

FILED  
OCTOBER 24, 2014  
Court of Appeals  
Division III  
State of Washington

NO. 31440-5-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

SHANE RICHARD BUCKMAN, Appellant.

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BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Were Buckman's statements properly admitted pursuant to a temporary and brief *Terry* detention that did not escalate into a custodial interrogation?
2. Did the State prove beyond a reasonable doubt all of the elements of the crime of possession of a dangerous weapon?

II. STATEMENT OF FACTS

The petitioner, Shane Buckman, was charged in juvenile court with a gross misdemeanor, possession of a dangerous weapon, under RCW 9.41.250. (CP 8).

The charges stem from the following factual scenario: On February 3, 2012, at 9:08 p.m., Wal-Mart loss prevention officers called 911 and reported that a male was flashing brass knuckles at customers in the store. (RP 16-19). They described the suspect as follows: a Hispanic male wearing a black shirt, blue jeans, a flat-billed style hat, and sunglasses. (RP 18, 27, 29).

At 9:13 p.m., the male left the store and got into a black four-door Acura heading eastbound on Nob Hill Boulevard. (RP 19). At 9:16 p.m., the car left the parking lot. (RP 20). Officer Adams was en route to the store when he saw the car traveling on Nob Hill Boulevard. (RP 21-22). The car was being driven towards the officer's direction. (RP 22). It was the only black Acura in the area. (RP 25). The car windows were heavily

tinted. (RP 28). Officer Adams turned around to follow the car and caught up to it. (RP 22). He activated his overhead lights and the car stopped. (RP 22). He called in the license plate at 9:20 p.m. (RP 23).

Next, Officer Miller pulled up behind the car. (RP 33). He spoke to Officer Adams for 40 seconds and then approached the rear passenger side of the car. (RP 38).

There were 5 occupants in the 4-door car, 2 in the front seat and 3 in the backseat. (RP 26, 46). A rear seat passenger, Buckman, matched the suspect's description in that he was wearing a black shirt, blue jeans, and a flat-billed hat, and holding sunglasses in his hands. (RP 27). Both officers testified that Buckman matched the description of the suspect who was flashing the brass knuckles at customers. (RP 27, 38).

Officer Miller asked, "how is it going today?" and no one in the car responded. (RP 40-41). He then asked Buckman if he had identification but Buckman did not answer. (RP 41). A front seat passenger stated that Buckman did not have identification. (RP 41). The officer asked if Buckman spoke English since he did not answer the officer. (RP 42). Officer Miller then asked twice where the brass knuckles were. (RP 43-44, 53). After the second time, Buckman pointed to the seat pocket in front of him and said something equivalent to "they're in there." (RP 44). Officer Miller then asked him, "why don't you hand them to me?" (RP 44, 53). Buckman then leaned forward a

little bit and from the pocket behind the front passenger seat, pulled out a pair of metal knuckles and handed them to the officer through the window. (RP 45). As he handed the weapon over, he volunteered that it was a belt buckle. (RP 47).

At the CrR 3.5 hearing, the COBAN video was played and Officer Miller testified that he wanted the weapon out of the vehicle for safety reasons. (RP 46-7, 54). Buckman was in the vehicle with a dangerous weapon and it was unknown how many weapons were in the car. (RP 47, 54,56). After considering the testimony and evidence, the court found that Buckman was not in custody at the time his statements were made, and therefore, *Miranda* warnings were not required. (RP 71-2).

At trial, Buckman was convicted of possession of a dangerous weapon. (RP 82). Findings of Fact and Conclusion of Law were subsequently filed. (CP 114-19). This appeal followed.

### III. ARGUMENT

#### A. **Buckman's statements were properly admitted pursuant to a temporary and brief *Terry* detention that did not escalate into a custodial interrogation.**

The first issue on appeal is whether Officer Miller's brief questioning of Buckman escalated into a custodial interrogation requiring *Miranda* warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Conclusions of law after a suppression hearing are reviewed de novo. See *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

There is no dispute that the initial vehicle stop was a valid investigatory detention based upon reasonable and articulable suspicion. A person subject to a vehicular *Terry*<sup>1</sup> stop is seized when a car stopped by an officer comes to a halt. *State v. Marcum*, 149 Wn. App. 894, 910, 205 P.3d 969 (2009). By definition, an individual subject to a *Terry* investigative detention is not “free to leave.” *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

But even the fact that a suspect is not “free to leave” during the course of a *Terry* or investigative stop does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less “police dominated,” and does not lend itself to deceptive interrogation tactics. *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003); *Walton*, 67 Wn. App. at 130.

