2016 IL App (1st) 133748-U

No. 1-13-3748

Fourth Division
August 11, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL MURPHY, Defendant-Appellant	)	Appeal from the Circuit Court of Cook County. No. 12 CR 15707 Honorable Thaddeus L. Wilson, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justice Ellis concurred in the judgment.
Presiding Justice McBride dissented.

O R D E R

¶ 1 *Held*: The trial court erred in denying defendant's motion to quash arrest and suppress evidence where police officers entered defendant's open apartment door without a warrant and no exigent circumstances existed.

¶ 2 Following a jury trial, defendant Michael Murphy was found guilty of being an armed habitual criminal and sentenced to 17 years' incarceration. On appeal, defendant asserts that the trial court erred in denying his pretrial motion to quash arrest and suppress evidence

recovered after police officers entered his apartment without a warrant. He also contends that his sentence is excessive. We reverse.

¶ 3 BACKGROUND

¶ 4 Motion to Quash Arrest and Suppress Evidence

¶ 5 Prior to trial, defendant filed a motion to quash arrest and suppress evidence. At the hearing on the motion, Chicago police officer Louis Loaiza testified that he was surveilling a location for an unrelated matter shortly after 9 p.m. on August 12, 2012. Loaiza was observing the location through binoculars from a nearby alley when a loud argument from the two-flat apartment building directly across the street drew his attention. A woman exited the building's front door and defendant followed. Defendant and the woman yelled and swore at each other. The woman began to walk down the front steps. As she reached the bottom, defendant "lifted up the front of his shirt" and Loaiza "observed a chrome handgun in his front waistband of his pants." The woman, still arguing with defendant, continued walking down the street. Defendant lowered his shirt and walked back through the building's front door. Loaiza radioed three other officers in the area, including Lawrence Olivares, and directed them to approach defendant. In less than a minute, the three officers arrived at the building and walked up the front stairs. Olivares opened the front door and the officers entered the building. Loaiza subsequently followed and learned that a gun had been recovered. He further testified that he did not have a warrant to arrest defendant or to search the apartment building.

¶ 6 Olivares testified that he was waiting a block away from the two-flat apartment building, serving as an enforcement officer in the unrelated surveillance on August 12, 2012. At approximately 9:30 p.m., Loaiza radioed that "he had observed an individual with a gun on

him" at the two-flat apartment building. Olivares drove to the building in less than 30 seconds. Two other officers also arrived. The three officers went to the building's front door. It was closed, but unlocked. Olivares opened the door without knocking and they stepped into the building. Looking to his left, Olivares saw defendant's apartment. The apartment door was "wide open" and defendant stood eight feet inside, facing the officers. Olivares pointed his flashlight and handgun at defendant and announced his office. Defendant reached into his waistband, retrieved a chrome handgun, and threw it to the ground in the living room.

¶ 7 Following arguments, the trial court denied defendant's motion to quash arrest and suppress evidence of the firearm. The court reasoned that the officers had properly entered the common area of the apartment building because they entered by "normal means of just twisting the knob and opening the door." Once in the common area, the officers had "plain view from a position where they had the ability to be." The court also held that exigent circumstances did not exist for officers to enter the apartment.

¶ 8 Subsequently, defendant filed a motion to reconsider. He argued that under *People v. Aguilar*, 2013 IL 112116, the possession of a firearm by a non-felon in his or her home was not illegal. Defendant asserted that the incriminating character of the firearm could not have been apparent because the officers had no knowledge of his criminal background. The trial court denied the motion, ruling that the officers were authorized to take reasonable steps to determine whether defendant's possession was lawful.

¶ 9 Evidence at Trial

¶ 10 At defendant's jury trial, Loaiza testified consistently with his hearing testimony. He added that during the argument between defendant and the woman, "once defendant showed the gun, that's when she began walking quickly southbound."

¶ 11 Olivares also testified consistently with his hearing testimony. He further testified that after defendant threw the firearm down it slid towards the living room. Olivares walked into the apartment. The other two officers placed defendant into custody as Olivares recovered the chrome handgun. The handgun was loaded with four live rounds.

¶ 12 The State entered certified copies of defendant's prior felony convictions for the delivery of a controlled substance and for aggravated arson. The parties stipulated that the convictions were qualifying felonies for the charge of armed habitual criminal.

¶ 13 Defendant testified that he shared the first-floor apartment of the two-flat building with Will Walker and a man named Martin. On August 12, 2012, defendant was in his apartment with Sharon Gardner and a woman named Chocolate. When the women began to argue with each other, defendant asked Chocolate to leave. He escorted her out of the apartment as she began to yell and swear at him. After she left the building, defendant closed and locked the building's front door. He went back into his apartment and talked with Gardner. One hour later, defendant heard a commotion on the front porch. Looking out of the window, he saw three police officers and Martin standing on the porch. Defendant went to the apartment's door to see what was happening. He found the door slightly ajar and attempted to lock it. Before he could do so, Officer Olivares pointed his firearm at defendant and backed him into the apartment. Olivares handcuffed defendant to the apartment's radiator. The police officers began to search the apartment, cutting locks off of doors. They also called for two female

officers to search Gardner. Defendant testified that he did not have a firearm at any point during the night.

¶ 14 The State recalled Olivares in rebuttal. He testified that there were no women present in defendant's apartment and that the officers only searched the apartment after receiving consent from Walker. He did not recall any locks being cut during the search.

¶ 15 The jury found defendant guilty of being an armed habitual criminal. The trial court sentenced him to 17 years' incarceration. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 Defendant first contends that the police officers violated his rights under the fourth amendment to the United States Constitution when they entered the two-flat building's front door and again when they entered his apartment. He argues that the officers did not have probable cause to believe he had committed a crime because the possession of a firearm by a non-felon in his or her home is not a crime and the officers had no knowledge of his criminal history. He also asserts that no exigent circumstances existed to excuse the officers' failure to obtain a warrant.

¶ 18 The State responds that defendant lacks standing to raise a fourth amendment challenge because he abandoned the handgun. It alternatively argues that (1) the officers had probable cause to arrest defendant, (2) exigent circumstances existed that excused the need for a warrant, (3) the plain view exception applies, and (4) the encounter was a valid investigative stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 19 When reviewing a lower court's ruling following a suppression hearing, the appellate court may consider both the evidence produced at the hearing and the evidence presented at the subsequent trial. *People v. Kidd*, 175 Ill. 2d 1, 25 (1996). We will not reverse the trial

court's factual findings unless they are against the manifest weight of the evidence; however, we review the ultimate question of whether evidence should be suppressed *de novo*. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004).

