-19; App. 317-19). Wearing, on the other hand, testified that Ayala was resisting, and that it took several officers to subdue Ayala and get him into custody. (R.54: 17-18; App. 517-18). Both stories cannot be true.

Despite these inconsistencies, the court found that "there was consistent testimony by police as far as the consent issue." (R.55: 5; App. 605). In order to find valid consent, however, the court had to disregard Rochelle Cervantes' testimony that police did not ask for

her consent to enter, but just went in. (R.53: 25; App. 425). Rochelle's testimony was almost entirely consistent with the officers' testimony, including her agreement that she signed Detective Blaszak's memo book indicating consent for officers to be in her house and searching,[5] and that she had done so without any threat whatsoever. (R.53: 28; App. 428). Rochelle's testimony differed from officers only on two main points: (1) that officers did not ask if they could enter the house, they just went inside; and (2) that she did not tell Detective Braunreiter in an interview after the entry and search that she had given police consent to enter. (R.53: 42; App. 442).

As to the first point, and as stated above, there is conflicting testimony between the officers about who told them to come inside and what was said to indicate permission to enter. Further, a common-sense view of the totality of the circumstances presented to the court by police supports Rochelle Cervantes' version of events at the door. Police had information that Ayala was the shooter in a high-profile homicide. That information came from the incriminating statements of two accomplices. Police also believed that the gun used in the murder had not been recovered. Police had information that Ayala was at 600 W. Maple Street, and though the source of that information was never divulged, they were obviously confident enough in its accuracy to coordinate a police presence of approximately 25 officers, including the tactical unit. Despite having nearly all of this information on the day preceding Ayala's arrest, officers never sought a search or arrest warrant, and police provided no explanation for why a warrant was not sought. (R.52: 44; App. 344). Officers instead chose to attempt a knock-and-talk approach. In the face of the significant concerns outlined in the officers' testimony about the safety of everybody involved, including those in the apartment, the officers would have the court believe that they chose a strategy in which they could have been denied consent to enter, alerting a potentially dangerous suspect inside.

Any reasonable, honest review of these circumstances would conclude that the officers were going to enter that apartment, one way or the other, right then and there. This view is further supported by Rochelle Cervantes' testimony that when she opened the door she saw several officers holding what appeared to be a battering ram as

[5] Cervantes signed this consent at 12:54 p.m. (R.52.: 34-35), approximately 25-30 minutes after officers had entered the apartment and begun searching. (R.52: 10, 19-20).

if they were prepared to break down the door. (R.53: 21-22; App. 421-22). She was able to describe this item in detail, and although the State bizarrely objected to this testimony as allegedly showing her "bias," her testimony on this point was not contested by the State's rebuttal witnesses. (Id.). In light of these circumstances, there is not just an eminently reasonable basis, but a compelling basis to believe that once Rochelle Cervantes confirmed that Ayala was upstairs in a bedroom, which she admits doing, police made immediate entry without regard to whether Cervantes consented.

As to Rochelle Cervantes' denial that she later told Detective Braunreiter that she had given police consent to enter the residence, Braunreiter testified that he did not clarify with her whether she was talking about giving consent to Bandt at the door or consent to Detective Blaszak in the kitchen after officers had entered. (R.52: 74-75; App. 374-75). Braunreiter further stated that he had destroyed his notes from his interview with Rochelle Cervantes and that the interview was not recorded. (R.54: 26-27; App. 526-27).

The court discounted Cervantes' testimony, finding her not credible:

> And what the court had noticed during her testimony when she stated she didn't give permission for the defendant to stay there or at least prior to that she was actually – her demeanor wasn't – she was smiling as far as what the court had seen, as far as the court's observations. And based upon what she said in court and how she said it, the court believes that she wasn't, quite frankly, very credible based on the court's observation.

(R.55: 6-7; App. 606-07). The court's record concerning why Rochelle Cervantes' testimony should not be credited is woefully inadequate. There are no specific examples from the court of "what she said" that detracted from her credibility, and nothing concerning "how she said it" other than giving one, inconsequential answer with a smile; perhaps the same smile that the prosecutor demanded be noted in the record.

