

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0447**

State of Minnesota,
Respondent,

vs.

Brandon Adam Potter,
Appellant.

**Filed January 27, 2025
Reversed and remanded
Cleary, Judge***

St. Louis County District Court
File No. 69HI-CR-22-341

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Kimberly J. Maki, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defenders, Samuel Buisman (certified law student practitioner) (for appellant)

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Cleary, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

Appellant challenges the district court's order denying his pretrial motion to suppress, arguing that his arrest was unlawful. The district court determined that law enforcement had sufficient probable cause to arrest appellant for felony-level drug crimes, and that third-party consent and exigent circumstances permitted the arresting officer's warrantless entry into appellant's bedroom. Because no exception to the warrant requirement applied to appellants' in-home arrest, we reverse and remand.

FACTS

The following summarizes the district court's factual findings issued after an evidentiary hearing, which included testimony from the arresting officer, and admission of the officer's body-camera recordings, two *Mirandized* statements, two search warrants, and a probable-cause packet, as well as other record evidence relevant to understand the issues on appeal.

On May 21, 2022, around 2:50 p.m., two Hibbing police officers were on patrol in a marked squad car. "The [o]fficers were looking for an individual, D.D., who was wanted in connection with an . . . overdose death." The officers were surveilling an apartment building because they learned that D.D. may be staying there. While conducting surveillance, the officers observed a black Volkswagen car parked behind the apartment building. The first officer testified that he had "recently learned from another police department" that appellant Brandon Adam Potter "was known to drive a black Volkswagen

car and that [Potter] may be making trips to the Twin Cities area, transporting large amounts of heroin and methamphetamine in said vehicle.”

The officers saw a man they later identified as Potter “walking toward the street from an alley behind the [apartment building].” The officers approached Potter, who told them that he was coming from D.D.’s mother’s apartment and that A. was watching the apartment for her. Potter told the officers that he forgot his phone in the apartment and that “the most” the officers would find inside was “some weed.” Potter told the officers that he was being picked up outside the apartment and that he was currently living at his grandmother’s home in Hibbing.

The officers ended the encounter with Potter, drove to the front of the apartment building, and knocked on the apartment door. The first occupant, B.D., answered the door and told officers that the renter was not home. The second occupant, A.S., was sitting inside the apartment. The first officer testified that, through the open door of the apartment, “he observed ‘a large, clear smoking device,’ as well as a digital scale with a brown rock-like substance on it that, based on his training and experience, he believed to be heroin.” The officers then entered the apartment and learned from the two occupants that D.D. was not there. The second officer “noted a large amount of cash on the ground.” In addition to the suspected heroin, the first officer observed a “bag of suspected methamphetamine on the floor.” B.D. and A.S. were placed under arrest and transported to the Hibbing Police Department. Before leaving, the officer who took A.S. to a squad car told the first officer that “she said she can tell you where everything is if you want.”

After being read his *Miranda* rights at the police department, B.D. “agreed to provide a recorded statement to law enforcement.” In his statement, B.D. told police that he went to the apartment to collect money D.D. owed him for a roofing job, and that Potter “was at the apartment for approximately 15 minutes” before the officers’ arrival. B.D. indicated that Potter and A.S. were selling drugs kept in the apartment and that he knew they were selling drugs based on rumors. B.D. stated that he saw Potter and A.S. handling the drugs in the apartment and admitted that “he purchased painkillers and heroin” from Potter in the past and had “referred people to Potter when they reach[ed] out to B.D. for drugs.” B.D. also indicated that he believed the black Volkswagen car outside the apartment belonged to Potter. “[W]hen asked if there could be ‘anything’ inside the car, B.D. responded, ‘[P]ossibly.’” Finally, B.D. indicated that he owned a pink phone located inside the apartment.

After being read her *Miranda* rights, A.S. also agreed to provide a recorded statement to law enforcement. In her statement, A.S. indicated that she was at the apartment watching D.D.’s mother’s dog. A.S. stated that B.D. came to the apartment “to purchase heroin from [Potter]” and that the large amount of cash and suspected methamphetamine in the apartment belonged to D.D. and Potter. A.S. stated that Potter was in the apartment shortly before the officers’ arrival and that Potter left the apartment to “get rid of a bag.” A.S. stated that Potter left his phone in the apartment. A.S. also told police Potter’s mother’s name.

After the arrests, the officers “left the residence and obtained a search warrant to search the apartment.” Police executed the search warrant around 7:50 p.m. that night.

Officers located three cell phones in the apartment—one identified as belonging to A.S., one with a pink case, and one with a black case. While the officers were in possession of the black cell phone, it received multiple incoming calls, including a call from Potter’s mother and calls from the person Potter said was picking him up outside the apartment.

Law enforcement collected the large plastic bag containing suspected methamphetamine, and a “blue cap and tin foil with residue sitting atop a digital scale containing rocks suspected to be heroin.”¹ Law enforcement also found a wallet containing Potter’s identification card, Volkswagen keys, \$2,268 in cash, and assorted drug paraphernalia in the apartment.