¶ 20 The fourth amendment to the United States Constitution ensures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV; see also *Elkins v. United States*, 364 U.S. 206, 213 (1960) (observing that the fourth amendment applies to state officials through the fourteenth amendment). The amendment protects individuals and not specific locations. *Pitman*, 211 Ill. 2d at 514 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Accordingly, wherever an individual personally holds a reasonable expectation of privacy, he or she is entitled to be free from unreasonable governmental intrusion. *People v. Gherna*, 203 Ill. 2d 165, 176 (2003) (quoting *Terry* 392 U.S. at 9). Reasonableness generally requires a warrant supported by probable cause. *People v. Trisby*, 2013 IL App (1st) 112552, ¶ 11 (citing *Katz*, 389 U.S. at 357). In the case of an individual's home, a warrantless intrusion is presumed to be unreasonable. *People v. Wear*, 229 Ill. 2d 545, 562 (2008).

¶ 21 Standing

¶ 22 Before addressing the merits of defendant's fourth amendment claim, we note that the State initially argued in its brief that defendant lacked standing to bring his claims because he abandoned the firearm by throwing it to the ground and affirmatively denied possession of any firearm in his testimony. However, during the pendency of this appeal the State made a motion to withdraw these arguments which we subsequently granted. Therefore, we do not address the issue further.

¶ 23 Entry Through the Building's Front Door

¶ 24 Defendant first argues that the police officers violated his fourth amendment rights when they entered the building's unlocked front door without a warrant. He asserts that the common area between his apartment and the building's door constituted curtilage. The constitutional protections provided to an individual's home extend to the home's curtilage. *Pittman*, 211 Ill. 2d at 516. Curtilage consists of the area "immediately surrounding and associated with the home." *Id.* When determining whether an area constitutes curtilage, a court considers several factors: "(1) the proximity of the area claimed to be the home's curtilage; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by." *Id.* (citing *U.S. v. Dunn*, 480 U.S. 294, 301 (1987)).

¶ 25 The United States Supreme Court examined the issue of curtilage in *Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409 (2013). In *Jardines*, the Miami-Dade police department received an "unverified tip" that marijuana was being grown in the defendant's home. *Jardines*, 569 U.S. at ___, 133 S. Ct. at 1413. A month later, police brought a drug-detection dog onto the defendant's front porch and had it sniff the base of the front door. *Id.* After the dog gave a positive alert for narcotics, the police applied for and received a warrant to search defendant's residence. *Id.* The subsequent search of the residence resulted in the discovery of marijuana plants. *Id.* The Supreme Court held that a warrantless "dog sniff" of an individual's front porch was a search for purposes of the fourth amendment and suppressed the recovered evidence. *Jardines*, 569 U.S. ___, 133 S. Ct. at 1417-18.

¶ 26 In its analysis, the Court noted that curtilage is " 'part of the home itself for Fourth Amendment purposes.' " *Jardines*, 569 U.S. ___, 133 S. Ct. at 1414 (quoting *Oliver v. United*

States, 466 U.S. 170, 180 (1984)). The Court then held that a home's porch is a "classic exemplar" of curtilage, and thus constituted a constitutionally protected area. *Jardines*, 569 U.S. ___, 133 S. Ct. at 1415. However, this determination did not end the Court's analysis. It then considered whether the police officers' actions were "an unlicensed physical intrusion." *Id.* The Court stated:

> "A license may be implied from the habits of the country, notwithstanding the strict rule of the English common law as to entry upon a close. [Citation.] We have accordingly recognized that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. [Citation.] This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do. [Citation.]" (Internal quotation marks omitted.) *Jardines*, 569 U.S. ___, 133 S. Ct. at 1415-16.

The Court then reasoned that the officers' use of a trained police dog exceeded the scope of the implied license to approach the defendant's front door and held that their actions constituted a search for purposes of the fourth amendment. *Jardines*, 569 U.S. ___, 133 S. Ct. at 1416-18.

¶ 27 Our supreme court recently discussed *Jardines* and the concept of curtilage in the context of an apartment building in *People v. Burns*, 2016 IL 118973. In that case, police officers

entered a locked apartment building after 3 a.m. and brought a drug-sniffing dog to the defendant's apartment door without a warrant. *Id.* ¶¶ 6-7. The dog gave a positive alert for illegal drugs and the officers later used the alert to obtain a warrant to search the defendant's apartment. *Id.* ¶¶ 7-8. A subsequent search recovered cannabis and defendant was charged with unlawful possession with intent to deliver. *Id.* ¶¶ 9-10. The trial court granted defendant's subsequent motion to suppress the recovered cannabis and the appellate court affirmed. *Id.* ¶ 13.

¶ 28 After summarizing *Jardines*, our supreme court considered whether the area in front of the defendant's door constituted curtilage by applying the *Dunn* factors. *Id.* ¶¶ 35-37. It found that all four factors supported a determination that the landing area outside defendant's apartment constituted curtilage. *Id.* The court noted that the area sniffed by the police dog was in direct proximity to defendant's apartment. *Id.* ¶ 35. It then reasoned:

> "Here, the landing to defendant's apartment is an area located within a locked structure intended to exclude the general public. The third-floor landing is located directly outside of defendant's apartment door and the nature of its use is generally limited to defendant, the tenant of unit No. 9, and their invitees. The third-floor landing is an area with limited access, located within a locked building and not observable by 'people passing by.' We find the last three Dunn factors weigh in favor of finding that the landing to defendant's apartment is curtilage and reject the State's argument to the contrary." *Id.* ¶ 37.

The court further explained, "[T]he police conduct in this case certainly exceeded the scope of the license to approach defendant's apartment door when the officers entered a locked building in the middle of the night and they remained in the building for more than 'a very

short period of time.' " *Id.* ¶ 43 (quoting *Jardines*, 569 U.S. at ___, 133 S. Ct. at 1423 (Alito, J., dissenting, joined by Roberts, C.J., Kennedy and Breyer, JJ.)). It concluded that the officers had violated the defendant's fourth amendment rights. *Id.* ¶ 81.

¶ 29 We note that the area in question here, the common area between defendant's apartment and the building's front door, bears many similarities to the area considered in *Burns*. The officers' entry was in close proximity to defendant's apartment. The area was enclosed within the walls of the building itself, generally used only by the building's residents and their invitees as a means of access to the apartments, and it was not readily visible to passers-by on the street. Thus, under the factors set forth in *Dunn* and in light of our supreme court's opinion in *Burns*, we hold that the small area between defendant's apartment and the building's front door constituted curtilage, and thus, a constitutionally protected space. We acknowledge that in *Burns*, our supreme court noted that the outer building door was locked (*id.* ¶ 41), in contrast to the building in the case at bar. This distinction alone, however, does not foreclose a finding that the area constituted curtilage, as the porch in *Jardines* bore no lock.

