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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1061-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT TORRES,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION
ENTERED IN THE RACINE COUNTY CIRCUIT COURT,
THE HONORABLE MICHAEL J. PIONTEK, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

SUPPLEMENTAL STATEMENT OF THE CASE

On September 6, 2013 at 9:17 p.m., Officer Thomas Riegelman and Officer Brinelle Nabors were dispatched to 1366 Deane Boulevard for "narcotics in progress." (1:3; 40:13-14.) The officers made contact with the citizen complainant, K.L., who was the downstairs resident of a duplex. (1:3; 11:2.) K.L. met the officers in the duplex's front yard and advised the officers that a 15 or 16 year-old boy lived upstairs with his mother, but was home alone while his mother and her boyfriend were out of town for several days. (11:2; 40:14.) The minor son was later identified as the defendant, Robert Torres. (11:3.)

K.L. alleged that Torres was hosting a party at which minors were smoking marijuana and engaging in underage drinking. (11:2; 40:14.) K.L. smelled a strong odor of marijuana coming from the upper apartment and personally observed the minors drinking alcohol on the upper porch. (11:2; 40:14.) She also told officers that several juveniles, both male and female, fled from the upper apartment after overhearing her call the landlord and the police. (11:2; 40:15.)

K.L. invited the officers inside her apartment to smell the odor of marijuana. (11:2-3; 40:14.) Officer Riegelman could smell the odor of burnt marijuana emanating from the upper apartment. (1:3; 40:15.)

K.L. advised the officers that Torres was still home, and asked that the officers try to make contact with him.

(11:3; 40:16.) As the officers were speaking with K.L. in the lower apartment, Officer Riegelman heard the upper apartment's floor creak. (40:16.) He thought someone may try to run out the front door of the building, so he stepped onto the shared front porch. (11:3; 40:16.)[1] As he did so, he encountered a male juvenile coming through a door at the bottom of the front stairway to the upper apartment. (11:3; 40:16.) Officer Riegelman asked the boy who he was. (11:3; 40:16.) The boy said his friend lived in the upper unit. (40:16.) The boy was later identified as Alejandro Sanchez-Morales. (11:3.)

Officer Riegelman testified that he told Sanchez-Morales that he needed to speak with Sanchez-Morales' friend. (40:16.) Officer Riegelman's report reflected that he told Sanchez-Morales to go back upstairs. (11:3; 40:30.) Officer Nabor testified that Sanchez-Morales told the officers that he would go get his friend, and the officers told Sanchez-Morales "we'll follow you upstairs." (40:52-53.) Sanchez-Morales then led the officers to the upper apartment via the front stairway. (11:3; 40:16, 53.) The front stairway led exclusively to the upper apartment. (17:4.) And the exterior door to the stairway contained a lock. (17:4.)

Officer Riegelman could smell a strong odor of marijuana as soon as he entered the stairway. (11:3; 40:27-28.) Once Sanchez-Morales got to the top landing, he quickly darted into the apartment, glanced over to a room not visible from the stairway, and appeared to gesture to someone.

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[1] The duplex had two exterior doorways located off the front porch. (10; 40:20.) Each doorway consists of a storm door and an exterior door. (10; 40:23-24.) One door led to the lower apartment and one led to the front stairway for the upper apartment. (40:20.) An individual address number and individual doorbells were located next to each doorway. (10; 40:23-24.)

(11:3; 40:16-17.) This concerned Officer Riegelman. (40:17.) He worried that Sanchez-Morales was warning someone that the police were present, which raised issues of officer safety and the destruction of evidence. (40:17, 40-41.) Entering the apartment, Officer Riegelman ordered Sanchez-Morales to stop, and immediately detained Sanchez-Morales by placing him in handcuffs. (40:17, 36.)

Officer Nabors also entered the apartment and called for the person, Torres, to come out. (40:55.) Torres peeked around a corner, and then ducked back into the bedroom area. (40:67-68.) Officer Nabors ordered Torres to come out, but he did not. Nabors then heard some wrestling sounds coming from the bedroom. (40:68.) Torres came out of the bedroom four or five seconds later. (40:68.) Officer Nabors patted Torres down and detained him by placing Torres in handcuffs. (40:38, 56.)

