SJC-11591

COMMONWEALTH vs. AARON MORIN.

Bristol. May 5, 2017. - November 21, 2017.

Present: Gants, C.J., Lenk, Hines, & Gaziano, JJ.[1]

Homicide. Felony-Murder Rule. Robbery. Practice, Criminal, Required finding, New trial, Assistance of counsel, Instructions to jury, Warrant, Capital case. Constitutional Law, Assistance of counsel, Search and seizure, Probable cause. Due Process of Law, Assistance of counsel. Search and Seizure, Warrant, Probable cause. Probable Cause. Cellular Telephone.

Indictment found and returned in the Superior Court Department on February 9, 2010.

The case tried before Robert J. Kane, J., and a motion for a new trial, filed on August 4, 2014, was heard by him.

Robert F. Shaw, Jr., for the defendant.
Mary E. O'Neil, Assistant District Attorney, for the Commonwealth.
Chauncey B. Wood, K. Neil Austin, Christopher E. Hart, & Kelly S. Caiazzo, for Massachusetts Association of Criminal Defense Lawyers, amicus curiae, submitted a brief.

[1] Justice Hines participated in the deliberation on this case prior to her retirement.

GAZIANO, J. A Superior Court jury found the defendant guilty of murder in the first degree on the theory of felony-murder, with unarmed robbery as the predicate felony, in the death of Chad Fleming on November 3, 2009. At trial, the Commonwealth's theory was that the defendant, along with his codefendant, Nelson Melo, and two unknown accomplices, robbed the victim of drugs and money, and that the killing occurred in connection with the robbery.[2] The defendant argues in this appeal, as he did in his motion for a new trial, that trial counsel's failure to file a motion to suppress the search of the defendant's cellular telephone constituted ineffective assistance of counsel. In addition, the defendant raises the following claims of error at trial: (1) the evidence was insufficient for a jury to find that the victim's death was connected to the robbery or that the unarmed robbery was committed with conscious disregard for the risk to human life; (2) the instruction on felony-murder was erroneous; and (3) the judge abused his discretion in excluding testimony concerning a statement made by the victim. Finally, the defendant contends that this court should abolish the common-law felony-murder rule.

[2] Nelson Melo was tried separately, and convicted of felony-murder. We affirmed his conviction. See Commonwealth v. Melo, 472 Mass. 278, 279 (2015).

We conclude that the evidence was sufficient to support his conviction, but that the defendant is entitled to a new trial because his trial counsel was ineffective for failing to have filed a motion to suppress the search of his cellular telephone; and the improperly seized evidence from that device, which was introduced at trial, likely influenced the jury's verdict. Because several other issues raised by the defendant may arise upon retrial, we also address these arguments.[3]

1. Facts. We summarize the facts the jury could have found, viewing the evidence in the light most favorable to the Commonwealth, see Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), and reserving some facts for our discussion of specific issues.

The defendant sold large quantities of Percocet pills in areas of southeastern Massachusetts. His codefendant was his source of supply. The codefendant, in turn, obtained his supply of thirty-milligram Percocet pills from the victim, most often through express mail packages shipped from Florida, where the victim lived, to Massachusetts.

Sometime in October, 2009, the defendant became dissatisfied with this arrangement, after the codefendant began shortchanging the victim by paying him less than the full amount

[3] We acknowledge the amicus brief submitted by the Massachusetts Association of Criminal Defense Lawyers addressing the abolition of felony-murder.

had been arranged for the pills, and the victim, angered at not receiving the agreed price, began selling pills directly to customers in Massachusetts, undercutting the defendant's sales. The defendant related his frustration to the codefendant and to a friend, Maurice Butler. He told Butler, who was also a friend of the victim, that he was "getting mad that now [the pills] were going other places."

A few days before November 3, 2009, the defendant attempted to recruit some people to help him rob the victim. He contacted Butler and offered him "a chance for you to make some money . . . if you want to get in on this." Butler had need of the money, but was wary because he thought that the money-making opportunity involved robbing the victim. He told the defendant that the victim trusted him and that he would never rob the victim. After this remark, the defendant ended the conversation.

On November 2, 2009, the defendant called another friend, Michael Matteson. They met at a restaurant, and the defendant asked Matteson if he "wanted to make some extra money" by helping him rob his "connect's connect" for "a bunch of Percs." In exchange for Matteson's assistance, the defendant offered to forgive a $2,000 debt Matteson owed him, and to pay Matteson an additional $5,000. Matteson did not know the drug supplier's

identity, but learned that he was traveling from Florida, and would be arriving the following day.

The defendant told Matteson that the robbery would take place at an apartment owned by the codefendant. The codefendant would use the promise of a drug deal to lure his "connect" to the apartment. The codefendant would bring with him approximately $40,000 in cash, which he purportedly would use to purchase a "few thousand Perc 30's" from the victim. The codefendant would leave the back door open, so that the defendant, Matteson, and others could enter. They would "run in, grab the stuff, and leave." Matteson's role would be to grab the "money and drugs" from the table, and to get out of the house. The defendant would "take care" of the codefendant during the robbery, e.g., would make it appear to the victim as though the codefendant were not involved. The defendant summarized the plan by saying that "[i]t was just supposed to be a quick rip" and "[i]t would be easy," because the victim was young and would be easily intimidated. Matteson did not agree to participate at that point, and the defendant told him to think about it.[4]

[4] On November 3, 2009, the defendant telephoned Michael Matteson and also sent him several text messages in an effort to confirm his participation in the robbery. Matteson answered the text messages vaguely and did not respond to the calls.

On the same day, the defendant visited the codefendant at his house. The codefendant's wife, Kendra Melo,[5] overheard the defendant whispering to her husband that he, or they, would "take care of it" and also whispering "something about wearing a black hat."

On the day of the robbery, November 3, 2009, the codefendant told Michael Stenstream, the second-floor tenant in the building where the robbery was to take place,[6] not to be in the apartment that evening. At some point during the day, Kendra saw the codefendant holding a box full of $58,000 in cash, and talking to someone on the telephone; she heard him say, "[a]m I going to get it back?" Sometime between 7:30 and 8 P.M., the codefendant left his house, wearing a black hat.

When the codefendant arrived at his rental property, he spoke with his sister, Lucia (Lucy) Rodriguez, who lived in the first floor apartment with her husband, Gabriel Rodriguez, and their three children.[7] The codefendant then went upstairs. At approximately 8:30 P.M., he called Kendra. While they were talking, she received a call from the victim. When Kendra told the codefendant the name of the caller, the codefendant

---

[5] Because Kendra Melo shares a last name with the codefendant, her husband, we refer to her by her first name.

[6] The codefendant owned the building.

[7] Because they share a last name, we refer to Lucy and Gabriel Rodriguez by their first names.

instructed her to tell the victim that they would meet at the apartment, rather than at the house where the codefendant and Kendra lived. At approximately 8:45 P.M., Stenstream and his girl friend left their apartment and went to dinner at a nearby restaurant.

Approximately forty-five minutes later, several other individuals arrived at the house and went upstairs. After a few minutes, Lucy and Gabriel Rodriguez heard loud banging coming from the upstairs apartment. It sounded like people running around. The noise lasted a few minutes and caused the chandelier in the Rodriguez's apartment to shake. About a minute later, the codefendant came downstairs. Lucy heard more loud noises from upstairs. They sounded like "a fight going on" and "stuff breaking." The codefendant ran out of the apartment, heading for the stairs. Before he could run up the stairs, what sounded like three sets of footsteps ran down the stairs; Lucy then saw an automobile carrying what looked like three people pull out of her driveway and drive away. The codefendant came downstairs looking "a little scared," and grabbed some bags of frozen peas from the freezer. Shortly after these individuals left, Lucy heard a voice she did not recognize coming from upstairs.[8] A little while later, Lucy went upstairs, and saw the

[8] As discussed during a sidebar hearing, Lucy had testified at the codefendant's trial that she had heard the person say,

codefendant bending over the victim, who was unconscious and laying on a bed. She did not see anyone else in the apartment. She attempted to determine whether the victim had a pulse, but was unable to locate one. At the codefendant's request, she left to go down the street and get his wife, Kendra, to help him take the victim to the hospital.

At some point that evening, the defendant called Kendra; he sounded out of breath and said, "[t]hat kid was tough."

A few minutes before 10 P.M., Stenstream and his girl friend returned to their apartment. There was blood on the carpeting, the walls, and the sofa in the living room. Some decorations had been knocked over and were broken. Stenstream found the codefendant in one of the bedrooms, standing over the victim, who was lying face up on the bed. The codefendant looked panicked, and was imploring the victim to wake up.

After some discussion, the codefendant agreed to take the victim to the hospital. Stenstream helped carry the lifeless victim downstairs to the victim's vehicle. Gabriel opened the door, and Stenstream and the codefendant placed the victim inside the vehicle. Stenstream then cleaned up his apartment by removing blood stains from the floor and walls. He found two large plastic "zip ties," one in the living room and one in the

---

"I'm okay. I'm okay." The judge at the defendant's trial permitted her to testify that she heard a voice speaking, but precluded all testimony about the content of the statement.

kitchen. The one in the living room had been cut, and one had blood on it. He put both zip ties in the trash.[9] Stenstream also found a wallet on the floor near the bed in the spare bedroom; it contained the victim's driver's license.