¶ 30 Yet, our analysis does not end with a determination that the area in front of defendant's apartment was a constitutionally protected space. We must next consider whether the actions of the police officers amounted to "an unlicensed physical intrusion." *Jardines*, 569 U.S. ___, 133 S. Ct. at 1415. As the United States Supreme Court noted, a police officer without a warrant may approach a residence, promptly knock, and wait briefly in the same manner that any citizen could. *Jardines*, 569 U.S. ___, 133 S. Ct. at 1416. In the case at bar, we cannot find that the police officers acted in a fashion that would not be expected of any private citizen. Officers entered an outer, unlocked door which provided entry to a vestibule leading

to defendant's apartment in much the same fashion that any visitor could. Given that the front door was unlocked, we find the common vestibule area to be analogous to the porch examined in *Jardines*. Although the officers could not, without a warrant, bring a drug dog into the area or linger for an unreasonable amount of time, they were permitted to approach defendant's apartment door.

¶ 31 Defendant argues that officers could not enter a home's front door merely because it was unlocked and asserts that the building's front door was merely an extension of the apartment's door. We find defendant's argument unpersuasive. The common area outside of defendant's apartment was more akin to a shared walkway in front of a home than to an additional room in defendant's home. He shared access to the area with the building's other tenants and there was no evidence that the area was used as anything more than a method of access to his home. Consequently, the area was subject to the same implied license for visitors as a home's front walkway or landing as already discussed. We note that it is possible for a resident to countermand this implied license. See *Burns*, 2016 IL 118973, ¶¶ 41-43 (noting that police exceeded scope of license to approach by entering locked building door). Here the building door was unlocked and there was no evidence presented which indicated that the residents had taken any other steps to deter visitors from approaching the interior apartment doors. Accordingly, we find that the officers did not violate defendant's fourth amendment rights by entering the unlocked common area outside defendant's apartment door.

¶ 32 Entry into Defendant's Apartment

¶ 33 Defendant argues alternatively that police officers violated his fourth amendment rights when they entered his apartment without a warrant. Governmental entry into the home "is the chief evil against which the wording of the fourth amendment is directed." *Wear*, 229 Ill. 2d

at 562. Barring limited exceptions, both arrests and searches within one's home are presumed to be unreasonable without a warrant. *Id.* Warrantless entry into the home is permitted where governmental actors have probable cause and exigent circumstances justify the intrusion. *People v. Dawn*, 2013 IL App (2d) 120025, ¶ 22 (citing *People v. James*, 163 Ill. 2d 302, 311-12 (1994)). We first consider whether the officers had probable cause to enter defendant's apartment and arrest him.[1]

¶ 34 Probable cause to arrest an individual exists when the officers, at the time of the arrest, know facts "sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime." *People v. Grant*, 2013 IL 112734, ¶ 11. The existence of probable cause is determined by commonsense considerations, and "concerns the probability of criminal activity, rather than proof beyond a reasonable doubt." *Id.* A reviewing court must consider the "totality of the circumstances" known to the officers. *Wear*, 229 Ill. 2d at 563-64.

¶ 35 The State acknowledges in its brief that the possession of a gun inside one's home is not inherently illegal. See generally *McDonald v. City of Chicago*, 561 U.S. 742 (2010); see also *People v. Aguilar*, 2013 IL 112116. Instead, the State argues that officers had probable cause to arrest defendant based upon his commission of an aggravated assault during the argument witnessed by Officer Loaiza. It asserts that defendant "brandished" his weapon during a heated argument, and thus, the officers could reasonably believe that defendant had committed an aggravated assault.

¶ 36 An assault occurs when an individual "knowingly engages in conduct that places another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1(a) (West 2012). The assault rises to the level of an aggravated assault when one of several factors is present,

[1] We note that neither party raises the issue of whether the officers had probable cause to enter the apartment in order to perform a search. Consequently, we focus solely on whether there was probable cause to arrest.

including the use of a deadly weapon or a weapon designed to look like a firearm. 720 ILCS 5/12-2(a) (West 2012).

¶ 37 Loaiza testified that defendant was engaged in a loud argument with a woman involving yelling and swearing. During this heated exchange, defendant lifted his shirt and "showed" a firearm as the woman walked down the front steps. The woman then "began walking quickly" away. Witnessing these events, a reasonably cautious person could believe that defendant had committed an assault. Given the argument, an observer could believe that defendant's display of the weapon caused the woman to fear that defendant intended to shoot her. The fact that she began to walk quickly away gives further evidence of her potential apprehension. Consequently, Loaiza knew facts sufficient to establish probable cause to arrest defendant for assault. As defendant displayed a firearm, a deadly weapon, the potential assault would rise to the level of aggravated assault. 720 ILCS 5/12-2(a)(1) (West 2012).[2] This knowledge, and resulting probable cause, extends to the arresting officers acting on Loaiza's call to approach defendant. *People v. Fonner*, 385 Ill. App. 3d 531, 541 (2008) ("When officers are working together, 'the knowledge of each is the knowledge of all,' and the arresting officer has the right to rely on the knowledge of the officer that gave the command to arrest together with his own personal knowledge.") (quoting *People v. Peak*, 29 Ill. 2d 343, 349 (1963)).

¶ 38 Defendant argues that Loaiza had no reason to believe that the woman was in apprehension of a battery because she continued to yell at and argue with defendant. We also note that Loaiza testified at the hearing that the woman was already walking down the steps

[2] Defendant argues in his reply brief that the alleged assault could not be deemed an aggravated assault, seemingly analyzing the most recent version of the aggravated assault rather than the statute in effect at the time of defendant's arrest. Regardless, both versions of the statute include assault through the use of a deadly weapon as an aggravated assault. See 720 ILCS 5/12-2(c)(1) (West 2014); compare 720 ILCS 5/12-2(a)(1) (West 2012).

and away from defendant when he displayed the firearm, although his trial testimony indicates that she quickened her pace. The fact that the woman did not stop arguing and yelling at defendant after he displayed the weapon weighs against a conclusion that she was in apprehension. Similarly, the fact that the woman was already leaving before the firearm was shown also provides some proof against the State's argument that her exit was evidence of apprehension. However, we need not determine whether Loaiza's observations were sufficient to prove defendant guilty of aggravated assault beyond a reasonable doubt. *Wear*, 229 Ill. 2d at 564. Importantly, a probable cause determination does not require a showing that the officer's belief that a crime was committed was " 'more likely true than false.' " *People v. Jones*, 215 Ill. 2d 261, 277 (2005) (quoting *Texas v. Brown*, 460 U.S. 730, 741-42 (1983)). The principles underlying the probable cause determination require us to "give fair leeway for enforcing the law in the community's protection." *Id.* at 277-78 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). Thus, although Loaiza's observation that the woman walked away "quickly" is not particularly strong evidence of her apprehension, we cannot say it is insufficient to establish probable cause.

¶ 39 Defendant also argues that the officers did not have probable cause because defendant merely showed the weapon and did not touch it or remove it from his waistband. However, we need not determine whether the showing of a firearm in and of itself is enough to support a conviction for aggravated assault. We must consider probabilities based upon the " 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *People v. Love*, 199 Ill. 2d 269, 279 (2002) (quoting *Brinegar* 338 U.S. at 175). Viewing the totality of the circumstances, a reasonably cautious person could believe that defendant had committed an aggravated assault.

¶ 40 Defendant also argues that the police officers' actions show that they did not actually believe an assault had occurred, but rather acted solely because defendant had a gun. However, the subjective motivations and beliefs of the officers are wholly irrelevant to our determination. *Id.* at 566 (citing *Brigham City, Utah, v. Stuart*, 547 U.S. 398, 404 (2006)). The determination of probable cause is based solely on an objective consideration of the facts known to the officers, not their personal conclusions. *People v. Byrd*, 408 Ill. App. 3d 71, 77 (2011). Objectively viewing the facts known to the officers, we find there was probable cause to arrest defendant.

¶ 41 Exigent Circumstances

¶ 42 The constitutional prohibition against warrantless entries into the home is subject to limited exceptions. *Wear*, 229 Ill. 2d at 563. Officers with probable cause but without a warrant may enter a suspect's home when certain exigencies exist, including when responding to emergencies, preventing the imminent destruction of evidence, or hotly pursuing a fleeing suspect. *Id.* (citing *Brigham City, Utah*, 547 U.S. at 403). The State bears the burden of demonstrating exigent need for warrantless entry into the home. *People v. McNeal*, 175 Ill. 2d 335, 345 (1997). Our supreme court has set forth several factors to consider when determining whether an exigency exists, including:

> "(1) the crime under investigation was recently committed; (2) there was any deliberate or unjustified delay by the police during which time a warrant could have been obtained; (3) a grave offense was involved, particularly a crime of violence; (4) there was reasonable belief that the suspect was armed; (5) the police officers were acting on a clear showing of probable cause; (6) there was a likelihood that the suspect would escape if he was not swiftly apprehended; (7) there was strong reason

> to believe the suspect was in the premises; and (8) the police entry was made peaceably, albeit nonconsensually." *Id.*

The list of factors is not exhaustive, and should be viewed as "merely guidelines rather than cardinal maxims to be applied rigidly in each case." *Id.* The primary question for the court, when viewing the totality of the circumstances, is whether police officers acted reasonably. *People v. Williams*, 161 Ill. 2d 1, 26 (1994). Where the facts are not in question, our review for exigent circumstances is *de novo*. *McNeal*, 175 Ill. 2d at 345.

¶ 43 We find several of the factors set forth by our supreme court weigh in favor of a finding that no exigency existed. First, defendant's actions, while potentially criminal, do not rise to the level of a grave crime. Assault, aggravated by the use of a deadly weapon, is a Class A misdemeanor. 720 ILCS 5/12-2(b) (West 2010); see also *People v. Eden*, 246 Ill. App. 3d 277, 284-85 (1993) (noting that the United States Supreme Court viewed a warrantless entry based on a misdemeanor with extreme caution) (citing *Welsh v. Wisconsin*, 466 U.S. 740, 750 n. 12 (1984)). We note that whether an act is a misdemeanor or felony is not dispositive (*People v. Wimbley*, 314 Ill. App. 3d 18, 32 (2000)), however, the particular actions taken by defendant also bolster a finding that any potential crime did not rise to the level of a grave crime. Defendant did not point the firearm, brandish it, nor even touch it. Loaiza did not hear defendant yell any threat when he displayed the weapon. While the mere display of a firearm is a serious action, it does not necessarily rise to the level of a grave crime.

¶ 44 Similarly, while we have determined that the officers had probable cause, the showing was not so clear as to weigh in favor of finding an exigency.[3] The officers' probable cause rested solely on defendant's display of a firearm and the fact that when the woman walked

[3]The fifth factor, examining whether officers relied on a clear showing of probable cause, cannot logically rely solely on whether the officers had probable cause because a finding of probable cause is necessary before exigent circumstances are considered. *Dawn*, 2013 IL App (2d) 120025, ¶ 22.

away, she did so quickly. However, the continuity of her actions provides some evidence against a conclusion that she was in apprehension of an impending battery. The woman was already leaving before defendant displayed the weapon and continued to walk away after defendant lifted his shirt. She was arguing and yelling at defendant before the weapon became visible and did not stop. Given these actions, it was not exceedingly clear that the woman was placed in apprehension. Thus, although the facts known to Officer Loaiza may have been sufficient to provide probable cause, the showing was not so strong as to support a finding of an exigency.

¶ 45 We note that the dissent disagrees with our characterization of the strength of the officers' probable cause, analogizing the present case to *People v. Wayman*, 379 Ill. App. 1043 (2008). In that case, the appellate court found, under the much stricter sufficiency standard, that the State presented sufficient evidence to convict the defendant of aggravated assault. *Id.* at 1061-62. The State's case relied on the victim's testimony that the defendant had stated "he would not let her leave" following a heated argument, retrieved a handgun, and pointed the gun at himself. *Id.* at 1047. The victim then heard several gunshots as she left. *Id.* By contrast, in the current case, Officer Loaiza did not speak to the alleged victim, did not hear any threatening language from defendant, and did not observe defendant ever hold or fire the handgun. Given these differences, we respectfully disagree that *Wayman* is instructive in the current case.

¶ 46 Two more listed factors weigh against a finding of an exigency: the likelihood of escape and the nature of the officers' entry. Nothing in the record supports the conclusion that defendant had any knowledge that a police officer had observed his actions. Consequently, when he returned into his home, he had no motivation to flee or to dispose of the weapon.

The dissent characterizes defendant's return to his home as a "retreat." However, at the time, defendant was not being pursued and had no knowledge that he had been observed. The officers could not reasonably believe that defendant's unprompted re-entry into a residence indicated that defendant might escape a pursuit of which he was completely unaware.

¶ 47 Additionally, we cannot find that the officers' entry was peacable. Although, they did not break down a door, three officers arrived in defendant's apartment building at night with their weapons drawn. At the time they entered defendant's apartment, the officers had their handguns and flashlights pointed directly at defendant. We note that the factor does not ask whether entry was forcible, but rather whether it was "peacable." *McNeal*, 175 Ill. 2d at 345. The fact that defendant's door was open does not render the entry at gunpoint peacable.

