COURT OF APPEALS
DECISION
DATED AND FILED

March 8, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1069-CR **Cir. Ct. No. 2015CF2944**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW DYLAN BUMP,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

Before Sherman, Blanchard, and Fitzpatrick, JJ.

¶1 PER CURIAM. Matthew Bump appeals a judgment of conviction for possession of marijuana with intent to deliver. Bump argues that the circuit court erred in denying his motion to suppress evidence seized during the warrantless, unconsented entry to his residence and entry to his locked bedroom by police. We conclude that the two searches were reasonable under the community caretaker exception to the Fourth Amendment and accordingly affirm.

BACKGROUND

¶2 Bump was charged with possession with intent to deliver marijuana after officers entered his residence and then entered his locked bedroom, where they discovered marijuana in plain view. In each case, the entry was without consent of any resident and without a warrant.[1] The following is a summary of pertinent facts found by the circuit court following a suppression hearing. Our summary is supplemented by uncontested testimony consistent with the court's findings and conclusions. All three witnesses at the suppression hearing were police officers.

[1] Bump's codefendant, Jacob Basterash, was also charged with possession of marijuana with intent to deliver, based on some but not all of the same police activity that resulted in the charge against Bump. We affirmed Basterash's conviction in an earlier appeal. *See* ***State v. Basterash***, No. 2016AP2137-CR, unpublished slip op. (WI App Oct. 26, 2017). The State contends that the instant appeal involves solely the question of whether officers lawfully entered the shared residence and then Bump's bedroom, and not whether they lawfully entered Basterash's bedroom and closet, where they also found marijuana. The State asserts that the State did not charge Bump with possessing the marijuana found in Basterash's bedroom and that Bump lacks standing to challenge the search of Basterash's bedroom. While Bump makes some references to the search of Basterash's bedroom in his principal brief, in his reply brief he does not contradict the State's position, thereby conceding it. Indeed, in his reply, Bump limits his arguments to challenging police entry to the unit and to his locked bedroom. Therefore we limit our review to the validity of police entry to the residence and to Bump's locked bedroom.

Police Calls To Unit

¶3 In November 2014, police responded to a report of a disturbance in an upstairs unit of a townhome residence that included at least one downstairs unit and one upstairs unit, but left after they were unable to make contact with anyone in the residence. The following month officers were called to the same upstairs unit. The December police call to this upstairs unit is the subject of this appeal.

¶4 In December, officers promptly responded to a 6:36 a.m. dispatch reporting a disturbance at this unit. When they arrived, officers knocked on an exterior fiberglass door that opened to stairs leading to the upstairs unit, but received no response over the course of approximately three to five minutes. Officers then made contact with a person ("the neighbor"), who said that she resided below the unit identified in the dispatch. The neighbor had made the call to police regarding the December disturbance and was the same person who had called police about the November disturbance in the same upstairs unit.

¶5 During the December incident, the neighbor told police that people in the upstairs unit had been arguing, including "screaming." The neighbor said that "fighting" had been "a consistent problem with the upstairs residents." The neighbor said that three people resided in the upstairs unit: a male and a female in an apparent romantic relationship, and a second male.

¶6 The neighbor further told police that the argument that night seemed to have begun at around midnight between a male and a female, and at one point she had heard someone say, "I hate you," and "what sounded like possibly a body" coming in contact with a wall or the floor. The neighbor said that she believed that this was the sound of a female colliding with a wall or the floor. After these

particular sounds, the neighbor heard "no more noise" from the upstairs unit. The neighbor "was fearful for the safety of anyone upstairs."

¶7 The neighbor said that she was certain that no one had entered or exited the upstairs unit—which had only one entry-exit way, a staircase next to the neighbor's unit—since she had called 9-1-1 that morning. The neighbor said that the residents would still be home if a van that she associated with the residents was parked in front of the townhome residence building. Police then determined that a van associated with the residents was parked in front of the building. The van was registered to Jacob Basterash. Police tried calling a telephone number that they had for Basterash, but reached no one.

