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

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BISIR BILAL MUHAMMAD,

Appellant.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

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

2. Law enforcement had independent lawful authority, in the form of a warrant, to search Muhammad's car. Did the trial court correctly conclude that evidence discovered inside the car, which was located using a warrantless ping of Muhammad's cell phone, was not the fruit of unlawful government conduct?

3. Was the evidence obtained through the lawful judicially-authorized search of Muhammad's car sufficiently attenuated from the warrantless ping that the exclusionary rule does not apply?

4. 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 harmless beyond a reasonable doubt?

5. 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

Bisir Muhammad was convicted of the rape and murder of Ina Clare Richardson. RP 893-94; CP 352, 395-99. The compelling facts of the crime and ensuing investigation are detailed in the published Court of Appeals decision affirming his convictions and in the Brief of Respondent filed in the Court of Appeals. State v. Muhammad, 4 Wn. App. 2d 31, 38-45 (2018). In brief, the evidence showed that Muhammad drove the petite, mentally ill, 69-year-old woman to a secluded location, where he beat, raped, and strangled her to death, then stripped her body and discarded her along the side of a road.

Police investigating the crime using ubiquitous security camera footage immediately focused on a distinctive car toward which Richardson was walking when she was last seen alive. Three days after Richardson's body was discovered, police stopped the car, identified Muhammad as its driver and registered owner, and released him. Although one officer surveilled Muhammad while others obtained a warrant to search his car, Muhammad and his car disappeared before officers could execute the warrant. Fearing that Muhammad would flee or destroy evidence, police

had Muhammad's cell phone company "ping" his phone. The ping narrowed the area to search, and police found Muhammad in Idaho and seized his car. The trial court denied Muhammad's motions to suppress evidence. A jury found Muhammad guilty of both rape in the first degree and felony murder in the first degree predicated on rape; the trial court entered judgment on both convictions, and imposed separate, consecutive sentences for the rape and murder.

C. ARGUMENT

1. 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 of Washington's constitution, requiring exclusion of the evidence subsequently found in Muhammad's car pursuant to a search warrant.<sup>1</sup> Exclusion is unnecessary. First, assuming the ping is a search at all, it was justified by exigent circumstances. Second, Muhammad's car was searched pursuant to a valid warrant, thus, the evidence found was not obtained by unlawful government conduct, and was sufficiently attenuated

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<sup>1</sup> For the first time in the Court of Appeals, Muhammad also asserted 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. The Court of Appeals did not address the claim, and Muhammad did not mention it in his petition for review.

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. The Nature Of The Information Obtained With The Single, Real-Time Ping.

In Carpenter v. United States, the Supreme Court recently held that the government's acquisition of cell site location information (CSLI) "that provide[s] a comprehensive chronicle of the user's past movements" is a search under the Fourth Amendment that must ordinarily be justified by a warrant supported by probable cause. \_\_ U.S. \_\_, 138 S. Ct. 2206, 2221, 201 L. Ed. 2d 507 (2018). The Court distinguished between comprehensive, historical CSLI used to produce "a detailed chronicle of a person's physical presence complied every day, every moment, over several years" and a more limited use of real-time CSLI to detect "a person's movement at a particular time." Id. at 2220. The Court also expressly provided that exigent circumstances, including "the need to pursue a fleeing suspect ... or prevent the imminent destruction of evidence," may excuse the failure to obtain a warrant. Id. at 2222-23.

This case does not implicate Carpenter. The warrantless ping at issue was used only to inform police of the approximate location of

Muhammad's cell phone in the Lewiston Orchards neighborhood at a single point in time.

