STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2020AP1559-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LAVERNE WARE, JR.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN DODGE COUNTY CIRCUIT COURT, THE HONORABLE BRIAN A. PFITZINGER, PRESIDING

RESPONSE BRIEF OF STATE OF WISCONSIN

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INTRODUCTION

A jury convicted Laverne Ware, Jr., of first-degree intentional homicide and other crimes. He challenges a law enforcement officer's entry into an attached garage at Ware's shared residence, where the officer found the homicide victim's body in a pickup truck. The circuit court held that the entry into the garage was lawful because the officer was acting reasonably as a community caretaker.

This Court should affirm on three independent grounds. First, the circuit court's community caretaker rationale is sound. The officer entered the garage to see if someone needed urgent medical care after a citizen informant called 911 and reported seeing a large amount of blood in the garage. Second, the officer entered the garage with a co-tenant's valid consent. The co-tenant was the citizen informant who told the officers that he lived at that house, and he opened the garage door when an officer asked him to show where he had seen the blood. Third, if the entry into the garage was unlawful, Ware is not entitled to suppression of evidence because the officers would have inevitably discovered the body with a search warrant. The officer was planning to apply for a search warrant before he decided to enter the garage pursuant to his community caretaker role. The officer would have received a warrant had he applied for one because the citizen informant's statements and other facts together created probable cause.[1]

[1] The circuit court addressed only the community caretaker rationale. This Court may affirm based on reasoning that the respondent did not raise in the circuit court. *State v. Abbott*, 2020 WI App 25, ¶ 24 n.6, 392 Wis. 2d 232, 944 N.W.2d 8.

ISSUES PRESENTED

1. Was a law enforcement officer reasonably exercising his community caretaker role when he entered a garage and found a homicide victim's body?

The circuit court answered "yes."

This Court should answer "yes."

2. Did the officer lawfully enter the garage with a co-tenant's consent?

The circuit court did not address this issue.

This Court should answer "yes" if it reaches this issue.

3. If the officer unlawfully entered the garage, does the inevitable discovery doctrine preclude suppression of the evidence?

The circuit court did not address this issue.

This Court should answer "yes" if it reaches this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this appeal can be decided based on the briefs and well-established legal principles.

STATEMENT OF THE CASE

Vernon Mickey called 911 to report a possible homicide at 100 We Go Trail in the City of Fox Lake. (R. 191:2.) He reported seeing a large amount of blood in the garage at that address, but he did not see a body. (R. 191:2.) Mickey told dispatch that he lived at that address with his girlfriend, Marjorie Jones, and with Jones's son, Laverne Ware. (R. 191:2.) Mickey said that he was at a Kwik Trip gas station one block from his house. (R. 191:2.)

Police officer Jason White went to the Kwik Trip and spoke to Mickey. (R. 566:11.) Sheriff's deputy Kevin Homan met them there after he briefly spoke to Jones at 100 We Go Trail. (R. 566:11.) Mickey said that he and Jones lived at 100 We Go Trail. (R. 563:203.) Mickey also said that Ware and a gun were present at that house. (R. 563:191–92, 202.) Mickey said that Ware and Ware's girlfriend, Sesalie Dixon, had been involved in an altercation and she was missing.[2] (R. 565:35.) Mickey said that he had last seen Dixon the previous night, she was alive then, and he had not seen or heard from her since then. (R. 563:190.) Mickey said he had seen blood in the garage at 100 We Go Trail below or next to a truck, he thought the blood might have been Dixon's, and he thought Ware might have harmed her. (R. 563:239.) Mickey said that he had seen blood in the garage while standing in the kitchen looking through a window. (R. 563:200–01.)

Mickey freely rode in the backseat of Officer White's squad car to return to 100 We Go Trail because it was cold outside. (R. 124:1–2; 563:193.) Mickey "was not under arrest or anything." (R. 563:205.) While standing outside the house, Mickey confirmed that he had seen the blood through a window inside the house, not from outside. (R. 565:76.)

Mickey entered the house when his girlfriend, Jones, let Officer White, Deputy Homan, and Sergeant Joseph Nicholas inside. (R. 191:3–4; 563:154–55.) Jones, Mickey, and the officers stood in the living room near the front door area. (R. 563:233.)

During law enforcement's two contacts with Jones, she repeatedly alleged that Ware was not at the residence, deferring and then later refusing consent to search the residence. When Deputy Homan first spoke with Jones before

[2] The record, including the circuit court's statements, sometimes refers to Sesalie Dixon as Sesalie Johnson. (*E.g.*, R. 563:178; 566:15.) In this brief, the State refers to her as "Dixon."

Mickey's return to the house from Kwik Trip, Jones said that Ware had "just left" her house and that Ware lived on State Street. (R. 566:10.) Homan asked Jones if he could quickly walk through the house during this initial contact, and Jones said that he could do so when Mickey comes back. (R. 563:167.) Jones again said that Ware was not at her house when Mickey and the officers were in the house upon returning from Kwik Trip. (R. 566:12.) Jones then refused to give consent to search the house. (R. 566:12.)

The officers informed Jones and Mickey that they would have to go outside so the officers could secure the house while they sought a search warrant. (R. 566:12.) Shortly before that, Sheriff Dale Schmidt asked Sergeant Nicholas over the phone whether there were any community caretaker concerns, and Nicholas said he would "use that." (R. 566:12.)

While the officers were still inside the house talking to Jones, Ware suddenly appeared in a hallway and walked toward the officers with his arms extending outward in a cross formation while wearing a mink coat. (R. 565:79; 566:12–13.) Ware told the officers, "I am the one you are looking for." (R. 566:13.) The officers thought that Ware's sudden appearance at the house—after Jones had repeatedly said that Ware was not there—corroborated Mickey's statement that a homicide might have occurred at that house. (R. 566:13.) Officer White handcuffed Ware and put him in the back of a squad car. (R. 563:160, 195) As Officer White was taking Ware outside, Ware said to Jones, "Mom I love you, no matter what happens." (R. 124:2; 191:4.)

Sergeant Nicholas walked to the kitchen area with Mickey. (R. 565:84.) Nicholas asked Mickey to show him where he had seen the blood from. (R. 191:4; 563:240; 565:52–53, 62.) Mickey responded by walking to a windowless metal door that led into the garage, unlocking the dead bolt, and opening the door. (R. 191:4; 563:241; 565:62.) There was a screen door behind the metal door on the same door frame.

(R. 565:63.) Nicholas walked up to the doorway, looked through the screen door, and saw blood under the truck but did not see a body. (R. 563:241.) Nicholas entered the garage, tried to open the truck door, and saw the victim's body through the truck window. (R. 563:241.) Nicholas then obtained a search warrant and searched the home with detectives. (R. 191:1.)

The State charged Ware with one count of first-degree intentional homicide, one count of hiding a corpse, one count of incest,[3] and two counts of possession of a firearm by a felon. (R. 1; 17; 246.)

Ware filed a motion to suppress the evidence stemming from the search of the garage. (R. 99.) The circuit court held an evidentiary hearing on the motion. (R. 563; 565.) The court denied the motion, reasoning that Sergeant Nicholas was lawfully acting as a community caretaker when he entered the garage and found Dixon's body. (R. 566:8–21.)