¶8 Four officers went to the exterior fiberglass door and "rang the doorbell many times," used a baton to rap on the exterior door, loudly identified themselves as police, and called out for anyone inside the upstairs unit to step out. None of these loud, persistent efforts resulted in any response from within the upstairs unit. All of the exterior windows of the upstairs unit were covered with shades.

¶9 During moments of quiet between noises made by the officers, one officer heard "slight noises," suggesting "movement," coming from the upstairs unit, although it was not clear whether these were noises caused by a person, a pet, or furniture being moved. However, officers did not hear whimpering, moaning, screaming, distressed cries, or other utterances coming from the upstairs unit.

Entry To Building; Entry To Unit

¶10 Officers obtained from the landlord a key that could open both the exterior fiberglass door and the door leading directly into the upstairs unit.

Officers used the key to enter the exterior door. They then proceeded up the stairs, kicked on the interior door several times, and continued to "very loud[ly]" announce their presence, but still received no response.

¶11 Four or five officers used the key to enter the upstairs unit, while announcing, "West Allis police, come out," and advancing behind a "ballistic shield" as protection, and with guns drawn.[2] This occurred approximately 30 minutes after officers arrived at the scene.

¶12 Although they initially continued to receive no response to their announcements, as the officers moved into a kitchen area, Bump appeared from a living room area.[3] At the same time, or shortly thereafter, a female, J.G., also appeared. By their obvious outward appearances, neither Bump nor J.G. gave signs of having been recently injured, and J.G. at one point told an officer that she was not injured.

¶13 J.G. told police that she was a resident of the upstairs unit, more specifically that she shared a bedroom with Basterash, and that Basterash's brother, Bump, lived in the other bedroom. J.G. indicated that Bump lived in "the far bedroom," meaning the locked bedroom that police would subsequently force

[2] The ballistic shield was described as being curved and approximately two feet by two-to-three feet, with a small window in the middle.

[3] As both sides note, the circuit court stated in its findings that it was Jacob Basterash who first appeared, but the undisputed testimony was that Bump was the first to appear. Based on the clarity of the testimony, we treat the court's statement as an inadvertent misstatement. Bump complains about the misstatement, but does not present a developed argument that we should not simply treat it as a misstatement.

open, as described below. J.G. denied that there had been "any type of physical argument" before police arrived.

¶14 Officers handcuffed Bump and J.G. and took them outside to a squad car. Bump was "cooperative" with officers and did not make any "threaten[ing]" or "furtive movements," but "had the demeanor of being confused" and did not answer questions that officers posed. J.G. also made no "threaten[ing]" or "furtive movements," and was cooperative with officers in the process of being handcuffed and taken out of the upstairs unit.

¶15 While in the kitchen, officers made several more announcements that they were police. When officers approached a closed bedroom door, a man later identified as Basterash "suddenly opened" the door of this bedroom and stood in the door frame.[4] An officer commanded Basterash to step away from the door frame and into the room where officers were. However, while Basterash did not make any "threaten[ing]" or "furtive movements," he did not comply with this command, and an officer forcibly pulled him into the room where the officers were. Officers handcuffed Basterash and took him outside.[5] Basterash did not provide police with "any explanation as to why" no one had responded to police repeatedly banging on the doors and announcing their office.

[4] Continuing in its apparent inadvertent switching of the names of the two men, the court stated that Bump was the second man to appear, but we treat this as another misstatement.

[5] No witness testified to *both* of the following: (1) that an officer asked Bump, J.G., or Basterash if a fourth person was located in the upstairs unit; and (2) that there was or was not a response to such a question from Bump, J.G., or Basterash. Therefore, in favor of Bump, we assume that officers did not discuss this topic with Bump, J.G., or Basterash.

¶16 Officers did not attempt to have the neighbor identify whether the three individuals that police took from the upstairs unit were the three residents of the unit about whom she had spoken with police.

¶17 Officers performed what they characterized as a "protective sweep" of the room that Basterash had walked out of, without finding any additional individuals, and made a preliminary search of all rooms of the upstairs unit, which did not involve opening any doors or drawers or manipulating any items.

