STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP276-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES RAY STEWART,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE AND A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE ELLEN R. BROSTROM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. Publication is unlikely to provide meaningful guidance in future cases because the facts of the case are unique and unlikely to be repeated, and the applicable search and seizure doctrines, community caretaker and plain view, are well established.

STATEMENT OF THE CASE

In December 2011, Charles Ray Stewart was charged in a criminal complaint with one count of repeated sexual assault of a child, contrary to Wis. Stat. § 948.025(1), for forcing his biological daughter to have oral, vaginal and anal intercourse with him (2:1; A-Ap. 35). The complaint alleged that Stewart assaulted his daughter about every other night for three to four years, starting when she was age twelve or thirteen and continuing until age sixteen, when she reported the assaults (2:1-3; A-Ap. 35-37). The complaint also charged one count of physical abuse of a child, contrary to Wis. Stat. § 948.03(2)(b), alleging that Stewart repeatedly beat his daughter with a belt and an extension cord (2:1, 3; A-Ap. 35, 37). A medical exam showed the daughter had multiple injuries consistent with the reported sexual and non-sexual assaults (2:3-4; A-Ap. 37-38).[1]

Police seized two sets of bedding from Stewart's home following his arrest (51:7-10; A-Ap. 97-99). Stewart filed a motion to suppress the evidence (13:2). After DNA testing revealed the presence of inculpatory material on the bedding, the circuit court held an evidentiary hearing on the motion at which Officer Daniel Keller and Detective Tammy Tramel-McClain were the only witnesses (48:4-6; 49:5-6; 50:2; 51:2; A-Ap. 40, 91).

[1] Stewart also gave a recorded interview in custody, which Stewart moved to suppress (15; 46:13-14). The court declined to address the motion when the State indicated that the recording did not contain a confession, and the State had no plans to introduce the recording at trial (46:14).

Suppression Hearing Testimony

At the hearing, Officer Keller testified that he and another officer named Ferguson were dispatched to Stewart's Milwaukee home in the late afternoon hours of November 28, 2011, to arrest him for child sexual assault (50:14; A-Ap. 52).[2] Stewart lived in the upper level of a two-flat house, and was home when the officers arrived (50:14-15; A-Ap. 52-53). At the officers' request, Stewart stepped outside of the house to meet the officers in the front yard, where they took Stewart into custody (50:14; A-Ap. 52). Stewart then asked if they could go inside his residence to avoid being seen by his neighbors, and so that he could secure his dog in his bedroom before being taken to jail (50:16-17; A-Ap. 55). The officers agreed, and they followed Stewart into the house and up the stairs to Stewart's apartment (50:17; A-Ap. 55).

The door to the apartment opened immediately onto a living room (50:18; A-Ap. 56). Stewart's bedroom was adjacent to the living room; the door to the bedroom was on the northwest wall of the living room (50:18; A-Ap. 56). Officers adjusted Stewart's handcuffs so he could lead his dog to his bedroom and open the bedroom door (50:18: A-Ap. 56).

Detective Tramel-McClain of the sensitive crimes unit arrived on the scene as the officers arrested Stewart and

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[2] Officers did not have a warrant to arrest Stewart (50:19; A-Ap. 57). At the suppression hearing, Stewart challenged both his arrest and the seizure of the bedsheets (50:11-12; A-Ap. 49-50). On appeal, Stewart challenges only the warrantless seizure of the bedding (Stewart's Br. at 7 -14).

followed him into the apartment (50:17; A-Ap. 55). The detective had been briefed by an investigator who had interviewed the victim, and knew that the victim had alleged that the assaults occurred on the victim's bed in her bedroom, and Stewart's bed in his bedroom (50:47; 51:15; A-Ap. 85, 104). Based on the victim's allegations, she believed that the bedding on the victim's and Stewart's beds would likely have evidentiary value (51:19-20; A-Ap. 108-109).