*Miranda* warnings are not needed before questioning when someone is detained pursuant to a routine investigative *Terry* stop. *State v. Huynh*, 49 Wn. App. 192, 201, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988). A “detaining officer may ask a moderate number of questions during a *Terry* stop to determine the identity of the suspect and

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1; 88 S. Ct. 1868 (1968).

to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of *Miranda*." *Heritage*, 152 Wn.2d at 218.

Officers are only required to give *Miranda* warnings if a suspect is subject to custodial interrogation. *State v. Heritage*, 152 Wn.2d at 214. Whether a person is in custody for *Miranda* purposes is reviewed de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). The test is an objective one—whether a reasonable person in the suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *see Heritage*, 152 Wn.2d at 218.

*Miranda* warnings are required when a temporary detention ripens into a custodial interrogation. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002); *State v. D.R.*, 84 Wn. App. 832, 836, 930 P.2d 350, *review denied*, 132 Wn.2d 1015 (1997) (*Miranda* safeguards apply as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest). And a suspect may be considered in custody for *Miranda* purposes if the officer engages in coercive or deceptive interrogation tactics. *State v. Hensler*, 109 Wn.2d 357, 362, 745 P.2d 34 (1987); *see also Walton*, 67 Wn. App. 127.

Objectively viewed, the encounter here was a short *Terry* stop that had not yet escalated to a custodial situation requiring *Miranda* warnings.

It was a brief 3-minute encounter with the officer standing at an open window of a car that Buckman was riding in. Buckman was not asked to get out of the car. His friends were in the car with him still and present during the questioning. He was not told he was under arrest. The mode of questioning was quick and casual, with just a few questions being asked. And it was not conducted at an odd hour of the night.

Buckman argues the following facts indicate he was in custody: 1) patrol car lights were activated, 2) officers were uniformed and armed, 3) he was 15 years old, 4) he was not told he was free to leave and not talk, 5) an officer talked to him through an open window, and 6) a patrol car was parked behind him.

Most of these facts are really non-factors for purposes of whether a *Terry* stop escalates into a custodial situation. Every vehicle stop is going to start with activated police lights. That doesn't escalate the *Terry* stop into a custodial situation. Nearly every stop will also involve uniformed and armed officers. That does not escalate a *Terry* stop. And, in nearly every *Terry* stop, the suspect is not told he is free to leave. Nor is that required. Talking to Buckman through an open window is how you would expect an officer to speak to a suspect during a *Terry* stop. That did not escalate the stop.

That leaves two remaining facts to address--the presence of another officer and Buckman's age. Buckman fails to explain how the

mere presence of another officer escalates a *Terry* stop into a custodial situation. The ratio of officers to passengers was 2:5, so the passengers were not outnumbered. And Buckman has also failed to explain how his age, 15, was a factor in this particular case. While age *could* be a factor in any stop, “this is not to say that a person’s age will be a determinative, or even a significant factor in every case.” *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310 (2011).

The principles in *Berkemer* are controlling here. The officer’s few questions in this case were not calculated and deceptive, nor coercive. His questions were within the moderate scope of noncustodial pre-*Miranda* questioning that is valid under *Terry* and *Berkemer*. See *Hensler*, 109 Wn.2d at 362-63, *Walton*, 67 Wn. App. at 130-31. Accordingly, the trial court did not err in concluding that the temporary and brief questioning was part of a valid *Terry* investigation for which no *Miranda* warnings were required.

Even a criminal traffic stop that is followed by asking the driver to exit the car and perform field sobriety tests does not give rise to the level of “coercive restraints comparable to those associated with a formal arrest.” *Heinemann v. Whitman Wash. Dist. Court*, 105 Wn.2d 796, 808, 718 P.2d 789 (1986); see also *State v. Torres*, 151 Wn.App. 378, 387 n 20, 212 P.3d 573 (2009) (noting field sobriety tests do not implicate *Miranda*).

