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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE ALBERT KIRYAKOZ,

Defendant and Appellant.

F054463

(Super. Ct. No. 1093389)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Ricardo Cordova, Judge.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Jesse Albert Kiryakoz (Kiryakoz) was charged with and convicted of possession for sale and cultivation of marijuana (Health & Saf. Code, §§ 11359, 11358),

and placed on probation for three years. The charges resulted when law enforcement officers responded to his residence on a domestic violence dispatch, entered the house to check on the welfare of the alleged victim, conducted a protective sweep search of the interior rooms and closets, and found a large amount of marijuana plants and dried marijuana throughout the house. At trial, Kiryakoz claimed he was a medical marijuana caregiver to numerous patients who had physician recommendations to use the drug.

On appeal, Kiryakoz contends the trial court improperly denied his suppression motion and argues the officers unlawfully entered and searched the entirety of his house. We will briefly review the trial evidence, and then turn to the facts and arguments raised at the suppression hearing. As we will explain *post*, the officers lawfully entered the house pursuant to the exigent circumstances of the domestic violence call, but they lacked articulable facts to justify the warrantless protective sweep search of the interior rooms and closets, which resulted in the discovery of the large amount of marijuana plants and led to the issuance of a search warrant. Given the entirety of the record, the matter must be reversed.

FACTS

On June 2, 2005, officers from the Modesto Police Department responded to Kiryakoz's house and discovered a substantial amount of dried marijuana and growing plants in the small two-bedroom residence. One bedroom and attached closet contained 62 growing, mature marijuana plants in the flowering stage. The plants were in hydroponic rocks and part of a hydroponic growing system. There were also separate jars of dried marijuana, each weighing from 28.9 grams to 47.5 grams. The second bedroom contained 35 plants, some of which were flowering, and another 27 plants that were only six inches high. There were handwritten notes attached to the bedroom walls, declaring the plants were medical marijuana and Kiryakoz was a patient and primary caregiver for other patients. The kitchen contained two small marijuana plants and

containers with dried marijuana. The living room contained eight bags of marijuana and four marijuana cigarettes.

The gross weight of the dried marijuana recovered from the house was 382.86 grams, which was a little over eleven ounces. Some of the small packages weighed close to 3.5 grams, approximately an eighth of an ounce, a common street sales amount. The dried marijuana was separated and labeled as different strains.

Kiryakoz possessed a plastic bag with 7.64 grams of marijuana, a cellphone, and $252. Kiryakoz said he was a medical marijuana caregiver for eight patients and also used medical marijuana himself. The officers repeatedly asked him to provide the appropriate documentation. Kiryakoz produced a compassionate caregiver card issued from Oakland, with his name and a doctor's signature, dated February 20, 2005. He also had a card issued by the Hayward Cannabis Buyers Co-Op, with an expiration date of December 2000. Kiryakoz said he needed time to retrieve the paperwork about his patients because the documents were not at the house, and then said the patient information was confidential. Kiryakoz was asked about the large amount of plants and marijuana, and he said he did not know there was a quantity limitation under the state medical marijuana laws and offered to destroy the plants because he was worried about being charged with cultivation.

Officer Douglas Ridenour, an agent with the Stanislaus County Drug Enforcement Agency, testified to his opinion that Kiryakoz possessed and cultivated marijuana for the purposes of sale, based on the "overabundance" of growing plants, dried and separated marijuana, different strains, marijuana packaged in baggies, and the scale. The prosecution witnesses testified that the state's medical marijuana laws allowed possession of eight ounces of dried marijuana, and six mature or 12 immature marijuana plants per

person, plus a current written or oral physician's recommendation.[1] Ridenour testified that Kiryakoz's possession might have been valid under the medical marijuana laws if he had a sufficient number of patients compared to the large amount of plants and dried marijuana. If Kiryakoz had provided documentation for the appropriate number of patients, "it would have came into account big time and we would have walked away from the residence," but Kiryakoz never provided any documentation about the identity or number of patients he served despite numerous requests by the officers for the information.

Defense evidence

Kiryakoz called three witnesses who testified that they had valid recommendations from their physicians to use medical marijuana for their serious physical conditions, and they obtained their medical marijuana from Kiryakoz. Their only contacts with Kiryakoz occurred when they placed their monthly telephone calls and asked for a certain amount of medical marijuana, and he went to their homes and delivered the requested amount. There was no evidence that Kiryakoz personally cared for or aided any of these individuals aside from providing them with medical marijuana. A defense expert testified Kiryakoz did not possess the marijuana for purposes of sale, based upon the absence of traffic to and from the house, pay/owe sheets, tote sheets, or anything indicating receipt of money from sales, large amounts of money found on Kiryakoz or in the house, and telephone calls from buyers placing orders.

Kiryakoz testified that he used medical marijuana to treat his chronic back pain, and he had a valid recommendation from his physician. He started to grow marijuana for his personal medicinal use because he could no longer afford to purchase it in the Bay Area. In 1999 or 2000, he became a caregiver for people in the Modesto area who were

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[1] See *People v. Mower* (2002) 28 Cal.4th 457, 470-471 (*Mower*); Health & Saf. Code, § 11362.77, subds. (a), (b).

unable to drive to the Bay Area to purchase marijuana because of their own health issues. Kiryakoz made sure his patients had recommendations from their doctors, but explained most doctors were afraid to write such recommendations and only gave oral consents.

Kiryakoz testified that he was growing marijuana for eleven to twelve people, including himself, when he was arrested in this case. He provided marijuana to his patients only when they called and said they needed it. Kiryakoz did not keep his patients' records at his house for privacy and confidentiality reasons, and he was afraid the police would seize the records and harass the patients. Kiryakoz admitted he had lost some of his patients' paperwork due to poor record-keeping.