The case went to trial, and a jury found Ware guilty of all five counts. (R. 527.)

Ware appeals his judgment of conviction. (R. 545.)

STANDARD 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. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis. 2d 443, 875 N.W.2d 567.

[3] Ware had been in a boyfriend/girlfriend relationship with Dixon, his cousin. (R. 1:8.)

ARGUMENT

I. The officer lawfully entered the garage pursuant to his community caretaker role.

A. Police officers may perform searches without a warrant when they are reasonably acting as community caretakers.

The Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches. *State v. Rome*, 2000 WI App 243, ¶ 10, 239 Wis. 2d 491, 620 N.W.2d 225. A warrantless search is unreasonable unless an exception to the warrant requirement applies. *Id.* One exception is the community caretaker doctrine. *Id.* ¶ 11.

"[A] police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." *Matalonis*, 366 Wis. 2d 443, ¶ 30 (citation omitted). A court thus "need not invalidate a warrantless search of a residence if the search was conducted pursuant to a police officer's reasonable exercise of a bona fide community caretaker function." *Id.* (citation omitted). The State has the burden of showing that an officer's conduct was a reasonable community caretaker function. *Id.* ¶ 31.

When the State relies on the community caretaker doctrine to justify a search, a court must consider (1) whether a search occurred; (2) if so, whether the police conduct was a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion on the individual's privacy. *Id.*

B. The community caretaker doctrine allowed Sergeant Nicholas to enter the garage to look for a possibly seriously injured person.

Sergeant Nicholas performed a search by entering the garage, so only the second and third prongs of the analysis are relevant.

1. Under the first prong, Sergeant Nicholas performed a search by entering the garage.

Under the first prong of the community caretaker analysis, the State concedes that Sergeant Nicholas performed a search when he entered the garage. *See Bies v. State*, 76 Wis. 2d 457, 462–63, 251 N.W.2d 461 (1977); *State v. Davis*, 2011 WI App 74, ¶ 12, 333 Wis. 2d 490, 798 N.W.2d 902.

2. Under the second prong, Sergeant Nicholas performed a bona fide community caretaker function by entering the garage.

a. Legal principles

Under the second prong of the analysis, a court considers the totality of the circumstances as they existed at the time of the police conduct at issue. *State v. Kramer*, 2009 WI 14, ¶ 36, 315 Wis. 2d 414, 759 N.W.2d 598. Thus, a court does not consider hindsight under the second prong. *Matalonis*, 366 Wis. 2d 443, ¶¶ 35–36. A court may consider a police officer's subjective intent when evaluating whether the officer acted as a bona fide community caretaker. *Kramer*, 315 Wis. 2d 414, ¶ 36. But the officer has met the standard for acting as a bona fide community caretaker if he has provided an objectively reasonable basis for a community caretaker function. *Id.* An officer's community caretaker function and law enforcement function are not mutually

exclusive. *Id.* ¶ 39. An officer may serve both roles simultaneously. *Id.* ¶ 32. So, an officer's subjective law enforcement concern does not negate a reasonable exercise of the community caretaker function. *State v. Gracia*, 2013 WI 15, ¶ 19, 345 Wis. 2d 488, 826 N.W.2d 87.

b. Application of legal principles

"The second step [of the analysis] requires determining whether the officers had an objectively reasonable basis to believe [someone] was hurt and in need of assistance, so that they were exercising a bona fide community caretaker function" by entering the garage. *Gracia*, 345 Wis. 2d 488, ¶ 17.

Here, Sergeant Nicholas performed a bona fide community caretaker function by entering the garage to search for a possibly severely injured person. Sergeant Nicholas was concerned that there potentially was a person in the garage who needed aid. (R. 563:239.) Nicholas checked the garage to see if he would need to render first aid. (R. 565:46.) Sheriff Dale Schmidt was also concerned about the potential victim's safety and wondered if the person was alive or not. (R. 563:213.)

Mickey's statements to law enforcement officers reasonably led them to believe that someone was seriously hurt and in need of help. Mickey called the Dodge County Sheriff's Department to report a possible homicide. (R. 566:11, 14.) Mickey reported that he had seen "a large amount of blood" in the garage. (R. 566:11.) The presence of a lot of blood heavily weighs in favor of a bona fide community caretaker function. *See Matalonis*, 366 Wis. 2d 443, ¶¶ 39, 49, 53–54. Mickey also reported that Ware and Dixon "had been arguing and recently going at it and that they were having problems of late." (R. 566:11.) In other words, Ware and Dixon "had been involved in a domestic dispute" (R. 566:15), or an "altercation" (R. 563:240; 565:35–36). Mickey said that he had

not seen Dixon since about 8:00 p.m. the previous evening. (R. 566:15.) Mickey said that he thought the blood might have been Dixon's and that Ware might have harmed her. (R. 563:239.) If Mickey was telling the truth, then the officers could reasonably think that someone—most likely Dixon—was seriously hurt in the garage.

The officers could reasonably think that Dixon was seriously hurt, rather than dead. This Court is "concerned with the extent of the officers' knowledge at the time they conducted the search, not after." *Matalonis*, 366 Wis. 2d 443, ¶ 35. Before entering the garage, the officers had a reasonable basis to think that the injured victim might still be alive and in need of help. As the circuit court found, "the sheriff's deputies had not been made aware of the nature and or the extent of the injuries that may or may not have been received by Ms. [Dixon] or some other individual in the garage." (R. 566:15–16.) And "the sheriff's deputies were not aware of who may have been injured, the extent of the injury, and, most importantly, whether in fact the injury had resulted in death or perhaps great bodily harm." (R. 566:16.)

Those factual findings are not clearly erroneous. Although Mickey reported a possible homicide, he told dispatch that he had not seen a body. (R. 190:4.) Mickey never told Deputy Homan that he had seen a body. (R. 563:178.) And Mickey told Officer White that he had not gone into the garage to investigate the blood and had not seen a body. (R. 563:200–01.)

The officers also had a reasonable basis to believe Mickey under the totality of the circumstances. Mickey was credible because he was a citizen informant who reported seeing something suspicious. Ware's presence at the house corroborated Mickey's statement. Jones displayed a consciousness of guilt by lying to the officers about Ware's whereabouts. Ware also showed a consciousness of guilt when he approached the officers in the house.

The officers could reasonably think that Mickey was being truthful because he was a citizen informant. "[W]hen an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case." *State v. Silverstein*, 2017 WI App 64, ¶ 14, 378 Wis. 2d 42, 902 N.W.2d 550 (alteration in original) (citation omitted). "Citizen informants are generally considered among the most reliable [of all informants]. These are informants who happen upon a crime or suspicious activity and report it to police." *State v. Anderson*, 2019 WI 97, ¶ 38, 389 Wis. 2d 106, 935 N.W.2d 285 (citation omitted). Here, Mickey was a reliable citizen informant because he called law enforcement to report a possible homicide, met with officers in-person, told them his name, said that he had seen a lot of blood in the garage, provided the home's address, and said he lived there. (R. 190:1; 566:9, 11.) Because Mickey disclosed his identity and reported a possible crime, the officers could presume that he was being honest.