¶ 48 We acknowledge that several other factors weigh in favor of an exigency. The officers entered within minutes after the alleged assault and without any undue delay. It was also clear to the officers that defendant was on the premises and armed. However, in viewing the totality of the circumstances, we find that the State has failed to show that the officers' decision to proceed without a warrant was reasonably justified. Defendant had done nothing to threaten the safety of the officers. While his display of a weapon potentially threatened the safety of the woman, that threat had subsided by the time the officers acted because the woman had already left. Moreover, there was no evidence beyond defendant's possession of a weapon that he was an imminent threat to any other person's safety. Because defendant did not have any knowledge of the police officers' presence there was no reasonable danger that he would flee or dispose of any evidence. The State has shown no reason why a delay during which officers sought a warrant would have endangered anyone or prevented defendant's arrest. Consequently, we cannot find that exigent circumstances existed to excuse the

officers' warrantless entry into defendant's home. Thus, the trial court erred when it denied defendant's motion to quash arrest and suppress evidence.

¶ 49 The dissent posits that three prior appellate court cases are controlling on the issue of whether exigent circumstances existed: *People v. Garcia*, 296 Ill. App. 3d 769 (1998); *People v. Pierini*, 278 Ill. App. 3d 974 (1996); and *People v. Allen*, 202 Ill. App. 3d 487 (1990). In *Garcia*, police officers arrested an individual on the defendant's front porch in an unrelated matter. *Garcia*, 296 Ill. App. 3d at 772. Looking through the open front door, the officers observed the defendant and another man weighing what appeared to be cocaine as a handgun lay nearby. *Id.* The officers entered the home and seized the drugs and firearm. *Id.* On appeal, the reviewing court held that exigent circumstances justified the warrantless entry into the house, noting that an offense was occurring in the officers' presence at the time of the search. *Id.* at 777-78. In *Pierini*, a police officer knocked on the defendant's front door and smelled cannabis when the door was opened. *Pierini*, 278 Ill. App. 3d at 976. The officer then observed a box containing marijuana cigarettes and other paraphernalia on a stand next to the door. *Id.* Reaching through the doorway, the officer picked up one of the cigarettes, smelled it, and then arrested defendant. *Id.* The officer testified that he did not get a warrant because the defendant's wife was in the other room and he feared the evidence would be destroyed. *Id.* Noting that an offense was occurring at the time of the search and that there was a danger of the evidence being destroyed, the appellate court held that exigent circumstances justified the police officer's intrusion into the home. *Id.* at 978-79. Unlike in the present case, in both *Garcia* and *Pierini* an offense was occurring at the time of the police intrusion into the home. Moreover, in those cases it was not clear that the offenders were unaware of a police presence. Thus, in both *Garcia and Pierini*, there was a real danger that

evidence would be destroyed which supported a finding of exigent circumstances. As we have already discussed, such a danger did not exist in the present case and thus we find both cases inapposite.

¶ 50 We find *Allen* even more disparate to the facts of the case before us. In that case, police officers responded to an emergency call that a man with a firearm was holding a woman in an apartment. *Allen*, 202 Ill. App. 3d at 489. When the officers arrived, a woman with a bloody face ran towards them, pointed to the defendant's apartment, and stated that a man with a gun was there and "they" had beaten her. *Id.* The officers knocked on the apartment door and the defendant opened it. *Id.* He held a firearm and another woman stood behind him. *Id.* The defendant dropped the handgun and officers entered the apartment, arrested him, and recovered the weapon. *Id.* On appeal, this court found that the seizure of the gun was valid as a search incident to arrest and that the officers' entry into the apartment was justified by exigent circumstances. *Id.* at 491-92. Several factors clearly supported a finding of exigent circumstances in *Allen*. Police officers were responding to a call that an armed man was holding a woman hostage, they were met by a bloody victim who directed them to the defendant, and when they found the defendant there was another potential victim with him. In that case, police officers clearly faced a dangerous and potentially still-occurring hostage situation that required immediate action. As already discussed, no such immediate danger existed in the present case.

¶ 51 The determination of exigent circumstances must focus on whether police officers acted reasonably. *People v. Yates*, 98 Ill. 2d 502, 515 (1983). We acknowledge that police officers face the difficult task of making quick decisions based upon the information before them while at the same time weighing their duty to protect the community. See *People v. Jones*, 31

Ill. 2d 42 47 (1964). However, the core of the fourth amendment is the protection of an individual's home from unwarranted governmental intrusion (People v. Absher, 242 Ill. 2d 77, 83 (2011)), and we cannot ignore that the amendment's protections have "drawn a firm line" at the entrance to one's home (*Payton v. New York*, 445 U.S. 573, 590 (1980)). The sanctity of the home is such that we presume a warrantless entry over its threshold is unreasonable. *Wear*, 229 Ill. 2d at 562. For the foregoing reasons, we cannot find that this presumption has been rebutted.

¶ 52 Plain View Doctrine

¶ 53 The State alternatively contends that the officers' entry into the apartment and the recovery of the firearm was justified by the plain view doctrine. It argues that the officers were legally permitted to stand in the building's vestibule and that the criminal nature of the firearm was immediately apparent.

¶ 54 We find the State's argument unpersuasive. The plain view doctrine authorizes warrantless recovery of an object when: (1) an officer is lawfully present in a location from which he or she can plainly see the evidence; (2) the incriminating nature of the object is readily apparent; and (3) the officer has "lawful right of access" to the object. *Jones*, 215 Ill. 2d at 271-72 (citing *Minnesota v. Dickerson*, 508 U.S. 366, 374-75 (1993)). The doctrine provides no independent right of entry. *People v. Hunley*, 313 Ill. App. 3d 16, 25 (2000) ("The plain view doctrine is not an independent exception to the warrant requirement and cannot, by itself, allow the police to make a warrantless entry into a home.") Here, as already determined, the police officers were not permitted to enter defendant's home and thus had no right of access to the recovered firearm. The plain view doctrine is inapplicable.

¶ 55 *Terry v. Ohio*

¶ 56 The State also contends that the officers' intrusion was justifiable as an investigative stop, citing *Terry v. Ohio*, 392 U.S. 1 (1968). However, this argument is equally inapplicable. In *Terry*, the United States Supreme Court held that an officer does not violate the fourth amendment where he or she conducts a brief, investigatory stop of an individual based upon a reasonable, articulable suspicion of criminal activity. *Id.* at 30. However, the *Terry* doctrine deals solely with investigative stops by police officers and does not authorize entry into an individual's home. See *Wear*, 229 Ill. 2d at 566-67 (explaining that entry into a residence "to merely conduct a *Terry* stop" would violate the fourth amendment). Accordingly, *Terry* and its progeny are inapposite to the current case.

¶ 57 Appropriate Remedy

¶ 58 Having determined that the officers' entry into defendant's apartment violated his fourth amendment rights, we must now consider the appropriate remedy. Defendant contends that the proper remedy is the reversal of his conviction because the suppression of the recovered firearm and related testimony would leave the State unable to present sufficient evidence of possession. The State offers no argument on this issue.