After detaining Torres, Officer Nabors conducted a protective sweep of the upper apartment. (40:56.) Nabors found an unconscious young female on the floor of the bedroom where Torres was initially observed. (40:56.) The female, N.F., was naked except for a t-shirt partially covering her torso. (1:3-4.) Nabors also observed alcohol bottles and a handgun located near N.F. (1:4; 40:56.)

Officer Nabors stayed with N.F. and Officer Riegelman finished conducting the protective sweep. (40:57.) Riegelman found four partially smoked marijuana cigarettes. (1:4.) No other individuals were located in the upper apartment.

Investigator Spiegelhoff was assigned to investigate the case. (1:4.) N.F. told Spiegelhoff that she had no memory of what happened to her. (1:4.) The last thing N.F. remembered was drinking on the balcony of Torres' residence; she drank so heavily that she blacked out. (1:4.)

Nevertheless, Investigator Spiegelhoff was able to piece together the lengthy and disturbing sexual assault of N.F. from a series of videos on Sanchez-Morales' cellular phone. (1:4.)

The first video depicted N.F. on the floor, incoherent, with her vagina exposed. (1:4.) The audio contained laughter from both Sanchez-Morales and Torres. (1:4.) Sanchez-Morales stated "I just gave her that daddy dick"; "[j]ust fuck the shit out of ol' girl." (1:4.)

The next video depicted N.F. incoherent, but trying to crawl from the floor to the bed. (1:4.) N.F. fell onto the floor and remained there. (1:4.) The video then showed a close up of her vaginal area. (1:4.)

The third video showed N.F. unconscious, still on the floor. (1:4.) Her vaginal area was still exposed. (1:4.) Torres is heard telling Sanchez-Morales to "put the water bottle in her," and Sanchez-Morales did so. (1:5.)

The fourth video showed Torres holding a .25 caliber handgun. (1:4.) At one point Sanchez-Morales told Torres to "just rape the bitch." (1:5.) Torres then stood over a clearly incapacitated N.F., and said: "Get the fuck out of my house." (1:5.) Sanchez-Morales then yelled "Penis Hondo" and both Torres and Sanchez-Morales slapped N.F. across the face. (1:5.) She did not respond. (1:5.) Torres then said: "This shit is loaded. Record this. Record this. I shoot her pussy with a bullet." (1:5.) He put the loaded handgun into N.F.'s vagina with his finger on the trigger and said "bang, bang, bang." (1:4-5.) Sanchez-Morales then digitally penetrated N.F. as he stated: "This is Hondo dirty P16 look at this shit." (1:5.) The video ended with Sanchez-Morales saying: "Gonna put my dick in her mouth." (1:5.)

The fifth video showed Sanchez-Morales putting his penis into N.F.'s mouth while she was incoherent and lying on the floor. (1:5.) Torres can also be seen in the video. (1:5.)

Torres was charged with five counts of possession of child pornography (as a party to a crime), contrary to Wis. Stat. § 948.12(1m); two counts of second degree sexual assault (as a party to a crime), contrary to Wis. Stat. § 940.225(2)(cm); one count of second degree sexual assault by use of a dangerous weapon, contrary to Wis. Stat. §§ 940.225(2)(cm), 939.63(1)(b); one count of first degree recklessly endangering safety by use of a dangerous weapon, contrary to Wis. Stat. §§ 941.30(1), 939.63(1)(b); one count of possession of a dangerous weapon by a person under the age of 18, contrary to Wis. Stat. § 948.60(2)(a); one count of possession of tetrahydrocannabinols (THC), contrary to 961.41(3g)(e); one count of possession of a controlled substance (MDMA), contrary to Wis. Stat. § 961.41(3g)(b);[2] and one count of sexual exploitation of a child by a person under 18 (as a party to a crime), contrary to Wis. Stat. § 948.05(1)(b). (2:1-3.)

