STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2022AP540-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GREGORY L. CUNDY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE DODGE COUNTY CIRCUIT COURT, THE HONORABLE MARTIN J. DE VRIES, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2065
(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

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INTRODUCTION

Gregory Cundy was convicted of OWI (7th), operating with a prohibited alcohol concentration (7th), and obstructing an officer after a jury found him guilty. Cundy now alleges that he is entitled to a new trial because the circuit court erroneously denied his motion to suppress evidence. Cundy believes the evidence in his case was the result of a Fourth Amendment violation, a Fifth Amendment violation, and a due process violation. Cundy's arguments are all without merit, and this Court should affirm.

First, Cundy was not under arrest for purposes of the Fourth Amendment until Officer Wheeler placed him in formal custody. When Cundy was initially seized, the seizure was nothing more than a temporary, investigative detention, which needed to be supported by only reasonable suspicion. Wheeler had that reasonable suspicion here based on the citizen witness's report, Cundy's vehicle matching the registration provided by the witness, Cundy's evasive behavior, and the indicia of intoxication that Wheeler observed. The initial seizure was therefore reasonable under the Fourth Amendment.

Further, Cundy was not "in custody" for purposes of *Miranda*[1] when Wheeler ordered Cundy out of his house. A reasonable person in Cundy's position would not believe themselves to be in custody at that point because, among other reasons, Cundy was not handcuffed, Wheeler never drew his weapon or raised his voice at Cundy, Cundy was not restrained in any way other than being in the squad car, and the interaction did not present the same inherently coercive environment as a station house interrogation. And, even if Cundy was in *Miranda* custody, any error in admitting his statements was harmless.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Finally, the showup identification of Cundy was not unnecessarily suggestive. Wheeler did not create a procedure that was likely to result in irreparable misidentification. And, even if the procedure was unnecessarily suggestive, the witness's identification was reliable. The witness, Williams, was not impaired, had a clear sightline to Cundy from across a well-lit street, provided an accurate description of Cundy, the cars involved in the hit-and-run, and identified Cundy in less than an hour after the hit-and-run.

For those reasons, the circuit court properly denied the motion to suppress, and this Court should affirm.

STATEMENT OF THE ISSUES

1. Was Cundy's seizure constitutionally valid?

Answered by the circuit court: Yes.

This Court should answer: Yes.

2. Were any of Cundy's statements taken in violation of his *Miranda* rights?

Answered by the circuit court: No.

This Court should answer: No.

3. Was the show up identification of Cundy by the citizen witness unnecessarily suggestive, and even if it was, was the identification sufficiently reliable?

Answered by the circuit court: No, the identification was not unnecessarily suggestive.

This Court should answer: No, the identification was not unnecessarily suggestive. But, even if it was, the identification had sufficient indicia of reliability.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent and because resolution of this appeal requires only the application of well-settled precedent to the facts of the case.

STATEMENT OF THE CASE

Factual Background

Lon Williams called the police to inform them of a hit-and-run that he had recently witnessed. (R. 3:2.) The hit-and-run occurred on a main street in downtown Mayville, and Williams witnessed the accident through his open car door. (R. 3:2; 181:96.) Williams provided dispatch with a description of the driver as "a middle-aged male, possibly in his 40's, with 'salt and pepper' hair, wearing a collared shirt." (R. 3:2.) Williams also provided dispatch with a license plate for the suspect car. (R. 3:2.)

Officer Michael Wheeler responded to the scene. Wheeler discussed what happened with Williams, talked to the driver of the other car, and took pictures of the damage on the vehicle. (R. 3:2.) While Wheeler was on scene, dispatch informed him that the plates that Williams provided were registered to a black Ford Fusion belonging to Cundy. (R. 3:3.)

Wheeler asked Williams and the owner of the car if they knew who Cundy was, they all responded in the negative. In a passing comment, Wheeler said he knew Cundy from previous contacts and that he was probably drunk. Wheeler informed Williams that he was going to see what he could learn from Cundy and would be in contact. As Wheeler drove away, he asked Williams whether he got a good enough look at the person that if Wheeler came back with him, he could say "yeah it was him." Williams answered affirmatively.

Wheeler drove to Cundy's house, which was approximately three blocks away (or approximately 900 feet as the crow flies) from the scene of the hit-and-run. (R. 3:2, 3; 181:152–3.) Wheeler knocked, and Tricia Mueller answered the door. (R. 3:3.) Tricia called Cundy over, and Wheeler asked how long Cundy had been home. (R. 3:3.) Tricia said "awhile" and that it was more than half an hour. (R. 3:3.)

When Cundy came to the door, Wheeler questioned him regarding how long he had been home, why a witness would have placed him and his car at the scene of the hit-and-run half an hour ago, and how much he had had to drink. (R. 3:3, 4.) Cundy did not directly answer, but Tricia again told Wheeler that "it was longer than" an hour. (R. 3:3.) When Wheeler told Cundy the hit-and-run occurred on Allen Street, Cundy acted as if he did not know what street that was, telling Wheeler to "describe it." (R. 3:3; 180:33.)

