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Division III
State of Washington

NO. 34233-6-III

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

BISIR BILAL MUHAMMAD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR ASOTIN COUNTY

THE HONORABLE SCOTT D. GALLINA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The last time Ina Clare Richardson was seen alive, surveillance video captured her walking toward Bisir Muhammad's car, which left the area minutes later. Did law enforcement have reasonable suspicion that Muhammad and/or his vehicle was connected to Richardson's abduction, rape, and murder, such that a brief investigatory stop was justified by Terry?

2. Is the location of an individual's cell phone in an outdoor, unprotected area a "private affair" protected by article I, section 7 of the Washington Constitution?

3. Shortly after an officer stopped Muhammad to ask about his whereabouts on the night of Richardson's murder, and while officers were obtaining a warrant to search his car, Muhammad and his car disappeared. Was law enforcement's warrantless "ping" of Muhammad's cell phone to locate him and his car justified by exigent circumstances, to wit, the possibility that a violent predator would flee and/or destroy evidence of the brutal beating, rape, and murder of Ina Clare Richardson?

4. Where law enforcement had independent lawful authority, in the form of a warrant, to search Muhammad's car, was

the evidence discovered inside the car, including Richardson's blood, not the fruit of unlawful government conduct?

5. Even if a warrantless ping of a cell phone is inconsistent with the Washington constitution, was the evidence obtained through the lawful judicially-authorized search of Muhammad's car sufficiently attenuated from the ping that the exclusionary rule does not apply?

6. In light of the overwhelming evidence that Muhammad raped, beat, strangled, and killed Richardson, was any error in using a warrantless ping to locate him and his car harmless beyond a reasonable doubt?

7. Do convictions for both first-degree rape and first-degree felony murder predicated on first- or second-degree rape violate double jeopardy or the merger doctrine?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.[1]

Ina Clare Richardson, aged 69, was a petite, 102-pound woman who suffered from bipolar disorder. RP 263. She was "the sweetest woman you ever met." RP 716. During her manic phases, Richardson was extremely open and trusting. RP 265,

[1] Citations to pretrial testimony are in **bold**; citations to trial testimony are plain.

712, 716. She always took her time shopping, and would stop to talk to anyone. RP 716. She frequently spent time at the Salvation Army soup kitchen, talking with the patrons and volunteers. RP 788. She was well-liked, and made a point of remembering people's birthdays so she could say a prayer that their day would be special. RP 788.

Richardson was beaten, raped, and strangled to death on the night of November 6-7, 2014. RP 468, 471-73. A couple on a morning walk discovered her naked corpse discarded along the side of an access road early on November 7 and called 911. RP 288, 305. Richardson had bruises, scrapes, and cuts on her body; her lips were swollen as though she had been struck in the mouth, and there were defensive wounds indicating that she had struggled with her attacker. RP 311, 315. One of her pinkie nails was torn off. RP 318. Marks on her neck and petechia in her eyes indicated that she had been strangled. RP 316. Richardson was bleeding from her vagina and had bruises on her thighs and genital area. RP 320, 325. An autopsy revealed numerous injuries to Richardson's scalp, face, lips, arms, forearms, hands, thighs, knees, legs, right buttock and left groin region, as well as a large laceration in Richardson's vaginal canal, "indicating a blunt object

of some sort being forced into that area, tearing the tissue inside." RP 468, 472-73. The medical examiner confirmed that Richardson had been sexually assaulted and strangled to death. RP 471. Because Richardson's feet were remarkably clean, officers concluded that she had been killed elsewhere and transported to the dump site. RP 308, 314.

After the news broadcast a description of the unidentified body, Richardson's friend Jeff Smith contacted law enforcement and told them he suspected the deceased was Richardson. RP 277. Smith explained that he had last encountered Richardson at the Clarkston Albertsons on the night of November 6, and that she had been looking for a ride home to Lewiston, Idaho from the store.[2] RP 276. Smith could not drive Richardson home because he was on his bike. RP 276. Richardson asked several other people about a ride, but no one was able to help. RP 709-10.

Using security camera footage from several establishments, and talking with workers at various shops near Albertsons, the police were able to construct a timeline of Richardson's last night. RP 800-05, 808-12. Video from the Albertsons camera showed Richardson leaving that store at 11:06 p.m. and walking southeast

[2] Lewiston is approximately four miles east of Clarkston. https://www.distance-cities.com/distance-clarkston-wa-to-lewiston-id (last visited 9/18/2017).

through the parking lot in the direction of a McDonald's. RP 809. The video shows that a distinctive car was parked in the southeast end of the parking lot, near McDonald's, for a considerable time before Richardson approached, with no one entering or emerging from the car. RP **72**, 336, 544, 809. The camera stopped recording as Richardson walked into the darkness; the video skips ahead 25 seconds, at which point Richardson was no longer visible. RP 545-46. The next observable event on the video was the headlights of the distinctive car turning on. RP 810. A few minutes later, at 11:20 p.m., the car started to move west through the parking lot. RP 810. Video from a nearby Costco surveillance camera then showed the same vehicle driving by with two people inside. RP 810. The car drove down an access road behind the Quality Inn and parked in a secluded area, remaining there for over an hour. RP 811. A condom wrapper was later found in that location. RP 454. At about 12:37 a.m., video showed the car leaving the area. RP 811-12. Richardson was never again seen alive.

Because Richardson was last seen walking toward a car that left the parking lot soon after, law enforcement focused on that vehicle. Clarkston Police Officer Darin Boyd studied the video and

noted several distinctive features of the car. RP 737, 739; CP 101-02. It was an older, boxy, American model, red or maroon, with a discolored front rim on the driver's side, a chrome strip, and a light on the side between the front and rear doors. RP 739-40; CP 101-02. On November 10, three days after Richardson's body was discovered, Boyd spotted the same car driving through town, noted its license plate, and initiated an investigatory stop. RP **74**, 741; CP 101-02. He identified the driver and registered owner as Bisir Muhammad. RP 743; CP 101-02. Boyd explained that he was investigating a crime that had occurred in the Albertsons parking lot on November 6 and that a car matching Muhammad's had been seen in the parking lot. CP 102. Boyd suggested Muhammad may have seen the crime and asked if he had been in the Albertsons parking lot at the time; Muhammad said no. RP 743-44; CP 102. Muhammad explained that "as far as he knew," he had driven directly home after he finished his shift at the Quality Inn that night. RP 744-45. Boyd thanked Muhammad for his time, apologized for any inconvenience, and let him go. RP **102**. Soon after, Boyd learned that Muhammad is a registered sex offender. RP **102**.

