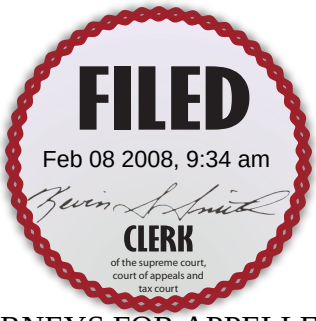

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IN THE
COURT OF APPEALS OF INDIANA

MELISSA BERGMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 01A02-0704-CR-318
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ADAMS SUPERIOR COURT
The Honorable James A. Heimann, Judge
Cause No. 01D01-0609-FD-96

February 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

In this interlocutory appeal, Melissa Bergman appeals the trial court's denial of her motion to suppress evidence in a case in which she was charged with battery as a class D felony.[1] Bergman presents the following restated issue for review: Did the trial court err in denying Bergman's motion to suppress?

We affirm.

On September 4, 2006, around 11:00 p.m., Bergman was at her house with her husband, Norman Bergman, Norman's father, Rick Bergman, and Bergman's four-year-old son, Nathan Bergman. As Bergman sat on the sofa with a dog on her lap, Nathan approached and tried to touch the dog. Bergman told Nathan to move away. When Nathan reached to touch the dog, Bergman kicked Nathan in the stomach, sending him across the room. Rick asked Bergman why she kicked Nathan, and she said, "I don't know." *Transcript* at 27. Rick then told her that he was "going to go see a cop" and would be back. *Id.*

Rick then found Reserve Geneva Police Officer Richard Schmit, who was a former classmate of Rick's, and asked the officer to go with him to 215 Harrison Street, which was Bergman's house. As they approached the house, Rick told Officer Schmit that Bergman had kicked Nathan in the stomach, causing Nathan to go across the room. Officer Schmit and Rick went up to Bergman's door and knocked. When no one answered, Rick opened the door, and Officer Schmit, who was in uniform, identified himself as a Geneva police officer. Once the door was opened, Officer Schmit saw Bergman sitting on the sofa with Nathan, who was crying a little bit. Officer Schmit,

[1] Ind. Code Ann. § 35-42-2-1(a)(2)(B) (West, PREMISE through 2007 1st Regular Sess.).

wanting to check on Nathan's welfare, followed Rick inside the house. After Officer Schmit walked into the house, no one asked him to leave. The officer saw Norman in another room and asked Bergman what was going on. Bergman replied, "oh, not much[.]" *Id.* at 46. Officer Schmit asked Bergman to go into the kitchen, and she did. Officer Schmit asked Nathan if his mother kicked him in the stomach, and Nathan responded that she had. Officer Schmit asked Nathan if it hurt, and Nathan replied that it hurt a little bit. Officer Schmit noticed that Nathan had a small red mark about the size of a fifty-cent piece on his sternum.[2] Officer Schmit then asked Bergman if she kicked Nathan in the stomach, and she acknowledged that she had. Officer Schmit did not give Bergman a *Miranda* warning prior to questioning her about Nathan.

Officer Schmit went outside on the porch with Rick and Norman and then called the county to dispatch Town Marshal Richard Johnson, who was a full-time duty officer, to the scene. Marshal Johnson arrived shortly thereafter, and Officer Schmit informed him of what was happening before he left on another dispatch. Marshal Johnson questioned Rick and Norman, both of whom said that Bergman had gotten upset with Nathan and had kicked him, which caused him to be propelled across the room. Marshal Johnson then went inside the house, with Norman's permission, to talk to Nathan. When the marshal walked in the house, Bergman, who had been standing in the living room, walked out of the room. Upon questions posed by Marshal Johnson, Nathan told the marshal that his mother kicked him and that it hurt. Marshal Johnson did not see a mark

[2] The record does not reveal if Officer Schmit had Nathan remove his shirt or if his shirt was already removed.

on Nathan's chest. Marshal Johnson walked back outside the house to confirm that Rick and Norman had seen Bergman kick Nathan, which they did. Marshal Johnson then went back into the house, placed Bergman under arrest for battery, advised her of her rights, but did not question her.