Cundy repeated similarly evasive comments throughout the exchange. For example, when Cundy asked, "are we done?" and Wheeler answered, "no," Cundy followed up with "what's up?" despite Wheeler's repeated explanation of the incident. (R. 42[2]:27:38–27:45.) Similarly, when Wheeler told Cundy that "I'm trying to get your side of the story so I don't think you're just some person that would cause a disturbance and flee a scene," Cundy responded, "what disturbance?" (R. 42:27:48–27:56.) And when Wheeler asked Cundy, "if I take you down by the witness, they're going to tell me nope that wasn't him," Cundy responded, "what's going on?" (R. 42:28:23–28:29.)

Cundy told Wheeler that he had had "quite a few" drinks that night, and Wheeler testified that he observed indicia of intoxication on Wheeler such as the strong odor of alcohol and red and glassy eyes. (R. 3:4; 181:169.) Wheeler

[2] Record item 42 is the same dashcam video that Cundy cites in his brief and is cited by the State as R. 42:(minutes):(second).

ordered Cundy out of the house, might have[3] patted him down, and placed him the back of his squad car to take him back to the scene. Cundy was not handcuffed, and Wheeler did not talk to Cundy or ask him questions while they were in the car. (R. 3:4; 42:31:12–37:45.)

Upon arriving at the scene, Wheeler called Williams, asked if he was still in the area, and stated, "I've got the gentleman who I believe might be involved here if you can tell me if this is who you've seen." (R. 42:32:52–33:15.) Williams came outside soon after, confirmed with Wheeler how he saw the accident occur, and that he was not dissuaded by the suspect seeing him. (R. 42:34:46–35:07.) Williams approached the car, saw Cundy, and confirmed Cundy was the person he saw back into the other car. (R. 3:4.)

Wheeler drove Cundy back to his house, took him out of the squad car, and continued asking him questions about the hit-and-run. Cundy continued to give Wheeler non-answers, deny his involvement, or ask Wheeler to describe the incident more. (R. 42:37:57–42:34.) For example, Wheeler describes in the criminal complaint that "I again asked when he had his last drink and [Cundy's] reply again was, 'Where are we going with this?' This exchange of the same question and answer went on for several cycles with [Cundy] never actually answering the question." (R. 3:5.) Wheeler asked Cundy how the fresh scuffs got onto his car, "and he stated that he has previously backed into numerous things with the vehicle." (R. 3:4–5.)

[3] Wheeler was not wearing a bodycam and only asks Cundy if he had any weapons on him. (R. 42:28:55–29:00.) While the criminal complaint states that Wheeler patted Cundy down, at the suppression hearing, Wheeler testified that he did "not remember at this time if I gave him a quick pat down, but that would have been it." (R. 3:4; 180:37.)

Wheeler asked Cundy if he would submit to a field sobriety test, and Cundy refused. (R. 3:5.) "Based on witness statements, evidence, and [his] contact with [Cundy]," Wheeler arrested Cundy for operating under the influence. (R. 3:5.) Cundy refused to consent to both a preliminary breath test and a blood draw. (R. 3:5.) Accordingly, Wheeler began the process of receiving a blood draw warrant. (R. 3:5.) Officer Howell of the Horicon Police Department again interviewed Tricia and Cundy's daughter while Wheeler filled out the warrant affidavit. (R. 3:5.) Howell informed Wheeler that Tricia and Cundy's daughter agreed that Cundy "arrived home around 9:30 p.m., which fits the timeline of the incident and when [Williams] called to report it." (R. 3:5.)

Wheeler received the warrant, took Cundy to the hospital for the blood draw, and then took Cundy to the Dodge County jail. (R. 3:5–6.) The jail staff conducted a preliminary breath test with Cundy and his blood alcohol concentration registered at a .147. (R. 3:6.)

Procedural Background

The State charged Cundy with one count of operating while intoxicated as a 7th offense, one count of operating with a prohibited alcohol concentration as a 7th offense, and obstructing an officer. (R. 29.)

Cundy filed a pretrial motion to suppress evidence, alleging that his statements and other evidence were taken in violation of the Fourth and Fifth Amendments and that the showup identification procedure violated his due process rights. (R. 33.) The circuit court denied the motion after an evidentiary hearing where it heard testimony from Wheeler and from Cundy. (R. 180.) The circuit court concluded that "up to the point when [Cundy] got in the car it was clear he was not under arrest, he was free to go." (R. 180:102.) The court further found that Wheeler "certainly had reasonable suspicion to believe that Mr. Cundy had been involved in a hit

and run, and an OWI at the time." (R. 180:102–03.) The court continued, "he was not [d]etained. There was nothing to indicate that he was in custody at that point in time. This [was] still an investigation." (R. 180:103.)

Cundy then moved the circuit court for reconsideration, which the circuit court denied, petitioned this Court for leave to appeal, which this Court denied, and moved this Court for reconsideration, which was also denied. (R. 46; 58; 59; 70; 72.) Cundy proceeded to trial where the jury heard testimony from Williams, Wheeler, Cundy, and Tricia, among others. (R. 181; 182.) The jury found Cundy guilty on all three counts. (R. 182:270–71.)