DISCUSSION

I. The validity of the warrantless searches.

Kiryakoz filed a pretrial suppression motion and argued the officers unlawfully entered his house and searched the interior rooms and closets without a warrant. The trial court denied the motion and found the officers' warrantless entry was valid under the exigent circumstances exception, and the interior rooms and closets were lawfully searched as part of a protective sweep to ensure officer safety.

On appeal, Kiryakoz challenges the trial court's ruling and contends the officers' initial entry and subsequent protective sweep were unlawful. We will review the evidentiary hearing, the arguments raised by the parties, the court's ruling, and find the court should have granted the suppression motion.

A. The evidentiary hearing.

The following evidence was adduced at the pretrial suppression hearing as to the circumstances of the officers' entry and search of Kiryakoz's house. At 2:15 p.m. on June 2, 2005, Officers Sanchez, Griffin, and Hopkins responded to Kiryakoz's residence because of a possible domestic violence situation. A 911 call had been placed from the house, and the police received a supplemental call that a female was screaming inside the house.

As the officers approached the front door, Sanchez heard a male and female yelling inside the house. Griffin heard a male and female arguing and screaming in very loud voices. Griffin stood outside the door for 30 to 60 seconds, continued to hear the male and female screaming at each other, and heard the female crying. Sanchez watched the front of the house while Hopkins went to the side.

Griffin loudly knocked on the door but there was no response. He knocked again and heard someone walk towards the door. A male voice yelled, "'Who is it? What do you want?'" The front door "jerked" opened and revealed Kiryakoz, who was breathing heavily, sweating profusely, and was very excited. Kiryakoz had opened the door wide, and was surprised to see the officers. He quickly closed the door to a small crack so the officers could not see inside.

Kiryakoz asked what they wanted. Griffin told Kiryakoz they had received a 911 call about a domestic dispute and asked if there was a woman in the house. Kiryakoz replied there was and she was all right. Griffin said he needed to talk to the woman. Kiryakoz again said she was all right.

Griffin testified that he was concerned there had been some type of struggle between Kiryakoz and the woman, based on the screaming and yelling he heard through the door, and Kiryakoz's appearance of being sweaty and breathing heavily. Griffin again told Kiryakoz that he needed to personally speak to the woman to make sure everything was okay. Kiryakoz again said she was all right, turned and walked away from the door, and swung the door closed.

Griffin stuck his hand out, blocked the door from closing, pushed the door back open, and saw Kiryakoz walk to the back of the house. Griffin told Kiryakoz that he needed to come into the house with him. Griffin stepped inside the house and Kiryakoz said, "'okay.'"

Kiryakoz quickly walked down the hallway, and Sanchez and Griffin followed him into the house. Kiryakoz walked through an open interior doorway and into a

bedroom. Griffin stood in the hallway and looked inside the bedroom. Griffin testified a woman was "kind of sprawled out" on the bedroom floor. The woman, later identified as Christine Dalton, was pregnant, she had been crying, and her cheeks were wet from tears.[2] Griffin testified, "She was hysterical, still crying, and [Kiryakoz] was standing over her and saying something to her." There appeared to be fingernail scratch marks on Dalton's chest and throat area. Neither Sanchez nor Griffin saw any drugs in plain view in that bedroom.

Griffin testified he wanted to separate the couple "so they wouldn't harm each other." He also wanted to "control the environment" because the officers did not know "what was in the house or how many subjects were in the house." Griffin asked Kiryakoz to step out of the bedroom and go into the living room with the other officers.

After Kiryakoz left the bedroom, Griffin asked Dalton if she could stand up, and she did so. They went into the kitchen and Griffin asked about the long fingernail-type scratches on her body, and whether she needed an ambulance because of her pregnancy. Dalton said she was seven months pregnant and declined any medical attention. Griffin directed Dalton into the living room, and testified she was not free just to roam around the house.

Officers Sanchez and Hopkins waited in the living room with Kiryakoz. Sanchez testified he did not observe any marijuana in the living room while he waited for Griffin, but he smelled marijuana in the living room.

> "Q. What did you--burning marijuana or unburned or could you tell? What did you smell?

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[2] Officer Sanchez testified he also looked inside the bedroom and saw both Kiryakoz and Dalton standing up, and Kiryakoz was whispering to Dalton. Sanchez did not see Dalton on the floor, and he did not see the scratches on her body until she went into the living room.

"[SANCHEZ]: I couldn't tell, just a smell of marijuana once we were inside.

"Q. Some smell of marijuana?

"A. Correct.

"Q. You don't know if it burned or just the smell of growing marijuana?

"A. No, I don't recall. I just remember smelling marijuana."

Sanchez asked Kiryakoz whether he was on probation or parole. Kiryakoz said no. Sanchez conducted a pat-down search of Kiryakoz for officer safety purposes. Sanchez heard and felt something "like a cellophane sandwich baggie, plastic" in Kiryakoz's right front pants pocket. Sanchez knew it was not a weapon and believed it was a baggie with a controlled substance. He reached into Kiryakoz's pocket and removed a bag of marijuana.

Griffin testified that as he stood in the living room and talked with the other officers, he smelled "a real strong odor of marijuana" in the house, but he did not clarify whether he smelled burning or fresh marijuana. Griffin had already noticed there was marijuana on a living room table. Griffin testified there was not "a whole lot" of marijuana, "certainly" less than an ounce, and it was "loose" and "out in the open on the table" in the living room. Sanchez testified he never saw any marijuana in plain view in the living room, but it was later pointed out to him that there was an amount of marijuana in that room.

