No. 82491-6

MADSEN, C.J. (concurring)—I concur in the result reached by the lead opinion. Because the deputies did not obtain James Eserjose's confession by exploiting any unlawful act, his confession is admissible. I write separately because the lead opinion applies an attenuation analysis where none is required.

ANALYSIS

Article I, section 7 of the Washington State Constitution requires exclusion of evidence seized during an illegal search or seizure. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). To prevent the government from benefiting from such unlawful activity, article I, section 7 also requires suppression of evidence derived from an illegal search or seizure under the "fruit of the poisonous tree doctrine." *Id*. at 717 (citing *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967)).

However, we have recognized that under article I, section 7, only evidence obtained as a result of unlawful government activity must be excluded in order to respect

both the privacy interests of the individual and the State's interest in prosecuting criminal activity. *State v. Winterstein*, 167 Wn.2d 620, 634, 220 P.3d 1226 (2009) (citing *Gaines*, 154 Wn.2d at 720). Thus, although article I, section 7's greater solicitude for personal privacy often requires broader application of the exclusionary rule, evidence not obtained by unlawful government conduct need not be suppressed. *See State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). In this case, exclusion of Eserjose's confession is not required because, as the lead opinion notes, Eserjose did not confess during the course of an illegal seizure. Lead opinion at 19.

No one disputes that the deputies had probable cause to arrest Eserjose or that the deputies entered Eserjose's home with his father's consent. Thus, any illegality occurred when the deputies exceeded the scope of Eserjose's father's consent and went upstairs to arrest Eserjose. But Eserjose did not confess upon his arrest in the hallway, and the deputies did not seize evidence from Eserjose or the house. And, although Eserjose himself was seized, his seizure was not unlawful as it was based on probable cause.

The "evidence" that Eserjose says must be suppressed is the confession he gave at the sheriff's office following *Miranda*[1] warnings. But as the lead opinion correctly notes, Eserjose confessed when confronted with his accomplice's confession at the sheriff's office. Lead opinion at 17. There is nothing indicating that the decision to confess was in any way related to the fact that he was arrested in his upstairs hallway; there is no connection between the illegality and the confession. Accordingly, Eserjose's confession

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

is connected to his learning of his accomplice's confession, and not to any illegality associated with the deputies' exceeding the scope of consent to enter the home. This should end the analysis.

Unfortunately, the lead opinion reads article I, section 7 as requiring us to conflate the separate inquiries of causation and attenuation. Lead opinion at 20 ("[u]nder [*New York v.*] *Harris*, our analysis would end there; but to satisfy article I, section 7, it is necessary to determine whether the confession, though the direct product of lawful custodial interrogation, was the indirect product of the prior arrest"). Adopting the rule proposed by the dissenting opinion in *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990), the lead opinion proceeds to apply the three-factor test of *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), to determine "whether the confession is 'sufficiently an act of free will to purge the primary taint.'" Lead opinion at 12 (internal quotation marks omitted) (quoting *Brown*, 422 U.S. at 602).[2]

However, as the majority in *Harris* noted, causation and attenuation are separate

[2] The lead opinion cites *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997), and *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968), as examples of cases where we have applied the factors of *Brown* to ensure sufficient attenuation under article I, section 7. Lead opinion at 15. These cases are unhelpful. In *Armenta*, as in *Brown*, the alleged illegality was the lack of probable cause prior to the seizure. *Brown* and its progeny are distinguishable from this case since the violation is qualitatively different: here the deputies had probable cause to arrest. *Rothenburger* is also distinguishable because the court there assumed without deciding that a seizure had occurred and that it was unlawful. *Rothenburger*, 73 Wn.2d at 599-600. Finally, the lead opinion's citations to *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995), and *State v. Vangen*, 72 Wn.2d 548, 433 P.2d 691 (1967), are likewise unhelpful because neither case applied article I, section 7. Lead opinion at 13. I note, however, that even in *Warner*, decided in the context of the Fifth Amendment, we recognized that inquiry into attenuation was appropriate only where it first could be determined that the challenged evidence was "discovered as a direct result of a compelled incriminating statement." *Warner*, 125 Wn.2d at 888.