Torres moved to suppress "all evidence obtained in a violation of his constitutional rights, including but not limited to the following: The loaded gun, BB gun, bottles of alcohol, condom wrappers, used condoms and marihuana." (8:1.) Torres also requested that the court suppress all derivative evidence including "statements made by the

[2] Spiegelhoff had received information that ecstasy was being stored at Torres' residence. On September 24, 2013, a search warrant was executed and law enforcement found pills testing positive for ecstasy. (1:4.)

defendant and co-defendant[] and all evidence obtained from co-defendant Alejandro Sanchez Morales['] cellular phone." (8:2.)

The basis for Torres' motion was an alleged unlawful entry into the upper apartment and alleged unlawful protective sweep. (8:2.)[3] After an evidentiary hearing, the parties submitted written arguments to the court. Regarding the alleged unlawful entries, Torres alleged that he had a reasonable expectation of privacy in the stairway leading to his residence and in the residence itself. (17:3.) He argued that the front stairway was exclusively under the control of the upper tenant, it was secured for private use, and Sanchez-Morales did not have authority to consent to the officers' entry into the stairway. (17:4-6.)

Torres also argued that the officers could not enter the stairway or residence under the exigent circumstances exception to the warrant requirement. (17:7-9.) Furthermore, if there was an exigency once the officers reached the top landing of the stairway, it was created by the officers' alleged unlawful entry into the stairway. (17:10-12.)

Finally, Torres argued there was no bona fide community caretaker function that allowed the officers to enter the stairway and residence, and even if there was a community caretaker function present, it was not divorced from the investigative function of responding to a narcotics complaint. (17:12-14.)

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[3] Torres does not challenge the protective sweep on appeal. (Torres' Br. 3 n.1.)

The trial court concluded that the officers' "initial inquiry" was not investigative, rather the officers were responding to a complaint of underage drinking and drug use. Under those circumstances, it was reasonable for the officers to take steps to assess the well-being of any unsupervised minors present in the apartment. (42:6-9.) It was also reasonable for the officers to enter the stairway and proceed to the upper apartment in order to perform that function. (42:7.)

The trial court concluded that once the officers reached the top of the landing, Sanchez-Morales' behavior gave them reason to enter the apartment. (42:7-8.) Therefore, the officers were still carrying out a community caretaker function when they entered the apartment. (42:7-9.) The community caretaker exception applied because it was reasonable for the officers to conclude that other people were located in the apartment who might be in need of assistance. (42:7-9.) Thus, the court denied Torres' suppression motion. (42:10.)

A plea agreement was reached and Torres pled guilty to one count of possession of child pornography, one count of second degree sexual assault, one count of first degree recklessly endangering safety, and one count of possession of a dangerous weapon by a person under the age of 18. (19; 20; 21; 22.) The remaining counts were dismissed and read in. (27.) The court sentenced Torres to 30 years of imprisonment. (26; 27.)

On appeal, Torres argues that the trial court erred when it denied his motion to suppress evidence.

ARGUMENT

Law enforcement's interaction with citizens, especially in response to a civilian complaint, is inherently fluid. As the situation evolves, the function that law enforcement serves evolves as well. As such, the State will address the reasonableness of the officers' interactions chronologically. But first, there are a few general principles of law that need to be noted.

Upon review of a denial of a motion to suppress, findings of historical fact are upheld unless found to be clearly erroneous. *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277. The application of constitutional principles to those facts is reviewed de novo. *Id.*

When a defendant alleges a violation of his Fourth Amendment rights, the court must first determine when his rights were implicated. 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 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). A warrantless entry of a home is a presumptively unreasonable search. *Payton v. New York*, 445 U.S. 573, 586 (1980); *State v. Richter*, 2000 WI 58, ¶ 28, 235 Wis. 2d 524, 612 N.W.2d 29.

Here, the home in question is the upper apartment of a duplex. Because of the structure of the house, there are two separate entries that need to be evaluated: (1) the entry into the private stairway leading to the upper apartment, and (2) the entry into the upper apartment. The entries

must be evaluated separately because ultimately, they are separate searches. If a Fourth Amendment violation occurred during either search, the court still must consider whether evidence should be suppressed. Suppression is not appropriate if there is an absence of any remedial value (deterrence of police misconduct) in applying the exclusionary rule and the important societal goals are furthered by admitting the evidence. *State v. Noll*, 111 Wis. 2d 587, 590, 331 N.W.2d 599 (Ct. App. 1983). Thus, this Court must balance the remedial objectives of the rule with the substantial costs exacted by the rule. *State v. Felix*, 2012 WI 36, ¶ 30, 339 Wis. 2d 670, 811 N.W.2d 775 (quotations omitted).