Detective Tramel-McClain joined the other officers in the apartment as Stewart was putting his dog into the bedroom (50:44; A-Ap. 82).[3] Stewart closed the door to the bedroom with the dog inside, and apparently none of the officers saw into the bedroom before the door was shut (50:27, 44; A-Ap. 65, 82). The detective testified Stewart sat in the living room and spoke with the officers (50:44; A-Ap. 82). Knowing that Stewart might be in custody for an extended period of time, and concerned that the dog "could die … if no one was there to care for it," the detective called the Milwaukee Area Domestic Animal Control Commission ("Animal Control") to take the dog into its care (50:34, 44-45; A-Ap. 72, 82-83).

Officers Keller and Ferguson then took Stewart to the police station (50:19, 31, A-Ap. 57). Detective Tramel-McClain stayed behind to wait for Animal Control to arrive

[3] The fact that the detective was not with the arresting officers when they entered the apartment is not legally relevant. *See State v. Johnston*, 184 Wis. 2d 794, 812, 518 N.W.2d 759 (1994) ("[W]hen one invites an undercover agent into his house, the agent can summon other agents to assist in the arrest, and the other agents are not guilty of a violation of the Fourth Amendment.").

(50:31-32; A-Ap. 69-70). The detective waited in Stewart's living room with Identification Technician Delores Young ("I.D. technician"), who joined the detective shortly after Stewart had left (51:6, 10-11; A-Ap. 95, 99-100). The detective said that the I.D. technician was there to take pictures of the scene (51:12; A-Ap. 101).

An animal control technician arrived at the residence about twenty to twenty-five minutes after Stewart's departure (51:14; A-Ap. 103). Detective Tramel-McClain, uncertain whether Stewart's dog, a pit bull, was dangerous, retreated to the stairwell while the animal technician took control of the dog (51:13-14; A-Ap. 102-103). The I.D. technician stayed in the residence (51:12; A-Ap. 84-85, 101). When the dog was removed from the apartment, the detective was downstairs speaking to Stewart's mother (51:12; A-Ap. 101).

Detective Tramel-McClain, who, with the I.D. technician, was the last officer on the scene, went back upstairs (51:7; A-Ap. 96). The detective did not conduct a full-blown search at this time—she did not "look[] in draw[er]s or anything"—because the only item she had hoped to spot in the apartment was the bedding (51:7; A-Ap. 96). The detective testified that the doors to both bedrooms were now open, and that the bedding was visible from outside of the bedrooms (51:26-27; A-Ap. 115-16). The detective indicated that, from the living room, she saw the bedding in Stewart's bedroom, which matched the victim's description of Stewart's bedding, and that, from a hallway, she saw the bedding in the victim's bedroom, which matched the victim's description of her bedding (51:29-31; A-Ap. 118-120). The detective collected the bedding from the two

bedrooms (51:8-9; A-Ap. 97-98). Additional testimony is provided as necessary in the Argument section below.

Circuit Court's Ruling

Two weeks after the evidentiary hearing, the court held a proceeding at which it issued an oral ruling denying Stewart's motion to suppress (52; A-Ap. 127-164). The court concluded first that probable cause existed to arrest Stewart outside of his home based on the victim's reports to investigators (52:4; A-Ap. 130). The court then concluded that, while Stewart had consented to allow officers to enter his apartment to avoid a scene in his front yard and to allow him to secure his dog, Stewart never consented to a search of his apartment (52:4; A-Ap. 130).

The court further concluded that, after officers removed Stewart from the apartment, Detective Tramel-McClain and the I.D. technician were lawfully present to ensure the welfare of Stewart's dog in exercise of the officer's community caretaker function (52:5; A-Ap. 131). Once the animal control technician arrived and removed the dog from Stewart's bedroom, leaving the bedroom door open, the detective saw Stewart's bedding from the living room, where she was lawfully present (52:5; A-Ap. 131). The court concluded that the detective lawfully seized Stewart's bedding under the plain view doctrine (52:5-6; A-Ap. 131-32).