Given the court's insufficient basis for discrediting Rochelle Cervantes' testimony, and given that the totality of the circumstances strongly demonstrates that police were going to enter the apartment with or without consent, the trial court's finding that the State proved by clear and convincing evidence that police asked Cervantes for permission to enter and were told "go, go, go" is

clearly erroneous. As a result, the officers actions cannot be justified by consent.

II. Cervantes Did Not Have Authority to Consent to A Search of the Bedroom that Ayala, As a Guest, Had Put to His Exclusive Use

Even if the circuit court's findings are not clearly erroneous as to the consent at the threshold of the residence, Rochelle Cervantes could not consent to a search of the bedroom in which Ayala was staying.

Under certain circumstances, consent to search may be given by a third party, that is, a person other than the subject of the search. State v. Kieffer, 217 Wis. 2d 531, 542, 577 N.W.2d 352 (1998); United States v. Matlock, 415 U.S. 164, 171 (1974). The United States Supreme Court in Matlock stated that consent to search may be "obtained from a third party who possessed common authority over, or other sufficient relationship to, the premises to be searched. 415 U.S. at 171. The Court clarified that this authority is not based in the law of property, but rather on mutual use of the premises to be searched by persons generally having joint access or control for most purposes, so it is reasonable to expect that any of them has the right to permit inspection in his own right and that others have assumed the risk that one of them might permit the common area to be searched. Id. at 171, n. 7.

While Wisconsin appellate courts have addressed the third-party consent topic in several cases, Ayala has found no Wisconsin cases addressing the situation presented here: where a lessee arguably consents to a search of the bedroom where a legitimate overnight guest is presently staying. See e.g., State v. Tomlinson, 2002 WI 91, 254 Wis. 2d 502, 548 N.W.2d 367 (discussing third-party authority of minor child to consent to police entry); State v. Matejka, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891 (applying third-party consent to automobile searches); State v. Kieffer, 217 Wis. 2d 531, 577 N.W.2d 352 (1998)(father-in-law did not have authority to consent to search of daughter and son-in-law's sleeping loft above the garage); State v. McGovern, 77 Wis. 2d 203, 252 N.W.2d 365 (1977)(individual present at house, but not owner, tenant, or occupant of any rooms no authority to consent to search); and Kelly v. State, 249 N.W.2d 800, 75 Wis. 2d 303 (1977) (deceased's children no authority to consent to search of bedroom of deceased's house when they did not live there).

Though Wisconsin hasn't addressed it, other states have found that a host cannot give consent to search the bedroom of an overnight guest. For example, in People v.Givens, 892 N.E.2d 1098, 1102 (Ill. App. 2008), officers received a tip that drugs were being sold out of a specific apartment in Chicago rented by Teri Matthews. Officers met Matthews outside the apartment, and said that she gave them signed consent to enter her apartment and search it, providing them with a key to do so. Id. at 1106. Officers entered the apartment and found Givens and another individual half-asleep in a bedroom along with 21 bags of cocaine. Id. at 1102. Givens did not live there, but was an overnight guest from the night before. Id. at 1103. Givens did not give police consent to enter the bedroom. Id. at 1106-07. The court found that Givens and a reasonable expectation of privacy in the bedroom she was occupying as a houseguest, and that Matthews only had the right to consent to a search of the common areas of the apartment and not the bedroom that was occupied exclusively by Givens. Id. at 1110. "In light of the fact that Matthews permitted Givens to sleep in her bedroom, and that Givens, a houseguest, has a Fourth Amendment right to privacy and thus a right to be free from unreasonable searches and seizures in Matthews' bedroom, Matthews could not, through her consent, give the police legal authority to enter Givens' bedroom." Id. (citing Minnesota v. Carter, 525 U.S. 83, 88 (1998).

Like Givens, Ayala was present in the Cervantes' residence as a welcome overnight houseguest of Steven Cervantes. (R.53: 9; App. 409). Steven had authority to invite guests to stay at the residence and in that room without seeking permission. (Id.: 11; App. 411). The room had been vacant for about a month. (Id.: 16-17; App. 416-17). Like Givens, Ayala had a reasonable expectation of privacy in the room. Police did not get consent from Ayala to enter the room. Ayala was alone in the room, and there was no evidence that anybody else came and went from the room while Ayala was sleeping inside. Given Ayala's exclusive use of the room and his reasonable expectation of privacy therein, Rochelle Cervantes could not give police consent to enter it.

