STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2014AP002604-CR

JEFFREY SMART,

Defendant-Appellant,

An Appeal From a Judgment of Conviction and Order from Waukesha County Case No. 2013CM002127 Denying Defendant's Motion to Suppress Evidence entered by the Honorable Donald J. Hassin, Jr., Circuit Court, Branch 9, Waukesha County

BRIEF OF PLAINTIFF-RESPONDENT

Lesli S. Boese
Deputy District Attorney
State Bar #1024374
Waukesha County District Attorney's Office
Waukesha County Courthouse
515 West Moreland Boulevard
Waukesha, Wisconsin 53188
(262) 548-7076

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I. Was the warrantless entry into Mr. Smart's motel room justified under the emergency doctrine because it was reasonable to believe that Mr. Smart's children were in need of immediate aid or assistance?

   A. Circuit Court's Answer: Yes. The warrantless entry was justified as a health and welfare inspection concerning the well-being of the two minor children.

II. Was the warrantless entry into Mr. Smart's motel room justified by the existence of probable cause and exigent circumstances because the safety of Mr. Smart's children was threatened?

   A. Circuit Court's Answer: Yes. The warrantless entry was justified as a health and welfare inspection concerning the well-being of the two minor children.

III. Even if the warrantless entry into Mr. Smart's motel room was unreasonable, the evidence should be admissible because there was probable cause to arrest Mr. Smart prior to the warrantless entry, and the evidence was obtained outside of the motel room.

A. The Circuit Court did not reach this issue, having already concluded that the warrantless entry was reasonable.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE

Jeffrey Smart was charged by an amended criminal complaint with Disorderly Conduct, Domestic Abuse, Repeater, Wis. Stats. §§ 947.01(1), 939.51(3)(b), 968.075(1)(a), 939.62(1)(a); Intimidation of a Victim, Domestic Abuse, Repeater, Wis. Stats. §§ 940.44(1), 939.51(3)(a), 939.62(1)(a), 968.075(1)(a); Operating a Motor Vehicle While Intoxicated, 2nd offense, with a Minor Child in the Vehicle, Wis. Stats. §§ 946.63(1)(a), 346.65(2)(am)2 and (2)(f)2; Operate Motor Vehicle While Revoked, Wis. Stats. §§ 343.44(1)(b), 343.44(2)(ar)(2); and Operating with Prohibited Alcohol Concentration, 2nd Offense, with Minor Child in the Vehicle, Wis. Stats. §§ 346.63(1)(b), 346.65(2)(am)2 and (2)(f)2. (R. 2.)

Subsequently, Mr. Smart filed a motion to suppress fruits of search of premises. (R. 4.) A motion hearing was held on March 31, 2014 in the Waukesha County Circuit Court, Honorable Donald J. Hassin, Jr. presiding. (R. 23, p. 1; App. 1.) The following facts were derived from the testimony at the motion hearing.

On November 30, 2013 at approximately 4:55 a.m., Officer Foth was dispatched to a residence for a report of

a domestic disturbance. (R. 23, p. 5, lines 19, 23-25, p. 6, line 1; App. 5-6.) The caller, Christine King, reported that her live in boyfriend, Mr. Smart, had strangled her, abused her, and left the residence. (R. 23, p. 6, lines 3-5, 9-12, p. 7, lines 18-20; App. 6-7.) Ms. King also indicated that Mr. Smart was intoxicated and left the residence by driving his vehicle with his two sons, ages nine and six, in the vehicle. (R. 23 p. 7, lines 24-25, p. 8, lines 1-10; App. 7-8.)

Officer Foth was familiar with both Mr. Smart and Ms. King from prior contacts for various reasons. (R. 23, p. 5, lines 12-14, p. 6, lines 13-17; App. 5-6.) Officer Foth responded to Ms. King's residence within approximately a minute or minute and a half since receiving the dispatch. (R. 23, p. 10, lines 14-15; App. 10.) Officer Foth then made contact with Ms. King at her residence and noted that only Ms. King and her two daughters were present. (R. 23, p. 10, lines 16-18, p. 11, lines 5-6; App. 10-11.) Ms. King admitted that both she and Mr. Smart had been drinking earlier in the evening and later began to argue. (R. 23, p. 11, line 23, p. 12, lines 1-3; App. 11-12.) Ms. King again indicated that Mr. Smart strangled her; he put his hands around her throat and attempted to choke her. (R. 23, p.

11, lines 8-9; App. 11.) Ms. King also indicated that that Mr. Smart may have some scratch marks on him because she fought back. (R. 23, p. 14, lines 11-14; App. 14.) Officer Foth did not recall seeing any marks on Ms. King. (R. 23, p.12, lines 10-12; App. 12.) He also observed that Ms. King was intoxicated. (R. 23, p. 12, lines 15-16; App. 12.)

