STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP350-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE A. BRIDGES,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION TO SUPPRESS ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MICHAEL D. GUOLEE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did Bridges have standing to object to the searches of Mallory's duplex unit and the separate, locked basement of the building when Bridges was in violation of his extended supervision by staying at Mallory's without his probation agent's permission? The circuit court concluded he lacked standing, and denied Bridges' motion to suppress on this basis (37:172-79; A-Ap. A117-A124).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested; the issue and relevant facts should be adequately presented in the briefs. Because no Wisconsin case has addressed whether a person on supervision has standing to object to a search when his or her presence in the searched place violates the person's conditions of supervision, this court's decision and opinion may meet criteria for publication. *See* Wis. Stat. § (Rule) 809.23(1).

SUPPLEMENTAL STATEMENT OF THE CASE

Bridges' Statement of the Case and Statement of the Facts sections are sufficient to frame the issue of standing, although his account of the facts is highly selective. As developed in Section II. below, the State takes issue with Bridges' view that the court made rulings on whether Mallory consented to the search, and whether the warrantless search was justified by one of the exceptions to the warrant rule. Despite some discussion of the consent issue in the court's oral decision, the record shows that the court purposely limited its decision to the standing issue, and chose not to rule on issues relating to the legality of the search (37:151-60; 162-63; 172-78; A-Ap. A107-A108, A117-A123).

The State provides facts as necessary in the Argument section.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY CONCLUDED THAT BRIDGES FAILED TO ESTABLISH STANDING TO OBJECT TO THE SEARCH OF MALLORY'S RESIDENCE, AND OF THE SEPARATE, LOCKED BASEMENT.

A. Introduction.

Bridges argues the circuit court erred in denying his motion to suppress evidence by concluding he lacked standing to object to the searches of Mallory's duplex apartment unit, and of the separate, locked basement in the apartment building (Bridges' br. at 18-20). Bridges argues he had standing because he was a guest at Mallory's unit that night, citing *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990), and was a frequent houseguest who had kept some personal items there (Bridges' br. at 18-20). Bridges asserts he had standing that he could access the locked basement "any time that he wanted," and that his stereo and treadmill were stored there (Bridges' br. at 20).

Curiously, Bridges' brief omits one critical fact: Bridges was on supervision at the time of the search, and, by staying at Mallory's residence overnight without his probation agent's permission, he was in violation of his supervision (37:119, 130-31). Bridges also overstates his access to the basement, the area in which the stash of heroin, cocaine, ecstasy and firearms was found (2:4-5). The basement was locked and separate from Mallory's unit, Bridges did not have a key, he was not allowed to access it without permission, and, by his own account, he visited the basement only two or three times over several months (37:19-20, 42-43, 105-06, 139-41).

In light of Bridges' admission that he was in violation of his probation by staying at Mallory's

residence, the State submits he lacks standing to object to the search because he did not have a privacy interest in Mallory's residence that society would recognize as legitimate. Moreover, if this court declines to rest its decision on the sole basis that Bridges lacked a legitimate expectation of privacy in a place in which he could not stay overnight without violating his probation, it should nonetheless conclude under the totality of the circumstances applying the multi-factor test in *Rewolinski*[1] that Bridges did not have a legitimate expectation of privacy in the searched areas.

B. Legal Principles and Standard of Review Relevant to Whether a Defendant Has a Reasonable Expectation of Privacy in a Particular Area.

The Fourth Amendment to the federal constitution and art. I, sec. 11 of the state constitution guarantee Wisconsin citizens freedom from "unreasonable searches and seizures." *State v. Robinson*, 2010 WI 80, ¶ 24, 327 Wis. 2d 302, 786 N.W.2d 463.[2]

However, to invoke this constitutional protection, the defendant must first have a reasonable expectation of privacy in the property or location to be searched. *State v. Rewolinski*, 159 Wis. 2d 1, 12, 464 N.W.2d 401 (1990) ("[T]he constitutionality or reasonableness of the government conduct does not come into question unless and until it is established that [the defendant] had a legitimate expectation of privacy . . ."). The defendant must demonstrate that he or she had an actual, subjective expectation of privacy in the area searched, and that "such

[1] *State v. Rewolinski*, 159 Wis. 2d 1, 12, 464 N.W.2d 401 (1990).

