STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP000276-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES RAY STEWART,

Defendant-Appellant.

ON APPEAL TO REVIEW THE JUDGMENT OF
CONVICTION AND SENTENCE ENTERED ON
DECEMBER 14, 2012,
IN THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, WISCONSIN,
THE HONORABLE ELLEN R. BROSTROM,
CIRCUIT COURT JUDGE, PRESIDING,

REPLY BRIEF OF THE DEFENDANT-APPELLANT

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ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED STEWART'S MOTION TO SUPPRESS THE ILLEGAL SEARCH OF STEWART'S APARTMENT.

A. THE TRIAL COURT'S DECISION TO NOT SUPPRESS THE EVIDENCE SHOULD BE REVERSED BECAUSE THE PLAIN VIEW DOCTRINE DOES NOT APPLY.

The State asserts in its brief that discovery of the two sets of bedding need not have been inadvertent. State's brief at 19. This is not correct as Angiolo requires that the search be inadvertent. 520 N.W.2d at 929. The Angiolo court specifically stated that one of the requirements of the plain view doctrine is "(3) The discovery must be inadvertent….." 520 N.W.2d at 929.

The police were in Stewart's residence to arrest him and seize evidence. Tranmmell-McClain admitted in her testimony that she was there to seize the bedding to corroborate the alleged victim's story and to obtain DNA. (51: 19-20) She intentionally went into other rooms in Stewart's residence to look for evidence and it was an intentional search and was not inadvertent. This factor, therefore, has not been satisfied.

Regarding the fourth factor from Angiolo, this factor is also not satisfied even though the State believes that it was satisfied. State's brief at 19-22. There is no connection between the bed sheets, a comforter and the alleged sexual assault in this case. It would be very speculative to assert that there is a connection. It would be possible for the police to guess that various bodily fluids had touched or fallen on the sheets or comforter and that there might be DNA in the fabric. But such an argument would be speculative and would not have be easily apparent and would be insufficient to support probable cause.

The State also assumes in its argument that the police had the legal right to be in the apartment under the community caretaker doctrine, State's brief at 21, but the State did not assert this argument in the trial court and cannot make such an assertion on appeal now.
As is argued in pages 3-5 of this reply brief, the police did not have the right to go into the bedrooms of Stewart's residence under the community caretaker doctrine. An officer must have the right to be present where the plain view of the item occurred. State v. Bell, 62

Wis.2d 534, 540. Moreover, Stewart never consented to the police going down the hall and into the bedroom where the alleged victim's bed sheets and comforter were located. The trial court decided, without any legal authority, that the police could go into both bedrooms without Stewart's consent. (52: 36-37) This is an erroneous conclusion of law and should be reversed.

B. THE TRIAL COURT'S DECISION TO NOT SUPPRESS THE EVIDENCE SHOULD BE REVERSED SINCE THE COMMUNITY CARETAKER\ EMERGENCY DOCTRINE DOES NOT APPLY HERE.

The State asserts that the community caretaker doctrine applies here. State's brief at pp. 13-18. This is erroneous.

First, it should be noted that the State's brief on this issue in the trial court appears to have only addressed the emergency doctrine. Pages 2-3 of the State's brief in the trial court referred to

"B. Emergency Doctrine." (24: 2-3) (A-Ap, p. 31-32) On pages 3-4 of that brief, the State then referred to "A. The Officers acted as community caretakers." (24:3-4) (A-Ap, p. 32-33) The State, however, then concluded on page 4 of its brief that Detective Trammel-McClain's "actions therefore fall within the purview of the emergency doctrine as applied to animals in Bauer." (24: 4) (A-Ap., p. 33) Consequently, the State only argued in the trial court that the detective's actions were only justified under the emergency doctrine.

On appeal, the State asserts that it has abandoned the emergency doctrine and instead it now attempts to assert the community caretaker doctrine even though it did not argue in the trial court that the community caretaker exception applied to this case. Since the State did not actually explicitly argue in the trial court that the community caretaker exception applied, that argument should not be considered on appeal as an appellate court will generally not review an issue raised for the first time on appeal. Wirth v. Ehly, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1983).

In the event that the Court of Appeals considers the applicability of the community caretaker exception, Stewart will address that issue. The State argues that this case involved a valid exigency that did not require a search warrant and that the community caretaker exception applied. State's brief at 16-18.

The police officers' actions were not reasonable. It is illogical for the State to argue that merely taking care of the dog justified the search of the apartment. The State itself in its brief asserts that after the animal technician took control of the dog, the detective went back to the apartment and then soon spotted the bedding outside of the bedrooms. State's brief at 17. This means that the alleged community caretaker function had been completed and no longer existed after the dog had been surrendered to the technician and before the detective had spotted the bedding from outside the bedrooms and had done a search. The act of conducting the search was, therefore, completely separate and independent of the alleged community caretaker function which no longer existed when the search was conducted. In such a situation, the need and public interest in ensuring the welfare of the dog does not outweigh the degree of the intrusion. Therefore, the community caretaker doctrine does not apply to this case.

C. THE STATE ERRONEOUSLY ASSERTS THAT THE TRIAL COURT'S DECISION TO NOT SUPPRESS THE SETS OF BEDDING IS HARMLESS ERROR.

The State attempts to venture into Stewart's mind and assert that, even had the trial court erred in denying the motion to suppress, Stewart was likely to have still entered into the plea agreement and pled guilty. State's brief at 22-24. This is an erroneous argument because, first, the State cannot look into Stewart's mind and predict with certainty what he would have done. Second, even if the plea agreement was favorable to Stewart, a victory on the motion to suppress, precluding a jury from considering that evidence, was likely to have caused him to decide that it was unwise to plead guilty.

Regarding the mandate if there is a reversal of the trial court's denial of the motion to suppress, it seems reasonable to allow Stewart to decide whether he wishes to withdraw his plea if there is a reversal of the denial of the motion to suppress.

CONCLUSION

For all the reasons set forth above, undersigned counsel respectfully requests that this court enter an order reversing the order denying the motion to suppress in this case and remanding the case back to the Circuit Court.

Dated this 30th day of June, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that the text of the electronic copy of this reply brief is identical to the text of the paper copy of this reply brief.

Date: June 30, 2015

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Paul G. Bonneson
Attorney for Defendant-Appellant

CERTIFICATION

I certify that this reply brief conforms to the rules contained in sec. 809.19(8) and (c) for a brief produced with a proportional font. The length of this reply brief is 7 pages and 1480 words.

Dated this 30th day of June, 2015.

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