Cundy now appeals his judgment of conviction. (R. 189.)

STANDARD OF REVIEW

This Court reviews a motion to suppress under a two-step standard of review. *State v. Roberson*, 2019 WI 102, ¶ 66, 389 Wis. 2d 190, 935 N.W.2d 813. This Court accepts the circuit court's findings of historical fact unless they are clearly erroneous. *Id.* Whether those facts pass constitutional muster is a question of law that this Court reviews independently. *Id.*

ARGUMENT

I. Cundy's seizure was not an arrest, but instead was a temporary detention that was supported by reasonable suspicion.

A. A suspect can be seized under the Fourth Amendment for temporary investigative purposes, including moving him within the vicinity of the incident, without transforming the seizure into an arrest.

"The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and

seizures." *State v. Young*, 2006 WI 98, ¶ 18, 294 Wis. 2d 1, 717 N.W.2d 729. There are two types of seizures recognized under the Fourth Amendment: temporary, investigative detentions and arrests. *Id.* ¶¶ 20, 22.

"[A]rrests are seizures [under the Fourth Amendment] and must be supported by probable cause." *State v. VanBeek*, 2021 WI 51, ¶ 28, 397 Wis. 2d 311, 960 N.W.2d 32. "Probable cause requires that an arresting officer have sufficient knowledge at the time of the arrest to 'lead a reasonable officer to believe that the defendant probably committed or was committing a crime.'" *Young*, 294 Wis. 2d 1, ¶ 22 (citation omitted). Probable cause is based upon the totality of the circumstances at the time of the arrest. *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018).

Courts determine "whether a person has been arrested by questioning whether a 'reasonable person in the defendant's position would have considered himself or herself to be "in custody," given the degree of restraint under the circumstances.'" *State v. Wortman*, 2017 WI App 61, ¶ 7, 378 Wis. 2d 105, 902 N.W.2d 561. Importantly, however, "the law permits the police, if they have reasonable grounds for doing so, to move a suspect in the general vicinity of the stop without converting what would otherwise be a temporary seizure into an arrest." *State v. Quartana*, 213 Wis. 2d 440, 446, 570 N.W.2d 618 (Ct. App. 1997).

A temporary detention, or *Terry* stop, is also a seizure under the Fourth Amendment. *VanBeek*, 397 Wis. 2d 311, ¶ 27. Investigative detentions are constitutional "if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." *Young*, 294 Wis. 2d 1, ¶ 20.

B. The seizure that Cundy challenges was a temporary, investigative detention, not an arrest.

There are two distinct points in time here that must be fully fleshed out in order for this Court to properly decide the Fourth Amendment question at hand. First is the moment that Wheeler approached Cundy's house, knocked, and began talking to Mueller and Cundy. Second is the moment when Wheeler denied Cundy's request to terminate the conversation.

1. The initial contact was a valid knock and talk.

Cundy, by his reference to the "knock and talk" doctrine, acknowledges that the Fourth Amendment is not implicated when an officer knocks on the door and an occupant chooses to open the door and speak to officers in the entryway. (Cundy's Br. 15.) That acknowledgement is appropriate because it is well-established that "[c]onsensual encounters do not lose their propriety . . . merely because they take place at the entrance of a citizen's home." *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005). That is the entire premise of the knock and talk doctrine—it "is an investigative technique premised on the implicit license that visitor, or neighbor, would have with regard to entering one's curtilage." *State v. Wilson*, 2022 WI 77, ¶ 21, ___ Wis. 2d __, __ N.W.2d __. It is only when "a 'knock and talk' interview at a private residence [loses] its consensual nature and has effectively become an in-home seizure or 'constructive entry'" that the Fourth Amendment may be triggered. *City of Sheboygan v. Cesar*, 2010 WI App 170, ¶ 13, 330 Wis. 2d 760, 796 N.W.2d 429. It is when police employ "overbearing tactics that essentially force the individual out of the home" that a "constructive entry" may occur. *Id.* (citing *Thomas*, 430 F.3d at 277).

Here, Wheeler was the only officer questioning Cundy at the door. To be sure, Howell was at Cundy's residence, but he was at the bottom of the porch and was not participating in the questioning. (R. 180:27.) Wheeler neither threatened Cundy to force him out of his home nor did he threaten to enter Cundy's home. Accordingly, there was no "constructive entry" at this point, and a reasonable person would have felt free to terminate the encounter and retreat into their home.

Cundy's only argument against the validity of the knock and talk interaction appears to be his cursory statement that Wheeler came to Cundy's door at 10:00 p.m. "well after an uninvited guest might knock on a person's door," and his observation that Officer Wheeler "knocked for several minutes." (Cundy's Br. 16.) This argument is undeveloped and unsupported by authority, and this Court should not consider it. *State v. Pettit*, 171 Wis. 2d 627, 642, 492 N.W.2d 633 (Ct. App. 1992). That aside, the time of night and minutes-long duration of the knock is not enough to cause a reasonable person to believe that he or she was not free to decline the officer's request to speak at the door. *See Cesar*, 330 Wis. 2d 760, ¶¶ 13–19. Accordingly, up until the time Wheeler told Cundy they were not done talking, the Fourth Amendment was not implicated.