[2] Wisconsin courts have generally viewed the scope of art. I, sec. 11 of the state constitution to be coterminous with the Fourth Amendment. *State v. Robinson*, 2010 WI 80, ¶ 24 n.11, 327 Wis. 2d 302, 786 N.W.2d 463.

an expectation is legitimate or justifiable in that it is one that society is willing to recognize as reasonable." *State v. Dixon*, 177 Wis. 2d 461, 468, 501 N.W.2d 442 (1993). The defendant's burden in establishing the reasonableness of the alleged privacy expectation is a preponderance of the credible evidence. *Rewolinski*, 159 Wis. 2d at 16.

In addressing the objective prong of the tests, courts typically examine the following factors:

> (1) whether the defendant had a property interest in the premises; (2) whether he was legitimately (lawfully) on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

Rewolinski, 159 Wis. 2d at 17-18 (citation omitted); *see also State v. Trecroci*, 2001 WI App 126, ¶ 36, 246 Wis. 2d 261, 630 N.W.2d 555. "This list of factors is neither controlling nor exclusive; rather, the totality of the circumstances is the controlling standard." *State v. Orta*, 2003 WI App 93, ¶ 14, 264 Wis. 2d 765, 663 N.W.2d 358.

Courts may simply conclude that the defendant lacks standing without applying a totality of the circumstances analysis when the defendant's expectation of privacy in a place is not legitimate because his or her very presence there is contrary to the law. *See, e.g. Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (burglar lacks an objective expectation of privacy because his presence is wrongful and not one society would recognize as legitimate); *State v. Amos*, 153 Wis. 2d 257, 269-70, 450 N.W.2d 503 (Ct. App. 1989) (prison escapee lacked expectation of privacy that society would recognize as legitimate in his hide out).

A trial court's factual findings pertinent to the issue of standing to challenge a search will be upheld unless clearly erroneous, but its determination of whether the

defendant had standing is reviewed de novo. *See Trecroci*, 246 Wis. 2d 261, ¶ 23.

C. Bridges' Did Not Have an Expectation of Privacy in Mallory's Residence that Society Would Recognize as Legitimate Because, By Staying There Overnight Without His Probation Agent's Permission, Bridges Was Violating the Terms of His Extended Supervision.

In March 2010, police conducted a warrantless search of Frederick Mallory's unit in a duplex apartment building, and of the building's locked basement (2:3-4). In Mallory's kitchen, officers found, among other items, a large bag containing empty, clear plastic "corner-cut" baggies used in the drug trade; a gram scale; and a plate with an off-white residue that appeared to be cocaine base (2:4). In the basement, officers found a toolbox containing a total of 341 pills of ecstasy in 14 plastic bags, two clear plastic knotted bags containing a total of 48.74 grams of heroin, and three clear plastic knotted bags containing a total of 22.72 grams of cocaine (2:4). Officers also discovered two loaded pistols above a heating duct in the basement (2:4). Fingerprint analysis tied Bridges to the toolbox, guns and other evidence (2:5). Bridges was charged in a criminal complaint with single counts of possession with intent to deliver heroin, possession with intent to deliver cocaine, possession with intent to deliver MDMA (ecstasy), and possession of a firearm by a felon (2:1-3).

