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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT I

Case No. 2009AP2690-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MIGUEL AYALA,

Defendant-Appellant.

**APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE JEFFREY WAGNER,
PRESIDING**

BRIEF OF PLAINTIFF-RESPONDENT

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**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

STATEMENT OF THE CASE

Miguel Ayala appeals from a judgment of conviction entered in Milwaukee County Circuit Court after a jury found him guilty of first degree intentional homicide and three counts of armed robbery with use of force, as a party to a crime (37). Ayala argues on appeal that the trial court improperly denied his motion to suppress certain evidence – a gun and Ayala’s police statement. Police obtained this evidence following their warrantless entry into the bedroom of an apartment in which Ayala was staying as an overnight guest.

STATEMENT OF FACTS

► **The Crime.**

The homicide victim was Lodewikus “Vic” Milford, who was an executive at Miller Brewing Company (2:4; 60:18). Ayala killed Milford in a random robbery attempt.

According to the criminal complaint, on Friday evening, January 25, 2008, Milford went out for dinner and drinks with three co-workers from Miller Brewing Company (2:4). Shortly after 1 a.m., the group began walking toward their cars, located in a parking lot near a bar they had visited (2:4). One member of the group had driven her own vehicle; the other two were riding with Milford (2:4).

As the group neared their vehicles, Ayala approached Milford, pointed a gun at him, and demanded money (2:3-4). Milford gave his wallet to Ayala (2:4). Ayala demanded money from Milford’s two passengers, and they complied (2:4).

At some point, Milford’s car alarm went off, which upset Ayala (2:7).

Milford got into the driver's seat and shut the door (2:4). According to Ayala, Milford made a "slick" comment that upset Ayala (2:7). Ayala fired two shots through the driver's side window, striking Milford in the neck (2:3, 7). He died at the scene (2:3).

► **The Investigation.**

By January 30, 2008, police had gathered enough information from individuals with knowledge of the robbery to identify Ayala as the prime suspect in Milford's homicide (52:25-28). Police had information that Ayala was a member of the Latin Kings (52:30). Police went to look for Ayala at a known Latin King meeting place – a bar named JoJo's and the apartment above it (52:26).

► **State Witnesses at the Suppression Hearing.**

Several officers testified at the suppression hearing about the events at JoJo's on January 30, 2008. A summary of their testimony follows.

»» Officer Bandt. Timothy Bandt was on-scene as a police officer (52:4-5). Bandt testified that he went to JoJo's at about 12:20 p.m. (52:10). The bar was on the first floor, with an apartment above (52:5).

Bandt talked to a Hispanic male through an apartment window (52:12). He asked the man to come to the front door (52:12).

A different person – Rochelle Cervantes – came down to the front door (52:12-13). Bandt talked with Rochelle. He did not have his gun drawn, nor does he believe that other officers had their guns drawn (52:13-14; 22).

Rochelle said she and her husband, Jose, rented the building and ran the tavern. They lived in the apartment above the bar (52:5-6).

Bandt showed her a picture of Ayala and asked her if he was there (52:6). She said yes and pointed to a bedroom at the top of the stairwell (52:6). Rochelle's husband, Jose, was standing on the stairwell (52:15).

Bandt said that he would like to go get Ayala (52:15). Rochelle and Jose made a statement to the effect of "go, go" (52:15-16, 23). Rochelle said something to the effect that she knew Ayala was no good (52:16, 23).

Approximately ten officers, including Bandt, entered the apartment (52:16). Bandt and another officer went to the bedroom where Rochelle said Ayala was staying (52:7). They suspected that Ayala was armed with the handgun he had used in the homicide, as this handgun had not yet been recovered (52:7).

The bedroom door was partially closed (52:16). Police did not knock on the bedroom door before entering; Officer Bandt explained that "when there is a person that is wanted for that type of aggravated offense and possibly and probably armed . . . I would not [knock] in fear of getting shot through the door" (52:22-23). Officer Bandt's weapon was drawn when he entered the bedroom (52:19).

Ayala was in bed (52:7). Police asked Ayala for his name (52:8); when Ayala responded truthfully, they placed him under arrest (52:8).

As part of a protective sweep, police lifted the mattress on which Ayala was resting (52:9). Bandt testified that they did a protective sweep because "if there [were] other persons present they could access" any firearms or contraband that may be present (52:8-9). Ayala was in reach of the bed when they searched it (52:9).

Police observed a handgun under the mattress (52:9). Bandt left the handgun in place and escorted Ayala outside (52:9).

