COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP276-CR **Cir. Ct. No. 2011CF5786**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES RAY STEWART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed*.

Before Kessler and Brennan, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 KESSLER, J. Charles Ray Stewart appeals a judgment of conviction, entered pursuant to a guilty plea to one count of second-degree sexual assault of a child. Stewart contends that the circuit court erroneously denied his

motion to suppress evidence seized following a warrantless entry into his home. Because we conclude that Stewart consented to Milwaukee police entering his home, that police lawfully remained in his home under the community caretaker exception to the warrant requirement, and that the evidence seized was in plain view of police, we affirm.

BACKGROUND

¶2 On November 28, 2011, Milwaukee police were dispatched to a Milwaukee high school where they met with the victim, a relative who lived with Stewart. The victim told Officer Andrew Wagner that over the course of four years, Stewart repeatedly sexually assaulted and physically abused her at their home. The victim told Wagner that the assaults all took place either in her bedroom, or in Stewart's bedroom. Milwaukee police subsequently went to Stewart's home where they arrested Stewart and recovered bedding from both bedrooms. The bedding tested positive for inculpatory evidence, namely, Stewart's DNA. Stewart was charged with one count of repeated sexual assault of a child and one count of physical abuse of a child.

¶3 Stewart subsequently filed a motion to suppress the evidence of the bedding, arguing that it was seized pursuant to an unlawful warrantless search. The State opposed the motion, arguing that the officers lawfully entered Stewart's home because Stewart requested to be arrested inside his home, hoping that his neighbors would not witness his arrest and because he wanted to secure his dog. The State also argued that pursuant to the community caretaker doctrine, a Milwaukee police detective lawfully remained on the premises after Stewart's arrest because the detective was waiting for the Milwaukee Area Domestic Animal Control Commission (Animal Control) to pick up Stewart's pit bull. After Animal

Control picked up the dog, Stewart's bedroom door was left open, putting the bedding in plain view of the onsite officer. The trial court held a hearing on Stewart's motion.

¶4 At the hearing, two Milwaukee police officers testified—Officer Daniel Keller and Detective Tammy Tramel-McClain. Keller testified that he and another officer were dispatched to Stewart's home in the late afternoon on November 28, 2011. Keller stated that when he and his partner arrived at the home, Stewart came to the front porch to find out why the officers were there. The officers asked Stewart his identity and then asked him to come outside, "at which time he was taken into custody in the front yard." Keller stated that as he was arresting Stewart, Tramel-McClain, a detective from the Sensitive Crime Unit, arrived. Stewart started to become "fairly loud," wanting to know why he was in custody. Neighbors started to come out of their homes, at which point Stewart asked the officers if they could go inside his home because "he didn't want his neighbors to know what was going on. And, also, he stated that he had a dog he had to put away if he was going to [go] to jail." There is no evidence that Stewart placed any limits on the officers' access to his apartment when he asked them to come into his home, or at any time thereafter. Keller, his partner and Tramel-McClain took Stewart into his home—the upper unit of a duplex. Stewart secured his pit bull in his bedroom and closed the bedroom door. Keller stated that Animal Control was called to care for the dog because Stewart "couldn't find anyone to come and take his dog," and it was "possible that [Stewart] may not be back … for a while." Keller and his partner then took Stewart to the police station, while Tramel-McClain stayed behind to wait for Animal Control.

¶5 Tramel-McClain testified that after Officer Wagner interviewed the victim at the victim's high school, Wagner informed Tramel-McClain about the

victim's allegations. Officer Wagner told Tramel-McClain that the victim described numerous instances of sexual assault which took place in both Stewart's and the victim's bedrooms. Tramel-McClain then went to Stewart's home. Tramel-McClain stated that when she arrived at Stewart's home, Keller and his partner were taking Stewart into custody outside of the home, but Stewart requested that the officers come into his home to prevent the neighbors from seeing his arrest and so that he could secure his dog. Tramel-McClain stated that Stewart "shuffl[ed]" his dog into his bedroom and closed the door. Tramel-McClain then called Animal Control because "if someone is going to be taken into custody, it is unknown how long they're going to be there. And if the animal is left in a bedroom, it could potentially die if no one is there to care for it."