Ms. King stated that Mr. Smart may have gone to his parent's residence in the City of Waukesha or to a hotel in the City of Pewaukee because he had gone to the same hotel in the past after they had gotten into arguments. (R. 23, p. 12, lines 19-23; App. 12.) Ms. King again indicated that Mr. Smart was very intoxicated. (R. 23, p.13, lines 7-12; App. 13.) Ms. King also expressed concern for Mr. Smart's children because Mr. Smart left the residence with his children in his vehicle and was intoxicated. (R. 23, p. 14, lines 5-10; App. 14.)

Officer Foth contacted his dispatch to have them conduct a record check of Mr. Smart. (R. 23, p. 14, line 25, p. 15, lines 1-3; App. 14-15.) He learned that Mr. Smart was on probation and had a prior conviction related to Operating While Intoxicated (R. 23, p. 15, lines 4-7; App. 15.) He requested that the Sherriff's Department check

their area for Mr. Smart and his vehicle. (R. 23, p. 15, lines 13-17; App. 15.) He also informed dispatch that based on the statements made by Ms. King and the fact that Mr. Smart was on probation there was enough probable cause to arrest Mr. Smart. (R. 23, p. 16, lines 23-25, p. 17, lines 1-2; App. 16-17.)

Deputy Becker and Deputy Casta located Mr. Smart's unoccupied vehicle in the parking lot of Wildwood Lodge, across the street from the Holiday Inn. (R. 23, p. 34, lines 14-21, p. 35, lines 12-13; App. 34-35.) Other deputies and Deputy Becker's captain also arrived at the scene. (R. 23, p. 35, lines 16-17; App. 35.) They went into the Wildwood Lodge and made contact with the night auditor who indicated that no one had checked in recently. (R. 23, p. 35, lines 17-20; App. 35.) The deputies did a walk-through of the motel and did not locate anyone. (R. 23, p. 35, lines 20-22, p. 36, lines 6-7; App. 35-36.) The night auditor contacted the Holiday Inn and was initially advised that no one recently checked in. (R. 23, p. 35, lines 24-25, p. 36, line 1; App. 35-36.) The night auditor of the Holiday Inn then contacted the Wildwood Lodge and indicated that somebody she had known as Jeffrey

Smart had checked into the motel. (R. 23, p. 36, lines 8-12; App. 36.)

The deputies proceeded to the Holiday Inn and made contact with the night auditor. (R. 23, p. 36, lines 18-19; App. 36.) The night auditor confirmed that Mr. Smart had checked into the motel and told the deputies his room number. (R. 23, p. 37, lines 20-24; App. 37.) The night auditor was familiar with Mr. Smart from past check-ins to the motel. (R. 23, p. 37, lines 8-14; App. 37.) Approximately forty-five minutes had passed at this point since Deputy Becker was dispatched to look for Mr. Smart. (R. 23, p. 38, lines 3-6; App. 38.)

The night auditor told Deputy Becker that she did not see anyone with Mr. Smart when he checked in. (R. 23, p. 38, lines 7-9; App. 38.) She also indicated that Mr. Smart asked her to take pictures with his cell phone of marks that were on the back of his neck caused from an altercation and the front of his shirt that had mashed potatoes on it that were thrown at him. (R. 23, p. 38, lines 12-16; App. 38.) The night auditor also stated that Mr. Smart appeared to have been consuming alcohol, but did not know his level of intoxication. (R. 23, p. 38, line 25, p. 39, lines 1-3; App. 38-39.)

At this point the deputies did not know the whereabouts of Mr. Smart's children. (R. 23, p. 39, lines 19-22; App. 39.) They only had information that the two boys were with Mr. Smart, but the night auditor did not see Mr. Smart with any children and they were not in Mr. Smart's vehicle. (R. 23, p. 39, lines 7-10, 15-18, 21-22; App. 39.)

Deputy Becker, his captain, and two other deputies went to the door of Mr. Smart's motel room. (R. 23, p. 40, lines 1-5; App. 40.) Another deputy stayed outside on the north side of the building to cover that door in case Mr. Smart tried to escape. (R. 23, p. 40, lines 14-17; App. 40.) The deputies knocked on Mr. Smart's motel room door and identified themselves as the Waukesha County Sheriff's Department, but no one answered. (R. 23, p. 40, lines 22-25, p. 41, lines 8-10; App. 40-41.) After attempting to make contact at the door for a couple minutes without any success, the deputies tried calling Mr. Smart's motel room, but no one answered. (R. 23, p. 42, lines 4-11; App. 42.) The deputies attempted to make contact with Mr. Smart for approximately ten minutes without any success. (R. 23, p. 42, lines 12-17; App. 42.)