The codefendant arrived at the hospital with the victim at approximately 11 P.M. An emergency department physician determined immediately that the victim, who was in the beginning stages of rigor mortis, was dead. The physician noted a cut on the victim's head, blood on his face and nose, and dried blood around his mouth. The medical examiner determined that the victim had been severely beaten; he had deep lacerations and abrasions on his head, internal injuries to his torso, bruises and abrasions on arms and legs, and two broken ribs; none of those injuries would have been sufficient to cause death. The cause of death was asphyxia by strangulation.

On November 5, 2009, two days after the victim's death, the defendant met with Matteson. He told Matteson to "get the battery out of [Matteson's cellular telephone], so that no one can hear the conversation." The defendant said that if the police asked Matteson where he had been in the evening of November 3, 2009, he was to say that he had been with the defendant at a restaurant.

---

[9] In a search of Stenstream's apartment later that night, police found two "extremely large" zip ties in the trash.

A few days after the victim's death, when the codefendant had been arrested, the defendant called Kendra and told her he would give her some money. Kendra went to the defendant's house, and he gave her $5,000. The defendant told Kendra that he "hop[ed] that [the codefendant] wouldn't rat him out."

2. Trial proceedings. At trial, the Commonwealth proceeded on all three theories of murder in the first degree: deliberate premeditation, extreme atrocity or cruelty, and felony-murder, with the predicate felony of unarmed robbery. The jury convicted the defendant of first degree felony-murder. His motion to set aside the verdict was denied by the trial judge. The defendant filed a motion for a new trial in the Superior Court, arguing that he had received ineffective assistance of counsel, and also filed a notice of appeal to this court. The matter was remanded to the Superior Court for consideration of the motion for a new trial. After that motion was denied, the defendant's appeal from the denial was consolidated with his direct appeal.

3. Discussion. a. Sufficiency of the evidence. The defendant contends that he was not present "when [the codefendant] unilaterally strangled the victim for reasons contrary to any established intention or plan" of the conspirators, after the unarmed robbery had been completed and he and two others had left the scene of the robbery. Therefore,

he argues, the strangulation did not occur during the course of the robbery, and he could not have committed the predicate felony of unarmed robbery with a conscious disregard for human life.

We conclude that, viewed in the light most favorable to the Commonwealth, the evidence was sufficient to support a conviction of felony-murder. See Commonwealth v. Latimore, 378 Mass. at 677. "The felony-murder rule 'imposes criminal liability for homicide on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise.'" Commonwealth v. Hanright, 466 Mass. 303, 307 (2013), overruled on another ground by Commonwealth v. Brown, 477 Mass. 805 (2017), quoting Commonwealth v. Matchett, 386 Mass. 492, 502 (1982). Once a defendant participates in the underlying felony, with the intent or shared intent to commit that felony, he or she becomes liable for a death that "followed naturally and probably from the carrying out of the joint enterprise" (citation and emphasis omitted). Hanright, supra. See Commonwealth v. Tejeda, 473 Mass. 269, 272 (2015) (felony-murder rule imposes "vicarious criminal liability for every act resulting in death committed by a joint venturer in furtherance of the joint venture, that is, the act of one is treated as the act of all"); Commonwealth v. Devereaux, 256 Mass. 387, 392 (1926) ("it is no defen[s]e for the associates engaged with

others in the commission of a robbery, that they did not intend to take life in its perpetration, or that they forbade their companions to kill").

The Commonwealth did not contend that there had been any plan to kill or injure the victim during the course of the unarmed robbery, and, indeed, conceded that there had been no plan to do so. The Commonwealth also conceded that the evidence could have supported the conclusion that the victim was alive and had not suffered any life threatening injuries when the defendant left the apartment and drove away, and that the victim had been strangled by the codefendant. Contrary to the defendant's argument, however, the Commonwealth is not required to prove that the killing occurred during the course of the predicate felony. Commonwealth v. Ortiz, 408 Mass. 463, 466 (1990). For purposes of felony-murder, the homicide and the predicate felony "need only to have occurred as part of one continuous transaction"; and the connection is sufficient as long as the predicate felony and the homicide "took place at substantially the same time and place." Id. The killing may occur after the completion of the predicate felony as long as the killing is "within the res gestae of the felonious conduct" (quotation omitted). Commonwealth v. Alcequiecz, 465 Mass. 557, 565 (2013), quoting Commonwealth v. Blackwell, 422 Mass. 294, 300 n.2 (1996). See Commonwealth v. Rogers, 459 Mass. 249, 251,

255-256, cert. denied, 565 U.S. 1080 (2011) (killing is part of robbery where shoplifter fled store after stealing item and fatally stabbed employee while resisting efforts to take him back to store).