The State charged Bergman with battery as a class D felony. In January 2007, Bergman filed a motion to suppress, arguing that Officer Schmit's warrantless entry into Bergman's home and the lack of *Miranda* warning violated her federal and state constitutional rights. Bergman requested that "all observations of the police officers, statements of the Defendant, victim and witnesses and other evidence obtained following illegal entry" be suppressed. *Appellant's Appendix* at 24.

During the suppression hearing, Officer Schmit testified that at the time he went inside the house, he believed that it was necessary to check on the welfare of Nathan given the fact that Rick had told him that Nathan had been kicked in the stomach hard enough to make him go across the room. Officer Schmit also testified that Nathan's crying gave him concern about whether Nathan was injured. Officer Schmit further testified that he did not see Bergman as a suspect and she was not in custody when he questioned her about what happened to Nathan. Officer Schmit also testified that he did not intend to arrest her and that he did not *Mirandize* her because he was concerned with checking on Nathan's welfare. Also during the hearing, Bergman testified that Officer

Schmit did not tell her that she did not have to talk to him and that she did not feel free to leave the house.[3]

On February 26, 2007, the trial court issued an order denying Bergman's motion to suppress. Specifically, the trial court concluded that exigent circumstances of aiding a person in need justified Officer Schmit's entry into Bergman's home and that a *Miranda* warning was not necessary because Bergman was not in custody. Upon Bergman's request, the trial court certified its order for interlocutory appeal. We accepted jurisdiction of the appeal on May 7, 2007, pursuant to Ind. Appellate Rule 14(B).

Bergman argues that the trial court erred by denying her motion to suppress all evidence obtained following the warrantless entry into her home as well as the statement she made to police without receiving a *Miranda* warning. Specifically, Bergman maintains that the evidence obtained pursuant to a warrantless entry—specifically, all observations of Officer Schmit and Marshal Johnson of Nathan and statements from Bergman, Nathan, Norman, and Rick—was in violation of her rights under the Fourth Amendment to the United States Constitution and under article 1, section 11 of the Indiana Constitution. Alternatively, Bergman argues that even if exigent circumstances justified the warrantless entry, then Officer Schmit's search exceeded the scope of the circumstances. Bergman also argues that the trial court should have suppressed her statement made to Officer Schmit because he did not give her a *Miranda* warning, which

[3] During the suppression hearing, the State also presented testimony in support of its alternative warrantless entry argument that Rick had apparent authority to consent to enter Bergman's house. The trial court found that the warrantless entry was justified based on exigent circumstances of assisting a person in need, and not upon apparent authority. Therefore, we will review only the facts relating to the exigent circumstances of the warrantless entry.

was in violation of her rights under the Fifth Amendment to the United States Constitution and under article 1, section 14 of the Indiana Constitution.

The State asserts that the warrantless entry was justified under both the federal and state constitutions due to the exigent circumstance of aiding a person in need and that the search did not exceed the scope of exigent circumstances, specifically the need to determine the safety of the child. The State also argues that no *Miranda* warnings were required because Bergman was not subjected to a custodial investigation. We will address each argument in turn.

First, however, we note that our review of a trial court's denial of a motion to suppress is similar to other sufficiency matters. *Masterson v. State*, 843 N.E.2d 1001 (Ind. Ct. App. 2006), *trans. denied*. That is, the record must disclose substantial evidence of probative value that supports the trial court's decision. *Id.* We do not reweigh the evidence and we consider conflicting evidence most favorably to the trial court's ruling. *Id.* We also consider the uncontested evidence favorable to the defendant. *Carroll v. State*, 822 N.E.2d 1083 (Ind. Ct. App. 2005).