While the warrantless entry of a home is presumptively unreasonable, there are exceptions to that general rule. Two of those exceptions come into play in this case. The first is the "community caretaker" exception. *Pinkard*, 327 Wis. 2d 346, ¶¶ 20-27. The second is exigent circumstances. *State v. Robinson*, 2010 WI 80, ¶ 24, 327 Wis. 2d 302, 786 N.W.2d 463.[4] As addressed below, the community caretaker exception applies to the entry into the front stairway, and the exigent circumstances exception applies to the entry into the living quarters of the upper apartment.

The two entries are reasonable under two different exceptions to the warrant requirement because the officers' function evolved from the time they were dispatched, to when they made contact with the complainant, and again

[4] The State argued in the trial court that the emergency doctrine exception to the warrant requirement also applied. The State concedes on appeal that the emergency doctrine is not relevant to the facts of this case.

when Sanchez-Morales darted into Torres' apartment. Because each entry was reasonable, this Court should affirm the trial court's order denying Torres' motion to suppress and affirm the judgment of conviction.[5]

I. The community caretaker exception to the warrant requirement allowed for the warrantless entry into the front stairway.

A police officer exercises a "community caretaker" function when the officer serves to protect persons and property outside of the context of criminal law enforcement. *Pinkard*, 327 Wis. 2d 346, ¶ 18; *State v. Kramer*, 2009 WI 14, ¶ 32, 315 Wis. 2d 414, 759 N.W.2d 598; *In re Kelsey C.R.*, 2001 WI 54, ¶ 34, 243 Wis. 2d 422, 626 N.W.2d 777. In short, an officer exercises a community caretaker function "'when the officer discovers a member of the public who is in need of assistance'" and takes appropriate action. *Pinkard*, 327 Wis. 2d 346, ¶ 18. A multitude of activities fall within law enforcement's community caretaker *function,* but not every intrusion that results from the exercise of that function will fall within the community caretaker *exception* to the warrant requirement. *Pinkard*, 327 Wis. 2d 346, ¶ 20.

"The community caretaker exception does not require the circumstances to rise to the level of an emergency to qualify as an exception to the Fourth Amendment's warrant requirement." *Pinkard,* 327 Wis. 2d 346, ¶ 26 n.8. Rather, the court applies a three-step test to determine whether an

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[5] While the trial court concluded that the community caretaker exception allowed the officers to enter the stairway and the upper apartment, this Court may affirm on different grounds than those relied on by the trial court. *State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

officer's conduct falls within the scope of the exception. *Pinkard*, 327 Wis. 2d 346, ¶ 29. When a community caretaker function is asserted as the basis for a home entry, the court must determine:

> (1) whether a search . . . within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

Pinkard, 327 Wis. 2d 346, ¶ 29 (internal citations and footnotes omitted). The State bears the burden of proof on all three prongs. *Id.*

The State does not dispute that Torres had a reasonable expectation of privacy in the stairway based on *State v. Trecroci*, 2001 WI App 126, 246 Wis. 2d 261, 630 N.W.2d 555.[6] Thus a search occurred within the meaning of the Fourth Amendment when the officers entered the private front stairway. As for the remaining two prongs of the analysis, the police were exercising a bona fide community caretaker function and the minimal intrusion into the stairway was reasonable under the circumstances.

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[6] The State submits that the *Trecroci* decision too broadly interpreted what a reasonable expectation of privacy is in a stairway to an upper apartment of a multi-family home. The decision is inconsistent with *State v. Edgeberg*, 188 Wis. 2d 339, 524 N.W.2d 911 (Ct. App. 1994), and bestows greater privacy protections to residents of a multi-unit home than those bestowed on residents of a single-family home. Because *Trecroci* is controlling, the State notes this issue to preserve it for review. *See Cook v. Cook,* 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (The court of appeals can't overrule, modify, or withdraw language from a prior published opinion.)

A. The officers were exercising a bona fide community caretaker function when they entered the front stairway.

Unlike in *State v. Matalonis*, 2016 WI 7, ¶ 35, 366 Wis. 2d 443, 875 N.W.2d 567, it is obvious in hindsight that Torres' home did in fact contain a member of the public in need of assistance. However, this Court must still determine "whether *under the circumstances as they existed at the time of the police conduct*, the officers were engaged in a bona fide community caretaker function." *Id.* (quotation and marks omitted). Thus, this Court is "concerned with the extent of the officers' knowledge at the time they conducted the search, not after." *Id.*

"When evaluating whether a community caretaker function is bona fide, we examine the totality of the circumstances . . . ." *Kramer*, 315 Wis. 2d 414, ¶ 30. The Wisconsin Supreme Court has rejected the view that community caretaker functions must be totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *Pinkard*, 327 Wis. 2d 346, ¶ 31. And it has cautioned against taking "a too-narrow view" in determining whether a community caretaker function is present. *Pinkard*, 327 Wis. 2d 346, ¶ 33 (citation omitted).

The "community caretaker" function, "while perhaps lacking in some respects the urgency of criminal investigation, is nevertheless an important and essential part of the police role." *Bies v. State*, 76 Wis. 2d 457, 471, 251 N.W.2d 461 (1977). Interpreting bona fide community caretaker functions too narrowly could deter the "assistance role of law enforcement" at the expense of someone who truly needs assistance. *Pinkard*, 327 Wis. 2d 346, ¶ 33.

Here, Officer Riegelman and Officer Nabors were dispatched to 1366 Deane Boulevard to a citizen complaint. The complainant, K.L., was the downstairs resident of a duplex. (1:3; 11:2.) She informed the officers that the upper tenant was out of town, but the tenant's minor son was home. (11:2; 40:14.) K.L. told the officers that the minor son was hosting an underage drinking party and some of the minors were smoking marijuana. (11:2; 40:14.)

K.L. told the officers that she smelled a strong odor of marijuana coming from the upper apartment and that she personally observed minors drinking alcohol on the upper porch. (11:2; 40:14.) K.L. invited the officers inside her apartment to smell the odor of marijuana. (11:2-3; 40:14.) Officer Riegelman could smell the odor of burnt marijuana emanating from the upper apartment (1:3; 40:15), which corroborated K.L.'s complaint about marijuana usage.

Contrary to Torres' assertion (Torres' Br. 16), the law permits officers to rely on the information supplied by K.L. "When an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case." *State v. Powers,* 2004 WI App 143, ¶ 9, 275 Wis. 2d 456, 685 N.W.2d 869 (quotation and other marks omitted). When a citizen provides identifying information, the citizen risks exposure to perjury or other criminal charges for supplying false information to law enforcement. *State v. Rutzinski*, 2001 WI 22, ¶ 20, 241 Wis. 2d 729, 623 N.W.2d 516. Thus, the information provided by an indentified citizen complainant bears sufficient indicia of reliability. *Id.* "[I]f there are strong indicia of the informant's veracity, there need not necessarily be any indicia of the informant's basis of knowledge." *Id.* ¶ 21.

K.L.'s veracity was high. She gave her name to the police and was interviewed by the officers after she phoned in her complaint. There was no reason for the officers not to believe her. Thus, the officers had reliable information that minors in the upper apartment were involved in drinking and marijuana usage, that the party had since ended, but that Torres was still home. (11:2-3; 40:15-16, 44.)

K.L. asked that the officers try to make contact with Torres, because she was concerned about the second-hand marijuana smoke affecting her minor children. (11:3; 40:15-16.) In other words, K.L. was a citizen in need of assistance. The officers also knew that juveniles do not use good judgment when engaging in underage drinking and drug use. (40:18.) So there was a need to check on the welfare of the juveniles that remained in the upper apartment. (40:18.)