The limited information obtained from the ping in this case also distinguishes it from cases in which this Court has held that the *contents* of cell phones are private affairs protected by article I, section 7. See, e.g., State v. Hinton, 179 Wn.2d 862, 865-66, 319 P.3d 9 (2014) (warrant required before reading text messages because “[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.’”) (quoting United States v. Jones, 565 U.S. 400, 415, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring) (alteration by Hinton court)); State v. Samalia, 186 Wn.2d 262, 270, 375 P.3d 1082 (2016) (warrant required to access suspect’s cell phone because cell phones typically contain “vast amounts of intimate, personal information”). Id. at 270. Because the location of a cell phone at a single point in time reveals no intimate details of a person’s life, the ping at issue is distinguishable from a search of a cell phone itself.

b. Exigent Circumstances Justified The Intrusion.

The trial court found that exigent circumstances justified immediate police action.<sup>2</sup> CP 223. Muhammad contends that no exigency existed because Richardson was already dead. 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). This 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

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<sup>2</sup> The trial court explained:

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.

nonexclusive factors guide the analysis: (1) the gravity or violent nature of the offense with which the suspect is to be charged; whether (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is at the place to be searched; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the search 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, this Court found exigent circumstances justified entry into a parked car where a burglary had recently been committed, the suspect was still likely in the area, 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, this 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).

This Court should likewise conclude 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 from a public place, 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, his brutal crime demonstrated the extreme risk of violence he posed. 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 left the parking lot shortly thereafter and drove to a secluded location behind Muhammad's workplace where it remained for an hour before moving. RP 336, 454, 510-11, 517, 544, 562, 800-05, 808-12. In addition, the video established that Muhammad had lied to the police during the investigatory stop when he claimed he had gone straight home after work. RP 355-58, 364, 378. 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. Finally, officers reasonably believed that Muhammad would flee or destroy evidence if his car was not quickly

seized. He had already been contacted by police about his car's proximity to a crime, an officer thereafter surveilled him for some time, and as soon as that officer was called away, Muhammad and his car disappeared.

Under these circumstances, law enforcement officers were justified in believing that Muhammad—whom they believed had abducted, raped, and killed a particularly vulnerable woman who was an apparent stranger to him—posed a danger to the public and would likely destroy evidence and escape unless the officers acted quickly to locate him and seize his car. Exigent circumstances justified the relatively unintrusive ping.

c. The Exclusionary Rule Does Not Apply.

Muhammad argues that the warrantless ping of his cell phone should lead to the suppression of evidence later obtained with judicial authorization. His argument is simplistic: his car would not have been seized *but for* the warrantless ping directing officers to its general location. 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, and an officer had in fact already stopped him once. Unless Muhammad decided to flee, there is no reason to believe that the officers would never have been able to locate his 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, this 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.

Further, 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, “the 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.” United States v. Smith, 155 F.3d 1051, 1060 (9<sup>th</sup> Cir. 1998). 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.’” Id.

The attenuation doctrine requires consideration of (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. 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,<sup>3</sup> the attenuation doctrine was first explicitly endorsed by a plurality of this 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

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<sup>3</sup> See State v. Vangen, 72 Wn.2d 548, 433 P.2d 691 (1967) (confession, sufficiently attenuated from illegal arrest, was properly admitted).

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. This Court flatly rejected the argument:

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.”

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, this Court turned to the facts before it and concluded that “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 while 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). A majority of this Court thus agreed that the exclusionary rule does not apply when the evidence sought to be excluded was not obtained as the result of unlawful government conduct.

Whether this Court determines that the warrantless ping did not cause the search of Muhammad's car, or determines 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.

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

Even if this Court concludes that evidence from Muhammad's car should have been excluded, reversal is not required because any error in admitting the evidence is plainly harmless.

The failure to suppress evidence obtained in violation of the Fourth Amendment and article I, section 7 is not reversible error when 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). 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. 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 Muhammad's wife confided in a friend that Muhammad came home unusually late that night, had blood on his clothes, and threw away a used condom while claiming 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.

3. 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<sup>4</sup> “same evidence” test to determine whether the two offenses are the same in law

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<sup>4</sup> Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

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 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 has relied 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.

4. 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.

DATED this 31st day of December, 2018.

Respectfully submitted,

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