Boyd continued to surveil Muhammad and eventually followed him to his home. RP **102**. Meanwhile, Clarkston Police Detective Sergeant Richard Muszynski obtained a warrant to search the car. RP **79**; CP 112-18. After the warrant was issued, but before it could be executed, Boyd left the area; when he returned, Muhammad and the car had disappeared. RP **102**. Boyd then learned that the autopsy confirmed what had been obvious, i.e., that Richardson had been murdered. CP 102. Concerned that Muhammad might flee or destroy evidence, and unable to find him in Clarkston, Boyd asked dispatch to contact Muhammad's cell phone carrier and have it "ping" Muhammad's phone.[3] CP 102-03.

The ping did not precisely pinpoint Muhammad's location, but directed officers to the general area of the Lewiston orchards. RP **57**, **79**. Lewiston and Clarkston officers searched that area and found Muhammad and his car. RP **79**. Muszynski advised that he had a search warrant for the car and asked if Muhammad would

[3] "[T]o ping a cell phone is to send a signal, so to speak, to identify where the phone is at any given moment. While pinging may in some cases employ CSL [cell site location] information (for example, by triangulating the location of a phone while a call is in progress by using data gathered from multiple cell towers)," the word is also used to describe location through "real-time collection of GPS data." United States v. Riley, 858 F.3d 1012, 1014 n.1 (6th Cir. 2017). It appears that the "ping" in the instant case involved cell site location information rather than GPS. See RP 57 (prosecutor explains that the pinging here did not pinpoint Muhammad's location, but instead "gave them a general area to search").

speak to them at the Clarkston police station. RP **80**; CP 218-19. Muhammad agreed. RP **80**; CP 219. His car was seized. RP 338.

Muhammad was advised of his constitutional rights and waived them before giving a recorded interview. RP **81**, **86**, 344-453, 461; CP 219. During his interview, Muhammad initially claimed that he had driven straight home after his shift washing dishes at Quality Inn on November 6. RP 355-57. Surveillance video from Walmart contradicts that statement, showing him driving in the opposite direction of his home. RP 358, 364. Muhammad also claimed that he would have been home by 10:25 p.m., but the Walmart video shows that his car was parked in the Walmart parking lot at that time. RP 378. Confronted with that fact, Muhammad first said he did not remember going there and did not know why he would have. RP 384. Muhammad then claimed that he went to Walmart to try to cash a paycheck, and that Walmart refused to cash the check. RP 385-86. But the Walmart video shows that Muhammad sat in his car in the Walmart parking lot for about 30 minutes and never emerged. RP 392, 399. Confronted with that fact, Muhammad again changed his story, explaining that he went to see his friend Mike at Motel 6. RP 394. Muhammad's various statements about when and where he parked his car were

both internally inconsistent and contradicted by security video. RP 397-99, 407, 416-17.

Muhammad told the detectives that he had worked at the Clarkston Albertsons for about two months, ending about two weeks before November 6. RP 379-80. The officers showed Muhammad a picture of Richardson and said they thought he knew her from Albertsons. RP 425. Muhammad agreed that he recognized Richardson, but claimed he had only spoken to her once, in a group of people. RP 426-28. Albertsons security camera footage from inside the store showed Muhammad and Richardson talking together, alone, on two other occasions. RP 430-31. In one of these videos, taken just one week before her rape and murder, Richardson appears to rebuff an attempted kiss from Muhammad. RP 434. Given what the videos depicted, Muszynski considered Muhammad's claims about his contact with Richardson to be "obviously deceptive." RP 434.

When the officers told Muhammad that Richardson was last seen walking toward his car on November 6, he claimed that he was not in his car at that time, but instead in his friend Mike's home. RP 395, 407, 436. Mike was later contacted and denied that he

had seen Muhammad that night.[4] RP 445, 673. Muhammad repeatedly denied that he had anything to do with Richardson's disappearance and death and refused to provide a DNA sample. RP 439, 448, 451. After the interview, the officers released Muhammad and he left the station. RP 461.

Pursuant to the search warrant, officers searched Muhammad's car. RP 490. In the trunk, they found latex gloves, personal lubricant, pornographic DVDs, and a box of condoms[5] bearing the same lot number as the wrapper found in the secluded area where Muhammad had parked for an hour after leaving the Albertsons parking lot. RP 492, 504, 511. Apparent blood stains on the front passenger seat and headrest were tested and confirmed to have come from Richardson. RP 658-59, 662.

Officers seized Muhammad's phone during his interview and obtained a warrant to search it and to obtain records from the cell phone company. RP **87**, 671; CP 159, 164. Further undermining Muhammad's claim that he was home by 10:25 p.m. on November 6, this evidence showed a series of phone calls between

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[4] At trial, Mike Delameter testified for the defense, but stated that he only ever saw Muhammad during daylight hours. RP 822.

[5] The presence of condoms in Muhammad's car was significant, in part, because Albertsons clerk Vickie Hollahan testified that Muhammad had previously told her that he and his wife, who is disabled, do not have sex. RP 732.

Muhammad and his wife, beginning at 12:17 a.m. on November 7, about an hour after his car left the Albertsons parking lot. RP 674-75. Cell site location information from the phone company records confirmed that Muhammad's phone was stationary during the time his car was parked behind the Quality Inn. RP 682. After 12:30 p.m., however, his phone began using other cell phone towers, indicating that he was moving. RP 682-84. Since cell phones will generally use the closest unobstructed cell tower, evidence that Muhammad's phone was later using a tower with an unobstructed line of sight to the location where Richardson's body was found is consistent with Muhammad having disposed of Richardson's body and inconsistent with his claim of being at home. RP 683-84.