In short, upon approaching the car, Buckman's actions were curtailed no more than a regular traffic stop, and much less so than in *Heinemann*. The entire questioning only lasted 2 to 3 minutes and consisted of only 7 questions. (RP 51,54). When an officer asks a passenger for identification and where his brass knuckles are, he has not curtailed that passenger's freedom of action to a degree associated with formal arrest. He has not placed that person into custody for purposes of *Miranda*. The few statements made during that period are not the product of custodial interrogation and there is no basis for their suppression. As such, the court did not err in finding that Buckman's statements were admissible at trial.

**B. The State proved beyond a reasonable doubt all of the elements of the crime of possession of a dangerous weapon.**

In reviewing the sufficiency of the evidence, this court must consider the evidence in the light most favorable to the State and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 145 L. Ed. 2d 239, 120 S. Ct. 285 (1999).

In determining whether the necessary quantum of proof exists, this court does not need to be convinced of the defendant's guilt beyond a

reasonable doubt. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Rather, the court simply needs to be satisfied that there is substantial evidence supporting the State's case. *Id.* Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the legislature in RCW 9.41.250(1) states it is a gross misdemeanor to possess metal knuckles.

**9.41.250. Dangerous weapons--Penalty.**

Every person who: (1) Manufactures, sells, or disposes of or possesses any instrument or weapon of the kind usually known as slung shot, sand club, or metal knuckles, ...is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

RCW 9.41.250(1). Possession may be actual or constructive. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). A trier of fact can find a defendant constructively possessed an object if the defendant had dominion and control over it or over the premises where the object was found. *Id.* A vehicle is a "premises" for purposes of this inquiry. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

The ability to reduce an object to actual possession is one aspect of dominion and control. *Echeverria*, 85 Wn. App. at 783. No single factor, however, is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d

1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. *Id.*

This case is stronger than *Echeverria*, where the court found that a rational trier of fact could reasonably infer that the defendant possessed or controlled a gun that was within his reach. There, the evidence consisted of a gun, in plain sight, sticking out from underneath the defendant's driver's seat. *Echeverria*, 85 Wn. App. at 783.

Here, the evidence showed that Buckman was in close proximity to the weapon, knew that it was in the seat pocket directly in front of him, and was able to quickly reduce it to his possession. In addition, he fit the description exactly of the suspect seen in the store flashing the dangerous weapon at customers. Like *Echeverria*, a rational trier of fact could find that Buckman possessed the weapon immediately in front of him. Here, not only was there close proximity, but Buckman's statements indicated both knowledge of the weapon's location and knowledge about the weapon itself (specifically, the ability to use it as a belt buckle). On top of that, there is evidence that he was in actual possession of the dangerous weapon inside the store just moments before being caught.

In *Mathews*, the court held that the defendant, who was a passenger in an automobile on a trip from Portland, exercised dominion and control over the area in the backseat of the automobile where heroin was found. 4 Wn. App. 653. The court stated:

We find substantial evidence in the record establishing circumstances which would justify a finding that defendant was in constructive possession of the narcotic drug heroin because he exercised dominion and control of the area in which the heroin was found. Our decision should not be construed as establishing a rule that a passenger seated in proximity to concealed narcotic drugs in an automobile is deemed to be in constructive possession of the drugs. However, that proximity coupled with the **other circumstances linking him to the heroin** was sufficient to create an issue of fact on constructive possession.

*Mathews*, 4 Wn. App. at 658 (emphasis added). The court held that under the facts of that case proximity to the drugs, along with evidence of control of the backseat area, was sufficient evidence for a trier of fact to find constructive possession.

The overwhelming evidence here clearly showed that Buckman constructively possessed the weapon in this case. First of all, there was substantial evidence that Buckman was in actual possession of the weapon prior to being stopped in the car. Two officers testified that he matched exactly the description given by Wal-mart officers of the suspect flashing the dangerous weapon at customers. On top of matching the suspect's description in every way, he was sitting right behind the pocket that had the weapon in it, knew that the weapon was in the pocket, and described the weapon as being a "belt buckle." As such, there was sufficient evidence for a rational trier of fact to find that he had constructive possession of the dangerous weapon in this case.