»» Detective Blaszak. Christopher Blaszak was on-scene as a homicide detective (52:24-25). Blaszak had previously worked with an anti-gang unit in the area where JoJo's is located (52:42). Blaszak knew from this experience that JoJo's and the apartment above it had Latin Kings associations (52:43). He testified that police went to the location because "it was a known Latin King hang out" and because police had "information that [Ayala] had connections with the Latin Kings" (52:43).

Blaszak arrived at the building at 12:10 p.m. (52:28). He requested additional backup units because he believed that Ayala would be armed (52:28). Blaszak knew the gun used in the homicide had not been recovered (52:29). He also testified that "if gang members had been previously identified at the location the chance of them being armed and the fact that I was looking for a homicide suspect who the probability of him being armed was great" (52:29).

In all, approximately fifteen uniformed officers and ten plain clothed officers were on-scene (52:46).

Blaszak waited outside while Officer Bandt asked for consent to enter the building (52:30). As best as he could recall, none of the on-scene officers had their guns drawn at this time (52:31).

Blaszak then followed a group of officers inside the residence and up the stairs leading to the apartment above the bar (52:31). He heard someone say that Ayala was in an upstairs bedroom (52:31).

Blaszak testified that he had his gun out as he made his way up the stairs "because of my training and experience and knowing that a potential homicide suspect

is up inside this residence and there are civilians inside the residence. The chance for the suspect being armed is highly probable. I need to be ready to defend myself, the other officers and other citizens.” (52:52, 55).

As he entered the second floor, he observed Rochelle Cerventes and her husband (52:32). He asked them to come with him into a hallway and then into the kitchen for their safety (52:32, 50-51).

Blaszak talked with Rochelle (52:32). He showed her a picture of Ayala (52:32). She said that she knew him only by the name of “Wicked” (52:32). She said she did not know when or how he got into the apartment (52:33).

Blaszak asked her for her consent to search the residence for evidence as part of a homicide investigation (52:33-34). She signed and dated his memo book beneath a statement that read: “We give police consent to search our house at 600 W. Maple for weapons and/or evidence related to a homicide investigation” (52:35; 73:Ex. 4). Rochelle signed the statement at 12:54 p.m. – after Ayala was in the squad car (52:35, 53; 73:Ex. 4). Other residents of the apartment (Jose Cervantes, Andy Hernandez, and Steven Cervantes) also signed Blaszak’s memo book beneath this statement (52:36-38; 73:Ex. 4). Blaszak’s weapon was not drawn at the time he obtained this consent (52:39).

Rochelle told Blaszak that she had no problem with police being there (52:36). She gave police information concerning who lived in the apartment and the rooms they stayed in (52:36).

By the time Blaszak reached the room where Ayala had been staying, Ayala was already in custody and his gun had been found (52:47-48).

Blaszak called the Bureau of Identification technician to photograph the residence and the gun

(52:40). Blaszak collected the gun for processing (52:40). The gun, which was loaded, matched the type of gun that killed Milford (52:41, 55).

»» Detective Braunreiter. Michael Braunreiter was on-scene as a detective (52:56-58). On January 30, 2008, Braunreiter interviewed Rochelle to learn what she knew about the homicide and about Ayala (52:59).

Rochelle told Braunreiter that she did not know how Ayala – she knew him as “Wicked” – got into her residence (52:59). She went to bed at 12:15 a.m. and Wicked was not there (52:60). She said she did not want Wicked in her home because he is trouble (52:60).

Rochelle also told Braunreiter that at 7:45 a.m., she saw Wicked in her son Ricardo’s room, lying on the bed (52:62).

While cooking lunch later that morning, one of her sons asked her what the police wanted (52:62). She went downstairs into the bar and looked out the windows and saw the police (52:62). The police saw her and motioned her to the back door (52:62). She went to the back door and let the police in (52:62). She consented to the police entering her home and searching for Ayala (52:62-63).

»» Detective Petropoulos. Gust Petropoulos was on-scene as a detective (52:81-82). Petropoulos testified about his conversation with Jose Cerventes on January 30, 2008 (52:82). Jose told Petropoulos that the police had his permission to search his residence and that he wanted to cooperate in every way that he could (52:83). He never complained about how the police searched his residence (52:83-84).

»» Officer Bohlen. Todd Bohlen was on-scene as a police officer (54:4). Bohlen testified that he knew that the building was a Latin King hang out; that Ayala was an alleged Latin King; and that Ayala was a homicide suspect who could be armed (54:8-9).

