SUPREME COURT NO. 96090-9
COURT OF APPEALS NO. 34233-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BISIR MILAL MUHAMMAD,

Appellant.

ANSWER TO PETITION FOR REVIEW

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A IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Muhammad, No. 34233-6-III, filed June 7, 2018.

C. ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issues the State raised in the Court of Appeals, which were either not reached by the Court or were decided adversely to the State:

1. The Court of Appeals concluded that the cell phone "ping" used to locate the suspect in order to execute a search warrant for his car was a warrantless search under the Fourth Amendment and article I, section 7 of Washington's constitution that was justified by exigent circumstances. As an alternative ground to affirm, the State renews its argument that the exclusionary rule does not apply because officers did not exploit the allegedly unlawful "ping" to search the car; rather, the search of the car was independently authorized by a search warrant supported by probable cause. Any connection between the "ping" and the search of the vehicle was sufficiently attenuated to dissipate any taint, so the trial court properly admitted the evidence from the car.

2. In concluding that the cell phone "ping" was justified by exigent circumstances, the Court of Appeals declined to reach the State's argument that any error in admitting evidence seized from Muhammad's car was harmless in view of the overwhelming untainted evidence of guilt. The State renews this argument as an alternative ground to affirm the trial court.

3. The Court of Appeals concluded that Muhammad's separate convictions for first-degree rape and first-degree felony murder predicated on rape do not violate double jeopardy and do not merge for sentencing purposes because the rape and murder statutes serve discrete goals and the victim in this case sustained injuries from the rape that were distinct from and unnecessary to the murder by strangulation. Despite affirming the two convictions, the court rejected the State's argument that first-degree rape and first-degree felony murder based on rape are not the same in law and fact because rape requires evidence of a completed rape, while the murder statute only requires an attempt to rape. The State renews this argument as an alternative ground to affirm the trial court.

D. STATEMENT OF THE CASE

The defendant, Bisir Bilal Muhammad, was convicted of first-degree felony murder and first-degree rape. RP 893; CP 352, 395. The relevant facts are set forth in the unanimous published opinion of the

Court of Appeals, Division III, which affirmed Muhammad's convictions. State v. Muhammad, No. 34233-6-III, __ WL ____ (June 7, 2018).

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Muhammad in his petition for review, which are limited to whether the warrantless cell phone ping was justified by exigent circumstances and whether separate convictions for rape and murder predicated on rape violate the double jeopardy or merger principles of the Due Process Clause. If review is accepted, the State seeks cross-review of corresponding issues it raised in the Court of Appeals but that the court's decision rejected or did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the alternative arguments raised by the State in the Court of Appeals, which are consistent with existing law. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. THE CELL PHONE "PING" DOES NOT REQUIRE SUPPRESSION OF EVIDENCE FOUND IN THE LAWFUL SEARCH OF MUHAMMAD'S CAR.

The Court of Appeals concluded that the warrantless ping of Muhammad's cell phone was justified by exigent circumstances. Muhammad, No. 34233-6-III, slip op. at 16-18. If this Court grants review on that issue, the State cross-petitions to preserve its arguments that (1) evidence seized from Muhammad's car need not be suppressed because it was not obtained by exploitation of unlawful government conduct, and was sufficiently attenuated from any unlawful conduct that the exclusionary rule does not apply, and (2) the overwhelming untainted evidence renders any evidentiary error harmless beyond a reasonable doubt.

First, because the "'fruit of the poisonous tree doctrine' does not operate on a 'but for' basis," the exclusionary rule requires more than a causal connection between the unlawful police conduct and the seizure of the evidence at issue. State v. Eserjose, 171 Wn.2d 907, 926, 259 P.3d 172 (2011). Where the seizure stems not from "exploitation of that illegality," but from "means sufficiently distinguishable to be purged of the primary taint," the exclusionary rule does not apply. Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Here, the rule does not apply because the search of Muhammad's car did

not stem from the warrantless cell phone ping; it stemmed from a valid search warrant based on probable cause. That warrant—which did not rely in any way on the subsequently-conducted ping—constitutes "means sufficiently distinguishable to be purged of the primary taint" such that the evidence obtained from Muhammad's car need not be suppressed. See Wong Sun, 371 U.S. at 488.

Closely related to the causation required to trigger the exclusionary rule is the attenuation doctrine. The attenuation doctrine requires consideration of such things as (1) the temporal proximity of the illegality and the recovery of the evidence; (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct. Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Here, while the seizure of the car occurred shortly after the warrantless ping, the seizure was already authorized by a valid search warrant supported by probable cause entirely independent of the ping. The purpose of the ping was simply to find the car to enable execution of the warrant. Further, the ping itself can hardly be called flagrant misconduct—the minimal intrusion revealed nothing but the approximate location of the phone at one point in time. The ping revealed none of the phone's content and did not interfere with Muhammad's ability to use or move the phone. Under the attenuation doctrine,

expressly adopted by a plurality of this Court in State v. Eserjose, 171 Wn.2d 907, 919-20, 259 P.3d 172 (2011), the search of Muhammad's car was sufficiently attenuated from the warrantless ping as to preclude application of the exclusionary rule.