Swabs of Richardson's vagina yielded a small amount of DNA consistent with Muhammad's DNA profile, with a 1 in 7 probability of an unrelated individual having the same profile. RP 620. Forensic scientist Anna Wilson testified that the use of a condom would explain why there was so little DNA to test. RP 621-22. More significantly, DNA retrieved from under Richardson's fingernails matched Muhammad with a 1 in 5,000 probability of the

same profile occurring in the male population of the United States. RP 628.

Police later arrested Muhammad for Richardson's rape and murder. RP 576, 684. His arrest on these charges was reported on the front page of the local newspaper on November 13. RP **137-38**; CP 281. At about 4:50 a.m. the next morning, Muhammad's wife Detra[6] called her insurance agent, Vicki DeRoche. RP 784-85. Detra was weeping and hysterical. RP 785. She told DeRoche that she thought Muhammad had done something "awful" and that she might have to kill herself. RP **127-28**, 785. Detra explained that Muhammad had come home late without explanation, that he had blood on his clothes, and that he threw away a used condom while claiming it was a latex glove he had used to help an injured coworker. RP 785-86.

2. PROCEDURAL FACTS.

The State charged Muhammad with felony murder in the first degree and rape in the first degree. CP 22-23. Muhammad moved to suppress "all evidence obtained by and through all search warrants issued in investigation of his case," "identification and location information" derived from the warrantless ping, and

[6] The State refers to Detra Muhammad by her first name to avoid confusion. No disrespect is intended.

"Defendant's pre-arrest statements, including statements made to Officer Boyd during an investigatory stop" and "statements made during an interview with police officers after his vehicle had been impounded on the same day." CP 28-62. Muhammad argued that the initial investigatory stop by Officer Boyd was unlawful and that all subsequent search warrants were improperly issued based on evidence obtained during that stop, that the seizure of Muhammad's car in Idaho was not authorized by a warrant issued in Washington, and that the cell phone ping used to help locate Muhammad was an unlawful search. CP 28-62. The trial court rejected Muhammad's arguments and denied his suppression motion. CP 218-26.

The jury found Muhammad guilty of both first-degree murder and first-degree rape. RP 893; CP 352, 395. With respect to both counts, the jury found that Richardson was particularly vulnerable. RP 893; CP 396-97. With respect to the rape, the jury further found that Muhammad inflicted serious physical injury. RP 894; CP 399.

The trial court imposed exceptional sentences on each count. CP 572-82. For the murder, the court imposed a term of 548 months. CP 576. For the rape, the court imposed an indeterminate sentence of 318 months to life. CP 576. The court

ordered that the sentences be served consecutively. CP 576. The court entered findings and conclusions in support of the exceptional sentence, determining that the rape and murder do not merge because the two crimes clearly had independent purposes and effects. CP 602-04.

C. ARGUMENT

1. OFFICER BOYD'S LAWFUL INVESTIGATORY STOP WAS BASED ON REASONABLE SUSPICION AND DID NOT VIOLATE THE WASHINGTON OR UNITED STATES CONSTITUTION.

Muhammad contends that the trial court erred in denying his motion to suppress because the search warrant for his car was based on information unlawfully obtained during the warrantless stop of his car by Officer Boyd on November 10. The argument fails because the trial court properly found that Boyd had "articulable facts giving rise to a reasonable suspicion that the observed vehicle may be connected to the abduction of Ms. Richardson thus warranting an investigatory stop for the purpose of identifying the driver." CP 221. Because Officer Boyd's stop was a lawful investigative stop under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), it also falls within the

"jealously and carefully drawn exceptions" to the warrant requirement under article I, section 7.

In reviewing the denial of a motion to suppress, the appellate court determines whether substantial evidence supports the trial court's factual findings, and whether those findings support its conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Unchallenged findings are verities on appeal. Id. Conclusions of law are reviewed de novo. Id.

a. Officer Boyd's Investigatory Stop Did Not Violate The Fourth Amendment.

Brief investigatory "Terry" stops are well-established exceptions to the general rule that warrantless seizures are unconstitutional. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Acrey, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003). A Terry stop is justified when an officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrants the intrusion." Terry, 392 U.S. at 20. Under Terry, an officer may conduct a warrantless investigatory stop if he or she has "a reasonable, articulable suspicion that criminal activity is afoot." State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000). A reasonable

suspicion means there is a "substantial possibility that criminal conduct has occurred or is about to occur." State v. Snapp, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012). This is a lower standard than probable cause. Id. at 197.

"The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991), overruled in part on other grounds by State v. Bailey, 109 Wn. App. 1, 3, 34 P.3d 239 (2000). The totality of the circumstances includes factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. Acrey, 148 Wn.2d at 747. In addition, a higher level of police intrusion is allowed for a greater risk and a more violent crime than would be acceptable for a lesser crime. State v. Duncan, 146 Wn.2d 166, 177, 43 P.3d 513 (2002). "Courts are reluctant to substitute their judgment for that of police officers in the field." State v. Belieu, 112 Wn.2d 587, 601, 773 P.2d 46 (1989).

Here, Officer Boyd had reasonable suspicion justifying the brief intrusion. He knew that Richardson had been killed after

leaving Albertsons, just after 11 p.m., on November 6. RP **71**. He carefully studied the Albertsons security video showing Richardson walking toward an older, maroon car that had been parked in the corner of the parking lot for a considerable amount of time without anyone entering or emerging. RP **71-72**. He noticed several distinctive features of the car, including a discolored front rim on the driver's side. RP **72**. He knew from the security video that the distinctive car left the area within minutes of Richardson's approach. Based on those facts, it was reasonable to infer that the distinctive maroon car was connected with Richardson's disappearance. Boyd stopped Muhammad only after he observed the car long enough to confirm, based on its distinctive features, that it was the same as the one in the video. RP **73-74**. The detention was brief and polite, and its scope was limited to ascertaining the driver's identity and whereabouts at the time of Richardson's disappearance. Given the facts known to Officer Boyd at the time, the trial court correctly concluded that the minimal intrusion was reasonable under the Fourth Amendment and Terry. CP 219-21.

b. Officer Boyd's Investigative Stop Did Not Violate The State Constitution.