Here, the evidence would have allowed a reasonable juror to find that the codefendant's act of strangling the victim was part of a single continuous transaction, begun with the defendant's plan to rob the victim of his large supply of Percocet pills, and to retain the purported "buy" money that the codefendant brought to the scene. The robbery and the strangulation occurred inside Stenstream's apartment, within a thirty-minute time frame, between 9:30 P.M. and 10 P.M.[10] Moreover, the jury could have found that the killing was causally related to the robbery. As we stated in Commonwealth v. Alcequiecz, 465 Mass. at 566, and Commonwealth v. Gordon, 422

[10] Stenstream and his girl friend left his second floor apartment at "roughly" 8:45 P.M. At 9 P.M., the codefendant arrived at the house and spoke to his sister, Lucy, in her first floor apartment. At approximately 9:19 P.M., Kendra spoke to the victim and told him to go to Stenstream's apartment rather than to the house were the codefendant lived. The victim arrived at approximately 9:30 P.M. Stenstream returned to the house at approximately 9:45 P.M., sent a text message to Nelson while waiting in the driveway, and entered his apartment at approximately 9:50 P.M. There, he found the unconscious victim laying on the bed with the codefendant hunched over him. At 9:55 P.M., while the codefendant was upstairs and Lucy was in her first-floor kitchen, she sent the codefendant a text message asking "who those three guys are that just left," whether they would be coming back, and if anyone had been hurt. He did not respond to the text message, but came back downstairs to the kitchen "a few minutes" later.

Mass. 816, 851 (1996), "were it not for the underlying felony, it is probable that [the victim] would not have been . . . [strangled]." See Commonwealth v. Dellelo, 349 Mass. 525, 529-530 (1965) (if killing occurred after robbery was complete, but during defendant's escape or flight, "the killing is referable to the robbery").

In addition, viewed in the light most favorable to the Commonwealth, the evidence also supported a reasonable inference that the defendant committed the unarmed robbery with conscious disregard for the risk to human life. The defendant's plan, as he reported it to Matteson, involved luring the victim to an apartment to participate in a $40,000 drug transaction, then having multiple assailants rush into the apartment while the purported drug deal was taking place. The multiple individuals were necessary to overpower and restrain the victim and to pretend to overpower the codefendant, while grabbing the money and drugs from the table and running from the apartment.

Although the defendant assured Matteson that "[i]t would be an easy rip," because of the victim's youth and likely level of fear when confronted with multiple attackers, a reasonable juror could have inferred that the victim resisted and the robbery turned violent. The defendant indicated that the victim put up a fight, telling Kendra, "[t]hat kid was tough." The victim sustained multiple blunt force injuries, including a laceration

on his scalp penetrating almost to the bone; multiple contusions and abrasions to the head and face; abrasions on the forearms, wrists, hands, and legs; soft tissue damage to the torso; and two fractured ribs which punctured a lung. See Commonwealth v. Scott, 428 Mass. 362, 365 (1998) (conscious disregard for risk to human life where defendant chased down victim after drug deal went awry, hit victim in face, kept striking victim as he attempted to flee, and continued assault as two acquaintances joined in, knowing that one was armed with knife); Commonwealth v. Lopez, 80 Mass. App. Ct. 390, 393 (2011) (grand jury heard sufficient evidence of conscious disregard for human life where defendant "sucker punched" delivery driver, causing victim to fall backward down flight of stairs).

b. Ineffective assistance of counsel. Where a defendant has been convicted of murder in the first degree, we review a claim of ineffective assistance of trial counsel under the more favorable standard of a substantial likelihood of a miscarriage of justice standard, in accordance with G. L. c. 278, § 33E. See Commonwealth v. Vargas, 475 Mass. 338, 358 (2016). "We consider whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." Id., quoting Commonwealth v. Lessieur, 472 Mass. 317, 327, cert. denied, 136 S. Ct. 418 (2015).

The defendant argued in his motion for a new trial that counsel's failure to challenge his unlawful detention, and the subsequent improper interrogation, constituted ineffective assistance. He maintained also that, as a result of having been subject to an illegal custodial interrogation, police improperly seized his cellular telephone without probable cause. In addition, the defendant argued that the subsequently-issued warrant authorizing the search of the telephone was invalid. To prevail on this claim, the defendant was required to establish, by a preponderance of the evidence, that trial counsel overlooked a meritorious motion to suppress, see Commonwealth v. Chatman, 466 Mass. 327, 335 (2013), S.C., 473 Mass. 840 (2016), citing Commonwealth v. Banville, 457 Mass. 530, 534, 539 (2010), and that trial counsel's failure to file such a motion created a substantial likelihood of a miscarriage of justice. Commonwealth v. Banville, supra at 534.

