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No. 130286

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CASEY ROBERT HAGESTEDT, Defendant-Appellant.	))))))))))	On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-21-0715 There on Appeal from the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois, No. 17 CF 2205 The Honorable Ann Celine O'Hallaren Walsh, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE ACTION

Following a stipulated bench trial, defendant was convicted of possessing less than 15 grams of a substance containing heroin and sentenced to 180 days in jail and 30 months of probation. Defendant appeals from the appellate court's judgment affirming his conviction. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

The drugs that defendant was convicted of possessing were found inside an open kitchen cabinet in his cousin's home. A police officer entered the home in response to reports of a gas leak and went to the kitchen to investigate the stove identified as the source of the leak. When the officer finished a minute or two later and turned to leave the kitchen, he noticed a cabinet with a chain looped through the door handles and secured with a padlock. One of the doors was ajar, and when the officer looked through the open door with his flashlight, he saw the drugs. The issue presented is:

Whether trial court correctly denied defendant's motion to suppress the drugs as the product of an unreasonable search because the challenged conduct — the officer observing drugs visible through an open cabinet door — was not a search under the Fourth Amendment.

JURISDICTION

This Court allowed defendant's petition for leave to appeal on March 27, 2024, and has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

After police went to the home of defendant's cousin in response to reports of a gas leak and found drugs and drug paraphernalia inside a kitchen cabinet, defendant was charged with unlawful possession of less than 15 grams of a substance containing heroin, unlawful possession of cannabis, and unlawful possession of drug paraphernalia. C61-62, 68.[2] Defendant moved to suppress the drugs and paraphernalia on the ground that police discovered them by conducting an unconstitutional search of the cabinet. C86-88.

I. Defendant Unsuccessfully Moves to Suppress Evidence.

At the suppression hearing, defendant presented the testimony of the two officers who saw the drugs and paraphernalia in the cabinet: Roselle Police Officers Robert Liebich and Kyle Stanish. R76, 94. The officers had been dispatched to a townhome in response to a neighbor's report of a natural gas leak. R77-78, 84, 94-95, 108. When they arrived, the fire department was already there, and firefighters were using fans to ventilate the house, which smelled strongly of gas. R77-78, 95-96, 115-16. The firefighters told the officers that the gas was coming from the stove in the kitchen, R86-87, 95,

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[2] Citations to the common law record appear as "C__," to the report of proceedings as "R__," to the exhibits included in the supplement to the record as "SUP E__," to defendant's brief as "Def. Br. __," and to defendant's appendix as "A__." The audio recording of the oral argument before the appellate court — available at https://www.illinoiscourts.gov/courts/appellate-court/oral-argument-audio/ — is cited as "OA__."

and neither officer was sure whether the firefighters had stopped the leak yet, R78, 96.

Officer Liebich testified that when he arrived, firefighters told him that the gas leak was coming from the stove in the kitchen; he did not know whether anyone was present in the townhome. R86-87. Liebich entered the townhome to check on the stove and went to the kitchen, R78, 86-87, where he "immediately" began inspecting the stove for damage or signs of tampering, R87, 92. It was a narrow galley kitchen, with the stove only a couple feet from the cabinets on the opposite wall:

SUP E9.[3] After inspecting the stove for a minute or two and finding nothing, Liebich turned to leave the kitchen. R87, 91-92.

As he turned, he noticed that a double-doored kitchen cabinet across from the stove had a chain looped through its door handles and secured with a padlock. R79, 87-88, 92; *see* SUP E9-10. One of the cabinet doors was ajar, leaving an opening of "about an inch." R88. Liebich looked through the opening with his flashlight and saw several syringes and packages of a leafy green substance that he recognized as cannabis. R81, 88-89. He did not touch the cabinet. *Id.*

Officer Stanich testified that he was in one of the bedrooms talking to defendant when Liebich discovered the drugs in the kitchen. R97. When the officers had arrived at the townhome, one of the firefighters told Stanich that there was a man in one of the bedrooms. R96, 106-07. The firefighters needed the man to leave the house so paramedics could evaluate his condition — they were concerned that he might have been breathing the leaking gas all night — but he was refusing to leave. *Id.* Accordingly, when the two officers entered and Liebich turned right to go to the kitchen, Stanish turned left and went directly to the bedroom, where he found defendant lying on the floor.

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[3] The record is silent as to when this photograph was taken, but the People presume that it was taken at the same time as the photograph of the cabinet included on page 3 of defendant's brief — that is, not when Liebich first entered the kitchen or first noticed the cabinet, but sometime later when other officers executed the search warrant after Liebich and Stanish had left the townhome. *See* R90, 113-14.

R96, 108-10; *see* Sup E8. Stanish had been trying to convince defendant to leave the townhome for about two minutes when he heard Liebich calling for him to come to the kitchen. R97, 110-11, 118.

Stanish went to the kitchen, where Liebich told him about the cannabis in the cabinet. R97, 111. Stanish testified that one of the cabinet's chained and padlocked doors was open an inch or two and that he could have looked into the opening without touching the cabinet. R97-98, 111-12. But when Liebich told him there was cannabis inside and he went to look for himself, he opened the door another inch or two — the chain had enough slack to allow the door to open wider — in a "knee jerk reaction"; Stanish's view was not as good as Liebich's because he was on the other side of the opening. R98, 111-12, 118-19. Inside, Stanish saw the syringes and packages of what appeared to be cannabis. R98-99, 113.

Stanish returned to the bedroom, where he asked defendant about the contents of the cabinet. R98-99. Defendant denied any knowledge of them, but eventually agreed to accompany Stanish outside. R99. Altogether, the officers had been in the house for about 10 minutes. R91, 116.

Once outside, defendant was placed under arrest and Stanish contacted a detective. R99-101, 103. After police obtained a search warrant, officers searched the cabinet and seized its contents, R105-06.

Although Liebich and Stanich both assumed that defendant was the resident of the townhome, *see* R92-93, 96, defendant presented no evidence

that he owned the townhome, lived in the townhome, was staying as an invited guest in the townhome, or otherwise was legitimately present in the townhome. Nor did he present any evidence that he used the kitchen cabinet; kept belongings in the cabinet; was the person who secured the cabinet with the lock and chain; or, if someone else had secured the cabinet, had a key to the lock.

After the close of evidence, the court heard argument on the motion to suppress. R121. Defendant conceded that Liebich and Stanish had lawfully entered the townhome in response to the reported gas leak. R122 ("[W]e're not contesting that the police had the ability to gain entry into the home that day under the Community Caretaking Doctrine."). But defendant argued that Liebich had conducted a search unrelated to the emergency that justified his presence in the kitchen when he looked at the drugs through the open cabinet door because he was only able to see them with the use of his flashlight, which, counsel argued, meant that they were not in plain view. R122-24.

The court denied the motion. R147; C144. The court credited the officers' testimony, including Liebich's testimony that the cabinet door was open an inch or two, R144-45, and held that Liebich's "observation" of the drugs and paraphernalia through the open cabinet door was lawful, R147.[4]

[4] The court noted that it could not find that the warrant was improper because defendant had not presented the search warrant or testimony regarding the warrant application. R146-47.