Mickey's apparent concern also supported Sergeant Nicholas's decision to enter the garage. Courts often highlight the presence or absence of a civilian's concern in community caretaker cases. In *State v. Ultsch*, police entry into the defendant's home and bedroom was unreasonable because, among other factors, the defendant's "boyfriend expressed no concern for her condition" when an officer spoke to him outside the house. 2011 WI App 17, ¶ 25, 331 Wis. 2d 242, 793 N.W.2d 505. In *State v. Pinkard*, by contrast, police reasonably entered the defendant's home after receiving an anonymous tip that the defendant appeared to be sleeping near drugs. 2010 WI 81, ¶¶ 32, 35–36, 327 Wis. 2d 346, 785 N.W.2d 592. And in *Gracia*, police lawfully entered the defendant's bedroom in part because "Gracia's brother appeared concerned about Gracia's safety." 345 Wis. 2d 488,

¶ 22. Here, Mickey appeared concerned because he called 911 to report a possible homicide, accompanied officers back to the house, and opened the door into the garage. The deputies were not acting on a hunch based solely on their observations. They were acting based on statements that they received from a concerned citizen informant. This fact strongly supports Sergeant Nicholas's search.

Other facts corroborated the officers' belief that Mickey's concerns were valid. While speaking to Officer White at Kwik Trip, Mickey said that Ware was at the house where Mickey had seen the blood. (R. 563:191–92.) After Mickey accompanied officers to the house from the Kwik Trip, the officers went inside the house and saw Ware there. (R. 566:11–13.) Sergeant Nicholas thought that Ware's presence at the house corroborated Mickey's statements. (R. 563:243–44.) "Because an informant is right about some things, he is more probably right about other facts." *State v. Robinson*, 2010 WI 80, ¶ 27, 327 Wis. 2d 302, 786 N.W.2d 463 (citation omitted). Because Mickey was right about Ware being present at the house, the officers could reasonably believe that Mickey was also right that Ware had likely seriously injured someone who was in the garage.

Deception by Ware's mother, Jones, also bolstered the officers' cause for concern. Jones told Deputy Homan multiple times that Ware was not present at the house, including when officers returned to the house with Mickey. (R. 566:10, 12–13.) After Ware revealed his presence to the officers, they could reasonably infer that Jones had lied to them about Ware's presence to help protect her son from getting into legal trouble. Lying to police reasonably implies a consciousness of guilt. *See State v. Kutz*, 2003 WI App 205, ¶ 72, 267 Wis. 2d 531, 671 N.W.2d 660.

Ware also showed a consciousness of guilt, which further supported the officers' concern that someone in the garage was seriously hurt. When Ware approached the

officers inside the house, he walked toward them with his arms straight out in a cross formation. (R. 565:79.) This gesture suggested that he was offering to be handcuffed. He was wearing a mink coat, which suggested that he was prepared to be arrested and taken outside, given that it was "extremely snowy" that day. (R. 566:9, 12–13.) Ware said to the officers, "I am the one you are looking for." (R. 566:13.) And he said to Jones, "Mom I love you, no matter what happens." (R. 124:2.) Ware's statements and gestures to the officers were consistent with Mickey's concern that Ware had committed a violent act against his girlfriend, resulting in a lot of blood in the garage.

Information about Ware also supported the officers' reasonable belief that Ware had hurt someone. Mickey told the officers that Ware had been drinking. (R. 566:14.) An officer may "infer that a person under the influence may be more likely to commit an impulsive violent act . . . than one who is sober." *State v. McGill*, 2000 WI 38, ¶ 31, 234 Wis. 2d 560, 609 N.W.2d 795. Law enforcement also knew that Ware was a convicted felon who was known to carry a gun, and there was a gun at the house where Mickey had seen a lot of blood. (R. 190:2; 563:202, 232; 566:15.) Those facts are significant because "someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use." *State v. Roundtree*, 2021 WI 1, ¶ 48, 395 Wis. 2d 94, 952 N.W.2d 765 (citation omitted).

Although the facts already discussed in this section created a bona fide community caretaker function, the State highlights one more fact: Sergeant Nicholas saw blood in the garage as he looked through a screen door into the garage. (R. 191:4; 563:241; 565:63.) Nicholas did not perform a search for Fourth Amendment purposes by looking through the doorway into the garage. *See Schill v. State*, 50 Wis. 2d 473, 477, 184 N.W.2d 858 (1971) (holding a "police officer's unobstructed view of the heroin packets through the open

door did not constitute a search"). Looking into a home's curtilage, without entering it, is not a search. *See Collins v. Virginia*, 138 S. Ct. 1663, 1675 (2018). By seeing the blood before entering the garage, Nicholas verified the accuracy of Mickey's report. This Court should rely on this fact, although there was a bona fide community caretaker function without it.

c. Ware's arguments are not persuasive because they essentially ignore the blood in the garage.

Ware argues that the community caretaker doctrine did not justify Sergeant Nicholas's entry into the garage. This Court should reject his arguments because he relies on inapposite case law and largely ignores the blood that Mickey reportedly saw in the garage.

Ware's reliance on *State v. Maddix*, 2013 WI App 64, 348 Wis. 2d 179, 831 N.W.2d 778, is misplaced because that case is highly distinguishable. In *Maddix*, two police officers responded to a reported domestic disturbance, heard a woman yelling, and entered the residence. *Maddix*, 348 Wis. 2d 179, ¶¶ 2–4. Maddix told an officer that he and his girlfriend were the only people in the residence, and his girlfriend said she was the person who had been screaming. *Id.* ¶¶ 5–6. An officer then performed a "protective sweep" of the residence and found marijuana plants. *Id.* ¶¶ 7–8.

This Court held that the community caretaker doctrine did not justify the search. *Id.* ¶ 1. This Court distinguished *Pinkard* and *Gracia*, two cases "where another person indicated concern for the well-being of one or more persons." *Id.* ¶ 27. Unlike in *Pinkard* and *Gracia*, no evidence in *Maddix* "directly corroborated the officers' theory that another person was present in the apartment, who was either a crime victim or a perpetrator." *Id.* The officers did not have "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.

Here, unlike in *Maddix*, the officers had a reasonable basis to think that someone was present in the garage and in need of medical help. Mickey reported seeing "a large amount of blood" in the garage (R. 566:11), and "[t]he blood . . . came from somewhere, obviously." *Matalonis*, 366 Wis. 2d 443, ¶ 49. Yet there was no indication that the three occupants of the house—Mickey, Jones, and Ware—had lost a lot of blood. (R. 566:18.) The officers thus had a reasonable basis to think that a fourth person had lost the blood that Mickey had seen in the garage.