Initially, the court concluded that, because the victim's bedroom was down a hallway, and officers could not see into the victim's bedroom from the living room, the seizure of the victim's bedding was not covered under the plain view doctrine (52:6; A-Ap. 132). However, after hearing

additional argument by the parties, the court revised its position to conclude that the bedding from the victim's room was also admissible under the plain view doctrine as well (52:36-37; A-Ap. 162-63). The court did not address whether Stewart had standing to object to a seizure that occurred in the victim's bedroom.

About three weeks after the court denied Stewart's suppression motion, Stewart agreed to plead guilty to one count of second-degree sexual assault of a child. In exchange, the State dismissed but read-in for sentencing purposes the physical abuse of a child charge, and a charge of incest with a child that had been added in an amended information (27:1-3; 33:1-2; A-Ap. 18-19). The circuit court sentenced Stewart to fifteen years' initial confinement and ten years' extended supervision, and a judgment of conviction was entered (33:1-2; A-Ap. 18-19).

ARGUMENT

STEWART SHOULD NOT BE ALLOWED TO WITHDRAW HIS GUILTY PLEA BECAUSE THE CIRCUIT COURT PROPERLY DENIED HIS SUPPRESSION MOTION.

On appeal, Stewart maintains the circuit court erred in denying his motion to suppress the two sets of bedding containing DNA evidence, and argues that this error entitles him the opportunity to withdraw his guilty plea. Stewart argues that the evidence should not have been allowed under the plain view doctrine, and that detective's presence in Stewart's apartment was not justified under the "community caretaker/emergency doctrine." (Stewart's Br. at 7 – 14).

Under the analysis set forth below, the State respectfully submits that the circuit court properly denied Stewart's motion to suppress the bedding where the detective was lawfully present in the shared areas of the apartment to carry out a bona fide community caretaker function, and both sets of bedding were in plain view from those areas of the apartment. Accordingly, the circuit court's order denying the motion to suppress evidence should be affirmed, and Stewart's request on appeal to direct the circuit court to allow him to withdraw his guilty plea should be rejected.

A. Police Lawfully Seized in Plain View Evidence of the Charged Sexual Assaults When Officers Were Lawfully Present under the Community Caretaker Exception to the Warrant Requirement.

1. General search and seizure principles.

a. The community caretaker exception.

The Fourth Amendment of the United States Constitution and Art. I, § 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Pinkard*, 2010 WI 81, ¶13, 327 Wis. 2d 346, 785 N.W.2d 592. A warrantless search of a home is presumptively unreasonable under the federal and state constitutions. *State v. Richter*, 2000 WI 58, ¶ 28, 235 Wis. 2d 524, 612 N.W.2d 29; *Payton v. New York*, 445 U.S. 573, 586 (1980).

Among the accepted exceptions to the warrant requirement is the "community caretaker" exception. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (establishing the

exception); *Bies v. State*, 76 Wis. 2d 457, 471-72, 251 N.W.2d 461 (1977) (adopting the exception in Wisconsin); *see also Pinkard*, 327 Wis. 2d 346, ¶13-27, *State v. Kramer*, 2009 WI 14, ¶¶ 19-20, 315 Wis. 2d 414, 759 N.W.2d 598.

The basic test for applying the community caretaker exception to the warrantless seizure of a person or warrantless search of a residence[4] consists of three requirements: (1) that a seizure or search within the meaning of the fourth amendment has occurred; (2) if so, that the police conduct was bona fide community caretaker activity; and (3) if so, the public need and interest outweigh the intrusion upon the privacy of the individual. *Kramer*, 315 Wis. 2d 414, ¶ 21. "The State bears the burden of proving that the officer's conduct fell within the scope of a reasonable community caretaker function." *Id.*, ¶ 17.

As relevant to the second step, the bona-fide-community-caretaker-activity requirement, the United States Supreme Court explained that the police activity should be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. Addressing the meaning of "totally divorced," however, the Wisconsin Supreme Court has clarified that, if the totality of the circumstances support an objectively reasonable basis for police activity under the community caretaker exception, an officer's subjective law enforcement concerns will not automatically render the police activity unlawful:

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[4] Here, the police presence in the residence is treated as a "search" under the case law. *See, e.g., State v. Ziedonis*, 2005 WI App 249, ¶¶ 14-16, 287 Wis. 2d 831, 707 N.W.2d 565.