He testified that he knocked on a door on the west side of the building (54:5). Rochelle Cervantes answered the door (54:5). Her husband, Jose, was behind her (54:5).

Officer Bandt asked Rochelle about Ayala, and she pointed to an upstairs bedroom (54:6). Bandt asked if they could go in and get him, and she said "Go. Go. Go." (54:7).

Bohlen led Rochelle and Jose to a safe area of the building (54:7).

»» Officer Wearing. Richard Wearing was on-scene as a police officer (54:13-14). Officer Wearing testified that Rochelle answered the knock on the door and confirmed that Ayala was in the residence (54:15-16). Jose was standing on the stairway (54:17). Jose asked Officer Wearing if the police were there for his son's friend (54:17). Officer Wearing said "yes" (54:17). Jose pointed to a room upstairs and said "He's in there. You can go get him" (54:17-18).

The officers then went up the stairs and located Ayala in the upstairs bedroom (54:18). The bedroom door was open about four to five inches (54:20).

Ayala resisted arrest. He kept moving his arms from side to side to prevent police from putting his arms behind his back (54:20). It took three officers to arrest Ayala (54:21). Wearing does not believe Ayala was injured during the struggle (54:22).

As they were arresting Ayala, Officers Wearing and Bandt searched the bed on which Ayala was resting and found a handgun underneath a mattress (54:19, 23).

► **Defense Witnesses At The Suppression Hearing.**

Ayala called two witnesses at the suppression hearing to tell their version of events on January 30, 2008. A summary of their testimony follows.

»» Steven Cervantes. Steven Cervantes lives with his parents, Rochelle and Jose, and his older brother, Andy Hernandez, in the apartment above JoJo's (53:7). Steven was twenty-one-years-old at the time of the suppression hearing (53:7).

Steven's older brother, Ricardo, had a bedroom in the apartment but did not use it because he stayed at his girlfriend's place (53:8). Ricardo had not used his room for about a month before the arrest (53:16).

Steven came into contact with Ayala around midnight the night before Ayala's arrest (53:8). Ayala asked if he could stay at the apartment, and Steven said yes (53:9). Ayala stayed in Ricardo's old room (53:9-10).

Steven was in a back room when the police entered the apartment (53:12-13).

»» Rochelle Cervantes. Rochelle testified that she and her husband, Jose, run JoJo's tavern (53:18-19).

Rochelle testified that she was in the kitchen of the apartment above JoJo's when she heard a tapping sound (53:20). She went to her bedroom window and saw officers with their guns drawn (53:20). She went downstairs and asked who it was (53:20). She saw eight-to-ten officers (53:22).

The officers said it was the Milwaukee Police Department and instructed her to open the door (53:20). Their guns were pointed at her (53:20). They had a device that she thought was for breaking her door down (53:22).

She asked the police what the problem was (53:20). They did not tell her (53:20). They told her to step outside (53:20). They showed her a picture of Ayala and asked if he was inside (53:20). She said yes (53:20). She knew he was inside because she saw Ayala resting in a bedroom; the bedroom door was cracked open about four or five inches (53:31). She pointed to a room where he was staying (53:21). The police told her to step to the front of the building (53:21).

The police went in, leaving her standing outside (53:24). She was outside for eight-to-ten minutes, and then the police allowed her back in and told her to sit on the stairs and not move (53:24-25).

She saw Ayala after police had arrested him (53:25-26). She saw his ear bleeding (53:26). She heard Ayala say that they didn't have to rough him up and rip his earring out of his ear, and the officer responded, "bitch, that ain't nothing" (53:26).

Rochelle denied a variety of things. She denied that the police ever asked for permission to enter (53:42). She denied ever letting in the police (53:42). She denied saying "go" to the officers (53:40). She denied ever letting Latin King members into her bar or her residence (53:32-33). She denied telling police that her son or Ayala are Latin King members (53:32-33). She denied any knowledge of where the loaded gun underneath Ayala's mattress came from (53:43-44).

► **Trial Court's Decision.**

In deciding Ayala's suppression motion, the trial court believed the officers' testimony and disbelieved Rochelle's version of events. The court stated:

[T]he testimony of the Detective said that they had consent from Ms. Cervantes to go up the staircase and get Mr. Ayala. She said go, go. That was repeated a couple of different times or heard by different other individuals that she had in fact given consent in order to allow the police to enter into the units.

(55:3).

