SJC-12889

COMMONWEALTH vs. FELIX MELENDEZ.

Suffolk. April 8, 2022. - September 12, 2022.

Present: Gaziano, Lowy, Cypher, & Kafker, JJ.

Homicide. Constitutional Law, Assistance of counsel, Double jeopardy. Cellular Telephone. Search and Seizure, Affidavit, Probable cause. Probable Cause. Evidence, Prior misconduct. Practice, Criminal, Assistance of counsel, Double jeopardy, Capital case.

Indictments found and returned in the Superior Court Department on September 26, 2013.

The cases were tried before Kenneth V. Desmond, Jr., J.; following mistrial, the remaining cases were tried before Kenneth W. Salinger, J.

Brett J. Vottero for the defendant.
Andrew Doherty, Assistant District Attorney, for the Commonwealth.

CYPHER, J. In 2013, the defendant, Felix Melendez, was indicted on charges of murder in the first degree of Hilda DeVincenzo (victim), unarmed robbery of a person aged sixty or older, and receiving stolen property. At his first trial, the

jury found the defendant guilty of receiving stolen property but were unable to reach a verdict on the remaining charges. The defendant was tried for a second time on the murder and robbery charges, and the jury again were unable to reach a verdict. At his third trial on these charges, the jury found the defendant guilty of murder in the first degree on a theory of extreme atrocity or cruelty and not guilty of unarmed robbery of a person aged sixty or older. The defendant was sentenced to life in prison without the possibility of parole on the murder conviction and to a term of from three years to three years and one day on the conviction of receiving stolen property. This appeal followed and is before us pursuant to G. L. c. 278, § 33E. After the appeal was docketed in this court, the defendant filed a motion for a new trial based on ineffective assistance of counsel, which we consolidated with his direct appeal.

The defendant raises five arguments. First, he argues that trial counsel was ineffective for failing to file a motion to suppress personal information collected from the defendant's cell phone on the ground that the warrant to search the cell phone was not supported by probable cause. Second, he argues that the trial judge erred in admitting evidence that the defendant had a history of opiate addiction and used heroin on occasions not related to the alleged crimes. Third, the

defendant argues that the evidence did not suffice to establish his guilt beyond a reasonable doubt on the murder charge and that the judge therefore erred in denying his motion for a required finding of not guilty. The defendant further argues that a fourth trial for murder would violate State and Federal double jeopardy principles, and that we therefore should dismiss the indictment for murder. Finally, the defendant argues that he should not have been tried for a third time and that we should dismiss the indictment for that reason and prohibit the retrial of any criminal charge after two mistrials due to a hung jury have been declared on that charge.

For the reasons stated infra, we conclude that there exist no grounds for reversal. After conducting a thorough review of the record, we also conclude that there is no reason to exercise our authority under G. L. c. 278, § 33E, to grant a new trial or to reduce the verdict. We therefore affirm the defendant's convictions and deny his motion for a new trial.

Background. "The jury could have found the following facts. We reserve other details for discussion of particular issues." Commonwealth v. Smith, 459 Mass. 538, 539 (2011).

1. Discovery of the victim's body. The victim's house, which was located in Chelsea, has three units and a basement, with common entrances on Washington Avenue and Prospect Avenue. Both entrances open to common staircases accessible from each

unit. The basement is accessible from the staircase on the Washington Avenue side of the house and from a half door located outside the Washington Avenue entrance. The victim, who was eighty-eight years old at the time of her death, lived on the second floor; she rented the first-floor apartment to two tenants, and the third-floor apartment to the defendant and his girlfriend.

On July 3, 2013, at approximately 1:30 P.M., one of the first-floor tenants was having trouble accessing his apartment. He informed the victim, and the victim gave him a spare key. The tenant used the spare key to access his apartment, and then immediately returned the key to the victim before returning to his apartment.

Later that afternoon, between approximately 3:30 and 4:30 P.M., the same first-floor tenant was in the living room of his apartment, directly below the room in which the victim's body later was discovered. From overhead, he heard the sound of someone running and a scream, followed by a bang. At trial, the first-floor tenant identified the scream as having been the victim's. He also testified that, if someone had come down the stairs from the second floor, he would have heard them do so from anywhere in the first-floor apartment. He did not hear anyone come down the stairs.

