STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP926-CR

TROY K. KETTLEWELL,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND DECISION DENYING SUPPRESSION MOTION, ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE DANIEL J. BISSETT, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. WAS DEPUTY SCHUH ENGAGED IN A VALID COMMUNITY CARETAKER ACTION WHEN HE TRESPASSED INTO THE CURTILAGE OF MR. KETTLEWELL'S RESIDENCE AND ORDERED MR. KETTLEWELL TO COME TO THE FRONT DOOR OF HIS RESIDENCE TO SPEAK WITH DEPUTY OLIG?

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT

Appellant anticipates that the issues raised in this appeal can be fully addressed by the briefs. Accordingly, appellant is not requesting oral argument.

STATEMENT ON PUBLICATION

In all likelihood, this opinion will not merit publication because the issues are fact-specific, and the case is governed by existing precedent; in particular, the facts in this case are so closely analogous to those in ***State v. Ultsch***, 2011 WI App 17, 331 Wis.2d 242, 793 N.W.2d 505 as to render publication particularly superfluous and unnecessary.

STATEMENT OF THE CASE

On December 24, 2016 at approximately 3:05 p.m., a citizen witness contacted the Winnebago County dispatch center to report that he had observed a male person leaving a vehicle which was in a ditch on foot at the intersection of County Trunk Highway E and Morrow Road in Winnebago County, Wisconsin, (R.55:4) and further reported that the male "might have been intoxicated," was slurring his speech, but did not appear to be injured. (R.55:10-11). The reporting witness did not say he smelled the odor of intoxicants, did not mention anything about red, bloodshot, glassy or watery eyes. (R.55:11-12). According to the deputies who testified at the suppression hearings held in this matter, the reporting witness further must have been within a few feet of the individual walking away from the vehicle, and in addition said witness did not report seeing the individual stumble or display any other indication that he was having trouble walking. (R.55:12-13).

Deputy Michael Huth of the Winnebago County Sheriff's Office responded to the scene of the vehicle in the ditch, and upon inspection of the vehicle noted all of the following: there was no broken glass, and none of the windows were damaged, including the windshield; there was not any blood to be seen anywhere in or around the vehicle; there was no matted hair or other indication that someone's head may have struck anything inside the vehicle. (R.55:13-14).

Deputy Huth concluded after examining the scene that the vehicle had been traveling east on County Trunk Highway E when it entered the ditch, went over Morrow Road, and continued in the ditch along CTH E for a short distance before becoming stuck in the snow. (R.55:5). Deputy Huth also noted that while the airbags on the vehicle had deployed, only the

side airbags had done so, not the front airbags. (R.55:5). There was only one vehicle in the ditch, and there was no indication of any damage to the vehicle other than the deployed airbags. (R.55:4-17, 56:12). When Deputy Huth ran the license plate number of the vehicle through dispatch, it came back to a Tamara Tracy as well as the defendant in this matter, Troy Kettlewell. (R.55:5-6). Deputy Huth also noted that there was a "half-drank" bottle of Miller Lite as well as a prescription medicine container with Mr. Kettlewell's name on it located inside the vehicle. (R.55:8).

When Deputy Huth arrived at the scene of the accident, Ms. Tracy was already present there, and Ms. Tracy eventually admitted to Deputy Huth that Mr. Kettlewell had been driving, but did not state at that time that Mr. Kettlewell was injured in any way, nor apparently did Deputy Huth inquire of Ms. Tracy as to whether Mr. Kettlewell was injured or in need of assistance. (R.55:6-7). Deputy Huth also noticed that there was one set of "very distinct" footprints in the snow leading away from the vehicle which did not match Ms. Tracy's footprints, (R.55:7), but did not see any blood anywhere in the snow along the path of the footprints, nor did he note anything else about the footprint trail which would have indicated that the person making it was in any way walking abnormally or having difficulty walking in a straight line. (R.55:14-15).

At this point, Deputy Huth traveled to the residence of a cousin of Mr. Kettlewell's which the deputy knew was located nearby to check to see whether Mr. Kettlewell would be located there. (R.55:7). Although Mr. Kettlewell was not at his cousin's residence, the cousin did call Mr. Kettlewell to let him know that the police were looking for him, and Deputy Huth then had a brief conversation with Mr. Kettlewell over the phone. (R.55:7). In that conversation, Mr. Kettlewell "immediately" stated that Ms. Tracy had been driving the vehicle when it went in the ditch. (R.55:7-8). When Deputy Huth asked Mr. Kettlewell where he was located, Mr. Kettlewell allegedly "mumbled" something that Deputy Huth couldn't understand and hung up. (R.55:8).

The reporting party did not indicate to either dispatch or Deputy Huth that the individual he encountered was in any way injured. (R.55:15-16). At the suppression hearing which

followed, Deputy Huth stated that he assumed that dispatch would have asked the reporting party if the individual appeared to be injured, and confirmed that dispatch reported nothing else about any indications of injury. (R.55:17).

Deputies Marcus Schuh and Nathan Olig also responded to the call regarding the vehicle in the ditch and the male walking away from it, although they did not report to the scene; instead, they reported to the address associated with the registered owners of the vehicle, which was located at 1710 Harrison Avenue in Omro, Wisconsin. (R.55:21-22). Deputy Schuh had been informed by dispatch that the reporting party described the male walking away from the vehicle in the ditch as weighing approximately 200 pounds, in his 40's, and that he might have been intoxicated due to his slurred speech and the way he was walking, without further elaboration. (R.55:20). Dispatch also relayed to Deputy Schuh that the airbags had deployed on the vehicle. (R.55:21).

Upon arrival at the residence at about 3:30 p.m. on December 24, 2018, Deputy Schuh and Deputy Olig first approached the front door and knocked for a period of between 30 seconds and a few minutes; the testimony was unclear as to exactly how long. (R.55:22, 56:6). Deputy Schuh then peered into the small (six to eight inches in height) windows of the garage to check to see whether any vehicles were inside; there were not any vehicles inside the garage. (R.55:22, 40). Although Deputy Olig was aware of the fact that dispatch had obtained multiple phone numbers for the residents of 1710 Harrison Avenue, neither he nor Deputy Schuh attempted to call any of those telephone numbers, nor did Deputy Olig know whether dispatch or anyone else had been able to reach anyone at those telephone numbers. (R.56:13-14). Upon failing to receive a response at the front door of the residence, Deputy Schuh and Deputy Olig had a converstion in which Deputy Olig informed Deputy Schuh that "the reason he was able to walk around the house was because [they] were checking on the welfare of an individual that was involved in an accident crash where air bags deployed." (R.56:7).