Sanchez mentioned to Griffin that "the house hadn't been cleared," and asked Griffin if he wanted to secure the house. Sanchez testified the officers conducted "a body search" of the residence "to see if there was anybody else" for purposes of officer safety, and to make sure "everybody inside the residence is okay." Sanchez said a body search was the police department's "standard procedure" on a domestic disturbance call, since there was a report of a possible physical incident and a woman screaming.

> "Q. And is it your policy that once the female has been located, is it Modesto police officers policy to continue to search for people in the residence?
>
> "[SANCHEZ]: Yes, if we're inside the residence, we will check to make sure for our safety."

Officer Griffin similarly testified that it was the police department's standard procedure to secure a residence, to make sure there were no weapons or people in the house who could harm the officers. Griffin said that officers followed this policy for various types of investigations, including domestic violence calls. Griffin explained:

> "Well, when you enter a house, you don't know how many people are in the house or what type of dangers are hidden behind doors, especially bedrooms, because weapons are typically hidden in bedrooms. And our purpose was to secure the house, because we knew that we were going to be spending some time in the house. We had a domestic violence situation, and we were trying to secure the house and make it safe before turning our backs to any closed doors or unseen people."

Griffin testified he did not ask Kiryakoz's consent to conduct the body search of the house, and he could not remember if Kiryakoz was in handcuffs at that time. Griffin and Sanchez conceded that once Kiryakoz and Dalton were in the living room, they did not hear any further noise or sounds indicating other people were in the house, or any specific facts indicating there were more than two people present. Griffin also conceded that when he looked into the first bedroom and saw Dalton on the floor, he did not see anyone else in that small room, and there was no indication that any type of weapon had been used in the disturbance.

Griffin and Hopkins stayed in the living room with Kiryakoz and Dalton, and Sanchez began the "body search" of the house. Sanchez walked through the open door into the bedroom where they found Dalton, and noticed the closet door was ajar by about one inch. He looked in the closet to determine if anyone was inside, and found marijuana in that closet.

Hopkins stayed with Kiryakoz and Dalton in the living room, and Griffin joined Sanchez as they cleared the bathroom. They headed to the second bedroom, located in the front of the house, and the bedroom door was closed. The officers knocked and announced their presence, no one responded, and they opened the door and entered the bedroom. The entire room was filled with marijuana plants. Griffin described "a sophisticated marijuana grow inside that bedroom with grow materials, draping, humidifiers, things of this nature."

The officers completed the "body search" of the house, they did not find anyone else or observe any additional contraband, and they called the Modesto Narcotics Enforcement Team to take over the case and obtain a search warrant. Griffin informed Officer Ridenour of the narcotics team about what they found inside the house.

Christine Dalton testified at the suppression hearing on Kiryakoz's behalf, and explained that Kiryakoz was her boyfriend and she moved into his house a couple of months before the incident. They were the only residents of the house. Just before the police arrived, they were in the bedroom and verbally arguing about whether Kiryakoz was the father of her unborn child, and the identity of the child's father was an "ongoing argument" between them. Dalton testified she was standing up during the argument, she was never sprawled on the bedroom floor, and she denied that Kiryakoz scratched, choked or grabbed her. Dalton could not recall whether she had been crying.

Dalton testified that neither she nor Kiryakoz called 911 and hung up, and they did not have a home telephone. When the police arrived, Kiryakoz spoke with them at the front door, and then Kiryakoz went into the bedroom and told her that the police wanted to make sure she was okay. Dalton testified the officers never walked down the hallway or entered the bedroom. Dalton went into the living room, and an officer took her into the kitchen to speak to her privately and make sure she was okay. Kiryakoz remained in the living room with the other officers.

Dalton testified the officer led her back into the living room. Another officer was speaking with Kiryakoz and "trying to get information from him about marijuana." The officers then searched the entire house. Dalton did not see the marijuana that the officers found in the living room and the bedroom closet, and denied that marijuana was located throughout the house. Dalton knew there was marijuana in Kiryakoz's bedroom but denied there was any particular type of odor in the house.

B. <u>The search warrant</u>.

At the evidentiary hearing, Officer Griffin testified that Officer Ridenour arrived at the house and was briefed about the protective sweep and their discovery of marijuana plants in the bedrooms. Ridenour used that information to obtain a search warrant for the entire house.

Officer Ridenour wrote the search warrant affidavit, which stated that officers responded to Kiryakoz's house on the report of a 911 hang-up call, the officers heard a male and female yelling inside the residence, Kiryakoz opened the door, the officers asked for consent to enter to check on the female's safety, and Kiryakoz refused. The affidavit states that "for their safety and the safety of the female heard," the officers entered the house "to check on the well being of the female," who was found in the rear bedroom, and that Officer Sanchez "continued a security check for any other subjects or victims where he located a marijuana garden in the closet of the bedroom where Christin[e] Dalton was . . . . Officer Sanchez finished his security check checking a final bedroom, which was also found to be a larger marijuana garden . . . ." The warrant was issued, and the officers executed the warrant and found large amounts of dried marijuana, growing plants, and growing materials itemized at the trial.

C. <u>The parties' arguments and the court's ruling</u>.

Kiryakoz moved to suppress all the evidence seized from his house, and argued the officers entered and searched the entirety of his house without probable cause, and the officers lacked reasonable suspicion to conduct a protective sweep of the house once they

ensured the safety of the alleged domestic violence victim because there was no evidence that other people were in the house.

Kiryakoz also moved to traverse the warrant based upon the testimony of Officers Sanchez and Griffin, and wanted to call Officer Ridenour to testify about the information he used to compile the search warrant affidavit. Kiryakoz argued the affidavit presented a false picture of the situation, and that the officers only found two people in the bedroom and there was no evidence that anyone else was in the house to justify a protective sweep search.