One of the deputies then made contact with the night auditor to get further information to confirm that she did not see any kids with Mr. Smart and did not know the severity of Mr. Smart's injuries to the back of his neck. (R. 23, p. 42, lines 21-24; App. 42.) The deputy then received a key to Mr. Smart's motel room from the night auditor. (R. 23, p. 43, lines 1-2; App. 43.) Deputy Becker used the room key to open the door. (R. 23, p. 43, lines 3-6; App. 43.) The deputies entered the room and identified themselves as the Waukesha County Sheriff's Department. (R. 23 p. 43, lines 6-7, 9-10; App. 43.) Deputy Becker saw Mr. Smart and asked if he was Jeffrey Smart and he confirmed. (R. 23, p. 43, lines 13-16; App. 43.) The deputies also located Mr. Smart's two children in the room sleeping on the bed. (R. 23, p. 43, lines 20-22; App. 43.)

Deputy Becker advised Mr. Smart that they entered the room because they did not know where the children were and there were unknown injuries to Mr. Smart. (R. 23, p. 44, lines 1-6; App. 44.) Deputy Becker observed a slight, minor cut on Mr. Smart. (R. 23, p. 44, lines 7-98; App. 44.) Two female deputies remained with the two children while Mr. Smart was detained. (R. 23, p. 44, lines 15-17; App. 44.)

Mr. Smart was handcuffed and advised that he was being detained due to an incident that occurred between him and Ms. King. (R. 23, p. 45, lines 2-7; App. 45.)

Mr. Smart was escorted to a squad car to wait for Officer Foth to arrive on scene. (R. 23, p. 45, lines 11-13; App. 45.) Officer Foth arrived on scene approximately twenty to thirty minutes later and made contact with Mr. Smart. (R. 23, p. 17, lines 7-9, 20, p. 45, lines 16-21; App. 17, 45.) Officer Foth could not recall, but believed that Mr. Smart was initially handcuffed, then was unhandcuffed pending the operating while intoxicated investigation. (R. 23, p. 20, lines 19-23, p. 21, lines 2-3; App. 20-21.)

Officer Foth believed Mr. Smart was intoxicated based on the fact that he detected an odor of intoxicants coming from Mr. Smart; Mr. Smart admitted he had been drinking; and Mr. Smart failed the field sobriety tests. (R. 23, p. 22, lines 3-6, p. 23, line 10; App. 22-23.) Mr. Smart was also given a preliminary breath test with a result of .138 percent. (R. 23, p. 23, line 25, p. 24, lines 2-7; App. 23-24.)

Mr. Smart was arrested for operating while intoxicated. (R. 23, p. 24, lines 8-10; App. 24.) Mr.

Smart was then transported to the Hospital where he submitted to a blood draw. (R. 23, p. 24, lines 12-16; App. 24.) Sometime after the operating while intoxicated investigation, Mr. Smart admitted that he had been driving; that a physical altercation took place with Ms. King; and that he physically touched Ms. King to defend himself. (R. 23, p. 18, lines 5-9, 12-17, p. 21, lines 15-19; App. 18, 21.) Mr. Smart denied strangling Ms. King. (R. 23, p. 18, line 11; App. 18.)

Based on the foregoing testimony the Honorable Donald J. Hassin, Jr. denied Mr. Smart's motion to suppress, finding that exigencies of the situation, including the concern for the health and welfare of the two minor children weighed in favor of the State. (R. 23, p. 55, lines 14-22, p. 56, lines 1-3; App. 55-56.) Mr. Smart was later convicted of Disorderly Conduct, Domestic Abuse, Repeater and Operating a Motor Vehicle While Intoxicated, 2nd Offense, with a Minor Child in the Vehicle. (R. 8, 9, 10.) Mr. Smart now appeals.

STANDARD OF REVIEW

A review of an order denying a motion to suppress evidence involves a question of constitutional fact. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d

463. This Court uses a two-step analysis when dealing with a question of constitutional fact. *Id.* The first step is to review the historical facts found by the circuit court under a deferential standard and uphold them unless they are clearly erroneous. *Id.* The second step is to independently apply constitutional principles to those facts. *Id.*

ARGUMENT

This Court should affirm the circuit court's decision that the evidence obtained should not be suppressed. Although the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures, there are exceptions to its warrant requirements. U.S. Const. amend. IV; Wis. Const. art. 1, § 11; See *State v. Larsen*, 2007 WI App 147, ¶ 16, 302 Wis. 2d 718, 736 N.W.2d 211. The protection of the Fourth Amendment against unreasonable searches and seizures does apply to a guest in a hotel room. *Stoner v. State of Cal.*, 376 U.S. 483, 490 (1964). A warrantless entry into a guest's hotel room cannot be justified based on the fact that a hotel clerk gave consent to search. *Id.* at 483. The State has the burden to prove that a warrantless entry was

justified based on an exception to the warrant requirement. *Larsen*, 2007 WI App 147, ¶ 16.