¶18 Officers did not discover at any point during their time in the upstairs unit physical evidence of violence, such as broken furniture or fixtures or items obviously out of place, or any apparent evidence of physical injury to Bump, J.G., or Basterash.

Forced Entry To Locked Bedroom

¶19 The officers discovered that the door to one bedroom of the unit was locked, namely, the "far bedroom" referenced above. The parties on appeal refer to this as Bump's bedroom, and we will refer to it as either Bump's bedroom or the locked bedroom. An officer kicked open the door to Bump's bedroom.[6] This occurred approximately two to three minutes after the officers opened the door into the upstairs unit using the landlord's key. Once inside Bump's bedroom, officers did not discover any additional individuals, but they did notice, on the

[6] Bump contends that the circuit court "clearly erroneously" found that the door to Bump's bedroom opened through "unknown agency." We do not read the court's oral findings this way, but it does not matter. The testimony was unambiguous that an officer kicked open the door and the State concedes the point.

floor, a clear, glass quart-sized jar containing suspected marijuana, which is the basis for the case against Bump.[7]

Police Concern Regarding How Many Individuals Might Be Located In Unit

¶20 On the topic of what officers knew or suspected regarding how many individuals might be in the upstairs unit that morning, the circuit court made the following findings:

> [Until all rooms of the upstairs unit were searched, officers] don't know how many people could be in the [unit]. They've been told by the neighbor that there's three people that live [in the unit].
>
> They do not know how many other people might be there. That's why they're checking, to see if somebody else might need some help ….
>
> ….
>
> … [I]t is clear that these officers were concerned, because of all the information they had available to them, they didn't know what was going on. They needed to make sure that nobody was in need of any type of medical attention.

These findings are supported by testimony that the neighbor told police that two men and a woman resided in the unit and that no one had left the unit after the neighbor called 9-1-1 that morning, but she also told them she was not sure how many people might be in the unit when police arrived. One officer testified as follows:

> It was our belief, based upon the [neighbor's] statement … that there was someone that was harmed. And

[7] Bump does not dispute that, if police lawfully gained entry to his bedroom, they could seize the jar and its contents under the plain view doctrine.

> with the first three occupants that came out of the residence, there [were] no obvious injuries to them, … anything obvious…. So in order to confirm that there was no one else either hiding in the residence or possibly injured somewhere else, we had to confirm that through the [search of Bump's bedroom].

¶21 As pertinent here, the circuit court denied the suppression motion as to Bump and Bump entered a plea. Bump now appeals denial of his motion to suppress based on both entry to the upstairs unit and to Bump's bedroom.[8]

DISCUSSION

¶22 Whether the circuit court properly denied Bump's motion to suppress evidence presents a question of constitutional fact, requiring a two-step review. *See* ***State v. Matalonis***, 2016 WI 7, ¶28, 366 Wis. 2d 443, 875 N.W.2d 567. We first review the circuit court's findings of historical fact for clear error. *See* ***id.*** We then independently apply constitutional principles to those facts. *See* ***id.***

Historical Facts

¶23 We have already addressed and resolved some of Bump's disputes of historical fact. We now address and resolve the balance of his challenges to fact-finding. To some degree, Bump frames as "clearly erroneous" factual findings that, properly understood, were legal conclusions. We independently

[8] As both parties recognize, the circuit court did not separately address the forced entry to Bump's locked bedroom in denying the suppression motion. However, Bump does not argue that the court prevented him from presenting evidence or argument regarding the bedroom entry issue, nor that we lack a sufficient record to review the issue, and we conclude that the record is sufficient. *See* ***Correa v. Farmers Ins. Exch.***, 2010 WI App 171, ¶4, 330 Wis. 2d 682, 794 N.W.2d 259 (appellate court may affirm circuit court for any reason, even one not relied on by circuit court).

address the legal principles in the following section under the appropriate standards.

¶24 Bump argues that "uncontroverted facts" established at the suppression hearing that officers knew or should have understood that no individual remained in the unit after officers removed Bump, J.G., and Basterash. Therefore, Bump's argument proceeds, officers could not have been "legitimately concerned" about the safety of anyone still in the unit.