Similarly, in Commonwealth v. O'Neal, 429 A.2d 1189, 1191 (Pa. Super. Ct. 1981), the Pennsylvania Superior Court held that a lessee could not consent to the search of a bedroom that was being used exclusively by his temporary houseguest. O'Neal, was staying at the apartment of Gaston for free. While O'Neal was staying there with

Gaston's permission, the bedroom was not put to common use. Id. at 1192. The record contained no information that Gaston had any of his personal effects in the closet or dresser in the bedroom. Id. As a result, O'Neal had a reasonable expectation of privacy that Gaston could not waive by consenting to a warrantless search. Id.

Ayala's situation is analogous to O'Neal. He was a consensual, overnight guest at the apartment. The record does not disclose any evidence that the bedroom in which he was sleeping was put to common use during his stay; it was put to his exclusive use. As a result, his reasonable expectation of privacy in that room could not be waived by Cervantes' consent.

The search of Ayala's room, resulting in his arrest and the seizure of the firearm, cannot be justified on the basis of consent.

III. Exigent Circumstances Did Not Exist to Justify the Warrantless Entry of the Residence or Bedroom

1. Standards.

Warrantless felony arrests are prohibited in the home, absent probable cause and exigent circumstances. Payton v. New York, 445 U.S. 573, 583-90 (1980). Wisconsin courts identified four exigent circumstances that might justify a warrantless entry: (1) an arrest made in hot pursuit; (2) a threat to safety of suspect or others; (3) a risk that evidence will be destroyed; and (4) the likelihood that the suspect will flee. See e.g., State v. Kiekhefer, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997). The burden is on the State to prove that exigent circumstances existed. Id. Whether exigent circumstances exist and support a warrantless entry is an objective test: whether a police officer under the circumstances known to the officer at the time of the entry reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape. State v. Sanders, 2008 WI 85, ¶ 116, 311 Wis. 2d 257, 752 N.W.2d 713. The State cannot, however, justify a search based on exigent circumstances that are of law enforcement's own making. Kiekhefer, 212 Wis. 2d at 476.

2. Exigent circumstances justifying a warrantless entry did not exist

In its decision in this case, the trial court did not identify which of the recognized exigent circumstances justified the police entry:

> The arrest took place without a warrant, obviously, and that's why we are here and the court will conclude that the entry of the residence was certainly with consent based upon the totality of the circumstances and the entry into the room may have not been with consent but was – there was probable cause. There was probable cause to establish exigent circumstances that were certainly present.
>
> You have to take into consideration the gravity of the offense and why the police were there. There has to be a determination as to the existence of those circumstances known to the officer at the time that they were there. They knew that there was a homicide, that there was also individuals that were in the premises at the time whose life could have been in danger or the destruction of evidence could have begun or in fact escape. They couldn't just sit there and wait based upon the totality of the circumstances of what was going on for the defendant, as was said some place in the testimony, to wait for this person to get out or come out of the residence. Who knows what would have happened if they would have done so and what the reaction would have been by the defendant if the police would have just waited there for the time being.
>
> So you have to analyze the situation from the perspective of the officers at the time they were there, and there was a compelling need to act at that time and they did so. And the court believes that they did so certainly reasonably.

(R.55: 8; App. 608). It appears the court found that entry was justifiable based on potential danger to individuals inside the apartment, destruction of evidence, or escape. The court referenced no specific facts supporting these conclusions.

As an initial matter, the records strongly suggests that obtaining a warrant was never a consideration. Detective Blaszak testified that they had not obtained a search warrant or arrest warrant, and he provided no explanation for why they had not done so. Further, it is reasonable to infer that officers had time to procure a warrant because they had the information the day before Ayala's arrest, and there was time to coordinate and assemble a 25-member police force at a pre-arranged meet location before going to Ayala's suspected

location. "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." Welsh v. Wisconsin, 466 U.S. 740, 751 (1984). No such showing was made.