In arguing that the officers lacked a bona fide community caretaking function, Ware focuses on what the officers and Mickey did not hear or see, glossing over the large amount of blood that Mickey reported seeing. (Ware's Br. 11–15.) Ware characterizes Mickey's statements as "uncorroborated." (Ware's Br. 12.) But the officers could rely on Mickey's statements even if they were uncorroborated. "[A]n *anonymous* informant . . . is considered reliable if police are able to corroborate details in the informant's tip." *Anderson*, 389 Wis. 2d 106, ¶ 40 (emphasis added). As explained, Mickey was a citizen informant, not an anonymous informant, because he met with police in-person and provided his name and address. "Citizen informants are generally considered among the most reliable." *Id.* ¶ 38. "[I]f an informant is more reliable, there does not need to be as much detail in the tip or police corroboration in order for police to rely on that information . . . ." *State v. Miller*, 2012 WI 61, ¶ 32, 341 Wis. 2d 307, 815 N.W.2d 349.

In any event, officers corroborated part of Mickey's statements. As discussed above, Mickey correctly told police that Ware was at the house where Mickey had seen blood in the garage, whereas Jones falsely told police multiple times

that Ware was not there. "[P]olice corroboration of innocent, although significant, details of an informant's tip lend[s] reliability to the informant's allegations of criminal activity." *Robinson*, 327 Wis. 2d 302, ¶ 27. Ware's presence at the house was a significant detail of Mickey's tip because Mickey thought that Ware was the culprit behind the large amount of blood in the garage. And Ware's consciousness of guilt, discussed above, also helped corroborate Mickey's statements. Mickey was a reliable citizen informant.

In short, Sergeant Nicholas exercised a bona fide community caretaker function when he entered the garage. The circuit court correctly determined that the facts of this case "clearly meet the second prong of the community caretaker test and that the actions of Sergeant Nicholas were in fact justified." (R. 566:16.) It would have been "a sign of poor police work" had the officers "not search[ed] behind [the garage] door" because there could have been "a bleeding body or a person in need of medical assistance behind that door." *Matalonis*, 366 Wis. 2d 443, ¶ 53 (citation omitted).

3. Under the third prong, the public interests outweighed Ware's privacy interests.

Under the third prong of the analysis, a court considers four factors: (1) "the degree of the public interest and the exigency of the situation"; (2) "the attendant circumstances surrounding the seizure, 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." *Kramer*, 315 Wis. 2d 414, ¶ 41 (citation omitted). The balance of these factors justifies Sergeant Nicholas's entry into the garage.

a. The public's substantial interest in ensuring safety supports the reasonableness of the entry into the garage.

"The public has a significant interest in ensuring the safety of a home's occupants when officers cannot ascertain the occupants' physical condition and reasonably conclude that assistance is needed." *Matalonis*, 366 Wis. 2d 443, ¶ 59 (citation omitted). As explained above, the officers had a reasonable belief that someone in the garage was seriously hurt. The public interest weighed in favor of Sergeant Nicholas's entry into the garage.

So too did the exigency of the situation. Mickey reported seeing "a large amount of blood" in the garage. (R. 566:11.) As noted earlier, "[t]he blood . . . came from somewhere, obviously." *Matalonis*, 366 Wis. 2d 443, ¶ 49. The officers had no reason to think that the three occupants of the house—Mickey, Jones, and Ware—had lost a lot of blood. (R. 566:18.) The deputies thus had a reasonable basis to think that the blood had come from an injured person who was in the garage. If someone "had been seriously injured" in the garage, then "quick medical assistance would have been necessary." *Matalonis*, 366 Wis. 2d 443, ¶ 59 (quoting *Gracia*, 345 Wis. 2d 488, ¶ 25).

The circuit court rightly determined that "[c]learly the circumstances presented here present exigent concerns." (R. 566:18.) The court pointed to Mickey's observation of a "large amount of blood," which could reasonably lead an officer to believe "that an individual has been significantly injured and may be in need of medical assistance." (R. 566:18.)

Ware argues that "Mickey's uncorroborated claims did not imply an ongoing situation but instead referred to a possible crime that occurred in the past tense." (Ware's Br. 16.) But the injured person's need for urgent medical care

could have been ongoing even though the crime was not ongoing.

Mickey further argues that "[t]here was no cry for help. There were no signs of a struggle." (Ware's Br. 16.) But an injured person in the garage could have been unconscious or too weak to loudly cry for help. And Mickey did not report a struggle inside the house. A serious injury could have occurred in the garage, or a person could have been injured somewhere else and then hauled to the garage. A cry for help or sign of a struggle would have made the situation more exigent, but there was still exigency without these things.

Ware also argues that the situation was not urgent because Deputy Homan initially arrived at the house and then left to speak with Mickey at a Kwik Trip. (Ware's Br. 16.) But the legal question is whether the officers had an objectively reasonable basis for the community caretaker function, not whether they always subjectively thought they did. *See Gracia*, 345 Wis. 2d 488, ¶ 19. It was reasonable for Homan to go talk with Mickey before returning to the house. Homan was initially confused because of the use of the names "Laverne or Vern," which could have referred to Laverne Ware or Vernon Mickey. (R. 566:9–10.) And Ware's mother, Jones, told Homan that Ware lived somewhere else. (R. 566:10.) Homan was confused about where the possible homicide had occurred, and he thought that it would have happened at Ware's house at a different address. (R. 563:151; 566:10–11, 13.) The officers reasonably waited to enter the garage until Mickey accompanied them to the house and confirmed that it was the one where he had seen the blood.

In short, the public interest and exigency of the situation heavily weighed in favor of Sergeant Nicholas's entry into the garage.

b. The attendant circumstances support the reasonableness of the officer's conduct.

The time, location, and degree of force used support the reasonableness of the search. The search occurred in the afternoon, it was limited to the garage where a citizen informant had reportedly seen a large amount of blood, and the officers did not use much force.

First, the time of the search supports its reasonableness. Sergeant Nicholas went to the garage area at 4:36 p.m. (R. 566:14.) He did not enter the house and garage in the middle of the night. Besides, when officers respond to a concerned citizen's phone call about a person's welfare, they do not have control over the time or location of the search. *See Matalonis*, 366 Wis. 2d 443, ¶ 61. The officers here responded to Mickey's call reporting a lot of blood in the garage. (R. 566:9, 11.) They did not have control over the time of Mickey's 911 call.

Second, the officers limited the location of their search and did not forcibly enter the house or garage. When the officers returned to the house with Mickey after meeting him at Kwik Trip, Jones let them inside. (R. 191:3; 563:155; 565:32–33.) Sergeant Nicholas eventually went into the kitchen and asked Mickey to show him where he had seen the blood from. (R. 563:240; 565:52–53, 62.) Mickey opened the metal windowless door that led into the garage. (R. 563:241; 565:52.) Nicholas looked through a screen door and saw blood in the garage under a truck. (R. 563:241.) Nicholas next went into the garage, tried to open the truck door, and saw the victim's body through the truck window. (R. 563:241.)

