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Court of Appeals

Division III

State of Washington

No. 31440-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

SHANE RICHARD BUCKMAN,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
JUVENILE DEPARTMENT
Honorable Richard H. Bartheld, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding Mr. Buckman was not in custody at the time of his contact with Officer Miller. Conclusion of Law No. 5, CP 117.

2. The trial court erred in concluding the entire contact between Officer Miller and Mr. Buckman did not constitute an interrogation by the officer. Conclusion of Law No. 4, CP 117.

3. The trial court erred in admitting Mr. Buckman's statements and testimonial acts into evidence.

4. The trial court erred in denying Mr. Buckman's motion to suppress statements made while in custody and without *Miranda* warnings.

5. The evidence was insufficient to support the conviction of possession of a dangerous weapon.

6. The trial court erred in concluding Mr. Buckman constructively possessed the brass knuckles. Conclusions of Law No. 2 and 13, CP 117, 119.

Issues Pertaining to Assignments of Error

1. Were Mr. Buckman's statements and testimonial acts in response to police requests inadmissible because they were obtained as a result of custodial interrogation without *Miranda* warnings?¹

2. Was Mr. Buckman's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the crime of possession of a dangerous weapon?²

B. STATEMENT OF THE CASE

The defendant, Shane Richard Buckman, was charged by amended information with possession of a dangerous weapon pursuant to RCW 9A.41.250. CP 8. Prior to trial, defense counsel filed several motions, including motions to suppress statements and evidence. CP 9–22, 23–40.

The trial court agreed to hear the CrR 3.5 and 3.6 motions together, and preferred that admissible portions not be repeated for purposes of trial. Defense counsel did not object to the incorporation, as long as she could make her objections as she would do in a trial. 1/25/13 RP 12–13.

¹ Assignments of Error 1, 2, 3 and 4.

² Assignments of Error 5 and 6.

Yakima Police Officer Tory Adams testified that on February 3, 2012 the 911 operator's entries in his case file showed that at 9:05 p.m. a person identifying himself as a loss prevention officer at the Wal-Mart store located in west Yakima, WA reported suspicious circumstances. The informant saw a male in the store who was wearing a black shirt, blue jeans, sunglasses and a flat-billed New York Yankees cap, and wearing brass knuckles. 1/25/13 RP 16–18, 27. Subsequent updates reported the male may have flashed the knuckles at someone, moved around in the store, left the store heading across the parking lot and was seen getting into a black Acura Legend, four-door, with unknown plate. Eleven minutes after the initial call the car left the parking lot and drove onto Nob Hill Boulevard traveling east. 1/25/13 RP 18–19. Defense counsel did not object to any of this testimony.

At some point Officer Adams received the information from dispatch and began his way toward the 6600 block address of the Wal-Mart store. At the 5300 block of Nob Hill Boulevard, he saw a black four-door Acura traveling east towards him. He waited for five or six eastbound cars to pass him before turning around. He followed two cars similar in color to the reported car. Once he found an Acura, he activated his lights and pulled the car over in the 4400 block of Hob Hill Boulevard. 1/25/13

RP 21–24. The officer called in the license plate number of the car about four minutes after it was seen leaving the Wal-Mart lot. 1/25/13 RP 23.

Officer Adams stopped the car because it was a black four-door Acura Legend. 1/25/13 RP 25–26. He saw no unlawful driving. 1/25/13 RP 25. He made no attempt prior to the stop to look inside the car to see if there was a person matching the suspect’s description. As his car and the Acura passed in opposite directions, he saw the windows were pretty darkly tinted and realized “it’d be impossible for me just to pull alongside and look inside the window” and “it was already dark at the time.” 1/25/13 RP 28.

Once he stopped the car, Officer Adams contacted the female driver. There were five occupants in the car: two females in the front seat and three people in the back seat. 1/25/13 RP 26, 46. He then went back to his patrol car to get a description of the person that he was looking for. 1/25/13 RP 26. Officer Adams testified he had no contact with Mr. Buckman during the stop other than eye contact, and that Mr. Buckman matched the clothing description he’d received from dispatch. 1/25/13 RP26–27.

Yakima Police Officer Jeffrey Miller also responded to the dispatch call and arrived at the scene shortly after Officer Adams had made the stop

and called in the license plate number. 1/25/13 RP 31–33. After talking with the other officer at his patrol car for 40 seconds, Officer Miller approached the passenger side from the rear. 1/25/13 RP 38, 50. He tapped on the window and made a motion for the passenger to roll down the window. 1/25/13 RP 50.

The State played a portion of the audio/video tape of the event recorded by the COBAN unit on Officer Miller’s patrol car. 1/25/13 RP 32, 36–37. The approximately three-minute long excerpt ended at the point where Mr. Buckman was asked to get out of the car. 1/25/13 RP 35, 37.