Deputy Schuh then proceeded to walk around the house in search of the back door, peering into each window he came across as he made his way around the house moving first down

the south side of the house before turning left and moving north along the east side of the house, in what Deputy Schuh characterized as an effort to see if anyone was injured in the house. (R.55:22, 41-43). While Deputy Schuh was walking along the south side of the house, he saw in one window a female in her "low teens" who turned and ran out of the room when she noticed him peering in at her, after which he continued on his trip around the house. (R.55:42-43). Deputy Schuh in fact looked into every window as he went around the house. (R.55:43).

The female was Mr. Kettlewell's 14-year-old daughter, Carrissa Kettlewell. (R.56:15, 17). She testified that she had been taking a shower when she heard loud banging at the front door, so she got out of the shower and put on a robe to go see who it was that was knocking. (R.56:17-18). Ms. Kettlewell further testified that when she got to the front room near the front door, she saw a strange man looking in at her from the outside of the house through a window on the west side of the house facing the street, which prompted her to run screaming to her room. (R.56:18-19). Ms. Kettlewell also noted that the patio at the back of the house which her parents' room opens out onto has a total of 14 steps leading up to it from ground level. (R.56:20).

More than halfway down the east side of the house, Deputy Schuh came upon a patio with "several steps" leading up to it as well as sliding glass doors leading into the residence. (R.55:42). Inside the glass doors was a bedroom with a male individual whom Deputy Schuh determined to be Mr. Kettlewell laying on it, apparently asleep with his boots on. (R.55:22-23, 45). Deputy Schuh proceeded to knock on the glass doors to get Mr. Kettlewell's attention, and then told Mr. Kettlewell more than once but fewer than a dozen times to go to the front door so that he and Deputy Olig could speak with him. (R.55:45-46). Deputy Schuh also noted that there is no walkway around the back of the house in the direction he traveled, and further, that there were no footprints in the snow indicating that anyone else had recently walked around the house in that direction. (R.55:46-47).

Mr. Kettlewell ultimately obeyed Deputy Schuh's insistent requests that he go to the front door to speak with him

and Deputy Olig. (R.55:47). Deputy Schuh then rapidly returned to the front of the house, at which point Deputy Olig was already inside the house speaking with Mr. Kettlewell, who had come to the front door. (R.55:47-48). Although Deputy Schuh claimed that his and Deputy Olig's primary concern up to this point was for Mr. Kettlewell's safety and well-being, both he and Deputy Olig asked a number of questions regarding whether Mr. Kettlewell had been driving the vehicle and how much he had to drink and when prior to ever asking after his well-being. (R.55:48-49). At no point did Deputy Schuh make any attempt to see if he could call Mr. Kettlewell or anyone else who might be in the house. (R.55:49). Ultimately, Mr. Kettlewell admitted to driving the vehicle, at which point the deputies asked him to come outside so that standardized field sobriety tests could be administered, after which Mr. Kettlewell was arrested for and charged with operating while intoxicated as a fifth or sixth offense. (R.56:10-11, R.1:1).

Mr. Kettlewell later moved to suppress all evidence obtained as a result of Deputy Schuh and Deputy Olig's encounter with him. (R.11:1, 12:1). Hearings were held on Mr. Kettlewell's motion to suppress on March 17, 2018 and May 4, 2018, (R.55:1, 56:1), after which the circuit court rendered an oral ruling on the motion. (R.57:1). The circuit court ultimately denied the motion, finding that the search at issue in this case was justified as a valid exercise of the police's community caretaker function. (R.57:21). The circuit court first noted that the community caretaker exception only applies where, when the totality of the circumstances is evaluated, there was: (1) a search or seizure within the meaning of the Fourth Amendment; (2) the police were acting as bona fide community caretakers; and (3) the public interest in the police so acting outweighed the police intrusion on Mr. Kettlewell's privacy "such that the community caretaker function was reasonably exercised within the context of the home." (R.57:6).

Regarding the first factor, the circuit court found that a search within the meaning of the Fourth Amendment clearly had taken place. (R.57:16). The court then turned to the question whether, under the totality of the circumstances, the police were performing a bona fide community caretaker action, framing the question as whether there was an

objectively reasonable basis for the exercise of the community caretaker function. (R.57:16). The facts which the circuit court found supported a finding that the police were engaged in a bona fide community caretaker action as required by the second factor consisted of all of the following: (1) the airbags deployed; (2) the reporting party was concerned enough to mention Mr. Kettlewell's slurred words; (3) when Mr. Kettlewell spoke with Deputy Huth, he mumbled something the deputy couldn't understand; and (4) the officers had a subjective concern for injury.[1] (R.57:16-19).

The circuit court then enumerated the facts it found to cut against a finding that the police were engaged in bona fide community caretaker action as follows: (1) there wasn't any sign of injury at the scene, as there was no blood, no sign of a head striking the windshield, and the windshield was intact; (2) there wasn't any damage to the vehicle at all; (3) Mr. Kettlewell was able to walk away from the scene; and (4) the reporting party did not report any signs of injury to dispatch. (R.57:18). Ultimately, the circuit court found that the police were in fact engaged in a bona fide community caretaker action when they penetrated Mr. Kettlewell's curtilage without a warrant. (R.57:19).

The circuit court then turned to the third factor, noting first that there exists a substantial public interest in a motor vehicle accident and making sure that the public is protected, particularly where the vehicle is in a ditch as a result not of having slid there, but rather as a result of having gone into the ditch, traveled over a side road, and then traveled back into the ditch on the other side. (R.57:19). Regarding the circumstances surrounding the search, in particular the time and location of the search as well as the degree of authority and force displayed by the police, the circuit court stated that there wasn't a physical entry into the residence and found that given the time of day and the speed with which the officers investigated the

[1] Although the circuit court used the word "objective," it seems clear from the context of its earlier remark regarding the officers' subjectively held concerns for Mr. Kettlewell's well-being that it meant that it was relying in part on those subjective concerns to support its ultimate conclusion that the officers' actions were an objectively reasonable exercise of the community caretaker function. See (R.57:18).

incident, this factor did not cut against a finding that the exercise of the community caretaker function was reasonable. (R.57:20). The circuit court further stated that since the search was of a home and not an automobile, the third sub-factor did not apply here. (R.57:20).