Muhammad contends that Officer Boyd's investigative stop violated article I, section 7 of Washington's constitution because it was conducted without lawful authority. Operating under the assumption that Boyd lacked reasonable suspicion justifying the Terry stop, Muhammad analyzes cases involving pretextual traffic stops. But as argued above, the investigatory stop was based on reasonable suspicion and was therefore lawful under Terry. And, as Officer Boyd never articulated any traffic code basis for the stop, cases involving pretextual traffic stops are inapposite.[7]

Muhammad also seems to argue that Terry investigative stops are never permissible unless an officer has reasonable suspicion to believe that the person to be stopped is "engaged in a crime *at the time of the stop*." Brief of Appellant at 13 (emphasis

[7] Muhammad devotes pages to an analysis of Division Two's decision in State v. Quezadas-Gomez, 165 Wn. App. 593, 267 P.3d 1036 (2011). That court concluded that no pretextual stop occurred where the officer "never purported to use any traffic code violation as pretext for the stop." Id. at 601. The court went on to consider whether the state constitution is offended "where law enforcement acquires probable cause *before* an investigatory stop, conducts the investigative stop for the sole purpose of obtaining identifying information to be used to further the investigation, and then releases the suspect and continues the investigation." Id. at 602. The court concluded that, because officers had probable cause to arrest the suspect, the lesser intrusion of an investigatory stop was also legally justified. Id. at 602-03. The court explicitly refused to address "whether this investigatory stop was independently lawful under Terry" and concluded that it "need not address" United States v. Hensley, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 504 (1985). Quezadas-Gomez, 165 Wn. App. at 600 n.9.

added). But Terry is not limited to crimes in progress.[8] Rather, "if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter *was involved in or is wanted in connection with a completed felony*, then a Terry stop may be made to investigate that suspicion." United States v. Hensley, 469 U.S. 221, 229, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985) (emphasis added). Washington courts have long described the suspicion required to justify a Terry stop as "a substantial possibility that criminal conduct *has occurred* or is about to occur." Snapp, 174 Wn.2d at 198 (quoting State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)) (emphasis added); Acrey, 148 Wn.2d at 747 ("A brief investigative stop is permissible whenever the police officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped *has been* or is about to be involved in a crime.") (emphasis added). This Court should similarly reject the notion that Terry investigative stops are only justified where law enforcement has reasonable suspicion of presently ongoing criminal activity.

As Muhammad acknowledges, Terry investigative stops are one of the "jealously and carefully drawn exceptions" to the warrant

[8] Indeed, Terry itself involved non-criminal conduct: the "elaborately casual and oft-repeated reconnaissance of the store window." Terry, 392 U.S. at 5-6.

requirement under article I, section 7 of the Washington Constitution. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Because, as argued above, Officer Boyd had reasonable suspicion justifying a valid Terry investigative stop, that stop was also lawful under article I, section 7. Id.

c. Probable Cause For The Search Warrant Existed Independent Of Information Gained During The Investigative Stop.

Muhammad argues that, without Officer Boyd's investigative stop, the affidavit in support of the search warrant for the car fails to provide probable cause.[9] His argument is based on an incomplete summary of the facts set out in the search warrant affidavit. When critical facts omitted from Muhammad's summary are considered, it is clear that the affidavit established probable cause independent of the facts obtained during the investigative stop.

"Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). "It is only the probability of criminal activity, not a prima facie showing of

[9] This Court need not reach the issue if it agrees with the State that Officer Boyd's stop was lawful.

it, that governs probable cause. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." Id. When a search warrant is based in part on illegally obtained information, the warrant is nonetheless valid if the affidavit contains facts independent of the illegally obtained information sufficient to give rise to probable cause. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005).

Muhammad suggests that, absent evidence obtained in Boyd's stop, the affidavit in support of the search warrant for his car established only that Richardson was killed after leaving Albertsons and that Muhammad's distinctive car was in the parking lot when Richardson walked out of the store. But Muhammad's recitation of the facts set out in the affidavit omits the critical facts that "Richardson walked towards this vehicle," after which "the vehicle headlights came on, the vehicle was then seen driving away and Richardson has not been seen alive since." CP 74. Muhammad also omits the fact that a search of Richardson's home indicated that she never made it there. CP 74. Combined with the fact that Richardson was found dead the next day and discarded on the side of a road, these facts establish a reasonable inference that the distinctive car's driver was involved in criminal activity, evidence of

which would be found in the car. Thus, probable cause existed independent of the evidence obtained during the valid traffic stop, which further established that Muhammad was the registered owner of the car, that he worked at Quality Inn, and that he suspiciously denied having been in the Albertsons parking lot on the night of the murder. Accordingly, even if this Court were to find that Officer Boyd's Terry stop was unlawful, it may safely conclude that all the subsequently obtained search warrants are independently supported by probable cause.

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

Muhammad contends that the use of a cell phone "ping" to locate him and his car violated the Fourth Amendment and article I, section 7 and requires exclusion of the evidence found in Muhammad's car pursuant to a search warrant.[10] Exclusion is unnecessary for four reasons. First, federal courts considering the issue have concluded that the use of cell site location information

[10] Muhammad also asserts that the ping violated state law, citing RCW 9.73.260, which requires a court order before law enforcement may utilize a cell site simulator device to locate a communications device. Muhammad did not raise this issue below and does not explain why the alleged failure to comply with a statute gives rise to manifest error of constitutional magnitude warranting review under RAP 2.5. The State therefore declines to address the operation of the statute.

("CSLI") is not a search under the Fourth Amendment. Second, there is no authority for the proposition that the location of one's cell phone at any particular moment in an outdoor unprotected area is a "private affair" under article I, section 7. Third, even if a ping constitutes an invasion of protected privacy interests, the warrantless ping was justified in this case by exigent circumstances. Fourth, the evidence at issue was found in Muhammad's car pursuant to a valid warrant, not obtained by unlawful government conduct, and was sufficiently attenuated from any unlawful conduct that the exclusionary rule does not apply. Finally, even if evidence from Muhammad's car should have been suppressed, the overwhelming untainted evidence renders any error harmless beyond a reasonable doubt.

a. "Pings" Are Not Searches Under The Fourth Amendment.