The warrantless entry into Mr. Smart's motel room was justified under the emergency doctrine. It was reasonable to believe that Mr. Smart's two young children were in need of immediate aid or assistance because Mr. Smart reportedly strangled his girlfriend, abused her, was very intoxicated, and drove his vehicle with his two young children in it. (R. 23, p. 6, lines 3-5, p. 7, lines 24-25, p. 9, lines 2-4; App. 6-7, 9.) Even if the emergency doctrine does not apply, the warrantless entry into Mr. Smart's motel room was justified because there were exigent circumstances and probable cause. The safety of Mr. Smart's children was threatened. Even if the warrantless entry is not justified based on an exception to the warrant requirement, the evidence should not be suppressed because there was probable cause to arrest Mr. Smart prior to the warrantless entry into the motel room and all of the evidence was obtained outside of the motel room.

I. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S DECISION DENYING MR. SMART'S MOTION TO SUPRESS EVIDENCE BECAUSE THE WARRANTLESS ENTRY INTO MR. SMART'S MOTEL ROOM WAS JUSTIFIED UNDER THE EMERGENCY DOCTRINE.

The emergency doctrine permits a governmental official to forego the Fourth Amendment's warrant requirement and enter a premises without a warrant when "the official reasonably believes a person within is in need of immediate aid or assistance and immediate entry into an area in which a person has a reasonable expectation of privacy is necessary to provide that aid or assistance. " *Larsen*, 2007 WI App 147, ¶ 17. The emergency doctrine was approved as an exception to the warrant requirement by the Wisconsin Supreme Court in *State v. Pires*, 55 Wis. 2d 597, 603-04, 201 N.W.2d 153 (1972). *Larsen*, 2007 WI App 147, ¶ 17. The emergency doctrine is based on the idea that "the preservation of human life is paramount to the right of privacy protected by the Fourth Amendment." *Id*. ¶ 17.

An objective test is used to determine whether a warrantless entry based on the need to render assistance or prevent harm is justified. *Id*. ¶ 18. The test to be applied is "whether 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…." *Id.* ¶ 19. An officer's subjective beliefs and motivations are not relevant. *Id.*; *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006). The objective test alone is determinative. *Larsen*, 2007 WI App 147, ¶ 19; *Brigham City*, 547 U.S. at 404. In *Larsen*, this Court applied a purely objective test in finding that officers were justified in conducting a warrantless search of a residence based on the emergency doctrine. *Id.* ¶ 27. This Court applied the same test used in *State v. Leutenegger*, 2004 WI App 127, ¶ 11, 275 Wis. 2d 512, 685 N.W.2d 536, an "exigent circumstances" case. *Larsen*, 2007 WI App 147, ¶ 19.

A. The Warrantless Entry into Mr. Smart's Motel Room Was Justified by the Emergency Doctrine Because it was Reasonable to Believe that Mr. Smart's Children were in Need of Immediate Aid or Assistance.

The deputies had a reasonable belief that a delay in getting a warrant would gravely endanger life. Specifically, the lives of Mr. Smart's two young children were in danger. Prior to entering Mr. Smart's motel room, the deputies received information that Mr. Smart had (1) strangled his girlfriend; (2) abused his girlfriend; (3) was very intoxicated; and (4) drove his vehicle with his two young sons, ages nine and six, in the car. (R. 23, p.

6, lines 3-5, 9-12, p. 7, lines 18-20, 24-25, p. 8, lines 1-10; App. 6-8.) Ms. King expressed her concern for Mr. Smart's children because Mr. Smart left the residence with his children in his vehicle and was intoxicated. (R. 23, p. 14, lines 5-10; App. 14.) Based on this information the deputies attempted to locate Mr. Smart and his two young children. (R. 23, p. 15, lines 13-17; App. 15.) The deputies did locate Mr. Smart's vehicle in a motel parking lot, but the vehicle was unoccupied. (R. 23, p. 34, lines 14-21, p. 35, lines 12-13; App. 34-35.)