Our supreme court has relied on similar facts in community caretaker cases. In one case, the court "emphasize[d]" that the officers had entered the defendant's home with consent, and the issue was merely whether they

had reasonably entered specific rooms without consent. *Matalonis*, 366 Wis. 2d 443, ¶ 60. The court further noted that the officers "searched only in areas where there was blood found and they didn't search drawers or places where obviously people could not hide." *Id.* ¶ 61 (citation omitted). The attendant circumstances were also reasonable in *Gracia* because "[t]he police entered Gracia's home on the consent of his brother, Jaime Gracia, and did not enter Gracia's bedroom to check on him until his brother broke open Gracia's door. The police were escorted by a seemingly concerned co-tenant the entire time they were in Gracia's home." *Gracia*, 345 Wis. 2d 488, ¶ 26 (footnote omitted). "Essentially, the officers found themselves in front of an open door and walked across the threshold to check on someone they thought was injured from a serious car accident, which was not unreasonable." *Id.*

The attendant circumstances here were like those in *Matalonis* and *Gracia*. Like in those two cases, here the officers entered the house with consent. Like in *Matalonis*, here the warrantless search was limited to a place where an injured person could be hiding and where there was blood (the garage). Like in *Gracia*, here a third party (Mickey) opened the metal door that led into the garage, and Sergeant Nicholas crossed the threshold into the garage to look inside the truck from which blood had dripped. Nicholas "didn't search the kitchen." (R. 565:52.) Nicholas stopped searching when he found Dixon's body in the truck. (R. 563:241; 565:64.) Nicholas then secured the home by having Mickey and Jones taken outside, he checked the first floor of the house for anyone else that might be hiding, and then he obtained a search warrant. (R. 191:4–5.) Nicholas did not rummage through the house or the garage without a warrant. He merely walked into the garage and looked through a window on a truck that was dripping blood. As the circuit court noted, this search involved "a minimal amount of intrusion." (R. 566:20.)

Third, the officers did not use much force against the residents of the house. As the circuit court explained, "It does not appear that there was any significant amount of force displayed other than in fact the defendant was handcuffed and taken from the house. No weapons were brandished." (R. 566:19.) It further noted that "[n]o harsh words were used. This appeared to be a civil discussion between Ms. Jones and the officers and ultimately the defendant and the officers." (R. 566:19.) It was reasonable for the officers to handcuff Ware and remove him from the house, given that Mickey had called 911 to report that Ware had possibly killed someone.

In short, the attendant circumstances strongly supported the reasonableness of Sergeant Nicholas's entry into the garage.

c. The automobile factor is irrelevant.

Ware challenged the search of a garage, not the search of an automobile. (R. 566:19.) So, "[t]he third factor is irrelevant because the search was not of an automobile." *Gracia*, 345 Wis. 2d 488, ¶ 27.

d. The lack of viable alternatives to entry supports the reasonableness of the search.

The officers did not have practical alternatives to entering the garage when Sergeant Nicholas did. As the circuit court noted, obtaining a search warrant before entering the garage "would necessitate significant delay and potentially cause the injured person to suffer death or great bodily harm or injuries may be exaggerated." (R. 566:20.)

Ware's proposed alternatives were not feasible. He suggests that the officers could have attempted to contact Dixon by calling her phone or trying to locate her at her home. (Ware's Br. 16.) But, as the circuit court found, the officers did

not know "who may have been injured" or "who the blood was from." (R. 566:16, 18.) As explained above, the officers knew that Mickey had reportedly seen a large amount of blood in the garage, the blood had come from someone, and the three occupants of the house showed no sign of massive blood loss. Even if the officers could have contacted Dixon by phone and confirmed that she was okay, they merely would have ruled out that the blood had come from Dixon. The officers then would have had a reasonable basis to think that the large amount of blood had come from some unidentified other person. Contacting Dixon would not have eliminated the officers' community caretaking concern.

Ware also faults the officers for not contacting neighbors to see if they had heard gunshots or other noises. (Ware's Br. 16.) But the officers already had enough information from Mickey, a citizen informant, to know that someone had likely been seriously injured. The officers would have rightly been concerned even if neighbors had not heard gunshots or other similar noises. Perhaps the injured person was stabbed or bludgeoned, rather than being shot. After all, Mickey did not report a gunshot. Maybe the injured person was shot somewhere else and hauled to the garage. Possibly the injured person was shot in the garage with a relatively quiet gun, such as a .22-caliber gun, that neighbors likely would not hear. The absence of a noise complaint from a neighbor would not have eliminated the officers' concern after Mickey reported seeing a large amount of blood in the garage.

Moreover, talking to neighbors would have wasted time when the officers were dealing with an urgent situation. As noted above, if someone "had been seriously injured" and was lying in the garage, then "quick medical assistance would have been necessary." *Matalonis*, 366 Wis. 2d 443, ¶ 59 (quoting *Gracia*, 345 Wis. 2d 488, ¶ 25). It would have been poor police work for the officers to go door-to-door to see if neighbors could verify Mickey's concerns. The officers were

"permitted to assume that they [were] dealing with a credible person" because Mickey was a citizen informant who had personally seen a large amount of blood in the garage. *Silverstein*, 378 Wis. 2d 42, ¶ 14. "[T]he officers could have checked with [the] neighbors to determine whether they had seen [or heard] anything suspicious; however, this was not a feasible option here in light of the exigency perceived by the officers." *Pinkard*, 327 Wis. 2d 346, ¶ 58.

Ware also argues that "[t]he officers could have yelled to see if anyone responded with a cry for help." (Ware's Br. 16.) But, "had there been no answer, the officers would have had the same cause for concern. An injured party on the other side of the door could be unconscious, incapacitated, or dead." *Matalonis*, 366 Wis. 2d 443, ¶ 65.

Ware also faults the officers for not asking him where Dixon was. (Ware's Br. 16–17.) However, "[g]iven their time constraints, and the fact that the officers 'would not have been required to accept at face value' [Ware's] responses, further questioning was not clearly an effective alternative to the route actually taken by the officers." *Matalonis*, 366 Wis. 2d 443, ¶ 64 (citation omitted). And, as already explained, the officers were not certain that Dixon was the person who had lost a lot of blood. Even if Ware could have somehow proven that Dixon was okay, the officers would have merely excluded Dixon as the source of the blood. But "[t]he blood . . . came from somewhere, obviously." *Id.* ¶ 49. Asking Ware about Dixon's whereabouts would not have eliminated the officers' concern that *someone* had lost a large amount of blood and was in the garage needing urgent medical care.

In sum, Sergeant Nicholas lawfully entered the garage pursuant to his community caretaker role. This Court may affirm on this basis.

II. Alternatively, the officer lawfully entered the garage with third-party consent.

If this Court concludes that Sergeant Nicholas did not lawfully enter the garage as a community caretaker, it should hold that he did so with Mickey's valid consent.

A. A law enforcement officer may perform a warrantless search with a third party's consent.

Consent is an exception to the Fourth Amendment's warrant requirement. *Rome*, 239 Wis. 2d 491, *Id.* ¶ 11. 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. *State v. Artic*, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 786 N.W.2d 430. The State must prove by clear and convincing evidence that consent was voluntary. *Id.* ¶ 32. A court looks at the totality of the circumstances to determine whether consent was voluntary. *Id.*

Police may rely on consent from a third party, i.e., someone besides the subject of the search, when the third party consents and has actual or apparent authority over the premises. *State v. Tomlinson*, 2002 WI 91, ¶¶ 22, 25, 254 Wis. 2d 502, 648 N.W.2d 367.