Application of the Fourth Amendment depends on whether the person invoking its protection can claim a reasonable expectation of privacy that has been invaded by government action. United States v. Knotts, 460 U.S. 276, 280-81, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983). This involves two questions: whether the individual, by his conduct, has exhibited a subjective expectation of

privacy; and whether any such expectation is "one that society is prepared to recognize as reasonable." Id. (internal quotations omitted).

In Knotts, the police placed a "beeper" (radio transmitter) in a drum of chloroform to track the movements of a suspect, Petschen, eventually discovering the location of a clandestine drug lab in Knotts' secluded cabin. Id. at 277-79. The Supreme Court reasoned that the surveillance by means of the beeper "amounted principally to the following of an automobile on public streets and highways." Id. at 281. Because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," and the police could have obtained the same information about the suspect's travels and destination from visual surveillance, the Court found no Fourth Amendment violation:

> Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the

> police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Id. at 282. This is in contrast to the situation in United States v. Karo, 468 U.S. 705, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984), in which a beeper placed into a can of chemicals revealed information about the *inside* of a home that could not have been obtained through visual surveillance. In Karo, the Court concluded that by monitoring the beeper while it was in a private residence, the government had conducted a search of an area in which the residents had a reasonable expectation of privacy. Id. at 714-15. "The case is thus not like Knotts, for there the beeper told the authorities nothing about the interior of Knotts' cabin .... [H]ere, as we have said, the monitoring indicated that the beeper was inside the house, a fact that could not have been visually verified." Id.

In United States v. Skinner, 690 F.3d 772, 777 (6th Cir. 2012), the Sixth Circuit relied on Knotts to hold that a person has no reasonable expectation of privacy in the data given off by his

voluntarily acquired cell phone.[11] There, Drug Enforcement Administration (DEA) authorities investigating a marijuana trafficking and money laundering conspiracy "pinged" a suspect's phone and thereby discovered the location of the suspect and the 1,100 pounds of marijuana he was transporting. Id. at 775-77. The court reasoned, "Similar to the circumstances in Knotts, Skinner was traveling on a public road before he stopped at a public rest stop. While the cell site information aided the police in determining Skinner's location, that same information could have been obtained through visual surveillance." Id. at 778. That the DEA agents in Skinner had actually "never established visual surveillance of his movements, did not know his identity, and did not know the make or model of the vehicle he was driving" made no difference. Id. at

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[11] The Skinner court reasonably observed:

> If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. Otherwise, dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen. The recent nature of cell phone location technology does not change this. If it did, then technology would help criminals but not the police. It follows that Skinner had no expectation of privacy in the context of this case, just as the driver of a getaway car has no expectation of privacy in the particular combination of colors of the car's paint.

690 F.3d at 777.

779. "Because authorities tracked a known number that was voluntarily used while traveling on public thoroughfares, Skinner did not have a reasonable expectation of privacy in the GPS data and location of his cell phone. Therefore, suppression is not warranted[.]" Id. at 781.

Likewise, under the Fourth Amendment, a person lacks a reasonable expectation of privacy "in information he voluntarily turns over to [a] third part[y]." Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). This "third party doctrine" applies even when the information is revealed "on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). In United States v. Graham, the Fourth Circuit held that this Supreme Court precedent dictated its conclusion that "the government does not violate the Fourth Amendment when it obtains historical CSLI from a service provider without a warrant." 824 F.3d 421, 425 (4th Cir. 2016). Since an individual has no legitimate expectation of privacy in information he voluntarily turns over to a third party – including CSLI exposed to a cell phone

company in the normal use of a cell phone – the government does not engage in a Fourth Amendment search when it acquires such information from the third party. Id. at 427. Accord, United States v. Carpenter, 819 F.3d 880, 887-89 (6th Cir. 2016) (no reasonable expectation of privacy in CSLI); United States v. Davis, 785 F.3d 498, 511-13 (11th Cir. 2015) (en banc) (no objectively reasonable expectation of privacy in cell phone company records showing the cell tower locations that wirelessly connected his calls); In re Application of U.S. for Historical Cell Site Data, 724 F.3d 600, 615 (5th Cir. 2013) (government may obtain CSLI under a statute without implicating the Fourth Amendment); In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. To Disclose Records to Gov't, 620 F.3d 304, 313, 317 (3d Cir. 2010) (same). And while these cases address *historical* CSLI, rather than *prospective* or real time cell phone location data, which is at issue here, "it is not clear," as a constitutional matter, "that a defendant has a significantly different expectation of privacy with regard to historical cell phone location data than he does with regard to prospective cell phone data. This is particularly true when the monitoring of prospective data is only for a limited duration[.]" In re Application of the U.S. for an Order for Authorization to obtain

Location Data Concerning an AT & T Cellular Tel., 102 F. Supp. 3d 884, 890 (N.D. Miss. 2015).[12] See also In re Smartphone Geolocation Data Application, 977 F. Supp. 2d 129, 146-47 (E.D.N.Y. 2013) (observing that "it is clearly within the knowledge of cell phone users that their telecommunications carrier, smartphone manufacturer and others are aware of the location of their cell phone at any given time," that "all of the known tracking technologies may be defeated by merely turning off the phone," and that "a cell phone user such as the defendant can easily protect the privacy of location data—literally at the touch of a button—and should not be heard to complain if he fails to do so").

Collecting CSLI from a third-party cell phone company is different from placing a GPS tracking device on a suspect's car and tracking his movements for a prolonged period, which the Supreme Court held requires a warrant in United States v. Jones, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). The Jones court did not come to that conclusion under the rubric of "reasonable expectation of privacy"; instead, the Court explicitly relied on the

[12] This federal court further observed, "If a less-than-savvy defendant chooses to travel to a drug buy while carrying a cell phone which is turned on and thus sending out location data to cell towers owned by third parties, does he truly have a reasonable expectation of privacy in that data? A number of federal courts have concluded that he does not, and this court is inclined to agree with them." 102 F. Supp. 3d at 890 (citing cases).

trespassory nature of the police action. Id. at 404-05. No such physical intrusion occurred in this case. Rather, Muhammad himself obtained the cell phone, which came preloaded with location tracking technology, for his own purposes. As Justice Sotomayor stated in her concurrence in Jones, "the majority opinion's trespassory test" provides little guidance on "cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property." Id. at 415 (Sotomayor, J., concurring).