The deputies eventually learned that Mr. Smart had checked into the Holiday Inn motel. (R. 23, p. 36, lines 8-12; App. 36.) However, the night auditor at the Holiday Inn stated that although she saw Mr. Smart when he checked in, she did not see any children with him. (R. 23, p. 38, lines 7-9; App. 38.) The deputies then proceeded to Mr. Smart's motel room and attempted to make contact with him for approximately ten minutes, by knocking on the door and calling the motel room. (R. 23, p. 40, lines 22-25, p. 41, lines 8-10, p. 42, lines 4-17; App. 40-42.) But no one responded. (R. 23, p. 40, lines 22-25, p. 42, lines 9-11; App. 40, 42.) Ultimately, the deputies obtained a key to Mr. Smart's motel room and entered without a warrant. (R.

23, p. 43, lines 3-6; App. 43.) Under the circumstances known to the deputies at the time, it was reasonable for them to enter the motel room without a warrant in order to locate and provide aid or assistance to Mr. Smart's two young children.

The Fourth Amendment "permits officials to act reasonably in the face of actual danger, not to ignore it. " *State v. Rome*, 2000 WI App 243, ¶ 20, 239 Wis. 2d 491, 620 N.W.2d 225. In *Rome*, this court held that a warrantless entry based on the need to provide aid or assistance to Rome's child who was in a house with Rome, while Rome was intoxicated and had been violent and threatening toward his wife, was justified by the emergency rule. *Id.* ¶ 18. In that case police officers observed a woman walking outside, carrying a baby, and crying. *Id.* ¶ 2. The officers approached the woman and she told them that her husband, Rome, yelled at her, threatened her, and grabbed her hair. *Id.* ¶ 2-3. She also stated that Rome was intoxicated and at home with her two-year-old daughter. *Id.* ¶ 3. She was concerned about the child's welfare because Rome was intoxicated and probably was not aware that the she had left the house. *Id.*

The officers went to Rome's residence and rang the door for two minutes, but did not get a response. *Id.* ¶ 4. The officers knocked on the door and the door leading to an enclosed porch swung open. *Id.* The officers then found an interior door which was open a few inches that led inside the house. *Id.* The officers swung open the door and shouted for over ten minutes, but still did not receive a response. *Id.* Dispatch attempted to call the residence, but the phone was disconnected. *Id.* The officers then entered the kitchen and continued to call out, but did not receive a response. *Id.* ¶ 5. The officers then went upstairs and located Rome asleep in the bed. *Id.* ¶ 6. Rome was placed in handcuffs for safety reasons. *Id.*

One of the officers saw a light flickering in the closet and believed the child may be hiding there. *Id.* The officer opened the closet and found a makeshift greenhouse and marijuana plant. *Id.* Another officer looked in other rooms and located the two-year-old child asleep in a bedroom. *Id.*¶ 7. Rome was charged with manufacturing marijuana and later moved to suppress the evidence found during the warrantless search of his home. *Id.* ¶ 8. This Court ultimately concluded that the warrantless entry and search was justified based on the emergency rule. *Id.* ¶ 25.

Just like the warrantless entry and search in *Rome*, 2000 WI App 243, ¶ 25, the warrantless entry and search in the present case was reasonable. Although the Court in *Rome* applied a subjective and objective test, *Id*. ¶ 13, and now the test is purely objective, *Larsen*, 2007 WI App 147, ¶ 19, the result should be the same. Both cases involve a report of domestic violence; that the defendants were intoxicated; and that the defendants had a minor child or children in their custody at the time. *Id*. ¶ 3; (R. 23, p. 6, lines 3-5, 9-12, p. 7, lines 18-20, 24-25, p. 8, lines 1-10; App. 6-8.)

The present case presents even more of an emergency than *Rome* because in the present case it was reported that Mr. Smart actually drove while under the influence of alcohol with his minor children in the car. (R. 23 p. 7, lines 24-25, p. 8, lines 1-10; App. 7-8.) Whereas in *Rome*, the child was just at home with Rome who was intoxicated. *Rome*, 2000 WI App 243, ¶ 3. Driving drunk with minor children in the car presents a substantial risk to the lives of the children.

"In 2012, of the 1,168 children 14 and younger killed in motor vehicle crashes, 239 (20%) were killed in alcohol-impaired-driving crashes. Out of those 239 deaths, 52

percent (124) were passengers of vehicles with drivers who had blood alcohol concentrations (BACs) of .08 grams per deciliter (g/dL) or higher." U.S. Department of Transportation, National Highway Traffic Safety Administration, *Traffic Safety Facts 2012 Data*, April 2014, http://www-nrd.nhtsa.dot.gov/pubs/812011.pdf.