The prosecutor argued the officers properly followed the police department's policy when they lawfully entered the house pursuant to the exigent circumstances of the 911 domestic violence call, and the yelling and screaming they heard as they stood outside the front door. The prosecutor noted the officers immediately smelled marijuana when they entered the house and saw marijuana on the living room table in plain view. The prosecutor further asserted there was reasonable suspicion to conduct the protective sweep of the entire house based upon the same exigent circumstances, given their discovery of Dalton and the obvious injuries on her body, they lawfully opened the closets as locations where a person could hide, and they saw the marijuana plants in plain view during the protective sweep. The prosecutor asserted there was no evidence of any false or misleading statements in the search warrant affidavit to support Kiryakoz's motion to traverse.

Kiryakoz replied that even if the officers lawfully entered to check on Dalton's safety, they only heard two voices arguing, and the officers lacked reasonable suspicion to believe anyone else was in the house to justify the protective sweep. Kiryakoz asserted the odor of marijuana and the small amount in plain view in the living room did not support the protective sweep search of the entire house.

The court rejected the officers' reliance upon departmental policy as justification for the protective sweep search, but held the warrantless search was lawful based on the

exigencies and the entirety of the circumstances and denied Kiryakoz's suppression motion. The court held:

> "I think that based on what I've heard, and the testimony I've heard in this hearing was that the officer[s] when they first went into the house, they heard arguing for half a minute to a minute, a woman screaming. They had responded to a 911 hang up call, and then another call had been received where a woman was screaming.
>
> "And I think based on Mincey . . . versus Arizona, 437 US 385, there was sufficient exigencies to enter the home. And I think where the officers get in trouble is their standard operating procedure. I don't believe that once they had access to the home, that automatically gives them [*sic*] right to go into the other rooms of the home absent additional information.
>
> "And here we have a woman screaming. They see some marks on her, obviously a domestic violence situation, and what I have difficulty with was the testimony of the alleged victim or Ms. Dalton that although they were discussing the paternity of her child, that that was a calm discussion. I find that very difficult to believe that under these circumstances that that was a calm discussion.
>
> "And while it is true the officers stated that they heard a man and a woman arguing, that does not necessarily mean there was no one else in the house.
>
> "And given the situation here, I think that was sufficient for the officers to conduct a protective sweep to make sure there was no one else there to protect their own safety. As one of the officers testified, you don't want to be in a situation where you have your back to a closed door not knowing what is behind that door.
>
> "And I think where the standard operating procedure would not be enough under these circumstances, but based on what they heard and that they had reason to want to search or at least go into the other rooms to make sure there was nothing there that could harm them, and based on the—the real discrepancy I see in the warrant and the testimony at trial was the location of Ms. Dalton.
>
> "And frankly, I don't know if that's sufficient enough to have made a difference in terms of whether or not the Judge would have issued that

search warrant, so for the foregoing reasons [Kiryakoz's] motion to suppress evidence is denied."[3]

D. <u>The officers' initial entry into the house</u>.

We begin with the validity of the officers' initial warrantless entry into Kiryakoz's house. In reviewing a suppression motion, this court defers to the trial court's factual findings, express or implied, where supported by substantial evidence. We exercise our independent judgment to determine whether, under the facts so found, the search or seizure was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Absent exigent circumstances, an officer's warrantless entry into a residence is presumptively unreasonable under the Fourth Amendment. (*Groh v. Ramirez* (2004) 540 U.S. 551, 559; *People v. Celis* (2004) 33 Cal.4th 667, 676 (*Celis*).) "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (*Mincey v. Arizona* (1978) 437 U.S. 385, 393-394 (*Mincey*); *Brigham City, Utah v. Stuart* (2006) 547 U.S. 398, 403.) "'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" (*Mincey, supra,* 437 U.S. at p. 392.)

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[3] The court also denied Kiryakoz's motion to traverse the affidavit filed in support of the warrant, and Kiryakoz has not challenged that ruling on appeal. We note that in order to prevail on a motion to traverse an affidavit, the defendant must demonstrate that the affidavit included a false statement made knowingly and intentionally, or with reckless disregard for the truth, and the allegedly false statement was necessary to the finding of probable cause. (*People v. Luera* (2001) 86 Cal.App.4th 513, 524-525.) There is no evidence of any false statements in the search warrant affidavit, and the only conflicting evidence at the suppression hearing was between the testimony of Officers Sanchez and Griffin as to whether Dalton was on the bedroom floor or standing up. As the trial court noted, such a conflict was irrelevant to the determination of probable cause and issuance of the warrant.

Exigent circumstances include hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect's escape, the risk of danger to the police or to other persons inside or outside the dwelling, or emergency situations requiring swift action to prevent physical harm to a person. (*Minnesota v. Olson* (1990) 495 U.S. 91, 100; *People v. Thompson* (2006) 38 Cal.4th 811, 818; *People v. Ramey* (1976) 16 Cal.3d 263, 276.) Entry into a home based on exigent circumstances requires probable cause to believe that the entry is justified by one of these factors. (*Minnesota v. Olson, supra,* 495 U.S. 91, 100; *Celis, supra*, 33 Cal.4th at p. 676.)

While there is no "domestic violence exception to the warrant requirement" (*People v. Ormonde* (2005) 143 Cal.App.4th 282, 295 (*Ormonde*)), "case law recognizes that probable cause of ongoing spousal abuse at a residence warrants immediate police intervention" and has been found to support warrantless entries under the exigent circumstances doctrine. (*People v. Higgins* (1994) 26 Cal.App.4th 247, 252 (*Higgins*).)