In denying the defendant's motion for a new trial, the trial judge determined that, because the Commonwealth did not introduce the statements the defendant made to police, the only "fruit" of the asserted police misconduct was the search and seizure of the defendant’s cellular telephone. The judge concluded that the search and seizure of the cellular telephone could not be the "fruit of the poisonous tree" because police had obtained a search warrant after seizing the telephone, and

the warrant "was obtained without exploitation of the assumed illegal seizure." The judge also determined that the search warrant affidavit established probable cause to believe that the cellular telephone would contain evidence of the crime under investigation.

We review a judge's denial of a motion for a new trial to determine whether there was "a significant error of law or other abuse of discretion," Commonwealth v. Grace, 397 Mass. 303, 307 (1986), according "special deference to the action of a motion judge who was also the trial judge." Id. See Commonwealth v. Cavitt, 460 Mass. 617, 625 (2011), citing Grace, supra. Having examined the four corners of the warrant affidavit, we conclude that the search warrant affidavit did not establish probable cause to search the defendant's cellular telephone, and the judge's decision to deny the defendant's motion for new trial on this basis was error.

The Fourth Amendment to the United States Constitution, and art. 14 of the Massachusetts Declaration of Rights, require that a search warrant may issue only upon a showing of probable cause. Commonwealth v. Valerio, 449 Mass. 562, 566 (2007). To establish probable cause to search, the facts contained in the warrant affidavit, and the reasonable inferences to be drawn therefrom, must be sufficient for the issuing judge to conclude that "a crime had been committed . . . and that items described

in the warrant were related to the criminal activity and probably in the place to be searched" (citation omitted). Commonwealth v. O'Day, 440 Mass. 296, 298 (2003).

In reviewing a determination that probable cause existed to issue a search warrant, we consider the facts contained within the "four corners of the [warrant] affidavit" (citation omitted), O'Day, supra at 297, and the reasonable inferences to be drawn from them. Id. at 298. See Commonwealth v. Martinez, 476 Mass. 410, 415 (2017). A warrant affidavit must be considered in "an ordinary, commonsense manner without hypertechnical analysis" (citation omitted). Commonwealth v. Perez-Baez, 410 Mass. 43, 46 (1991).

The affidavit in this case stated:

> "[On] November 4, 2009, I seized three [cellular telephones] pursuant to Search Warrant . . . That two of these telephones belonged to the victim of a homicide, Chad Fleming, and a third belonged to the person who transported Fleming to the hospital. That [Nelson Melo] was being interviewed and during his interview at the police station he had a second telephone that he was using and he voluntarily provided this telephone to the police officers present. That a review of this telephone showed that [Melo] made several telephone calls to a subject later identified as Aaron Morin before and after the suspected murder time of Fleming. That later in the day Morin was in the police station and voluntarily surrendered his cellular telephone. That specifically these telephones contain or may contain information which shows the activities of the individuals involved prior and after the death of Chad Fleming by pinpointing who was spoken to and when."[11]

[11] The affidavit erroneously identified the victim as "the person who transported Fleming to the hospital", and incorrectly

Whether there is probable cause to believe that a cellular telephone contains evidence of a crime is a fact-intensive inquiry, and must be resolved based on the particular facts of each case. See Commonwealth v. White, 475 Mass. 583, 594 (2016). Nonetheless, some guidance may be drawn from our recent jurisprudence on the search of cellular telephones. To begin, police may not rely on the general ubiquitous presence of cellular telephones in daily life, or an inference that friends or associates most often communicate by cellular telephone, as a substitute for particularized information that a specific device contains evidence of a crime. See White, supra, at 590-591 ("even where there is probable cause to suspect the defendant of a crime, police may not seize or search his or her cellular telephone to look for evidence unless they have information establishing the existence of particularized evidence likely to be found there").

In addition, information that an individual communicated with another person, who may have been linked to a crime, without more, is insufficient to establish probable cause to search either individual's cellular telephone. See Commonwealth v. Fulgiam, 477 Mass. 20, 34, cert.