¶25 It is true that the officers had clues from which they could have deduced that Bump, J.G., and Basterash may have represented all or some percentage of the three residents of the unit to whom the neighbor had referred. However, Bump fails to come to grips with the rationale offered by police, which had nothing to do with anyone's residency status in the unit, and which the circuit court found persuasive. This rationale was that the officers reasonably believed, based on plausible statements of the neighbor, that someone might have been injured by coming into audible contact with the wall or floor, and because Bump, J.G., and Basterash did not appear to have been injured, this left open the reasonable possibility that an injured person was still in the unit. Under this theory, it did not matter how many people the officers believed were residents of the unit, or who was a resident. What mattered was that an injured person, resident or non-resident, might still be in the unit. Bump suggests that we are obligated to reject this reasoning, but fails to provide a convincing reason that we should. This defeats many of his arguments on appeal.

¶26 Bump argues that the neighbor's statements "were not corroborated in any way," but this is incorrect, as our summary above readily demonstrates. She told the police that two men and one woman lived above her, and police

ultimately encountered two men and one woman in the upstairs unit. She also told police that the residents were associated with a van, and a van outside the building came back as registered to Basterash at that address. More generally, Bump fails to point to any persuasive reason that the circuit court was obligated to dismiss as inaccurate or unreliable testimony about what the neighbor allegedly told police or about why police took those statements seriously.

¶27 Bump also apparently intends to argue that the circuit court clearly erred in failing to recognize that the fact that officers did not ask Bump on the scene whether anyone was in the locked bedroom demonstrated that the officers had, at least by the time they encountered the locked bedroom, been presented with unambiguous evidence that no one could be in the locked bedroom. However, Bump fails to support this argument. The evidence supported competing inferences on this point, including those arising from the fact that the door was locked.

¶28 In his principal brief, Bump seems to argue that the circuit court clearly erred in failing to recognize that marijuana which the officers found in the closet of the unlocked bedroom—the bedroom associated with Basterash and J.G.—"spurred the police to search for similar evidence in" Bump's bedroom. However, after the State develops an argument that the record does not support the proposition that police found marijuana in Basterash's bedroom before they entered Bump's bedroom, Bump fails to address the issue in his reply brief, conceding the point.

Reasonableness Of The Searches

¶29 We turn to the second step of the analysis, which is to independently review the reasonableness of the search based on the facts summarized above.

More specifically, this involves determining whether the community caretaker exception to the warrant requirement applies to the officers' actions. We apply a three-step test:

> "(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."

See ***Matalonis***, 366 Wis. 2d 443, ¶31 (quoted source omitted).

¶30 We address challenges to two searches: entry to the unit, and entry to Bump's bedroom. In each case, the parties disagree about whether the second and third factors support application of the community caretaker exception. The State has the burden of demonstrating that both the bona fide community caretaker function and public interest factors have been met. ***Id.***

¶31 In his principal brief, Bump discusses the two searches as if they were a single search, making it difficult to discern the particular arguments he makes to challenge entry to the unit, as opposed to entry to his bedroom. In any case, we now address the two disputed factors of the legal test as they relate to each search, with many of the same facts informing the analysis in each instance.

I. ENTRY TO THE UPSTAIRS UNIT

A. Whether The Officers Were Exercising A Bona Fide Community Caretaker Function In Entering The Unit

¶32 Whether officers were exercising a bona fide community caretaker function depends on "'the totality of the circumstances as they existed at the time of the police conduct.'" ***Id.***, ¶32 (quoted source omitted). The State must show

that the officers had an objectively reasonable basis for exercising their community caretaker function. *See* ***id.***, ¶42.

¶33 The State argues that there was an objectively reasonable basis for police to believe, before they entered the unit, that an injured person was inside the unit and needed help based on what the neighbor told officers and the appearance that at least one and likely more individuals were in the unit but were failing to respond to loud, persistent inquiries from police. This is an obviously strong argument based on the summary of the facts above. Bump's counterarguments are insubstantial.