and distinct inquiries. *Harris*, 495 U.S. at 19 ("attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity'" (quoting *United States v. Crews*, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980))). Attenuation asks how far existing causation may be stretched as a matter of "good sense." *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939). By contrast, causation itself turns on the logical link between the illegal governmental conduct and the acquisition of the challenged evidence. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (distinguishing evidence "'attenuated'" from the government's lawless conduct from evidence that has not "'been come at by exploitation of that illegality'" in the first place (quoting *Nardone*, 308 U.S. at 341 and John MacArthur Maquire, Evidence of Guilt 221 (1959)). The lead opinion erroneously confuses these distinct inquiries.

In addition, the lead opinion concludes that our state's exclusionary rule requires it to consider "the legality of each link in the causal chain, not merely the last." Lead opinion at 11-12. This is also erroneous because under article I, section 7, the requisite correlation between the illegality and the evidence obtained may be severed by any "link in the chain." Indeed, we have repeatedly held that even where a constitutional violation occurs at some point in a search, article I, section 7 does not require exclusion of evidence if information independent of the illegality supports a later valid search or if illegally obtained information in a search warrant can be redacted. *See, e.g., Gaines*, 154

Wn.2d at 720; *Maxwell*, 114 Wn.2d at 769; *State v. Coates*, 107 Wn.2d 882, 887, 735 P.2d 64 (1987); *State v. Casal*, 103 Wn.2d 812, 820-21, 699 P.2d 1234 (1985); *State v. Cockrell*, 102 Wn.2d 561, 571, 689 P.2d 32 (1984); *O'Bremski*, 70 Wn.2d at 428. Any connection here was severed when Eserjose's confession occurred in response to learning that his accomplice had confessed.[3]

The scope of my disagreement with the lead opinion is limited. Had the deputies seized physical evidence from the upstairs of the home during the arrest, the evidence would unquestionably have been the proper subject of suppression. *See State v. Garvin*, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009) ("'[t]he exclusionary rule mandates the suppression of evidence gathered through unconstitutional means'" (quoting *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002))). Likewise, my resolution of this case would be different had Eserjose made an inculpatory statement in the house if that statement was obtained by exploiting the illegal entry into the upstairs hallway. Lead opinion at 17. Here, however, the only thing seized from the home was Eserjose himself, who is not the "fruit" of his own arrest. *See Crews*, 445 U.S. at 474 ("[r]espondent is not himself a suppressible 'fruit'").

[3]Although the article I, section 7 violation ended once the deputies removed Eserjose from his house, his confession would still be inadmissible if obtained in violation of the Fifth Amendment. *See Harris*, 495 U.S. at 20. Had Eserjose raised a Fifth Amendment challenge, the court would have started its analysis there, since the voluntariness of the statement at issue is a "threshold requirement." *Brown*, 422 U.S. at 604. However, because Eserjose does not claim that his confession was coerced, this court need not consider this a basis for exclusion. I do so only to point out that Eserjose can raise a Fifth Amendment challenge. Thus, contrary to the lead opinion's suggestion, we are not left with "a rule that makes the admissibility of a confession depend entirely on the legality of custody." Lead opinion at 11.

Lastly, the lead opinion describes the results other states have reached on this issue as "mixed." Lead opinion at 6. However, it is telling that Arizona—the only one of these states with constitutional language identical to article I, section 7—has found the *Harris* majority's rule fully consistent with the protections of its constitution. *See State v. Cañez*, 202 Ariz. 133, 152, 42 P.3d 564 (2002). While the lead opinion acknowledges this as "notable," it makes no effort to explain why the same language in our constitution should be interpreted differently.

CONCLUSION

Although Eserjose confessed after the deputies exceeded the scope of the consent they were given, the deputies did not exploit the illegal entry into Eserjose's upstairs hallway to obtain the confession. There is therefore no connection between the government's unlawful act and Eserjose's confession. Because the lead opinion erroneously applies an attenuation inquiry, I concur in the result only.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: