STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP1609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FAITH N. REED,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR MONROE COUNTY, THE HONORABLE DAVID J. RICE, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Did a police officer receive voluntary consent from Faith Reed's roommate to enter their apartment?

The circuit court answered "yes."

The court of appeals answered "yes."

This Court should answer "yes."

2. Alternatively, did exigent circumstances justify the officer's entry into Reed's apartment?

The circuit court found the officer's safety concerns reasonable.

The court of appeals did not address this issue.

This Court should answer "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are appropriate.

INTRODUCTION

Tomah Police Officer Steven Keller responded to a report that men were fighting in a parking lot outside an apartment building. He talked with two men, Daniel Cannon and Kirk Sullivan, who said that the two men who had been fighting had left. Cannon and Sullivan both thought that one of the men, Jerome Harris, had gone to Sullivan and Faith Reed's apartment. Cannon suggested that Officer Keller go with Sullivan to look for Jerome. Officer Keller made the same suggestion—and in direct response, Sullivan headed toward the apartment building and led Officer Keller to his and Reed's apartment doorway.

Sullivan—who was on probation for battery and strangulation—opened the door just enough for him to enter, called out to Jerome as he entered, and softly pushed the door toward the closed position. Officer Keller pushed the door open as it almost closed. He wanted to see inside the apartment because he was concerned that there might be weapons and that evidence might get destroyed. He saw Jerome through the doorway trying to conceal something. Officer Keller entered the apartment, saw marijuana, and ultimately arrested Reed. Police later found an illegally obtained prescription pill in Reed's sock. Reed unsuccessfully moved to suppress the drug evidence on the grounds that Officer Keller had illegally entered her apartment.

This Court should hold that Officer Keller lawfully entered Reed's apartment with Sullivan's consent. A reasonable police officer would think that Sullivan had given Officer Keller consent to enter Reed's apartment based on Sullivan's response to Officer Keller's request that they go look for Jerome, who was believed to be in Reed's apartment. This Court should further hold that Sullivan's consent was voluntary and that he did not withdraw his consent by apparently trying to close the apartment door.

This Court should further hold that, regardless of consent, Officer Keller lawfully entered Reed's apartment because there were exigent circumstances. Officer Keller could reasonably believe that his safety was in danger and that Jerome would likely try to escape. Sullivan suspiciously knocked on the door to his own apartment, opened the door just far enough to slip inside, and then tried to close the door as he called out to Jerome, who reportedly had two arrest warrants.

STATEMENT OF THE CASE

On December 13, 2015, at 1:20 p.m., Tomah police officers were dispatched to investigate a complaint of two men, brothers Brandon and Jerome Harris (Jerome), fighting in the parking lot of 308 Murdock Street. (R. 1:2; 20:6–7.)

When Officer Steven Keller arrived, he encountered two men, Daniel Cannon and Kirk Sullivan, standing in Murdock Street. (R. 1:2; 20:7.) Cannon told Keller that one of the brothers might have gone to unit 11 at 304 Murdock Street, and the other brother had gone to Sullivan's apartment. (R. 1:2; 19:Ex.1 0:45–47.) Cannon said that he and Sullivan had both tried to stop the fight. (R. 19:Ex.1 0:38–40.)

After Officer Keller talked to Cannon and Sullivan for about one minute, Sullivan began walking away. Officer Keller said, "Hey, why don't you come back here? Don't just leave." (R. 19:Ex.1 1:15–20.) Sullivan returned. (R. 19:Ex.1 1:20–25.) Officer Keller told Sullivan to remove his hands from his pockets, and Sullivan complied. (R. 19:Ex.1 1:25–26.) Officer Keller found it suspicious that Sullivan had started walking away. (R. 20:10.)

Cannon provided more details about the fight and said that he and Sullivan "both were trying to diffuse the situation." (R. 19:Ex.1 1:27–40.) Cannon said that the brothers had been fighting over "shoes." (R. 19:Ex.1 1:46–50.) Officer Keller asked Sullivan if he was involved with the fight, and Sullivan said, "I was just trying to break it up." (R. 19:Ex.1 1:56–59.) Officer Keller got identification from Cannon and Sullivan and then got information from dispatch about both of them, telling dispatch they were "witnesses." (R. 19:Ex.1 2:00–3:35.) Cannon gave more details about the fight, and Sullivan reiterated that he had just tried to break it up. (R. 19:Ex.1 3:35–4:47.)

Officer Keller asked Cannon and Sullivan, "Could you guys just stick around this area for a moment?" (R. 19:Ex.1 4:45–5:00.) Cannon said, "Oh, yeah," Sullivan said something inaudible, the three men laughed, and Sullivan said, "I was going to watch the [football] game." (R. 19:Ex.1 4:45–5:00.)

Cannon reiterated that one of the brothers had gone to Sullivan's apartment. (19:Ex.1 5:00–05.) Sullivan said, "Yeah, he was supposed to go to my, my apartment to watch football." (R. 19:Ex.1 5:05–07.) Cannon suggested that Officer Keller "go with him," meaning Sullivan. (R. 19:Ex.1 5:08–10.) Sullivan confirmed that the brother "was supposed to come to my house." (R. 19:Ex.1 5:12–16.) Sullivan said that he did not know if that brother was at his apartment right then but that the brother was "supposed to" be there. (R. 19:Ex.1 5:19–21.) Cannon said, while pointing, "I saw him walk that way. He might be there already." (R. 19:Ex.1 5:22–24.)

Dispatch told Officer Keller that Sullivan was on probation for battery, strangulation, and suffocation. (R. 19:Ex.1 5:35–45.) Dispatch indicated that Sullivan had supervision rules about phone contact with Faith Reed. (R. 19:Ex.1 5:30–6:00.) Officer Keller asked Sullivan if his apartment was Reed's and if she was there, and Sullivan answered yes to both questions. (R. 19:Ex.1 5:55–6:05.) Sullivan disputed what dispatch was saying about his no-contact condition. (R. 19:Ex.1 6:10–30.) A short exchange occurred between Officer Keller and Sullivan to clarify that it was a phone-contact rule, not a no-contact rule. (R. 19:Ex.1 6:05–30.)

Sullivan clarified that "Jerome" was the man who had been arguing outside with his brother and that Jerome "was supposed to go" to Sullivan's apartment. (R. 19:Ex.1 6:35–45.) Cannon clarified that the Harris brothers had been engaging in a verbal, nonphysical argument. (R. 19:Ex.1 7:17–24.)

Officer Keller said to Sullivan: "All right, let's go—ah—let's go look over, see if he is over here. . . . If anything, we can just talk to him." (R. 19:Ex.1 7:45–55.) Sullivan and Officer Keller started walking toward the apartment building. (R. 20:10–11; 19:Ex.1 7:53–8:19.) Dispatch told Officer Keller that Jerome appeared to have two "body only" arrest warrants. (R. 19:Ex.1 7:54–8:23.)

Sullivan opened an external door, and Officer Keller followed him into the building. (R. 19:Ex.1 8:41–45.) After they went upstairs, Sullivan opened an internal door that led to another hallway. (R. 19:Ex.1 8:55–9:00.) Sullivan went through the doorway first and kept one hand on the door to hold it open for Officer Keller. (R. 19:Ex.1 8:55–9:00.) Sullivan led Officer Keller down the hallway to his unit. (R. 19:Ex.1 9:00–9:18.) Officer Keller told dispatch that he would be in unit 206. (R. 19:Ex.1 9:14–16.)

Sullivan knocked on the door to unit 206, opened the door just wide enough for himself to enter, called out for Jerome as he entered the unit, and gently pushed the door toward the closed position. (R. 19:Ex.1 9:15–21.)

Officer Keller placed his hand on the door and pushed it open before it could fully close. (R. 19:Ex.1 9:20–9:23.) Officer Keller had safety concerns about weapons possibly being involved, and he wanted to prevent the destruction of any type of evidence. (R. 20:13.) Officer Keller was "all alone," without backup officers. (R. 20:45, 47.) Reed, Sullivan, and Jerome were standing inside the doorway. (R. 19:Ex.1 9:23.) Officer Keller saw Jerome trying to conceal something in the kitchen area inside the apartment. (R. 20:12, 25–26.)

Officer Keller entered the apartment, and none of the three people inside objected. (R. 19:Ex.1 9:23–30.) Reed said, "Oh, shit." (R. 19:Ex.1 9:24–25.) Jerome stood in front of Officer Keller as Sullivan went into the nearby kitchen area.

(R. 19:Ex.1 9:25–33.) Officer Keller said to Sullivan, "Put it back on the table." (R. 19:Ex.1 9:31–34.) Sullivan then "placed a partially rolled 'joint' on the counter." (R. 1:3.) A lighter and bag of marijuana were also on the counter. (R. 1:3–5.) Jerome said that he had been rolling the joint for Reed but that he would take the blame because Reed was "trying to get her kids back." (R. 1:4.) Jerome admitted that he had tried to hide the joint when he saw Officer Keller. (R. 1:4.) Reed, who was on bond, denied knowing that marijuana was in her apartment. (R. 1:5.)

Officer Keller arrested Reed. (R. 1:5.) Officers later searched Reed when she was booked at jail, and they found a prescription-only pill of dextroamphetamine sulfate in one of her socks. (R. 1:6.) The State charged Reed with two counts based on the pill: possession of a controlled substance and possession of an illegally obtained prescription drug. (R. 1:1.) It also charged her with a count of possession of THC as a party to the crime and one count of misdemeanor bail jumping. (R. 1:1–2.)

Reed moved to suppress all evidence on the grounds that Officer Keller had unlawfully entered her apartment. (R. 16; 17.) The circuit court held a hearing on the motion where it received testimony from Officer Keller and watched his body-camera video depicting his interaction with Sullivan and Cannon as well as his entry into Reed's apartment. (R. 20:16–17, 40.)

The circuit court denied Reed's suppression motion, mainly reasoning that Sullivan had voluntarily given Officer Keller consent to enter Reed's apartment and had not withdrawn that consent. (R. 20:40–47.) The court further reasoned that Officer Keller's safety reason for opening the door and entering the apartment was "legitimate" and "reasonable," even though there was no "immediate threat." (R. 20:45, 47.)

Pursuant to a plea agreement, Reed pled no contest to possession of a controlled substance, misdemeanor bail jumping, and one count in a different case. (R. 30:3–4, 6–9.) The remaining counts were dismissed and read in. (R. 30:15.) The circuit court sentenced Reed to 20 days in jail on each conviction, stayed the sentence, and placed her on probation for one year. (R. 30:18.)

Reed appealed. The court of appeals affirmed, reasoning that Officer Keller had Sullivan's consent to enter Reed's apartment. (A-App. 102–18.)[1]

Reed petitioned for review, and this Court ordered the State to file a response. Because this case involves misdemeanor convictions, the Attorney General was not involved until the Court ordered the State to respond to the petition for review.

The State concluded that it had not carried its burden at the suppression hearing to prove that Officer Keller lawfully entered Reed's apartment with Sullivan's consent. (State's Resp. Aug. 1, 2017.) The State argued this Court should grant review, summarily reverse, and remand with orders that the circuit court suppress the evidence. (*Id*.)

This Court granted review and remanded the case "to the court of appeals for reconsideration in light of the State's concession." (Order Granting Pet. Oct. 10, 2017.) The Court "note[d], without expressing any opinion on its merits, that the State's legal concession is not binding upon [the Court]." (*Id.* at 2.) Chief Justice Roggensack, joined by Justice Ziegler and Justice Gableman, dissented and stated that the State's

[1] The court of appeals's decision and the orders from this Court are included in the appellate record, but they are not numbered.

concession "appears to be unwarranted under the facts of this case." (*Id.* at 3.)

On remand, the court of appeals concluded that it was "not persuaded by the State's new legal argument" and denied reconsideration. (A-App. 101.)

Reed petitioned this Court for review again. The State responded by asking this Court to accept review to reverse. (State's Resp. Dec. 12, 2017.) The Court granted Reed's petition for review.

STANDARDS OF REVIEW

When reviewing a decision on a motion to suppress evidence, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Lonkoski*, 2013 WI 30, ¶ 21, 346 Wis. 2d 523, 828 N.W.2d 552. A court applies that two-step standard of review when determining whether consent to search was voluntary, *State v. Artic*, 2010 WI 83, ¶ 23, 327 Wis. 2d 392, 786 N.W.2d 430, whether the consent was withdrawn, *United States v. Gray*, 369 F.3d 1024, 1026 (8th Cir. 2004); *see also State v. Wantland*, 2014 WI 58, ¶ 19 & n.11, 355 Wis. 2d 135, 848 N.W.2d 810, and whether exigent circumstances justified a search, *State v. Richter*, 2000 WI 58, ¶ 26, 235 Wis. 2d 524, 612 N.W.2d 29.

But an appellate court applies a more deferential standard when determining whether someone has given consent to search. "Whether consent was given and the scope of the consent are questions of fact that [an appellate court] will not overturn unless clearly erroneous." *State v. Garcia*, 195 Wis. 2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995).

ARGUMENT

I. Officer Keller lawfully entered Reed's apartment with Sullivan's consent.

A. Through his conduct, Sullivan gave Officer Keller consent to enter Reed's apartment.

Did Sullivan give Officer Keller consent to enter Reed's apartment? This Court should apply the clear-error standard of review and conclude that Sullivan gave consent through his conduct.

1. This Court should apply the clear-error standard of review.

A warrantless search is illegal unless an exception to the Fourth Amendment's warrant requirement applies. *State v. Rome*, 2000 WI App 243, ¶ 10, 239 Wis. 2d 491, 620 N.W.2d 225. Consent is one such exception. *Id.* ¶ 11.

Police sometimes may rely on consent from a third party, i.e., someone besides the subject of the search. *State v. Tomlinson*, 2002 WI 91, ¶ 22, 254 Wis. 2d 502, 648 N.W.2d 367. A search with third-party consent is lawful if the third party had actual authority to consent to the search or if police reasonably thought the third party had apparent authority to do so. *Id.* ¶ 25. "Reed acknowledges that Officer Keller reasonably believed Mr. Sullivan had authority or apparent authority to consent to entry of Reed's apartment." (Reed's Br. 12.)

To determine if consent justified a search, a court must determine whether a person in fact gave consent and, if so, whether the consent was voluntary. *Artic*, 327 Wis. 2d 392, ¶ 30.

"Whether an individual in fact gives consent is a question of historical fact. Thus, [an appellate court] will

uphold the trial court's finding on this issue unless it is against the great weight and clear preponderance of the evidence." *Tomlinson*, 254 Wis. 2d 502, ¶ 36 (citation omitted). "This is basically a 'clearly erroneous' standard of review." *State v. Turner*, 136 Wis. 2d 333, 343–44, 401 N.W.2d 827 (1987).

This deferential standard of review applies here even though the circuit court's findings were partly based on video evidence. Court of appeals precedents seem to conflict on what standard to apply when reviewing a circuit court's findings based on documentary evidence, such as video evidence. *Compare State v. Walli*, 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898, *and State v. Lala*, 2009 WI App 137, ¶ 14, 321 Wis. 2d 292, 773 N.W.2d 218, *with Cohn v. Town of Randall*, 2001 WI App 176, ¶ 7, 247 Wis. 2d 118, 125, 633 N.W.2d 674, *Weinberger v. Bowen*, 2000 WI App 264, ¶ 7, 240 Wis. 2d 55, 622 N.W.2d 471, *and State v. Jimmie R.R.*, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196 (Ct. App. 1999).

But this Court has already resolved that apparent conflict of authority, which predates those cases. *See Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶¶ 37–39 & nn. 9–10, 319 Wis. 2d 1, 768 N.W.2d 615. An appellate court "uphold[s] a circuit court's findings of fact unless they are clearly erroneous." *Id.* ¶ 34. "[A] finding of fact is clearly erroneous when 'it is against the great weight and clear preponderance of the evidence.'" *Id.* ¶ 39 (citation omitted). That standard of review applies when a circuit court has decided "the meaning of the evidence," "although evidence may have presented competing factual inferences." *Id.* ¶¶ 38–39.

So, "where the underlying facts are *in dispute*, the circuit court resolves that dispute by exercising its fact-finding function, and its findings are subject to the clearly

erroneous standard of review *even if they are based solely on documentary evidence*." *Id.* ¶ 38 n.10 (emphases added). The so-called "'documentary evidence exception' to the clearly erroneous standard of review" does not apply in that situation. *Id.* Instead, "the documentary evidence exception applies to *inferences* the circuit court draws from 'established or undisputed facts' based solely on a documentary record." *Id.* An appellate court thus "normally" reviews independently "the *sufficiency* of documentary evidence," such as the sufficiency of a criminal complaint. *Id.* ¶ 37 n.9. But a court applies the clear-error standard when reviewing the circuit court's resolution of a *disputed* factual issue. *Id.* ¶ 38 n.10. One rationale for the clear-error standard "is the efficient use of judicial resources." *Id.*

Under *Phelps*, this Court should review the circuit court's finding of consent for clear error. Again, "[w]hether an individual in fact gives consent [to a search] is a question of historical fact" that is reviewed for clear error. *Tomlinson*, 254 Wis. 2d 502, ¶ 36. Here, it is disputed whether Sullivan consented to Officer Keller's entry into Reed's apartment. To resolve that dispute, the circuit court had to determine "the meaning of the evidence," "although [the] evidence may have presented competing factual inferences." *See Phelps*, 319 Wis. 2d 1, ¶¶ 38–39. The clear-error standard of review thus applies, even though the circuit court's finding of consent was partly based on video evidence.

2. The circuit court's finding that Sullivan had given consent was not clearly erroneous.

"The touchstone of the Fourth Amendment is reasonableness." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citation omitted). "The Fourth Amendment does not proscribe all state-initiated searches

and seizures; it merely proscribes those which are unreasonable." *Id.* (citation omitted).

Consent to search must be unequivocal. *Gautreaux v. State*, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971). "This burden is satisfied if the State objectively shows the totality of the circumstances would cause a reasonable police officer to believe he was authorized to enter." *State v. Grey*, 813 A.2d 465, 469 (N.H. 2002).

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *State v. Wantland*, 2014 WI 58, ¶ 33, 355 Wis. 2d 135, 848 N.W.2d 810 (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)).

There is no "'magic words' formula" that an officer must follow to validly request consent to search. *United States v. Carter*, 378 F.3d 584, 589 (6th Cir. 2004). "'[A]ny words, when viewed in context, that objectively communicate to a reasonable individual that the officer is requesting permission to [conduct a search] constitute a valid search request' for Fourth Amendment purposes." *United States v. Gant*, 112 F.3d 239, 243 (6th Cir. 1997) (alteration in original) (quoting *United States v. Rich*, 992 F.2d 502, 506 (5th Cir. 1993)). Courts "have eschewed fine semantic distinctions, refusing to allow the Fourth Amendment analysis to turn on the officer's choice of words." *Id.* at 242. Requiring police to use specific words when requesting consent to search "would be an unjustifiable extension of the Fourth Amendment's requirement that searches be 'reasonable.'" *Id.* at 242–43 (quoting *Rich*, 992 F.2d at 506).

"Consent [to search] may be given in non-verbal form through gestures or conduct." *Tomlinson*, 254 Wis. 2d 502,

¶ 37. In *Tomlinson*, police officers knocked on the door to Tomlinson's house, a teenage girl answered the door, and police "asked for permission to enter the house. The girl said nothing, opened the door, and walked into the house. The officers followed her into the entryway and the kitchen area." *Id.* ¶ 7. This Court concluded that "the circuit court did not err when it held that the girl gave consent for the officers to enter the house." *Id.* ¶ 37. It reasoned that "[t]he girl who answered the door turned to enter the house upon the officer's request to enter—this could reasonably have been interpreted as an invitation to follow her inside." *Id.* "Additionally, Tomlinson was present and apparently said nothing when this occurred." *Id.*

Police similarly had consent to enter in *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998). Police officers entered a basement and asked Phillips if they could search his bedroom for marijuana. *Id.* at 187. "Phillips responded to this request by opening the door to his bedroom and walking inside. The agents followed Phillips into the bedroom." *Id.* "Once inside the bedroom, Phillips immediately retrieved a small baggie containing marijuana, handed it to the agents, and then pointed out to the agents a number of drug paraphernalia items." *Id.* This Court concluded that those facts supported "the circuit court's finding" that Phillips had consented to the entry of his bedroom. *Id.* at 197.

The officer here likewise had consent to enter Sullivan and Reed's apartment. A reasonable person would think that (1) the officer asked for consent to enter the apartment, and (2) Sullivan gave consent.

On the first point, Officer Keller made a request that a reasonable person would have interpreted as seeking permission to enter Sullivan and Reed's apartment. In Sullivan's presence, Cannon twice told Officer Keller that one of the men who had been arguing outside—Jerome—had gone

to Sullivan's apartment. (R. 19:Ex.1 0:32–47, 1:19.) The second time Cannon made that point, Sullivan said, "Yeah, he was supposed to go to my, my apartment to watch football." (R. 19:Ex.1 5:05–07.) Cannon suggested that Officer Keller "go with him," meaning Sullivan. (R. 19:Ex.1 5:08–10.) Sullivan confirmed that Jerome "was supposed to come to my house." (R. 19:Ex.1 5:12–16.) Sullivan said that he did not know if Jerome was at his house right then, but Jerome was "supposed to" be there. (R. 19:Ex.1 5:19–21.) Cannon said, while pointing, "I saw him walk that way. He might be there already." (R. 19:Ex.1 5:22–24.) About one minute later, Sullivan said that Jerome "was supposed to go" to Sullivan's apartment. (R. 19:Ex.1 6:35–45.) About another minute later, Officer Keller said to Sullivan: "Alright, let's go—ah—let's go look over, see if he is over here. . . . If anything, we can just talk to him." (R. 19:Ex.1 7:45–55.)

Viewed in context, that request would have conveyed to a reasonable person that Officer Keller was seeking consent to enter Sullivan's apartment to look for Jerome. A court does not determine whether consent to search was ambiguous "in the abstract." *United States v. Price*, 54 F.3d 342, 346 (7th Cir. 1995). "The circumstances under which a statement is made must be considered in determining that statement's equivocality." *United States v. McCann*, 465 F.2d 147, 158 (5th Cir. 1972). The circumstances underlying Officer Keller's request show that he was asking for consent to enter Reed and Sullivan's apartment. A reasonable person would have interpreted Officer Keller's request that way because (1) Officer Keller told Sullivan that he was looking for Jerome; (2) Sullivan and Cannon thought that Jerome was in Sullivan's apartment; and (3) Cannon, in front of Sullivan, suggested that the officer go with Sullivan to look for Jerome. It is significant that the object of the search—Jerome—was likely in Sullivan's apartment because "[t]he scope of a search

is generally defined by its expressed object." *Wantland*, 355 Wis. 2d 135, ¶ 21 (citation omitted).

It does not matter that Officer Keller did not use magic words, like "enter the apartment." The several minutes of conversation leading up to Officer Keller's request made it clear what he was saying. Further, Officer Keller did say that he wanted to "look" for Jerome and "see if he is over here." (R. 19:Ex.1 7:45–55.) Courts have consistently held that a phrase like "look around" sufficiently conveys that a police officer is requesting permission to search. *See, e.g.*, *United States v. Melendez*, 301 F.3d 27, 32 (1st Cir. 2002) (collecting cases); *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667–68 & n.7 (5th Cir. 2003) (collecting cases); *Rich*, 992 F.2d at 506 & n.2 (collecting cases).

Turning to the second point mentioned earlier, a reasonable person would think that Sullivan gave Officer Keller consent to enter his apartment for two reasons. First, Sullivan led Officer Keller to his apartment. Right after Officer Keller requested to go look for Jerome, Sullivan turned and started walking toward the apartment building with Officer Keller. (R. 20:10–11; 19:Ex.1 7:53–8:40.) Sullivan opened two doors and even held the second one open for Officer Keller. (R. 19:Ex.1 8:40–59.) Sullivan ultimately led Officer Keller to his and Reed's apartment door. (R. 19:Ex.1 9:00–20.)

It bears repeating that Sullivan began walking toward his apartment building *in direct response* to Officer Keller's request to go look for Jerome. As in *Tomlinson* and *Phillips*, the officer here requested someone's permission to enter a house or room and, in direct response, that person said nothing but instead turned and walked into the area where the officer was seeking to go. Like in *Tomlinson* and *Phillips*, Sullivan's act of walking toward the apartment "could reasonably have been interpreted as an invitation to follow

[him] inside." *See Tomlinson*, 254 Wis. 2d 502, ¶ 37. To be sure, had Officer Keller followed Sullivan when Sullivan initially began to walk away, there would have been no consent to enter the apartment. Sullivan's subsequent act of walking away indicated consent, however, given the context surrounding Officer Keller's request to look for Jerome.

Second, nobody objected when Officer Keller entered Reed and Sullivan's apartment. (R. 19:Ex.1 9:20–55.) If a defendant is present but fails to object when police enter his or her house pursuant to third-party consent, the lack of an objection supports the conclusion that police had consent to enter. *See, e.g.*, *Tomlinson*, 254 Wis. 2d 502, ¶ 37; *State v. St. Germaine*, 2007 WI App 214, ¶¶ 19–23, 305 Wis. 2d 511, 740 N.W.2d 148. Reed, Sullivan, and Jerome were standing inside the doorway when Officer Keller entered the apartment, but they did not object. (R. 19:Ex.1 9:20–55.)

In short, the circuit court was correct—not clearly erroneous—when it found that Officer Keller could have reasonably thought that he had Sullivan's consent to enter Reed's apartment.

3. Reed's arguments are unavailing.

Reed argues that "[t]here does not appear to be any case, anywhere, with facts remotely close to those presented where a court has found implied consent to enter a home." (Reed's Br. 29.) She is wrong. "Where courts have found that an occupant's gesture . . . amounts to consent to enter, these actions have often been in response to what could reasonably be construed as a request to enter by the police or an explicit disclosure of their purpose." *Commonwealth v. Rogers*, 827 N.E.2d 669, 674 (Mass. 2005). The consenting gesture here was in response to both of those things: Sullivan began walking toward his apartment in response to what could reasonably be construed as a request to enter it, and Officer

Keller disclosed that looking for Jerome was the purpose of the search. There is nothing extraordinary about Reed's case.

In arguing that Sullivan did not give Officer Keller consent to enter her apartment, Reed relies on *State v. Johnson*, 177 Wis. 2d 224, 501 N.W.2d 876 (Ct. App. 1993). (Reed's Br. 31–32.) *Johnson* does not help Reed.

In *Johnson*, two police officers were performing investigatory duties inside an apartment complex with "extremely high drug dealing" when they encountered Johnson in a hallway. *Johnson*, 177 Wis. 2d at 227. Johnson said that he was visiting his girlfriend. *Id.* The officers asked for Johnson's identification, which Johnson said was in his girlfriend's apartment. *Id.* The officers followed Johnson to his girlfriend's apartment. *Id.* An officer "grabbed" a key from Johnson, Johnson said, "let me do it," and the officer gave the key back. *Id.* at 227–28. Johnson unlocked the apartment door and went inside. *Id.* at 228. An officer placed his foot in the doorway so that Johnson could not close the door. *Id.*

The court of appeals concluded that "[n]othing in the record provides any basis upon which consent [to enter the apartment] reasonably could have been inferred." *Id.* at 233–34. "[N]o evidence at the suppression hearing" supported a finding of consent. *Id.* at 233. Johnson had not asked the officer to enter his apartment, and the officer "had not asked Johnson for permission to enter the apartment." *Id.* at 233–34. The court of appeals independently reviewed the circuit court's finding of consent. *See id.* at 231, 233.

Johnson does not control here for four reasons. First, the court of appeals in *Johnson* applied independent review, but this Court should apply the deferential "clearly erroneous" standard of review.

Second, unlike in *Johnson*, the officer here *did* ask for permission to enter the apartment. Officer Keller's request to

look for Jerome is reasonably interpreted as a request to enter Sullivan's apartment. Sullivan's response to that request is reasonably interpreted as inviting the officer into his apartment. Unlike in *Johnson*, the record here has a "basis upon which consent reasonably could have been inferred." *Id.* at 234.

Third, the defendant in *Johnson* entered an apartment to retrieve his identification for police, but here Sullivan entered an apartment to allow a police officer to speak to someone inside. A person can easily bring identification outside to police, but a person cannot easily force someone else to go outside to speak to police. Thus, it is reasonable to think that a person implicitly invites police to follow when the person enters a home in direct response to a police officer's request to speak to someone inside. *Cf. Tomlinson*, 254 Wis. 2d 502, ¶ 37. But it is *not* reasonable to think that a person implicitly invites police inside when he enters a residence simply to retrieve his identification for police.

Fourth, the defendant in *Johnson* indicated that he wanted to enter the apartment alone when he took his key back from the officer and said, "let me do it." Nothing like that happened here.

In short, by his nonverbal conduct, Sullivan gave Officer Keller consent to enter his and Reed's apartment.

B. Sullivan's consent to enter Reed's apartment was voluntary.

Sullivan's consent for Officer Keller to enter his and Reed's apartment was voluntary because Officer Keller did not use coercive or improper tactics.

1. Sullivan's consent was voluntary because there were no improper or coercive police tactics.

If a court determines that police received consent to search, it must next determine whether the consent was voluntary. *Artic*, 327 Wis. 2d 392, ¶ 30. "The test for voluntariness is whether consent to search was given in the 'absence of actual coercive, improper police practices designed to overcome the resistance of a defendant.'" *State v. Xiong*, 178 Wis. 2d 525, 532, 504 N.W.2d 428 (Ct. App. 1993) (quoting *State v. Clappes*, 136 Wis. 2d 222, 245, 401 N.W.2d 759 (1987)). Although *Clappes* dealt with the voluntariness of a confession, its principles apply to cases involving the voluntariness of consent to search. *Id.* at 535. A court considers the totality of the circumstances when determining whether consent to search was voluntary. *Id.* at 532.

"Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." *State v. Hoppe*, 2003 WI 43, ¶ 37, 261 Wis. 2d 294, 661 N.W.2d 407. "The presence or absence of actual coercion or improper police practices is the focus of the [voluntariness] inquiry because it is determinative on the issue of whether the consent [to search] was the product of a 'free and unconstrained will, reflecting deliberateness of choice.'" *Vill. of Little Chute v. Walitalo*, 2002 WI App 211, ¶ 9, 256 Wis. 2d 1032, 650 N.W.2d 891 (quoting *Clappes*, 136 Wis. 2d at 236). So, if "there was no actual coercion or improper police conduct," then a person's "consent [to search] was voluntary." *See id.* ¶ 11.

Of course, "police conduct does not need to be egregious or outrageous in order to be coercive. Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist." *Hoppe*, 261 Wis. 2d 294, ¶ 46; *accord Xiong*, 178 Wis. 2d at 534–35.

Courts may consider several "non-exclusive factors" in determining whether consent to search was voluntary: "(1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent"; "(2) whether the police threatened or physically intimidated the defendant or 'punished' him by the deprivation of something like food or sleep"; "(3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite"; "(4) how the defendant responded to the request to search"; "(5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police"; and "(6) whether the police informed the defendant that he could refuse consent." *Artic*, 327 Wis. 2d 392, ¶ 33.

Here, the police did not use any improper or coercive tactics to get Sullivan's consent to enter his and Reed's apartment. Officer Keller did not use any deception, trickery, or misrepresentation to get Sullivan's consent. (R. 19:Ex.1 0:30–9:24.) He did not punish Sullivan or deprive him of food or water. Officer Keller got Sullivan's consent while they were speaking in a parking lot in broad daylight. Another civilian, Cannon, was present during that conversation. (R. 19:Ex.1 0:30–8:00.) The conversation was congenial. Indeed, Sullivan laughed once or twice. (R. 19:Ex.1 4:52–58, 5:30–35.) Officer Keller used a calm tone of voice and did not threaten Sullivan or brandish a weapon. (R. 19:Ex.1 0:30–9:24.) Because Officer Keller did not use improper or coercive tactics, Sullivan's consent was voluntary. Sullivan's personal traits are irrelevant because there is no improper police conduct against which to balance them.

In any event, Sullivan's personal traits confirm that his consent was voluntary. Regarding the fourth factor under *Artic*, Sullivan did not hesitate to go with Officer Keller to

Sullivan's apartment. (R. 19:Ex.1 7:45–8:00.) There was nothing about their interaction that would have signaled that Sullivan's consent was involuntary.

Regarding the fifth factor under *Artic*, there was nothing to suggest that any of Sullivan's traits overbore his ability to withhold consent. To the contrary, Sullivan was on probation for battery and strangulation (R. 19:Ex.1 5:30–6:00), which shows that he had prior experience with the criminal-justice system. Sullivan appeared to be an adult, and there is no evidence that he was under the influence of drugs at the time of his consent.

Regarding the sixth factor under *Artic*, Officer Keller did not explain that Sullivan could refuse consent, but that factor is not determinative. *Artic*, 327 Wis. 2d 392, ¶ 60.

In short, Sullivan voluntarily consented to Officer Keller's entry into his and Reed's apartment.

2. Reed's arguments have no merit.

Reed mainly argues that Sullivan's consent for Officer Keller to enter his apartment was involuntary because Sullivan was in custody when he consented. (Reed's Br. 18–25.) That argument fails because Sullivan was not in custody when he consented and, even if he was, his consent was still voluntary.

a. Sullivan was not in custody when he consented.

"Only when [a law enforcement] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred." *State v. Pugh*, 2013 WI App 12, ¶ 10, 345 Wis. 2d 832, 826 N.W.2d 418 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). Because Officer Keller did not use

physical force against Sullivan, whether Sullivan was seized hinges on whether Officer Keller detained Sullivan with a show of authority.

"[T]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *State v. Young*, 2006 WI 98, ¶ 39, 294 Wis. 2d 1, 717 N.W.2d 729 (citation omitted). But "not every display of police authority rises to a 'show of authority' that constitutes a seizure." *Id.* ¶ 65. "If a reasonable person would have felt free to leave but the person at issue nonetheless remained in police presence, perhaps because of a desire to be cooperative, there is no seizure." *Id.* ¶ 37.

A court must consider all the circumstances surrounding a police–citizen encounter to determine whether it was a seizure. *City of Sheboygan v. Cesar*, 2010 WI App 170, ¶ 13, 330 Wis. 2d 760, 796 N.W.2d 429. "Examples of circumstances that might indicate a seizure would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Kramar*, 149 Wis. 2d 767, 781–82, 440 N.W.2d 317 (1989). The presence of other civilians supports the notion that a police–citizen encounter was consensual, not a seizure. *See United States v. Drayton*, 536 U.S. 194, 204 (2002). If an officer does not draw a weapon, then his or her uniform, badge, and weapon belt have "little weight" in the analysis. *See id.* at 204–05.

Officer Keller had a consensual encounter with Sullivan and Cannon. The encounter began with the officer exiting his squad car, approaching Sullivan and Cannon—who were standing in the street—and asking them, "What's going on?"

(R. 19:Ex. 1 0:29–0:32.) Cannon said that two men had been fighting and that Cannon and Sullivan were not involved but instead had tried to stop the fighting. (R. 19:Ex. 1 0:32–0:41.) Cannon told the officer where he thought the two men had gone after the fight, and Sullivan began to walk away. (R. 19:Ex.1 0:41–1:18.) Keller noticed Sullivan walking away and said: "Hey, why don't you come back here? Don't just leave." (R. 19:Ex.1 1:15–20.) Sullivan returned. (R. 19:Ex.1 1:15–20.) About three and one half minutes later, after more conversation among the three of them, Officer Keller asked Cannon and Sullivan, "Could you guys just stick around this area for a moment?" (R. 19:Ex.1 4:45–5:00.) Cannon said, "Oh, yeah," Sullivan said something inaudible, the three men laughed, and Sullivan said, "I was going to watch the [football] game." (R. 19:Ex.1 4:45–5:00.) Less than three minutes later, Officer Keller suggested that he and Sullivan go look for Jerome, and Sullivan led Officer Keller to his apartment. (R. 19:Ex.1 7:45–9:20.)

Significantly, Officer Keller did not threaten Sullivan or draw a weapon before Sullivan led him to Reed's apartment. There was no threatening presence of officers. Another civilian, Cannon, was present during Sullivan's interaction with Officer Keller before Sullivan led the officer to Reed's apartment. That interaction lasted less than ten minutes and occurred outside in a public area during the daytime.

Under those facts, a reasonable person in Sullivan's position would have felt free to leave. When Sullivan first began to walk away, Cannon had already told the officer where he thought the two men who had been fighting had gone. A reasonable person could thus think that Officer Keller no longer needed Sullivan's help.

Further, the officer's request for Sullivan to come back was partially phrased as a question: "Hey, why don't you come back here? Don't just leave." (R. 19:Ex.1 1:15–20.) A

reasonable person would have thought that the officer was asking Sullivan to come back because he wanted more information about the fight and was hoping for Sullivan's cooperation. Officer Keller confirmed that reasonable belief by asking Cannon and Sullivan more questions about the two men who had been fighting.

And the officer's next request for Sullivan and Cannon to stay was even more clearly a question, not a command: "Could you guys just stick around this area for a moment?" (R. 19:Ex.1 4:45–5:00.) A reasonable person would have viewed the officer's two requests for Sullivan to stay as requests for his cooperation, not commands.

Reed argues that Sullivan was seized when he consented because Sullivan is African-American. (Reed's Br. 20–22.) Although a person's "race is 'not irrelevant' to the question of whether a seizure occurred, it is not dispositive either." *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015). For the reasons stated above, a reasonable person in Sullivan's position—even a person of his race—would have felt free to end the encounter with Officer Keller. Sullivan's race does not receive the overriding consideration that Reed attributes to it.

Reed further argues that Sullivan was seized because Officer Keller asked him to remove his hands from his pockets. (Reed's Br. 18, 20, 23.) But "asking someone to remove his hands from his pockets will not transform a consensual encounter into a seizure." *United States v. Griffin*, 884 F. Supp. 2d 767, 785 (E.D. Wis. 2012) (citing *United States v. Broomfield*, 417 F.3d 654, 656 (7th Cir. 2005)).

Reed seems to argue that Sullivan was seized because Officer Keller testified that he would not have allowed Sullivan to walk away. (Reed's Br. 22, 24–25.) But in determining whether a person was seized, "[a]ny subjective

intention of the officers to detain a person is relevant only to the extent it is conveyed to that person." *Kramar*, 149 Wis. 2d at 782. Officer Keller's undisclosed intent to detain Sullivan is irrelevant.

Reed also seems to argue that Sullivan was in custody because he spoke less than Cannon did. (Reed's Br. 27.) But Sullivan was assertive throughout his outside interaction with Officer Keller. Sullivan said that he wanted to watch a football game when Officer Keller asked him to stay outside, he refused to say with certainty that Jerome was at his apartment, and he challenged Officer Keller's interpretation of his probation rules. (R. 19:Ex.1 4:45–5:30, 6:05–30.)

In short, Sullivan was not in custody when he gave Officer Keller consent to enter Reed's apartment.

b. Further, Sullivan's consent was voluntary even if he was in custody.

A person's "custody is one factor to be considered in determining voluntariness, [but] it is not in itself dispositive." *State v. Hartwig*, 2007 WI App 160, ¶ 13, 302 Wis. 2d 678, 735 N.W.2d 597 (alteration in original) (citation omitted). "[A] search authorized by consent is wholly valid *unless* that consent is given while an individual is illegally seized." *Id.* ¶ 11 (citation omitted).[2] "[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search." *United States v. Watson*, 423 U.S. 411, 424 (1976).

[2] Evidence obtained as a result of *illegal* police activity, such as an illegal seizure, is generally inadmissible even if there was voluntary consent to search. *See State v. Hogan*, 2015 WI 76, ¶ 57, 364 Wis. 2d 167, 868 N.W.2d 124. Reed does *not* argue that Sullivan was *illegally* seized. (Reed's Br. 18–25.)

In *Watson*, the Supreme Court held that the defendant's consent to search his car was voluntary even though he was under arrest and was not informed that he could refuse consent. *Id.* at 424–25. The defendant there "had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station." *Id.*

Sullivan's consent was also voluntary even if he was in custody when he consented. Similar to the defendant in *Watson*, Sullivan consented when he was in the driveway of a parking lot in the daytime. (R. 19:Ex.1 7:53–8:40.) His consent was even more voluntary than the defendant's in *Watson* because, at most, Sullivan was temporarily in custody during an investigative stop. (*See* Reed's Br. 18–25.) Although an arrest and an investigative stop both constitute a seizure for Fourth Amendment purposes, an investigative stop is "only a minor infringement on personal liberty," while an arrest "is a more permanent detention." *Young*, 294 Wis. 2d 1, ¶¶ 20, 22. Because being under arrest did not render the defendant's consent involuntary in *Watson*, the alleged investigative stop of Sullivan did not invalidate his consent either.

Reed argues that Sullivan simply acquiesced to Officer Keller's requests. (Reed's Br. 26–28.) Reed's argument gets her nowhere because "'[a]cquiescence' commonly indicates assent, however grudging." *Carter*, 378 F.3d at 589. "A defendant's silence and acquiescence may support a finding of *voluntary* consent." *United States v. Patten*, 183 F.3d 1190, 1194 (10th Cir. 1999) (emphasis added). Of course, "[a]cquiescence to an *unlawful* assertion of police authority is not equivalent to consent." *State v. Johnson*, 2007 WI 32, ¶ 16, 299 Wis. 2d 675, 729 N.W.2d 182 (emphasis added) (citation omitted); *see also id.* ¶¶ 67, 71 (Roggensack, J., dissenting) (arguing that acquiescence "is not the silver bullet to set aside voluntarily given consent" and "only that acquiescence that evidences involuntary consent violates constitutional

guarantees"). But Reed's acquiescence argument fails because she does not explain why—or even seem to allege that—Sullivan was acquiescing to *unlawful* assertions of authority by Officer Keller. (*See* Reed's Br. 26–28.) She instead seems to concede that, if Sullivan was in custody when he allegedly gave consent, the custody was *lawful*. (*See id.* at 18–25.)

In short, Sullivan voluntarily gave Officer Keller consent to enter his and Reed's apartment.

C. Sullivan did not withdraw his consent.

A person's consent to search remains valid "until someone withdraws the consent." *United States v. Jackson*, 598 F.3d 340, 347 (7th Cir. 2010). "Withdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by unequivocal act or statement." *Wantland*, 355 Wis. 2d 135, ¶ 33 (quoting *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005)). "[C]onduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both." *Sanders*, 424 F.3d at 774 (quoting *Burton v. United States*, 657 A.2d 741, 746–47 (D.C. 1994)).

Closing a door does not necessarily withdraw consent to search. In an Oregon case, the defendant did not withdraw his consent to search his bedroom by closing and locking the door as he exited the bedroom to speak to police. *State v. Luther*, 663 P.2d 1261, 1263 (Or. App.), *aff'd*, 672 P.2d 691 (Or. 1983). The court reasoned that the defendant tried to open the door when it was locked and "made no objection to the police obtaining the key [from his mother] or opening the door." *Id.*

In a California case, by contrast, an apartment tenant let police officers into her home, one officer went into the kitchen and then "headed toward a bedroom with its door

ajar," the tenant "ran in front of the officer and attempted to close the bedroom door," and "[t]he officer pushed open the door." *People v. Hamilton*, 214 Cal. Rptr. 596, 597 (Cal. Ct. App. 1985). The court concluded that, even if the defendant had consented to a search by opening the front door for the officers to enter her apartment, she withdrew her consent to enter the bedroom by trying to close the bedroom door. *Id.* at 602.

In an instructive case not involving a door, a sudden movement did not withdraw consent to search. In *Burton*, police officers boarded a Greyhound bus in a drug-interdiction effort. 657 A.2d at 742. Burton consented to a search of his person. *Id.* at 743. The officer noticed a bulge in Burton's left inner jacket pocket. *Id.* As the officer started searching Burton, Burton turned toward the bus window and put his hand into that pocket. *Id.* The officer told Burton to remove his hand from his pocket, and he complied. *Id.* The officer found cocaine in that pocket. *Id.*

The D.C. Court of Appeals concluded that Burton had *not* unequivocally withdrawn his consent to search by putting his hand into his pocket. *Id.* at 748–49. It reasoned that Burton did not say anything to police after he gave consent to search, even when he complied with the request to remove his hand from his pocket. *Id.* at 748. The court further noted that "there were a number of possible explanations for [Burton's] conduct." *Id.* Burton's "furtive actions could reasonably have been interpreted" as, among other things, "an attempt to hide the contents of his pocket or to acquire a weapon," a "reflexive response of a guilty conscience," or "an attempt to discard the drugs before they were found on [Burton's] person." *Id.*

Here, similarly, Sullivan did not unequivocally withdraw his consent for Officer Keller to enter his and Reed's apartment. Officer Keller had three pieces of information that allowed him to reasonably interpret Sullivan's attempt to

close the apartment door in several different ways. First, Officer Keller knew that Sullivan and Jerome were not very law-abiding. He knew that Sullivan was on probation for battery, strangulation, and suffocation. (R. 19:Ex.1 5:35–45.) And Officer Keller was going to Sullivan and Reed's apartment to look for Jerome, who recently had a verbal fight outside and who reportedly had an arrest warrant. (R. 19:Ex.1 7:54–8:22; 20:8, 10–11.)

Second, right before Officer Keller entered the apartment, he observed suspicious behavior by both Sullivan and Jerome. Sullivan knocked on the door before entering the unit *where he lived* (R. 20:43; 19:Ex.1 9:15–20), which is unusual and suspicious. Before Officer Keller entered the apartment, he saw Jerome through the doorway trying to conceal something. (R. 20:12, 25–26.)

Based on those facts, Sullivan's apparent attempt to close the door was an equivocal, furtive movement—like the defendant's putting his hand into his pocket in *Burton*. As in *Burton*, the officer here could have reasonably interpreted Sullivan's furtive movement in several different ways. For example, it was reasonable to think that Sullivan was trying to buy time to grab a weapon, hide contraband, or allow the people inside the apartment to do either of those things or stop engaging in illegal behavior. It was also reasonable to view Sullivan's conduct as a reflexive response of a guilty conscience—in other words, to think that Sullivan was reflexively closing the door because he thought that people in the apartment were engaging in illegal conduct or had contraband in plain view.

Third, Sullivan's silence supports the conclusion that his conduct was equivocal. Like the defendant in *Burton*, who did not say anything after giving consent to search, Sullivan did not say anything to Officer Keller as he led the officer into the apartment building and toward his and Reed's unit.

(R. 19:Ex.1 8:00–9:20.) *See also Wantland*, 355 Wis. 2d 135, ¶ 43 (relying on Wantland's long stretch of silence as one reason why his question about a search warrant was insufficient to withdraw consent). Moreover, Sullivan (and Jerome and Reed) did not object when Officer Keller opened the door and entered the apartment—like the defendant in the Oregon *Luther* case, who did not object when police unlocked his bedroom door and entered his bedroom. (R. 19:Ex.1 9:20–50.)

Reed's case is a far cry from the California *Hamilton* case. A tenant in *Hamilton* withdrew her consent by running ahead of an officer and trying to close an open bedroom door as the officer was about to enter the bedroom. Nothing like that happened here. At Officer Keller's request, Sullivan led Officer Keller from a parking lot outside, through an apartment building, all the way to his and Reed's unit door. (R. 19:Ex.1 7:55–9:20.) That whole time, Officer Keller could reasonably think that Sullivan was consenting to the officer's entry into the unit. Sullivan's last-second, soft push on the door was open to several reasonable interpretations, unlike the tenant's closing the bedroom door in *Hamilton*.

Reed's arguments are unavailing. She cites *Burton* and *Commonwealth v. Suters*, 60 N.E.3d 383, 391 (Mass. App. Ct. 2016), for the proposition that "courts consistently rule closing a door or attempting to close a door is an unequivocal act terminating any previously given consent to enter." (Reed's Br. 38.) Those cases do not help Reed.

Burton did not involve a door. The *Burton* court simply noted that the courts in *Hamilton* and *Luther* had reached different conclusions on whether closing a door withdrew consent. *Burton*, 657 A.2d at 747 & n.14.

In *Suters*, the defendant let police into her basement to help fix a water problem. *Suters*, 60 N.E.3d at 388. While the

officers were looking for the water-shutoff valve in the basement, the defendant's husband entered the basement and said that he knew where the shutoff valve was. *Id.* He then walked past the officers, entered a separate room, and closed the door behind him. *Id.* The court concluded that the husband's closing the door withdrew "any consent that may previously have been given by [the defendant]" to enter that room. *Id.* at 391. And "[t]here was no indication that [the husband] was incapable of turning off the water or needed assistance in doing so." *Id.* at 393.

Suters is distinguishable from Reed's case. The person who withdrew consent in *Suters* had never suggested that police should follow him into the separate room, nor did he engage in any ambiguous conduct at the doorway. And there was no reason for police to follow him into the separate room. His closing the door was therefore unequivocal. Here, by contrast, Officer Keller had reason to believe that Sullivan was leading him to Reed's apartment so that Officer Keller could go inside to speak to Jerome. Thus, Sullivan's ambiguous conduct at the doorway—knocking, opening the door just far enough for him to slip inside, and then softly pushing the door—did not unequivocally withdraw his consent.

Reed further argues that she and Sullivan were not required to physically resist Officer Keller's entry. (Reed's Br. 38–39.) The State does not argue otherwise. Sullivan or Reed could have withdrawn consent by, for example, telling Officer Keller, "Wait outside."

Reed seems to argue that Officer Keller could not rely on Jerome's attempt to conceal something because Officer Keller made that observation *after* he had crossed the threshold into the apartment. (Reed's Br. 32 & n.13.) But Officer Keller testified that he had made that observation

after he began pushing the door open but *before* he crossed the threshold into the apartment. (R. 20:25–26.)

In any event, Officer Keller's observation of Jerome is relevant to the consent-withdrawal analysis even if it occurred *after* Officer Keller had initiated a search by entering the apartment. When determining whether a particular act unequivocally withdrew consent to search, courts routinely consider subsequent facts, such as cooperation or conversations with police during a search. *See, e.g.*, *United States v. $304,980.00 in U.S. Currency*, 732 F.3d 812, 821 (7th Cir. 2013); *United States v. Joseph*, 892 F.2d 118, 122 (D.C. Cir. 1989); *Wantland*, 355 Wis. 2d 135, ¶ 39. This approach makes sense because a court must consider "the totality of the circumstances" when determining whether consent to search was withdrawn and because an officer may proceed with a search instead of clarifying whether an ambiguous action was meant to withdraw consent. *See Wantland*, 355 Wis. 2d 135, ¶¶ 44–47. Because Sullivan's soft push on the door was ambiguous, Officer Keller was permitted to rely on Sullivan's previously given consent to enter the apartment. Officer Keller's subsequent observation of Jerome trying to conceal something bolstered the conclusion that Sullivan's gentle push on the door could reasonably be interpreted as, for example, an attempt to allow Jerome to conceal a weapon or contraband.

In sum, Sullivan voluntarily consented to allow Officer Keller to enter his and Reed's apartment, and he did not withdraw that consent. Thus, Officer Keller's entry into the apartment was lawful.

II. Alternatively, exigent circumstances justified Officer Keller's entry into Reed's apartment.

Police may perform a warrantless entry into a home if there are exigent circumstances, such as "a threat to the

safety of a suspect or others" or "a likelihood that the suspect will flee." *Richter*, 235 Wis. 2d 524, ¶ 29. A court applies "an objective test" when determining if exigent circumstances existed: "[w]hether 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." *Id.* ¶ 30 (alterations in original) (citation omitted).

"The State bears the burden of proving the existence of exigent circumstances." *Id.* ¶ 29. When the exigent circumstances do not involve possible destruction of evidence, the State need not establish that there was probable cause to believe that a search would produce evidence of a crime. *United States v. Holloway*, 290 F.3d 1331, 1337–38 (11th Cir. 2002).

A court must "weigh the urgency of the officer's need to enter against the time needed to obtain a warrant." *Richter*, 235 Wis. 2d 524, ¶ 28. When determining whether an exigent threat to safety existed, a court may consider the possible presence of weapons, whether a suspect was considered dangerous, the number of officers and civilians involved, and whether the suspect was aware of police presence. *See State v. Kiekhefer*, 212 Wis. 2d 460, 477, 569 N.W.2d 316 (Ct. App. 1997). A police officer's subjective beliefs are relevant to the extent they help a court apply that objective test. *State v. Leutenegger*, 2004 WI App 127, ¶ 19, 275 Wis. 2d 512, 685 N.W.2d 536.

In *State v. Kirby*, two police officers went to an apartment to question young men who had reportedly been fighting outside. 2014 WI App 74, ¶¶ 4–5, 355 Wis. 2d 423, 851 N.W.2d 796. The door to the apartment unit was open, and five men were inside. *Id.* ¶ 6. When the officers were about to leave after speaking with the men, one officer

received a phone call and learned that an informant had told police that if there was a black backpack in the apartment, it had a handgun and sawed-off shotgun inside. *Id.* ¶ 9. The officer then noticed a black backpack, opened it, and found a sawed-off shotgun. *Id.* ¶ 12. The court of appeals held that the possible threat to officer safety justified the officer's search of the backpack. *Id.* ¶¶ 18–19. It noted that "even had the officer been outside the threshold of the apartment," she would have been justified in entering it to look for the backpack. *Id.* ¶ 18.

In *State v. Ayala*, police officers lawfully entered the defendant's bedroom without a warrant because of the chance that he could try to escape. 2011 WI App 6, ¶ 19, 331 Wis. 2d 171, 793 N.W.2d 511. Police had probable cause to arrest the defendant for a homicide and armed robberies. *Id.* ¶ 18. The court of appeals concluded that exigent circumstances justified the officers' entry into the bedroom. *Id.* ¶ 19. It reasoned that, had the officers waited for a warrant or taken time to secure the property, the defendant could have awoken and discovered the police presence, which would have increased the likelihood of injury or an attempted escape. *Id.* It further reasoned that other people in the apartment or a downstairs tavern could have tried to help the defendant escape. *Id.*

Here, exigent circumstances likewise justified Officer Keller's entry into Reed's apartment for two separate reasons: (1) Officer Keller reasonably believed that he was in danger; and (2) Officer Keller could reasonably think that Jerome would likely try to escape. Three sets of facts support both of those conclusions.[3]

[3] This Court may review an issue that was not raised in a petition for review or response to the petition. *See, e.g.*, *State v. Denny*, 2017 WI 17, ¶ 63 n.15, 373 Wis. 2d 390, 891 N.W.2d 144.

First, Officer Keller had reason to think that Sullivan was dangerous. He knew that Sullivan was on probation for battery, strangulation, and suffocation. (R. 19:Ex.1 5:35–45.) He thought it was suspicious when Sullivan initially began to walk away while Officer Keller was talking to Sullivan and Cannon outside. (R. 20:10.) As explained above, Officer Keller could reasonably think that Sullivan was leading him to Reed's apartment so he could speak to Jerome. But when Sullivan got to Reed's apartment, where Sullivan also lived, he knocked on the door. (R. 20:43.) Sullivan then opened the door just enough for him to slip through, and then he began to push the door shut. (R. 19:Ex.1 9:15–20.) Knocking on one's own door is suspicious, and an officer could reasonably view it as an attempt to alert residents that police are outside. This concern became magnified when Sullivan opened and apparently tried to close the door in a way that prevented Officer Keller from seeing inside.

Second, Officer Keller had reason to have safety concerns about Jerome. Officer Keller reasonably thought that Jerome was in Reed and Sullivan's apartment, as explained above. And he had reason to think that Jerome was dangerous. Jerome reportedly had two arrest warrants and recently had a verbal fight outside. (R. 19:Ex.1 7:54–8:22; 20:8, 10–11.) The fight was serious enough that Cannon went outside to see what was going on and "diffuse the situation." (R. 19:Ex.1 1:28–41.) Cannon told Officer Keller that Jerome had gone to Sullivan's apartment after the fight "to cool off." (R. 19:Ex.1 0:41–47.) Further, Sullivan called out to Jerome as he was pushing the apartment door closed. (R. 19:Ex.1 9:15–21.) Officer Keller could reasonably think that Sullivan would tell Jerome that the officer was standing right outside the door and looking for him—and that Jerome, perhaps not yet cooled off, would respond violently to prevent the officer from executing arrest warrants.

Third, Officer Keller was outnumbered three-to-one. Sullivan had told Officer Keller that Reed was at home. (R. 19:Ex.1 5:55–6:05.) Officer Keller thus had reason to think that Sullivan, Jerome, and Reed were inside the apartment.

Under those facts, Officer Keller could reasonably think that his safety was in danger and that Jerome would try to escape. Sullivan's conduct supported a belief that he was trying to help Jerome escape or set up Officer Keller to be ambushed in the hallway. Sullivan—who was on probation for violent crimes—led Officer Keller down a hallway, knocked on the door apparently to alert people inside that police were there, opened the door just enough to slip through, called out to Jerome, and pushed the door toward the closed position without letting the officer see inside. Officer Keller kept the door open because he was concerned about possible weapons. (R. 20:13.) Like in *Kirby*, the officer here was outnumbered while inside an apartment building to investigate a recent fight. And, like in *Ayala*, there were other people in the apartment who could have helped Jerome try to escape. The situation was more urgent here than in *Ayala* because Officer Keller could reasonably think that Jerome was about to learn that police were waiting for him in the hallway, but the defendant in *Ayala* was asleep when police entered his bedroom.

There is one immaterial difference between Reed's case and *Kirby*: the officer here did not have a report about weapons or end up finding weapons. But a police officer may think that there is an exigent threat to safety without having affirmative evidence of the presence of weapons. *Richter*, 235 Wis. 2d 524, ¶ 40. And a court does not apply hindsight to an exigency analysis. *Id.* ¶ 43. It is thus irrelevant that Officer Keller did not end up finding weapons in Reed's apartment. Like in *Kirby*, the officer here was justified in crossing the

threshold into the apartment because he reasonably believed that his safety was in danger.

To be sure, there were other reasonable inferences. But "[w]hen a police officer is confronted with two reasonable competing inferences, one that would justify the search and another that would not, the officer is entitled to rely on the reasonable inference justifying the search." *State v. Mielke*, 2002 WI App 251, ¶ 8, 257 Wis. 2d 876, 653 N.W.2d 316.

Further, Officer Keller's search was properly limited. "[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (citation omitted). The search here met that requirement. Officer Keller prevented the apartment door from closing all the way so that he could see inside, partly due to his safety concerns. (R. 20:12–13.) He entered the apartment after he saw that Jerome was apparently trying to conceal something while looking over his shoulder with his back to the door. (R. 1:3; 20:12–13.) Officer Keller did not rummage through Reed's apartment. He made a limited entry into her apartment due to reasonable concerns for his safety. Officer Keller's entry was lawful because he could reasonably think that his safety was in danger and that Jerome would likely try to escape.

In short, if this Court concludes that Sullivan's consent did not justify Officer Keller's entry into Reed's apartment, it should conclude that exigent circumstances did.

CONCLUSION

This Court should affirm the court of appeals's decision.

Dated this 6th day of July, 2018.

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 10,955 words.

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Dated this 6th day of July, 2018.

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