2. Cundy was temporarily detained, not arrested, when Wheeler denied Cundy's request to terminate the encounter, including when Wheeler transported Cundy to the scene of the hit and run.

The second moment in time is when Wheeler denied Cundy's request to terminate the encounter. At that point, it is likely that Wheeler's denial was a show of authority sufficient to result in a seizure under the Fourth Amendment. However, it does not automatically follow, as Cundy seems to assume, that the seizure was an arrest requiring probable

cause even with Wheeler transporting Cundy to the scene of the hit and run. (Cundy's Br. 17–19 (arguing that Wheeler lacked probable cause).) After all, "[a] restraint of liberty does not ipso facto prove that an arrest has taken place." *Quartana*, 213 Wis. 2d at 449.

To the contrary, like in *Quartana*, Cundy was aware of the scope of Wheeler's investigation (initially the hit-and-run), and there was no degree of restraint here that would lead a reasonable person in Cundy's position to believe that he was in custody. 213 Wis. 2d at 450. Cundy was not told that he was under arrest nor was he handcuffed at any point during the interaction. *See State v. Swanson*, 164 Wis. 2d 437, 448, 475 N.W.2d 148 (1991), *abrogated on other grounds by State v. Sykes*, 2005 WI 48, 279 Wis. 2d 742, 965 N.W.2d 277. Other than placing him in the back of his squad car (without handcuffs), Wheeler did not physically restrain Cundy in any way, he did not draw his weapon toward Cundy, and he did not raise his voice at Cundy. (R. 180:29–30.) During the investigation Cundy was not transported to a more formal setting like the police station or an interrogation room, nor was he held for an inordinate amount of time. *Quartana*, 213 Wis. 2d at 450; *see also Wortman*, 378 Wis. 2d 105, ¶ 11.

Ultimately, no reasonable person in Cundy's position would believe that they were under arrest when Cundy was seized. Wheeler explained that he was investigating a hit and run and was merely trying to get Cundy's side of what happened because he had been identified at the scene. (R. 42:27:38–27:50.) Based on the complete lack of conduct or words from Wheeler that would have communicated to a reasonable person that they were under arrest, Cundy's seizure was merely a temporary, investigative detention for which Wheeler needed only reasonable suspicion.

C. Wheeler had reasonable suspicion to temporarily detain Cundy, and the initial seizure was therefore constitutionally valid.

"Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot." *Young*, 294 Wis. 2d 1, ¶ 21. While a "mere hunch" is insufficient to justify an investigatory stop, police officers are not required to dispel of innocent behavior before temporarily detaining a suspect. *Id.*

Whether an officer possessed reasonable suspicion is an objective inquiry: it asks, "What would a reasonable police officer reasonably suspect in light of his or her training and experience?" *State v. Genous*, 2021 WI 50, ¶ 8, 397 Wis. 2d 293, 961 N.W.2d 41 (citation omitted). To that end, courts do not view facts in isolation; rather, "[t]he building blocks of facts accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn." *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996); *see also Genous*, 397 Wis. 2d 293, ¶ 12. Said differently, Wisconsin courts "consider everything observed by and known to the officer, and then determine whether a reasonable officer in that situation would reasonably suspect that criminal activity was afoot." *Genous*, 397 Wis. 2d 293, ¶ 10.

Here, a reasonable officer in Wheeler's position would have had reasonable suspicion that Cundy committed a traffic violation and had been driving under the influence.

First, looking only at the potential traffic violation of the hit and run, Wheeler had reasonable suspicion to temporarily detain Cundy and investigate that incident. *See State v. Colstad*, 2003 WI App 25, ¶ 11, 260 Wis. 2d 406, 659 N.W.2d 394, (officers may conduct *Terry* stops "based on a reasonable suspicion of a non-criminal traffic violation"

(citing *State v. Griffin*, 183 Wis. 2d 327, 331–34, 515 N.W.2d 535 (Ct. App. 1994)).

Wheeler received information from Williams that he had watched a middle-aged man with salt and pepper hair back into a car and drive away. (R. 3:2–3.) Williams was able to get the license plate number of the car, and he relayed that to dispatch. (R. 3:2.) The vehicle came back as registered to Cundy. (R. 3:3.) Even before reaching Cundy's home, Wheeler had enough facts from which a reasonable officer could believe that Cundy had committed a traffic violation, which justified an investigatory detention. *Colstad*, 260 Wis. 2d 406, ¶ 11.

Wheeler's reasonable suspicion was only bolstered when Cundy evasively answered his questions. For example, rather than answer whether he had been driving on Allen Street, Cundy told Wheeler to describe Allen Street despite the street being downtown Mayville and visible from Cundy's house. Additionally, continually asked Wheeler to describe the incident despite Wheeler's clear prior descriptions. *See State v. Olson*, 2001 WI App 284, ¶ 8, 249 Wis. 2d 391, 639 N.W.2d 207 (noting that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). Taken as a cumulative whole, those facts supported Wheeler placing Cundy under a temporary detention to investigate the hit-and-run.