Two days later, on May 23, 2022, the first officer went to Potter’s grandmother’s house (the Potter residence), where Potter told the officer he was staying. At approximately 8:00 p.m., the officer knocked on the front door and was greeted by Potter’s grandparents.² When the officer asked if Potter was there, grandmother stated, “He’s downstairs.” Grandfather motioned for the officer to enter the house and said “come on in.” The officer told the grandparents that he had to “talk to [Potter] about a case.”

The grandparents “directed [the officer] to a room in their basement.” Grandfather pointed to a stairwell and said, “[D]ownstairs.” Grandmother stated, “Down to the right

¹ The suspected heroin field-tested “positive for opiates and weighed approximately 13 grams.” This amount constituted a felony-level sale offense pursuant to Minn. Stat. § 152.021, subd. 1(3) (2020). The suspected methamphetamine field-tested “positive for methamphetamine and weighed 13 grams.” This amount also constituted a felony-level possession offense pursuant to Minn. Stat. § 152.023, subd. 2(a)(1) (2020).

² For this opinion, we refer to Potter’s grandparents as “grandmother” and “grandfather.”

and he's on the left, just after the stairs." While the officer went downstairs, "grandmother stood at the top of the stairwell and provided further direction to the [o]fficer." The door to the basement room was closed, so the officer knocked on the door. The body-camera recording shows that the officer did not receive a response and waited approximately six seconds before opening the door. When the officer opened the door, he saw Potter "lying on a bed at the far end of the room." The officer saw what he believed, based on his training and experience, to be drug paraphernalia. The officer then placed Potter in handcuffs and arrested him.

While in handcuffs, Potter asked if he could have a cigarette and directed the officer to a bag on his bed. When the officer removed the contents of the bag to grab the cigarettes, the officer saw a roll of aluminum foil and a small piece of foil covered with what he believed to be burnt heroin residue. While waiting for backup to arrive, Potter told the officer, "I'll tell you where everything is real quick if you want." After police removed Potter from the house, the grandparents "confirmed that [Potter] drove a black Volkswagen car." Grandfather motioned to the room where the officer found Potter and said, "Just so's you know, that room is off limits to me. I have nothing to do with it." The body-camera recording shows grandmother telling the officer "I don't go in there . . . he's 26 years old."

Later that day, after being read his *Miranda* rights at the police department, Potter agreed to speak with law enforcement. Potter stated that there was drug paraphernalia and heroin in the bedroom. However, when the investigator confirmed that Potter stated that there was heroin in the bedroom, Potter responded, "Allegedly." Potter then requested the presence of an attorney, and the questioning ended.

Law enforcement obtained a warrant to search the Potter residence. The warrant application's probable-cause statement incorporated the investigation of the apartment, the drug paraphernalia seen during Potter's arrest, and Potter's *Mirandized* statement. Law enforcement executed the search warrant and found a bag containing substances that tested positive for heroin and methamphetamine, amongst other things.³ Law enforcement also obtained a search warrant for the black Volkswagen, based on much of the information stated above. Besides a small amount of marijuana, no drugs were found in the car.

Respondent State of Minnesota charged Potter with one count of first-degree felony drug sale under Minn. Stat. § 152.021, subd. 1(3) (2020), and one count of third-degree felony drug possession under Minn. Stat. § 152.023, subd. 2(a)(1) (2020). Potter moved to suppress the evidence obtained as a result of his arrest and to dismiss the case. Potter argued, among other things, that law enforcement lacked probable cause to arrest Potter because the recorded statements from B.D. and A.S. were unreliable. Potter contended that the other circumstantial evidence linking him to the apartment was also insufficient to establish probable cause of his involvement with the drugs. Finally, Potter argued that the arresting officer's warrantless entry into his bedroom violated his Fourth Amendment right against unreasonable searches and seizures.

The state opposed Potter's motion to suppress and argued that "the totality of the circumstances supports an objective honest and strong suspicion" that Potter possessed the

³ The heroin weighed approximately 7.9 grams. The methamphetamine weighed 0.5 grams. The brown substance found in foil also field-tested positive for heroin and weighed approximately one gram.

drugs in the apartment. The state contended that B.D. and A.S.’s statements provided direct evidence of Potter’s involvement and that other evidence—including Potter’s identification, phone, car, and acknowledgment that he had just left the apartment—corroborated these statements. The state argued that, even without these statements, the other evidence established probable cause that Potter committed felony-level drug crimes. Finally, the state contended that both the grandparents’ consent and exigent circumstances justified the officer’s warrantless entry into Potter’s bedroom to effect the arrest.