Nor does this case present the concern raised by Justice Alito's concurrence in Jones. As Justice Alito observed, in the pre-computer age, "practical" constraints on police resources provided the greatest protection of privacy. Id. at 429. For example, the "*constant monitoring* of the location of a vehicle for *four weeks*" that happened in Jones "would have required a large team of agents, multiple vehicles, and perhaps aerial assistance." Id. (emphasis added). But technological advances have now made it easy and inexpensive to "secretly monitor and catalogue every single movement of an individual's car for a very long period," such that there may be situations where police, using otherwise legal methods, so comprehensively track a person's activities that the

very comprehensiveness of the tracking is unreasonable under the Fourth Amendment. 565 U.S. at 418-31.

No such extreme or comprehensive tracking occurred in this case. While Jones involved intensive monitoring over a 28-day period, here Clarkston officers only used CSLI to locate Muhammad once, while he was outdoors, in order to execute a search warrant for evidence of a brutal rape and murder. Such "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." 565 U.S. at 430 (Alito, J., concurring).

Under the Fourth Amendment, Muhammad had no reasonable expectation of privacy in the location of his cell phone at a precise moment because he voluntarily shared CSLI with his cell phone carrier and because his movements on the public roads from his home to the Lewiston orchards could have been discovered by visual surveillance. There was no Fourth Amendment violation.

b. The Location Of A Cell Phone In An Unprotected Area Is Not A "Private Affair" Under Art. I, Section 7.

Washington's constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, sec. 7. This provision is

more protective than the Fourth Amendment. State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). Under Washington's constitution, "the inquiry ... focuses on 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.'" Id. at 259-60 (quotation omitted).

Under article I, section 7 of the state constitution, "'what is voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person's private affairs.'" Jackson, 150 Wn.2d at 260. Even where law enforcement uses "sense-enhancing devices" to see more easily what is open to public view, there is no invasion of private affairs. Id. "However, a substantial and unreasonable departure from a lawful vantage point, or a particularly invasive method of viewing, may constitute a search." Id. (quotation omitted). In determining whether an individual's subjective expectation of privacy is one that a citizen of this state should be entitled to hold, courts must consider "the nature *and extent* of information obtained by the police, for example, information concerning a person's associations, contacts, finances, or activities is relevant[.]" Id. (citation omitted) (emphasis added).

Here, the warrantless ping informed law enforcement of the approximate location of Muhammad's cell phone (and, as it happened, his car and person) in the orchards of Lewiston, Idaho at a single point in time. The ping did not allow warrantless access to the contents of Muhammad's cell phone and was not used to track Muhammad as he travelled over a prolonged period of time. Unlike in Jackson, there was no extended period of uninterrupted 24-hour surveillance; nor was the ping so intrusive as to "provide a detailed record of travel to doctors' offices, banks, gambling casinos, tanning salons, places of worship, political party meetings, bars, grocery stores, exercise gyms, places where children are dropped off for school, play, or day car, the upper scale restaurant and the fast food restaurant, the strip club, the opera, the baseball game, the 'wrong' side of town, the family planning clinic, [or] the labor rally." Id. at 262. Rather, the ping simply narrowed the search area, and in searching that area, the police located Muhammad's car parked on a public street; because this is something that an officer could detect "at a lawful vantage point through his or her senses, no search occur[red] under article I, section 7." Id. at 260.

The limited information obtained from the ping in this case also distinguishes it from cases in which our supreme court has

held that the *contents* of cell phones are private affairs protected by article I, section 7. In State v. Hinton, the court held that an officer invaded the defendant's private affairs by reading and responding to text messages delivered to the defendant's phone. 179 Wn.2d 862, 865-66, 319 P.3d 9 (2014). In reaching this conclusion, the court emphasized that "[v]iewing the contents of people's text messages exposes 'a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations.'" Id. at 869 (quoting Jones, 565 U.S. at 415 (Sotomayor, J., concurring) (alteration by Hinton court)). The Hinton court distinguished but did not overrule State v. Wojtyna, 70 Wn. App. 689, 855 P.2d 315 (1993), which held that the phone number displayed on a pager was not a "private affair" under the state constitution because, rather than revealing the content of communications, "all that was learned from the pager was the telephone number of one party, the party dialing." Hinton, 179 Wn.2d at 870 (quoting Wojtyna, 70 Wn. App. at 870). As in Wojtyna, the ping in this case revealed no content; only the approximate location of Muhammad's phone in a public area.

Our supreme court faced another cell phone-related privacy claim in State v. Samalia, 186 Wn.2d 262, 375 P.3d 1082 (2016).

There, officers attempted to stop Samalia, who was driving a stolen car. Id. at 266. Samalia stopped and ran away, but left a cell phone in the stolen car. Id. An officer found the phone and called some of the contacts listed in it to find out to whom the phone belonged. Id. The officer was thereafter able to identify Samalia as the driver who fled from the stolen vehicle. Id. at 267. In broadly holding that cell phones and the information they contain are "private affairs" under the state constitution, the Samalia court emphasized that cell phones typically contain "vast amounts of intimate, personal information[.]" Id. at 270. The court further observed that cell phones retain call logs, can be used to track and log continuous GPS data, and may contain banking and hotel registry information, and that all of these types of information have been held to be "private affairs" protected by article I, section 7. Id. at 271-72. "Given the intimate information that individuals may keep in cell phones and our prior case law protecting that information as a private affair," the court concluded that cell phones are private affairs that police may not search without a warrant or applicable exception to the warrant requirement. Id. at 272. However, because the location of a cell phone outdoors reveals no

intimate details of a person's life, the ping at issue here is distinguishable from a search of the cell phone itself.

c. Exigent Circumstances Justified The Minimal Intrusion.

The trial court found that even if the ping constituted a search requiring a warrant, exigent circumstances existed to justify immediate police action:

> It was only hours after Mr. Muhammad had been contacted for the first time by law enforcement concerning a heinous crime to which they believe he was connected. The officers could reasonably infer that the window for collection of evidence would be closing rapidly now that the vehicle owner had reason to believe that he was suspected of a violent crime involving the vehicle.