For example, in *People v. Frye* (1998) 18 Cal.4th 894, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 439, fn. 22 (*Frye*), officers responded to an apartment on a domestic violence call. They knocked on the defendant's door and saw the victim with a bruised, swollen face, and what appeared to be blood on the outside of the door. The officers asked the victim who injured her. She stepped outside the door and pointed to the defendant, who was still inside the apartment. The officers entered and arrested the defendant. (*Id*. at pp. 935, 989.)

Frye held the officers' warrantless entry into the apartment was objectively reasonable and justified by exigent circumstances of the domestic violence situation, even though the victim had stepped out of the apartment. (*Frye, supra*, 18 Cal.4th at p. 990.) In light of the facts known to the officers, "they could reasonably have concluded that immediate action was necessary." (*Id*. at p. 989.) *Frye* further held that if the officers left the scene to obtain a warrant, there was "a significant risk" the victim would have

suffered "additional harm," and the likely delay "could have posed a safety risk to not only [the victim] but the remaining officers as well." (*Id*. at pp. 989-990.)

In *People v. Wilkins* (1993) 14 Cal.App.4th 761 (*Wilkins*), the police responded to a domestic violence call and found the victim outside the residence. She was crying and upset, said the defendant hit her, and requested the officers to enter the residence to arrest him. The officers forcibly entered through the front door and arrested the defendant. He moved to suppress all the evidence obtained as a result of the warrantless entry. (*Id*. at pp. 767-768, 772.)

Wilkins held the officers' warrantless entry was valid under the exigent circumstances exception: "The officers could not abandon the matter and expose the victim to further harm simply because defendant refused them admittance." (*Wilkins, supra*, 14 Cal.App.4th at p. 772.) The officers were not constitutionally constrained to delay until an arrest warrant could have been obtained: "Given the time of night [around midnight], the securing of a warrant would necessarily have occasioned some delay and during this period the victim would have been vulnerable to further risk of physical harm. The risk of imminent violence resulting in further physical harm to the victim was an exigent circumstance requiring immediate action." (*Ibid*.)

In *Higgins, supra,* 26 Cal.App.4th 247, the officers responded to a domestic disturbance report of a man shoving a woman around at a residence. The officers knocked on the back door and no one answered. They walked around to the front door, and saw a man inside the residence and heard a shout from within. They knocked on the front door and a woman answered. She was frightened, nervous, and had marks on her face consistent with being recently struck or slapped. She claimed she was alright, she had fallen down the stairs, and her boyfriend had been there but he was gone. As she talked to the officers, she tried to edge them away from the open front door. (*Id*. at pp. 249-250.) Based on her appearance and demeanor, the officers believed she was a domestic violence victim and the perpetrator was still in the house. The officers entered

the house to make sure everything was alright. The woman called out to her boyfriend, who emerged from upstairs and said he had been sleeping. While talking to him, an officer smelled marijuana and saw a scale and a bindle of cocaine on the floor. The boyfriend consented to a search of the residence, the police found more contraband, and they were both arrested on narcotics violations. (*Id*. at p. 250)

Higgins held the officers' warrantless entry into the house was valid based on the exigent circumstances of responding to a domestic disturbance report, and immediate action was necessary given the battered victim's frightened appearance at the front door. (*Higgins, supra*, 26 Cal.App.4th at pp. 252, 255.) The officers' actions were "objectively reasonable and motivated by their concern for [the victim's] well being . . . ." (*Id*. at p. 255.) *Higgins* rejected the defendants' argument that the officers merely followed departmental policy when they entered the house to check on the woman's welfare:

> "[T]he record does not support [the defendants'] contention the officers blindly followed their department's domestic disturbance response policy without considering the facts at hand. That policy apparently requires officers to contact all parties at the scene of a suspected domestic disturbance, to ensure everyone is safe and the situation is under control. [The officer] acknowledged this policy. However, he indicated he had discretion to disregard it if the first person he contacted at the scene convinced him everything was all right. [The officer] said the situation at [the defendants'] residence was 'totally different' and [the woman] appeared in danger. This signifies [the officer] carefully assessed the situation and responded based on the circumstances before him." (*Higgins, supra*, 26 Cal.App.4th at p. 251-252.)

In the instant case, the trial court properly found that the officers' initial warrantless entry into Kiryakoz's house was justified under the exigent circumstances exception. As in *Frye*, the officers herein reasonably concluded that immediate action was necessary in light of the facts known to them when they arrived at Kiryakoz's house. (*Frye, supra*, 18 Cal.4th at p. 989.) Given the 911 calls, the screaming and yelling heard through the front door, the woman's crying, Kiryakoz's excited appearance when he answered the door, his furtive conduct when he realized the officers were there, and his

repeated refusal to call the victim to the front door, it was objectively reasonable for the officers to assume the woman was injured or under imminent threat of serious injury and might have been forced to terminate the 911 call. As in Wilkins, the officers could not abandon the matter and "expose the victim to further harm simply because defendant refused them admittance." (*Wilkins, supra*, 14 Cal.App.4th at p. 772.)

As we will discuss *post*, the officers cited to their department's policies when they testified about their reasons for the subsequent protective sweep search. However, their initial decision to enter Kiryakoz's house was objectively reasonable and based on probable cause that a domestic violence incident was in progress. As in *Higgins*, the officers herein "carefully assessed the situation and responded based on the circumstances" before them. (*Higgins, supra*, 26 Cal.App.4th at p. 251-252.) We thus find their initial warrantless entry was valid under the exigent circumstances exception.