¶34 Bump argues that police were not engaged in a bona fide community caretaker function when they entered the unit because they relied on the neighbor's subjective perceptions of what she said she had heard, and because they did not themselves see or hear signs of disturbance. However, as the State points out, at least one premise of this argument is faulty. If it were true that someone was slammed into a wall or the floor and also true that one or more perpetrators were trying to hide that fact, then upon arrival of the police, the upstairs unit would likely be silent and no one would respond to loud, persistent inquiries. All the more so, in fact, based on recent history: a similar 9-1-1 call, with no responses to police inquiries. Based on this information, the officers could reasonably believe that someone in the apartment may have been injured. The fact that the noise had stopped by the time the officers arrived was entirely consistent with what the neighbor reported.

¶35 There was no testimony about the nature of the construction or the internal acoustics of the townhome residence building, or of particular units, but assuming this to have been typical construction, as a matter of common sense the

force necessary to create what sounds like a body hitting a wall or the floor would typically involve a substantial collision. Common sense also dictates that under such circumstances injury is a distinct possibility, including possibly severe injury.

¶36 Bump points to precedent that is readily distinguishable on the points that matter, as we explained in some detail in ***State v. Basterash***, No. 2016AP2137-CR, unpublished slip op. (WI App. Oct. 26, 2017), and we need not repeat that analysis here.

¶37 For these reasons, we conclude that the officers were acting in a bona fide community caretaker capacity when they entered the unit.

B. Whether The Public Interest In Entering the Unit Outweighed The Private Intrusion

¶38 Under the third step in the analysis, we "balance the public interest or need that is furthered by the officers' conduct against the degree and nature of the intrusion on the citizen's constitutional interest." *See* ***State v. Pinkard***, 2010 WI 81, ¶41, 327 Wis. 2d 346, 785 N.W.2d 592 (citation omitted). Four considerations are relevant to this balancing:

> "(1) [T]he 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."

Matalonis, 366 Wis. 2d 443, ¶33 (quoted source omitted). We address each factor in turn, leaving off separate treatment of the undisputed fact that no automobile was involved.

The Degree Of The Public Interest And The Exigency

¶39 There is no reasonable argument that the degree of public interest and exigency of the situation did not support entry to the unit, and Bump does not present a meaningful argument to the contrary not already addressed above. All the facts summarized above paint a picture involving a genuine safety issue, which justified prompt entry to the unit, and it appears that police were deliberate and did not significantly delay in pursuing the safety issue by entering the unit. *See* ***State v. Ziedonis***, 2005 WI App 249, ¶28, 287 Wis. 2d 831, 707 N.W.2d 565 (affirming application of the community caretaker doctrine despite 90-minute delay).

The Circumstances Surrounding Entry To The Unit

¶40 The second consideration involves the attendant circumstances surrounding the search, including the time, location, and degree of overt authority and force displayed. Bump asserts that the police acted in a "brutal" manner, but fails to support that assertion. There was no police brutality here. The facts support the conclusion that the officers proceeded in a reasonable manner in entering the unit, including obtaining a key from the landlord instead of breaking the door open.

¶41 As the circuit court observed, the incident appears to have taken a turn from a potentially routine police response to an armed entry for reasons largely out of the hands of the officers. That is, a police response that perhaps could have ended with a cooperative discussion after those in the unit came to the door to answer questions about possible violence became an armed entry after it reasonably appeared to police that at least one and likely more individuals in the unit were declining to respond to loud, persistent police inquiries. When coupled with the possibility of injury, police reasonably entered the unit in a strongly

defensive mode, including use of the ballistic shield and unholstered firearms. The show of force and authority was reasonable under the circumstances considering the potential for injury to officers and others.

Whether There Were Alternatives To Intrusion Into The Unit

¶42 The fourth consideration is the availability, feasibility, and effectiveness of alternatives to the intrusion. *See* ***Matalonis***, 366 Wis. 2d 443, ¶33. Bump does not present a substantial argument regarding alternatives to entry to the unit. As the summary above reflects, the officers made loud, persistent efforts to get the peaceful attention of anyone in the unit, and entered in a guns-drawn, highly defensive posture based on a reasonable belief that one or more silent perpetrators of physical violence could be inside.