> When evaluating whether a community caretaker function is bona fide, we examine the totality of the circumstances as they existed at the time of the police conduct. . . . In doing so, we conclude that the "totally divorced" language from Cady does not mean that if the police officer has any subjective law enforcement concerns, he cannot be engaging in a valid community caretaker function. Rather, we conclude that in a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns.

Kramer, 315 Wis. 2d 414, ¶ 30.

"[W]hen a search or seizure is not supported by probable cause or reasonable suspicion and it is contended that the reasonableness of police conduct stands on other footing [such as "community caretaker" activity], an officer's subjective motivation is a factor that may warrant consideration." *Id.*, ¶ 27 (brackets added). In effect, "while the subjective intent of the officer may be relevant, it is not dispositive, constituting merely one factor among many to be considered in the totality of the circumstances." *Id.*, ¶ 25.

In short, so long as a law-enforcement officer "has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he [or she] has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." *Id.*, ¶ 36 (brackets added).

Finally, in addressing the balancing test in the third step, whether the public need and interest outweigh the intrusion, courts may consider the following factors:

> "(1) the degree of the public interest and exigency of the situation; (2) the attendant circumstances surrounding the seizure [or search], including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished."

Id., ¶ 41 (citations omitted).

b. The plain view doctrine.

A person "has no reasonable expectation of privacy in an item that is in plain view." *State v. Edgeberg*, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994); *see also Horton v. California*, 496 U.S. 128, 133 (1990).

Under this plain view doctrine, "'objects falling within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence.'" *Edgeberg*, 188 Wis. 2d at 345 (citation omitted). A law enforcement seizure of evidence following a "plain view" is "not the product of a search." *Id.*

To satisfy the plain view exception to the warrant requirement, a law enforcement seizure of evidence must meet three requirements:

> "'(1) the evidence must be in plain view; (2) the officer must have a prior justification for being in the position from which she discovers the evidence in "plain view"; and (3) the evidence seized 'in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and criminal activity.'"

State v. Buchanan, 2011 WI 49, ¶ 23, 334 Wis. 2d 379, 398-99, 799 N.W.2d 775 (citations omitted).

Previously, the plain view doctrine also required that the discovery of the seized item be inadvertent. *See, e.g. Coolidge v. New Hampshire*, 403 U.S. 443, 469 (1971). But the United States Supreme Court eliminated the inadvertence requirement in *Horton*, 496 U.S. at 136-37, and, two years later, the Wisconsin Supreme Court, adopting *Horton*, expressly dropped the same requirement in *State v. Guy*, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992).[5]

As with any determination of whether evidence was constitutionally seized, the appellate court must uphold the circuit court's factual findings unless clearly erroneous, and independently determine whether the constitutional standard of reasonableness is satisfied. *Bies v. State*, 76 Wis. 2d 457, 467, 251 N.W.2d 461 (1977).

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[5] On occasion, Wisconsin courts have mistakenly provided the pre-*Horton*/pre-*Guy* standard when reciting plain-view boilerplate. *See e.g. State v. Gracia*, 2013 WI 15, ¶ 29 n.14, 345 Wis. 2d 488, 509, 826 N.W.2d 87 (*citing State v. McGovern*, 77 Wis. 2d 203, 210, 252 N.W.2d 365 (1977)); *State v. McGill,* 2000 WI 38, ¶ 40, 234 Wis. 2d 560, 609 N.W.2d 795 (*citing State v. Washington*, 134 Wis.2d 108, 123, 396 N.W.2d 156 (1986)). But to revive the inadvertence requirement, the Wisconsin Supreme Court would first need to overrule *Guy*, then distinguish *Horton* by construing the search and seizure provisions of the state constitution to provide greater protection than the Fourth Amendment. It has done neither; *Guy* remains good law.

2. The officers' presence in the apartment was lawful under the community caretaker doctrine, and Stewart fails to present a developed argument showing that it was not.