The circumstances giving rise to the community caretaker exception need not rise to the level of an emergency. *Pinkard,* 327 Wis. 2d 346, ¶ 26 n.8. Checking on the welfare of juveniles known to be engaging in underage drinking and drug use is a bona fide community caretaker function. Underage alcohol consumption can lead to serious health risks, and can be a significant contributor to juvenile fatalities. As the Wisconsin Supreme Court has noted:

> Alcohol abuse is the leading cause of hospitalization and death of youth (11–25 year olds). Drinking is involved in 55% of all teenage deaths, including 39% of suicides, 40% of "falls," 43% of drownings, 43% of automobile crashes, and 75% of all fatal drug overdoses.... Alcohol *is* Wisconsin's drug problem.... This is reflected in our children, whose pattern of

> abusive drinking significantly exceeds the national average.

Miller v. Thomack, 210 Wis. 2d 650, 668 n.16, 563 N.W.2d 891, (1997) (citing State of Wisconsin, Department of Justice, Office of Transportation Safety, *Report and Recommendations of the Task Force on Underage Violator Programs in Wisconsin,* 1 (1995); Legislative Reference Bureau Brief 95–3, *The Minimum Drinking Age in Wisconsin* (1995) (discussing the history of efforts to control underage drinking and the nature of the problem)).

The fact that the officers were dispatched for "narcotics in progress" does not diminish their community caretaker function or foreclose the officers from exercising it. To hold that officers cannot have an iota of any other intent in addition to their community caretaker function would essentially preclude the community caretaker doctrine from ever applying. It is also not the law. *See Pinkard*, 327 Wis. 2d 346, ¶ 31. When executing community caretaker functions, law enforcement officers are not forced to put crime-investigating functions out of their minds or ignore potential dangers or crimes that could occur at any time. *See id.* We do not force officers to make on-the-spot determinations as to which function – community caretaking or law enforcement – is being served in order to determine whether they can proceed with a citizen encounter.

The State agrees that an underage drinking complaint does not give law enforcement *carte blanche* to enter a residence. But that is not the inquiry at this stage in the analysis. The question is whether it is a bona fide community caretaker function to try to make contact with a juvenile known to have engaged in underage drinking and drug use. The answer to that question is yes. To hold otherwise would ignore the warnings against taking too

narrow of a view in determining whether a community caretaker function is present. *See Pinkard*, 327 Wis. 2d 346, ¶ 33.

B. The officers reasonably exercised their community caretaker function by entering the front stairway because there is an overwhelming public interest in responding to complaints of underage drinking and drug use and the intrusion suffered by Torres was minimal.

The next step is to determine if the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised. It is important to keep in mind that the intrusion that the court is concerned with at this point is the intrusion into the private stairway.[7] In addressing the balancing test in the third step of the community caretaker analysis, whether the public need and interest outweigh the intrusion, courts may consider the following factors:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the [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

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[7] Torres blurs the two distinct entries in an attempt to paint the police conduct as egregious. (*See generally* Torres' Br.) However, it is undisputed that the stairway and the living quarters of the upper apartment were separated by a solid door. (12.) Thus, by entering the stairway, the officers did not immediately enter the living quarters of the home. As such, it is the entry into the stairway that is the relevant intrusion for the purposes of the community caretaker analysis.

> alternatives to the type of intrusion actually accomplished.

Id. at ¶ 42 (citations omitted).[8]

First, there is a high degree of public interest in responding to underage drinking complaints. As noted above, underage drinking has serious risks. If Officer Riegelman and Officer Nabors had responded to the complaint and advised K.L. that they would do nothing, the public would have been disappointed or even outraged at such a cavalier dismissal of a serious complaint.

Next, the attendant circumstances surrounding the entry into the stairway support a finding of reasonableness. The officers were responding to a complaint in the evening hours, which is when alcohol is typically consumed. However, it was not so late that it would be unreasonable to assume that the 15 or 16-year-old Torres would normally still be awake and able to respond to attempts to contact him.

Before the officers had taken any steps to make contact with Torres, Officer Riegelman heard the upper apartment's floor creak. (40:16.) He stepped onto the shared front porch and encountered a male juvenile, Sanchez-Morales, exiting from the stairway of the upper apartment. (11:3; 40:16.)

The officers did not detain Sanchez-Morales. Rather, they informed him that they needed to speak to whomever lived in the upper apartment. (40:16.) Sanchez-Morales told

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[8] The automobile factor is not relevant here, and thus, will not be addressed in any depth.

the officers he would go get his friend, and held the door open for the officers to follow him up the stairs. (40:52-53.) Sanchez-Morales then led the officers to the upper apartment by the stairway. (11:3; 40:16, 53.)