At the hearing on the motion to suppress, Bridges testified that he stayed at Mallory's duplex unit approximately three to four times per week from August 2009 to the date of the police search in March 2010 (37:14, 101). Bridges stated he was "on parole" at the time of the search of Mallory's residence, and that the

terms of his supervision required him to stay at his mother's house (37:119, 131).[3] On cross examination, Bridges admitted that he had never asked his probation agent for permission to stay at Mallory's place, and that he was in violation of the terms of his supervision by staying there:

> Q: [Y]ou were on parole, right?
>
> A: Yes.
>
> Q: Did you ever tell your parole agent that you were staying at Mr. Mallory's residence?
>
> A: No, I didn't.
>
> Q: Why not?
>
> A: I just didn't never bring it up.
>
> Q: You never brought it up. As a matter of fact, one of the conditions of your parole, is you are supposed to let your parole agent know where you are staying, aren't you?
>
> A: Yes.
>
> Q: So you were in violation of your parole if you are staying three and four nights a week at Mr. Mallory's residence, aren't you?
>
> A: Technically, yes.

(37:130-31). Bridges admitted that he would be at his mother's house for monthly "home visits" from his probation agent, but that he actually stayed at Mallory's place more often than he stayed at his mother's house (37:132).

In its bench ruling on the motion to suppress, the trial court found that Bridges violated the conditions of his supervision by staying at Mallory's residence without his

[3] Bridges was on extended supervision at the time of his March 2010 arrest, not parole. In May 2005, Bridges was convicted of possession with intent to distribute cocaine in Milwaukee County Case No. 2004CF4724, and was sentenced to a total of five years' imprisonment, consisting of two years' initial confinement followed by three years' extended supervision (4:5).

probation agent's permission (37:171-72; A-Ap. A116-A117). The court acknowledged this fact in concluding that Bridges' lacked standing to challenge the search: "Now did this defendant have [a] legitimate expectation of privacy in these areas that the government invaded? He was paroled to his mother's house—not to [Mallory's residence]." (37:174; A-Ap. A119). However, it appears that the court based its ruling primarily on its conclusions that Bridges lacked a property interest in the unit because he paid little rent, he had very little control over the unit, and he could not exclude others from the property (37:175-77; A-Ap. A120-122). The State submits that the trial court reached the correct conclusion, albeit under the wrong analysis.

The main problem with Bridges' assertion of standing to object to the search rests with the fact that his presence as a frequent overnight guest at Mallory's residence violated the terms of his supervision, as well as the sentencing court's order that he "Follow all rls [sic] of Extended supervision" (27:2). Although the precise rules of Bridges' supervision are not of record, Bridges admits that he was in violation of his supervision by staying overnight at Mallory's house without his agent's approval (37:130-31). The State respectfully submits that Bridges cannot have an expectation of privacy that society would deem legitimate in a place in which his very presence is contrary to rules imposed pursuant to a judgment of conviction and sentence, and a court order specifically directing his compliance with those rules. While no Wisconsin case has addressed whether an offender who violates his or her conditions of supervision by staying in a place may nonetheless have a legitimate expectation of privacy in that place, analogous case law from Wisconsin and other jurisdictions, as well as the nature of supervision itself, support this conclusion.

It is well-established that probationers and offenders on other forms of supervision are subject to significant limitations of liberty and privacy rights. *See State v. Griffin*, 131 Wis. 2d 41, 45, 388 N.W.2d 535 (1986) *aff'd*, 483 U.S. 868 (1987). In Wisconsin, extended supervision is a part of a bifurcated sentence of imprisonment for a felony offense, Wis. Stat. § 973.01(1), and sentencing courts and the Department of Corrections may impose conditions of supervision. Section 973.01(5); Wis. Admin. Code § DOC 328.04(2). When an offender does not follow these conditions, he or she violates a lawful order that is imposed pursuant to his or her judgment of conviction and sentence. An offender on supervision may face serious consequences for failing to adhere to these conditions, including temporary detainment, Wis. Admin. Code § DOC 328.27(2), and reconfinement. Wis. Stat. § 302.113(9). The conclusion that an offender on supervision has a legitimate expectation of privacy in a place in which his or her presence constitutes a violation of supervision would undermine the importance of such conditions.