"The State bears the burden of proving by a preponderance of the evidence that the search and seizure falls within the third-party consent exception." *State v. St. Germaine*, 2007 WI App 214, ¶ 16, 305 Wis. 2d 511, 740 N.W.2d 148 (citation omitted).[4] A court considers the totality

[4] Some case law states that the burden of proof is clear and convincing evidence. *E.g.*, *State v. Tomlinson*, 2002 WI 91, ¶ 21, 254 Wis. 2d 502, 648 N.W.2d 367. The correct burden is the preponderance standard. *See United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974). Under either burden, the State has proven valid third-party consent here.

of the circumstances when determining whether a third party gave consent to search and whether that person had authority to do so. *See Tomlinson*, 254 Wis. 2d 502, ¶¶ 31, 37.

The State will now explain that (1) Mickey consented to a search of the garage, (2) this consent was voluntary, and (3) Mickey had actual or apparent authority to consent. The State will further explain that Jones' objection to a search did not invalidate Mickey's consent.

B. The officer lawfully entered the garage with Mickey's consent.

1. Mickey gave consent for the officer to search the garage.

"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.*

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.* The supreme court concluded that those facts supported the circuit court's finding that Phillips had consented to the entry of his bedroom. *Id.* at 197.

Here, like in *Tomlinson* and *Phillips*, Mickey gave consent for Sergeant Nicholas to enter the garage by opening the garage door. The context behind Mickey's opening the door strongly supports this conclusion. Mickey called 911 to report a possible homicide because he had seen "a large amount of blood in the garage." (R. 190:1; 191:3.) Officers met with Mickey at Kwik Trip to discuss his 911 call. (R. 566:11.) Although Mickey was "free to go," he rode in the backseat of a squad car to return to the house where he had seen the blood. (R. 563:193.) While standing outside the house, Mickey said that he had seen the blood from a window inside the house. (R. 565:76.) Mickey entered the house when Ware's mother, Jones, let the officers inside. (R. 191:3–4; 563:154–55.) Jones, Mickey, and the officers stood in the living room near the front door area. (R. 563:233.) Ware walked down a hallway toward the officers, and officers removed him from the home. (R. 563:238–39.) Sergeant Nicholas walked to the kitchen area with Mickey. (R. 565:84.) Nicholas asked Mickey to show him where he had seen the blood from. (R. 191:4; 563:240; 565:52–53, 62.) Mickey responded by walking to a metal door that led into the garage, unlocking the dead bolt, and opening the door. (R. 191:4; *see also* R. 563:241; 565:62.)

Those facts show that Mickey gave "non-verbal" consent for Sergeant Nicholas to enter the garage. *Tomlinson*, 254 Wis. 2d 502, ¶ 37. This conclusion is even stronger here than it was in *Tomlinson* and *Phillips* because the person who gave consent here (Mickey) was the same person who contacted law enforcement in the first place. This fact strongly indicates that Mickey *wanted* officers to enter the garage. There is no other rational explanation for why Mickey called 911 and told

officers that he thought a homicide victim was in the garage. Mickey's opening the garage door "could reasonably have been interpreted as an invitation" for Sergeant Nicholas to enter the garage. *Tomlinson*, 254 Wis. 2d 502, ¶ 37.

2. Mickey's consent was voluntary.

To determine whether a person's consent to search was voluntary, courts consider several "non-exclusive factors": "(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 (citations omitted).

Under that test, Mickey's consent to search the garage was voluntary. There is no indication that the officers used deception, trickery, threats, or punishments to get Mickey to open the garage door for Sergeant Nicholas. Mickey was very cooperative and led officers to the evidence. "[A] person's cooperation in leading law enforcement to evidence supports a determination of voluntary consent." *State v. Baric*, 2018 WI App 63, ¶ 34, 384 Wis. 2d 359, 919 N.W.2d 221 (citation omitted). Mickey cooperated by calling 911, speaking with officers at Kwik Trip, accompanying the officers back to the house, and opening the garage door. Further, Mickey was 57 years old when the searched occurred. (R. 191:1.) The fact that Mickey "was nearly 60 years old at the time of the search" weighs in favor of voluntariness. *Artic*, 327 Wis. 2d 392, ¶ 59.

Although the officers did not tell Mickey that he could refuse to give consent, this omission is "not fatal" to voluntariness. *Id.* ¶ 60. And Mickey likely understood that he could refuse, given that Mickey was present when Jones refused to give consent. (R. 191:3–4; 565:13–14, 91.)

The conditions preceding the search were cooperative and non-threatening. Jones was courteous, friendly, and cooperative other than her refusal to consent to a search. (R. 565:34–35.) Even Ware was cooperative and non-threatening. (R. 565:82.) To be sure, Officer White handcuffed Ware and put him in the back of a squad car (R. 563:160, 195), but this fact does not make Mickey's consent involuntary. Mickey had no reason to think that he was a suspect or that he would be handcuffed and detained if he refused to give consent to search the garage. Rather, Mickey said that he thought Ware had hurt or killed Ware's girlfriend. (R. 191:3; 563:239.) The officers indicated that they trusted Mickey by detaining Ware.

The officers' initial plan to secure the residence while seeking a search warrant did not invalidate Mickey's consent. It might have been a misrepresentation for the officers to state that they could secure the residence and force Jones and Mickey to wait outside while the officers obtained a warrant. *See State v. Kiekhefer*, 212 Wis. 2d 460, 473, 569 N.W.2d 316 (Ct. App. 1997). But "[a] genuine statement by law enforcement that they could procure a search warrant does not constitute a threat that renders consent involuntary." *Baric*, 384 Wis. 2d 359, ¶ 33. As explained more below in Argument Section III, Sergeant Nicholas planned on applying for a search warrant, but that plan changed when Ware revealed his presence to the officers. (R. 565:57–58, 61, 66.) Because the initial plan to seek a warrant was not a "baseless threat, . . . [t]his factor weighs in favor of voluntary consent." *Artic*, 327 Wis. 2d 392, ¶ 42 (citation omitted). At most, the facts in this paragraph are a neutral factor.

In sum, Mickey's consent to search the garage was voluntary.

3. Mickey had actual or apparent authority to consent to a search of the garage.

Police may rely on a third party's apparent authority "when the information available to the police officers at the time of the search or seizure would justify a reasonable belief that the party consenting had the authority to do so." *State v. Abbott*, 2020 WI App 25, ¶ 14, 392 Wis. 2d 232, 944 N.W.2d 8.

Mickey had actual or apparent authority to consent to a search of the garage because (1) Mickey lived at the residence; and (2) Jones's conduct established Mickey's shared authority over the residence.