¶ 59 Under the exclusionary rule, courts may not admit evidence gathered in violation of the fourth amendment. *People v. Lampitok*, 207 Ill. 2d 231, 241 (2003). Because the officers' entry into defendant's apartment was illegal, the resulting recovery of the firearm should be suppressed in the absence of any exception to the exclusionary rule. See *Burns*, 2016 IL 118973, ¶¶ 46-56 (considering the good faith exception to the exclusionary rule). The State has not argued any such exception applies, and we therefore conclude that the firearm and testimony regarding defendant's arrest should have been suppressed. See Ill. S. Ct. R. 341(h)(7), (i) (eff. Feb. 6, 2013) ("Points not argued are waived"). Where a defendant's

conviction could not stand without the suppressed evidence, the proper remedy is reversal. See *People v. Sims*, 2014 IL App (1st) 121306, ¶ 19 (reversing defendant's conviction for possession of a controlled substance where drugs were recovered in illegal search); *People v. Rhinehart*, 2011 IL App (1st) 100683, ¶ 21 (reversing defendant's conviction for, *inter alia*, unlawful use of a weapon where evidence of the firearm should have been suppressed).

¶ 60 The State does not argue that it could sufficiently prove defendant guilty beyond a reasonable doubt absent the recovered weapon and testimony regarding defendant's arrest. We therefore accept defendant's contention and reverse his conviction of being an armed habitual criminal and his sentence outright. Accordingly, his claim that his sentence was excessive is now moot, and we need not discuss the issue.

¶ 61 Conclusion

¶ 62 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County denying defendant's motion to quash arrest and suppress evidence, as well as reverse defendant's conviction for being an armed habitual criminal.

¶ 63 Reversed.

¶ 64 Presiding Justice McBride, dissenting:

¶ 65 I respectfully dissent from the majority's opinion finding that the trial court erred in denying defendant's motion to quash arrest and suppress evidence. I would find that the officer's recovery of the gun was justified under the plain view and exigent circumstances exceptions to the warrant requirement. As a result, I would find that the trial court's denial of defendant's motion to suppress was not erroneous.

¶ 66 At the hearing on defendant's motion, two Chicago police officers testified. Officer Loaiza testified that he was surveilling a building on an unrelated matter when he saw and

heard defendant and a woman arguing loudly. During the course of the argument, the officer saw defendant lift up the front of his shirt to reveal a chrome handgun that he was carrying in the waistband of his pants. The officer radioed other officers in the area, three of whom arrived in less than one minute. Responding Officer Olivares approached the building with two other officers, and went inside to a common area of the apartment. Once inside that small vestibule area, Officer Olivares saw defendant's apartment door, which was "wide open," and defendant standing eight feet inside facing the officers. With a gun or guns drawn, and with a flashlight shining into an open door, Officer Olivares observed defendant reach into his waistband and throw the handgun to the ground. The officers recovered the handgun and placed defendant under arrest. Defendant did not testify, and his counsel simply questioned one of the officers and rested on his motion.

¶ 67 Initially, I note that in denying defendant's motion, the trial court explicitly found the police officers' testimony to be credible. We give deference to the trial court's findings of fact, and unless we find those facts to be manifestly against the weight of the evidence, we consider them in determining the ultimate question of whether the motion to suppress should have been granted or denied as a matter of law. *People v. Slater*, 228 Ill. 2d 137, 149 (2008).

¶ 68 I have no quarrel with the majority's discussion of *Jardines* or *Burns*, however, I do not believe those cases are particularly relevant to the discussion here because they involve dog sniff searches of the curtilage of homes. This case, however, does not involve a dog sniff, and I agree with the majority's eventual conclusion that the officers did not violate defendant's fourth amendment rights by entering the unlocked common area outside defendant's door.

¶ 69 I agree with the trial court, which found that the recovery of the weapon was justified by the plain view exception to the warrant requirement. An item is in plain view if the process of finding it involves no search and no prying into hidden places for that which is concealed. See *Texas v. Brown*, 460 U.S. 730, 739 (1983) ("In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately.") A warrantless seizure of evidence is permissible under the plain view doctrine because such a seizure does not constitute an intrusive invasion into private property in violation of the fourth amendment. *People v. Hassan*, 253 Ill. App. 3d 558, 569 (1993), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 466–67 (1971). The "plain view" doctrine allows a police officer to seize an object without a warrant if (1) he views the object from a place he is legally entitled to be, and (2) the object is immediately apparent to him to be evidence of a crime, contraband or otherwise subject to seizure. See *People v. DeLuna*, 334 Ill. App. 3d 1, 13 (2002), citing *People v. Watkins*, 293 Ill. App. 3d 496, 502 (1997).

¶ 70 As the majority recognizes, the officers had a right to be in the hallway vestibule outside the apartment door. The outer door was not locked, the officers gained entry to an area that was accessible by the general public, and their access was not forceful. See *People v. Smith*, 152 Ill. 2d 229, 245 (1992) (holding that an individual resident of a multi-unit building does not have a fourth amendment privacy interest in a common area where members of the public are reasonably expected to enter). Moreover, the officers were not at that location to search for an item, but to investigate a crime. See *Horton v. California*, 496 U.S. 128, 136 (1990) ("The [plain view] doctrine serves to supplement the prior justification-whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other

legitimate reason for being present unconnected with a search directed against the accused-and permits the warrantless seizure.") In these circumstances, the first requirement is plainly established.

¶ 71 I would also find the second element to be present in this case. Although defendant contends that "seeing a person on their own land with a gun cannot form the basis for probable cause unless the police know, at the time of the arrest or search, that the person is a felon," the record shows that it was not the mere fact of defendant's possession that led to the seizure here. Instead, only minutes before the officers recovered the weapon from defendant, another officer had seen defendant engaged in an argument with a woman during which he lifted his shirt to display a handgun. As the majority recognizes, the officer's observations of defendant's actions provided probable cause to believe that he had committed an aggravated assault. See 720 ILCS 5/12-1(a) ("A person commits an assault when, without lawful authority, he or she knowingly engages in conduct which places another in reasonable apprehension of receiving a battery"); 720 ILCS 5/12-2(c)(1) ("A person commits aggravated assault when, in committing an assault, he or she *** [u]ses a deadly weapon").

¶ 72 Defendant contends that his conduct could not be found to have been an aggravated assault, reasoning that "the woman continued to yell and swear at him after [he showed her the gun]" and thus, she was "hardly act[ing] afraid of [defendant]." Defendant further speculates that the "mystery woman could have been an intruder into [defendant's] home, she could have assaulted him in the house, necessitating his need to defend himself with a gun, or they could have been rehearsing a play." Defendant's arguments are unconvincing.