Here, Bridges, who was on supervision for a 2005 conviction for possession with intent to distribute cocaine (4:5), was required to stay at his mother's house (37:119). Bridges did not inform his agent that he was, in fact, staying regularly at Mallory's place, and maintained the appearance that he was staying at his mother's house by showing up there for his agent's monthly home visits (37:132). Bridges' regular presence at Mallory's duplex without his probation agent's approval was a violation of a condition of his supervision, and, critically, enabled Bridges to hide his contraband and continued involvement in the drug trade from his probation agent. Bridges should not be allowed to profit from his violation by being able to claim an expectation of privacy in a place that he had no right to be under his conditions of probation.

Bridges may object that courts have generally rejected arguments that defendants forfeit their right to an expectation of privacy by engaging in unlawful conduct

on the premises. The State agrees that a drug dealer typically has a right to privacy in a place in which he plies his illegal trade during the day and sleeps at night. *See, e.g. United States v. Gamez-Orduno*, 235 F.3d 453, 459-60 (9th Cir. 2000); *State v. Simmons*, 714 N.W.2d 264, 272-73 (Iowa 2006) (defendant had legitimate privacy expectation in girlfriend's residence where he had manufactured methamphetamine and stayed overnight for six weeks).

However, the State focuses on the wrongful nature of Bridges' *presence* at Mallory's place, not on the wrongfulness of his conduct there. Courts have long recognized that a person lacks an expectation of privacy that society would consider legitimate in a place he or she has no legal right to be. *See United States v. Jones*, 362 U.S. 257, 267 (1960) *overruled on other grounds, United States v. Salvucci*, 448 U.S. 83 (1980) (exclusionary rule may not be asserted by "those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched."). As with standing generally, the defendant bears the burden of proving that his presence in the searched area is not wrongful. *See United States v. Mitchell*, 64 F.3d 1105 (7th Cir. 1995).

The classic example is the burglar who claims an expectation of privacy in the home he or she has burgled. Then-Justice Rehnquist addressed this situation in *Rakas*:

> A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence, in the words of *Jones*, 362 U.S. at 267 [], is "wrongful"; his expectation is not "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S., at 361, 88 S.Ct., at 516 (Harlan, J., concurring).

Rakas, 439 U.S. at 143 n.12.

In *Amos*, this court addressed whether the defendant, a prison escapee, had an expectation of privacy in his friend Nelson's residence, where he was hiding from authorities. 153 Wis. 2d at 269-70. This court concluded that while Amos may have had a subjective expectation of privacy in Nelson's residence, his expectation was not one that society would recognize as legitimate, relying on *United States v. Roy*, 734 F.2d 108, 110–12 (2d Cir. 1984), cert. denied, 475 U.S. 1110 (1986):

> We agree with and adopt the view of the Second Circuit Court of Appeals that an escapee has no legitimate expectation of privacy in a residence where he or she is hiding from lawful authority at the time of a warrantless exigent circumstances search. As a matter of policy, society is not prepared to recognize an expectation of privacy as reasonable under these circumstances. Thus, the seizure of Amos's person in Nelson's home was not unconstitutional, because Amos had no privacy interest in Nelson's home since he was an escapee from a penal institution.

Amos, 153 Wis. 2d at 269-70 (footnotes omitted). As Judge Fine explained in a concurring opinion, "[a] person who is on the searched premises unlawfully has no 'legitimate' expectation of privacy in those premises." *Id.* at 285 (Fine, J. concurring).