The court found that Liebich's use of a flashlight did not render his observation of the cannabis an unlawful search under the Fourth Amendment. R148-49. The court suppressed Stanish's testimony about his observation of the cabinet's contents because Stanish made that observation only after conducting an unauthorized search by opening the door another couple of inches. R145, 149.

Defendant moved to reconsider, C147-49, again "agree[ing] that . . . [Liebich and Stanish] had the ability to enter the residence based on an emergency based on the smell of gas," C148, but arguing that Liebich's use of a flashlight constituted an unauthorized search, C148-49. The court denied the motion reconsider, R175, holding that Liebich's observation of the drugs and paraphernalia through the open cabinet door was "a plain view observation," R175, and that "the use of a flashlight" does not "constitute a search within the [Four]th Amendment," R174.

II. Defendant Is Convicted Following a Stipulated Bench Trial.

After the court denied defendant's motion to suppress, the People *nol prossed* the cannabis and paraphernalia charges, R333, and defendant proceeded to a stipulated bench trial on the charge of possessing less than 15 grams of a substance containing heroin, R336. The stipulated evidence showed that Stanish[5] responded to a report of a gas leak at the townhome

[5] Defendant did not object to the stipulation's reliance on Stanish's observations of the drugs rather than Liebich's. *See* R336-39.

and saw what appeared to be cannabis in the kitchen cabinet. R336-37. The subsequent search of the cabinet pursuant to a warrant produced 37 small zip-lock baggies containing what testing confirmed was less than 15 grams of residue from a mixture of heroin, fentanyl, and cocaine. R336-38. Defendant told the detective on the case that the townhome where the drugs were found belonged to his cousin, but that defendant had been living there for a few days, had access to the cabinet, and had kept the baggies there. R338.

Based on the stipulated evidence, the court found defendant guilty. R339. Defendant filed no posttrial motion, either oral, *see* R338-40, or written, *see* C232-45 (no motion filed between guilty verdict and notice of appeal); *see also* C25-26 (docket showing same). After a hearing, the court sentenced defendant to 30 months of probation and 180 days in jail (to be served at 50% with credit for 126 days of presentencing custody credit). R363; A11-12.

III. The Appellate Court Affirms.

On appeal, defendant argued that Liebich violated the Fourth Amendment by looking in the cabinet. A30-31, ¶ 32. At oral argument, defendant conceded that Liebich was properly in the kitchen when he saw the cabinet. OA at 1:30-1:50 ("He [Liebich] had a right to go into the kitchen[.]"); OA at 3:28-3:47 ("I'll concede that [Liebich] was in a place he was legally allowed to be when he saw the locked cabinet."). But, defendant argued, although Liebich "was legally allowed to be [in the kitchen] when he turned

around and he saw the lock," he violated the Fourth Amendment "when he approached that cabinet" and "took all the steps to look into that cabinet." OA at 7:39-7:57; *see* A30-31, ¶ 32.

The appellate court affirmed. A51, ¶ 79. The court accepted defendant's concession that Liebich lawfully entered the townhome and the kitchen to investigate the reported gas leak, A38, ¶ 50, and held that once Liebich lawfully entered the kitchen, the Fourth Amendment did not prohibit him from noticing drugs visible from that lawful vantage point, A41, ¶¶ 54-56; *see* A53, ¶ 85 (Hutchinson, J., specially concurring). The court further held that Liebich's plain-view observation of the drugs was not rendered a search under the Fourth Amendment by his use of a flashlight. A47, ¶ 66.

The dissent would have reversed on the ground that Liebich violated defendant's legitimate expectation of privacy in the cabinet. A64, ¶ 106 (McLaren, J., dissenting). The dissent emphasized that its disagreement with the majority rested substantially on its belief that the cabinet was in defendant's home (rather than the home of his cousin where he had been staying for a few days, as he told police, R338). *See* A64, ¶ 106 ("The kitchen was in defendant's home, a place where defendant clearly had a superior position to anyone else of ownership, possessory interest, prior presence in and use of the property, and the ability to exclude or control others' use of the property."); A64, ¶ 107 ("The majority never truly addresses the idea that defendant could have an expectation of privacy in a locked cabinet inside his

own house."). The dissent would have found that the drugs were not in plain view because Liebich could not see them until he "positioned himself" to look through the open door with a flashlight. A65-66, ¶ 109. To support this conclusion, the dissent would have applied what it offered as the "common definition" of a search, under which any observation motivated by a desire to see the observed object constitutes a search, regardless of whether the object is in plain view. A73, ¶ 122 ("If one is looking for his car keys and finds them [in plain view] hanging on a hook or happens to find them by opening a drawer, there is no difference between the two actions; they are both searches according to common definition.").

STANDARD OF REVIEW

In reviewing the trial court's order denying defendant's motion to suppress, the Court first "gives great deference to the trial court's factual findings and will reverse those findings only if they are against the manifest weight of the evidence," then "reviews *de novo* the trial court's ultimate legal ruling as to whether suppression is warranted." *People v. Smith*, 2016 IL 119659, ¶ 43.

ARGUMENT

The Trial Court Correctly Denied Defendant's Motion to Suppress the Drugs as the Product of an Unreasonable Search Because Officer Liebich's Observation of the Drugs Was Not a Search Under the Fourth Amendment.

The trial court correctly denied defendant's motion to suppress the drugs found in the kitchen cabinet as the product of an unreasonable search

because he failed to prove that the challenged government conduct — Officer Liebich looking in the open cabinet door as he turned to leave the kitchen — was a search subject to the Fourth Amendment. To establish that conduct as a search, defendant had to prove that (1) he had a reasonable expectation of privacy and (2) Liebich violated that expectation by looking at the drugs through the open cabinet door. Defendant failed to bear that burden. He presented no evidence that (1) he had any interest in the townhome, its kitchen, or the kitchen cabinet, or (2) the contents of the cabinet were not in open view from Liebich's lawful vantage point, such that Liebich violated no reasonable expectation of privacy by observing them.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." U.S. Const., amend. IV. Accordingly, before a court can evaluate whether a challenged government action was an *unreasonable* search, it first must answer "the antecedent question whether or not a Fourth Amendment 'search' has occurred." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). Here, that means answering whether Liebich conducted a "search" under the Fourth Amendment by looking through the open cabinet door as he turned to leave the kitchen.

"Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States v. Jacobsen*, 466

U.S. 109, 123 (1984)). Therefore, Liebich's act of looking through the open cabinet door was not a search unless it violated a legitimate expectation of privacy, *People v. Lindsey*, 2020 IL 124289, ¶ 16, meaning a subjective expectation of privacy that society recognizes as reasonable, *Kyllo*, 533 U.S. at 33 ("[A] Fourth Amendment search does *not* occur — even when the explicitly protected location of a *house* is concerned — unless 'the individual manifested a subjective expectation of privacy in the object of the challenged search,' and 'society [is] willing to recognize that expectation as reasonable.'" (quoting and altering *California v. Ciraolo*, 476 U.S. 207, 211 (1986)) (emphasis in original)); *see People v. Bartelt*, 241 Ill. 2d 217, 229-30 (2011) (conduct that does not violate reasonable expectation of privacy is not a search).