After an evidentiary hearing, the district court denied Potter’s motion to suppress. It determined that B.D. and A.S.’s recorded statements were reliable because they “were sufficiently corroborated” by Potter’s statements to police. The district court held that, even if it had excluded the statements, the officer still had sufficient probable cause to arrest Potter based on Potter’s admission that he was at the apartment shortly before law enforcement arrived, the first officer’s observation of suspected drugs and drug paraphernalia from the front door of the apartment, and the recovery of what law enforcement reasonably believed to be Potter’s phone and wallet inside the apartment.

The district court also determined that the arresting officer had obtained the grandparents’ consent to enter the house and acted within the scope of said consent when he accessed Potter’s room without a warrant. The district court noted that the grandparents “openly and voluntarily directed” the officer to Potter’s room. The district court held that “a reasonable person would have understood” the grandparents’ conduct to mean that the officer “had their consent to go to the basement and enter the room where [Potter] was ultimately located.” The district court also determined that the officer, “at a minimum, had

a reasonable belief that [the] grandparents had authority to give him consent to enter the room.”

Finally, the district court determined that the police entry into Potter’s bedroom was lawful under the exigent-circumstances exception to the warrant requirement. The district court determined that the officer “had strong probable cause” connecting Potter “to a serious felony-level controlled substance crime—one that is considered to be a ‘crime of violence’ and/or a ‘violent crime.’” The district court determined that, upon arrival at the Potter residence, the officer “almost immediately” learned that Potter was inside the house and, based on previous interactions with Potter, had “a legitimate concern” that Potter would flee. The district court noted that, even though the officer “had no reason to believe” Potter was armed, there was a “very real concern for officer safety” when there was only one officer on-site. The district court stated that “it would put law enforcement officers at heightened safety risks if the law required officers, after being peaceably invited in the home, to stop and wait for an arrest warrant” instead of immediately arresting a suspect they learn is inside the home. Based on the totality of the circumstances, the district court determined that the exigency exception applied to the officer’s entry of Potter’s bedroom.

After the district court denied his motion, Potter agreed to a stipulated-evidence trial for second-degree controlled-substance possession under Minn. Stat. § 152.022, subd. 2(a)(3) (2020), pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court received and considered stipulated evidence and found Potter guilty of second-degree controlled-substance possession.

Potter appeals.

DECISION

Potter argues that the district court erred in denying his motion to suppress because police (1) lacked probable cause to arrest Potter and (2) made an illegal warrantless entry into Potter's bedroom to effect the arrest. "When reviewing a district court's pretrial order on a motion to suppress evidence, [appellate courts] review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted).

I. Law enforcement had probable cause to arrest Potter.

Both the United States and Minnesota Constitutions protect individuals against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. "A warrantless arrest is reasonable if supported by probable cause." *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011). "The test of probable cause to arrest is whether the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Johnson*, 314 N.W.2d 229, 230 (Minn. 1982) (quotation omitted). "[T]he totality of the circumstances includes reasonable inferences that police officers draw from facts, based on their training and experience, because police officers may interpret circumstances differently than untrained persons." *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016). Appellate courts "review the district court's application of the legal standard of probable cause to [the] facts de novo." *State v. Lopez*, 778 N.W.2d 700, 703 (Minn. 2010) (citation omitted).

Here, Potter argues that the “unreliable and uncorroborated informant statements and weak circumstantial evidence that [the officer] relied on would not lead a reasonable person to entertain a ‘strong suspicion’ that Potter was involved in narcotics sales.” We address each piece of evidence in turn.

A. Law enforcement reasonably relied upon the statements of B.D. and A.S. because the statements had sufficient indicia of reliability.

An informant’s statement must have “sufficient indicia of reliability” for an officer to rely on the statement to sustain probable cause. *State v. Mosley*, 994 N.W.2d 883, 890 (Minn. 2023) (quotation omitted). To determine whether an informant’s statement has “sufficient indicia of reliability,” the informant’s “reliability” and “basis of knowledge” are “relevant considerations.” *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 233 (1983)). Importantly, a “deficiency in one may be compensated for, in determining the overall reliability of a [statement], by a strong showing as to the other, or by some other indicia of reliability.” *Id.* (quotation omitted). Other indicia of reliability include “identifying oneself to police, providing statements against interest, and corroboration of facts in the [statement].” *State v. Wiggins*, 4 N.W.3d 138, 149 (Minn. 2024) (citations omitted). An informant’s basis of knowledge “may be supplied directly” through “first-hand information” provided by the informant or indirectly through “self-verifying details that allow an inference that the information was gained in a reliable way and is not merely based on a suspect’s general reputation or on a casual rumor” circulating amongst criminals. *State v. Cook*, 610 N.W.2d. 664, 668 (Minn. App. 2000), *rev. denied* (Minn. Jul. 25, 2000).

Potter contends that the statements made by B.D. and A.S. after their arrests “lack any suggestion of reliability and demonstrate no basis of knowledge beyond mere rumor.” Potter notes that B.D. and A.S. “had no history as reliable police informants” and were instead criminal suspects under police interrogation. Potter notes that, according to the first officer, B.D. and A.S. lied and changed their statements during their interrogations and that the first officer testified that he found A.S. “not really reliable in her *Miranda* statement.” Potter maintains that these “self-serving statements from untested informants” were insufficient to sustain probable cause that Potter was involved with the drugs in the apartment.