Mr. Buckman had just recently turned 15 years old. CP 58, 99. Officer Miller’s sole purpose in assisting Officer Adams with the traffic stop was to investigate whether or not there was someone in the car who had brass knuckles. 1/25/13 RP 49. As he approached the car he had a description of that person, and identified Mr. Buckman as matching the description of the suspect. 1/25/13 RP 38.

Officer Miller asked Mr. Buckman for identification. 1/25/13 RP 41, 43. He asked twice where the brass knuckles were, and Mr. Buckman pointed with his finger to the map pocket on the seat about two feet in front of him and said something similar to “they’re in there”. 1/25/13 RP 43–44. The officer told Mr. Buckman to hand them to him. 1/25/13 RP

44–45. Mr. Buckman leaned forward to pull them out of the map pocket. He said they were a “belt buckle” as he handed them to the officer. 1/25/13 RP 44–45, 47.

Officer Miller placed the brass knuckles on the trunk of the car. He’d been talking to Mr. Buckman for approximately three minutes. At no point during this time did he read *Miranda* rights to Mr. Buckman. 1/25/13 RP 47–48, 54. During the entire interview, Officer Miller had his duty weapon, and may have rested his hand on the top of the holster as was his habit. 1/25/13 RP 48. Officer Adams was sitting in the driver’s seat of his patrol car, which was parked directly behind the black Acura. 1/25/13 RP 33–34, 49.

After hearing argument, the trial court denied the CrR 3.5 and 3.6 motions. 1/25/13 RP 57–72. Trial proceedings then commenced. The State sought and the court allowed admission of that portion of the COBAN recording used in the hearings on the motions. 1/25/13 RP 72–74.

Through Officer Miller, two pictures of the brass knuckles handed to him by Mr. Buckman were admitted as exhibits. 1/25/13 RP 76–77. The witness answered yes when asked if he “agree[d] that the recording was accurate [that] as the Respondent was getting out of the car, he was

making statements to the effect that those [knuckles] were a belt buckle.”

1/25/13 RP 78.

The State rested its case in chief and the defense called no witnesses. 1/25/13 RP 78. In closing, the prosecutor argued Mr. Buckman possessed the brass knuckles by proximity to them, exercise of dominion and control over them in handing them over to the officer, and due to inferences that could be drawn of his familiarity with and having an alternative use for the brass knuckles as shown by his statement that they were actually a belt buckle. 1/25/13 RP 79. Defense counsel began argument by saying, “Your honor, you heard testimony that the brass knuckles were part of a belt buckle” and then briefly argued that brass knuckles were trendy novelty items not falling under the dangerous weapon statute. 1/25/13 RP 79–80.

The court ruled that brass knuckles are a dangerous weapon. It found Mr. Buckman possessed the weapon because it was located immediately in front of him in a pocket to the rear of the [front] seat, clearly within his reach and because his statement that it “is a belt buckle clearly indicates ... that he has familiarity with the object and portrayed [sic] use of this object.” 1/25/13 RP 81.

The court entered a single written document titled “Findings of Fact, Conclusions of Law and Order” regarding its motion rulings and adjudication of guilt. CP 114–119.

This appeal followed. CP 104.

C. ARGUMENT

1. Mr. Buckman’s statements and testimonial acts in response to police requests were inadmissible because they were obtained as a result of custodial interrogation without *Miranda* warnings.

In order to protect a defendant's Fifth Amendment right against compelled self-incrimination, the United States Supreme Court determined in *Miranda v. Arizona*, that a suspect must be given the right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The Washington State Constitution provides the same protection as the Fifth Amendment. Article 1, § 9; *State v. Warness*, 77 Wn. App. 636, 893 P.2d 665 (1995) (citing *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979)).

Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive

environment of custodial police interrogation. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). The *Miranda* rule applies when "the interview or examination is (1) custodial (2) interrogation (3) by a state agent." *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) (citing *State v. Sargent*, 111 Wn.2d 641, 649-53, 762 P.2d 1127 (1988)). Unless a defendant has been given the *Miranda* warnings, his statements during police interrogation are presumed to be involuntary. *Sargent*, 111 Wn.2d at 647-48.

Interrogation. *Miranda* interrogation is not limited to express questioning. It includes words or conduct by the police "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Pejsa*, 75 Wn. App. 139, 147, 876 P.2d 963 (1994) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297 (1980)). Words or conduct compelling the production of contraband is subject to *Miranda*.