To address the prior-justification requirement of the plain-view test, the State considers first whether the officers were lawfully present in Stewart's apartment.

Stewart does not dispute that the arresting officers and Detective Tramel-McClain had Stewart's valid consent to be in the apartment after he invited the officers back to his apartment to avoid the public embarrassment of an arrest on his front lawn, and to secure his dog (50:16-17; A-Ap. 55). Stewart's consent would appear to have been valid only for the time in which Stewart was in the apartment with the officers. *Florida v. Jimeno*, 500 U.S. 248, 251-52 (1991) (scope of consent is generally defined by its expressed object). The issue, then, is whether, after the arresting officers removed Stewart from the apartment, officers nonetheless had another valid justification to be present in the apartment.

On appeal, Stewart argues that Detective Tramel-McClain and the I.D. tech were not lawfully present in the apartment under the "community caretaker/emergency doctrine," then analyzes the officers' conduct under the emergency doctrine only (Stewart's Br. at 12-14).

The State elects not defend the officers' actions under the emergency doctrine, which is analytically distinct from

the community caretaker doctrine.[6] The former, unlike the latter, prohibits an officer's warrantless presence in a residence in exercise of the emergency function if he or she intended to conduct a search or seizure, *State v. Bauer*, 127 Wis. 2d 401, 407-408, 379 N.W.2d 895 (Ct. App. 1985), and Detective Tramel-McClain's testimony shows that she subjectively intended to seize evidence of the alleged child sexual assaults in the apartment (51:7; A-Ap. 96).

Addressing only whether the detective's presence was lawful under the emergency doctrine, Stewart fails to provide the relevant legal test for the community caretaker exception, or to apply the facts of his case to that standard—even though the circuit court concluded the detective's presence was lawful on community caretaker grounds (Stewart's Br. at 12-14) (52:5; A-Ap. 131). Accordingly, this court may treat Stewart's failure to adequately brief the point as a concession. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 58, 527 N.W.2d 343 (Ct. App. 1994) (appellate court

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[6] The Wisconsin Supreme Court has defined the emergency doctrine as follows:

> "Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search."

State v. Kraimer, 99 Wis. 2d 306, 314, 298 N.W.2d 568, 572 (1980) (citation omitted).

need not address inadequately developed arguments); *Schlieper v. State Dep't of Natural Res.*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) ("when an appellant ignores the ground upon which the trial court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling," the appellate court may conclude that the appellant has conceded the matter).

However, even if the court chooses to address the merits of the community caretaker issue despite Stewart's failure to join the issue, the detective and I.D. tech's presence in the apartment was lawful as an exercise of the officers' community caretaking function under the following analysis.

Based on her hearing testimony, the detective articulated an objectively reasonable basis for an exercise of a community caretaker function under the totality of the circumstances, and her acknowledged intent to obtain evidence of the child sexual assaults does not defeat the conclusion that she was engaging in bona fide community caretaker activity. *See Kramer*, 315 Wis. 2d 414, ¶¶ 25, 30, 36.

The detective testified that, while Stewart was still in the apartment with the officers, she called Animal Control to have them to provide the dog with shelter (50:44-45; A-Ap. 82-83). She said she called Animal Control because she believed, based on her experience, that Stewart might be in custody a long time before he would be able to return to the apartment (50:45; 51:6; A-Ap. 83, 95). The detective testified she was concerned that the animal could become sick or die

if no one was there to care for it (50:45; A-Ap. 83).[7] *See* 3 Wayne R. LaFave, Search and Seizure, § 6.6(a) at pp. 612-13 and n.49 (5th ed. 2012) (stating that assistance to a person "or animal" justifies warrantless entry into a residence and listing cases). And so the detective waited in the living room of the apartment with the I.D. technician for Animal Control to arrive (50:19, 31-32; A-Ap. 57, 69-70). While the detective plainly went to Stewart's residence in her investigative function, and hoped to lawfully collect the two sets of bedding if possible, this subjective intent did not render invalid the co-existing community caretaker justification for her presence in the apartment (51:18-19; A-Ap. 107-108).