---

identified the victim as the individual who made calls to the defendant shortly before and after the victim was strangled.

denied, S. Ct. (2017). In that case, we considered whether an application for disclosure of stored wire and electronic communications, pursuant to 18 U.S.C. § 2703 (d), established probable cause to obtain the contents of the text messages on a defendant's cellular telephone. Id. at 30, 34. We noted that the application "established a personal relationship" between the homicide victim and the defendant, that the defendant had sent text messages to the victim and his alleged accomplice on the day of the murder, and that "the circumstances of the murders suggested a connection to drugs." Id. These facts suggested that the text messages were a "matter of importance in the investigation," but were not sufficient to establish probable cause. Id. at 34-35. We concluded that, "Other than the cellular telephone communication between [the victim] and [the defendant], the application failed to recite any facts that might have implicated [the defendant] in the crimes or suggested that the content of his text messages would aid in the apprehension of a suspect in the murders." Id. at 35.

By contrast, in Commonwealth v. Dorelas, 473 Mass. 496, 502-503 (2016), we considered whether a warrant affidavit established probable cause to search a cellular telephone for evidence of communications that would link the defendant to a shooting. According to the affidavit, witnesses had reported

that the defendant had been receiving threats on his cellular telephone, and was seen using his telephone while arguing with someone immediately prior to the shooting. Id. at 503. We determined that this was "sufficient to establish probable cause to believe that the defendant's iPhone [cellular telephone] likely contained evidence of multiple contentious communications between himself and other persons in the days leading up to the shooting . . . ." Id. Compare Commonwealth v. Broom, 474 Mass. 486, 496 (2016) (affidavit failed to point to "particularized evidence" suggesting that contents of cellular telephone were likely to contain information linking defendant to victim or relating to death of victim); Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 750-751 (2017) (no probable cause to search for text messages where affidavit merely established that defendant used cellular telephone four hours before killing and used it to contact family members near time of killing).

Here, the affidavit stated that the codefendant "made several telephone calls to [the defendant] before and after" the time of the homicide.[12] At best, it established a personal

[12] The affidavit identifies the codefendant as the person who transported a "homicide victim" to the hospital. It does not mention the unusual circumstances of this trip to the emergency department, such as the victim being in rigor mortis on arrival and the codefendant's conflicting statements to hospital staff and police about what had happened to the victim. Thus, based on the four corners of the affidavit, a magistrate would be unable to determine whether the codefendant was a good

relationship between the individual who brought the victim to the hospital and the defendant, and that they had communicated by cellular telephone before and after the killing. Nothing in the affidavit indicated the defendant's cellular telephone would contain particular evidence related to the crime under investigation. See Dorelas, 473 Mass. at 501-502. That the defendant used his cellular telephone at unspecified times to communicate with someone implicated in the crime "elevated their relationship to a matter of importance in the investigation[;], it did not, without more, justify intrusion into the content of that communication" (emphasis omitted). Fulgiam, 477 Mass. at 34. Based on the limited information presented, the affiant's statement that the defendant's telephone would lead to evidence of "the individuals involved" in the victim's death is merely conclusory and cannot support a determination of probable cause.

Having determined that the judge erred in finding that the warrant affidavit established probable cause to search the defendant's cellular telephone, and that trial counsel overlooked a meritorious argument that should have been raised in a motion to suppress, we turn to a consideration whether this

---

Samaritan, who sought medical treatment for a mortally injured friend, or whether his conduct suggested some involvement in the victim's death.

error created a substantial likelihood of a miscarriage of justice and likely would have influenced the jury's verdict. See Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014). After a careful review of the trial record, we conclude that the evidence obtained from the defendant's cellular telephone likely would have had an impact on the jury's thinking and the verdict.

One of the police officers who interviewed the defendant testified at trial that he seized the defendant's cellular telephone during the course of the interrogation by asking the defendant to hand it over, and that the defendant did so voluntarily.[13] The Commonwealth introduced it in evidence, displayed the content of some of the text messages to the jury, and introduced a report detailing all of the data recovered from the device. Among the items recovered were a number of text messages between the defendant and Matteson on November 2, 2009 (the day of their meeting), and November 3, 2009 (the day of the robbery and the victim's death). Most damaging to the defendant was a series of text messages he sent to Matteson on November 3,

[13] Because of the result we reach, we do not address the defendant's arguments about the conduct of the interrogation or the seizure of the cellular telephone. But see Commonwealth v. Baye, 462 Mass. 246, 252-262 (2012).

2009.[14] The messages began at 3:47:08 with, "Aight makin sure u still in be ready 1 hour." A few minutes later, at 3:50:50, the defendant texted to Matteson, "Do not say anything to noone." Less than a minute later, the defendant sent a reply text referring to his "crew": "No go 4 him old school cr[e]w he was an extra." Within another few minutes, he texted, "be ready like 45." At 3:57:46, the defendant texted again, "where u wanna meet me?"