The act of producing contraband is testimonial and inadmissible under *Miranda*. *State v. Spotted Elk*, 109 Wn. App. 253, 258, 34 P.3d 906 (2001) (citing *State v. Lozano*, 76 Wn. App. 116, 119, 882 P.2d 1191 (1994)). In *Spotted Elk*, the defendant handed the officer heroin in response

to his question, which the court held was a testimonial act. Id. The defendant in *Spotted Elk* had not received her *Miranda* warnings, but the officer asked her a question which was reasonably likely to elicit an incriminating response. Id. at 259. The court held that the circumstances were sufficiently coercive to constitute an interrogation for *Miranda* purposes. Id. An officer may ask a question of a defendant prior to *Miranda* warnings if (1) the question is solely for the purpose of officer or public safety, and (2) the circumstances are sufficiently urgent to warrant an immediate question. Id. at 260 (citing *State v. Lane*, 77 Wn.2d 860, 863, 467 P.2d 304 (1970) and *State v. Richmond*, 65 Wn. App. 541, 545-546, 828 P.2d 1180 (1992)).

Here, Officer Miller demanded Mr. Buckman hand over what the officer believed were Mr. Buckman's brass knuckles by stating "where are your brass knuckles at?" and "hand them to me." In response Mr. Buckman pointed to the map pocket, said something like "they're in there," and produced them for the officer. 1/25/13 RP 43–45, 47.

Mr. Buckman had not been read his *Miranda* warnings. Officer Miller was in no danger, as he was standing outside the vehicle while Mr. Buckman was seated in the rear passenger seat. Officer Miller also noted the brass knuckles were in the rear pocket of the passenger seat, so they

were not in Mr. Buckman's direct possession. The questions posed to Mr. Buckman were not solely for the purpose of officer safety, as the officer testified his only purpose in assisting with the traffic stop was to investigate whether there was someone in the car who had the brass knuckles. 1/25/13 RP 49.

There were no circumstances which would have made the questions urgent. Once the traffic stop was underway, two officers were present, the situation was controlled, all occupants of the vehicle were inside the vehicle and cooperating with officers, and no weapons were seen. There was no urgency for an immediate question, when giving of *Miranda* rights including the required juvenile warnings would have taken but a few minutes.

Officer Miller compelled acts of Mr. Buckman which he knew were likely to elicit incriminating responses. The acts must be suppressed. The trial court erred in concluding the contact between Officer Miller and Mr. Buckman did not constitute an interrogation by the officer. Conclusion of Law No. 4, CP 117.

Custodial. The custody requirement to invoke *Miranda* is also at issue in this appeal. In *Miranda*, the United States Supreme Court defined custodial interrogation as “questioning initiated by law enforcement officers

after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602.

Miranda focuses on custodial interrogations because of their secrecy. When an interrogator is alone with a suspect, police may employ a number of subtle psychological pressures. A suspect's will is much more likely to be overcome in an atmosphere controlled by the police. *State v. Mahoney*, 80 Wn. App. 495, 497, 909 P.2d 949 (1996) (citing *Pejsa*, 75 Wn. App. at 147). Isolation is the key aspect of a custodial setting. *Pejsa*, 75 Wn. App. at 147 (police in interrogation setting can restrain a suspect and apply "whatever psychological techniques they think will be most effective") (quoting *United States v. Mesa*, 638 F.2d 582, 586 (3d Cir.1980)).

In *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the United States Supreme Court refined the definition of “custody.” The court developed an objective test—whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Id.* at 441–42, 104 S.Ct. 3138. Washington has adopted this test. See *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1988).

Here, Mr. Buckman had just recently turned 15 years old (1/25/13 RP 58, 99) so his youthfulness and naivety must be taken into account. Police stopped the black Acura with lights blazing. Officer Adams contacted the driver and went back to his patrol car. A second police car then arrived. 40 seconds later Officer Miller approached Mr. Buckman's window and indicated he must roll the window down. Both Officer Adams and Officer Miller were in uniform and their guns were exposed. There is nothing in the record to indicate either officer told Mr. Buckman he did not have to talk with them or that Mr. Buckman was free to leave.

During the entire interview, Officer Miller stood next to the open window through which he questioned Mr. Buckman, and Officer Adams sat in the driver's seat of his patrol car parked directly behind the black Acura. No Miranda warnings were given. Considering all these factors, under the totality of the circumstances a reasonable person in Mr. Buckman's position would have felt that his freedom was curtailed to the degree associated with a formal arrest. Therefore, the trial court erred in concluding Mr. Buckman was not in custody at the time of his contact with Officer Miller. Conclusion of Law No. 5, CP 117.

Harmless Error. A confession erroneously admitted in violation of the defendant's *Miranda* rights is harmless only when the remaining

evidence overwhelmingly supports a guilty verdict. See *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177, rev. denied, 118 Wn.2d 1006, 822 P.2d 288 (1991); *State v. Cervantes*, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991). Here, there is insufficient evidence to support the conviction for possession of a dangerous weapon without Mr. Buckman's compelled production of contraband.