But it would not be enough to show that Liebich violated *someone's* reasonable expectation of privacy. Because Fourth Amendment rights are "'personal rights'" that "may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed," defendant bore the burden of proving that *he* had a reasonable expectation of privacy in the townhome, its kitchen, or the kitchen cabinet. *People v. Rosenburg*, 213 Ill. 2d 69, 77 (2004) (quoting *Simmons v. United States*, 390 U.S. 377, 389 (1968)). To prove that he had a reasonable expectation of privacy, defendant had to show that he had a subjective expectation of privacy, and that expectation was reasonable because it was based on either "'concepts of real

or personal property law'" or "'understandings that are recognized and permitted by society.'" *Byrd v. United States*, 584 U.S. 395, 405 (2018) (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)); *see Lindsey*, 2020 IL 124289, ¶ 16. And to prove that Liebich conducted a search subject to the Fourth Amendment, defendant had to prove that Liebich violated defendant's reasonable expectation of privacy by looking in the open cabinet door. *See Rosenberg*, 213 Ill. 2d at 78; *see People v. Brooks*, 2017 IL 121413, ¶ 22 (defendant bears burden at suppression hearing to prove "both that there was a search and that it was illegal").

Defendant failed to bear his burden of proving that Liebich conducted a Fourth Amendment search when he looked through the open cabinet door. First, defendant failed to prove that he had any cognizable interest in the townhome, its kitchen, or the kitchen cabinet. Second, he failed to prove that Liebich violated any expectation of privacy that defendant might have had in those places, presenting no evidence that Liebich physically intruded anywhere or otherwise did anything but observe what was in open view. Because defendant failed to prove that there was a search, his arguments that the search was unreasonable are beside the point. *See*, *e.g.*, Def. Br. 33 (asking Court to evaluate whether "it was reasonable to search [the cabinet] given the totality of the circumstances of the ongoing community caretaking event"); *People v. Sylvester*, 43 Ill. 2d 325, 327 (1969) ("arguments relating to

the reasonableness of a search" are "irrelevant" where "no 'search' ever occurred").

A. Defendant failed to prove that he had any cognizable interest in the townhome, its kitchen, or the kitchen cabinet.

Defendant failed to prove he had any cognizable interest in the townhome, its kitchen, or the kitchen cabinet because he presented no evidence of such an interest.[6] To determine whether a person has a reasonable expectation of privacy in a place, the Court considers evidence of the person's ownership or possessory interest in the place, the person's prior use of the place, the person's exclusive control of the place or ability to exclude others from it, and the person's subjective expectation of privacy in the place. *Lindsey*, 2020 IL 124289, ¶ 40. Defendant presented no evidence related to any of these factors at the suppression hearing.

Although he now claims the townhome and the kitchen cabinet as his own, *see*, *e.g.*, Def. Br. 8 (asserting that officers entered "[defendant's] home" and looked in "[his] chained and locked kitchen cabinet"), at the suppression hearing he presented no evidence that he had any interest in those places.

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[6] Although the People did not rely below on the lack of evidence that defendant had any interest in the townhome, the kitchen, or the kitchen cabinet, "[i]t is well established that the appellee may urge any point in support of the judgment on appeal, even though not directly ruled on by the trial court, so long as the factual basis for such point was before the trial court." *Rehfield v. Diocese of Joliet*, 2021 IL 125656, ¶ 31 (cleaned up); *see also People v. Horrell*, 235 Ill. 2d 235, 241 (2009).

He presented no evidence that he owned the townhome,[7] rented the townhome, was a guest in the townhome, had stayed in the townhome before, kept any of his belongings in the townhome, or was otherwise legitimately present in the townhome when Stanish found him lying on the floor of one of the bedrooms. Indeed, the only evidence of any connection between defendant and the townhome was the bare fact that he was there when the officers arrived, from which Liebich and Stanish apparently inferred that he was a "resident." *See* R92-93, 96. But defendant's presence alone was insufficient to prove that he had a cognizable interest in the townhome. *See People v. Delgado*, 231 Ill. App. 3d 117, 119 (1st Dist. 1992) ("Defendant's mere status as the sole occupant of the apartment at the time of the search is not sufficient to establish that he had a legitimate expectation of privacy in the apartment."); *see also People v. Nichols*, 2012 IL App (2d) 100028, ¶ 46 ("Although each case is fact-sensitive, 'Illinois courts . . . have repeatedly declined to grant standing for the purposes of contesting a search and seizure to persons who are guests or merely present in someone else's home or on another person's property which is searched.'" (quoting and altering *People v.*

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[7] Presumably he had no evidence of ownership to present, given that he later stipulated at trial that he told police the townhome belonged to his cousin. *See* R338. This Court may consider the evidence introduced at defendant's stipulated bench trial to affirm (but not overturn) the trial court's denial of his motion to suppress because "'[w]hen a reviewing court affirms a trial court's suppression ruling based on evidence that came out at trial, it is akin to a harmless error analysis.'" *People v. Murdock*, 2012 IL 112362, ¶¶ 36-38 (quoting *People v. Brooks*, 87 Ill. 2d 91, 127-28 (1999)).

Ervin, 269 Ill. App. 3d 141, 147 (1st Dist. 1994), and collecting cases)); *People v. McLaurin*, 331 Ill. App. 3d 498, 501 (3d Dist. 2002) (defendant's mere presence "at the time of the search or immediately prior to the search is insufficient to establish a legitimate expectation of privacy"). Construed generously, defendant's presence in one of the bedrooms at most might have supported an inference that he had an interest in that particular bedroom. But defendant presented no evidence that he had an interest in the townhome generally.

Nor did he present any evidence that he had an interest in the kitchen cabinet in particular. He offered no evidence that he ever used the cabinet or stored anything there; that he was the person who secured the cabinet with the chain and padlock; or that, if someone else had secured the cabinet, he had a key to the padlock. The only evidence at the suppression hearing concerning defendant's relationship to the cabinet was his denial to Stanish that he had any knowledge of the cabinet's contents. R99. This was insufficient to prove that he had a reasonable expectation of privacy in the cabinet. *See People v. Keller*, 93 Ill. 2d 432, 440 (1982) (defendants' failure to prove that they had reasonable expectations of privacy in a garage was particularly stark where they "denied to the police ever having been in the garage").

For that same reason, the record does not support defendant's argument that the chain and padlock, by "prevent[ing] [all others] from

accessing [the cabinet's] contents," Def. Br. 12; *see id.* 23, proved *his* reasonable expectation of privacy in the cabinet. A lock that excludes all but the keyholder supports the keyholder's claim to an expectation of privacy but defeats the claims of all others, and at the suppression hearing defendant offered no evidence that he had a key to the lock.

Finally, defendant presented no evidence that he had any subjective expectation of privacy in the townhome, its kitchen, or the kitchen cabinet. *See Lindsey*, 2020 IL 124289, ¶ 40 (noting that a defendant's subjective expectation of privacy in a place may be relevant to determining whether that expectation was reasonable).[8] With no evidence of a property or possessory interest from which a subjective expectation of privacy could be inferred, defendant would have had to profess a subjective expectation of privacy founded on some other, idiosyncratic basis. Such a subjective expectation of privacy would not necessarily have supported Fourth Amendment protection — it would still have to be "one that society is willing to recognize as reasonable," *People v. McCavitt*, 2021 IL 125550, ¶¶ 59-60— but it could at least have been evaluated for reasonableness. But defendant did not claim to have actually expected that anything he might have kept inside the kitchen cabinet would remain private. Again, the only evidence of

[8] Defendant was free to testify to his use of the townhome, its kitchen, and the kitchen cabinet and to his expectation (if any) that they would remain private without fear that such testimony would be used against him at trial in the People's case in chief. *See Rosenberg*, 213 Ill. 2d at 80-81.

his relationship to the townhome was that he was there, and the only evidence of his relationship to the cabinet was his disclaimer of any knowledge of what it contained. R99.