Decisions from other state appellate courts are instructive. In *Commonwealth v. Morrison*, 710 N.E.2d 584, 586 (Mass. 1999), the Massachusetts Supreme Judicial Court held that the defendant lacked standing despite his status as an overnight guest because he was also subject to a protective order that forbade him not to be at that very premises. "It is simply nonsense to say that society is prepared to recognize his right to be where society by the processes of the law has ordered him not to be," explained the *Morrison* court. *Id.* "What deprives this defendant of a reasonable expectation of privacy is not his status as a law violator in general, but the fact that

he was under a specific and valid legal order not to be in this particular place." *Id.*

In *State v. Oien*, 717 N.W.2d 593, 597 (N.D. 2006), the North Dakota Supreme Court concluded that a defendant who had been given notice by the manager of a public housing project that the defendant was not allowed on the premises lacked a reasonable expectation of privacy in the premises. *Id.* Despite Oien's status as an overnight guest, the court concluded that Oien could not claim an expectation of privacy in a place in which he was ordered not to be. *Id.*

Based on the logic of the authorities discussed above, the State submits that this court should conclude that Bridges lacks standing to object to the search of Mallory's duplex. Society should not recognize as a legitimate an expectation of privacy in a place in which Bridges' presence was contrary to his conditions of probation. If this court declines to so rule, it should nonetheless give significant weight to the fact of Bridges' supervision violation in the totality of the circumstances analysis discussed in the next section.

D. Alternatively, Bridges Cannot Establish a Legitimate Expectation of Privacy in Mallory's Kitchen or the Locked Basement of Mallory's Building under the Six-Factor Analysis in *Rewolinski*.

If the fact that Bridges' presence in Mallory's duplex does not, by itself, persuade this court that Bridges lacks standing to object to the search, it should nonetheless conclude that Bridges cannot prove a legitimate expectation of privacy under the multi-factor,

totality of the circumstances test in *Rewolinski*, 159 Wis. 2d at 17-18. To repeat, the six factors in this test are as follows:

> (1) whether the defendant had a property interest in the premises; (2) whether he was legitimately (lawfully) on the premises; (3) whether he had complete dominion and control and the right to exclude others; (4) whether he took precautions customarily taken by those seeking privacy; (5) whether he put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy.

Id. (citation omitted). Below, the State applies the relevant facts from the suppression hearing to the six factors, and submits that they weigh heavily against an objective ground for standing.

As to the first factor, property interest in the premises, Mallory testified that Bridges gave him some money toward rent on occasion, but he was unclear exactly how much (37:23-25). Mallory said Bridges also did chores around the house, and would occasionally help Mallory, who worked as the maintenance person for the landlord's 150 properties, by shoveling snow or "mov[ing] things" on the properties (37:25-27). Bridges also did some dry walling on the properties (37:106-08). However, Bridges was not on Mallory's lease and did not pay rent regularly to Mallory (and apparently not at all to the landlord) (37:24-25). Accordingly, Bridges cannot claim a traditional property interest in Mallory's premises, and this factor weighs against recognition of an objective expectation of privacy on the premises.

The second factor, whether Bridges was lawfully on the premises, must weigh heavily against an objective basis for standing for reasons fully developed in Section I.C. above. As discussed, Bridges had no right to be at Mallory's duplex overnight without his probation agent's permission when he was required to stay at his mother's house as a condition of his supervision. This factor should

be assigned substantial weight in the totality of the circumstances analysis, for the reasons discussed in the preceding Section.

Concerning the third factor, whether Bridges had complete control and dominion and the right to exclude others, Mallory testified that Bridges was often alone in the unit, and Bridges had keys to the outside door to the building and the interior door to Mallory's unit (37:18; 26). In addition, Bridges could invite friends over, and Mallory said he could exclude people from the building—but apparently only if Mallory felt Bridges had a "good reason" to do so (37:18). However, no matter what may be gleaned from this testimony, the circuit court expressly found that Bridges lacked complete control and dominion over Mallory's duplex unit, and this finding is not clearly erroneous.