Buckman argues that “the State presented no testimony that Mr. Buckman had ever possessed the brass knuckles.” (App.’s Brief at 14). However, this argument must fail. Matching a clothing description is circumstantial corroboration that Buckman possessed and displayed the dangerous weapon shortly before his contact with Officer Miller. The traditional common-law rule is that any evidence tending to identify the accused is relevant, competent, and therefore, admissible. *State v. Gosby*, 85 Wn.2d 758, 760, 539 P.2d 680 (1975).

Matching a clothing description is circumstantial evidence of identity. *See State v. Johnson*, 132 Wn. App. 454, 461, 132 P.3d 767 (2006). In *State v. Collins*, the fact that the defendant’s pants matched the description of unusual pants seen by burglary victims was one facet of the testimony furnishing circumstantial corroboration of Collins’ identifications as the one who committed a burglary. 2 Wn. App. 757, 759-760 (1970).

As explained in another case, *State v. Palmer*:

...the state produced strong and convincing evidence of guilt of defendant Palmer. An eyewitness identified him as being at the scene of the robbery, wearing clothing which matched the clothing he was wearing at the time of his arrest 45 minutes later.

73 Wn.2d 462, 474 438 P.2d 876 (1968). Furthermore, statements describing clothing of a suspect falls under the hearsay exception of ER 801(d). *State v. Stratton*, 139 Wn. App. 511, 516-517, 161 P.3d 448

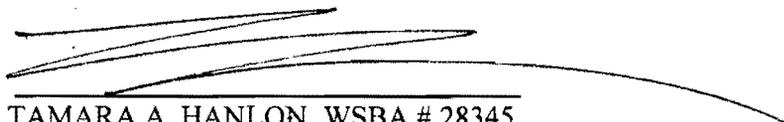
(2007) (no error in officer relaying witness' description of the suspect as the person wearing the yellow t-shirt).

Thus, the fact that Buckman was wearing a black shirt, blue jeans, flat-billed New York Yankees hat, and holding sunglasses in his hand at the time Officer Miller saw him, is circumstantial evidence that he was the suspect inside Wal-mart displaying the dangerous weapon before the police caught him leaving the store. Thus, this is not a case of someone simply being next to a weapon and being convicted *solely* because of their close proximity. In sum, when viewing the evidence in a light most favorable to the State, a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.

#### IV. CONCLUSION

The trial court correctly ruled that Buckman's statements were admissible as statements given during a temporary and brief *Terry* investigation. No *Miranda* warnings were required in this situation. Further, there was substantial evidence supporting all the elements of possession of a dangerous weapon. The conviction should be affirmed.

Respectfully submitted this 24th day of October, 2014,



TAMARA A. HANLON, WSBA # 28345  
Senior Deputy Prosecuting Attorney  
Yakima County, Washington

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on October 24, 2014, by agreement of the parties, I emailed a copy of the State's Brief of Respondent to Ms. Susan Gasch at [gaschlaw@msn.com](mailto:gaschlaw@msn.com).

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of October, 2014 at Yakima, Washington.

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tinted. (RP 28). Officer Adams turned around to follow the car and caught up to it. (RP 22). He activated his overhead lights and the car stopped. (RP 22). He called in the license plate at 9:20 p.m. (RP 23).

Next, Officer Miller pulled up behind the car. (RP 33). He spoke to Officer Adams for 40 seconds and then approached the rear passenger side of the car. (RP 38).

There were 5 occupants in the 4-door car, 2 in the front seat and 3 in the backseat. (RP 26, 46). A rear seat passenger, Buckman, matched the suspect's description in that he was wearing a black shirt, blue jeans, and a flat-billed hat, and holding sunglasses in his hands. (RP 27). Both officers testified that Buckman matched the description of the suspect who was flashing the brass knuckles at customers. (RP 27, 38).

Officer Miller asked, "how is it going today?" and no one in the car responded. (RP 40-41). He then asked Buckman if he had identification but Buckman did not answer. (RP 41). A front seat passenger stated that Buckman did not have identification. (RP 41). The officer asked if Buckman spoke English since he did not answer the officer. (RP 42). Officer Miller then asked twice where the brass knuckles were. (RP 43-44, 53). After the second time, Buckman pointed to the seat pocket in front of him and said something equivalent to "they're in there." (RP 44). Officer Miller then asked him, "why don't you hand them to me?" (RP 44, 53). Buckman then leaned forward a

little bit and from the pocket behind the front passenger seat, pulled out a pair of metal knuckles and handed them to the officer through the window. (RP 45). As he handed the weapon over, he volunteered that it was a belt buckle. (RP 47).