¶43 For all these reasons, we conclude that the State carried its burden of showing that entry to the unit was reasonable under the community caretaker exception.

II. ENTRY TO THE LOCKED BEDROOM

¶44 We now address the two disputed factors of the legal test as they relate to forced entry of the locked bedroom. While some repetition is unavoidable, we limit our discussion to the extent feasible to the particular arguments raised on these topics not already addressed above.

A. Whether The Officers Were Exercising A Bona Fide Community Caretaker Function In Entering The Bedroom

¶45 Bump argues that the officers lacked an objectively reasonable basis for exercising their community caretaker function in forcing open the bedroom door. More specifically, Bump contends that, once inside the unit, officers "found

no objective indications that anyone needed help: no [signs] of distress, criminal activity, unresponsive individuals. Only compliant, groggy, selectively responsive roommates." As we have already explained, however, because the three "selectively responsive" individuals appeared uninjured, this raised the reasonable possibility that an injured person remained in the unit. Bump fails to persuade us that, once the officers encountered a locked door, it was unreasonable to suspect that it might be locked to hide an injured person.

¶46 In essence, Bump ignores the parts of the overall picture that make the officers' rationale for entering the locked room objectively reasonable: the clarity of the neighbor's statement about the thud of a body, followed by silence; the multiple ways in which the neighbor's statement was corroborated; the extended lack of response from three individuals to loud, persistent inquiries by the officers, which was not explained by anything the officers encountered upon entering the unit; the fact that none of the three individuals in the unit appeared to be injured; and the fact that the bedroom door was locked, with no sound coming from the room, despite the loud, persistent efforts officers had made to draw attention to themselves.

¶47 For these reasons, we conclude that the officers were acting in a bona fide community caretaker capacity when they entered Bump's bedroom.

B. Whether The Public Interest In Entering the Unit Outweighed The Private Intrusion

¶48 Bump contends that there was little or no public interest or need to force entry to the bedroom and therefore this significant invasion of privacy was not reasonable. We now explain why we reject this argument in the course of

addressing the four factors, again giving Bump credit for the fact that no automobile was involved.

The Degree Of The Public Interest And The Exigency

¶49 We have already explained why we reject Bump's argument that it was unreasonable for officers to think that an injured person might be behind the locked door. Bump does not attempt to argue that, if this was a reasonable belief, forcing open the door was unreasonable. We have explained why we reject Bump's argument that, by the time officers discovered the locked bedroom door, they had learned enough to know, or should have learned enough to know, that there was no need to enter the bedroom, because all of the residents of the unit had been accounted for.

The Circumstances Surrounding Entry To The Locked Bedroom

¶50 Within minutes of entering the unit, the officers faced the locked bedroom door, after removing from the unit the three individuals who had eventually shown themselves after failing to respond to loud, persistent inquiries. Given the potential rescue mission at issue, the officers were under time pressure and used the force necessary to enter the locked bedroom.

Whether There Were Alternatives To Intrusion Into The Locked Bedroom

¶51 Bump argues that officers should have "take[n] the time to interview" each of the three individuals who eventually emerged from within the unit, which would have allowed the officers to "reliably discover" and "rationally process all the received information," and "assuage" their concern about an injured person. Bump also apparently intends to argue that the officers were obligated to accept as true anything any of the individuals told them, contending for example

that officers "did in fact learn from" J.G. that "no physical altercation had occurred."

¶52 However, police were not obligated to accept at face value statements from the individuals. And, while failure by police to ask pertinent questions of witnesses can be relevant to the consideration of overall reasonableness, Bump fails to explain how any particular question posed by officers to any of the three individuals who had refused to acknowledge their presence on the scene for such an extended period could have generated a response that the officers would have been obligated to accept as assurance that there was no injured person behind the door.

¶53 For all these reasons, we conclude that the State carried its burden of showing that entry to the locked bedroom was reasonable under the community caretaker exception.[9]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

[9] Given our resolution of the issue based on the community caretaker exception, we do not need to and do not address the State's alternative argument that entry to the locked bedroom was part of a valid protective sweep.