¶ 73 Probable cause exists when the totality of the facts and circumstances known to the officer making the arrest is such that a reasonably prudent person would believe that the

suspect is committing or has committed a crime. *People v. Montgomery*, 112 Ill.2d 517, 525 (1986). Probable cause is more than a mere suspicion that an offense has been committed and the individual in question committed it, but it does not require evidence sufficient to convict. *People v. Neal*, 111 Ill. 2d 180, 193, (1985); *People v. Moody*, 94 Ill. 2d 1, 7 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (probable cause deals with " 'probabilities * * * the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act' ")). Probable cause also does not demand a showing that the belief that the suspect has committed a crime be more likely true than false. *People v. Jones*, 215 Ill. 2d 261, 277 (2005). Whether probable cause exists "must be determined from the standpoint of the officer, with his skill and knowledge being taken into account, and the subsequent credibility determinations must be made by the trial court." *People v. Stout*, 106 Ill. 2d 77, 87 (1985).

¶ 74 Although sufficient evidence to convict is not necessary in the probable cause context, I note that this court has found sufficient evidence of an aggravated assault in similar factual circumstances. In *People v. Wayman*, 379 Ill. App. 3d 1043, 1047 (2008), the defendant challenged the sufficiency of the evidence to support his aggravated assault conviction where the evidence showed that during the course of a "heated argument" with his wife, the defendant told her he was not going to let her leave, and retrieved a gun which he turned on himself. Although the defendant never pointed the gun at his wife, this court found that it was "reasonable to infer from the defendant's conduct that his specific intent was to place [his wife] in fear of receiving a battery. Why else would he tell her he would not let her leave and produce a gun for her to see?"

¶ 75 Similarly here, Officer Loaiza observed defendant engaged in a heated argument with a woman. During the course of that argument defendant lifted his shirt and displayed a gun that he had hidden in this waistband. In these circumstances, I would find no other reasonable explanation for defendant's conduct, other than that he intended to place the woman in reasonable apprehension of receiving a battery. Thus, because there was clear probable cause to believe that defendant had just committed an aggravated assault with the handgun, I would find the second element of plain view to have been clearly established. It was immediately apparent that the object in plain view was evidence, as it was the instrumentality of the crime just committed.

¶ 76 In my opinion, our inquiry should end here—the officers had a right to be where they were, and it was immediately apparent that the gun that defendant dropped was evidence of the crime that they had just observed him commit. In these circumstances, I believe that the officers had the absolute right to recover the weapon under the plain view doctrine. I acknowledge, however that some cases have inserted a third element into the plain view analysis: namely, that the officer must have a lawful right of access to the object. See *People v. Pierini*, 278 Ill. App. 3d 974, 977 (1996); *People v. Garcia*, 296 Ill. App. 3d 769, 776 (1998). However, even if this element applies, I believe that it is met in this case and the officers had a lawful right of access to the gun.

¶ 77 This third prong of the plain view exception may be satisfied by the exigent circumstances exception to the warrant requirement. See *Garcia*, 296 Ill. App. 3d at 776. Although the trial court determined that exigent circumstances did not exist, we may affirm the judgment on any basis supported by the record, even if that basis was rejected by the trial court. *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008). Further, we may do so

regardless of whether the trial court's reasoning was correct. See *Toia v. People*, 333 Ill. App. 3d 523, 527 (2002). This is because of the "long-standing principle that 'it is not the trial court's reasoning which is the subject of this court's review, but, rather, its judgment.' " *People v. Cleveland*, 342 Ill. App. 3d 912, 915 (2003) (quoting *People v. Norks*, 137 Ill. App. 3d 1078, 1082 (1985)).

¶ 78 "[P]olice may make a warrantless entry into private premises based on circumstances confronting them at the time of entry indicating that an emergency situation exists." *People v. Lewis*, 75 Ill. App. 3d 259, 276 (1979). The fundamental guiding principle with respect to exigency is reasonableness, and in determining whether the police officers acted reasonably, this court should look to the totality of the circumstances known to the officers at the time of the warrantless entry. *People v. Yates*, 98 Ill. 2d 502, 515 (1983); *People v. Williams*, 161 Ill. 2d 1, 26 (1994).

¶ 79 Factors relevant to the determination of whether exigent circumstances exist include whether (1) the crime under investigation was recently committed, (2) any deliberate or unjustified delay occurred during which time a warrant could have been obtained, (3) a grave offense has occurred, (4) there was a reasonable belief the suspect was armed, (5) the officers were acting on a clear showing of probable cause, (6) there was a likelihood that the suspect would escape if he was not swiftly apprehended, (7) there was a strong belief the suspect was in the premises and (8) the police entry was made peaceably, albeit nonconsenually. *People v. McNeal*, 175 Ill. 2d 335, 345 (2001). These factors are not exhaustive, and are merely guidelines rather than cardinal maxims to be applied rigidly in each case. *Id.*

¶ 80 It seems to me all the above factors weigh in favor of finding the existence of exigent circumstances. As stated above, one of the police officers had just observed defendant

commit an aggravated assault (720 ILCS 5/12-2(a); (c)(1)), which is considered a grave offense. *Minnesota v. Carter*, 525 U.S. 83, 110 (1998) (listing "first-degree murder, armed robbery, and assault" as examples of grave crimes); *People v. Ferral*, 397 Ill. App. 3d 697, 710-11 (2009) (same).

¶ 81 Moreover, there was no unjustified delay as the officers arrived at the building within one minute of the crime. As such, there was no time during which a warrant could have been obtained. Defendant was also known to be armed, having just displayed the weapon to the woman with whom he was arguing. As discussed above, the officers were also acting on a clear showing of probable cause. Defendant retreated into a building, so he may have escaped if not swiftly apprehended. Additionally, the officers had a strong belief that he was in the premises since he had just been seen entering the building. Finally, the police entry was also made peaceably, albeit nonconsenually—the outer door to the vestibule was not locked, and the door to defendant's location was wide open. In these circumstances, I would find a clear showing of the existence of exigent circumstances sufficient to justify the recovery of the weapon.

¶ 82 In so concluding, I have reviewed a number of Illinois cases, specifically *People v. Allen*, 202 Ill. App. 3d 487 (1990), *People v. Pierini*, 278 Ill. App. 3d 974 (1996); *Garcia*, 296 Ill. App. 3d 769. I cannot reconcile the majority's opinion in light of the foregoing cases.