E. <u>The protective sweep</u>.

Kiryakoz acknowledges the officers' initial warrantless entry into the house may have been valid under the exigencies of the domestic violence dispatch and the yelling and screaming they heard outside the front door. However, he argues that any such exigency terminated once the officers determined that Dalton was safe, and a generalized concern for officer safety cannot justify the protective sweep of the entire house.[4]

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[4] Kiryakoz raises an alternate argument that the officers' entry into his house was only lawful because of his limited consent to check on Dalton's safety, and the officers exceeded the scope of his consent when they conducted the protective sweep of the interior rooms and closets. The record shows that as the officers entered the residence and followed Kiryakoz down the hallway, he said it was okay for them to enter the house. A voluntarily given consent is obviously an exception to the warrant requirement, and the scope of the consent is defined by its expressed object, which is a question of fact to be determined by the totality of the circumstances. (*Florida v. Jimeno* (1991) 500 U.S. 248, 251; *People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408.) To the extent Kiryakoz voluntarily consented to the officers' entry into his house, we agree that his consent was clearly limited to checking on the welfare of Dalton and did not, by itself, extend to a protective sweep of the entire house, interior rooms, and closets, absent "articulable facts

iryakoz is correct that a warrantless search must be "'strictly circumscribed by the exigencies which justify its initiation . . . .'" (*Mincey, supra,* 437 U.S. at p. 393.) Once the exigencies of the initial entry have dissipated, the police must comply with the warrant requirement for any further search of the premises. (*U.S. v. Murphy* (9th Cir. 2008) 516 F.3d 1117, 1121.)

We thus turn to the officers' conduct after they checked on Dalton's well-being, and their decision to conduct the protective sweep of the interior rooms and closets. At the suppression hearing, the officers testified they conducted the protective sweep because it was departmental policy to determine if anyone else was in the house and ensure their safety on a domestic disturbance call. Kiryakoz contends such a reason fails to satisfy even the lesser standard required to justify a protective sweep search of a house.

"The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Buie*, *supra*, 494 U.S. at p. 337.) "A protective sweep ... occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." (*Id.* at p. 333.) It allows the arresting officers to take "steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." (*Ibid.*) "[A] protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the

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that the area to be swept harbors an individual posing a danger" to the officers in the house. (*Maryland v. Buie* (1990) 494 U.S. 325, 337 (*Buie*).) Nevertheless, the limited nature of Kiryakoz's consent does not foreclose the possibility that the officers' subsequent protective sweep search was still lawful.

reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." (*Id*. at pp. 335-336.)

Buie thus recognized two types of protective sweeps.

> "[*A*]*s an incident to the arrest* the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. *Beyond that*, however, we hold that there must be *articulable facts* which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Buie, supra*, 494 U.S. at p. 334, italics added.)

Unlike an entry based on exigent circumstances, a protective sweep does not require probable cause to believe there is someone posing a danger to the officers in the area to be swept. (*Celis, supra,* 33 Cal.4th at p. 678.) Instead, a protective sweep can be justified merely by a reasonable suspicion that the area to be swept harbors a dangerous person. (*Ibid*.)

While *Buie* involved a protective sweep in the context of an arrest, its holding is not limited to arrest situations. (*People v. Ledesma* (2003) 106 Cal.App.4th 857, 864 (*Ledesma*); cf. *U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027-1028.) However, a protective sweep cannot be based on an inchoate and unparticularized suspicion or a hunch, or a generalized expectation of violence at an arrest scene. (*Buie, supra*, 494 U.S. at p. 332; *Celis, supra*, 33 Cal.4th at p. 678.) "Where an officer has no information about the presence of dangerous individuals, the courts have consistently refused to permit this lack of information to support a 'possibility' of peril justifying a sweep." (*Ledesma, supra*, 106 Cal.App.4th at p. 866.) "[T]he fact that someone else 'might be' present is not a strong enough basis on which to justify" a protective sweep under *Buie*. (*U.S. v. Sunkett* (N.D.Ga. 2000) 95 F.Supp.2d 1367, 1372.) The danger posed by the arrested or detained individuals is largely irrelevant where they are detained by the officers as part of the initial entry. "The facts upon which officers may justify a *Buie* protective sweep are

those facts giving rise to a suspicion of danger from attack by a third party during the arrest, not the dangerousness of the arrested individual." (*U.S. v. Colbert* (6th Cir. 1996) 76 F.3d 773, 777.)

In *Celis,* the defendant was part of a drug trafficking ring that transported and sold cocaine concealed inside large truck tires. The police followed the defendant to his home and witnessed him rolling a truck tire from his house to a waiting co-conspirator. The police detained the defendant outside the house. A detective had previously observed that the defendant lived with his wife and possibly a male juvenile. (*Celis, supra,* 33 Cal.4th at pp. 671-673.) Based on that information, the police entered the defendant's home "to determine if there was anyone inside who might endanger their safety." (*Id.* at p. 672.) No one was inside the house but the officers found a wooden box large enough to conceal a person, which contained wrapped packages of cocaine. (*Id.* at pp. 672-673.)

Celis held the facts known to the officers when they entered the defendant's house "fell short" of the reasonable suspicion standard required to justify a protective sweep under *Buie*. (*Celis, supra*, 33 Cal.4th at p. 679.) While the police had prior information that two other people lived in the house, they had no factual basis to support a reasonable suspicion that anyone was in the house at the time that they arrested the defendant outside. (*Ibid*.) *Celis* reasoned that since the officers had not kept track of who was in the house when the defendant was detained, "they had no knowledge of the presence of anyone in defendant's house," and "when they entered the house to conduct a protective sweep, they did so without 'any information as to whether anyone was inside the house.'" (*Ibid*.) Moreover, there was no indication that the defendant or his co-conspirator were armed when police detained them, and that police found no weapons during the earlier investigation of the drug ring. (*Id.* at pp. 672, 679.)