The state argues that B.D.’s statement “provided probable cause to believe that [Potter] physically possessed heroin found inside the apartment,” given that B.D. was inside the apartment and saw Potter handling drugs minutes before officers arrived. The state contends that these statements are reliable for two main reasons. First, the state contends that B.D. made a statement against his own interest when he admitted to referring prospective drug buyers to Potter, which bolstered his reliability as an informant. Second, the state contends that Potter’s earlier admission to police that he was coming from the apartment corroborated B.D.’s statement that Potter left the apartment minutes before officers arrived.

Based on the record, we conclude that B.D. and A.S.’s statements had “sufficient indicia of reliability” to sustain probable cause for Potter’s arrest. *See Mosley*, 994 N.W.2d at 890. The first officer’s body-camera recording shows that B.D. and A.S. accurately identified themselves after officers arrived at the apartment. Although the

officer testified that B.D. and A.S. lied during their statements, B.D. did provide a statement against his own interest when he admitted to purchasing painkillers and heroin from Potter in the past and to referring people to Potter when they asked for heroin. A.S. also provided a statement against her own interest in her recorded statement when she admitted to using methamphetamine. B.D. and A.S. both stated that Potter was in the apartment just prior to law enforcement's arrival. Potter corroborated these statements when he told the officers he was leaving the apartment shortly before they contacted B.D. and A.S., and that A., i.e., A.S., was watching the apartment for D.D.'s mother. *See State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) ("The independent corroboration of even innocent details of an informant's tip may support a finding of probable cause."). Potter's earlier encounter with police sufficiently corroborates B.D. and A.S.'s statements that they saw Potter handling the drugs in the apartment. Therefore, the officer reasonably relied on these statements to sustain probable cause to arrest Potter for felony-level drug crimes.

B. The other evidence bolstered the officers' honest and strong suspicion that Potter constructively possessed drugs in the apartment.

Possession of a controlled substance may be either actual or constructive. *State v. Florine*, 226 N.W.2d 609, 610 (1975). An individual may be found guilty of constructive possession if the state proves:

(a) that the police found the substance in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found it in a place to which others had access, *there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.*

Id. at 611 (emphasis added). “Proximity is an important factor in establishing constructive possession” and controlled substances may be constructively possessed by “more than one person.” *State v. Porte*, 832 N.W.2d 303, 308 (Minn. App. 2013) (quotation omitted).

Potter argues that the remaining evidence the officer relied upon “in forming probable cause does little to suggest” Potter’s involvement with the drugs in the apartment. Potter notes that the officer testified that his interaction with Potter outside the apartment was “fine” and did not indicate Potter possessed or was under the influence of drugs at the time. Potter contends that his statement “that there was marijuana in the apartment, which police never found, does not suggest that Potter had any control over the meth and heroin that police did find” and that the wallet and phone found by law enforcement “only places him in the apartment and does nothing more to connect him to narcotics sale than what police already knew.” Potter argues that, if we believe this to be a close call, the officer’s “disregard of the warrant requirement weighs against finding probable cause.”

The state argues that the remaining evidence supports probable cause to arrest Potter for drug possession. The state contends that Potter’s admission that he left the apartment minutes before the officers discovered the heroin, methamphetamine, and over \$2,000 in cash sitting in plain view in the apartment establishes proximity and “would give a prudent person a strong suspicion that [Potter] at least jointly possessed the drugs.” The state argues that this suspicion is strengthened by Potter’s attempt to mislead the officers by saying they

would find only marijuana in the apartment and his clear intent “to return to the apartment given that he left his cell phone and possibly his wallet inside.”⁴

The state’s arguments are persuasive. Potter admitted to being at the apartment with A. minutes before the officers observed A.S. inside the apartment with a scale and heroin, in plain view from the front door. The officers found Potter’s identification card and presumably his phone inside the apartment, which suggests Potter intended to return to where the suspected drugs were located.⁵ These facts suggest that Potter was in close proximity to the drugs shortly before officers arrived at the apartment.

Based on the totality of the circumstances, we conclude that a reasonable person would “entertain an honest and strong suspicion” that Potter constructively possessed the drugs at the apartment on May 21, 2022. *Johnson*, 314 N.W.2d at 230. Therefore, officers had the probable cause necessary to obtain an arrest warrant against Potter for felony-level drug offenses, which they did not do over the following 48 hours.