Those same facts, i.e., the hit-and-run, the positive identification, the matching registration, and Cundy's evasive behavior at his house, coupled with the indicia of intoxication that Wheeler observed also provided Wheeler with reasonable suspicion that Cundy had been driving under the influence. Wheeler testified that Cundy had slurred speech, "a very strong odor of intoxicants . . . glossy eyes . . . . [and] was slightly off balance" while they talked at Cundy's door. (R. 180:30.) Cundy also told Wheeler that he had had "quite a few" drinks that night. (R. 180:34.) Any reasonable officer who was informed of a hit-and-run by a citizen witness, who had

the registration of the driver, and who observed the owner of the car act evasively and avoid his questions while exhibiting signs of intoxication would have reasonable suspicion that the person had driven under the influence.

As seen, not only could Wheeler temporarily detain Cundy to investigate the hit-and-run, but Wheeler could also reasonably detain Cundy to investigate a possible OWI. Because Wheeler had reasonable suspicion to investigate the hit-and-run and the OWI, his seizure of Cundy was constitutionally reasonable, and the circuit court properly denied Cundy's motion to suppress.[4]

II. Cundy was not "in custody" for purposes of the Fifth Amendment and no *Miranda* warnings were required.

A. Whether a suspect is in custody for purposes of *Miranda* is a two-step inquiry that examines the suspect's freedom of movement and any inherently coercive nature of the questioning.

"The Fifth Amendment of the United States Constitution provides" a "privilege against self-incrimination." *State v. Halverson*, 2021 WI 7, ¶ 13, 395 Wis. 2d 385, 953 N.W.2d 847. *Miranda v. Arizona*, 384 U.S.

[4] Further, even if this Court agrees that this was an arrest without probable cause, the facts here still counsel against exclusion. "[E]xclusion is warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future." *State v. Burch*, 2021 WI 68, ¶ 17, 398 Wis. 2d 1, 961 N.W2d 314 *cert. denied Burch v. Wisconsin*, 142 S. Ct. 811 (2022). After all, "[t]he 'sole purpose' of the exclusionary rule 'is to deter future Fourth Amendment violations.'" *Id.* (citation omitted). There is simply no evidence of misconduct from Wheeler (and no argument from Cundy suggesting misconduct) that would necessitate the deterrent effect of exclusion.

436 (1966), announced a "set of procedural safeguards, enforced by the remedy of exclusion, aimed at 'protecting'" that privilege. *Halverson*, 395 Wis. 2d 385, ¶ 13 (citation omitted).

Like an arrest triggering a probable cause determination under the Fourth Amendment, an individual being subjected to a "custodial interrogation" triggers the mandates of *Miranda*. *Halverson*, 395 Wis. 2d 385, ¶ 15. Custody, in the context of *Miranda*, is "a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id.* ¶ 16 (citation omitted). This is a two-step inquiry that first asks whether "in light of 'the objective circumstances of the interrogation,' a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" *Id.* ¶ 17 (alteration in original) (citations omitted).

Courts consider several factors in the "freedom-to-leave" step, including "the purpose, place, and length of the interrogation and the degree of restraint." *State v. Morgan*, 2002 WI App 124, ¶ 12, 254 Wis. 2d 602, 648 N.W.2d 23; *see also Halverson*, 395 Wis. 2d 385, ¶ 17. Factors to be considered when assessing the degree of restraint include "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." *Morgan*, 254 Wis. 2d 602, ¶ 12; *Halverson*, 395 Wis. 2d 385, ¶¶ 17, 30.

If the "freedom-to-leave" test is satisfied, courts move to the second step, which asks, "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Halverson*, 395 Wis. 2d 385, ¶ 17 (citation omitted). This too is based on the "specific" and "objective circumstances" of the

questioning. *State v. Bartelt*, 2018 WI 16, ¶ 33, 379 Wis. 2d 588, 906 N.W.2d 684.

B. Cundy was not in custody for purposes of *Miranda*.

Cundy alleges that he was in *Miranda* custody when Wheeler ordered him out of the house and that he should have been given his *Miranda* warnings at that point. (Cundy's Br. 22–23.) Any statements taken after that moment, according to Cundy, must be suppressed. (Cundy's Br. 23.) Contrary to Cundy's argument, and for many of the same reasons that Cundy was not under arrest for purposes of the Fourth Amendment, he was not in custody for purposes of *Miranda* when Wheeler ordered him out of the house.

To be sure, the Fourth and Fifth Amendments protect different rights, and it is therefore possible for a suspect to be both not under arrest under the Fourth Amendment and in custody under the Fifth. *State v. Dobbs*, 2020 WI 64, ¶¶ 56–60, 392 Wis. 2d 505, 945 N.W.2d 609. However, based on the totality of the circumstances here, Cundy's "freedom of action [was not] curtailed to [the] degree associated with a formal arrest," and therefore he was not "entitled to the 'full panoply of protections prescribed by *Miranda*.'" *Id.* ¶ 59 (citation omitted).