Absent any evidence that he had a cognizable interest in the townhome or the kitchen cabinet containing the drugs, defendant failed to prove that he had a reasonable expectation of privacy in the townhome or the cabinet. *See*, *e.g.*, *Lindsey*, 2020 IL 124289, ¶ 28 (defendant failed to prove that he had a reasonable expectation of privacy in an alcove outside a motel room where he failed to present evidence that he stayed at the motel long enough for it to be considered his home); *Keller*, 93 Ill. 2d at 440 (same with respect to a garage where defendants who had been entering and leaving it presented no evidence that they owned the garage, leased the garage, or were legitimately on the premises); *see also*, *e.g.*, *People v. Duran*, 2016 IL App (1st) 152678, ¶ 30 (same with respect to a car where defendant presented no evidence of any possessory interest in the car, prior use of the car, or right to control others' use of the car); *Nichols*, 2012 IL App (2d) 100028, ¶ 45 (same with respect to a shed where defendant presented no evidence that he spent the night there or had any right to exclude others from the shed); *Delgado*, 231 Ill. App. 3d at 119-20 (same with respect to an apartment where defendant presented no evidence that he owned it, had been staying there for any length of time, had a key, or kept any possessions there, but instead relied solely on the fact that he was the only person present when police searched it).

Accordingly, defendant failed to show an interest in the townhome or the kitchen cabinet protected by the Fourth Amendment, and the trial court correctly denied his motion to suppress.

B. Defendant failed to prove that Officer Liebich violated his reasonable expectation of privacy by looking in the open cabinet.

Even assuming that defendant had some protected interest in the townhome, its kitchen, or the kitchen cabinet, he failed to prove that Liebich conducted a search under the Fourth Amendment because he presented no evidence that Liebich violated defendant's reasonable expectation of privacy in those places by looking in the cabinet. Rather, the evidence showed that the drugs were visible through the open cabinet door, such that Liebich's observation of them was not a search at all. *See Kyllo*, 533 U.S. at 32 ("[W]e have held that visual observation is no 'search' at all[.]").

"[I]f contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search' within the meaning of the Fourth Amendment — or at least no search independent of that initial intrusion that gave the officers their vantage point." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993); *see People v. Berg*, 67 Ill. 2d 65, 68 (1977) ("[I]t is not a search to observe that which is in open view."). This principle applies equally inside the home. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection.").

Here, Liebich's observation of the drugs did not invade any reasonable expectation of privacy — and therefore was not a search under the Fourth Amendment — because (1) the drugs were in open view through the open cabinet door, and (2) Liebich observed them from a lawful vantage point.

1. The drugs were in open view.

For something to be in open view — or "plain view," in the sense that an officer does not conduct a search merely by observing it rather than in the sense that it is subject to seizure under the plain-view doctrine[9] — the officer must be able to see it without physically moving anything to reveal it. *See Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (mere observation of evidence is not a search, but observation of evidence made visible only through physical manipulation is a search); *People v. George*, 49 Ill. 2d 372, 378 (1971) ("it is not a search to observe that which is open to view" because "[a] search

[9] "It is important to distinguish 'plain view,' as used in [the plain-view doctrine] to justify *seizure* of an object, from an officer's mere observation of an item left in plain view." *Texas v. Brown*, 460 U.S. 730, 738 n. 4 (1983) (plurality opinion). The plain-view doctrine "is grounded on the recognition that when a police officer has observed an object in 'plain view,' the owner's remaining interests in the object are merely those of possession and ownership." *Id.* at 739. Property is subject to warrantless seizure under the plain-view doctrine only if it is in open view, such that the defendant has no privacy interest in it, and police have both probable cause to associate the property with criminal activity and a lawful right of access to the property, such that the defendant's possessory interest is overcome. *See Dickerson*, 508 U.S. at 375; *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 65-66 (1992). Perhaps to avoid confusion, this Court has sometimes described property that is visible from a lawful vantage point as being in "open view." *See Berg*, 67 Ill. 2d at 68 ("it is not a search to observe that which is in open view"); *see also State v. Clark*, 859 P. 2d 344, 349 (Idaho Ct. App. 1993) ("The 'open view' terminology distinguishes the analysis applicable to warrantless observations from the legally distinct 'plain view' doctrine applicable to seizures.").

implies an invasion and a quest with some sort of force either actual or constructive").

The Supreme Court explained this constitutional distinction — between observing something that was already visible and observing something only after exercising force to reveal it — in *Arizona v. Hicks*. There, officers entered the defendant's apartment in response to a report that his downstairs neighbor had been shot through the ceiling. 480 U.S. at 323. While searching the apartment for the shooter, any additional victims, and any guns, one of the officers "noticed two sets of expensive stereo components, which seemed out of place in the squalid and otherwise ill-appointed four-room apartment." *Id.* at 323. "Suspecting they were stolen, he read and recorded their serial numbers — moving some of the components . . . in order to do so." *Id.* The Court held that the officer had not conducted a search by examining the serial numbers that he could see without moving the components, but that he did conduct a search when he turned some of the components to expose additional serial numbers. *Id.* at 325. The Court explained that "the distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment" because "taking action, unrelated to the objectives of the authorized intrusion, which expose[s] to view concealed portions of the apartment or its contents," constitutes "a new invasion of [the defendant's] privacy." *Id.* at 325 (internal quotation marks omitted).

The trial court correctly applied this principle when it found that Liebich did not conduct a search by observing the drugs through the open cabinet door. R174-75. Liebich testified that the cabinet door was open about an inch and that he saw the drugs through the open door without touching the cabinet. R81, 88-89. The trial court credited this testimony, R144-45, and found that the drugs were in open view from Liebich's vantage point, R174-75.[10] This factual finding was not against the manifest weight of the evidence. *See People v. Lewis*, 363 Ill. App. 3d 516, 531 (2d Dist. 2006) (trial court's finding that evidence was in plain view is factual finding); *People v. Madison*, 264 Ill. App. 3d 481, 487 (1st Dist. 1994) (same); *see also People v. Evans*, 2023 IL App (1st) 220384-U, ¶ 52 (trial court's factual finding that object was in plain view may only be reversed if against manifest weight of evidence); *People v. Gibson*, 2021 IL App (1st) 200198-U, ¶ 26 (same).[11]

Contrary to defendant's assertion, *see* Def. Br. 20-21, Liebich's observation of the drugs through the open cabinet door was not transformed into a search merely because he used a flashlight. The great weight of authority holds that "the use of artificial means to illuminate a darkened

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[10] Consistent with *Hicks*, the trial court correctly distinguished between Liebich, who observed the drugs without touching the cabinet, and Stanish, who observed the drugs only after opening the cabinet door wider, finding that Liebish's actions did not constitute a search, but Stanish's actions did. *See* R145, 147-49.