At the CrR 3.5 hearing, the COBAN video was played and Officer Miller testified that he wanted the weapon out of the vehicle for safety reasons. (RP 46-7, 54). Buckman was in the vehicle with a dangerous weapon and it was unknown how many weapons were in the car. (RP 47, 54,56). After considering the testimony and evidence, the court found that Buckman was not in custody at the time his statements were made, and therefore, *Miranda* warnings were not required. (RP 71-2).

At trial, Buckman was convicted of possession of a dangerous weapon. (RP 82). Findings of Fact and Conclusion of Law were subsequently filed. (CP 114-19). This appeal followed.

### III. ARGUMENT

#### A. **Buckman's statements were properly admitted pursuant to a temporary and brief *Terry* detention that did not escalate into a custodial interrogation.**

The first issue on appeal is whether Officer Miller's brief questioning of Buckman escalated into a custodial interrogation requiring *Miranda* warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Conclusions of law after a suppression hearing are reviewed de novo. *See State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

There is no dispute that the initial vehicle stop was a valid investigatory detention based upon reasonable and articulable suspicion. A person subject to a vehicular *Terry*<sup>1</sup> stop is seized when a car stopped by an officer comes to a halt. *State v. Marcum*, 149 Wn. App. 894, 910, 205 P.3d 969 (2009). By definition, an individual subject to a *Terry* investigative detention is not “free to leave.” *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

But even the fact that a suspect is not “free to leave” during the course of a *Terry* or investigative stop does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less “police dominated,” and does not lend itself to deceptive interrogation tactics. *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003); *Walton*, 67 Wn. App. at 130.

*Miranda* warnings are not needed before questioning when someone is detained pursuant to a routine investigative *Terry* stop. *State v. Huynh*, 49 Wn. App. 192, 201, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988). A “detaining officer may ask a moderate number of questions during a *Terry* stop to determine the identity of the suspect and

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1; 88 S. Ct. 1868 (1968).

to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of *Miranda*." *Heritage*, 152 Wn.2d at 218.

Officers are only required to give *Miranda* warnings if a suspect is subject to custodial interrogation. *State v. Heritage*, 152 Wn.2d at 214. Whether a person is in custody for *Miranda* purposes is reviewed de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). The test is an objective one—whether a reasonable person in the suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *see Heritage*, 152 Wn.2d at 218.

*Miranda* warnings are required when a temporary detention ripens into a custodial interrogation. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002); *State v. D.R.*, 84 Wn. App. 832, 836, 930 P.2d 350, *review denied*, 132 Wn.2d 1015 (1997) (*Miranda* safeguards apply as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest). And a suspect may be considered in custody for *Miranda* purposes if the officer engages in coercive or deceptive interrogation tactics. *State v. Hensler*, 109 Wn.2d 357, 362, 745 P.2d 34 (1987); *see also Walton*, 67 Wn. App. 127.

Objectively viewed, the encounter here was a short *Terry* stop that had not yet escalated to a custodial situation requiring *Miranda* warnings.

It was a brief 3-minute encounter with the officer standing at an open window of a car that Buckman was riding in. Buckman was not asked to get out of the car. His friends were in the car with him still and present during the questioning. He was not told he was under arrest. The mode of questioning was quick and casual, with just a few questions being asked. And it was not conducted at an odd hour of the night.

Buckman argues the following facts indicate he was in custody: 1) patrol car lights were activated, 2) officers were uniformed and armed, 3) he was 15 years old, 4) he was not told he was free to leave and not talk, 5) an officer talked to him through an open window, and 6) a patrol car was parked behind him.

Most of these facts are really non-factors for purposes of whether a *Terry* stop escalates into a custodial situation. Every vehicle stop is going to start with activated police lights. That doesn't escalate the *Terry* stop into a custodial situation. Nearly every stop will also involve uniformed and armed officers. That does not escalate a *Terry* stop. And, in nearly every *Terry* stop, the suspect is not told he is free to leave. Nor is that required. Talking to Buckman through an open window is how you would expect an officer to speak to a suspect during a *Terry* stop. That did not escalate the stop.