Second, even if the evidence seized from Muhammad's car should have been suppressed, the failure to do so was harmless beyond a reasonable doubt because of the overwhelming untainted evidence of his guilt.

Although the failure to suppress evidence obtained in violation of the Fourth Amendment and article I, section 7 is presumed prejudicial, reversal is not required where the State can show that the error was harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. McReynolds, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). Constitutional error is harmless when the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result in the absence of the error. Chapman v. California, 286 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "Under the 'overwhelming untainted evidence' test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so

overwhelming that it necessarily leads to a finding of guilt." Guloy, 104 Wn.2d at 426.

The evidence at issue here includes the victim's blood on the passenger seat and headrest of Muhammad's car and a box of condoms with the same lot number as a condom wrapper found at the scene. Muhammad, slip op. at 8. While this is compelling evidence of guilt, the remaining untainted evidence that Muhammad raped and killed Ina Clare Richardson is overwhelming.

Muhammad's activities on the night of November 6-7, 2014, were well documented by several security cameras in the area. He clocked out from his dishwashing job at Quality Inn at 10:15 p.m. RP 377. From there, he drove to the far end of the Walmart parking lot, where he lurked, never emerging, for about 30 minutes. RP 358, 367-68, 399. At 10:42 p.m., Muhammad left the Walmart parking lot, and at 10:45 p.m., he entered the Albertsons parking lot, where he again parked far from the store, near the McDonald's, and remained in his car for a considerable length of time. RP 335, 399, 544.

Ms. Richardson left Albertsons at 11:06 p.m., lingered in front of the store for a minute, and then walked through the parking lot toward Muhammad's car and the McDonald's. RP 516, 544, 809. The Albertsons security video skips ahead a few seconds, after which it shows

Muhammad's headlights come on. RP 809-10. A few minutes later, at 11:20 p.m., Muhammad's car starts to move through the parking lot. RP 544, 810. A different camera then shows the car drive by Costco, now with two people inside it. RP 562, 810. From there, the car drove to an isolated area behind the Quality Inn, where it remained for over an hour. RP 510-11, 517, 811. At 12:35 a.m., Muhammad's car drove away. RP 811.

In addition to showing Ms. Richardson walking toward Muhammad's car right before his car drove away, the video evidence is significant because it demonstrates that Muhammad repeatedly lied to police during his interview. RP 344-422, 508-21. Muhammad told police that he went straight home after work; that if he had instead gone to Walmart, he went inside and unsuccessfully tried to cash a check; that if he instead stayed in his car, he could not say why; that he was not in the Albertsons parking lot, but if he was, it was because he was visiting his friend Mike; and that he went home from the Albertsons parking lot. Additionally, Albertsons security video established that Muhammad had spoken to Ms. Richardson privately at some length on at least two occasions while he was working at Albertsons, contradicting Muhammad's claim that he had only spoken to her once, in a group. RP 426-35. One of the videos shows that the two had a conversation around

midnight on October 30-31, just a week before Ms. Richardson was raped and killed, during which it appears that Muhammad attempted to kiss Ms. Richardson and that she backed away in response. RP 432-34. Muhammad's demonstrably deceptive statements during his interview are powerful evidence of his guilt.

Even more compelling was the evidence recovered from Ms. Richardson's body. In addition to evidence of rape, strangulation, and myriad other physical injuries indicating that she struggled with her attacker, DNA consistent with Muhammad's profile was found in her vagina and under her fingernails. RP 311, 315, 620, 628. Although there was no semen present in Ms. Richardson's vagina, a forensic scientist testified that is consistent with the use of a condom. RP 621-22. A condom wrapper was found in the isolated area behind the Quality Inn. RP 511. And when Muhammad got home that night, unusually late and with blood on his clothes, he threw away a used condom and claimed it was something else. RP 785-86.

The evidence of Muhammad's guilt is overwhelming, even without the additional evidence of Ms. Richardson's blood in his car and the box of condoms matching the wrapper found behind the Quality Inn. Accordingly, any error in admitting the evidence from Muhammad's car is

harmless beyond a reasonable doubt, furnishing alternative grounds on which this Court may affirm.

2. MUHAMMAD'S CONVICTIONS FOR BOTH FELONY MURDER AND RAPE DO NOT MERGE AND DO NOT CONSTITUTE DOUBLE JEOPARDY.

The Court of Appeals rejected Muhammad's claims that the separate convictions for first-degree rape and first-degree murder predicated on rape violate double jeopardy and/or should have merged for sentencing purposes. Muhammad, No. 34233-6-III, slip op. at 7. Though it affirmed and found no error, the court expressly rejected the State's argument on that point. If this Court grants review in this case, the State cross-petitions to preserve its contention that first-degree rape and first-degree felony murder predicated on rape are not the same in fact and law, and therefore do not violate the due process principles of double jeopardy or merger.