1. The degree of restraint was not akin to a formal arrest.

First, the degree of restraint here was not sufficient to trigger *Miranda*'s protections. While Cundy was subjected to a temporary, investigative detention, that brief restraint on his liberty did not rise to the level of *Miranda* custody. *See Howes v. Fields*, 565 U.S. 499, 510 (2012) (citation omitted) ("[T]he 'temporary and relatively nonthreatening involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody.'"). As already noted, Cundy was not handcuffed, and

Wheeler never drew his weapon. (R. 180:29–30.) *See Halverson*, 395 Wis. 2d 385, ¶ 30. Cundy was physically "restrained" only to the extent that he was seated in the back of Wheeler's squad car and had a seatbelt on. However, unlike *Dobbs*, where Dobbs was handcuffed and "questioned by Officer Milton in his parked, locked squad car form 7:31 a.m. until 8:52 a.m." (392 Wis. 2d 505, ¶ 62), no questioning occurred while Cundy was in the squad car, and Cundy was in the car for less than ten total minutes. (R. 42 31:12–37:45.)

Further, although Cundy was moved from one location to another, that subsequent location was not a police station, an interrogation room, a hospital room, or somewhere else that Cundy's questioning would be precluded from public view—instead, the questioning occurred in Cundy's doorway and in the street in front of his house. *Compare State v. Torkelson*, 2007 WI App 272, ¶ 20, 306 Wis. 2d 673, 743 N.W.2d 511 (noting that Torkelson was not in custody in part because "[h]e was questioned by only one officer in an area open to the public) *with Dobbs*, 392 Wis. 2d 505, ¶ 62 ("Unlike a brief traffic stop, the place of the interrogation did not expose Dobbs to public view and would have cause a reasonable person to feel completely at the mercy of police.").

Cundy, in arguing that "[t]ransporting a person to two locations by squad car is more akin to a formal arrest then [sic] a routine traffic stop" (Cundy Br. 24), neglects to acknowledge that Cundy was driven less than a mile from his house, not questioned in the car, and was in the squad car for roughly seven minutes. (R. 42 31:12–37:45.) In turn, Cundy ignores that his case is entirely unlike *Dobbs*, where "[i]n each of the locations [that] Dobbs was taken, he was either locked in, guarded by armed law enforcement, or both." 392 Wis. 2d 505, ¶ 61.

Finally, the length of the questioning cuts against a finding of *Miranda* custody. Cundy was questioned for roughly four minutes at his door before they left for the scene

of the accident, not questioned at all in the car, and questioned for roughly five minutes when they arrived back at his house before he was arrested. (R. 42:25:50–29:15, 37:55–42:30.) The aggregate time of his questioning is "far afield" from cases where *Miranda* has been triggered. *Halverson*, 395 Wis. 2d 385, ¶ 32; *see also Dobbs*, 392 Wis. 2d 505, ¶ 63 ("Ultimately, Dobbs was not read the *Miranda* warnings until almost *three hours* after he was first handcuffed and put in the backseat of a locked squad car."); *but see Howes*, 565 U.S. at 507 (nearly seven-hour interrogation did not result in custody for purposes of *Miranda*).

At bottom, Cundy was not in custody under the totality of the circumstances here. Because he was not in custody, Wheeler did not need to read him his *Miranda* rights, and no statements should be suppressed. This Court should therefore affirm.

2. Cundy was not subjected to the inherently coercive pressures of a station house interrogation.

Even if Cundy was subjected to a degree of restraint akin to a formal arrest, that does not end the inquiry. Again, a *Miranda* custody analysis proceeds in two steps, and "[t]he freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Halverson*, 395 Wis. 2d 385, ¶ 17 (citation omitted). Even if his freedom of movement was restricted, Cundy still needed to be subjected to an "environment [that] presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* As explained below, he was not subjected to that inherently coercive environment, and his *Miranda* argument fails on the second step of the test as well.

Here, the questioning began in the doorway of Cundy's home—not at a police station or anything equivalent. Wheeler maintained a calm demeanor while questioning Cundy, and, despite the presence of two officers, until Wheeler and Cundy returned from the scene of the hit-and-run, it was only Wheeler doing the questioning. In the one spot where the questioning of Cundy could have been more coercive than the street, i.e., Wheeler's squad car, there were no questions asked and no statements given. All questioning paused while they drove and waited for Williams, and it did not resume until Wheeler and Cundy returned to Cundy's home.

There was simply nothing here that resembled the traditionally inherent pressures of stationhouse questioning, and Cundy's *Miranda* custody argument therefore fails the second step of the test as well.

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In sum, the brief, temporary detention that occurred here did not trigger *Miranda*. Because Cundy was not in *Miranda* custody at any point until his formal arrest, there are no statements from before that point that should be suppressed, and this Court should affirm.

C. Even if Cundy was subjected to a custodial interrogation, any error in admitting un-*Mirandized* statements was harmless.

"Incriminating statements made in violation of *Miranda* must be suppressed, unless the admission of the statements was harmless error." *Dobbs*, 392 Wis. 2d 505, ¶ 52 (citation omitted). An error is harmless if "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* ¶ 68 (citation omitted).