"Drinking drivers are more likely than other drivers to transport children improperly." National Highway Traffic Safety Administration, *Impaired Driving in Wisconsin*, http://www.nhtsa.gov/people/injury/alcohol/impaired_driving_pg2/WI.htm. "Infants and children who are seated in places other than the back seat account for nearly 34% of child fatalities in Wisconsin, and those seated in the back seat without proper restraints account for an additional 39% of child fatalities." *Id.*

Because of the risk that was posed to the children by Mr. Smart considering that he was reportedly physically violent toward his girlfriend and drove drunk with his two minor children in the car, it was reasonable for the deputies to enter the motel room without a warrant in order to locate the children and provide any aid or assistance as needed. It was reasonable to believe under the

circumstances that Mr. Smart's children may have been injured or at least faced the threat of death or injury.

Young children are less capable of protecting themselves from harm or independently seeking medical attention than adults. *State v. Boggess*, 115 Wis. 2d 443, 457-58, 340 N.W.2d 516, 524 (1983). In *Boggess*, a social worker received an anonymous tip that children living with Boggess were in need of medical attention because they may have been abused. *Id.* at 446, 340 N.W.2d at 519. The caller indicated that one of the children was limping and had bruises. *Id.*, 340 N.W.2d at 519. The caller also indicated that Boggess had a bad temper. *Id.*, 340 N.W.2d at 519. Another social worker and a police officer went to the Boggess residence. *Id.*, 340 N.W.2d at 519. They knocked on the door and Boggess answered. *Id.*, 340 N.W.2d at 519. They then entered the residence without a warrant. *Id.* at 447, 340 N.W.2d at 520. The social worker and the officer found the children inside the home; noticed injuries to the children; and asked them questions. *Id.*, 340 N.W.2d at 520. They then took the children to the hospital to receive medical attention. *Id.*, 340 N.W.2d at 520. Boggess was later charged with child abuse and he

moved to suppress evidence obtained based on the illegal search. *Id.* at 448, 340 N.W.2d at 520.

The court in *Boggess* held that that the warrantless entry into the residence was justified under the emergency rule. *Id.* at 443, 340 N.W.2d at 516. The court did apply a subjective and objective analysis, *Id.* at 450-51, 340 N.W.2d at 521. However, as stated previously this Court has since adopted a purely objective test under the emergency doctrine. *Larsen*, 302 Wis. 2d at 729, 736 N.W.2d at 216. In reaching its holding, the court in *Boggess* reasoned that "a reasonable person would have believed that the children within the Boggess residence were in immediate need of aid or assistance due to actual or threatened physical injury, and that there was an immediate need for entry into the home to provide that aid." *Id.* at 452-53, 340 N.W.2d at 522.

Just like the children in *Boggess*, *Id.*, 340 N.W.2d at 522, Mr. Smart's children faced an actual or threatened physical injury and were in need of immediate aid or assistance. Although the children in *Boggess* were reported to have injuries, *Id.* at 446, 340 N.W.2d at 519, and the children in the present case were not, it was still reasonable for the deputies to believe that the children

may have injuries because it was reported that Mr. Smart was physically violent and he drove with the children while he was intoxicated. (R. 23, p. 6, lines 3-5, p. 7, lines 24-25, p. 9, lines 2-4; App. 6-7, 9.) Therefore, the warrantless entry into Mr. Smart's motel room was justified.

II. EVEN IF THE WARRANTLESS ENTRY INTO MR. SMART'S MOTEL ROOM WAS NOT PERMITTED ON THE BASIS OF THE EMERGENCY DOCTRINE, IT WAS JUSTIFIED BY THE EXISTENCE OF PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES.

A warrantless entry to premises can be justified if the State can prove that it was supported by probable cause and there were exigent circumstances. *Robinson*, 2010 WI 80, ¶ 24. Exigent circumstances include four different categories that permit law enforcement to enter a home without a warrant: 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." *Id.* ¶ 30.

Courts apply an objective test in determining whether a warrantless entry was justified by exigent circumstances: "whether 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. " *State v. Richter*, 2000 WI 58, ¶ 30, 235 Wis. 2d 524, 612 N.W.2d 29. The determination turns on the consideration of reasonableness. *Id*.

A. The Warrantless Entry in Mr. Smart's Motel Room was Justified Based on Exigent Circumstances Because the Safety of Mr. Smart's Children Was Threatened.