Contrary to Torres' characterization of the facts, the officers did not immediately detain Sanchez-Morales, nor did the officers "barge" into the stairway. (Torres' Br. at 22-23.) There was no show of overt authority and no display of force. Rather, the officers told Sanchez-Morales that they had to speak to the resident of the upper apartment. Sanchez-Morales did not refuse to assist the officers; he did not ask them to wait outside; he did nothing to indicate that their presence was unwelcome. Instead, Sanchez-Morales immediately led the officers into the stairway – holding the door open for the officers to follow him. (40:52-53.) Under those circumstances, it was reasonable for the officers to enter the private stairway.

Regarding the fourth factor, Torres is correct that the officers did not attempt any other methods of contact before entering the stairway. However, "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983).

Law enforcement's interaction with civilians is inherently fluid. Sanchez-Morales appeared before the officers could attempt any other method of contact. And Sanchez-Morales led the officers into a stairway – not directly into the living quarters of the upper apartment. This is significant because while a private secured stairway does not carry an implicit license to enter, *Trecroci*, 246 Wis. 2d 261, ¶ 40, it is only logical that any reasonable expectation of privacy in that type of area is not of the same degree as the

reasonable expectation of privacy we all hold in the living quarters of our homes.

Unlike the living quarters, the main purpose of the stairway is ingress and egress. Everything in the stairway would be exposed to anyone who entered. This type of stairway is not a place to store private information or valuable items, nor is it a place to engage in overtly private functions that one would engage in inside the home. Because the officers were only entering the stairway and not the living quarters of the home, it was a reasonable exercise of the officers' community caretaker function to follow Sanchez-Morales into the stairway to attempt to make contact with Torres.

II. The exigent circumstances exception to the warrant requirement allowed the officers to enter the upper apartment.

After the officers lawfully entered the stairway, the situation evolved again. The officers immediately noticed a strong odor of marijuana. (11:3; 40:27-28.) But that alone is not what transformed the situation. Rather, it was the actions of Sanchez-Morales. As soon as he got to the top landing, he quickly darted into the apartment, glanced over to a room not visible from the stairway, and appeared to gesture to someone. (11:3; 40:16-17.) Sanchez-Morales' darting and motioning actions gave the officers cause to enter the living quarters of the upper apartment without a warrant.

Officers can conduct a search, including an entry into a residence, without a warrant and without consent if the officers have probable cause to search and exigent circumstances to justify warrantless entry. *State v. Hughes*, 2000 WI 24, ¶ 24, 233 Wis. 2d 280, 607 N.W.2d 621. Here, the officers had both probable cause to suspect drug activity

and a reasonable concern for the destruction of evidence before they entered the upper apartment.

A. The officers had probable cause to believe that the living quarters of the upper apartment contained evidence of a crime.

"Under an analysis of probable cause to search, the relevant inquiry is whether evidence of a crime will be found." *State v. Secrist*, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). The officers clearly had probable cause to believe that the upper apartment contained marijuana.

As discussed above, the police were acting on an inherently reliable complaint of underage drinking and drug use. The officers observed an odor of marijuana in the lower apartment, and observed that the odor was stronger in the stairway leading to the upper apartment. (1:3; 11:3; 40:15, 27-28.) It is common sense that when a strong smell of marijuana exists, there is fair probability that marijuana is present. *Hughes*, 233 Wis. 2d 280, ¶¶ 22-23. Given the prevalent marijuana odor and the reliable complaint of drug use, there was probable cause to lead a reasonable, experienced officer, to believe that there was a crime being committed in the upper apartment of that duplex, i.e., possession of THC.

B. The potential destruction of evidence was an exigent circumstance justifying warrantless entry into the upper apartment.