Here, any error in admitting Cundy's non-*Mirandized* statements was harmless. For one, it is only incriminating statements that must be suppressed if there is a violation of

Miranda. *Id.* ¶ 52. But Cundy does not identify what of his statements, if any, were incriminating. Importantly, Cundy never admitted to driving, hitting the other car, or driving under the influence. Accordingly, it is unclear what else Cundy said to Wheeler that he believes impermissibly contributed to the verdict. The inquiry can therefore stop there because absent incriminating statements there is no need to reverse for suppression.

Further, any potentially incriminating statements that Cundy made after the point that he believes he should have received the *Miranda* warnings merely duplicated statements he made before Cundy alleges he was in custody. *State v. Harris*, 2008 WI 15, ¶ 45, 307 Wis. 2d 555, 745 N.W.2d 397 (one factor in the harmless error analysis is "whether the erroneously admitted evidence duplicates untainted evidence"). For example, to the extent Cundy's statements that he wasn't driving and had been home for more than a half an hour could be construed as incriminating, he maintained that he hadn't been driving before Wheeler asked him to come out of the house. (*See, e.g.,* R. 42:28:09–28:13.) Similarly, Cundy mentioning that he had "quite a few" drinks and was at Sidelines merely replicated the statement he made prior to being asked to come out of his house that he had quite a few drinks. (R. 42:28:13–18.)

Cundy was not in custody for the purposes of *Miranda*. But even assuming he was, there were no identifiably incriminating statements introduced and Cundy's statements, writ large, duplicated statements he had made prior to the alleged custody point. Therefore, any error in admitting those statements was harmless.

III. The show up identification of Cundy by Williams was not unduly suggestive.

A. Defendants bear the burden to demonstrate that an out-of-court identification was unnecessarily suggestive.

"A 'showup' is a procedure whereby a lone suspect is presented by police to a witness or victim of a crime so that the witness or victim may identify the person as the perpetrator." *State v. Kaelin*, 196 Wis. 2d 1, 9, 538 N.W.2d 538 (Ct. App. 1995). Showups are not per se suggestive or impermissible. *Id.* at 10. Rather, "[t]he defendant bears the initial burden of proving that the identification was unnecessarily suggestive." *Id.* A defendant may achieve that burden by proving that "the identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." *Id.*

If a defendant meets that initial burden, the burden shifts to the State to prove that the identification was nevertheless reliable. *Id.*

B. Cundy has failed to meet his burden.

Cundy contends that the showup identification procedure here was unnecessarily suggestive for the following reasons: (1) Wheeler knowing Cundy and stating that Cundy was probably drunk to Williams; (2) Wheeler telling Williams he was going to get Cundy to confirm whether he was the person responsible for the hit-and-run; (3) Wheeler calling Williams back and stating that "I've got the gentleman who I believe might be involved here if you can tell me if this is who you've seen"; and (4) Cundy's position in the back of Wheeler's squad car when Williams identified him. (Cundy's Br. 29–30.) Cundy's arguments boil down to the premise that Wheeler made it clear that he believed Cundy committed the hit-and-run, and therefore the showup was impermissible.

To begin, Wheeler's rogue statement to Williams that he believed Cundy was drunk does little for the analysis. Cundy argues that the statement "clearly put the idea in Williams' head that officer Wheeler believed that Cundy was a criminal and was the person responsible for the hit-and-run." (Cundy's Br. 29.) Cundy ignores, however, that Wheeler learned that the suspect car was registered to Cundy only after Williams provided the registration to dispatch. (R. 3:2–3.) It seems straightforward, then, that Williams believed that the person whose name matched the registration was responsible for the hit-and-run, not because of Wheeler's comment, but because *Williams saw the accident happen*.

Further, merely because Wheeler may have believed that Cundy committed the offense does not mean that the showup was impermissible. Rather, "[a] showup by its very nature suggests that the police believe they have caught the perpetrator." *Kaelin*, 196 Wis. 2d at 12. In turn, Wheeler telling Williams that he was going to get the person whose registration matched that provided by Williams does not render the showup impermissible. All Wheeler did with that statement to Williams was describe a showup and indicate to Williams that he should stay in the area to conduct the identification. *See id.* at 11–12 ("[A] crime scene confrontation, proximate in time and place to the commission of the crime, 'promote[s] fairness, by assuring reliability' because the witness's or victim's memory is fresh.").

For the same reason, it is of little import that the identification occurred while Cundy was sitting in the back of the police car. Cundy's unsupported argument that "[p]lacement inside a squad car is . . . suggestive of the officer's belief that the suspect is the guilty party," (Cundy's Br. 29), runs directly contrary to settled precedent that rejects the notion that a showup occurring in a squad car makes the showup impermissible because such a holding would "be

tantamount to holding that all showups are impermissibly suggestive." *Kaelin*, 196 Wis. 2d at 12 (citation omitted).