That leaves two remaining facts to address--the presence of another officer and Buckman's age. Buckman fails to explain how the

mere presence of another officer escalates a *Terry* stop into a custodial situation. The ratio of officers to passengers was 2:5, so the passengers were not outnumbered. And Buckman has also failed to explain how his age, 15, was a factor in this particular case. While age *could* be a factor in any stop, “this is not to say that a person’s age will be a determinative, or even a significant factor in every case.” *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406, 180 L. Ed. 2d 310 (2011).

The principles in *Berkemer* are controlling here. The officer’s few questions in this case were not calculated and deceptive, nor coercive. His questions were within the moderate scope of noncustodial pre-*Miranda* questioning that is valid under *Terry* and *Berkemer*. See *Hensler*, 109 Wn.2d at 362-63, *Walton*, 67 Wn. App. at 130-31. Accordingly, the trial court did not err in concluding that the temporary and brief questioning was part of a valid *Terry* investigation for which no *Miranda* warnings were required.

Even a criminal traffic stop that is followed by asking the driver to exit the car and perform field sobriety tests does not give rise to the level of “coercive restraints comparable to those associated with a formal arrest.” *Heinemann v. Whitman Wash. Dist. Court*, 105 Wn.2d 796, 808, 718 P.2d 789 (1986); see also *State v. Torres*, 151 Wn.App. 378, 387 n 20, 212 P.3d 573 (2009) (noting field sobriety tests do not implicate *Miranda*).

In short, upon approaching the car, Buckman's actions were curtailed no more than a regular traffic stop, and much less so than in *Heinemann*. The entire questioning only lasted 2 to 3 minutes and consisted of only 7 questions. (RP 51,54). When an officer asks a passenger for identification and where his brass knuckles are, he has not curtailed that passenger's freedom of action to a degree associated with formal arrest. He has not placed that person into custody for purposes of *Miranda*. The few statements made during that period are not the product of custodial interrogation and there is no basis for their suppression. As such, the court did not err in finding that Buckman's statements were admissible at trial.

**B. The State proved beyond a reasonable doubt all of the elements of the crime of possession of a dangerous weapon.**

In reviewing the sufficiency of the evidence, this court must consider the evidence in the light most favorable to the State and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 145 L. Ed. 2d 239, 120 S. Ct. 285 (1999).

In determining whether the necessary quantum of proof exists, this court does not need to be convinced of the defendant's guilt beyond a

reasonable doubt. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Rather, the court simply needs to be satisfied that there is substantial evidence supporting the State's case. *Id.* Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the legislature in RCW 9.41.250(1) states it is a gross misdemeanor to possess metal knuckles.

**9.41.250. Dangerous weapons--Penalty.**

Every person who: (1) Manufactures, sells, or disposes of or possesses any instrument or weapon of the kind usually known as slung shot, sand club, or metal knuckles, ...is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

RCW 9.41.250(1). Possession may be actual or constructive. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). A trier of fact can find a defendant constructively possessed an object if the defendant had dominion and control over it or over the premises where the object was found. *Id.* A vehicle is a "premises" for purposes of this inquiry. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

The ability to reduce an object to actual possession is one aspect of dominion and control. *Echeverria*, 85 Wn. App. at 783. No single factor, however, is dispositive in determining dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d

1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. *Id.*

This case is stronger than *Echeverria*, where the court found that a rational trier of fact could reasonably infer that the defendant possessed or controlled a gun that was within his reach. There, the evidence consisted of a gun, in plain sight, sticking out from underneath the defendant's driver's seat. *Echeverria*, 85 Wn. App. at 783.

Here, the evidence showed that Buckman was in close proximity to the weapon, knew that it was in the seat pocket directly in front of him, and was able to quickly reduce it to his possession. In addition, he fit the description exactly of the suspect seen in the store flashing the dangerous weapon at customers. Like *Echeverria*, a rational trier of fact could find that Buckman possessed the weapon immediately in front of him. Here, not only was there close proximity, but Buckman's statements indicated both knowledge of the weapon's location and knowledge about the weapon itself (specifically, the ability to use it as a belt buckle). On top of that, there is evidence that he was in actual possession of the dangerous weapon inside the store just moments before being caught.