First, the record does not support a conclusion that a reasonable officer would have believed that delay in procuring a warrant would have "greatly enhanced" the likelihood of Ayala's escape. Police had surrounded the bar and residence with approximately 25 officers. (R.52: 46; App. 346). Given the manpower on the scene, it would be patently unreasonable to believe that Ayala *could have escaped* if the officers had waited to obtain a warrant, much less that his ability to do so would have been greatly enhanced. See State v. Smith, 131 Wis. 2d 220, 235, 388 N.W.2d 601 (1986) (with personnel available, officers could have staked out the premises, covering all exits, and then procured a warrant).

Second, the record is silent regarding the officers concern about the risk of destruction of any evidence. The only "evidence" discussed at the hearing that could have been the subject of this concern was the fact that the weapon used in the Milford homicide had not been recovered. (R.52: 29; App. 329). Unlike small amounts of narcotics, which are easily disposed of with the flush of a toilet or the touch of a flame, a gun is not something that can be easily disposed of. Where police know that suspected evidence is of the type or in a location that makes it impossible to destroy quickly, a warrantless entry on the basis of destruction of evidence is not valid. See Kiekhefer, 212 Wis. 2d at 478-79. Based on the record in this case, no reasonably officer would have believed that delaying to get a warrant would have risked the destruction of the evidence, in this case, a gun.

The only exigent circumstance with even a sliver of factual support in record is the threat of risk of safety to the suspect and others. Detective Blaszak testified that Ayala was wanted for a homicide, the gun had not been recovered, and police had information that the location where they believed Ayala to be was associated with a gang. (R.52: 28-29; App. 328-29). While these facts suggest that Ayala is a dangerous person, however, there is nothing in the record to suggest that *a delay to procure a warrant* would have increased the risk of harm to Ayala, police or others. Surely, once officers decided to knock on the door the risk of a dangerous encounter

increased. However, police are not entitled to create an exigency to justify a warrantless entry. Kiekhefer 212 Wis. 2d at 476. "Exigent circumstances must exist *before* police decide to knock and announce themselves at the door." United States v. Coles, 437 F.3d 361, 367 (3rd Cir. 2006) (emphasis added). The record contains no evidence that at the time officers decided to converge on the residence, Ayala presented a risk of harm to himself or others. To the contrary, the officers testified that they believed Ayala was on friendly turf!

To the extent any exigencies existed in this case, they came to be after officers made the decision to approach the residence without a warrant. The record does not support a finding that a delay in obtaining a warrant to arrest Ayala or search the residence, for which probable cause appeared to be abundant, would have created a risk of harm, destruction of evidence, or escape.

This analysis applies equally to the entry of the residence as well as the interior bedroom. The record reflects that the officers had ample time and information to secure a warrant for Ayala's arrest or a search of the premises. If the court believes that circuit court was correct in finding that Rochelle Cervantes had given valid consent at the door, any subsequent exigencies as to Ayala's bedroom were *created* by police action; they did not exist before police made the decision to proceed without a warrant.

The police action here is consistent with a "planned" arrest situation – one in which an arrest is made after a criminal investigation has been fully completed at another location and the police make a deliberate decision to got to a certain place where the suspect is believed to be in order to take him into custody. LaFave, Search and Seizure, 6.3(f) at 271-72. Courts have been reluctant to accept claims of exigency in these situations because whatever exigencies arose were foreseeable at the time the arrest decision was made, when a warrant could have been readily obtained. Id., and see, State v. Smith, 131 Wis. 2d 220 (1986) (no exigent circumstances where three hours earlier police at station decided to arrest defendant, therefore not an ongoing investigation type of case).

V. The Gun and Ayala's Statement Are Fruit of the Illegal Search, and Must Be Suppressed.

1. Standards

Evidence seized pursuant to searches conducted in violation of State and Federal constitutions must be excluded from evidence. See Mapp v. Ohio, 367 U.S. 643 (1961); Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923). In addition, any evidence that is fruit of the poisonous tree, must also be excluded. Wong Sun v. United States, 371 U.S. 471 (1963). Whether evidence is sufficiently attenuated from the illegal police activity to remove its taint is a question of constitutional fact. Kiekhefer, 212 Wis. 2d at 480. In determining whether evidence is sufficiently attenuated from the primary illegality, courts should consider: (1) the temporal proximity of the arrest and confession; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the misconduct. Brown v. Illinois, 422 U.S. 590, 604 (1975). Once the illegality has been established, the burden is on the State to prove that the challenged evidence is sufficiently attenuated. Id.