That leaves Wheeler's statement to Williams that "I've got the gentleman who I believe might be involved here if you can tell me if this is who you've seen." (R. 42:32:52–33:15.) While that statement was slightly more suggestive than the above facts, it was also qualified by Wheeler's statement that the person *might* be who Williams saw. Wheeler did not, for example, tell Williams that "the person you saw is in my car if you want to come out and ID him" or anything similarly concrete. It was still up to Williams to confirm whether Cundy was the person he witnessed hit the other car.

In sum, the showup in this case was relatively unremarkable, occurred quickly, and occurred in the proximity of the incident. There is nothing to suggest that the showup was "so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." *Kaelin*, 196 Wis. 2d at 10. Accordingly, Cundy has failed to meet his burden. The inquiry stops there, and this Court should affirm.

C. Even if the identification of Cundy was unnecessarily suggestive, the identification had sufficient indicia of reliability.

"[R]eliability is the linchpin in determining the admissibility of identification testimony." *Mason v. Braithwaite*, 432 U.S. 98, 114 (1977). Accordingly, an identification that was the result of an unnecessarily suggestive showup may still be admissible if it was reliable. *State v. Roberson*, 2019 WI 102, ¶ 82, 389 Wis. 2d 190, 935 N.W.2d 813. It is the State's burden to prove reliability based on the totality of the circumstances. *Id.*

Courts assess several factors to determine whether an identification was reliable. *Id.* Those factors include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his

prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Braithwaite*, 432 U.S. at 114. All of those factors point toward reliability here.

Williams witnessed the hit-and-run from across the street through his opened car door, so his view not obstructed by his own car window. (R. 181:96.) Per Wheeler's dashcam video, the area was well-lit even at night. Williams testified that when Cundy drove away there was at most a distance of the witness box between Cundy's and Williams's cars. (R. 181:97.) Williams got a good enough look at Cundy to describe his hair and his attire, which he described to dispatch. (R. 3:2.) Williams was also able to get the license plate number off of Cundy's car and provide that to police. (R. 3:2.)

Williams testified that he was not under the influence of anything that would have hindered his ability to accurately view the hit and run and that he had "very" good vision. (R. 181:95.) *See Roberson*, 389 Wis. 2d 190, ¶ 69 ("Nothing in the record suggests C.A.S. had an altered mental state or was otherwise cognitively impaired."). In turn, his attention to detail and the accuracy of his descriptions supports the reliability of the identification. He described in detail the direction that Cundy came from, how he began reversing toward the other car, the sound the cars made when they collided, and how Cundy drove away. (R. 3:2–3.) Williams also provided an accurate description of Cundy, including his general age, hair, and clothing, and of both cars, including Cundy's license plate. (R. 3:2.) Williams testified that "[t]here was no doubt in my mind that it was him," and that Cundy was wearing "[t]he exact . . . same type of attire that [he] saw [Cundy] in earlier." (R. 181:99.)

Finally, there is not a significant amount of time between Williams witnessing the hit-and-run and the identification. Williams testified that he had seen the incident

about 10–15 minutes before he called the police. (R. 181:101.) Wheeler was at the scene prior to going to get Cundy for approximately 20 minutes, which makes sense considering he told Cundy that Williams witnessed the hit-and-run "about a half an hour ago." (R. 42:1:30–20:00, 26:28–26:34.) Wheeler returned with Cundy and Williams identified him about 15 minutes later, which also tracks with Williams telling Wheeler that the hit-and-run occurred about 45 minutes prior. (R. 42:34:39–45.) So, there was only 45 minutes between Williams witnessing the hit-and-run and identifying Cundy—that expeditious identification supports that Williams's memory was fresh and the identification was reliable. *See Braithwaite*, 432 U.S. at 115–16 (description happened within minutes of the crime and identification occurred only two days later); *see also Roberson*, 389 Wis. 2d 190, ¶ 76 (two weeks between crime and identification not significant).

Based on the totality of the circumstances here, even if the showup identification was unnecessarily suggestive, it was nevertheless reliable. Williams was not impaired, got a good look at Cundy, provided an accurate description of Cundy and the cars involved, and identified Cundy as the culprit in less than an hour from witnessing the hit-and-run. There is therefore no reason to doubt the reliability of Williams's identification, and this Court should affirm.

***

As explained above, Cundy's Fourth and Fifth amendment rights were not violated, and no evidence should be suppressed in this case. To the extent this Court disagrees, this Court should reverse the suppression decision only and remand, in order to give the parties the opportunity to address the scope of the evidence that should be suppressed (if any), whether an exception to the exclusionary rule applies, and the effect on each charge in the case. *See State v. Anker*, 2014 WI App 107, ¶¶ 26–27, 357 Wis. 2d 565, 855 N.W. 2d 483

(remand for hearing on whether independent source or inevitable discovery exceptions applied); *State v. Marquardt*, 2001 WI App 219, ¶¶ 23, 53, 247 Wis. 2d 765, 635 N.W.2d 188 (remand on whether good-faith exception applied).

CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated this 20th day of December 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General
State Bar #1113772

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2065
(608) 294-2907 (Fax)
odaykm@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7352 words.

Dated this 20th day of December 2022.

Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

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Electronically signed by:

Kieran M. O'Day
KIERAN M. O'DAY
Assistant Attorney Genera