II. The officer’s warrantless arrest of Potter was unlawful.

In Minnesota, police officers are encouraged “to obtain arrest warrants whenever possible.” *State v. Gray*, 456 N.W.2d 251, 255 (Minn. 1990) (quotation omitted). “This preference is strongest when a dwelling is involved” because protection “from warrantless, nonconsensual intrusion into the privacy of one’s dwelling is an important [F]ourth

⁴ The state also contends that Potter left the apartment to meet “a known heroin user.” We note that the district court did not make a factual finding regarding the third party’s status as “a known heroin user.”

⁵ The district court noted that, given the circumstances, it was “reasonable to conclude that officers had honest and strong reasons to believe” the phone belonged to Potter.

[A]mendment right.” *Id.* (quotation omitted); *see also Payton v. New York*, 445 U.S. 573, 585 (1980) (“[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” (quotation omitted)). “Absent exigent circumstances and probable cause, or consent, a warrantless entry and search of a private residence is *per se* unreasonable and violates the Fourth Amendment.” *In re Welfare of B.R.K.*, 658 N.W.2d 565, 578 (Minn. 2003) (citing *Payton*, 445 U.S. at 590). The state has the burden to establish an exception to the warrant requirement. *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003).

Potter argues that the arresting officer’s warrantless entry into his bedroom was unconstitutional because (1) the officer lacked valid consent to open Potter’s bedroom door and (2) no exigent circumstances “necessitated a warrantless arrest of Potter in his bedroom.”⁶ We address each argument in turn.

A. The grandparents’ consent to police entry into their house did not extend into their adult grandson’s bedroom.

“A valid and voluntary consent” to police entry into a residence “may be followed by a warrantless in-home arrest.” *Pesterfield v. Comm’r of Pub. Safety*, 399 N.W.2d 605, 609 (Minn. App. 1987). “Valid consent for police entry of a dwelling may be given by a third party possessing common authority over the premises.” *State v. Thompson*, 578 N.W.2d 734, 740 (Minn. 1998) (citation omitted).

⁶ Potter also argues that the officer lacked probable cause to arrest him. As discussed, we conclude that law enforcement had probable cause to suspect Potter possessed controlled substances two days before the arrest.

The parties agree that Potter did not consent to the officer's entry into his bedroom and that the grandparents had common authority to consent to the officer's initial entry into the Potter residence. Instead, the parties dispute whether the grandparents provided third-party consent to the officer's entry into Potter's bedroom and, if so, whether the grandparents had actual or apparent authority to grant police entry into the bedroom.

1. The scope of the grandparents' consent ended at the closed door of the bedroom.

Once allowed inside a residence, an officer's conduct is "limited by the scope of the consent given." *Id.* When assessing the scope of consent, courts must use an objective standard to determine what the "typical reasonable person" would have understood the exchange between the officer and consenting individual to include. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (quotation omitted). The exchange can be express or "implied by the circumstances," and courts may consider the parties' "words, gestures, or conduct" in determining scope of consent. *State v. Powell*, 357 N.W.2d 146, 149 (Minn. App. 1984), *rev. denied* (Minn. Jan. 15, 1985).

Potter argues that, based on the officer's stated purpose to "talk to" Potter, an objectively reasonable person would understand the grandparents' consent to authorize the officer to "approach Potter's bedroom and try to speak with him" but not to enter their adult grandson's bedroom. Potter contends that the officer "himself acted as if the Potters' consent grant stopped at the bedroom door" because he stopped and knocked on the door rather than immediately entering the room.

The state argues that the grandmother's actions, namely directing the officer to Potter's bedroom and failing to object to police entry "at any point," indicate that the officer did not exceed the scope of her consent when he knocked on and opened Potter's bedroom door. The state relies upon *State v. Thompson*, 578 N.W.2d at 734. In *Thompson*, law enforcement believed Thompson was inside his friend's apartment, but did not have an arrest warrant. *Id.* at 736-37. When officers knocked on the apartment door, a third party answered, and the officers told the third party they needed to speak to the renter. *Id.* at 737. The third party let the officers inside and pointed to the renter's bedroom door. *Id.* The officer "stood outside the bedroom door" and spoke with the renter, then spoke to a female occupant in another room. *Id.* "The officer walked to her bedroom door and asked her to come out so he could talk to her. She got out of bed, and as she approached, he looked inside the doorway" and saw Thompson in plain view. *Id.* The supreme court concluded that the officers acted within the scope of the third party's consent "to enter for the purpose of talking with" the apartment's occupants because the officers saw Thompson "in plain view, from a position in the apartment that was reasonable for the officer to be located." *Id.* at 740-41.

Here, the arresting officer similarly received third-party consent to enter a residence to "talk to" an occupant who was in their bedroom. The grandparents allowed the arresting officer inside their house and directed him to Potter's bedroom door. However, unlike the officers in *Thompson*, the arresting officer did not remain outside the bedroom—he knocked on the door, waited six seconds, then opened the door without identifying himself. The state appears to ask this court to extend the supreme court's holding in *Thompson* and

conclude that the scope of third-party consent to police entry to “talk to” an occupant includes opening their bedroom door when no one answers. We decline to do so.