CP 223. Muhammad contends that, since this occurred three days after Richardson's battered body was found, no exigency existed. This Court should reject the argument.

The exigent circumstances exception to the warrant requirement applies when "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (internal quotation omitted). Our supreme court has identified five circumstances that may be termed "exigent":

"(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of evidence." State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983).

A court must look to the totality of the circumstances to determine whether exigent circumstances exist. Smith, 165 Wn.2d at 518. Six nonexclusive factors guide the analysis: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably. State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127 (2002). "[I]t is not necessary that every factor be met to find exigent circumstances, only that the factors are sufficient to show that the officers needed to act quickly." Id. at 408.

In State v. Patterson, the court found exigent circumstances justifying entry into a parked car where a burglary had recently been committed, the suspect was likely in the immediate vicinity of the car because officers had noticed the car mere minutes after the

crime, information in the car could help identify and locate the suspect, and a delay in searching the vehicle could have allowed the suspect to flee. 112 Wn.2d 731, 735-36, 774 P.2d 10 (1989). In State v. Terrovona, our supreme court found exigent circumstances justified the warrantless nighttime entry into the defendant's home to arrest him because police had probable cause to arrest the defendant for the murder of his step-father, there was a need to protect the public, and there was the distinct possibility of the defendant fleeing. 105 Wn.2d 632, 644-45, 716 P.2d 295 (1986).

Applying the factors set forth above, this Court should conclude that the trial court properly found that exigent circumstances justified a warrantless ping to locate Muhammad and his car. First, the crime at issue was extremely violent and grave: a vulnerable woman had been abducted, beaten, raped, and strangled to death by an apparent stranger. This is far graver than the burglary in Patterson and presented greater danger to the public than the domestic nature of the murder in Terrovona. While there was no information about whether Muhammad was likely to be armed, he was perfectly able to kill Richardson with his bare hands. Third, the indication that Muhammad, a registered sex

offender, was involved in the rape and murder of Richardson was reasonably trustworthy: security video showed Richardson walk toward Muhammad's car – which had been lurking in the parking lot for a considerable period of time – and Muhammad's car left the parking lot shortly thereafter. In addition, the video established that Muhammad had lied to Officer Boyd about going straight home after work. Fourth, the officers had a strong reason to believe that Muhammad would be found with his cell phone for the simple reason that people typically are not far from their cell phones. Fifth, officers reasonably perceived a likelihood that Muhammad would flee and/or destroy evidence if his car was not quickly seized. He had already been contacted by police about a crime that had occurred in the Albertsons parking lot while he was in that parking lot,[13] he had been surveilled for some time after that by the same officer who stopped him, and as soon as that officer was called away for another reason, Muhammad and his car disappeared.

Under these circumstances, law enforcement officers were justified in believing that Muhammad—whom they believed had

[13] Muhammad points out that Officer Boyd did not tell him the nature of the crime he was investigating, as if that fact undermines the trial court's conclusion that exigent circumstances justified the warrantless ping. Given the overwhelming evidence that Richardson had been murdered, it was reasonable for police to assume that the perpetrator would try to destroy evidence.

abducted, raped, and killed a particularly vulnerable woman who was an apparent stranger to him—posed a danger to the public and could likely destroy evidence and/or escape unless the officers acted quickly to locate him and seize his car. Accordingly, the relatively unintrusive ping was justified by exigent circumstances.

d. The Exclusionary Rule Does Not Apply.

Muhammad argues that the warrantless ping of his cell phone after he and his car disappeared should lead to the suppression of evidence later obtained with judicial authorization. His argument is simple but simplistic: his car would not have been seized but for the warrantless ping directing officers to its general location. See BOA at 56 ("The evidence found in Mr. Muhammad's car was the fruit of the seizure of the car itself, which was only possible because of the illegal interception and use of the cell phone number obtained through the illegal stop."). This "but for" argument should be rejected. As an assertion of fact, it is false. More importantly, as a legal argument, it is unsound because it employs a test for suppression that has been explicitly rejected by courts in Washington and elsewhere.

The factual premise for Muhammad's "but for" argument is false because police had already obtained a warrant to "seize and

search" Muhammad's car when the ping was conducted. CP 118. Muhammad's car was very distinctive and easy to spot, and there was only one similar vehicle in the area, which police were at some point able to look at and rule out. RP 793. Police knew where Muhammad lived and worked. There is no reason to believe that the officers would never have been able to locate Muhammad's car "but for" the cell phone ping.

Further, even if the factual assertion was true, the "but for" argument for suppression has been consistently and expressly rejected for decades by federal and Washington courts. The Supreme Court explained this more than 50 years ago:

> We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (emphasis added). More recently, the Washington Supreme Court explicitly stated, "The 'fruit of the poisonous tree' doctrine does not operate on a 'but for' basis."

State v. Eserjose, 171 Wn.2d 907, 926, 259 P.3d 172 (2011) (plurality opinion).

Thus, Muhammad must do more than show a causal connection between the warrantless ping of his cell phone and the seizure of his car. He must show that the seizure and search of his car stemmed from "exploitation of that illegality." Wong Sun, 371 U.S. at 488. This he cannot do because the search of his car did not stem from the warrantless 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." Id.

Closely related to the causation required to trigger the exclusionary rule is the attenuation doctrine. A causal connection between information gained during an illegal search and evidence prepared for trial does not automatically result in exclusion of the evidence because "such connection may have become so attenuated as to dissipate the taint." Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939). This also is not a "but for" test. On the contrary, as one court has noted:

> [T]he taint inquiry is more akin to a proximate causation analysis. That is, at some point, even in the event of a direct and unbroken causal chain, the relationship between the unlawful search or seizure and the challenged evidence becomes sufficiently weak to dissipate any taint resulting from the original illegality. In other words, at some point along the line, evidence might be "fruit," yet nonetheless be admissible because it is no longer "tainted" or "poisonous."

United States v. Smith, 155 F.3d 1051, 1060 (9th Cir. 1998).