First, Mickey told officers that he lived at the house where he had seen blood in the garage. (R. 190:1; 563:203.) Under the doctrine of third-party consent, "it is reasonable to recognize that any of the *co-inhabitants* has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *State v. Torres*, 2018 WI App 23, ¶ 17, 381 Wis. 2d 268, 911 N.W.2d 388 (emphasis added) (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)). "One who *shares a house* or room or auto with another understands that the partner may invite strangers—that his privacy is not absolute, but contingent in large measure on the decisions of another." *Id.* ¶ 18 (emphasis added) (citation omitted). Here, because Mickey was a cohabitant of the house where the search occurred, he had actual or apparent authority to consent to a search of the garage.

Second, other facts supported a reasonable belief that Mickey had actual or apparent authority to consent. When Deputy Homan first spoke to Jones, Jones said that Homan

could walk through the residence when Mickey comes back. (R. 563:167.) This statement bolstered the notion that Mickey lived there and that he had authority to escort police around the house to do a search. And there is no indication that Jones or Ware objected to Mickey's presence in the house, or that Jones said Mickey lacked authority to consent to a search of the garage. A person's failure to object to a third party's entry into a home supports a reasonable belief that the third party has common authority over the home. *See Torres*, 381 Wis. 2d 268, ¶ 20. Jones did not claim to have "a superior privacy interest" when Mickey opened the garage door for Sergeant Nicholas. *State v. St. Germaine*, 2007 WI App 214, ¶ 19, 305 Wis. 2d 511, 740 N.W.2d 148 (citation omitted).

In short, Mickey had actual or apparent authority to consent to a search of the garage.

C. Jones's objection to the search did not invalidate Mickey's consent.

Ware never objected to the search. Although Jones consented to law enforcement entering the house, she refused to consent to a search. (R. 566:12.) But Jones's refusal is irrelevant. Ware's failure to object to the search is key. Mickey's consent is valid as to Ware.

Georgia v. Randolph does not compel a different conclusion. Under *Randolph*, "a physically present inhabitant's express refusal of consent to a police search is dispositive *as to him*, regardless of the consent of a fellow occupant." *Georgia v. Randolph*, 547 U.S. 103, 122–23 (2006) (emphasis added). So, Jones's objection invalidated the search *as to Jones*, but it has no bearing on whether the search is valid *as to Ware*. Mickey's consent would be invalid as to Ware only if Ware had objected to a search while he was physically present in the house.

The *Randolph* rule does not apply where, as here, a defendant is present in a house, fails to object to a search, and then is removed from the house by law enforcement. *State v. St. Martin*, 2011 WI 44, ¶¶ 21–23, 27, 334 Wis. 2d 290, 800 N.W.2d 858; *State v. Pirtle*, 2011 WI App 89, ¶¶ 14–15, 334 Wis. 2d 211, 799 N.W.2d 492. In *St. Martin*, the defendant fell outside the scope of the *Randolph* rule because his girlfriend let police into his house, he did not object to the police entry or to a search, police arrested him and brought him outside, the girlfriend consented to a search of the attic, and the defendant first objected to the search while he was outside the house. 334 Wis. 2d 290, ¶¶ 9, 21–23, 27. That is, the search of the attic was valid under *Randolph* because the defendant was not physically present in the house when he objected. *Id.* ¶ 27. This Court reached a similar conclusion in *Pirtle*. There, the defendant's girlfriend "called 911 after she found blood and a dead body in the basement of her home." *Pirtle*, 334 Wis. 2d 211, ¶ 2. The girlfriend allowed police officers to enter the house. *Id.* ¶ 14. "When Pirtle was asked to wait outside, he did not object to the police being inside the home, nor did he say they could not search it." *Id.* This Court thus concluded that *Randolph* was "not on point." *Id.* "Unlike the situation in *Randolph*, Pirtle did not initially object to the police entering the home." *Id.* ¶ 15.

Under *St. Martin* and *Pirtle*, the *Randolph* rule does not apply here because Ware did not object to the officers' presence in the house or to a search while he was still in the house. In fact, the officers never asked Ware for consent to search. (R. 563:119.) Because Ware was "not invited to take part in the threshold colloquy, . . . he therefore does not fall within the rule stated in *Randolph*." *St. Martin*, 334 Wis. 2d 290, ¶ 27. *Randolph* is "not on point" because, when Ware was present in the house, "he did not object to the police being inside the home, nor did he say they could not search it." *Pirtle*, 334 Wis. 2d 211, ¶ 14.

Jones's objection does not trigger the *Randolph* rule as to Ware. This rule does not apply when the objecting person is someone besides the defendant. *State v. Lathan*, 2011 WI App 104, ¶¶ 13–16, 335 Wis. 2d 234, 801 N.W.2d 772. In *Lathan*, police officers went to the defendant's grandmother's house looking for him. *Id.* ¶ 4. The defendant's mother let the officers enter the house, told them to wait in the living room area, and went upstairs. *Id.* ¶ 5. The grandmother entered the living room and gave the officers consent to go upstairs to look for the defendant. *Id.* Officers found the defendant upstairs and arrested him. *Id.* The defendant unsuccessfully moved to suppress evidence that police found stemming from their warrantless entry into his home. *Id.* ¶¶ 6–7.

On appeal, this Court *rejected* the defendant's argument that, under *Randolph*, "his mother was a legitimate co-occupant of the home and had the authority to prevent police officers from proceeding up the stairway, despite his grandmother's consent." *Id.* ¶ 11. It explained that *Randolph* "narrowly dealt with disputed consent issues in the context of the subject of the arrest being physically present and personally objecting." *Id.* ¶ 13. *Randolph* did not address a situation where one tenant refuses consent to search, a second tenant gives consent, and a third tenant challenges the constitutionality of the search. *Id.* This Court concluded that *Randolph* did not apply because the defendant "was not present to object to the consent. [The mother], who did object, was not the subject of the search." *Id.* ¶ 16.

Under *Lathan*, Jones's objection to the search has no bearing on its constitutionality as to Ware. Although Jones "did object," she "was not the subject of the search." *Id.* Because Ware did not object to the search of the garage, it was "reasonable as to him." *Id.* ¶ 13 (quoting *Randolph*, 547 U.S. at 120).

The officers did not remove Ware from the house "for the sake of avoiding a possible objection." *Randolph*, 547 U.S. at 121. That is, they did not detain Ware as "a pretext to remove him from the premises so that police could search" without his objection. *St. Martin*, 334 Wis. 2d 290, ¶ 22. Three points compel this conclusion.

First, Ware "was detained and arrested validly in response to" Mickey's statement that Ware had possibly killed his girlfriend. *Martin*, 334 Wis. 2d 290, ¶ 22. This valid arrest undercuts any notion of a pretext for removing Ware from the house.

Second, Jones had told the officers that Ware did not live at her house. (R. 566:13.) The *Randolph* rule applies when there is "a physically present *inhabitant's* express refusal of consent to a police search." *Randolph*, 547 U.S. at 122 (emphasis added). Because the officers could reasonably think that *Randolph* did not apply to Ware, they did not remove him from the house as a pretext for avoiding a *Randolph* objection.[5]

Third, Sergeant Nicholas entered the garage pursuant to his community caretaker role, making the issue of consent irrelevant. (R. 208:2; 565:42, 66.) Consent and the community caretaker doctrine are two separate exceptions to the Fourth Amendment's warrant requirement. *Rome*, 239 Wis. 2d 491, ¶ 11. So, even if Ware had objected to a search—and even if the officers thought that Ware's objection would be binding under *Randolph*—the officers still could have reasonably thought that they could validly search the garage pursuant to their community caretaker role. The officers did not remove Ware from the house as a pretext for avoiding his objection to the search.