Celis acknowledged the difficulties faced by police officers in such situations, but held the officers' entry into the house was presumptively unreasonable and the protective

sweep unlawful, even under the lesser standard of *Buie*. (*Celis, supra*, 33 Cal.4th at p. 680.)

> "Unquestionably, the work of a police officer in the field is often fraught with danger. At any given moment, a seemingly safe encounter or confrontation with a citizen can suddenly turn into an armed and deadly attack on the officer. Society's interest in protecting police officers must, however, be balanced against the constitutionally protected interest of citizens to be free of unreasonable searches and seizures. In considering both interests, the United States Supreme Court has articulated certain legal rules, allowing, for instance, a warrantless entry into a home when exigent circumstances exist, or permitting a protective sweep of areas of a home where persons in hiding may pose a danger to officer safety. . . . [W]hen the entry of a house for officer safety is based on exigent circumstances, the officers must have probable cause to believe that a dangerous person will be found inside. [Citation.] But a protective sweep, as described by the high court in *Buie* . . . can be justified by a standard lower than probable cause, namely, reasonable suspicion. [Citation.] Because, as we explained . . . that lower standard was not satisfied here, i[t] follows that the higher standard requiring probable cause was not met either." (*Celis, supra*, 33 Cal.4th at p. 680.)

In *Ormonde*, a detective responded to a domestic violence dispatch and went to an apartment complex where the suspect was supposed to be located. The detective believed the domestic violence incident occurred either inside or outside the apartment, and felt vulnerable because he did not know if someone was going to emerge from the apartment with a weapon. The detective entered the apartment and subsequently obtained the defendant's consent to recover drugs from his bedroom. The defendant moved to suppress the evidence and argued the detective's initial entry was not justified by either exigent circumstances or as a protective sweep. (*Ormonde, supra*, 143 Cal.App.4th at pp. 286-290.) *Ormonde* held the warrantless entry and search were invalid under the exigent circumstances exception because the objective circumstances known to the detective "fell short of supplying them with probable cause to believe there was someone in the apartment who was either in danger or dangerous to them." (*Id*. at p. 292.)

Ormonde further held the search was invalid as a protective sweep under *Buie*'s lesser standard. The detective knew the victim was not on the premises, he did not believe there was anyone in the apartment, and he was just trying to determine if someone was inside. (*Ormonde, supra*, 143 Cal.App.4th at p. 294.) The record failed to show the officer who conducted the sweep "actually suspected that a person was inside [the residence], or that he had any grounds for suspecting as much[.]" (*Ibid*.) Instead, the detective's only justification was his general experience that domestic violence situations often involve danger. (*Id*. at pp. 287, 294.) *Ormonde* held the detective's general experience in domestic violence situations failed to "rise to a reasonable suspicion that the area to be swept harbors an individual or individuals posing a danger to those on the arrest scene," as required by *Buie* and *Celis*. (*Ormonde, supra*, 143 Cal.App.4th at p. 295.)

> "Such facts were not shown in *Celis,* and they are not shown here. It does not appear to be enough, under *Celis,* that the police were genuinely apprehensive of danger based on past experience with domestic battery situations or large-scale drug operations.
>
> "We are aware that 'case law recognizes that probable cause of ongoing spousal abuse at a residence warrants immediate police intervention.' [Citation.] Nor do we question that 'frequently sympathetic parties other than the two combatants, such as family members, friends, parents, people that have an emotional stake in what's occurring ... and are not happy about the police being involved in their personal business and ... also may want to protect the victim and/or suspect,' as [the detective] testified. As the *Celis* court recognized, '[T]he work of a police officer in the field is often fraught with danger. At any given moment, a seemingly safe encounter or confrontation with a citizen can suddenly turn into an armed and deadly attack on the officer.' [Citation.] Nevertheless, to say that the warrantless entry into defendant's home in this case was justified because of a police officer's past experiences with domestic violence arrests would be tantamount to creating a domestic violence exception to the warrant requirement. This we cannot do." (*Ormonde, supra*, 143 Cal.App.4th at p. 295.)

In both *Celis* and *Ormonde*, the officers lacked any information about the presence of dangerous individuals in the residences to satisfy *Buie*'s lesser standard of reasonable suspicion. In contrast, *Ledesma* involved a situation where the officer's factual observations, prior to conducting a probation search, included multiple vehicles parked close to a residence that appeared to be the site of ongoing narcotics activity. Based on these observations, the officer conducted a protective sweep of the house. (*Ledesma, supra*, 106 Cal.App.4th at pp. 861-862.) *Ledesma* held the warrantless protective sweep was valid because the officer relied "on factual observations to create a reasonable, not simply a theoretical, possibility of the presence of others." (*Id*. at p. 866.) *Ledesma* held the officer was not required to have specific information that a person was inside the house, and the test under *Buie* was "whether the officer has a reasonable suspicion, based on facts," and the officer's training and experience "can be critical in translating observations into a reasonable conclusion." (*Ibid*.)

> "Here, [the officer] not only had a reasonable suspicion that others were present at the residence, but that a convicted drug user resided there and that recent drug activity had occurred there. Relying on these facts and his expertise, [the officer] formed the reasonable opinion that these other persons would pose a danger to him during the search. No more was needed to permit the limited intrusion of a protective sweep." (*Ledesma, supra,* 106 Cal.App.4th at pp. 866-867.)

In applying *Buie* to the instant case, we note that it permits law enforcement officers, "as an incident to the arrest . . . as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." (*Buie, supra*, 494 U.S. at p. 334.) As Kiryakoz points out, however, there is absolutely no evidence that the officers had arrested Kiryakoz, or were about to arrest him, when they conducted the protective sweep.