Article I, section 9 of the Washington State Constitution and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). But a trial court's imposition of more than one punishment for a criminal act that violates more than one criminal statute does not necessarily constitute multiple punishments for a single offense. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). Whether multiple

punishments constitute double jeopardy is a legal question reviewed de novo. State v. Daniels, 160 Wn.2d 256, 261, 156 P.3d 905 (2007).

The fundamental issue is whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute. Calle, 125 Wn.2d at 776. Where the statutory language does not clearly resolve the issue, courts apply the Blockburger[1] "same evidence" test to determine whether the two offenses are the same in law and fact. State v. Freeman, 153 Wn.2d 765, 776-77, 108 P.3d 753 (2005). "If each offense requires proof of an element not required in the other, where proof of one does not necessarily prove the other, the offenses are not the same and multiple convictions are permitted." State v. Louis, 155 Wn.2d 565, 569, 120 P.3d 936 (2005).

Rape and felony murder are not the same in law. Felony murder requires the element of death, which is not an element of rape. RCW 9A.32.030. Further, felony murder *does not* require a completed rape. One is guilty of first-degree felony murder when he commits *or attempts* rape in the first- or second-degree, and he (or another person) causes the death of a person "in the course of or in furtherance of such crime or in immediate flight therefrom." Id. First-degree rape, on the other hand, clearly requires a completed rape. RCW 9A.44.040. Proof of felony

[1] Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

murder does not necessarily prove first-degree rape, and proof of first-degree rape does not prove felony murder. The offenses are not the same, so "multiple convictions are permitted." Louis, 155 Wn.2d at 569.

Under the merger doctrine, crimes merge when proof of one is necessary to prove an element or the degree of another crime. State v. Vladovic, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). Thus, merger applies only where the legislature has clearly indicated that in order to prove a particular degree of a crime, the State must prove not only that the defendant committed that crime, but that the crime was accompanied by an act that is defined as a crime elsewhere in the criminal statute. Id. at 420-21. Stated another way, if a defendant is convicted of two crimes, the second conviction will stand if that conviction is based on "some injury to the person or property of the victim or others, which is *separate and distinct from and not merely incidental to the crime of which it forms an element.*" State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979) (emphasis added).

Thus, in State v. Saunders, Division Two of the Court of Appeals held that convictions for felony murder and first-degree rape did not merge where the murder was distinct from and not merely incidental to the rape. 120 Wn. App. 800, 86 P.3d 232 (2004). There, the defendant restrained the victim with handcuffs and leg shackles, attempted to force

her to perform oral sex on him, anally raped her, and then stabbed or asphyxiated her to death. Id. at 807. The jury found Saunders guilty of felony murder, as well as predicate offenses including first-degree rape. Id. at 808. On appeal, Saunders argued, as Muhammad does here, that his rape conviction merged into the felony murder. The court recognized that an exception to the merger doctrine applies when the predicate and charged crimes are not sufficiently "intertwined." Id. at 821 (citing Johnson, 92 Wn.2d at 681; State v. Peyton, 29 Wn. App. 701, 720, 630 P.2d 1362 (1981)). To determine whether Saunders' rape and murder offenses were sufficiently intertwined for merger to apply, the court considered (1) whether the crimes "occurred almost contemporaneously in time and place," (2) whether the "sole purpose" of one crime was to facilitate the other; and (3) whether there was any injury "independent of or greater than" the injury associated with the predicate crime. Id. (citing Johnson, 92 Wn.2d at 681). Even though the court assumed that the rape and murder occurred close in time and place, the victim "clearly sustained independent harm exceeding that necessary to commit the murder." Id. at 823. Because the rape caused injury to the victim's anus, an injury that was "distinguishable from the subsequent murder and ... did not facilitate the murder," it was separate and distinct from the murder and the two crimes did not merge. Id. at 824.

Following the reasoning of Johnson and Saunders, Muhammad's rape and murder convictions do not merge because they are separate and distinct. First, while the crimes likely occurred close in time and place, they had different purposes. The purpose of the rape was to have forcible intercourse with Ms. Richardson. The purpose of the murder, along with the stripping of Ms. Richardson's clothing and the dumping of her body in a different location, was to eliminate the only witness to the crime so that Muhammad might escape detection. And, as in Saunders, Muhammad inflicted injury independent from that necessary to commit murder. Muhammad raped Ms. Richardson by violent vaginal penetration, causing a large tear in her vaginal canal. This was separate and distinct from the manual strangulation Muhammad used to kill Ms. Richardson.

"Where the underlying felony used to invoke felony-murder is, as in this case, a separate and distinct act independent of the killing, we hold the lesser crime does not merge into the felony-murder conviction." Peyton, 29 Wn. App. at 720. Because the brutal rape of Ina Clare Richardson was a separate and distinct act independent of her murder, the rape does not merge into the felony murder and separate punishments are permitted.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issues identified in Section C and E, supra.

DATED this 24th day of July, 2018.

Respectfully submitted,

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