As to the available alternatives to conducting a search, the court first noted that the police did call Mr. Kettlewell, but also that he hung up on them, and further, noted and rejected the alternatives listed in the defense's reply brief as unreasonable. (R.57:20-21). The alternatives listed in the defense's brief consisted of the following: (1) the police could have noted the scant evidence available to substantiate an injury to the driver of the vehicle as well as the fact that Mr. Kettlewell's daughter was home and apparently unconcerned for his welfare and conclude that there was no injury to be concerned about; (2) Deputy Huth could have recalled Mr. Kettlewell to clarify the situation the situation; (3) Deputies Olig and Schuh could have asked dispatch or Deputy Huth if there were any other available telephone numbers and called those numbers themselves or had others make those calls; (4) upon seeing Mr. Kettlewell's half-naked daughter, Deputy Schuh could have loudly and quickly identified himself as a law enforcement officer and stated his purpose; or (5) Deputy Schuh could have returned to the front door upon sighting Mr. Kettlewell's daughter and continued knocking in an attempt to get her to come to the door and speak with him. (R.20:8-9).

After a successful collateral attack on one of the convictions which the State proposed to use in support of the charge of operating while intoxicated as a fifth or sixth offense[2], and as a result of the denial of his motion to suppress, Mr. Kettlewell pled no contest to one count of operating a motor vehicle while intoxicated as a fourth offense. (R.27:1, 42:1-5). This appeal follows pursuant to the provisions of Wis. Stat. § 971.31(10).

[2] The State did not appeal the court's order granting Mr. Kettlewell's collateral attack on the previous conviction.

ARGUMENT

I. DEPUTY SCHUH WAS NOT ENGAGED IN A VALID COMMUNITY CARETAKER ACTION WHEN HE TRESPASSED INTO THE CURTILAGE OF MR. KETTLEWELL'S RESIDENCE AND ORDERED MR. KETTLEWELL TO GO TO THE FRONT DOOR OF HIS RESIDENCE AND SPEAK WITH DEPUTY OLIG AND HIMSELF.

A. Summary of Arguments and Standard of Review

It is undisputed that a search occurred when Deputy Schuh entered the curtilage of Kettlewell's residence and began peering into each of the exterior windows as he made his way around the house. The State asserted, and the circuit court agreed, that the search was justified as a valid community caretaker action, in spite of the facts that Kettlewell's vehicle was not damaged, only the side air bags deployed, there was no blood or other evidence of injury to be found anywhere at either the scene of the accident or along the footprint trail left by Kettlewell as he walked away from the vehicle, and the reporting party did not indicate that Kettlewell was injured in any way other than possibly being intoxicated.

While Kettlewell agrees that there is a substantial public interest in ensuring that individuals involved in a motor vehicle accident are safe, such an interest is weak at best where, as here, there are virtually no objective facts available to the police which would allow them to reasonably believe that the occupant of a vehicle which had gone into a ditch was in fact injured. Kettlewell further asserts that there was in fact a physical entry into the home, in particular, the curtilage of the home, and that during the course of that entry, Deputy Schuh came across and frightened Kettlewell's 14-year-old daughter, who was in a state of undress after having just left the shower.

In addition, and contrary to the circuit court, Kettlewell notes that the fact that search was of Kettlewell's home rather than a vehicle weighs against a finding that the purported exercise of the community caretaker function here was conducted reasonably. Finally, Kettlewell asserts that *all* of the

alternative courses of action available to the police and enumerated in his brief in the circuit court would have been more reasonable than the course of action they did in fact take, which was to engage in a warrantless and highly intrusive search of Kettlewell's home by walking around the residence and peering intrusively into each and every window of the home until they found Kettlewell. The search was neither a bona fide exercise of the community caretaker function, nor was that function reasonably exercised here.

Whether the police's community caretaker function provides constitutional justification for a warrantless search or seizure presents a question of constitutional fact subject to this court's independent review. ***State v. Kramer***, 2009 WI 14, ¶16, 315 Wis.2d 414, 759 N.W.2d 598. "Upon review of an order [denying] a motion to suppress evidence, we uphold the circuit court's findings of historic fact unless they are clearly erroneous." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis.2d 358, 752 N.W.2d 748 (internal citations omitted, brackets added). "A finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence." ***Id.*** (internal citations and quotation marks omitted).

"Whether a given community caretaker function will pass muster under the Fourth Amendment so as to permit a warrantless home entry depends on whether the community caretaker function was reasonably exercised under the totality of the circumstances of the incident under review." ***State v. Ultsch***, 2011 WI App 17, ¶12, 331 Wis.2d 242, 793 N.W.2d 505 (internal citations omitted).

> To determine whether an officers conduct properly falls within the scope of the community caretaker exception to the Fourth Amendments warrant requirement based on home entry, [this court] must determine: (1) whether a search or seizure 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.

Id., ¶13.

B. A Search Within the Meaning of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution Indisputably Took Place.

"Curtilage is the area immediately adjacent to the home to which a person extends the intimate activities associated with the privacies of life[,]" and is treated as functionally identical to the interior of the home itself for constitutional purposes. ***State v. Wilson***, 229 Wis.2d 256, 264, 600 N.W.2d 14 (1999) (citing ***Oliver v. United States***, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). When a police officer enters the curtilage of a home without a warrant, "his presence there must be justified by either a valid search warrant or probable cause and exigent circumstances, or by another judicially-recognized exception to the warrant requirement under these circumstances[,]" such as, as is relevant here, the community caretaker exception. ***Florida v. Jardines***, 569 U.S. 1, 7-8, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013).

Here the circuit court implicitly found, and Kettlewell agrees, that when Deputy Schuh left the front door of Kettlewell's residence and began working his way around the residence peering into each window he passed, he had invaded the curtilage of the residence and therefore engaged in a search within the meaning of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution had taken place. (R.57:16). Accordingly, the first factor to be analyzed in determining whether the police were engaged in a community caretaker action is satisfied. *See* ***Ultsch***, 331 Wis.2d 242, ¶12.

C. The Entry Into Kettlewell's Curtilage Was Not Supported By an Objectively Reasonable Belief That Someone Inside Was In Need of Assistance, And Therefore Did Not Constitute A Bona Fide Community Caretaker Action.

Where the police have an objectively reasonable basis, founded upon specific and articulable facts and reasonable inferences arising therefrom, to conclude that an intrusion is necessary because there is a person in need of assistance in the searched area, the police may enter the area without a warrant

pursuant to their community caretaker function, so long as the alleged community caretaker action is "totally divorced" from law enforcement concerns. ***State v. Maddix***, 2013 WI App 64, ¶20, 348 Wis.2d 179, 831 N.W.2d 778 (internal citations omitted). In determining whether the police exercise of their community caretaker function is bona fide, therefore, courts must evaluate the totality of the facts and circumstances available to the police at the time of the intrusion. ***State v. Matalonis***, 2016 WI 7, ¶31, 366 Wis.2d 443, 875 N.W.2d 567 (internal citations omitted). Accordingly it is instructive to compare the facts in this case to other cases involving the assertion that a search or seizure was justified by the community caretaker function.