It has been recognized that law enforcement are not required to delay their investigation if it would gravely endanger the lives of others. *Id*. ¶ 37. In the present case, there were exigent circumstances of a threat to the safety of others. The safety of Mr. Smart's two young children were threatened because it was reported that Mr. Smart was very intoxicated; he drove with his children in his vehicle; and he was physically violent toward his girlfriend. (R. 23, p. 6, lines 3-5, 9-12, p. 7, lines 18-20, 24-25, p. 8, lines 1-10; App. 6-8.) Based on the foregoing information known to the deputies at the time, it was reasonable to enter Mr. Smart's motel room without a warrant. Any delay in procuring a warrant could have endangered the lives of the children. It was reasonable for the deputies to believe that the lives of the children were in danger.

A police officer is entitled to rely on a reasonable inference that justifies a search even when the officer is confronted with two reasonable competing inferences: one justifying the search and the other not. *State v. Mielke*, 2002 WI App 251, ¶ 8, 257 Wis. 2d 876, 653 N.W.2d 316. Even if there was an inference that Mr. Smart's children were safe and not in need of any immediate assistance, there was a reasonable inference that the children were in danger because of the information known to the deputies at the time. Therefore, the deputies were permitted to rely on that inference and enter Mr. Smart's motel room without a warrant in order to ensure the safety of the children.

The deputies ultimately located the children in Mr. Smart's motel room who thankfully were safe (R. 23, p. 43, lines 20-22; App. 43), but the fact that the children were unharmed is not relevant in considering whether the warrantless entry was justified. See *Richter*, 2000 WI 58, ¶ 43. Hindsight is not considered in the exigency analysis. *Id.*

B. The Warrantless Entry into Mr. Smart's Motel Room was Justified Because the Deputies had Probable Cause.

The standard of probable cause is a relatively low standard that only requires the probability of criminal

activity. *Illinois v. Gates*, 462 U.S. 213, 235 (1983). Probable cause is a fluid concept that requires an assessment of probabilities in particular factual contexts, which cannot readily or usefully be reduced to a neat set of legal rules. *Id.* at 232.

The deputies had probable cause to believe that a crime was committed and that Mr. Smart committed it. Ms. King reported that Mr. Smart strangled her, abused her, was very intoxicated, and drove his vehicle with his two young children in it. (R. 23, p. 6, lines 3-5, 9-12, p. 7, lines 18-20, 24-25, p. 8 lines 1-10; App. 6-8.) Officer Foth also had dispatch conduct a record check of Mr. Smart in which he learned that Mr. Smart was on probation and had a prior conviction related to Operating While Intoxicated. (R. 23, p. 15, lines 4-7; App. 15.) Officer Foth informed dispatch that based on the statements made by Ms. King and the fact that Mr. Smart was on probation there was enough probable cause to arrest Mr. Smart. (R. 23, p. 16, lines 23-25, p. 17, lines 1-2; App. 16-17.) Based on the information provided to the police by Ms. King it was probable that Mr. Smart was involved in domestic violence and operated a motor vehicle while intoxicated with a minor child.

III. EVEN IF THE WARRANTLESS ENTRY INTO MR. SMART'S MOTEL ROOM WAS NOT JUSTIFIED BY AN EXCEPTION TO THE WARRANT REQUIREMENT, THE EVIDENCE OBTAINED SHOULD NOT BE SUPPRESSED BECAUSE THERE WAS PROBABLE CAUSE TO ARREST MR. SMART PRIOR TO THE WARRANTLESS ENTRY AND ALL OF THE EVIDENCE WAS OBTAINED OUTSIDE OF THE MOTEL ROOM.

Where police have probable cause to make an arrest prior to an unlawful entry, a warrantless arrest inside of a home does not require the suppression of evidence obtained outside of the home. *State v. Felix*, 2012 WI 36, ¶ 4, 339 Wis. 2d 670, 811 N.W.2d 775. In *Felix*, police unlawfully arrested Felix in his home without a warrant in violation of *Payton v. New York*, 445 U.S. 573, 590 (1980), and subsequently obtained statements and physical evidence from Felix outside of his home after *Miranda* warnings were given and waived. *Felix*, 2012 WI 36, ¶ 1. In *Payton*, 445 U.S. at 590, the United States Supreme Court held that "even if police have probable cause to arrest a defendant, entering the defendant's home without a warrant to accomplish an arrest violates the Fourth Amendment. " *Felix*, 2012 WI 36, ¶ 29. Subsequently, the United States Supreme Court held in *New York v. Harris*, 495 U.S. 14, 21 (1990) "that where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of

his home, even though the statement is taken after an arrest made in the home in violation of *Payton*." *Felix*, 2012 WI 36, ¶ 35. The court in *Felix* adopted the *Harris* rule. *Id.* ¶ 38. The court declined to apply the attenuation analysis adopted in *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). *Felix*, 2012 WI 36, ¶ 34.