In *Mathews*, the court held that the defendant, who was a passenger in an automobile on a trip from Portland, exercised dominion and control over the area in the backseat of the automobile where heroin was found. 4 Wn. App. 653. The court stated:

We find substantial evidence in the record establishing circumstances which would justify a finding that defendant was in constructive possession of the narcotic drug heroin because he exercised dominion and control of the area in which the heroin was found. Our decision should not be construed as establishing a rule that a passenger seated in proximity to concealed narcotic drugs in an automobile is deemed to be in constructive possession of the drugs. However, that proximity coupled with the **other circumstances linking him to the heroin** was sufficient to create an issue of fact on constructive possession.

*Mathews*, 4 Wn. App. at 658 (emphasis added). The court held that under the facts of that case proximity to the drugs, along with evidence of control of the backseat area, was sufficient evidence for a trier of fact to find constructive possession.

The overwhelming evidence here clearly showed that Buckman constructively possessed the weapon in this case. First of all, there was substantial evidence that Buckman was in actual possession of the weapon prior to being stopped in the car. Two officers testified that he matched exactly the description given by Wal-mart officers of the suspect flashing the dangerous weapon at customers. On top of matching the suspect's description in every way, he was sitting right behind the pocket that had the weapon in it, knew that the weapon was in the pocket, and described the weapon as being a "belt buckle." As such, there was sufficient evidence for a rational trier of fact to find that he had constructive possession of the dangerous weapon in this case.

Buckman argues that “the State presented no testimony that Mr. Buckman had ever possessed the brass knuckles.” (App.’s Brief at 14). However, this argument must fail. Matching a clothing description is circumstantial corroboration that Buckman possessed and displayed the dangerous weapon shortly before his contact with Officer Miller. The traditional common-law rule is that any evidence tending to identify the accused is relevant, competent, and therefore, admissible. *State v. Gosby*, 85 Wn.2d 758, 760, 539 P.2d 680 (1975).

Matching a clothing description is circumstantial evidence of identity. *See State v. Johnson*, 132 Wn. App. 454, 461, 132 P.3d 767 (2006). In *State v. Collins*, the fact that the defendant’s pants matched the description of unusual pants seen by burglary victims was one facet of the testimony furnishing circumstantial corroboration of Collins’ identifications as the one who committed a burglary. 2 Wn. App. 757, 759-760 (1970).

As explained in another case, *State v. Palmer*:

...the state produced strong and convincing evidence of guilt of defendant Palmer. An eyewitness identified him as being at the scene of the robbery, wearing clothing which matched the clothing he was wearing at the time of his arrest 45 minutes later.

73 Wn.2d 462, 474 438 P.2d 876 (1968). Furthermore, statements describing clothing of a suspect falls under the hearsay exception of ER 801(d). *State v. Stratton*, 139 Wn. App. 511, 516-517, 161 P.3d 448

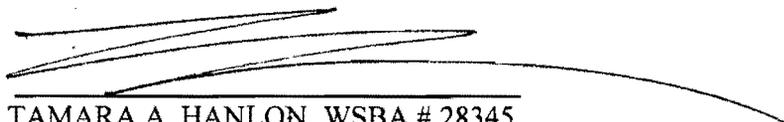
(2007) (no error in officer relaying witness' description of the suspect as the person wearing the yellow t-shirt).

Thus, the fact that Buckman was wearing a black shirt, blue jeans, flat-billed New York Yankees hat, and holding sunglasses in his hand at the time Officer Miller saw him, is circumstantial evidence that he was the suspect inside Wal-mart displaying the dangerous weapon before the police caught him leaving the store. Thus, this is not a case of someone simply being next to a weapon and being convicted *solely* because of their close proximity. In sum, when viewing the evidence in a light most favorable to the State, a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.

#### IV. CONCLUSION

The trial court correctly ruled that Buckman's statements were admissible as statements given during a temporary and brief *Terry* investigation. No *Miranda* warnings were required in this situation. Further, there was substantial evidence supporting all the elements of possession of a dangerous weapon. The conviction should be affirmed.

Respectfully submitted this 24th day of October, 2014,



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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on October 24, 2014, by agreement of the parties, I emailed a copy of the State's Brief of Respondent to Ms. Susan Gasch at [gaschlaw@msn.com](mailto:gaschlaw@msn.com).

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of October, 2014 at Yakima, Washington.

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