In ***State v. Ultsch***, the facts which were available to the police to support an objectively reasonable belief that someone within the residence at issue there were as follows: Ultsch's vehicle, a Dodge Durango, was damaged significantly, but the damage was limited to the front driver's side fender, and "[t]he airbags had not deployed, the windshield was intact, there was no damage to the passenger compartment or to the driver's side door, and there was no blood or other indication of injury." ***Ultsch***, 331 Wis.2d 242, ¶19. Notably, the crash which the vehicle was involved in had caved in a portion of a brick building, causing damage to the building which was significant enough to raise concerns that the structural integrity of the building was compromised. ***Id.***, ¶2.

Additionally, the officers there had no information to suggest that Ultsch was "in a vulnerable situation," and in fact, they had been told that she was inside her residence and possibly asleep, and further, the person informing the police did not mention that she was in need of assistance, nor did the police ask if she was. ***Id.***, ¶20. Finally, the police had to travel up a lengthy driveway through deep snow to reach Ultsch's residence, and they did not see any blood in the snow along Ultsch's footprint trail. ***Id.***, ¶21. This court ultimately determined that these facts taken together were insufficient to give rise to an objectively reasonable belief that Ultsch was in need of assistance, and therefore that the search at issue there was not in furtherance of a bona fide exercise of the community caretaker function. ***Id.***, ¶¶15, 22.

In ***State v. Maddix***, the police were called regarding screaming and yelling coming from another unit in the caller's apartment complex. ***Maddix***, 2013 WI App 64, ¶2, 348 Wis.2d 179, 831 N.W.2d 778. Once on scene, the police heard some screaming indicative of a female in distress, and thus proceeded to the unit from which the screams were emanating, forced entry into the unit, and interviewed the occupants, a male and a female, in separate locations within the unit. ***Id.***, ¶¶2-4. Both of the occupants told the police that there was no one else in the residence, that they were in a relationship, and that they had been arguing. ***Id.***, ¶¶5-6. The police looked into a room adjacent to that in which the male was being interviewed, and did not see anyone. Id. at ¶5. In addition, the female stated that she was scared, but did not know what she was scared of. ***Id.***, ¶6.

As in ***Ultsch***, this court found that these facts were insufficient to allow the police to form an objectively reasonable belief that someone in the residence was in need of assistance, and therefore that the police were not acting in furtherance of a bona fide exercise of the community caretaker function. ***Maddix***, 348 Wis.2d 179, ¶25. In doing so, this court noted that there was no evidence corroborating the officers' suspicion that someone else may have been present in the apartment, and further, that even though the female's explanation of her scream seemed fishy to the officers, this "fishiness," without more, did not provide an objectively reasonable basis to believe that someone else may be in the apartment and in need of assistance. ***Id.***, ¶¶27-28. This court summarized its holding regarding this second part of the three-part test as follows: "It is not enough that the officers subjectively thought that perhaps someone else was in the apartment; what matters is whether they possessed any facts that would lead to a reasonable conclusion that someone else was present to justify a search to render assistance or protection." ***Id.***, ¶30.

In ***State v. Durham***, the facts possessed by the officers and advanced by the State as satisfying the second prong of the community caretaker analysis were: "(1) that a neighbor had reported hearing yelling and banging and observing a shaking wall; and (2) that dispatch characterized the situation as a "possible domestic incident." ***State v. Durham***, No.

2015AP1978-CR, ¶31, *slip copy* (Wis. Ct. App. June 1, 2016) (unpublished opinion citable pursuant to Wis. Stat. § 809.23(3)). When the officers arrived at the defendant's residence in that case, "they did not observe any additional evidence indicating anyone inside was in need of assistance, nor did they observe anything that corroborated the neighbor's report." ***Id.*** Nonetheless, the officers entered the defendant's darkened home, failed to announce themselves as police, and then proceeded up the defendant's stairs. ***Id.*** The court of appeals held that on those facts, "the officers lacked an objectively reasonable basis to conclude anyone inside Durham's residence needed assistance." ***Id.***, ¶32.

In ***State v. Schwartz***, the police suspected that a vehicle owned by Schwartz had been involved in a hit-and-run accident with a parked car, and they ultimately found the vehicle outside of Schwartz's home with a damaged front bumper and a cracked windshield. ***State v. Schwartz***, No. 2013AP1868-CR, ¶2, *slip copy* (Wis. Ct. App. July 30, 2014) (unpublished opinion citable pursuant to Wis. Stat. § 809.23(3)). The police approached Schwartz's residence and observed through a window a man matching Schwartz's description lying on a couch as well as two empty gun magazines and a rifle round on a table near the couch. ***Id.***, ¶2.

After knocking on the door and windows as well as calls to Schwartz's cellular telephone failed to yield a response, the police forced entry into the residence, at which point Schwartz "immediately jumped up" and was subsequently handcuffed while the police searched the rest of the home ostensibly in search of injured persons in need of assistance. ***Id.***, ¶¶2-3, 8. This court again found that there were insufficient facts available to the officers to render the search a bona fide exercise of their community caretaker function. ***Id.***, ¶¶9-10. In so doing, it noted that "[t]he absence of contrary evidence alone, however, does not provide an "objectively reasonable basis" nor is it a "specific and articulable" fact warranting police to believe" that someone within the residence was in danger. ***Id.***, ¶9.

In ***State v. Landwehr***, the State sought to justify a seizure on the basis that the police were acting in their community caretaker capacity when they seized Landwehr due

to their fear that he would in some way injure his girlfriend, whom had been walking home from a bar in a visibly intoxicated state and whom had initially resisted accepting a ride from the police before ultimately relenting. ***State v. Landwehr***, No. 2016AP2536-CR, ¶11, *slip copy* (Wis. Ct. App. November 27, 2017) (unpublished opinion citable pursuant to Wis. Stat. § 809.23(3)). The girlfriend, named Paulson, was emotional during the ride, stated that her boyfriend, Landwehr, was "so mad at her right now," but it was also true that Paulson had no outward signs of injury, and further, that she repeatedly denied that she and Landwehr had been involved in an altercation. ***Id.***, ¶¶11-12.

This court held that on those facts, while the police were acting in a bona fide community caretaker capacity when they picked Paulson up, they lacked an objectively reasonable community caretaker basis to seize Landwehr at the residence once they arrived at the residence she shared with him, as Paulson repeatedly said that she was fine and there was no other indication that she was in any kind of immediate danger, finding instead that once the police got Paulson home, their community caretaker function ended. ***Id.***, ¶13.