The *Brown* attenuation analysis should only be applied when the court determines that "the challenged evidence is in some sense the product of illegal governmental activity. *Harris*, 495 U.S. at 19. The illegality in *Brown* was the absence of probable cause. *Id.* The *Brown* analysis is not appropriate to apply when the evidence is not derived from the illegality. *Felix*, 2012 WI 36, ¶ 41.

Suppressing evidence has substantial social costs. *Id.* ¶ 39. "The *Harris* rule appropriately balances the purposes of the exclusionary rule and the *Payton* rule with the social costs associated with suppressing evidence. *Id.* ¶ 39. The main purpose of the exclusionary rule is to deter police misconduct. *Id.* The *Payton* rule was based on protecting the "sanctity of the home." *Id.* The *Harris* rule is premised on the notion that:

> Suppressing evidence and statements obtained from a defendant outside of the home following a *Payton* violation does not further the purpose of

> the Payton rule: 'the rule in Payton was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects… protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime.

Id. ¶ 40 (quoting *Harris*, 495 U.S. at 17). There is no compelling reason to suppress evidence that is obtained lawfully outside of a home. *Felix*, 2012 WI 36, ¶ 40.

In the present case, the *Harris* rule adopted in *Felix*, 2012 WI 36, ¶ 4, should apply and the evidence obtained should not be suppressed. The deputies had probable cause to arrest Mr. Smart prior to entering the motel room without a warrant. Probable cause to arrest exists if police have "information which would lead a reasonable officer to believe that the defendant probably committed a crime." *Id.* ¶ 28. Based on the information provided to the deputies that Mr. Smart strangled and abused Ms. King and drove his vehicle while intoxicated with his two young children in it, (R. 23, p. 6, lines 3-5, 9-12, p. 7, lines 18-20, 24-25, p. 8 lines 1-10; App. 6-8) it was reasonable to believe that Mr. Smart committed a crime. Although Mr. Smart was informed that he was being detained, not arrested, when deputies placed him in handcuffs in the motel room, (R. 23, p. 44, lines 15-17; App. 44) a

detention, like an arrest, is a seizure. See *State v. Vorburger*, 2002 WI 105, ¶ 39, 255 Wis. 2d 537, 648 N.W.2d 829.

The *Brown* attenuation analysis is not appropriate to apply because the evidence was not derived from the illegality. *Felix*, 2012 WI 36, ¶ 41. The deputies did not obtain any evidence from inside Mr. Smart's motel room. After Mr. Smart was detained in the motel room he was escorted to a squad car in the parking lot of the motel. (R. 23, p. 45, lines 11-13; App. 45.) Twenty to thirty minutes later Officer Foth arrived at the scene and had Mr. Smart perform field sobriety tests in the parking lot of the motel. (R. 23, p. 17, lines 7-9, 20, p. 21, lines 4-6, p. 45, lines 16-21; App. 17, 21, 45.) Officer Foth believed Mr. Smart was intoxicated based on the fact that he detected an odor of intoxicants coming from Mr. Smart; Mr. Smart admitted he had been drinking; and Mr. Smart failed the field sobriety tests. (R. 23, p. 22, lines 3-6, p. 23, line 10; App. 22-23.) Mr. Smart was also given a preliminary breath test with a result of .138 percent. (R. 23, p. 23, line 25, p. 24, lines 2-7; App. 23-24.)

Mr. Smart was then arrested for Operating While Intoxicated. (R. 23, p. 24, lines 8-10; App. 24.) Mr.

Smart was transported to the Hospital where he submitted to a blood draw. (R. 23, p. 24, lines 12-16; App. 24.) Sometime after the operating while intoxicated investigation, Mr. Smart admitted that he had been driving; that a physical altercation took place with Ms. King; and that he physically touched Ms. King to defend himself. (R. 23, p. 18, lines 5-9, 12-17, p. 21, lines 15-19; App. 18, 21.) All of this evidence was obtained outside of the motel room. Therefore, the evidence should not be suppressed because deputies had probable cause to arrest Mr. Smart prior to entering his motel room without a warrant and all of the evidence was obtained through lawful means outside of the motel room.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm the circuit court's decision and deny Mr. Smart's motion to suppress.

Dated this ____ day of March, 2015.

Respectfully Submitted,

_____
Lesli Boese
Deputy District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1024374

Prepared by:
Becky VanDam, Legal Intern

CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 33 pages.

Dated this _____ day of March, 2015.

_____
Lesli S. Boese
Deputy District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1024374

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, 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 with the court and served on all opposing parties.

Dated this ____ day of March, 2015.

_____
Lesli S. Boese
Deputy District Attorney
Waukesha County
Attorney for Plaintiff-Respondent
State Bar Number 1024374