By knocking at the door, the officer recognized Potter’s privacy expectation in the bedroom. We conclude that the officer did not act within the scope of the grandparents’ third-party consent to “talk to” Potter when he opened the door, because the officer did not stay outside the bedroom or see Potter “in plain view, from a position . . . that was reasonable for the officer to be located.” *Id.*

2. The grandparents lacked actual and apparent authority to consent to police entry into the bedroom.

Although we conclude that the officer exceeded the scope of the grandparents’ consent, we also address the parties’ arguments regarding the grandparents’ actual and apparent authority to consent to the officer’s entry into Potter’s bedroom.

A third party has actual authority to consent to police entry if they have “common authority” over the premises. *Id.* at 740. Common authority rests on “mutual use of the property by persons generally having joint access or control for most purposes” so “it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). If common authority “does not actually exist,” a third party retains valid apparent authority when, “under an objective standard, an officer reasonably believes the third party has authority over the premises and could give consent to enter.” *Thompson*, 578 N.W.2d at 740 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990)). “Whether actual or apparent

authority to consent exists is a legal question subject to de novo review.” *State v. Dotson*, 900 N.W.2d 445, 450 (Minn. App. 2017).

Potter argues that the grandparents lacked both actual and apparent authority to consent to police entry of the bedroom. Potter relies upon *State v. Licari*, which held that a finding of “mutual use” is “the essential ingredient of effective consent” in establishing third-party common authority over a premises. 659 N.W.2d at 250-51 (quotation omitted). Potter contends that the grandparents “did not mutually use or even access Potter’s bedroom” and therefore did not have the actual authority to consent to the officer’s entry. Potter argues that the grandparents’ “property interest in the home” and familial relationship to Potter was insufficient to support the officer’s mistaken belief that the grandparents had common authority over the bedroom.

The state appears to argue that the rule depends on law enforcement’s purpose for entering the premises—specifically, consent to “talk to” an occupant rather than a search for evidence of a crime. The state contends that third-party consent to police entry to “talk to” an occupant requires only “proof of access to the premises” under *Thompson*, and that *Licari*’s “mutual use” rule applies to searches. The state argues that, under the totality of the circumstances, a reasonable person would believe that the grandparents “had the authority to knock on [Potter’s] bedroom door, and then open it, but not enter, when they did not receive a response.” The state notes that the grandparents did not tell the officer

that Potter was in his bedroom, and that for all the officer knew, it could have been “a laundry room or rec room.”⁷

The United States Supreme Court has recognized that “common authority” rests on “*mutual use of the property*” by people having “*joint access or control for most purposes*,” even in the context of third-party consent to police entry for a warrantless arrest. *Rodriguez*, 497 U.S. at 181 (emphasis added) (quoting *Matlock*, 415 U.S. at 171 n.7). Here, the officer arrived at the Potter residence at 8:00 p.m., knowing that Potter “was living” there based on their encounter outside the apartment. The officer intended to arrest Potter and testified that the grandparents told him, “Go down the stairs and his [Potter’s] room is to the left.” This suggests that the officer understood he was going to Potter’s bedroom. Further, the grandparents never said that the officer could open the bedroom door.

After opening the bedroom door, the officer learned additional facts to suggest that the grandparents did not use Potter’s bedroom. At the hearing, the officer agreed that, once inside the bedroom, “it didn’t look like [the] grandmother’s items were in the room” and that “it was clearly Mr. Potter’s bedroom.” After the arrest, both grandparents told the officer that they do not access the bedroom.

⁷ The state contends that, even if the officer should have known it was Potter’s bedroom, the officer did not enter until after he had already seen Potter through the open bedroom door, “which was in line with the facts in *Thompson*.” As discussed, this case is easily distinguishable from *Thompson*, because the officers saw Thompson in plain view and did not open the occupant’s bedroom door. 578 N.W.2d at 736-41.

Under these circumstances, we conclude that a reasonable person in the officer's position would understand they were being directed to Potter's bedroom, not a common area in the home.

This court has repeatedly determined that third parties whose adult relatives live inside their homes do not have actual authority to consent to police entry of their relatives' bedrooms unless the facts establish mutual use of those rooms.⁸ *State v. Stewart*, No. A16-1357, 2017 WL 958475, at *1, *4-5 (Minn. App. Mar. 13, 2017) (requiring proof of actual or apparent mutual use of adult granddaughter's bedroom in grandmother's home to establish grandmother's authority to consent to a search of the bedroom); *State v. Kise*, No. A09-263, 2010 WL 273710, at *2-4 (Minn. App. Jan. 26, 2010) (determining that father's joint access to his adult son's basement area was insufficient to show common authority when there was no evidence that father also had mutual use of the basement); *State v. Weatherford*, No. A05-250, 2006 WL 1147663, at *4-5 (Minn. App. May 2, 2006) (determining that mother lacked actual or apparent authority to consent to search of adult son's hut on her property because there was no mutual use of the hut). Mutual use is not "implied from the mere property interest a third party has in the property." *Matlock*, 415 U.S. at 171 n.7.