Applying the balancing-step test required in the third step of the community caretaker doctrine, the State submits that the need and public interest in ensuring the welfare of the dog outweighs the degree of the intrusion. Here, officers were already present in the living room of the apartment pursuant to Stewart's consent, and their presence was extended for a limited time (twenty to twenty-five minutes before the arrival of Animal Control) to ensure that the dog would be cared for while Stewart was in custody (51:14; A-Ap. 103). The testimony establishes that the officers did not conduct a full-blown search of the apartment (51:7; A-Ap. 96). Rather, the detective spotted the two sets of bedding

[7] The pit bull also had to be removed from the apartment for other reasons related to the criminal investigation. After all, the apartment was a crime scene, and removal of a live animal from a room in which the crimes allegedly occurred—and which police would need to access at some point to collect evidence—was necessary for officer safety and to preserve evidence. The detective appeared to make this point in noting it was also necessary to remove the dog to "secure the house" and not have any "living being" left inside (50:45; A-Ap. 83).

from her lawful vantage point in the shared areas of the apartment (the living room and hallway), and lawfully gathered that evidence (51:29-31; A-Ap. 118-120).[8] While the temporary intrusion occurred in the constitutionally-protected space of the home, a proper weighing of the balancing test favors the conclusion that the officers' presence was a lawful exercise of the community caretaking function.

To the extent any objection may be raised to the detective's brief absence and return to the apartment (Stewart raises none), the detective's actions were reasonable. When Animal Control arrived, the detective stepped out onto the stairway to the apartment out of a justifiable concern for her own safety; the dog was a pit pull, the detective "wasn't sure of the dog's demeanor" and wanted to "stay out of [the animal technician's] way" (51:13-14; A-Ap. 102-103). In the meantime, the detective learned that Stewart's mother "was outside waiting to speak with someone," and went downstairs to talk with her (51:6; A-Ap. 95). Once the animal technician took control of the dog and walked it down the apartment stairs, the detective went back up to the apartment, and soon spotted the bedding from outside of the bedrooms (51:8, 13-14; 29-31; A-Ap. 97, 102-103, 118-120).

[8] As animal technician was about to take the dog into his truck, "another guy" came up to the technician and ended up taking the dog (51:7; A-Ap. 96). Nothing in the record suggests that the detective knew of anyone else who might take the dog. In fact, Officer Keller testified that he "believe[d] [Stewart] couldn't find anyone to come and take his dog" (50:33; A-Ap. 71).

Regardless the detective's subjective investigatory reason for returning to the apartment, her return was objectively reasonable, and a necessary extension of the community-caretaker reason for her presence. It would be unreasonable to hold that, once the dog was removed, the detective automatically lost all ability to lawfully return to the apartment, even to perform the routine law enforcement task of securing the crime scene where the detective and the I.D. tech were the last officers there.

Stewart argues that the detective's concern for the dog's welfare did not justify the "search," by which he appears to mean the seizure of the bedding, because "[t]here was no emergency regarding the bed sheets—only the dog" (Stewart's Br. at 13). But, of course, the State does not maintain that the seizure of the bedding was justified by the community caretaker doctrine—only that the officers were lawfully present under this doctrine when the bedding was spotted in plain view.

Based on the foregoing, even if this court elects to address the community caretaker issue on the merits, it should conclude that the officers' presence was lawful under the community caretaker doctrine.

3. Both sets of bedding were properly obtained under the plain view exception to the warrant requirement.

Stewart argues that the circuit court erred in admitting both sets of bedding under the plain view doctrine because (1) the discovery of the evidence was not inadvertent, as the detective sought to collect the bedding

from the apartment; (2) the connection between the bedding and the alleged crimes was purely "speculative," and the detective lacked probable cause to seize the sheets; (3) the detective did not have a legal right to be present either in the apartment and the location from which the bedding was spotted, or in the bedrooms themselves (Stewart's Br. at 7-11). The State addresses these arguments in turn, and submits that the bedding was properly admitted under the plain view exception.