The court found that the police did not knock at the bedroom door because they feared getting shot by a suspect who they believed still had possession of the murder weapon (55:3-4). The court further found that JoJo's was a known Latin King hang out and that Ayala was a known Latin King (55:4).

The court continued:

There was consistent testimony as to what was said to the police, and there was consistent testimony by the police as far as the consent issue. And their recordings of what Ms. Cervantes had said to them, including writing out a piece of paper or initialing the fact that they were allowed entry into the premises with consent.

(55:5).

Then the court summarized Rochelle's testimony. The court noted that she denied that the police requested permission to enter and that Latin King members come into her bar (55:6). The court then stated:

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.

(55:6-7).

The court continued:

[T]he 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 the evidence could have been 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.

(55:7-9).

ARGUMENT

I. THE OFFICERS ENTERED THE APARTMENT CONSTITUTIONALLY.

“The Fourth Amendment generally prohibits the warrantless entry of a person’s home.” *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). This ban is inapplicable, however, when the police enter the home with consent from a person with authority over the premises. *See id.*

Whether an individual gave consent for the police to enter is a question of historical fact; this court must uphold the trial court determination of that issue unless the court's finding is contrary to the great weight and clear preponderance of the evidence. *State v. Tomlinson*, 2002 WI 91, ¶ 36, 254 Wis. 2d 502, 648 N.W.2d 367.

Voluntariness of consent, however, is a question of constitutional fact. *State v. Hartwig*, 2007 WI App 160, ¶ 7, 302 Wis. 2d 678, 735 N.W.2d 597. This court gives deference to the circuit court’s findings of historical fact but independently applies constitutional principles to those facts. *Id.*

A. Rochelle Gave Police Consent To Enter.

Ayala does not dispute that Rochelle lived in the apartment above JoJo’s bar and had authority to permit the police to enter the apartment. Ayala contends, however, that the testimony does not support a finding that she

actually consented to the officers' entry. In Ayala's view, the evidence shows only that the officers "did not ask for her consent to enter, but just went in" (Ayala's Brief at 18-19).

Consent may be given verbally, by gesture, or by conduct. *Tomlinson*, 254 Wis. 2d 502, ¶ 37. In this case, the trial court believed the officers' testimony that Rochelle gave verbal consent for the police to enter the apartment. Credibility determinations lie with the trial court because it can observe the witnesses and assess their demeanor and overall persuasiveness. *State v. Hughes*, 2000 WI 24, ¶ 2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621. This court must uphold the trial court's credibility determinations unless they are "against the great weight and clear preponderance of the evidence." *Id.*

Rochelle claimed at the suppression hearing that when she went to the front door, she was met by battering-ram-wielding officers with guns pointed at her, who did not tell her why they were there; who told her to exit the building; and who then entered while she stood outside, without asking for permission to enter. The trial court rejected that testimony. The trial court determined instead that the "the entry of the residence was certainly with consent based upon the totality of the circumstances," and that "what [Rochelle] 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" (55:6-8). The record offers no reason to reject the trial court's credibility determination in this case.

Ayala argues that the credibility determination should be rejected for a variety of reasons. One reason is that court, in summarizing the officers' testimony, referred to one of the officers by the wrong name (Ayala's Brief at 18). This argument is overly fussy. *First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 988 (9th Cir. 2000) ("Of course, judges are not infallible").

Ayala also claims that the trial court should have concluded that the testifying officers were lying because Officer Wearing testified that Jose gave police consent to enter, whereas Officer Bandt testified that both Rochelle and Jose gave consent to enter (Ayala's Brief at 18). The State does not know how testimony that more than one person gave consent to enter undermines the trial court's finding that police had consent to enter. Regardless, there is nothing patently incredible about the scenario described by the officers: Rochelle giving consent at the front door, and Jose giving consent while standing on the stairway beyond the front door. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) (circuit court's credibility assessments will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts).

Ayala also points out differences in the two officers' testimonies concerning circumstances wholly unrelated to the issue of consent; *e.g.*, how many officers were in the bedroom when Ayala was arrested and whether Ayala was cooperative during the arrest (Ayala's Brief at 18). Any differences in these post-entry facts are irrelevant to the issue of consent.

Ayala also argues that "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" (Ayala's Brief at 19). Ayala claims that, given the dangerousness of the situation, "[a]ny 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" (Ayala's Brief at 19). It is therefore impossible to believe, Ayala argues, that the officers actually asked for consent when "they could have been denied consent to enter, alerting a potentially dangerous suspect inside" (Ayala's Brief at 19).