[11] Copies of all nonprecedential orders cited in this brief are available at https://www.illinoiscourts.gov/top-level-opinions. *See* Ill. S. Ct. R. 23(e)(1).

area simply does not constitute a search, and thus triggers no Fourth Amendment protection." *Texas v. Brown*, 460 U.S. 730, 739-40 (1983) (holding that officer's use of flashlight did not change plain-view observation into Fourth Amendment search and noting agreement among other courts on that point); *see People v. Bombacino*, 51 Ill. 2d 17, 22 (1972) ("The use of artificial light to observe that which is in plain view has not been considered a fact which would alter the plain-view doctrine."); *People v. Epperley*, 33 Ill. App. 3d 886, 889 (2d Dist. 1975) ("the use of artificial light to observe that which is in a position to be plainly seen does not alter the [plain-view] doctrine").

Although defendant is correct that many cases rejecting his argument involve officers using flashlights to illuminate objects in cars stopped on roads rather than objects in areas under greater Fourth Amendment protection, Def. Br. 21, courts similarly recognize that the use of a flashlight while on curtilage or inside the home does not change an open-view observation into a Fourth Amendment search. *See Bombacino*, 51 Ill. 2d at 22 (no search where an officer observed an object by shining his flashlight through the window of a vehicle in a private driveway); *People v. Echols*, 2024 IL App (2d) 220281-U, ¶ 109 (no search where an officer in a home observed object by shining his flashlight down a hall and through an open bedroom door); *see also United States v. Law*, 384 F. App'x 121, 123-24 (3d Cir. 2010) ("there is nothing unreasonable about a police officer's use of a flashlight . . .

to illuminate the threshold of a closet," for "[a] flashlight merely enhances an officer's vision; it does not expand its scope" (citing *State v. Hite*, 642 So. 2d 55, 56 (Fla. Dist. Ct. App. 1994)); *State v. Johnson*, 793 A.2d 619, 630 (N.J. 2002) (no search where an officer on a porch observed an object by shining his flashlight on the porch because "the use of a flashlight does not transform an otherwise reasonable observation into an unreasonable search within the meaning of the Fourth Amendment" (cleaned up) (collecting cases)); *cf. United States v. Dunn*, 480 U.S. 294, 304-05 (1987) (no search where an officer in an open field observed marijuana by shining his flashlight through an open barn door). Accordingly, the trial court correctly rejected defendant's argument that Liebich's observation of the drugs through the open cabinet door was a search merely because Liebich used a flashlight. R174-75.

2. Liebich saw the drugs from a lawful vantage point.

Liebich's observation of the drugs was not a Fourth Amendment search because not only were they in open view, he saw them from a lawful vantage point. An officer's observation of evidence in open view is not a Fourth Amendment search if "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California*, 496 U.S. 128, 136 (1990). Thus, to prevail on his motion to suppress, defendant had to prove that Liebich reached the vantage point from which he saw the drugs by violating either defendant's reasonable expectation of privacy based on property concepts or defendant's reasonable

expectation of privacy based on the bounds of what society accepts. *See Lindsey*, 2020 IL 124289, ¶ 16. Defendant failed to prove either violation.

a. Liebich did not violate a property-based expectation of privacy.

Defendant failed to prove that Liebich violated a property-based expectation of privacy by entering the kitchen where he saw the drugs through the open cabinet door because defendant failed to prove that Liebich physically intruded on defendant's property. An officer's observation of something in open view violates a property-based reasonable expectation of privacy only if he made the observation after "physically intruding" on the defendant's constitutionally protected property. *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (internal quotation marks omitted); *see Lindsey*, 2020 IL 124289, ¶ 20. It is undisputed that Liebich did not physically intrude on the cabinet itself, *see* Def. Br. 12, 32-33; that Liebich was implicitly licensed to enter the kitchen for the purpose of investigating the gas leak, *see* Def. Br. 29; R122; C148; OA at 1:30-1:50, 3:28-3:47, and that Liebich entered the kitchen for that purpose, *see* Def. Br. 8 ("Liebich went to the kitchen to look at the stove"); R87.[12] Thus, Liebich's subsequent observation of the drugs in open

[12] Defendant takes issue with the appellate majority's understanding of the scope of his concession at oral argument, *see* Def. Br. 9, 22, but the majority's holding did not depend on its articulation of defendant's concession, and, in any event, this Court is not constrained by the appellate court's reasoning and may affirm on any basis supported by the record, *People v. Agee*, 2023 IL 128413, ¶ 89.

view while lawfully in the kitchen did not result from any physical intrusion on defendant's property rights.

To avoid this conclusion, defendant relies on *Florida v. Jardines* to argue that although Liebich initially entered the kitchen for a licensed purpose, that entry subsequently *became* an unlicensed physical intrusion into the kitchen when Liebich looked in the open cabinet door because doing so was unrelated to the purpose for which he had been implicitly licensed to enter. *See* Def. Br. 26. In *Jardines*, the Supreme Court held that an observation made by an officer on private property is a search if the officer physically intruded on the property by entering it for a purpose other than one for which he was implicitly licensed to enter. 569 U.S. at 10-11. There, officers surveilling the defendant's home led a drug-sniffing dog to the defendant's porch, where the dog "energetically explor[ed] the area," walking "back and forth, back and forth" at the end of its six-foot leash until it alerted to narcotics and the officers left to get a warrant. *Id.* at 3-4. Because the "investigation" took place on the defendant's property, the Court "turn[ed] to the question of whether it was accomplished through an unlicensed physical intrusion." *Id.* at 7.

The Supreme Court explained that "whether officers had an implied license to enter the porch . . . depend[ed] upon the purpose for which they entered," *id.* at 10, for "[t]he scope of a license — express or implied — is limited not only to a particular area but also to a specific purpose," *id.* at 9.

An officer who enters private property for a purpose within an implied license may do whatever "'any private citizen might do'" within the bounds of "background social norms." *Id.* at 8-9 (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). But an officer who enters private property for an unlicensed purpose has "physically intrud[ed] on [the defendant's] property" and therefore conducted a search subject to the Fourth Amendment's reasonableness requirement. *Id.* at 11.

In *Jardines*, the license at issue was the one implied by the door knocker on the defendant's front door, which "typically permits the visitor to approach the house, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8. Because the officers' actions — "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" — "objectively reveal[ed]" that the officers entered the porch with "a purpose to conduct a search," their entry was beyond the scope of the implied license to enter the porch for the purpose of inquiring within. *Id.* at 9-10. Therefore, the officers' entry onto the defendant's porch constituted a physical intrusion — that is, a search under the Fourth Amendment — while, for example, a Girl Scout's entry onto the same porch for the purpose of selling cookies would not. *Id.* at 8, 11.

Here, the license at issue was Liebich's implied license to enter the kitchen to investigate the report of a gas leak. That license was limited to

the purpose of investigating the leak, and the evidence objectively revealed that Liebich entered the kitchen for that limited purpose. He arrived at the house in response to a report of a gas leak, R77, went directly to the kitchen where the leak was located, and immediately began inspecting the stove that had been identified as the source of the leak, R86-87. He finished a minute or two later, then turned to leave. R87-88, 91. Thus, Liebich did not enter any room other than those necessary for him to carry out his investigation of the gas leak.