First, contrary to Stewart's suggestion, the detective's discovery of the two sets of bedding need not have been inadvertent. Rather, under the *Horton*/*Guy* standard, the detective's acknowledged subjective motivation to collect the bedding from the apartment if it were in plain view is irrelevant. *See Horton*, 496 U.S. at 138 ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.").

Second, the detective's belief that the bedding likely contained DNA evidence of the crime was well-grounded on the facts known to the officer at the time and was not speculative. *See Buchanan*, 334 Wis. 2d 379, ¶ 23 ("'the evidence seized "in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and criminal activity."'") (citations omitted). The detective was informed by the officer who interviewed the victim that the victim had alleged that Stewart sexually assaulted her every other night for several years in ways that would

produce bodily fluids, and that the assaults occurred on Stewart's bed and on her bed; the victim also provided descriptions of the bedding on each bed. (50:47; 51:15, 29-30; A-Ap. 85, 104, 118-19). Given the specificity of the victim's allegations, and the frequency with which the alleged assaults occurred, the detective had probable cause to believe that the bedding on Stewart's and the victim's beds contained DNA evidence of the alleged assaults.

These facts distinguish Stewart's case from *State v. Angiolo*, 186 Wis. 2d 488, 930, 520 N.W.2d 923 (Ct. App. 1993), and *Arizona v. Hicks*, 480 U.S. 321, 325-27 (1987). In *Angiolo*, this court held that officers did not have probable cause to believe that Angiolo, who was suspected of committing a burglary, had stolen a welding unit that was observed in plain view in his garage where officers had no evidence to connect the welding unit to the burglary. *See Angiolo,* 186 Wis. 2d at 930-31. Likewise, in *Hicks*, 480 U.S. at 325-27, the Supreme Court held invalid a seizure of stereo equipment spotted in plain view where officers had only reasonable suspicion to believe the equipment was stolen, and only acquired probable cause by turning the equipment to read its serial numbers.

Here, the strength of the victim's account provided probable cause to believe that the bedding contained inculpatory biological evidence. While DNA testing was of course necessary to confirm the existence of biological evidence, no such testing was required for the detective to reach the common-sense conclusion that the bedding probably contained this evidence.

Third, as discussed in the prior section, officers had a legal right to be present in the apartment under the community caretaker doctrine. More specifically, the officers were lawfully present in the shared areas of the home from which Detective Tramel-McClain spotted the bedding on Stewart's and the victim's respective beds. The detective indicated that the animal control technician had left the door to Stewart's bedroom open, and that the bedding on Stewart's bed was visible from the living room, and was similar to the description provided by the victim (51:26, 29-30; A-Ap. 115, 118-19). Moreover, the door the victim's bedroom was open, and the detective indicated that the bedding on the victim's bed was visible from the hallway. (51:26-27, 30-31; A-Ap. 115-16, 119-120). The detective said the victim's bedding matched the description provided by the victim, although the detective could not recall what that description was at the time of the hearing (51:30-31; A-Ap. 119-120). To the extent that review of this issue rests on whether, in fact, the detective spotted the sets of bedding from her respective positions in the living room and then in the hallway, the circuit court implicitly found the detective's testimony on this point to be credible, and this determination must be upheld on review. *State v. Jenkins*, 2007 WI 96, ¶ 33, 303 Wis. 2d 157, 736 N.W.2d 24.

Stewart's suggestion that the detective's necessary entry into the bedrooms to seize the bedding renders the seizure illegal is contrary to established law. "A seizure following a plain view is not the product of a search." *Edgeberg*, 188 Wis. 2d at 345. An officer need only be lawfully present in the position from which she saw the property to seize the property, regardless whether the item is located in an otherwise constitutionally-protected space.

See, e.g., State v. Ragsdale, 2004 WI App 178, ¶¶ 16-17, 276 Wis. 2d 52, 687 N.W.2d 785 (seizure of a gun exposed when a child opened a heating vent exposing the gun was permissible under the plain view doctrine); *Edgeberg*, 188 Wis. 2d at 345-46 (seizure of marijuana plants spotted inside home through a window was lawful under plain view doctrine).