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. And as argued above, 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 and did not interfere with Muhammad's ability to use or move the phone.

Although it has been employed by Washington courts for decades,[14] the attenuation doctrine was first explicitly endorsed by a plurality of the Washington Supreme Court in 2011. In Eserjose, the defendant was illegally arrested in his home. 171 Wn.2d at 911. Later, while still in custody, he confessed to a burglary. Id. The defendant argued that his confession should have been suppressed because it was obtained as a result of the illegal arrest. Id. at 912. On appeal, the defendant conceded that his confession was admissible under the federal exclusionary rule, but argued that it violated article I, section 7. Id. at 913. Our supreme court observed:

> While we have expressed the exclusionary prohibition in broad terms, our cases do not stand for the proposition that the exclusionary rule under article I, section 7 operates on a "but for basis."
>
> ...
>
> In fact, the "fruit of the poisonous tree" doctrine and the attenuation doctrine stem from the same source. In the very opinion in which he described evidence derived from the "'Government's own wrong'" as "fruit of the poisonous tree," Justice Felix Frankfurter said, "Sophisticated argument may prove a causal connection," but "[a]s a matter of good sense, ... such connection may have become so attenuated as to dissipate the taint."

[14] See State v. Vangen, 72 Wn.2d 548, 433 P.2d 691 (1967) (confession, sufficiently attenuated from illegal arrest, was properly admitted).

Eserjose, 171 Wn.2d at 919-20 (citing Nardone, 308 U.S. at 341). Having concluded that the attenuation doctrine is consistent with article I, section 7, the court turned to the facts before them and concluded:

> Eserjose's confession was obtained with the requisite 'authority of law,' the deputies having legal authority based on probable cause developed independently of the illegal arrest to keep Eserjose in custody and to question him about the burglary.

Eserjose, 171 Wn.2d at 926.

This case presents an even more compelling application of the attenuation doctrine than Eserjose. There, the defendant was arrested illegally and remained in custody when he was interrogated and confessed. Here, police already had lawful authority to seize and search Muhammad's car before the allegedly unlawful ping. The search warrant affidavit established probable cause on the basis of facts that were completely independent of the later warrantless ping. The subsequent seizure and search of Muhammad's car did not violate the Washington Constitution because, as the plurality held in Eserjose, it was conducted with "the authority of law." See id. at 926.

> When a court determines that evidence is not the "fruit of the poisonous tree," a defendant's privacy rights are respected, the deterrent value of

> suppressing the evidence is minimal, and the dignity of the judiciary is not offended by its admission. *An alternative "but for" principle would make it virtually impossible to rehabilitate an investigation once misconduct has occurred, granting suspected criminals a permanent immunity unless, by chance, other law enforcement officers initiate an independent investigation.*

Eserjose, 171 Wn.2d at 922 (emphasis added). Justice Madsen concurred with the lead opinion, writing separately to explain the distinction between causation and attenuation and argue that, because there was no connection between Eserjose's illegal arrest and his confession, the court need not reach the attenuation issue. 171 Wn.2d at 930-37 (Madsen, J., concurring).

Whether this Court determines that the warrantless ping did not cause the already-authorized seizure and search of Muhammad's car, or that the evidence from the car is sufficiently attenuated from the warrantless ping, the ultimate conclusion is the same: the exclusionary rule does not apply. The trial court properly admitted the evidence found in Muhammad's car, including Ina Clare Richardson's blood and the box of condoms Muhammad used when brutally raping her.

3. ANY ERROR IN ADMITTING EVIDENCE FROM MUHAMMAD'S CAR WAS HARMLESS BEYOND A REASONABLE DOUBT.

For the reasons set forth above, this Court should conclude that the trial court properly admitted the evidence discovered pursuant to a valid warrant to search Muhammad's car. However, even if this Court disagrees, reversal is not required because any error in admitting the evidence is plainly harmless.

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 that Muhammad challenges is the evidence found in his car. See BOA at 56. The most compelling pieces of that evidence are Richardson's blood on the passenger seat and headrest and the box of condoms with the same lot number as the condom wrapper found at the scene. But even without those pieces, the 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.

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 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. The car then drove 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 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 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 Richardson was raped and killed, during which it appears that Muhammad attempted to kiss Richardson and that she backed away in response. RP 432-34. Muhammad's demonstrably deceptive statements during his interview are compelling evidence of his guilt.

Even more compelling was the evidence recovered from 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. Although there was no semen present in 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 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. This Court should affirm.

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

Muhammad contends that his convictions for first-degree murder and first-degree rape violate double jeopardy or should have merged for sentencing purposes. This Court should reject the arguments.

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[15] "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 murder does not

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

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.

In arguing the broad proposition that convictions for felony murder and the predicate felony necessarily violate double jeopardy, Muhammad relies largely on Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), a three-paragraph per curiam opinion concerning successive prosecutions, first for felony murder based on robbery with firearms and then, in a separate and later prosecution, for the predicate robbery. The Court held that where "conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one." Id. at 682. The case is distinguishable because, as explained above, conviction for felony murder is possible without proof of a completed rape, and there was no successive prosecution in this case.

Because felony murder and rape are not the same in law, conviction for both crimes does not violate double jeopardy. Both convictions may stand.

5. MUHAMMAD'S RAPE AND MURDER CONVICTIONS DO NOT MERGE.

Muhammad also contends that the trial court erred in imposing sentences for both the rape and murder because the two offenses merged for sentencing purposes. Because the rape was separate and distinct from, and not merely incidental to the felony murder, the merger doctrine does not apply and separate punishment is permitted.

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 this Court 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 Richardson. The purpose of the murder, along with the stripping of 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 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 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.

D. CONCLUSION

The State respectfully asks this Court to affirm. The State does not intend to seek appellate costs.

DATED this 28th day of September, 2015.

Respectfully submitted,

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Today I directed electronic mail addressed to Susan M Gasch, the attorney for the appellant, at gaschlaw@msn.com, containing a copy of the Brief of Respondent, in State v. Bisir Bilal Muhammad, Cause No. 34233-6, in the Court of Appeals, Division III for the State of Washington.

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

Dated this 28th day of September, 2017.

L Brame

Name:
Done in Seattle, Washington

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