The Fourth Amendment to the United States Constitution and article 1, section 11 of the Indiana Constitution protect citizens from unreasonable searches and seizures.[4] "In spite of the similarity in structure of the federal and state constitutional provisions, interpretations and applications vary between them." *Holder v. State*, 847 N.E.2d 930,

[4] The Fourth Amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .", while article 1, section 11 of the Indiana Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated . . . ."

935 (Ind. 2006). Bergman has alleged a violation under both the federal and state constitution; thus, we will separately review them.

The trial court found the State had demonstrated that exigent circumstances justified the warrantless entry. The Fourth Amendment requires a warrant be issued before a search of a home is conducted in order to protect against unreasonable searches and seizures. *Smock v. State*, 766 N.E.2d 401 (Ind. Ct. App. 2002). There are, however, exceptions to the warrant requirement, such as when exigent circumstances exist. *Id.* Under the exigent circumstances exception, police may enter a residence when the facts suggest a reasonable belief that someone inside the residence is in need of aid. *Id.*; *Vitek v. State*, 750 N.E.2d 346 (Ind. 2001), *reh'g denied*. The State bears the burden of demonstrating that exigent circumstances existed in order to overcome the presumption of unreasonableness that accompanies all warrantless home entries. *Alspach v. State*, 755 N.E.2d 209 (Ind. Ct. App. 2001), *trans. denied*.

The record before us reveals that while Officer Schmit was on reserve duty, he was beckoned by Rick to go to a house where Rick had witnessed his four-year-old grandson being kicked in the stomach to the extent that the child was thrown across the room. At the time Officer Schmit arrived at Bergman's house, he had knowledge that Bergman had kicked four-year-old Nathan in the stomach and across the floor. When no one answered the door, Rick opened the door, and Officer Schmit identified himself as a Geneva police officer. When the door was opened, Officer Schmit saw Bergman sitting on the sofa with Nathan, who was crying a little bit. Officer Schmit testified at the suppression hearing that at the time he went inside the house, he did not know whether

Nathan was injured but that he believed it was necessary to check on the welfare of the child given the fact that Rick had told him that Nathan had been kicked in the stomach hard enough to make him go across the room. The officer also testified that Nathan's crying gave him concern about whether Nathan was injured. Once inside the house, Officer Schmit asked Nathan if Bergman had kicked him—to which Nathan responded that she had, and then asked Nathan if it hurt—to which Nathan responded that it did. Officer Schmit also noticed that Nathan had a small red mark on his sternum. Officer Schmit then asked Bergman if she kicked Nathan in the stomach, and she acknowledged that she had.

Under the particular facts presented, we conclude that Officer Schmit had a reasonable belief Nathan was a person in need of assistance when he entered the residence without a warrant. Indeed, Officer Schmit's observation of Nathan crying corroborated Rick's eyewitness report that Nathan had been kicked—and in turn, was a person in need of aid—and justified the warrantless entry on the basis of exigent circumstances. *See, e.g.*, *Collins v. State*, 822 N.E.2d 214 (Ind. Ct. App. 2005) (holding that warrantless entry was justified by exigent circumstances of investigating whether someone in a residence was in need of aid where the police had received an anonymous tip that someone at the residence had been shot and that tip was corroborated by the police when they saw a gun through a window), *trans. denied*; *Alspach v. State*, 755 N.E.2d 22 (holding that exigent circumstances justified the sheriff's warrantless entry into the defendant's apartment). Accordingly, under the facts of this case, we conclude

the State met its burden of demonstrating probable cause[5] and exigent circumstances existed to overcome the presumption of unreasonableness that accompanies all warrantless home entries.

Furthermore, we do not agree with Bergman's argument that Officer Schmit's actions of locating Nathan and determining his well-being went beyond the scope of the exigency presented. Accordingly, the officer's entry into the house did not violate the Fourth Amendment, and the trial court did not err by denying Bergman's motion to suppress on this basis.