2. Both the gun and Ayala's statement must be excluded

Immediately following Ayala's arrest in the bedroom, Officers Bandt and Wearing lifted the mattress and found the gun. (R.52: 8-9; App. 308-09 There can be no doubt that this piece of evidence was obtained as a direct result of the illegality and must be suppressed.

Ayala's subsequent statement to police must also be suppressed. In analyzing the temporal proximity factor, courts examine both the amount of time between the illegal conduct and the confession as well as the conditions that existed during that time. State v. Anderson, 165 Wis. 2d 441, 448, 477 N.W.2d 277 (1991). In Anderson, the time between the illegal searches and confession was overnight and "at least" 7 hours. Id. at 450. During that time, Anderson slept at home, and after police came back to arrest him Anderson joked back and forth with the officers until his confession. Id. Given that amount of time under those conditions, the court found that this factor "leans" toward a finding of attenuation. Ayala was arrested at approximately 12:30 p.m. He was removed from a holding cell and brought to an interrogation room at 7:00 p.m. (R.54:

29-30; 429-30). He was interviewed by two detectives for approximately 44 minutes before his Miranda warnings were given. (Id.: 31). He made admissions regarding the shooting approximately 1 hour later. (R.69: Exh. 95, 2:20:00-2:52:00). While Ayala had an approximately similar amount of time between his arrest and confession, he did not spend that time sleeping in his own bed or joking with the officers, he was in a holding cell, uncertain why he had been arrested. These starkly contrasting conditions of existence in the intervening time from illegal arrest to confession point towards a finding that Ayala's confession was not attenuated. See also, Taylor v. Alabama, 457 U.S. 687 (1982)(six hours between illegal arrest and confession insufficient to purge taint).

Second, the only intervening circumstance between Ayala's illegal arrest and his confession was the fact that he was Mirandized. Of course, the administration of Miranda warnings alone does not cause the statement to be sufficiently attenuated so as to purge the taint. Anderson, 165 Wis. 2d at 449. In further contrast to Anderson, whose wife told him about the police searches that lead to his interrogation, Ayala was not given any information by police about why he had been arrested. Indeed, Ayala seemed to believe he had been arrested for something other than a homicide. (R.54: 44-45; App. 544-45).

In addition, the officers misconduct had a "quality of purposefulness." Brown, at 605. As has been detailed elsewhere in this brief, officers had ample information and time to obtain an arrest or search warrant, but chose instead to make a warrantless entry. Police provided no explanation for eschewing the preferred approach of obtaining independent judicial approval for their actions. See U.S. v. Ventresca, 380 U.S. 102, (1965) (the informed and deliberate evaluations of magistrates who are empowered to issue warrants are to be preferred over the hurried action of the officers who may happen to make arrests.).

While the burden is on the State to prove that the evidence is sufficiently attenuated from the illegal activity, the record in this case demonstrates that the gun seized at the apartment and Ayala's subsequent confession are free of the illegal taint, and must be suppressed from evidence.

CONCLUSION

Wherefore, based on the foregoing, Ayala requests that this court enter an order vacating his conviction and ordering a new trial.

Dated at Milwaukee, Wisconsin this 5th day of February .

_/s/ Craig S. Powell_____
Martin E. Kohler
State Bar No. 1016725
Craig S. Powell
State Bar No. 1046248
KOHLER & HART, LLP
Attorneys for Miguel Ayala

KOHLER & HART, LLP
735 North Water Street, Suite 1212
Milwaukee, Wisconsin 53202
Phone: 414-271-9595
Facsimile: 414-271-3701

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for brief and appendix produced with a proportional serif font. The length of this brief is 10,984 words.

__/s/ Craig S. Powell_____
Craig S. Powell
State Bar No. 1046248
KOHLER & HART, LLP

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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_/s/ Craig S. Powell_____
Craig S. Powell
State Bar No. 1046248
KOHLER & HART, LLP