For this reason, defendant's reliance on *People v. Mikrut*, 371 Ill. App. 3d 1148 (2d Dist. 2007), is misplaced. *See* Def. Br. 30-32. *Mikrut* held that once officers who entered an apartment for the permissible purpose of securing the defendant while his girlfriend removed her belongings had secured the defendant in the living room, they were prohibited from then entering the bedroom "because any further intrusion was unnecessary" absent "additional justification." 371 Ill. App. 3d at 1153. But Liebich did not stray into rooms unrelated to his purpose for entering the townhome. Liebich entered the kitchen to investigate the stove identified as the source of a gas leak. His observation of the contents of the open cabinet as he left the kitchen after completing that investigation did not physically intrude on some new place.

Nor did Liebich's observation of the open cabinet on his way out of the kitchen retroactively render his entry into the kitchen unlicensed. "If the

interest in privacy has been invaded, the violation must have occurred before the object came into plain view," *Horton*, 496 U.S. at 141, and defendant conceded in both courts below that Liebich did not violate the Fourth Amendment by entering the kitchen to investigate the gas leak, *see* R122; C148; OA at 1:30-1:50, 3:28-3:47. The license for Liebich to enter the kitchen to investigate the gas leak necessarily included a license to leave the kitchen when he was finished, and his observation of objects in open view while doing so did not retroactively change the nature of his presence on the property. Just as one of *Jardines*'s Girl Scouts, turning to leave a porch after an attempted cookie sale, would not trespass by noticing a partially open container positioned along her path and, in doing so, seeing its contents, Liebich violated no property right by noticing the open cabinet door on his way out of the kitchen and looking at its exposed contents.

Although defendant argues that Liebich's observation of the open cabinet constituted a search because the cabinet was not related to the gas leak that he entered the kitchen to investigate, Def. Br. 32-33, this argument, like that of the dissent below, *see* A73-74, ¶ 123 (McLaren, J., dissenting), rests on a misreading of *Hicks*. According to defendant, *Hicks* held that the officer who lawfully entered the apartment to investigate the shooting conducted a search because he diverted his attention from the investigation to the stereo equipment, and "[i]t was that diversion of attention that made his search unconstitutional, not just the touching of equipment." Def. Br. 32-

33. But *Hicks* explicitly "reject[ed]" the position "that because the officers' action directed to the stereo equipment was unrelated to the justification for their entry into [the] apartment, it was *ipso facto* unreasonable." 480 U.S. at 325. The Supreme Court explained that such a "lack of relationship *always* exists with regard to action validated under the 'plain view' doctrine" because "where action is taken for the purpose justifying the entry, invocation of the doctrine is superfluous." *Id.* (emphasis in original). Thus, the officer's examination of the suspicious stereo components was not a search except to the extent that it involved touching the components. *Id.* (holding that the officer's "moving of the equipment . . . constitute[d] a 'search'" where "[m]erely inspecting those parts of the turntable that came into view during the [search for the shooter, victims, and weapons] would not have constituted an independent search"). Therefore, there is no merit to defendant's argument that Liebich conducted a search simply by looking at something in open view that was unrelated to the gas leak; the Fourth Amendment does not "require tunnel vision." *State v. Shevchuk*, 191 N.W.2d 557, 559 (Minn. 1971); *see Fagnan v. City of Lino Lakes, Minn.*, 745 F.3d 318, 323 (8th Cir. 2014) (guns visible in a cabinet were in plain view to officers passing by on their way to investigate a gas leak in another room).

At bottom, defendant's insistence that an officer who has lawfully entered a place for a particular purpose not look at anything not directly related to that purpose, *see* Def. Br. 26, 32, is essentially an argument that an

officer cannot observe something in open view unless he does so inadvertently. But there is no inadvertency requirement. *People v. Mitchell*, 165 Ill. 2d 211, 226 (1995) ("[a]ny inadvertency requirement for 'plain view' purposes was rejected in *Horton v. California*" (citing generally *Horton v. California*, 496 U.S. 128 (1990)). Accordingly, when an officer has lawfully entered a place for a particular purpose, he is not prohibited from looking at his surroundings just because they are not directly related to that purpose. *See State v. Elam*, 229 N.W.2d 664, 671 (Wis. 1971) (officer who entered bathroom to look for people hiding in the shower did not conduct a search when he turned and saw unmarked pill bottles in the medicine cabinet because "[t]here was no evidence that [he] had to open the medicine cabinet to observe its contents"); *see also, e.g.*, *Bombacino*, 51 Ill. 2d at 22 (officer who approached home to ask resident about a suspect's whereabouts did not conduct a search by observing a bloody baseball bat through the open window of an unoccupied car in the driveway); *United States v. Shuck*, 713 F.3d 563, 568-70 (10th Cir. 2013) (officer who entered defendant's property for purpose of approaching door to knock and converse did not conduct a search by smelling a pipe near the door after his knock produced no response); *Hite*, 642 So. 2d at 56 (officer who entered home to look for people in need of assistance did not conduct search by observing contraband visible through a partially open closet door because "he was not obliged to shield his eyes from any objects other than those he entered to inspect" and contraband was in open

view); *United States v. Medina*, 944 F.2d 60, 69 (2d Cir. 1991) (officer conducting a protective sweep after an arrest did not conduct a search when he saw a gun inside partially open case); *United States v. Fuller*, 847 F. Supp. 300, 305 (W.D.N.Y. 1993) (officers who entered bedroom to conduct a protective sweep did not conduct a search by observing evidence in a partially open drawer under a waterbed); *accord* 1 W. LaFave, *Search and Seizure* § 2.3(e) (when officers enter property with legitimate business, "they are free to keep their eyes open" (internal quotation marks omitted)).

Because Liebich was implicitly licensed to enter the kitchen to investigate the gas leak and entered the kitchen for just that purpose, his observation of drugs in open view inside the kitchen cabinet as he left did not violate defendant's property-based expectation of privacy.

b. Liebich did not violate an expectation of privacy founded in societal expectations.

Defendant also failed to prove that Liebich violated a reasonable expectation of privacy by engaging in behavior beyond what society would accept of someone lawfully in another person's kitchen. When someone has "justifiably relied" on societal prohibitions against particular kinds of observation, an officer who engages in those kinds of observation violates that person's reasonable expectation of privacy and has conducted a search. *Katz*, 389 U.S. at 353. In other words, someone who wishes to remain private need guard against only those intrusions that are plausibly within the bounds of what society allows — they must guard against nosy neighbors, not

peeping toms. *See State v. Smith*, 181 A.2d 761, 769 (N.J. 1962) ("[T]he Fourth Amendment does not protect against all conduct unworthy of a good neighbor."); 1 W. Lafave, *Search and Seizure* § 2.3(c) (when police "resort to the extraordinary step of positioning themselves where [no one] would ordinarily be expected to be," an observation from that vantage violates a reasonable expectation of privacy and "constitutes a Fourth Amendment search"); *accord Unites States v. Gori*, 230 F.3d 44, 54 (2d Cir. 2000) (opening door to visitor "opens to view whatever can be seen by a nosy neighbor or an observant police officer").