The text messages were central to the Commonwealth's case, and were emphasized at multiple stages during the course of the trial. The Commonwealth relied on the text messages to corroborate[15] Matteson's testimony implicating the defendant in a plan to rob the victim, and emphasized the messages from the beginning of the trial through its closing argument. In her opening statement, the prosecutor summarized the Commonwealth's case, and foreshadowed the central role of the text messages in the prosecution:

> "[N]ot only are you going to hear from Mr. Matteson about his contact and conversations with the defendant, you're going to see text messages between the two of them on November 3, 2009, from one of the phones that was seized from the defendant. They are still on his phone today. And you're going to see that they were text messages between Mr. Matteson and this defendant. The defendant

[14] Matteson had deleted the text messages from his cellular telephone.

[15] With respect to evidence that is corroborative of other evidence, see Commonwealth v. Cowels, 470 Mass. 607, 621 (2017).

> wanted to know, 'Are you still in?' Mr. Mattson asking, 'Who else is going to be involved?' The defendant responds, 'We're going with the old school crew.' Mr. Matteson asks about a couple of names. The defendant tells him, 'It's going to be 45 minutes or an hour, I have got to run an errand first, are you in?'"

In pointing out the potential impact of the text messages, the prosecutor told the jury, "[v]ery important, ladies and gentlemen. So not only are you going to hear from Mr. Matteson, but you're actually going to see it in writing coming from this defendant's phone to Mr. Matteson's phone."

In his closing,[16] the prosecutor returned to the topic of the text messaging, referring to the evidence seized from the cellular telephone as "very compelling" and "critical." He urged the jury to consider the messages in the same light: "The phones are very compelling evidence, ladies and gentlemen, against the defendants in this case, against [the codefendant] as a suspect when he was arrested, and against [the defendant] as well." At another point, he argued that "[t]hose phones are critical evidence because, if you take the witnesses here and you could say, geez, there's some question about the witness. But if we look at the witnesses and you look at the statements that [the defendant] made, and you look at the text messages, look at the use of zip ties, you look at the phone records, I'd

[16] There were two prosecutors at trial. One presented the opening statement and the other conducted the closing argument.

suggest to you that the evidence in this case is very compelling."

The evidence of the text messages seized from the defendant's cellular telephone was central to the Commonwealth's case, and the Commonwealth emphasized it throughout the trial. Therefore we conclude that the improperly-admitted evidence likely influenced the jury's verdict, see Commonwealth v. Gray, 463 Mass. 731, 750 (2012), and the defendant's conviction must be vacated.

c. Other issues. We briefly discuss several issues that arose at trial that might recur at any new trial.

i. Instruction on merger. The defendant contends that the judge abused his discretion in declining to instruct the jury on merger. He argues that the jury did not find two independent assaults, one sufficient to satisfy the elements of robbery and a separate one that caused the victim's death. See Commonwealth v. Kilburn, 438 Mass. 356, 359 (2003). The defendant did not request an instruction on merger at trial, nor did he object to the absence of such an instruction. Because the judge was not required to provide the jury, sua sponte, with a merger instruction, there was no error. Commonwealth v. Christian, 430 Mass. 552, 556 (2000), overruled on another ground by Commonwealth v. Paulding, 438 Mass. 1 (2002). See discussion, infra.

The merger doctrine functions as a limitation on the application of the felony-murder rule. See Commonwealth v. Gunter, 427 Mass. 259, 272 (1998), S.C., 459 Mass. 480, cert. denied, 565 U.S. 868 (2011). It requires the Commonwealth to establish that a defendant committed or attempted to commit a felony independent of the act of personal violence which caused the victim's death. Commonwealth v. Wade, 428 Mass. 147, 153 (1998), S.C., 467 Mass. 496 (2014) and 475 Mass. 54 (2016). Commonwealth v. Quigley, 391 Mass. 461, 465 (1984), cert. denied, 471 U.S. 1115 (1985). The rationale for the merger doctrine is that absent this requirement, "the distinctions among homicides would be rendered meaningless: all murders in the second degree and manslaughters could be enhanced to murder in the first degree based on the felony-murder theory with assault as the underlying felony." Gunter, 427 Mass. at 272. See Crump & Crump, In Defense of the Felony Murder Doctrine, 8 Harv. J. L. & Pub Pol'y 359, 377 (1985) (merger doctrine prevents prosecution from bootstrapping lesser-included homicide offenses into murder).