More importantly, regardless whether Bridges had control and dominion over the unit, he plainly did not have such authority over the locked basement where the contraband used to convict him was found. In his brief, Bridges notes he kept his treadmill and stereo equipment in the basement, and asserts that he had access to the basement "anytime that he wanted it" (Bridges' br. at 20). The record indicates Bridges' access to the basement—which was down a flight of stairs and could not be entered from Mallory's unit itself (37:14)—was very limited. Bridges was not given a key to the basement, and he was not authorized by Mallory or the landlord to access it without permission (37:19-20; 42-43). Mallory testified that his boss, the landlord, kept equipment in the basement, and so "it was not cool to go down in the basement" without permission (37:20). Moreover, Bridges had no control or dominion over the basement because, by his own account, he went down there only "like two to three times," and he never had his own key (37:139-41). Bridges said he would have to wait for the landlord or Mallory to come around to gain access to the basement (37:105-06). These circumstances show that

Bridges had little control over the basement, and this factor must be counted against Bridges in the analysis.[4]

The fourth factor, whether Bridges took the precautions of someone seeking privacy, is of little value to the analysis in this case. Bridges was Mallory's guest, and he did not erect any barriers in addition to those that came with Mallory's unit and the basement to which Mallory had access. Both were locked and were not accessible to the public. As noted, Bridges had keys to the outside and interior doors, but lacked a key to the basement and could not access it without permission (37:19-20, 42-43).

As to the fifth factor, there is no question that Bridges put Mallory's duplex unit, and, *to a much lesser extent*, the locked basement, to his own private use. By Mallory's account, Bridges was an overnight guest three or four times per week for at least three months (37:16-18). Bridges described Mallory's residence as a "place of leisure" where he and Mallory could "[l]ounge around," watch TV and "have female company" (37:109). Bridges made meals at Mallory's, kept personal and work clothes there, had friends over (male and female), and kept many personal items there, including toiletries, food, and car equipment (37:103-04, 109).

While Bridges frequently used the kitchen—the area where the baggies and some other drug evidence was found—Bridges used the locked basement—the area where the stash of drugs and guns was found—far less regularly. As noted, Bridges accessed the locked

[4] Bridges cites *State v. Curbello-Rodriguez*, 119 Wis. 2d 414, 424-25, 351 N.W.2d 758 (Ct. App. 1984), a case in which an overnight guest was found to have "unrestricted access" to an area under a bed in the residence, in support of his position (Bridges' br. at 19). But unlike *Curbello-Rodriguez*, Bridges plainly did not have "unrestricted access" to the locked basement. Moreover, other factors, including that Bridges' very presence as an overnight guest was contrary to his conditions of supervision, distinguish *Curbello-Rodriguez*.

basement "like two to three times" in the months he stayed at Mallory's, did not have a key, and was not authorized to access it without the permission of Mallory or the landlord (37:19-20, 42-43, 139). Mallory's main use of the basement was to store a handful of personal items, including a set of hub caps, an entertainment center, the treadmill, as well as the contraband (37:104-06). Thus, taking the two areas searched separately in evaluating the private-use factor, the search of the kitchen weighs far more heavily in Bridges' favor than the search of the basement.

Finally, factor six, whether Bridges' claim of privacy is consistent with historical notions of privacy, should also factor against recognition of a legitimate expectation of privacy, particularly with regard to the locked basement. Of course, the Fourth Amendment accords the greatest protection to living quarters, *Trecroci*, 246 Wis. 2d 261, ¶ 41, and Bridges' was a regular overnight guest at Mallory's residence. However, Bridges' overnight presence there without his probation agent's permission violated his conditions of supervision. Recognition of a right to privacy in a place where one is not allowed to be under lawful conditions imposed as a part of a sentence on a felony conviction is contrary to historical notions of privacy. *See Amos*, 153 Wis. 2d at 269-70; *Rakas*, 439 U.S. at 143 n.12. Moreover, Bridges' claim of privacy to the locked basement, which he states he rarely visited, had no key to, and was not authorized to access without the permission of Mallory or the landlord, is far less consistent with historical notions of privacy than his claim of privacy in Mallory's apartment unit itself.