Finally, in ***State v. Halverson***, the situation was very similar to the situation here: the police were dispatched to a one-car accident involving a vehicle which appeared to have lost control and left the roadway, where it went into the ditch on the north side of the road and crashed into some pine trees. ***State v. Halverson***, No. 2011AP240-CR, ¶2, *slip copy* (Wis. Ct. App. September 14, 2011) (unpublished opinion citable pursuant to Wis. Stat. § 809.23(3)). A number of branches from the pine trees as well as a piece of the vehicle's grill were broken off and lying on the ground near the vehicle, and as here, the officer noted that there was an open alcoholic beverage in the vehicle as well as a trail of footprints in the snow leading away from the vehicle, and also as here, no blood was noted along said trail. ***Id.*** In addition, when the officer was able to locate Halverson at his residence, he found Halverson in what appeared to be a highly intoxicated state, such that he had trouble keeping his balance to the point of nearly falling over and was slurring his words. ***Id.***, ¶4. The officer "testified that he believed the loss of balance could possibly be due to an injury sustained in the crash," but testified inconsistently as to

whether he had asked Halverson if he was in need of medical assistance. ***Id.***

This court agreed with the circuit court that on those facts, the subsequent "protective hold" seizure of Halverson from the threshold of his home was not an example of a bona fide exercise of the community caretaker function. ***Id.***, ¶12. In support of this holding, this court noted that "stricter scrutiny is applied to an encounter in the home, as opposed to a police encounter with an individual in a vehicle." ***Id.***, ¶14. Ultimately, this court stated that "The facts in this case, as in [*State v.*] *Ultsch*, lack any indication of injury or need for assistance and, therefore, do not support an objective basis for community caretaker activity." ***Id.*** (brackets added).

On the other side of the coin, there are numerous cases finding that on facts more egregious than those at issue here, the police were acting in a bona fide community caretaker capacity due to the presence of facts giving rise to an objectively reasonable belief that someone was injured or in danger and therefore in need of their assistance. In ***State v. Pinkard***, for instance, the Supreme Court of Wisconsin was asked to determine whether there was an objectively reasonable basis to fear for the safety of the occupants of the residence at issue there. ***State v. Pinkard***, 2010 WI 81, ¶28, 327 Wis.2d 346, 785 N.W.2d 592.

There, the police had received an anonymous tip the court characterized as reliable stating that the occupants of a home appeared to be sleeping near a collection of drugs, money, and drug paraphernalia and that the rear door to the residence was hanging open. ***Id.***, ¶32. When they arrived at the residence, the police were able to corroborate the tip when they found that the rear door was indeed standing open, and were able to further corroborate that Pinkard and his companion may be in need of assistance when they found that repeated knocking and announcement of their presence failed to rouse either of them. ***Id.*** The court conceded that these facts presented a "close case," but ultimately found that the police were justifiably acting as community caretakers because the facts made it necessary to ensure that the occupants were not the victims of some kind of crime and that their health and safety was not at risk. ***Id.***, ¶¶33-34.

State v. Matalonis, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567, is another case in which the Supreme Court of Wisconsin found an objectively reasonable basis for a bona fide exercise of the community caretaker function. There, the facts supporting a bona fide exercise of the community caretaker function involved the police being summoned to a call for medical assistance, whereupon they found a door covered in blood at the residence, and when they made contact with Matalonis's brother Anthony, he too was covered in blood and stating that he had been beat up by several different groups of people at a bar. ***Id.***, ¶4.

Upon further investigation of the scene, the police noted that there was a great deal of blood forming a trail up the stairs to Anthony's door, and that the trail led through the snow to the side door of another residence. ***Id.***, ¶¶5-7. There, they discovered blood on the screen door as well as the inside door, and heard loud banging as well as what sounded like things being shuffled around inside. ***Id.***, ¶7. When the defendant in that case, Charles Matalonis, answered the door, he did not have blood on him, but he was shirtless and out of breath, and he stated that he had been cleaning up blood after having gotten into a fight with his brother Anthony. ***Id.***, ¶9. The officers also noticed that there was blood on the floor in the foyer which formed a trail leading up the stairs inside Matalonis's residence. ***Id.***, ¶9. The supreme court held that based on the blood trail leading to Matalonis's door, into the residence, and up the stairs, as well as the loud bangs and Anthony's statement that multiple people were involved in beating him up, the police had an objectively reasonable basis to believe that someone inside may have been injured and in need of assistance, in spite of Matalonis's denial that anyone else was in the residence. ***Id.***, ¶¶10, 42.

In ***State v. Gracia***, the police were summoned to a one-car accident scene where they found "a traffic signal completely knocked down, but the front end of the vehicle was essentially caved in, pieces of the bumper were left at the scene, and the front license plate was entirely ripped off." ***State v. Gracia***, 2013 WI 15, ¶21, 345 Wis.2d 488, 826 N.W.2d 87. The police there also repeatedly expressed their concern for the safety of the driver of the vehicle, which the court found to be

significant. ***Id.*** When they went to Gracia's residence, his brother answered the door and appeared concerned for Gracia's safety, particularly when he assisted the police by breaking down the locked door to Gracia's room, and in addition, the damage at the scene of the accident was characterized as "extensive," as it involved a traffic signal being knocked completely off of its base and left lying half in the median and half in the roadway. ***Id.***, ¶¶6, 22. On these facts, the supreme court found that the police were acting in a bona fide community caretaker capacity. ***Id.***, ¶22.

Finally, in ***State v. Ferguson***, 2001 WI App 102, 244 Wis.2d 17, 629 N.W.2d 788, the police were dispatched to a residence following a 911 call in which the caller stated that a fight was taking place there. ***Id.***, ¶2. There, they found a minor outside of the residence who appeared to be intoxicated, and who led the police inside where they found three other minors, two of whom were drinking but did not appear to be intoxicated and one of whom appeared to be highly intoxicated, and who had been vomiting in a bathroom. ***Id.***, ¶4. The police also encountered a locked bedroom door, as well as numerous empty beer bottles and gallon jugs of liquor, similarly empty. ***Id.***

The minors inside informed the police that three people were in that bedroom, and that the bedroom door locked from the inside only, which led the police to become concerned that someone was inside of the room who was also highly intoxicated and might therefore be in need of assistance, particularly in view of the fact that they received no response after repeated knocking on the door to the bedroom and yelling for the occupants to come out. ***Id.***, ¶5. This court held on those facts that the police had an objectively reasonable basis to believe that someone inside was in need of assistance, and therefore that they were acting as bona fide community caretakers. ***Id.***, ¶15.