The district court found that there was "little information" in the record as to whether the officer "reasonably believed that [the] grandparents mutually used the bedroom." The

⁸ "Nonprecedential opinions and order opinions are not binding authority . . . but nonprecedential opinions may be cited as persuasive authority." Minn. R. Civ. App. P. 136.01, subd. 1(c); see *State v. Jonsgaard*, 949 N.W.2d 161, 169 n.9 (Minn. App. 2020) (stating that unpublished opinions may be cited for their persuasive value).

grandparents' property interest in the house does not imply mutual use of the basement bedroom. *See id.* We conclude that the limited facts available to the officer at the time of his entry did not establish the grandparents' mutual use of Potter's bedroom. Therefore, the state did not sufficiently prove that the grandparents had actual authority to consent to the officer's entry into the bedroom.

“[I]f the facts possessed by police would not establish actual authority to consent under the law, police reliance on those facts cannot be reasonable.” *Licari*, 659 N.W.2d at 253. Even if law enforcement had a good-faith belief that a third party had the authority to consent to police intrusion, that belief cannot establish apparent authority if the facts available to the police do not establish mutual use. *Id.* at 253-54.

As mentioned, the facts available to the officer before he opened the bedroom door did not establish the grandparents' mutual use of the bedroom. Because the officer relied upon facts insufficient to establish the grandparents' mutual use of the bedroom, the state also did not sufficiently prove that the grandparents had apparent authority to consent to the officer's entry into the bedroom.

We conclude that the arresting officer exceeded the scope of the grandparents' third-party consent, and that the grandparents lacked actual or apparent authority to consent to police entry into Potter's bedroom. Therefore, the district court erred in determining that the consent exception applied to the warrantless entry of the bedroom.

B. The exigent-circumstances exception did not apply to the officer's warrantless in-home arrest.

Law enforcement may enter a home to make a warrantless arrest if there are exigent circumstances and the officers have probable cause to believe a felony was committed. *State v. Othoudt*, 482 N.W.2d 218, 223 (Minn. 1992). “[W]e make our own evaluation of the found facts in concluding whether exigent circumstances” existed under the totality of the circumstances. *Gray*, 456 N.W.2d at 256 (quotation omitted). To determine exigency, courts consider

[1] whether a grave or violent offense is involved; [2] whether the suspect is reasonably believed to be armed; [3] whether there is strong probable cause connecting the suspect to the offense; [4] whether police have strong reason to believe the suspect is on the premises; [5] whether it is likely the suspect will escape if not swiftly apprehended; and [6] whether peaceable entry was made.

Id. (adopting the exigency factors set forth in *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970)). These six “*Dorman* factors” are not exhaustive, and Minnesota courts also consider the time necessary for police to obtain an arrest warrant in determining whether exigent circumstances exist. *Id.* We address each factor in turn.

First, a grave or violent offense was not involved. We recognize that felony drug crimes under Minn. Stat. ch. 152 are either considered “crime[s] of violence” under Minn. Stat. § 624.712, subd. 5 (2020), or “violent crime[s]” under Minn. Stat. § 609.1095, subd. 1(d) (Supp. 2021). However, we agree with Potter that supreme court caselaw indicates that “grave and violent offenses” under the first *Dorman* factor are limited to actual or threatened interpersonal harm. *See In re Welfare of D.A.G.*, 484 N.W.2d 787, 791

(Minn. 1992) (recognizing that felony-level possession of two pounds of marijuana was not a “grave and violent offense” in the same sense as a suspected “execution-type murder” (quotations omitted)); *State v. Olson*, 436 N.W.2d 92, 97 (Minn. 1989) (determining that a first-degree murder suspect did not commit a “grave or violent offense” because he was the getaway driver); *B.R.K.*, 658 N.W.2d at 579 (“While a serious offense, underage drinking is not a ‘grave or violent’ offense like robbery or assault.”). *Dorman* itself distinguished an armed robbery from “complacent crimes” such as gambling. 435 F.2d at 392. Although felony drug crimes are considered “crime[s] of violence” by the legislature, a “grave or violent offense” under *Dorman* appears to mean offenses that involve direct physical harm between individuals, not the sale or possession of drugs at issue here. This factor weighs in favor of Potter.

Second, Potter was not reasonably believed to be armed. In its brief to this court, the state does not address this factor. The arresting officer testified, “I didn’t believe [Potter] had any weapons on him. He doesn’t have a history with weapons.” This factor weighs in favor of Potter.

Third, it is a close call whether there was strong probable cause connecting Potter to the offense. As discussed, the officer had sufficient probable cause to arrest Potter for felony-level drug crimes. However, law enforcement’s reliance on two arguably self-interested witnesses and circumstantial evidence tying Potter to the apartment cuts against *strong* probable cause connecting Potter to the drugs. This factor is neutral.