This argument goes much too far. There are innumerable situations in which it is dangerous or troublesome for law enforcement to ask for consent – but that does not mean that the court can simply presume that they never do so. Obtaining valid consent to enter a dwelling is a perfectly lawful and well recognized substitute for the warrant requirement. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The police testified that they asked for and received such consent here, and the court did not believe testimony to the contrary. Ayala presents no valid reason to reject the trial court's credibility determination.

Finally, Ayala criticizes the trial court for not explaining why it found Rochelle's testimony incredible, other than the court's remark that she was smiling when denying some of the prosecutor's questions (Ayala's Brief at 20). Once again, questions of witness credibility are "peculiarly within the province of the trial court acting as the trier of fact," and this court will not "reassess the witnesses' credibility." *State v. Young*, 2009 WI App 22, ¶ 17, 316 Wis. 2d 114, 762 N.W.2d 736, *review denied*, 2009 WI 34, 316 Wis. 2d 719, 765 N.W.2d 579. The trial court is not required to "explicitly explain why it finds one witness more credible than another." *Id.* ¶ 18. This court cannot substitute its judgment for that of the trial court, and, therefore, this court must reject Ayala's request that it reverse the trial court's finding that Rochelle gave consent for the police to enter.

B. Rochelle Gave Her Consent Voluntarily.

The next issue is whether Rochelle gave her consent voluntarily. Consent is voluntary when "given in the absence of duress or coercion, either express or implied." *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). "Voluntariness is determined by looking at the totality of the circumstances, including events surrounding the consent and the character of the

individual whose consent is sought. No single criterion controls.” *Hartwig*, 302 Wis. 2d 678, ¶ 8 (citation omitted).

In this case, the circuit court found that the officers correctly described the details of what took place before they entered the apartment: the police came to the door at about noon; they identified themselves to Rochelle as police officers; and they explained to her why they wanted to enter the apartment – to find Ayala (55:2-5). There is nothing in the record to suggest that Rochelle was anything other than alert, oriented, and sober. There is nothing in the record to suggest that Rochelle, or any other resident of the house, ordered the police out of the house. Additionally, the circuit court found that the events surrounding the consent to enter included Rochelle’s voluntary cooperation with the police after the entry, and the court noted particularly that she gave the officers written consent to search the apartment (55:5).

To the extent that Ayala contests the voluntariness of Rochelle’s consent by way of her testimony at the suppression hearing, it is clear that the trial court placed little weight in her testimony. The court found that the officers recalled the events more accurately than did Rochelle. Because the court’s findings are not against the great weight and clear preponderance of the evidence, this court must not disturb them. *See Tomlinson*, 254 Wis. 2d 502, ¶ 36.

The totality of the circumstances supports the trial court’s determination that Rochelle voluntarily consented to the officers’ entry into the apartment. Accordingly, the trial court properly concluded that the officers’ entry into the apartment was constitutional.

II. EXIGENT CIRCUMSTANCES JUSTIFIED THE WARRANT-LESS ENTRY BY THE POLICE INTO THE BEDROOM WHERE AYALA WAS STAYING AS AN OVERNIGHT GUEST.

The trial court held 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 . . . there was probable cause. There was probable cause to establish exigent circumstances that were certainly present” (55:7-8).

As the trial court’s ruling reflects, an exception to the warrant requirement arises when the State can demonstrate “both probable cause and exigent circumstances that overcome the individual’s right to be free from government interference.” *Hughes*, 233 Wis. 2d 280, ¶ 17. To determine whether the entry into the bedroom where Ayala was staying as a guest was lawful,¹ this court must answer two questions: first, did the officers have probable cause to believe that the bedroom contained evidence of a crime; and second, did exigent circumstances exist at the time of the entry to establish an exception to the warrant requirement? *Id.* ¶ 18.

Here, Ayala does not dispute the existence of probable cause to search the bedroom in which he was staying. And for good reason: based on the officers’

¹ The State does not dispute that, as an overnight guest at the apartment, Ayala had a legitimate expectation of privacy under the Fourth Amendment. See *Minnesota v. Olson*, 495 U.S. 91, 98-100 (1990).

knowledge of information implicating Ayala in Milford's homicide, there was a fair probability that contraband or evidence of a crime would be found in the bedroom; therefore, the officers had probable cause to enter.