The quintessential example of nosiness beyond the bounds of what society accepts (and therefore constituting a search subject to the Fourth Amendment's reasonableness requirement) is the officer in a public restroom peering intrusively at someone inside a closed stall. Courts have had little difficulty recognizing that a person in a closed restroom stall has a reasonable expectation of privacy against intrusion by someone standing just outside the door and peering through the gap between the door and the partition. *See Ward v. State*, 636 So.2d 68, 69, 72 (Fla. Dist. Ct. App. 1994); *but see United States v. White*, 890 F.2d 1012, 1015 (8th Cir. 1989) (person in closed stall has no reasonable expectation of privacy against someone observing them from a distance rather than "peer[ing] in 'knothole fashion' though the gap"). Similarly, courts have recognized that a person in a closed restroom stall has a reasonable expectation of privacy against someone

looking over the partition by standing on the toilet in the adjacent stall. *See People v. Morgan*, 200 Ill. App. 3d 956, 958-59 (5th Dist. 1990); *but see United States v. Billings*, 858 F.2d 617, 618 (10th Cir. 1988) (person in closed stall has no reasonable expectation of privacy against someone looking at his feet and legs between the bottom of the stall door and the floor).

But courts vary substantially regarding how invasive conduct must be in less sensitive settings before it violates social expectations in a way that a person seeking to preserve privacy could not be reasonably expected to anticipate and take measures to prevent. Many courts have held that defendants had no reasonable expectation of privacy against officers looking into their residences through a variety of small openings, including gaps in blinds and curtains, holes and cracks in walls, and openings at the bottom of closed garage doors. *See Martin v. State*, 297 P.3d 896, 899 (Alaska Ct. App. 2013) (collecting cases); *see also State v. Buzzard*, 860 N.E.2d 1006, 1010 (Ohio 2007) (collecting cases). Other courts have drawn the line at "keyhole-peeping, transom-peeping, or looking through minute openings in covered windows." *See* 1 W. Lafave*, Search and Seizure* § 2.3(c).

Wherever the line may be, defendant failed to present any evidence that Liebich overstepped it. The testimony at the suppression hearing was simply that the cabinet door was open about an inch and Liebich was able to see the drugs inside as he turned from the stove to leave the kitchen. R81, 88-89. Someone who leaves a cabinet door ajar can reasonably anticipate

that a person passing by might look through the open door, and therefore has no reasonable expectation of privacy in the cabinet unless he closes the door.

Neither of the cases that defendant cites as examples of unacceptable police conduct — *State v. Tarantino*, 368 S.E.2d 588 (N.C. 1988), or *State v. Fortmeter*, 37 P.3d 223 (Or. Ct. App. 2001) — supports his claim that Liebich violated a reasonable expectation of privacy by looking through the open kitchen cabinet door. *Tarantino* considered the conduct of an officer who climbed onto the second-story porch on the back of the defendant's building, then conducted a "probing examination" of the walls until he found at the base a crack no more than a quarter-inch wide that, when he "maneuvered his body," he could peer through. 368 S.E.2d at 590-92. The North Carolina Supreme Court held that "the presence of tiny cracks near the floor on the interior wall of second-floor porch is not the kind of exposure which serves to eliminate a reasonable expectation of privacy" because to hold otherwise would require people "who want to enjoy their Fourth Amendment rights to maintain their structures almost as airtight containers." *Id.* at 591.

Liebich's conduct — looking through an eye-level opening in a cabinet as he passed within a foot or two on his way out of the kitchen, *see* Sup E9 — was far less intrusive than the conduct at issue in *Tarantino* and defending it does not upend society's demands of those wishing to maintain privacy in their homes. Requiring that people who wish to maintain a reasonable expectation of privacy in a building seal every crack and crevice in the

building's exterior is unreasonable; requiring that people who wish to maintain a reasonable expectation of privacy in a cabinet close the door is not. Accordingly, defendant is incorrect that the Court can affirm only by holding that a reasonable expectation privacy requires "constant maintenance and vigilance in an area one seeks to keep private so no gap, however small, forms." Def. Br. 15. The Court need only reaffirm that if a person wishes to preserve a reasonable expectation in a container, the person must close the container's lid or doors to hide its contents. *See People v. Jones*, 215 Ill. 2d 261, 279 (2005) ("when a container is 'not closed,' . . . the container supports no reasonable expectation of privacy and the contents thereof can be said to be in plain view" (quoting *United States v. Corral*, 970 F.2d 719, 725-26 (10th Cir. 1992)); 1 W. Lafave, *Search and Seizure* § 2.2(a) ("if the contents [of a container] themselves are in plain view within an accessible container, then there exists no reasonable expectation of privacy as to those contents"); *accord McCavitt*, 2021 IL 125550, ¶ 61 (people "generally retain a reasonable expectation of privacy in the contents of a closed container that conceals its contents from plain view" (citing *United States v. Ross*, 456 U.S. 798, 822-23 (1982)).

Fortmeyer is even less apposite. First, *Fortmeyer* did not address a claim under the Fourth Amendment. 37 P.3d at 487 n.1. Rather, *Fortmeyer* held that the officer's conduct violated the Oregon Constitution's protections against unreasonable searches, *id.* at 227, which are different than the

Fourth Amendment's, *id.* at 225; *see State v. Dixson*, 766 P.2d 1015, 1020-24 (Or. 1988) (en banc) ("this court [has] expressly rejected the federal 'reasonable-expectation-of-privacy' test for defining protected privacy interests under [the Oregon Constitution]").

Second, the conduct at issue in *Fortmeyer* was far more intrusive than Liebich's conduct here. The Oregon Appellate Court held that officers violated the defendant's right to privacy under the Oregon Constitution when they knelt on the ground at "a particular angle" next to his basement window, which was largely blocked by a door and covered with cardboard, so that they could see past the door, through a gap in the cardboard, and into the home. *Fortmeyer*, 37 P.3d at 225-27. The court concluded that "[t]o find strangers, on their knees, attempting to peer through what appears to be a covered basement window, would be suspicious, uncommon, and unacceptable in our society." *Id.* at 492.

Like the police conduct in *Tarantino*, the conduct in *Fortmeyer* was a far cry from Liebich looking through the open cabinet at eye-level as he passed within a foot or two on his way out of the kitchen. Although one might be annoyed to find that a visitor who is lawfully in one's kitchen has taken a peek through a cabinet door that was left ajar, such benign and everyday nosiness is not "unacceptable in our society," such that one has a reasonable expectation of privacy in a cabinet even if one does not close it.

Similarly, defendant is incorrect that the chain looped through the handles of the cabinet doors and secured with a padlock created a reasonable expectation of privacy by communicating a message to "keep out." *See* Def. Br. 15. Although the lock and chain certainly signaled that someone wanted to keep people from getting inside the cabinet, it did not create a reasonable expectation of privacy in the contents of the cabinet where the contents were nonetheless visible because the door was not closed. The lock and chain rendered the cabinet's contents inaccessible, not invisible.

Defendant also tries to place Liebich's observation of the drugs through the open cabinet door as beyond the bounds of what society would accept by characterizing it as exploitative, contorted, and prolonged, *see* Def. Br. 12, and arguing that it was tortious and trespassory, such that it could have been legally met with physical violence, *id.* at 24-25. But these arguments are factually and legally unfounded.

i. There is no evidence that Liebich's observation of the drugs was exploitative, contorted, or prolonged.