"Review of whether exigent circumstances exist is to be 'directed by a flexible test of reasonableness under the totality of the circumstances.'" *State v. Ayala*, 2011 WI App 6, ¶ 17, 331 Wis. 2d 171, 793 N.W.2d 511 (quoted source omitted). "The test is objective." *State v. Mielke*, 2002 WI App 251, ¶ 7, 257 Wis. 2d 876, 653 N.W.2d 316. To

determine whether exigent circumstances exist, this Court reviews "whether a police officer, under the facts as they were known at the time, would reasonably believe that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of the suspect's escape." *Hughes*, 233 Wis. 2d 280, ¶ 24 (citation omitted). The exigency at issue in this case is a risk that evidence will be destroyed. *Id.* The burden is on the State to show there were exigent circumstances by clear and convincing evidence. *Robinson*, 327 Wis. 2d 302, ¶ 24.

Hughes confirms that the officers were permitted to enter Torres' apartment due to exigent circumstances. In *Hughes*, the Wisconsin Supreme Court concluded that the odor of marijuana coupled with the suspect's knowledge that police were present is sufficient to establish an exigent circumstance for warrantless entry. *Hughes*, 233 Wis. 2d 280, ¶ 27.

Here, as soon as Sanchez-Morales got to the top landing, he quickly darted into the apartment, glanced over into another room, and appeared to be gesturing to someone. (11:3; 40:16-17.) The officers knew that Torres was still home. (11:3; 40:16.) Thus, it was reasonable for the officers to believe that Sanchez-Morales was alerting someone to their presence. (40:17.)

This created an exigency because "[d]rugs like marijuana are easily and quickly destroyed." *Robinson*, 327 Wis. 2d 302, ¶ 31. "Particularly in the drug context, officers are called upon to make rapid decisions balancing the risk of intentional evidence destruction against the seriousness of what may be a variety of potentially chargeable offenses." *Hughes*, 233 Wis. 2d 280, ¶ 34.

Additionally, Officer Riegelman was not required to ignore grave concerns for officer safety simply because he was responding to a complaint about a juvenile. The officers were not certain about what they were dealing with, which is evident by the fact that the officers did not immediately rush into the bedroom and detain Torres. (40:44, 55-56.) It is a sad reality that juveniles are active participants in the drug trade. And Wisconsin law recognizes that guns and drugs go hand-in-hand. *See e.g., State v. Guy*, 172 Wis. 2d 86, 98, 492 N.W.2d 311 (1992) ("[T]hose involved in drug dealing often keep weapons handy."); *State v. Richardson*, 156 Wis. 2d 128, 144, 456 N.W.2d 830 (1990) ("drug dealers and weapons go hand in hand").

Marijuana is very easily destroyed, so it was reasonable for Officer Riegelman to enter the apartment as he ordered Sanchez-Morales to stop. And because of the likelihood that someone might be armed, there was an inherent risk to officer safety. Therefore, it was reasonable for Officer Riegelman to detain Sanchez-Morales immediately after he entered the upper apartment.

Furthermore, this exigency was not created by the officers' entry into the stairway. *See, e.g., Robinson*, 327 Wis. 2d 302, ¶ 32.[9] The officers were simply attempting to make contact with Torres by following Sanchez-Morales to the main door of the upper apartment. There is no evidence that the officers exerted any pressure on Sanchez-Morales at any point in time before he darted into the apartment. It was Sanchez-Morales' decision to dart into the apartment to attempt to covertly alert Torres to the officers' presence that created the exigency. *Id.* To conclude otherwise would "defy

[9] The trial court did reach this issue and concluded that there was no reasonable argument that could be made to establish that the officers created the exigency. (42:6.)

the very standard of reasonableness considered to be the 'ultimate touchstone of the Fourth Amendment.'" *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)).

Thus, Sanchez-Morales' actions in darting into the upper apartment and motioning to another person gave the officers cause to enter the living quarters of the upper apartment without a warrant. The officers had both probable cause to suspect drug activity and a reasonable concern for the destruction of evidence.

Because the officers' warrantless entry into the stairway was justified by the community caretaker exception and the warrantless entry into the upper apartment was justified by the exigent circumstances exception, the trial court appropriately denied Torres' motion to suppress. Accordingly, this Court should affirm the judgment of conviction.

CONCLUSION

For all of the forgoing reasons, the State respectfully submits that this Court should affirm Torres' judgment of conviction.

Dated this 2nd day of December, 2016.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 6,154 words.

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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).

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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 December, 2016.

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