¶6 Tramel-McClain testified that she remained at Stewart's home to wait for Animal Control. When Animal Control arrived, Tramel-McClain stood outside of the upper unit to "let the animal control officer take control of the dog and stay out his way." While Animal Control was securing the dog, Tramel-McClain left the upper unit and went down the stairs to speak with Stewart's mother. After Animal Control left, Tramel-McClain went back to the upper unit, where she saw the door to Stewart's bedroom had been left open by Animal Control. The victim's bedroom door was also open. Tramel-McClain testified that she could see into both Stewart's and the victim's bedrooms without having to enter either bedroom. She collected the bedding, which was visibly on top of both beds, from both bedrooms.

¶7 Tramel-McClain admitted that she went to Stewart's home hoping to collect evidence, particularly bedding. With the bedroom doors open, Tramel-McClain stated, she collected bedding in "plain view" because "it was what [the victim] laid upon, and it was to show that this is what she described as being in the

house at the time these incidents took place." The bedding collected matched the description given by the victim to Officer Wagner.

¶8 The circuit court denied Stewart's motion to suppress, finding: (1) that the arresting officers and Tramel-McClain had consent to be in Stewart's apartment; (2) that Tramel-McClain lawfully remained in the apartment while waiting for Animal Control, pursuant to the community caretaker doctrine; and (3) that once the dog was removed, Tramel-McClain collected the bedding which was in her plain view. The court noted that once Stewart invited the officers into his apartment, he lost his reasonable expectation of privacy in the premises. This appeal follows.

DISCUSSION

¶9 On appeal, Stewart argues that he should be allowed to withdraw his guilty plea because his motion to suppress evidence was erroneously denied. Specifically, he contends that neither the community caretaker doctrine, nor the plain view doctrine, apply to the facts of his case. We disagree.

¶10 "In reviewing the denial of a motion to suppress, this court will uphold the [circuit] court's findings of fact unless they are clearly erroneous." *See* ***State v. Ziedonis***, 2005 WI App 249, ¶12, 287 Wis. 2d 831, 707 N.W.2d 565. "The application of constitutional principles to the facts is a question of law" that we decide *de novo*. *See* ***id.***

Community Caretaker Doctrine.

¶11 The Fourth Amendment of the United States Constitution and article I, section 11 of the Wisconsin Constitution both protect against unreasonable searches and seizures. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11.7. However, even though "warrantless searches are per se unreasonable under the fourth amendment," they are "subject to a few carefully delineated exceptions" that are "'jealously and carefully drawn.'" ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983) (citation omitted).

¶12 One such exception is the community caretaker function. To determine whether a particular activity qualifies under the community caretaker exception, the following three-step test must be used: (1) whether a search or seizure, within the meaning of the Fourth Amendment, has taken place; (2) if the Fourth Amendment is implicated, "whether the police conduct was bona fide community caretaker activity;" and (3) if the conduct was bona fide community caretaker activity, "whether the public need and interest outweigh the intrusion upon the privacy of the individual." ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987). In evaluating the third factor, we consider: "(1) the degree of the public interest and 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." *See* ***id.*** at 169-70. (footnotes omitted).

¶13 It is undisputed that a seizure within the meaning of the Fourth Amendment had taken place. The issue is whether Tramel-McClain was engaged in bona fide community caretaker activity or whether she used the community

caretaker role as a pretext for obtaining the bedding without a warrant. Both Tramel-McClain and Keller testified that when suspects are arrested on charges of sexual assault, it is unknown how long the suspects will remain in custody. Thus, it was unknown how long Stewart's dog would remain without a caretaker. Tramel-McClain testified that she was unsure how long the dog would survive alone in a closed bedroom and decided to call Animal Control because, based on her previous experiences with Animal Control, she knew officers would pick up the dog and care for it. Given these facts, Tramel-McClain's initial intentions for coming to Stewart's apartment (i.e., to collect bedding) are irrelevant. "[I]n a community caretaker context, when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination is not negated by the officer's subjective law enforcement concerns." ***State v. Kramer***, 2009 WI 14, ¶30, 315 Wis. 2d 414, 759 N.W.2d 598. Accordingly, Tramel-McClain was acting as a bona fide community caretaker when she called Animal Control and waited for officers to come and pick up the dog.