Although the language of article 1, section 11 tracks the Fourth Amendment, we proceed somewhat differently when analyzing a claim under the Indiana Constitution:

> [O]ur investigation under Section 11 places the burden on the State to demonstrate that each relevant intrusion was reasonable in light of the totality of the circumstances. As we consider reasonableness based upon the particular facts of each case, the Court also gives Art. 1, § 11, a liberal construction to angle in favor of protection for individuals from unreasonable intrusions on privacy. At the same time, Indiana citizens have been concerned not only with personal privacy but also with safety, security, and protection from crime. It is because of concerns among citizens about safety, security, and protection that some intrusions upon privacy are tolerated, so long as they are reasonably aimed toward those concerns. Thus, we have observed that the totality of the circumstances requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure.

Holder v. State, 847 N.E.2d at 940 (internal quotes and citations omitted). The determination of the reasonableness of police conduct under the totality of the

[5] *See Cudworth v. State*, 818 N.E.2d 133, 140 (Ind. Ct. App. 2004), (explaining that when "validating a warrantless search based on the existence of an emergency, as with any other situation falling within the exigent circumstances exception, the Government must demonstrate both exigency and probable cause"), *trans. denied*.

circumstances "turn[s] on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs." *Id.* (quoting *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)).

Considering and balancing these factors, we conclude that Officer Schmit's warrantless entry was reasonable under the totality of the circumstances. Here, Officer Schmit had an eyewitness summoning the officer to assist a four-year-old child who had been kicked in the stomach, and Officer Schmit's observation of Nathan crying corroborated the eyewitness's report that there was a child that was in need of aid. Officer Schmit accompanied Bergman's father-in-law, Rick, to Bergman's house, they knocked on the door, Rick opened the door, and Officer Schmit saw a crying Nathan and Bergman on the sofa. Officer Schmit testified that he entered the house because he believed that it was necessary to check on the welfare of the child and because of his concern that the child might be injured. Upon entering the house, Officer Schmit merely asked Nathan if Bergman had hit him and if it hurt. While we recognize that a police officer entering a person's home involves some degree of intrusiveness, that factor is strongly outweighed given the high degree of concern that a violation had occurred and the needs of law enforcement in protecting a four-year-old child. Indeed, as noted above, "[i]t is because of concerns among citizens about safety, security, and protection that some intrusions upon privacy are tolerated, so long as they are reasonably aimed toward those concerns." *Holder v. State*, 847 N.E.2d at 940. Because the officer's entry was

reasonable under the totality of the circumstances, the trial court did not err by denying Bergman's motion to suppress based on a violation of article 1, section 11.

We next address Bergman's argument that her admission to Officer Schmit that she kicked Nathan should have been suppressed because Officer Schmit did not give her a *Miranda* warning, thereby violating her right against self-incrimination as set forth in the Fifth Amendment to the United States Constitution and article 1, section 14 of the Indiana Constitution.

The Fifth Amendment to the United States Constitution and article 1, section 14 of the Indiana Constitution guarantee a defendant's right against self-incrimination. *Malinski v. State*, 794 N.E.2d 1071 (Ind. 2003). Because the right against self-incrimination contained in the state constitution is coextensive with that right as set forth in the federal constitution, an analysis under the Fifth Amendment is sufficient to reach a conclusion as to both the federal and state constitutional right. *Id.* (citing *Ajabu v. State*, 693 N.E.2d 921 (Ind. 1998)).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that when law enforcement officers question a person who has been "taken into custody or otherwise deprived of his freedom of action in any significant way," the person must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Luna v. State*, 788 N.E.2d 832, 833 (Ind. 2003) (quoting *Miranda v. Arizona*, 384 U.S. at 444). Statements elicited in violation of this rule are generally inadmissible in a criminal trial. *Loving v. State*, 647 N.E.2d 1123

(Ind. 1995). A police officer's duty to give *Miranda* warnings, however, does not attach unless a defendant has been subjected to custodial interrogation. *State v. Linck*, 708 N.E.2d 60 (Ind. Ct. App. 1999), *trans. denied*. In other words, a police officer is only required to give *Miranda* warnings when a defendant is both in custody and subject to interrogation. *Id.*