Fourth, police had a strong reason to believe Potter was on the premises. In his brief to this court, Potter concedes that this factor does not weigh in his favor. The officer strongly believed Potter was on the premises because the grandparents immediately told the officer he was home when the officer arrived. This factor weighs in favor of the state.

Fifth, it was unlikely that Potter would have escaped if not swiftly apprehended. The officer testified that Potter had a “history of running from law enforcement,” that he believed Potter knew about the drug investigation, and that he was concerned Potter might flee the jurisdiction through out-of-county connections. However, we agree with Potter that the unexplained 48-hour delay in effecting the arrest “voids any assertion that Potter’s awareness of the investigation and [out-of-county] connections made a swift, warrantless arrest necessary.” This factor weighs in favor of Potter.

Sixth, peaceable entry was not made into Potter’s bedroom. Under *Dorman*, “the fact that entry was not forcible aids in showing reasonableness of police attitude and conduct.” 435 F.2d at 393. Peaceable entry involves a law-enforcement officer “identifying their mission” and giving the suspect an opportunity to surrender without a struggle, thereby avoiding “the invasion of privacy involved in entry into the home.” *Id.* Although the officer peaceably entered the Potter residence and identified his mission to the grandparents, he did not give Potter the opportunity to surrender and avoid “the invasion of privacy involved” in the officer’s unidentified entry into the bedroom. *Id.* The state’s argument that the officer “only entered the room—without drawing his firearm—after he saw [Potter] rolling off of the bed” does not remedy the fact that the officer opened Potter’s door without identifying himself. This factor weighs in favor of Potter.

Perhaps the strongest factor against exigency is the officer's failure to obtain an arrest warrant in the 48-hour period between his investigation at the apartment and his arrival at the Potter residence. The supreme court has held that a 90-minute delay after obtaining probable cause presented "a close question whether police had adequate time and opportunity to secure an arrest warrant." *Gray*, 456 N.W.2d at 257. In *Gray*, officers identified Gray as a murder suspect, began surveillance on him that evening, then arrested him, without a warrant, in the early-morning hours of the following day. *Id.* at 252-54. In affirming the exigency exception, the supreme court noted that Gray's arrest "was in the field as police were continually investigating and trying to locate [Gray], whom they had lost several times." *Id.* at 257. This fact, plus "the existence of virtually all the *Dorman* factors," demonstrated that law enforcement "acted promptly pursuant to exigent circumstances." *Id.*

Here, the officer had sufficient probable cause to obtain an arrest warrant for Potter 48 hours before the warrantless in-home arrest. There is no indication from the record that this delay served an investigative purpose like the officers' active, all-day pursuit of Gray. Potter told the arresting officer where he lived shortly before the officer obtained probable cause, so there was no need to actively investigate Potter's location in lieu of applying for an arrest warrant. This unexplained 48-hour delay, plus the existence of virtually none of the *Dorman* factors, indicates that obtaining an arrest warrant was not impractical.

Notably, the officer testified that he had *never* obtained an arrest warrant during his nine-year career in law enforcement. A police practice of obtaining probable cause, waiting multiple days, then arresting individuals in their homes without a warrant runs counter to

the supreme court’s repeated encouragement that law-enforcement officers “obtain arrest warrants whenever possible.” *Id.*

Therefore, based on the totality of the circumstances, we conclude that the exigent circumstances exception also does not apply to this warrantless in-home arrest.

III. Because Potter prevailed on a dispositive pretrial issue, his conviction must be vacated.

If police conduct a warrantless entry and search of a person’s home to make a felony arrest “without consent or probable cause and exigent circumstances, its fruit must be suppressed.” *Othoudt*, 482 N.W.2d at 222 (citing *Wong Sun v. United States*, 371 U.S. 471, 484 (1963)). In Minnesota, a criminal defendant may “plead not guilty; waive all trial-related rights, including his or her right to a jury trial; stipulate to the state’s evidence in a trial to the court; and then appeal a dispositive, pretrial ruling” under Minnesota Rule of Criminal Procedure 26.01, subdivision 4. *State v. Myhre*, 875 N.W.2d 799, 802 (Minn. 2016). Under this rule, “The defendant and the prosecutor must acknowledge that the pretrial issue is dispositive, or that a trial will be unnecessary if the defendant prevails on appeal.” Minn. R. Crim. P. 26.01, subd. 4(c).

Because no exception to the warrant requirement permitted police entry into the bedroom, the district court erred in denying Potter’s pretrial motion to suppress the statements and physical evidence obtained because of the arrest. After the district court’s denial of Potter’s motion, the parties agreed to proceed under rule 26.01, subdivision 4, which required the state to acknowledge that this appeal was “dispositive” in its case, or that a retrial would be unnecessary. Therefore, we reverse and remand for the district court

to vacate Potter's judgment of conviction on the second-degree controlled-substance possession offense.

Reversed and remanded.