Turning finally to the facts of this case, it is clear that the police did not have sufficient facts available to them to render their belief that Kettlewell was injured and in need of assistance objectively reasonable. Here, Kettlewell was seen walking away from the scene of a one-car accident in which the airbags had deployed, was reportedly slurring his words

and had brief telephone contact with the police during which he mumbled something the police couldn't understand and hung up on them. (R.57:16-18). The circuit court did find that the police harbored a subjective belief that Kettlewell may have been injured, but that this was due to their belief that slurred speech may indicate intoxication but may also indicate injury. (R.57:16-18).

The circuit court also found that there weren't any signs of injury at the scene of the accident, that there was no blood and no sign of Kettlewell's head striking the windshield, and no broken windshield, that Kettlewell was able to walk away from the scene under his own power, and the reporting party did not report any signs of injury to dispatch. (R.57:18). In addition, there was no evidence presented to the circuit court, other than the deployed side airbags, that the vehicle was damaged in any way. (R.55:13-17). Finally, the trail of footprints leading through the snow away from the vehicle did not have any blood visible along it, nor did it indicate that the person who left it was impaired or otherwise unable to walk in a straight line. (R.55:14-15).

Nonetheless, the circuit court found that the following facts supported a finding that the police were acting in a bona fide community caretaker capacity when Deputy Schuh entered Kettlewell's curtilage in search of him: (1) the side airbags on the vehicle had deployed; (2) the reporting party was concerned that Kettlewell might be intoxicated due to his slurred speech; (3) when Kettlewell spoke with the officer, he mumbled something the officer couldn't understand and hung up; and (4) the officers were subjectively concerned that Kettlewell might be injured. (R.57:18). With respect to its finding regarding the officers' subjective concern for injury, the circuit court did not make a finding either way as to the significance of the fact that Deputies Schuh and Olig asked numerous questions of Kettlewell regarding whether he was driving as well as how much he had to drink and when prior to asking any questions regarding the possibility that Kettlewell was injured as a result of the accident. (R.57:13-17, 55:48-49).

Like the situations invovled in ***Ultsch***, ***Schwartz***, and ***Halverson*** discussed above, the vehicle here had clearly been involved in an accident, but unlike those cases, there was no

indication of any damage, much less significant damage, to the vehicle. Like all of those cases, there was no blood to be found either at the scene, in the trail of footprints leading away from the scene, or at Kettlewell's residence. Like both ***Ultsch*** and ***Schwartz***, the police encountered a person who did not report that Kettlewell was injured or in need of assistance. Finally, like the situation in ***Halverson***, the police had information that Kettlewell was intoxicated enough to slur his speech, mumble, and have trouble walking normally, but had no other indication available to them that he was displaying any signs of possible injury.

Finally, like the situation in ***Maddix***, ***Durham***, and ***Landwehr***, the facts available to the police here involved nothing more than speculation as to whether Kettlewell or anyone else was injured and in need of assistance as opposed to being merely intoxicated. *See* ***Maddix***, 348 Wis.2d 179, ¶27-30 (reported screaming and yelling as well as "fishiness" of female's explanation that while she was scared but couldn't say of what insufficient to justify belief some else was there and in need of assistance); ***Durham***, No. 2015AP1978-CR, ¶31 (reported yelling, banging, and shaking wall coupled with report that this was a "possible domestic disturbance" insufficient to support objectively reasonable belief that someone was in need of assistance); and ***Landwehr***, No. 2016AP2536-CR, ¶¶11-13 (community caretaker seizure not objectively reasonable where girlfriend for whom the police were concerned was emotional and intoxicated, but showed no outward signs of injury and denied being in an altercation with Landwehr).

In contrast, the facts here are distinguishable from the cases cited above which did find an objectively reasonable basis for community caretaker action on the part of the police. In each of ***Matalonis*** and ***Gracia***, there was much more significant indication of potential injury involved than the facts here, involving deployed side airbags and Kettlewell's slurred speech, would suggest. *See* ***Matalonis***, 366 Wis. 2d 443, ¶¶4-9 (bloodied fight victim, blood trail leading from one residence to another and up to a closed and locked door); *see also* ***Gracia***, 345 Wis.2d 488, ¶¶21-22 (traffic pole knocked completely down, extensive damage to the vehicle, and a brother who was concerned enough to break down Gracia's bedroom door to

allow the police in to check on him).

Similarly, the facts here are significantly less concerning than those available to the police in ***Pinkard*** and ***Ferguson***. Unlike the situation in ***Pinkard***, where the occupants of the residence were reportedly unconscious near a collection of drugs and drug paraphernalia with the door to their residence standing open, *see* ***id.***, ¶32, here the police had no indication outside of the undamaged vehicle in the ditch and Kettlewell's slurred speech that he was in fact in immediate danger. In addition, while it is true that like the situation in ***Pinkard***, no-one in the residence responded to the police knocking on the door, the doors of the residence were closed and there was no indication that Kettlewell was intoxicated to the point of unconsciousness, and in addition, Deputy Schuh discovered a 14-year-old female was in the residence who presumably would have taken action to assist Kettlewell if he were in need of assistance, but who was unconcerned enough to have been in the shower when the police arrived; this becomes particularly significant in view of the supreme court's acknowledgement that the question there was "close." ***Pinkard***, 327 Wis.2d 346, ¶¶32-34.

Ferguson is likewise distinguishable based on the presence there of more significant facts justifying a police belief that someone in the searched area was in need of assistance. There, the police were confronted with a call reporting a fight at the residence, and upon arrival, were confronted with numerous intoxicated minors, at least one of whom was intoxicated to the point of vomiting. ***Ferguson***, 244 Wis.2d 17, ¶¶ 2-5. In addition, the police were informed that three people were inside the locked bedroom, but repeated knocking and yelling failed to induce anyone inside to unlock the door. ***Id.***, ¶5. Here, again, the police had only the facts that there was an undamaged vehicle in a ditch with only its side airbags deployed and the information that the likely driver was slurring his speech but otherwise not displaying any signs of possible injury or distress, nor was there any blood or other signs of injury either at the scene or along the trail of footprints left by Kettlewell.

In light of the above discussion, it is clear that this case most closely resembles the facts in ***Ultsch*** and ***Halverson***. In

each of those cases, as noted above, significant damage to the vehicles at issue was noted, but no blood or other evidence of injury to a person was found, and further, in ***Halverson***, the defendant there was slurring his speech and having some difficulty remaining upright. *See* ***Ultsch***, 331 Wis.2d 242, ¶¶19-21; *see also* ***Halverson***, No. 2011AP240-CR, ¶¶2, 4.