The parties focus their arguments on whether Bergman was "in custody" at the time she admitted to Officer Schmit that she kicked Nathan. To be in custody, the defendant need not be placed under formal arrest. *King v. State*, 844 N.E.2d 92 (Ind. Ct. App. 2005). Rather, a person is in custody if a reasonable person under the same circumstances would have believed that he or she was under arrest or not free to resist the entreaties of the police. *Clark v. State*, 808 N.E.2d 1183 (Ind. 2004); *see also Luna v. State*, 788 N.E.2d 832 (explaining that a determination of whether a person is in custody includes examining whether a reasonable person in similar circumstances would believe he is not free to leave). A custody determination involves an examination of all the objective circumstances surrounding the interrogation. *Loving v. State*, 647 N.E.2d 1123. An officer's knowledge and beliefs are relevant to the question of custody only if they are conveyed--through words or actions--to the person being questioned. *Id.* "The test is how a reasonable person in the suspect's shoes would understand the situation." *Id.* at 1125. Also relevant to a custody determination is the length of the questioning. *See Clark v. State*, 808 N.E.2d 1193.

Here, Officer Schmit walked into Bergman's house with Rick to investigate whether Nathan was injured. He asked Bergman what was going on, and she replied,

"oh, not much[.]" *Transcript* at 46. Officer Schmit asked Bergman to step into the kitchen, and he talked to Nathan. After Nathan affirmed that Bergman had kicked him and that it hurt, Officer Schmit asked Bergman if she had kicked Nathan. Officer Schmit did not give Bergman a *Miranda* warning prior to asking her this question. Bergman was not physically restrained when Officer Schmit questioned her about whether she kicked Nathan. After Bergman admitted that she had kicked Nathan, Officer Schmit walked out of the house and onto the porch, where Rick and Norman were standing. Officer Schmit then called dispatch to send Marshal Johnson to the scene. As Officer Schmit waited on the porch with Rick and Norman, he explained to them that he did not know what was going to happen and that they would have to wait for Marshal Johnson to come and investigate. Marshal Johnson arrived within five to ten minutes, and Officer Schmit informed him of what was happening. Marshal Johnson then questioned Rick and Norman, both of whom said that Bergman had kicked Nathan and propelled him across the room. Marshal Johnson went inside the house to talk to Nathan, and Bergman walked out of the living room. After Nathan told Marshal Johnson that his mother kicked him and that it hurt, the marshal walked back outside the house to confirm that Rick and Norman had seen Bergman kick Nathan. Upon their confirmation, Marshal Johnson went back into the house, placed Bergman under arrest for battery, advised her of her rights, but did not question her.

Although Officer Schmit and Bergman's suppression hearing testimony reveal that they had conflicting subjective views about whether Bergman was in custody, we agree with the trial court's determination that the objective circumstances show that Bergman

was not in custody and that *Miranda* warnings were not applicable. Officer Schmit was the only officer present when he questioned Bergman inside her home. Officer Schmit did not arrest Bergman and did not place her in handcuffs. Officer Schmit's questioning of Bergman was limited and short in duration. After Bergman answered Officer Schmit's question regarding whether she had kicked Nathan, the officer left the house and went outside. He did not tell her that she could not leave her home. Indeed, a reasonable person would feel free to move about or leave his or her own home. Given the facts of this case, we conclude that a reasonable person under the same circumstances would not have believed that he or she was under arrest or not free to resist the entreaties of the police. *See, e.g.*, *State v. Linck*, 708 N.E.2d 60 (holding that defendant who was in his residence was not in custody until after he admitted that he had engaged in illegal activity by smoking marijuana), *trans. denied*.

Ruling affirmed.

MATHIAS, J., concurs.

ROBB, J., concurs in result without opinion.