Weighing these factors together, the State submits that Bridges did not have an expectation of privacy that society should recognize as legitimate in either Mallory's apartment unit (the kitchen) or the locked, separate basement. The balance of factors shows that one, two, three and six weigh against recognition of an objective expectation of privacy, and only factor five plainly counts in favor of recognition of such an expectation. The State

submits that the fact that Bridges overnight presence at Mallory's without his probation agent's permission was contrary to his supervision should factor heavily in the totality of the circumstances analysis.

If this court concludes that Bridges had a legitimate expectation of privacy in Mallory's duplex unit itself—and thus has standing to object to the kitchen search—but did not have a legitimate privacy expectation in the locked basement, it must also conclude that the trial court's wrongful admission of the baggies and other evidence from the kitchen was harmless. *See State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (an error is harmless "if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" (citation omitted)). The primary evidence at trial, the evidence which led to the charges in this case, was the drugs and guns found in the basement (40:139-50; 41:7-11). There is no reasonable possibility that exclusion of the evidence from the kitchen would have changed the jury's guilty verdict.

II. IF THIS COURT CONCLUDES THAT BRIDGES HAD STANDING TO CHALLENGE THE SEARCH, IT MUST REMAND FOR FURTHER PROCEEDINGS TO ADDRESS THE LEGALITY OF THE SEARCH.

On appeal, Bridges also challenges the legality of the search, arguing that Mallory's consent to search to the basement was not voluntary, that the warrantless entry into Mallory's duplex unit was not justified by an exception to the warrant requirement, and the allegedly consensual search of the kitchen and basement was not sufficiently attenuated from the illegal entry to purge the taint of the illegal police conduct (Bridges' br. at 20-28).

Of course, if, as the State maintains, Bridges lacked standing to object to the search, the matter of the search's legality is irrelevant. However, if this court concludes that

Bridges had standing, it should decline to address Bridges' arguments concerning the legality of the search because the circuit court intentionally chose not to rule on these issues. Contrary to Bridges' suggestion, the suppression hearing transcript shows that the court purposely addressed the standing issue only.

At the start of the hearing, the court agreed to divide the proceedings into two parts. The defense would proceed first on the threshold issue of standing, which it had the burden to establish (37:4, 8). If standing was found, the State would then present witnesses on the issue for which it carried the burden: the legality of the search. (37:4, 8). Thus, after the defense presented its witnesses, Mallory and Bridges, the court requested argument from the prosecutor and defense counsel only on the issue of standing (37:151). Per the court's instructions, the attorneys argued the standing issue only (37:151-60).

In issuing its bench ruling, the court began by explicitly declining to address the issue of the legality of the warrantless entry, stating that it had not heard evidence pertaining to whether the warrantless entry was justified by exigent circumstances: "We haven't talked about the exigent circumstances that might have gotten the officers to the premises. We had that in the Complaint. We had that in the general overview of this, but we have no direct testimony on about that now." (37:162; A-Ap. A107). Shortly thereafter, the court declared: "we spend all our time on standing. . . . But there is a question of standing. *And that's what the Court will deal with.*" (37:163; A-Ap. A108) (emphasis added).

The court then announced it would be making findings of fact, and turned to a review of the testimony of the two witnesses (37:163-64; A-Ap. A108-A109). The findings-of-fact section of the bench ruling spans nine transcript pages, ending with the phrase "[s]o with those Findings of Fact, let's look to the law" (37:172; A-Ap. A117). In this section, the court reviewed Mallory's testimony, including testimony relating to the issue of

consent (37:167-68; A-Ap. A112-A113).[5] The court's statements here do not represent a ruling on the legal issue of whether the search was a valid consensual search.