We have relied upon the merger doctrine to ensure that "not every assault that results in death will serve as a basis for murder in the first degree on the theory of felony-murder." Commonwealth v. Scott, 472 Mass. 815, 819 (2015). The Commonwealth therefore is required to prove that "the conduct

which constitutes the felony be 'separate from the acts of personal violence which constitute a necessary part of the homicide itself.'" Gunter, 427 Mass. at 272, quoting Quigley, 391 Mass. at 466. See Commonwealth v. Bell, 460 Mass. 294, 301 (2011) (no merger between homicide and predicate felony of armed assault in dwelling where defendant assaulted multiple occupants in dwelling in addition to homicide victim); Kilburn, 438 Mass. at 362 (no merger between fatal shooting and predicate felony of armed assault in dwelling based on evidence of earlier assault on victim). See also Model Jury Instructions on Homicide, at 53 n.121 (2013).

Notwithstanding the defendant's argument to the contrary, the merger doctrine does not apply in cases such as this one, where the predicate felony has an intent or purpose separate and distinct from the act causing physical injury or death. "[T]he conduct which constitutes the felony must be separate from the acts of personal violence which constitutes a necessary part of the homicide itself. Thus, although rape, arson, robbery and burglary are sufficiently independent of the homicide, . . . aggravated battery toward the deceased will not do for felony murder . . ." (quotations and citation omitted). Quigley, 391 Mass. at 466. As particularly relevant here, the merger doctrine does not apply where the predicate felony is a robbery. See Christian, 430 Mass. at 556. "It is the first element of

the crimes of robbery and armed robbery, namely the stealing or taking of property, that qualifies them for application of the felony-murder rule. It is the intent to do that conduct (here stealing from [the victim]) that serves as the substitute for the malice requirement of murder." Id. See also Commonwealth v. Tevlin, 433 Mass. 305, 315 (2001) (element of intent to steal or to take property makes felony-murder rule applicable to offense of armed robbery). Accordingly, the judge was not required to instruct the jury on merger.[17]

ii. Hearsay exception. The defendant sought to introduce testimony by Lucy concerning the content of a statement she heard being made by the voice issuing from the second floor after the three individuals had fled the upstairs apartment and drove away. The judge conducted a voir dire hearing to determine whether Lucy would be permitted to testify that, after the footsteps had run down the stairs out the front door, she heard an unfamiliar voice from the upstairs apartment say, "I'm okay, I'm okay." The judge considered two grounds for admission of the content of the statement: the hearsay exception for a then-existing mental, emotional or physical condition, see Mass. G. Evid. § 803(3)(A) (2016), and the exception for third party

[17] For the same reasons, we reject the defendant's additional claims that the jury heard insufficient evidence of an independent assault, and that the judge was required to provide the jury with a special verdict form in order to indicate the separate assault.

culprit evidence. See Mass. Guide Evid. § 1105 (2016). Ultimately, he decided that Lucy could testify that she heard a voice she did not recognize, but that she could not testify to the content of the statement.

On appeal, the defendant argues that the content of the victim's statement should have been admitted for any one of three reasons: (1) it was an excited utterance; (2) it was a statement of the declarant's then-existing physical condition; or (3) it was third-party culprit evidence. The defendant also argues that trial counsel's failure to object to its exclusion constituted ineffective assistance of counsel.

We conclude that the judge did not abuse his discretion in finding that there was an inadequate foundation to permit the introduction of this evidence. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (abuse of discretion standard). Lucy was able only to testify that she overheard a "vague" voice from the upstairs apartment saying "I'm okay, I'm okay." She could not tell the speaker's gender or the speaker's tone of voice. The judge concluded the statement was ambiguous and potentially misleading. He noted, in the context of discussing third-party culprit evidence, "I'm okay could be a statement of I don't want the police here, and don't call the police. And I'm okay means what from a layperson? What does it mean? How much service does it provide this jury in understanding to what degree he

[the victim] was functioning? We know from alternative evidence, which is within the hearsay rule, that we can prove he was alive because he was speaking and articulating words, and I'm going to permit that."

iii. Felony-murder. Finally, the defendant urges this court to adopt the direction taken by several other countries and some other States and abolish the common-law doctrine of felony-murder. We declined to abolish felony-murder in Commonwealth v. Brown, 477 Mass. 805 (2017). Instead, we narrowed the application of the felony-murder rule to eliminate felony-murder as an independent theory of liability. Id. at 807. As a result, a defendant no longer may be convicted of murder absent proof of one of the three prongs of malice. Id. Accordingly, felony-murder is limited to its statutory role under G. L. c. 265, § 1, as an aggravating element of murder. Id. Any new trial in this case, therefore, would be subject to the rule announced in Brown, which "appl[ies] only to cases that go to trial after our adoption of the change." Id. at 834 (Gants, C.J., concurring).

4. Conclusion. The defendant's conviction is vacated and set aside. The matter is remanded to the Superior Court for further proceedings consistent with this decision.

So ordered.