Based on the foregoing, the two sets of bedding were lawfully seized under the plain view doctrine. Accordingly, the circuit court's order denying the motion to suppress should be affirmed, and Stewart's request for a remand order allowing him the opportunity to withdraw his guilty plea should be rejected.

B. Stewart Would Not Be Entitled to Plea Withdrawal Even If the Circuit Court Properly Admitted Only One of the Sets of Bedding Because the Court's Error in Admitting the Other Set Would Be Harmless.

As a general rule, a valid guilty plea waives all nonjurisdictional defects and defenses, including constitutional claims. *State v. Bangert*, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986). However, the statutes provide that a defendant convicted pursuant to a valid guilty plea may nonetheless seek review of an order denying a motion to suppress evidence. *See* Wis. Stat. § 971.23(10).

Appeals under § 971.23(10) are subject to harmless error analysis. *State v. Armstrong*, 225 Wis.2d 121, 122, 591 N.W.2d 604 (1999). "In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on

appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." *State v. Semrau*, 2000 WI App 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376. "'[T]he relevant inquiry is whether there is a reasonable probability that, but for the failure to disclose, the defendant would have refused to plead and would have insisted on going to trial.'" *Id.* (citation omitted). In addressing this inquiry, courts may consider:

> (1) the relative strength and weakness of the State's case and the defendant's case; (2) the persuasiveness of the evidence in dispute; (3) the reasons, if any, expressed by the defendant for choosing to plead guilty; (4) the benefits obtained by the defendant in exchange for the plea; and (5) the thoroughness of the plea colloquy.

Id.

Applying this test, the State respectfully submits that there is no reasonable probability that Stewart would not have entered into the plea agreement even if the circuit court had properly admitted only one set of bedding. Stewart sought suppression of both sets of bedding after DNA testing apparently revealed the existence of inculpatory DNA evidence on both (48:4-6; 49:5-6). DNA evidence on one set of bedding would have been highly persuasive evidence of Stewart's guilt, and admission of the second set would have largely been cumulative. Further, the plea agreement, which allowed Stewart to plead guilty to a single count of second-degree sexual assault of a child, was highly favorable to him, given the seriousness of the victim's allegations and the charges he was facing. It is unlikely that admission of only one set of bedding containing DNA evidence would have caused Stewart to reject this deal, or

somehow led to a deal that was even more favorable to Stewart. Thus, it is not reasonably probable that admission of only one set of bedding would have changed Stewart's calculus in deciding to accept the plea offer.

Finally, the State addresses the issue of remedy should this court determine that Stewart is entitled to withdraw his plea. Stewart, by appellate counsel, requests that this court "vacate the judgment of conviction and reverse the order denying the motion to suppress in this case and order that Stewart be allowed to withdraw his guilty plea" (Stewart's Br. at 14).

The State submits that the proper mandate in such a case would be reversal of the suppression order, and a remand with instructions for to the circuit court to: (1) allow Stewart the opportunity to withdraw his guilty plea, and (2) vacate the judgment of conviction should Stewart decide to seek withdrawal. Unlike the choice of arguments to pursue on appeal, which ultimately rests with appellate counsel, the decision whether to plead guilty or to withdraw a guilty plea is the defendant's own to make, and no motion for plea withdrawal has been filed in this case. *State v. Brunette*, 220 Wis. 2d 431, 443, 583 N.W.2d 174, 179 (Ct. App. 1998). Stewart himself may ultimately choose not to withdraw his guilty plea on remand, particularly in light of the increased exposure to criminal penalties he would face in doing so.

CONCLUSION

For the reasons set forth above, this court should affirm the circuit court's order denying Stewart's motion to suppress and the judgment of conviction, and reject Stewart's request for an order allowing him to withdraw his plea.

Dated this 21th day of April, 2015.

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 6,086 words.

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Jacob J. Wittwer
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of April, 2015.

_____
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