Here, there was no damage at all to the vehicle, and even adding the fact that the side airbags deployed, the level of concern reasonably engendered by the condition of the vehicle itself is identical here as it was in both ***Ultsch*** and ***Halverson***. For the same reasons articulated in those cases, the circuit court fell into error when it held that the facts here supported an objectively reasonable belief that Kettlewell was injured and in need of assistance, and therefore the police were not engaged in a bona fide community caretaker action when they entered the curtilage of his home. As such, the circuit court should have granted Kettlewell's motion and suppressed all evidence obtained by the police after they penetrated his curtilage without a warrant. *See* ***Jardines***, 569 U.S. at 7-8.

D. Regardless of Whether Deputy Schuh Was Engaging In A Bona Fide Community Caretaker Action When He Entered The Curtilage of Kettlewell's Residence, The Public Interest In Doing So Did Not Outweigh The Significant Intrusion Into Kettlewell's Privacy, And As Such, The Action Was Unreasonable.

Even if the police are engaged in a bona fide community caretaker action, that action must still be reasonable to pass constitutional muster, which is determined by balancing the public interest in the police taking such action against the degree of police intrusion into the defendant's protected privacy interest; ""The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable."". ***Ultsch***, 331 Wis.2d 242, ¶¶23-24 (quoting ***Pinkard***, 327 Wis.2d 346, ¶41). In making that determination, courts are to consider four 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 alternatives to the type of intrusion actually accomplished.

Pinkard, 327 Wis.2d 346, ¶42 (brackets in original, internal citations and quotation marks omitted). As shall be demonstrated below, the circuit court erred in determining that the police's alleged exercise of their community caretaker was reasonable after applying these factors, each of which shall next be examined in turn.

1. *The degree of public interest and the exigency of the situation was not as substantial as the circuit court believed.*

The circuit court held, citing ***Gracia***, that the public interest in ensuring that a person involved in an automobile accident is substantial, but it stated the principle involved too broadly, as a comparison of the facts here to those in ***Gracia*** on the one hand and those in ***Ultsch***, ***Schwartz***, and ***Halverson*** on the other hand will amply demonstrate.

In ***Gracia***, the court did state that the public interest in ensuring the safety of individuals involved in an automobile accident was strong, but did so because there, the accident at issue was fairly characterized as "serious" due to the significant damage to Gracia's vehicle as well as the traffic pole he struck with it, and indeed, Gracia's brother demonstrated his concern for Gracia by breaking down the door for the police when Gracia refused to come out of his room. ***Gracia***, 345 Wis.2d 488, ¶¶22, 25. Here, no-one who had contact of any kind with Kettlewell after the accident expressed any concern that he was injured, nor was there anything like the kind of damage to either Kettlewell's vehicle or objects nearby; indeed, there was no evidence presented that indicated that there was any damage to it *at all*. (R.55:4-8, 10-17, 20-21).

In ***Ultsch***, by contrast, while there was fairly significant damage done to both the vehicle and the building it struck, there was also evidence that Ultsch had driven it after the accident for two miles through a snowstorm, walked up her

long driveway on foot without leaving a trail of blood, and the person the police talked to on the way to her residence did not indicate that Ultsch was in need of any assistance. ***Ultsch***, 331 Wis.2d 242, ¶¶20-21, 25. This court noted that while "[t]here was good reason to believe she was intoxicated and almost no reason to think that she was in distress[,]" "there is very little indication of any danger to Ultsch." ***Id.***, ¶25. The same is even more true here, where there was no blood and the only damage to the vehicle was not really damage at all, but rather deployed side airbags.

Similarly, in ***Halverson***, there was arguably more available to the police to trigger the public interest in ensuring the safety of the individuals involved in the accident there, as there the vehicle at issue had lost control and left the roadway, crashing into some pine trees and causing damage to both the trees and the vehicle. ***Halverson***, No. 2011AP240-CR, ¶2. Here, there was no damage to the vehicle at all other than the deployed side airbags, and further, like ***Halverson***, there was no blood or other indicia of injury either at the scene or in the trail of footprints leading away from it. ***Id.***, ¶2. This court ultimately stated, as is relevant here, that "the public's interest in the intrusion upon Halverson, *who was in his home at the time*, was minimal at best and did not outweigh the substantial intrusion on his privacy." ***Id.***, ¶14. The same is true here, and as such, this factor cuts against a finding that any purported exercise of the community caretaker function under these facts was reasonably executed.

2. *Contrary to the circuit court's ruling, the attendant circumstances surrounding the search, including its time, its location, and the degree of overt authority and force displayed, all cut against a finding that the police acted reasonably in entering Kettlewell's curtilage without a warrant.*

As with the first of the four sub-factors, a comparison of the facts in this case to those in ***Gracia***, ***Ultsch***, and ***Halverson*** is instructive. Beginning with ***Gracia***, there the court noted that the degree of force and authority was notably less than that involved in ***Ultsch***, as the police did not force entry or even penetrate the curtilage of the home, but were rather invited in by Gracia's brother, and further, it was

Gracia's brother, not the police, who broke down the door to Gracia's bedroom. ***Gracia***, 345 Wis.2d 488, ¶26. The ***Gracia*** court also noted that the police were escorted by Gracia's brother the entire time they were in the residence, whereas "[i]n contrast, the police in ***Ultsch*** entered the house without permission and then walked around unattended until they found Ultsch sleeping in bed. ***Id.*** (citing ***Ultsch***, 331 Wis.2d 242, ¶4).

Here, as in ***Ultsch***, Deputy Schuh was not invited into Kettlewell's curtilage by anyone, and as in ***Ultsch***, Deputy Schuh wandered around the house invasively peering into windows in a manner every bit as offensive as the actual entry into the confines of the home in ***Ultsch*** until he located Kettlewell, who like Ultsch was sleeping in his bed at the time. Indeed, Kettlewell's 14-year-old daughter was frightened to the point of tears when she saw Deputy Schuh peering in through the window at her after she had just left the shower. (R.56:17-19). *See* ***Ultsch***, 331 Wis.2d 242, ¶26 (holding that while there was no force used, the fact that the officer let himself into the house and searched until he found Ultsch in her bed, whereupon he woke her, represented a considerable display of authority).

Similarly, while the ***Halverson*** court did not find it necessary to reach the third overall community caretaker factor due to its determination that the action there was not objectively reasonable and bona fide, the facts there that the officer refused to leave Halverson's residence when told to do so and that when Halverson attempted to retreat into the residence and close the door, the officer grabbed his wrist, stepped inside the door, and handcuffed Halverson all indicate that if the court had found it necessary to analyze this factor, it too would have found that the degree of overt force and authority used was considerable. *See* ***Halverson***, No. 2011AP240-CR, ¶¶4-5. While it is true that Kettlewell was not arrested inside of his residence, he was ordered by Deputy Schuh, who was in his full police uniform, to go to the front door and speak with the police more than once but less than a dozen times, and he was ultimately arrested as a result. (R.45:45-48). Accordingly, and in light of the preceding discussion, the circumstances surrounding the search here plainly involved a substantial intrusion and a significant

display of overt authority on the part of the police. As a result, this second sub-factor weighs against a finding that any purported community caretaker action here was reasonably executed.