Defendant's arguments that Liebich's conduct in looking at the drugs through the open cabinet door lay beyond the pale rest largely on his characterization of that conduct as exploitative, unnatural, and prolonged. *See* Def. Br. 12 (arguing that the drugs inside the cabinet were visible only due to "a minor structural flaw in the cabinet that kept the door open a mere inch," which Liebich "exploit[ed]" using "a contorted viewing angle" and "time"). But the record provides no support for this characterization.

To start, the record contains no evidence supporting defendant's repeated speculation that the cabinet door was open due to some "minor structural flaw" that prevented it from closing and that Liebich "exploited" the purported defect to look inside. *See*, *e.g.*, Def. Br. 11 ("one of [the cabinet's] hinges had a structural flaw leaving less than a one-inch gap"); *id.* at 12 ("through no fault of [defendant's] own, the door of the cabinet apparently stopped less than inch shy of closing entirely"); *id.* at 15 (door was open due to "a very minor structural flaw in the cabinet"); *id.* at 20 (door was open due to "a minor flaw in the cabinet's closing mechanism"). To the contrary, as defendant correctly notes, the photograph of the cabinet taken after Stanish handled the door "does not show this [one-inch] gap or any gap for that matter," *id.* at 19, demonstrating that defendant could have closed the door completely, *see* Sup E10. If the cabinet was left open, the Fourth Amendment does not treat it as closed. *See Buzzard*, 860 N.E.2d at 1009 ("Simply put, the Fourth Amendment does not itself 'draw the blinds the occupant could have drawn but did not.'" (quoting *Smith*, 181 A.2d at 769)).

Defendant's assertion that Liebich "contorted" himself to look through the open cabinet door is similarly unsupported by the record. *See* Def. Br. 12 (Liebich assumed a "contorted viewing angle"); *id.* at 19 (Liebich's observation of the drugs was "strained and contorted"). Liebich testified only that he saw the open cabinet door from "an angle" as he turned to leave the kitchen rather than "straight on," R89-90, and that, "without manipulating it,

[he] w[as] able to see what[was] inside the cabinet," R88. In other words, Liebich saw through the open cabinet door as he approached it from the side on his way out of the kitchen. Nothing about this viewing angle supports defendant's assertion that Liebich contorted himself to look through the open cabinet door.

Nor would there have been any need for Liebich to assume an unusual position to look through the open cabinet door. The cabinet was at eye-level, and he could not have avoided passing within a couple feet of it as he left the narrow kitchen. *See* Sup E9. To the extent that he might have tilted his head, craned his neck, or leaned to one side to see the drugs inside the cabinet — and there is no evidence that he did — such movements do not change an open-view observation into a search. *See United States v. Elkins*, 300 F.3d 638, 654-55 (6th Cir. 2002) ("The fact 'that the policeman may have had to crane his neck, or bend over, or squat, does not render the [plain view] doctrine inapplicable, so long as what he saw would have been visible to any curious passerby.'" (quoting and altering *James v. United States*, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969)); *see also Brown*, 460 U.S. at 740 (plurality opinion) (because "[t]he general public could peer into the interior of [defendant's] automobile from any number of angles," the officer was free to do so as well).

Defendant's final assertion — that Liebich "spent almost all of his time searching [the] secured cabinet," Def. Br. 34 — is not only unsupported by the

record but belied by it. Liebich testified that "[l]ess than a minute or two" passed between when he entered the townhome and when he noticed the locked cabinet as he was leaving the kitchen, R91, and Stanish testified that Liebich called him to the kitchen to show him the drugs about two minutes after Stanish entered and started talking to defendant in the bedroom, R110-11. Thus, the record shows that Liebich looked in the cabinet only briefly as he left the kitchen after inspecting the stove for a couple minutes.

In sum, defendant failed to present any evidence that Liebich's conduct in looking in the cabinet represented an intrusion beyond the nosiness of an inquisitive visitor that society tolerates.

ii. Society does not prohibit looking in an open cabinet on pain of tort liability and physical violence.

Defendant insists that society's intolerance of visitors looking through open cupboard doors is reflected in Illinois laws subjecting visitors who engage in such conduct to tort liability and physical violence. *See* Def. Br. 24-25. Defendant is mistaken.

Defendant's argument that a person who looks through an open kitchen cabinet door violates a reasonable expectation of privacy because looking through an open kitchen cabinet door constitutes tortious invasion of privacy, *id.* at 24, is circular and incorrect. A civil plaintiff seeking to prove that the defendant committed tortious invasion of privacy must prove the same thing as a criminal defendant seeking to prove that police conducted a Fourth Amendment search: an invasion of his reasonable expectation of

privacy. *See Jacobsen v. CBS Broadcasting, Inc.*, 2014 IL App (1st) 132480, ¶¶ 47-48 (claim of intrusion upon seclusion fails where plaintiff lacked reasonable expectation of privacy in area observed by defendant); *Morton v. Hartigan*, 145 Ill. App. 3d 417, 427 (1st Dist. 1986) (same). Thus, defendant's argument that Liebich's conduct violated defendant's reasonable expectation of privacy because it constituted tortious invasion of privacy is effectively an argument that Liebich's conduct violated defendant's reasonable expectation of privacy because it violated defendant's reasonable expectation of privacy; defendant's argument assumes the point that he must prove.

Circularity aside, defendant's reliance on tort law is misplaced because Liebich's conduct of looking in an open cabinet door did not violate defendant's reasonable expectation of privacy under the standard governing tortious invasion of privacy. That tort requires an invasion such as a "physical intrusion into a place where the plaintiff has secluded himself," surveillance like "looking into his upstairs windows with binoculars or tapping his telephone wires," or an investigation like "opening his private and personal mail, searching his safe or wallet, examining his private bank account, or compelling him by a forged court order to permit inspection of his personal documents." Restatement (Second) of Torts § 652B, cmt. b; *see Lawlor v. N. Am. Corp. of Ill.*, 2012 IL 112530, ¶ 33 (quoting Restatement (Second) of Torts § 652B, cmt. b, at 378-79 (1977)). Looking inside a cabinet that someone left open does not fit this bill. Thus, the law of tortious

invasion of privacy does not support defendant's claim that Liebich violated a reasonable expectation of privacy by looking in the open cabinet.

Nor is defendant's claim supported by the statutory "castle" doctrine, *see* Def. Br. 24-25, which provides that "[a] person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry or attack upon a dwelling," 720 ILCS 5/7-2. Defendant cites no authority for the proposition that one may physically attack someone who is lawfully in one's kitchen if they look at an open cabinet, and the People are not aware of any.

* * *

In sum, the trial court correctly denied defendant's motion to suppress because Liebich's observation of the drugs visible through the open cabinet door was not a search for Fourth Amendment purposes. Defendant failed to prove that he had a reasonable expectation of privacy and that Liebich, having lawfully entered the kitchen for the purpose of investigating a gas leak, violated such expectation by observing the drugs as he left the kitchen upon finishing that investigation.

CONCLUSION

This Court should affirm the judgment of the appellate court.

September 13, 2024

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 44 pages.

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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 13, 2024, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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