¶ 83 I find this case analogous to *People v. Allen*, 202 Ill. App. 3d 487 (1990), in which this court affirmed the trial court's denial of the defendant's motion to suppress. In that case, the evidence showed that officers were responding to a call that a man with a gun was holding a woman at an apartment building. *Id.* at 489. When the officers arrived, they saw a woman with a bloody face who told them that there was a man with a gun in "there," pointing to one

of the apartments. *Id*. The officers approached, knocked on the door, and when the defendant opened the door, he dropped a gun three feet inside the doorway. *Id*. The officers entered the apartment, recovered the gun, and arrested the defendant. *Id*. During a subsequent search, officers recovered cocaine, marijuana, and various other items inside the apartment. *Id.*

¶ 84 On appeal, the defendant argued that the "the warrantless seizure of the gun was outside of the scope of an exception to the warrant requirement." *Id.* at 491. This court disagreed, finding that the recovery of the gun was justified as a search incident to arrest, because the gun was arguably seized in an area within defendant's immediate control. Id. The court additionally held "assuming, arguendo, that the gun was seized in an area not within defendant's immediate control, the seizure clearly falls within the plain view exception[.]" *Id.* (also noting that "the seizure is valid if the items are inadvertently discovered in plain view in a place where the police have a right to be and there is probable cause to believe that the items constitute proceeds or the instrumentality in a crime."

¶ 85 In *People v. Pierini*, the defendant was convicted of possession with intent to deliver cannabis. *Pierini*, 278 Ill. App. 3d at 976. At the pre-trial suppression hearing, the court heard testimony that established that a police officer was at defendant's home investigating information provided by a confidential informant regarding cannabis trafficking. The officer knocked on the defendant's door and, after defendant opened it, the officer smelled a "strong aroma of reefer, cannabis, fresh cannabis emanating from there." *Id.* After smelling the cannabis, the officer observed that "[j]ust next to the door inside to the right on like a nightstand was a cigar box full of half-smoked marijuana cigarettes and roaches, roach cigarettes," or partly smoked cannabis cigarettes. *Id.* The officer reached into the doorway, picked one up, smelled it, and determined it was cannabis. The officer testified that he had

"an idea" that the cigarette contained marijuana, but he was not certain until he picked it up. *Id.* The officer arrested defendant, and testified that he did not obtain a search warrant because the defendant's wife was in another room at the time and there was a chance that the contraband would be destroyed. *Id.* at 977.

¶ 86 In reviewing the circuit court's denial of the defendant's motion to suppress, the appellate court considered whether the search was justified by the plain view exception to the warrant requirement. It found the first two requirements satisfied because "it is not disputed that Officer Shields was lawfully present outside defendant's apartment. From that vantage point, it was immediately apparent to him, an experienced narcotics officer who detected the odor of fresh cannabis, that the hand-rolled cigarettes were evidence, notwithstanding his need to smell them to confirm his belief." *Id.* at 977.

¶ 87 The court then considered whether the officer had a lawful right of access to the box of cannabis cigarettes sitting inside the defendant's home. The court noted that the police are "constitutionally prohibited from making a warrantless and nonconsensual arrest or seizure in a suspect's home, unless exigent circumstances existed to excuse the absence of a warrant." *Id.* at 977-78, citing *Payton v. New York*, 445 U.S. 573, 576, 588-89 (1980).

¶ 88 The court examined the exigent circumstances factors and concluded that the officer had "a lawful right of access to the cannabis cigarettes" and that the seizure was proper. *Id.* at 979. The offense was occurring in the presence of a police officer; a delay in obtaining a warrant could have resulted in the destruction of evidence; and the officer was acting on a clear showing of probable cause. *Id.*

¶ 89 Similarly, in *Garcia*, 296 Ill. App. 3d 769, this court affirmed the trial court's denial of the defendant's motion to suppress evidence supporting his possession of a controlled

substance with intent to deliver conviction. The evidence at the suppression hearing established that officers were lawfully on defendant's front porch engaged in an unrelated arrest of a person for underage drinking. *Id.* at 772. The front door was open, and officers were able to see through a glass storm door defendant and a codefendant sitting at a kitchen table, upon which a scale and handgun lay. *Id.* The officer saw the defendant place a package of white powder onto the scale and the codefendant take the package off the scale. The officers entered the home and recovered the handgun, cocaine, and various other items. *Id.* at 773.

¶ 90 Based on the above, this court concluded that the officers' seizure of evidence from the defendant's home was lawful under the plain view doctrine. *Id.* at 777. The officers were lawfully present on the front porch of defendant's house, and the evidence of a crime was immediately apparent to the police officer, who testified that based upon his experience as a police officer, he believed the substance being weighed to be cocaine. *Id.* Finally, this court held that the officers had a lawful right of access to that evidence based upon exigent circumstances, because an offense was taking place in the officers' presence, there was no deliberate or unjustified delay by the officers during which time they could have obtained a search warrant, and the suspects were armed with the gun that was laying on the table near where they were sitting. *Id.* at 777-78. The court also determined that the officers were acting on a clear showing of probable cause since they saw the alleged contraband and the suspects weighing a white powder. *Id.* at 778. Finally, the officers' entry into defendant's house was peaceful since the door to the house was open and the outer storm door was unlocked. *Id.*

¶ 91 I find the case at bar to be even stronger for an exigency finding than *Pierini* or *Garcia*, primarily because of defendant's crime and the dangerous nature of the item at issue. In

Pierini and *Garcia*, the defendants were challenging the introduction of drug evidence, whereas here, defendant was armed with a handgun, with which he had recently been observed committing an aggravated assault. While the defendant in Garcia also moved to suppress a recovered handgun, that gun was merely sitting on a table, while defendant in this case was carrying the gun and had displayed it minutes prior during an argument with a woman. In these circumstances, I find it totally unreasonable to suggest that the officers needed to either ignore the weapon, or to get a warrant before recovering it. See *People v. Trask*, 167 Ill. App. 3d 694, 705 (1988) (holding that exigent circumstances excused the officers failure to knock and announce where the defendant had recently been found to be carrying a concealed, loaded pistol, and it was reasonable to believe that he might be armed and dangerous in light of a previous encounter. "The police should not have to be certain that they will be shot at if they wait very long before entering; they just have to have a reasonable apprehension of danger.")

¶ 92 In sum, our chief concern on review is the reasonableness of the officer's actions. In the words of our supreme court, "Courts must remain cognizant of the observation that the police " 'often must act upon a quick appraisal of the data before them, and the reasonableness of their conduct must be judged on the basis of their responsibility to prevent crime and to catch criminals.' " *People v. Jones*, 31 Ill.2d 42, 47 (1964) (quoting *People v. Watkins*, 19 Ill. 2d 11, 19 (1960)). To suggest that, in these circumstances, the officers could not recover the handgun lying mere feet within the open doorway ignores the reasonableness factor that the Fourth Amendment is founded upon. In this situation, it is my opinion that the police officers had the absolute right to recover that gun, and did not need to ignore what was, in all likelihood, the instrumentality of a crime they had witnessed on the front steps.

¶ 93 For the foregoing reasons, I respectfully dissent. I would affirm the denial of defendant's motion to suppress.