3. *Contrary to the circuit court's analysis, the fact that the search was of a home and not a vehicle does not render the third sub-factor inapplicable; rather, that fact weighs strongly in favor of a finding that the police acted unreasonably*.

The circuit court in its ruling simply stated that because this case involved a search of a home rather than a vehicle, the third sub-factor did not apply. (R.57:20). This was error, and plainly so. In ***Ultsch***, this court noted that for purposes of the Fourth Amendment, "a warrantless search of a car deemed reasonable may be unreasonable in the context of a search of a home." 331 Wis.2d 242, ¶12 (quoting ***Pinkard***, 331 Wis.2d 242, ¶16). Similarly, in ***Halverson*** and ***Maddix***, the fact that the search involved a residence rather than a vehicle reduced the likelihood that the searches at issue there would pass constitutional muster. *See* ***Halverson***, No. 2011AP240-CR, ¶14 (recognizing "that stricter scrutiny is applied to an encounter in the home, as opposed to a police encounter with an individual in a vehicle"); *see also* ***Maddix***, 348 Wis.2d 179, ¶35 (stating that "[t]his is not a relevant factor here *except* to recognize that *one has a heightened privacy interest in preventing intrusions into one's home*.") (internal quotation marks and citations omitted, brackets in original, emphasis added).

Accordingly, this third factor also cuts against a finding that the police action here reasonably balanced the public interest in community caretaker activity with the private interest in one's privacy and seclusion.

4. *Contrary to the circuit court's ruling, any of Kettlewell's proffered alternatives to invasion of his curtilage and thus of his home itself would have been more reasonable than the invasion which took place.*

The fourth and final reasonableness sub-factor looks to whether there were available alternative courses of action

which would have effectively addressed the concerns the police reasonably had without resorting to a warrantless search or seizure. ***Maddix***, 348 Wis.2d 179, ¶36. Here, the court noted that the police had in fact contacted Kettlewell by phone but that he had hung up on them, and then proceeded to dismiss without discussion the remaining alternatives suggested by the defense in its briefing. (R.57:20-21). Here again, a comparison of the suggested alternatives here versus those suggested in other cases is useful.

In ***Gracia***, the defendant there suggested that rather than breaking down the door of his room, the police instead could have waited and allowed Gracia's brother to evaluate and monitor Gracia's well-being. ***Gracia***, 345 Wis.2d 488, ¶27. The court there stated that although such a suggestion had some appeal, Gracia's brother's agitated state, which was such that he felt compelled to break down Gracia's bedroom door, rendered such an alternative course of action less reasonable than what the police in fact did. ***Id.***

In contrast, in ***Ultsch***, the court noted that the police could have simply relied upon the representation they had already heard to the effect that Ultsch was sleeping and not in need of assistance, noted the absence of evidence of injury to the driver and limited damage done to the vehicle as well as the absence of any real exigency to the situation, and done nothing. ***Ultsch***, 331 Wis.2d 242, ¶28. Here, there was even less indication of injury to Kettlewell available to police, and in addition, there was no damage at all to the vehicle involved, and further, neither the reporting party nor Kettlewell mentioned at any point to the police that Kettlewell was injured or in need of medical assistance. (R.55:7-8, 17). Thus, one reasonable alternative would have been to note all of the above, conclude that no further action was warranted, and to act accordingly. *See* ***id.***

Similarly, in ***Maddix***, the court stated that rather than invasively searching every room of the house for some third party they believed may have been in the residence, they simply could have asked the occupants they did find whether anyone else was in there, and if they weren't satisfied with the responses they received, they could have separated and separately probed the issue with each of the two occupants

further. ***Maddix***, 348 Wis.2d 179, ¶36.

Here, the defense proposed all of the following alternative courses of action which would not have involved a warrantless incursion into the curtilage of Kettlewell's home: (1) the officer could have gone back to the front door after seeing the young female and continued knocking, which was made more reasonable by the fact that the officer now knew that a person was inside and awake, and also aware of his presence there, (R.20:8-9); (2) Deputy Huth could have called Troy again to clarify the situation, (R.20:9); (3) Deputies Olig and Schuh could have asked dispatch or Huth if there were any other available phone numbers, (R.20:9); (4) Schuh could have upon sighting the half-naked girl yelled to her that he was a law enforcement officer. (R.20:9).

Any one of the above proposed alternatives would have been at least as reasonable and more importantly, effective, as the alternatives this court found to be reasonable and at least potentially effective in ***Ultsch*** and ***Maddix***, and moreover, in light of the fact that Deputy Olig was in fact aware that dispatch had been attempting to get alternate numbers which might be used to get hold of Kettlewell, alternative (3) above would certainly have been more reasonable than a warrantless sojourn into the most intimate areas of Kettlewell's home. (R.56:13-14). As such, the circuit court erred when it found that none of Kettlewell's proposed alternative courses of action were reasonable in comparison to a warrantless penetration of Kettlewell's curtilage, and this fourth and final sub-factor, like the other three, cuts strongly against a finding that even if the police were engaged in a bona fide community caretaker action, they executed the action reasonably.

* * *

In light of the above discussion of each of the four sub-factors to be analyzed and weighed when determining whether a community caretaker action, even if bona fide and supported by an objectively reasonable basis to believe that someone was in need of police assistance, was exercised reasonably, it is clear that even if the police here were in fact engaged in a bona fide community caretaker action, the manner in which they chose to conduct the action was unreasonable. This is so

because each of the four sub-factors, as discussed above, compels a finding that the public interest in having the police act as community caretakers under these circumstances was outweighed by Kettlewell's countervailing, and in the context of his home and its curtilage, very strong interest in avoiding the intrusion such an action represented. *See* ***Ultsch***, 331 Wis.2d 242, ¶12 (quoting ***Pinkard***, 331 Wis.2d 242, ¶16); *see also* ***Maddix***, 348 Wis.2d 179, ¶35 (requiring that a community caretaker action involving a home be analyzed with greater vigor and skepticism than one involving a vehicle due to the heightened expectation of privacy in one's home). The circuit court's conclusion to the contrary was therefore erroneous and should be reversed by this court.

CONCLUSION

For the reasons discussed above, the defendant respectfully requests that this court reverse the judgment, reverse the order denying the motion to suppress, and remand to the circuit court for further proceedings with instructions that the circuit court shall grant his motion to suppress.

Respectfully submitted 8/6/18:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,339 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the

printed form of the brief filed as of this date.

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

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