Ayala contends, however, that there were no exigent circumstances justifying the warrantless entry and search of the bedroom (Ayala's Brief at 23-26). There are four well-recognized categories of exigent circumstances that have been held to authorize a law enforcement officer's warrantless entry into a residence: (1) hot pursuit of a suspect; (2) a threat to the safety of a suspect or others; (3) a risk that evidence will be destroyed; and (4) a likelihood that the suspect will flee. *State v. Richter*, 2000 WI 58, ¶ 29, 235 Wis. 2d 524, 612 N.W.2d 29. Whether exigent circumstances exist turns on considerations of reasonableness, and this court applies an objective test when making this determination. *Id.* ¶ 30. The test is "[w]hether a police officer under the circumstances known to the officer at the time [of 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." *Id.* (citation omitted).

At a minimum, the second factor – a threat to the safety of a suspect or others – was present here. Ayala was a suspect in a brutal, random homicide. He had avoided police for several days. Police had not found the murder weapon, and thus they reasonably believed that Ayala was armed. Ayala was a suspected Latin King; the building was a known Latin King meeting place. Police knew that Ayala was in the bedroom because Rochelle and Jose said he was there, though neither appeared to know why he was there. There were numerous people in the apartment whose identities and relationships to Ayala were either unknown or unclear to the police. The door to Ayala's room was ajar, so that officers could reasonably believe that Ayala was aware that officers were outside the door. The officers could also reasonably believe that, under these circumstances, Ayala would be nervous and

agitated, and would do what he deemed necessary to avoid arrest. These facts would allow a reasonable police officer to believe that entry into the bedroom in order to perform a protective sweep was necessary due to a potential threat to the safety of the officers and the other inhabitants of the apartment.

Ayala's arguments to the contrary are unavailing. He argues that the police created the exigency used to justify their warrantless search and seizure by knocking on the door of the apartment (Ayala's Brief at 25-26). This argument ignores two facts: (1) obtaining consent to enter a dwelling is a perfectly lawful substitute for the warrant requirement, *Schneckloth*, 412 U.S. at 219; and (2) as explained above, the police validly obtained Rochelle's consent to enter the apartment. By obtaining consent to enter the apartment, the police were lawfully in a position to observe the exigent circumstances that justified their further actions.

Ayala also argues that the delay associated with the warrant procedure would not have jeopardized the safety of the officers or the public because the defendant "was on friendly turf" and because police had sufficient personnel to observe all of the building's entrances and exits (Ayala's Brief at 24-26). But whether the officers' entry into the bedroom where Ayala was staying was lawful must be viewed through the prism of whether, once in the apartment by consent, a reasonable officer would have believed that a further entry into the bedroom was justified by the exigent circumstances that were present. As explained above, upon learning that Ayala was in a bedroom, possibly armed, it would have been unreasonable to expect the police to then retreat from the premises, or to stand at the bedroom door while waiting for a warrant. The officers were not in a position of safety, and they did not have the luxury of time to carry out a warrant procedure.

This case is unlike the case cited by Ayala, *State v. Kiekhefer*, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997), where this court found no justification for a warrantless search. In *Kiekhefer*, police, acting on a tip that Kiekhefer was holding drugs and guns for a friend, sought and received permission from Kiekhefer's mother to enter the house in which he was living. *Id.* at 465-66. Although police had been informed that Kiekhefer was possibly holding guns for his friend, they did not know whether they were in his room or whether they were loaded, nor was there any indication that Kiekhefer was dangerous. *Id.* at 477. As the officers approached the closed door to Kiekhefer's room, they smelled the odor of burning marijuana. *Id.* at 466. They opened the door, walked in, and immediately handcuffed Kiekhefer and a friend who was with him. *Id.*

This case is degrees-of-separation different than *Kiekhefer*. Ayala was the prime suspect in a very recent, random murder. Police had reason to believe he was armed. He was a suspected Latin King in a known Latin King meeting place. He was in a bedroom with the door cracked open. The officers could reasonably fear being attacked whether they stood guard over the bedroom door or retreated down the stairs. These circumstances posed special risks that did not exist in *Kiekhefer* and that required the officers to act immediately and to forego obtaining a warrant.

Because there was both probable cause and exigent circumstances, the officers' entry into the bedroom was lawful, and neither the gun nor Ayala's police statement obtained after his arrest was fruit of the poisonous tree.

CONCLUSION

The judgment of conviction should be affirmed.

Dated this 21st day of May, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,598 words.

Dated this 21st day of May, 2010.

Mark A. Neuser
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I hereby certify that:

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Dated this 21st day of May, 2010.

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