After addressing the facts, the court then turned to the issue of whether Bridges had standing to object to the search (37:172-78; A-Ap. A117-A123). Over the seven transcript pages, the court mentions the issue of consent once, stating: "How can he piggyback on Mallory's consent? Mallory's consent is voluntary. It is clear" (37:177; A-Ap. A122). These comments must be viewed within the context of surrounding portions of the bench ruling and the suppression proceeding as a whole. They appear immediately following a discussion of Bridges' rights of control and dominion over the premises vis-à-vis Mallory (37:176-77; A-Ap. A121-A122), and immediately prior to a discussion of whether Bridges had an expectation of privacy in the premises (37:177-78; A-Ap. A122-A123). It would seem the court made these comments because it believed them to be relevant to the standing analysis. The full hearing transcript leaves little doubt that the court purposely chose to address only the standing issue by: dividing the hearing into two parts, standing and legality of the search; cutting off the testimony after the defense made its case for standing;[6] and asking the attorneys to present arguments on the issue of standing only. Thus, these comments should not be regarded as a final ruling on the issue of consent. Had the court ruled on the issue of consent, it would have denied

[5] The court allowed testimony from Mallory and Bridges on the issue of consent and the police entry into the residence so that Mallory and Bridges would not need to be called later to testify on these issues (37:29, 31-32).

[6] Contrary to Bridges' suggestion, the State did not intentionally forgo calling witnesses to establish the legality of the search (Bridges' br. at 16). The State's witnesses were available (37:4, 8), and were not called because the court chose to rule on the threshold issue of standing before the State could present its case on the issue of legality, and the court's ruling on standing mooted the legality issue.

the State a fair opportunity to present evidence on an issue for which it carries the burden of proof, and, further, the court would have made a ruling on a wholly incomplete set of facts.[7] Moreover, the fact that the court plainly did not address other issues pertinent to the legality of the search, including the police entry, and the impact of that entry on the validity of Bridges' consent,[8] demonstrates that the court purposely chose to address only the threshold issue of standing.

Accordingly, if this court concludes that Bridges had standing to object to the search, it must remand for further proceedings at which the court may take testimony relevant to the legality of the search, make necessary factual findings and credibility determinations, and issue rulings on the issues relating to the search's legality.

Finally, should this court regard the trial court's comments on consent to be a final ruling on the issue, the State would submit that this ruling should be upheld on review. In Wisconsin, the voluntariness of consent to search is a question of constitutional fact. *See State v. Phillips*, 218 Wis. 2d 180, 194-95, 577 N.W.2d 794 (1998). As Bridges notes, Mallory provided testimony supporting a reasonable inference that he only acquiesced to the search—"You gonna anyway. I don't care. Go head on" (37:68). However, he also provided testimony supporting an equally valid inference that he gave valid consent. Mallory emphatically stated "always a choice"

[7] The trial testimony shed light on the incompleteness of the suppression hearing transcript on the issue of the search's legality. For example, one State's witness, Officer Scott Marlock, provided extensive testimony at trial that would be relevant to the issue of consent, as well as exigent circumstances and the circumstances of the police entry into the residence, and differs in many respects from Mallory's suppression hearing testimony (40:120, 123-25).

[8] Just as Bridges was "prevented" from making his attenuation argument in the trial court (Bridges' br. at 25) by the court's decision to reject Bridges' motion on the threshold issue of standing, the State was denied the opportunity to present testimony on this issue.

and he "had a choice" when asked whether he consented to the search, and he agreed multiple times that he had provided consent (37:83, 88, 90-91). Moreover, as to the validity of that consent under the circumstances, the court found that Bridges did not "seem to be upset" and was not otherwise threatened by the police entry into the residence (37:168, 177; A-Ap. A113, A122). This finding is also supported by Mallory's testimony; Mallory agreed that how the police entered his residence played no role in his giving consent to search (37:94). To the extent that the trial court's ruling of voluntariness rests on these factual findings and others, it must be upheld because these findings are supported by Mallory's testimony and are therefore not clearly erroneous.

CONCLUSION

For the reasons set forth above, this court should affirm the order denying Bridges' suppression motion on grounds that he lacked standing to object to the search, and affirm the judgment of conviction.

Dated this 2nd day of August, 2013.

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 5,947 words.

Dated this 2nd day of August, 2013.

_____
Jacob J. Wittwer
Assistant Attorney General

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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 2nd day of August, 2013.

_____
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