[5] Based on Ware's testimony at the suppression hearing, the State does not dispute that Ware has standing to challenge the search of the garage.

In sum, Sergeant Nicholas lawfully entered the garage pursuant to Mickey's consent. Mickey had actual or apparent authority to give consent, and Jones's objection did not invalidate Mickey's consent. This Court may affirm on this ground.

III. Suppression is not justified because the officers would have inevitably discovered the victim's body with a warrant.

If this Court concludes that Sergeant Nicholas unlawfully entered the garage, it should apply the inevitable discovery rule and affirm.

"Exclusion is a judicial remedy that can apply when the government obtains evidence as a result of a constitutional violation." *State v. Jackson*, 2016 WI 56, ¶ 46, 369 Wis. 2d 673, 882 N.W.2d 422. "However, exclusion is not an absolute, automatic remedy." *Id.* It instead "is the last resort." *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97.

"Under the inevitable discovery doctrine, 'evidence obtained during a search which is tainted by some illegal act may be admissible if the tainted evidence would have been inevitably discovered by lawful means.'" *Jackson*, 369 Wis. 2d 673, ¶ 47 (citation omitted). In *State v. Weber*, "a defendant argued that police officers conducted an unreasonable search when they listened to a cassette tape containing the defendant's confession that they obtained while taking inventory of his car's contents." *Id.* ¶ 56 (citing *State v. Weber*, 163 Wis. 2d 116, 121, 471 N.W.2d 187 (1991)). The court in *Weber* concluded that, "even assuming the officers conducted an illegal search by playing the tape, the facts demonstrated that the police 'would inevitably have obtained a warrant to play the tape' and discover its contents." *Id.* (quoting *Weber*, 163 Wis. 2d at 141). In *Jackson*, the court reaffirmed "the analysis applied by [the] court in *Weber*." *Id.* ¶ 66.

Here, under the reasoning of *Weber*, the officers would have inevitably discovered Dixon's body in the garage. Had Sergeant Nicholas not entered the garage when he did, the officers would obtained a search warrant and then found Dixon's body.

First, the officers would have applied for a search warrant had Sergeant Nicholas not found Dixon's body pursuant to a warrantless community caretaker search. Jones refused to give consent to search, insisting that the officers obtain a search warrant. (R. 563:179.) The officers then began the process of clearing the house to secure the scene while they applied for a search warrant. (R. 566:12.) The officers told Jones and Mickey that they would have to leave the house while the officers sought a search warrant. (R. 563:179–80.) Sergeant Nicholas told the sheriff that their plan was to secure the scene and contact the District Attorney's Office to try to get a warrant. (R. 565:59, 92–93.) When Ware revealed his presence to the officers, Jones was putting her shoes on so she could go outside. (R. 563:158–59; 565:82.) Sergeant Nicholas's plan was to get a warrant, but the plan changed when Ware revealed his presence at the house. (R. 565:57–58, 61, 66.) The plan to get a warrant changed because Ware's appearance corroborated what Mickey had said to dispatch. (R. 565:58.)

Second, the officers would have obtained a search warrant had they applied for one before entering the garage. "A search warrant may issue only on probable cause." *State v. Romero*, 2009 WI 32, ¶ 16, 317 Wis. 2d 12, 765 N.W.2d 756. "Probable cause 'is not a high bar.'" *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (citation omitted). Probable cause to search exists if there is "'fair probability' that contraband or evidence of a crime will be found in a particular place." *State v. Tullberg*, 2014 WI 134, ¶ 33, 359 Wis. 2d 421, 857 N.W.2d 120 (citation omitted). Probable cause is lower than a "more likely than not" standard. *Id.*

"[P]olice corroboration of innocent, although significant, details of an informant's tip lend[s] reliability to the informant's allegations of criminal activity. For purposes of making a practical, common-sense determination of probable cause, that is sufficient." *Robinson*, 327 Wis. 2d 302, ¶ 27 (citation omitted).

Here, the officers had probable cause based on Mickey's statement and their corroboration of it. Mickey told police that he had seen "a large amount of blood" in the garage. (R. 566:11.) The officers were "permitted to assume that they [were] dealing with a credible person" because Mickey was a citizen informant who had personally seen a large amount of blood in the garage. *Silverstein*, 378 Wis. 2d 42, ¶ 14. And the officers corroborated a significant but innocent detail of Mickey's statement: the fact that Ware was present at the house where Mickey had seen the blood. While speaking to Officer White at Kwik Trip, Mickey said that Ware was at the house where Mickey had seen the blood. (R. 563:191–92.) After Mickey accompanied officers to the house from the Kwik Trip, the officers went inside the house and saw Ware there. (R. 566:11–13.) Sergeant Nicholas thought that Ware's presence at the house corroborated Mickey's statements. (R. 563:243–44.) Ware's mother, by contrast, falsely told Deputy Homan multiple times that Ware was not present at the house, even after officers returned to the house with Mickey. (R. 566:10, 12–13.)

Other facts helped create probable cause. Mickey told officers that Ware and his girlfriend "had been involved in a domestic dispute" (R. 566:15), or an "altercation" (R. 563:240; 565:35–36). Mickey said that he had not seen Dixon since about 8:00 p.m. the previous evening. (R. 566:15.) Mickey said that he thought the blood might have been Dixon's and that Ware might have harmed her. (R. 563:239.) Mickey told the officers that Ware had been drinking. (R. 566:14.) The officers also knew that Ware was a convicted felon who was known to

carry a gun, and there was a gun at the house where Mickey had seen a lot of blood. (R. 190:2; 563:202, 232; 566:15.)

And Ware's conduct and statements in front of the officers implied a consciousness of guilt. When Ware approached the officers inside the house, he walked toward them with his arms straight out at both sides in a cross formation. (R. 565:79.) Ware said to the officers, "I am the one you are looking for." (R. 566:13.) And he said to Jones, "Mom I love you, no matter what happens." (R. 124:2.)

The facts in the three preceding paragraphs created probable cause to search the garage. Ware's presence and his apparent consciousness of guilt, combined with his mother's false statements about his whereabouts, helped corroborate Mickey's report. Because Mickey was a citizen informant, the officers could rely on his report.

In short, the inevitable discovery doctrine applies here because the officers "would inevitably have obtained a warrant" to search the garage had Sergeant Nicholas not entered the garage when he did. *Jackson*, 369 Wis. 2d 673, ¶ 56 (quoting *Weber*, 163 Wis. 2d at 141). Ware is not entitled to suppression of any evidence.

CONCLUSION

This Court should affirm Ware's judgment of conviction.

Dated this 31st day of March 2021.

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 10,926 words.

Electronically signed by:

s/ Scott E. Rosenow

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Assistant Attorney General

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

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