¶14 We turn to the third factor. Stewart himself confirmed the exigency of the situation by inviting officers into his home so that his arrest could be private and so that he could secure his dog. Stewart told the officers that he was unaware of anyone who could come and care for his dog while he was in custody. He chose to secure the dog in a closed bedroom. Tramel-McClain could not see whether there was food or water in the bedroom and was concerned for the dog's well-being. Accordingly, Tramel-McClain reasonably felt it necessary to call Animal Control. Tramel-McClain reasonably waited for Animal Control officers to arrive so that she could explain the situation and ensure the dog was taken into protective care. Tramel-McClain's presence at Stewart's apartment was with his

consent; following his arrest, her presence qualifies under the community caretaker exception to the warrant requirement.

Plain View Doctrine.

¶15 Having established that Tramel-McClain was lawfully present in Stewart's apartment pursuant to the community caretaker doctrine, we turn to the application of the plain view doctrine. The State contends that the two doctrines, taken together, justified seizure of the bedding from Stewart's apartment.

¶16 The plain view doctrine requires the following: "[f]irst, the evidence must be in plain view. Second, the police officer must have a lawful right of access to the object. Third, the incriminating character of the object must be immediately apparent, meaning the police must show they had probable cause to believe the object was evidence or contraband." ***State v. Wheeler***, 2013 WI App 53, ¶27, 347 Wis. 2d 426, 830 N.W.2d 278 (citation omitted).

¶17 Stewart argues that the plain view doctrine is not applicable because Tramel-McClain's discovery was intentional, rather than inadvertent. He also contends that there was no connection between the evidence seized and the alleged crimes. We disagree.

¶18 Stewart's argument that the seizure was not "inadvertent" ignores the Wisconsin Supreme Court's holding in ***State v. Guy***, 172 Wis. 2d 86, 492 N.W.2d 311 (1992), which "eliminate[ed] the inadvertence element." *See* ***id.*** at 101. The court in ***Guy*** stated "for the plain-view doctrine to apply, the evidence must be in plain view, the officer must have a lawful right of access to the object itself, and the object's incriminating character must be immediately apparent." ***Id.*** All of those elements are present here.

¶19 Although Tramel-McClain testified that she hoped to seize the bedding, she also testified that she did not open the bedroom doors in Stewart's apartment. Rather, she only entered Stewart's bedroom after Animal Control left the door open. The victim's bedroom door was already open. Tramel-McClain testified that from her vantage point, she could clearly see the bedding in Stewart's bedroom. The bedding in both bedrooms, according to Tramel-McClain, was "out in the open" on top of the beds. Tramel-McClain stated that she did not open drawers, open closets, search under the beds, or manipulate anything in Stewart's apartment to gain sight of the bedding. Tramel-McClain described her search as "cursory." Thus, Tramel-McClain's interest in obtaining the bedding does not negate the lawfulness of the seizure.

¶20 The record also establishes a sufficient connection between the evidence seized and the alleged crimes. The victim described the locations of the assaults, namely, her bedroom and Stewart's bedroom, to Wagner. The victim described the frequency of the assaults (every other night) and the color and patterns of the bedding on which the assaults occurred. Wagner relayed that information to Tramel-McClain. Given the nature of the crimes and the facts known to Tramel-McClain at the time of the seizure, there was probable cause for Tramel-McClain to suspect that the bedding contained DNA evidence of the crimes. Thus, the bedding's "incriminating character" was "immediately apparent." *See* ***Guy***, 172 Wis. 2d at 101. The record supports the circuit court's conclusion that the bedding was in plain view.

¶21 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgment affirmed.

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