Instead, the officers testified they decided to conduct the protective sweep for purposes of officer safety. Officer Sanchez testified a "body search" was the police

department's "standard procedure" on a domestic disturbance call to ensure officer safety, since there was a report of a possible physical incident and a woman screaming. Officer Griffin similarly testified that it was the police department's standard procedure to secure a residence and make sure there were no weapons or people in the house who could harm the officers. Griffin said that officers followed this policy for various types of investigations, including domestic violence calls.

In the instant case, the officers herein had even fewer "articulable facts" than in *Celis* that "the area to be swept [the inside of the residence] harbor[ed] a person posing a danger to officer safety." (*Celis, supra,* 33 Cal.4th at p. 680.) When the officers arrived at the front door, they only heard the voices of a man and woman arguing. They did not hear multiple voices or noises inside the house which might have indicated that more than two people were there. When they entered, they walked through the front door, living room, and hallway, and looked into the rear bedroom to see Kiryakoz with Dalton. Sanchez escorted Kiryakoz into the living room, while Griffin stayed with Dalton in the bedroom and then took her into the kitchen to check on her well-being. Hopkins had been watching the outside of the house but eventually went into the living room with Sanchez and Kiryakoz. None of the officers testified as to any observations or sounds, inside or outside, which would have supported a reasonable suspicion that more than a man and a woman were in the house. There is no evidence the officers had any reason to believe there were more people in the house.

While the officers' initial entry into the house was lawful based upon the exigencies of the domestic disturbance call, and the yelling and screaming heard outside the front door, the officers only heard a man and woman yelling, and they were able to contact the combatants fairly quickly upon their entry into the house. The exigent circumstances which justified their warrantless entry cannot support their decision to conduct the protective sweep of the interior rooms and closets. As explained by *Ledesma*, law enforcement officers are not required to have specific information that a

person is inside a house to satisfy the lesser standard of *Buie*. (*Ledesma, supra*, 106 Cal.App.4th at p. 866.) Instead, Sanchez and Griffin testified they conducted the protective sweep search based upon departmental policy to ensure no one else was in the house. As in *Ormonde*, however, "to say that the warrantless entry into defendant's home in this case was justified because of a police officer's past experiences with domestic violence arrests would be tantamount to creating a domestic violence exception to the warrant requirement. This we cannot do." (*Ormonde, supra*, 143 Cal.App.4th at p. 295.)

Officer Sanchez also explained the decision to conduct the protective sweep was to make sure "everybody inside the residence is okay." Sanchez's secondary explanation touches upon a corollary to the protective sweep, known as law enforcement's community caretaking functions, which permits the police to conduct a warrantless entry of a residence where the totality of the circumstances support a reasonable belief that the safety of persons or property in a home may be in jeopardy, such that the officers may enter the home to ascertain whether their assistance is needed. (*People v. Ray* (1999) 21 Cal.4th 464, 471, 472-473, 476-477.) "'[D]ue weight must be given *not* to [the officer's] unparticularized suspicions or "hunches," but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.'" (*Ray, supra*, 21 Cal.4th at p. 477, italics aded.) As with the protective sweep, there is no evidence in the instant case on which the officers could have based a reasonable suspicion that there were additional victims inside Kiryakoz's house aside from Dalton.

We thus conclude the officers did not reasonably believe, based on specific and articulable facts, that there were additional people or victims in the house, and the warrantless search of the entire house cannot be justified as a protective sweep or part of the officers' community caretaking functions.

We note that Kiryakoz has not challenged the validity of the pat-down search and seizure of the marijuana in his pocket,[5] and concedes the officers had probable cause to arrest him for simple possession based upon the small amount of marijuana found in his pocket and observed in plain view on the living room table. However, the officers lacked any reasonable justification for the protective sweep of the entirety of the house, the trial court should have granted Kiryakoz's suppression motion and excluded the officers' observations of marijuana found during the protective sweep, and the marijuana, plants, and growing materials found during the execution of the search warrant.

Given our resolution of the search and seizure issue, we need not address Kiryakoz's remaining contentions regarding alleged instructional error as to his medical marijuana defense.

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[5] While he has not challenged the pat-down search, it appears that Officer Sanchez's decision to conduct the pat-down search was also reasonable based on the same exigent circumstances which justified the initial entry. A protective pat-down search is permitted without a warrant on the basis of reasonable suspicion less than probable cause, and must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373.) When a police officer lawfully pats down a suspect's outer clothing "and feels an object whose contour or mass makes its identity immediately apparent" as contraband, the officer may lawfully remove the object. (*Id*. at pp. 375-376.) The "plain feel" exception has been applied in situations where officers immediately determine an object is contraband during pat-down searches. (*People v. Dibb* (1995) 37 Cal.App.4th 832, 836-837; *People v. Limon* (1993) 17 Cal.App.4th 524, 536.) "The 'strong aroma of fresh marijuana' can establish probable cause to believe contraband is present." (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 273.) Sanchez testified he had already detected the odor of marijuana in the house. When he conducted the pat-down search, he heard and felt something "like a cellophane sandwich bag, plastic" in Kiryakoz's right front pants pocket, he knew it was not a weapon, and he believed it was a baggie with a controlled substance based upon his experience. He properly seized the baggie based on the "plain feel" exception and his previous detection of the odor of marijuana. (See, e.g., *People v. Valdez* (1987) 196 Cal.App.3d 799, 806.)

DISPOSITION

The judgment is reversed.

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Gomes, J.

WE CONCUR:

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Cornell, Acting P.J.

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Hill, J.