The State presented no testimony that Mr. Buckman had ever actually possessed the brass knuckles. The loss prevention officer from Wal-Mart did not testify. No evidence tied the individual and alleged brass knuckles seen in the store to Mr. Buckman. Police did not see the brass knuckles until requiring Mr. Buckman to hand them over. 1/25/13 RP 52.

The trial court concluded Mr. Buckman was in constructive possession because of his (1) close proximity and (2) "familiarity with the device and its potential use". Conclusion of Law No. 2, CP 117. The court made no finding of fact in connection with the second reason, and the conclusion based upon it is unsupported in the record. To the extent the conclusion is a finding of fact, it is an innocuous fact. As discussed in the following issue, mere proximity and an innocuous fact do not establish by substantial evidence that Mr. Buckman constructively possessed the brass

knuckles. Therefore, the erroneous admission of Mr. Buckman's compelled production of the brass knuckles was not harmless error.

2. Mr. Buckman's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of possession of a dangerous weapon.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549

(1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

At the adjudication hearing, the court is required to state its findings including the evidence relied upon and enter its decision, JuCR 7.11(c), and to reduce them to writing if the case is appealed, JuCR 7.11(d). This court then reviews its findings to determine whether they are supported by substantial evidence, which is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421-22, 894 P.2d 403 (1995).

Constructive possession. Possession may be either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Here, the state did not argue that Mr. Buckman had actual possession of the brass knuckles. Rather, the State showed proximity to the contraband, which is insufficient to prove constructive possession. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

Constructive possession requires a showing that the defendant had dominion and control over the contraband or over the premises where the contraband was found. *Echeverria*, 85 Wn. App. at 783; *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996). An automobile is deemed “premises” for purposes of this rule. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971); *State v. Huff*, 64 Wn. App. 641, 654, 826 P.2d 698 (1992). In establishing dominion and control, the totality of the circumstances must be considered and no single factor is dispositive. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001); *State v. Bradford*, 60 Wn. App. 857, 862–63, 808 P.2d 174 (1991). There must be substantial evidence showing dominion and control. *Callahan*, 77 Wn.2d at 29; *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731, rev. denied, 127 Wn.2d 1026, 904 P.2d 1158 (1995).

The ability to reduce an object to actual possession is but one aspect of dominion and control. *Echeverria*, 85 Wn. App. at 783. The mere fact of a person’s physical nearness or “proximity” to certain goods or an

article of goods is not enough, standing alone, to prove dominion and control over the goods and therefore constructive possession of them. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). Although exclusive control is not necessary to establish constructive possession, a showing of more than mere proximity to the item is required. *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). The fact of temporary residence, personal possessions on the premises, or knowledge of the presence of the item without more is insufficient to show the dominion and control necessary to establish constructive possession. *Id.* It is not a crime to have dominion and control over the premises where drugs are found. Rather, dominion and control is but one factor to consider in deciding whether the defendant exercised dominion and control over the drugs in question. *Cantabrana*, 83 Wn. App. at 207–08; *State v. Shumaker*, 142 Wn. App. 330, 333–35, 174 P.3d 1214 (2007).

“Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found. But courts hesitate to find sufficient evidence of dominion or control where the State charges passengers with constructive possession.” *State v. Chouinard*, 169 Wn. App. 895, 899-900, 282 P.3d 117, 120

(2012) (citations omitted), rev. denied, 176 Wn.2d 1003, 297 P.3d 67

(2013).

In *State v. Cote*, 123 Wn. App. 546, 96 P.3d 410 (2004), this Court reversed a conviction also dealing with constructive possession by a passenger in another's vehicle. Inside the automobile, authorities found a syringe and components of a methamphetamine lab, including Mason jars containing chemicals. *Id.* at 548. The State showed that Cote had been a passenger in the truck and that authorities had found his fingerprints on the jars. *Id.* The court held, "The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it. But ... this is insufficient to establish dominion and control." *Cote*, 123 Wn. App. at 550.

Similarly, here the State presented insufficient evidence against Mr. Buckman to establish dominion and control. There was no evidence Mr. Buckman brought the brass knuckles into the car. The loss prevention officer did not testify at trial, so there is no evidence Mr. Buckman was the same young man observed in the Wal-Mart store. Mr. Buckman was not the owner or driver or sole occupant of the car. Any one of the other occupants or even someone else could have placed the brass knuckles into the seat pocket at any time. There was no evidence to refute the possibility

the brass knuckles had been in the car for a long enough time to generate discussion and the spread of knowledge to any number of people that they were kept in the map pocket. And familiarity with a possible use of brass knuckles as a belt buckle is an innocuous fact and sounds like a novelty or trivial use that would readily circulate among young people.

Based on the State's evidence Mr. Buckman was simply a passenger in the vehicle where the contraband was found, he was in close proximity to the contraband, but there is not even evidence he touched the brass knuckles before being compelled to produce it to police.

The conviction must be reversed for insufficient evidence.

D. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted on April 1, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 1, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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