On July 7, at approximately 12:45 A.M., Chelsea firefighter Paul Doherty responded to a report of an electrical fire in the basement of the house. When he arrived, no smoke or flames were apparent from the outside of the house. The half door to the basement was open, and Doherty entered. There was no smoke in the basement, but it smelled as if something had been burning, and there was charring on one of the basement walls. The defendant, a thirty-five year old man who was six feet tall and 220 pounds was in the basement speaking with firefighters. The defendant told Doherty that his girlfriend had smelled smoke and that he had gone into the basement, where he discovered the fire, which he suspected was an electrical fire, and extinguished it.

As Doherty was about to leave, the deputy chief firefighter asked him to check on the occupant of the second-floor apartment, who had not been seen in a few days. The defendant unlocked the Washington Avenue entrance to the house and led Doherty and another firefighter up the stairway to the second-floor landing. The door to the victim's apartment was locked. One panel of the door to the apartment appeared to have been replaced with a piece of wood. Without first knocking or calling out to anyone in the apartment, the defendant began to strike the door around the wood panel. Doherty asked him to stop and searched for another way to enter. After Doherty and

the other firefighter went out to the rear porch, the defendant called out to them that he had been able to open the door. He appeared to have gained entry by reaching through the damaged panel.

The defendant entered the apartment first, and the firefighters entered behind him. Doherty immediately smelled the odor of a decomposing body. The entrance opened into a kitchen, which had doorways leading to a bedroom, a hallway, and, farthest from the entrance, a dining room. Upon entering, the defendant went directly into the dining room. The victim lay face down on the floor of the dining room dressed only in a brassiere and underwear. Blood was visible on her head and in her hair. The victim's body had not been visible from the entrance. Upon seeing the victim's body, the defendant became distraught. The firefighters asked him to leave the room, and he went back into the kitchen.

The apartment was generally clean and tidy. The victim's bedroom, however, appeared to have been ransacked. Drawers had been pulled out of the bureau and nightstand and emptied onto the bed and floor, and the bed covers had been pulled up over the pillows, partially exposing the mattress.

Additional officers were summoned, and Chelsea police officer Augustus Casucci arrived at the house soon afterward. Casucci and the two firefighters went up to the victim's

apartment. The defendant attempted to go into the victim's apartment as well, but Casucci told him not to do so. The defendant appeared to be excited and nervous. After Casucci entered the victim's apartment, the defendant went up to the third-floor apartment, and then came down to the second-floor apartment and asked whether he could enter. He stated that the keys to his car might be inside. He was not allowed to enter. Then, while two other officers who had arrived were on the rear porch of the second-floor apartment, they heard footsteps overhead on the third-floor porch. The defendant had come out onto the porch above and was smoking a cigarette.

2. Investigation. An autopsy of the victim revealed injuries to her neck, including fractures to her thyroid cartilage, which were consistent with compression or blunt force trauma. Her sternum and all but five of her ribs had been broken. She also had blunt force injuries on all of her extremities, and either blunt force or sharp force injuries to her head. Soft tissue hemorrhaging around the bone and cartilage fractures indicated that the injuries were inflicted prior to her death. The Commonwealth's expert testified that either the injuries to the victim's neck or those to her chest could have caused her death.

The victim's son examined the contents of the apartment to determine whether any of the victim's property had been removed

and provided investigators with a list of missing items. All of the victim's jewelry was missing, including, specifically, a platinum or white gold ring with a row of diamonds, a gold wedding ring, a white gold pinky ring with two stones, a gold necklace with a pendant in the shape of the letter "H," and a gold necklace with a crucifix pendant. The victim's son described the band of the diamond ring as being thin and worn. The victim's credit card, checkbook, and cell phone, as well as a strong box and the keys to the other apartments in the house, also were missing.

Detectives checked various pawn shops in the area to determine whether any of the victim's missing jewelry had been sold there. On July 8, 2013, detectives learned that, on July 5, the defendant had sold some items at a jewelry store in Everett for $130. The sale records included a copy of the defendant's driver's license. The records indicate that, initially, the person selling the items was identified as "Frank A.," although this name was crossed out and the defendant's name was written in its place. Among the items sold on July 5 were a gold wedding band and a platinum or white gold ring with a row of diamonds. The band of the diamond ring that the defendant sold was bent and worn. The victim's son identified this diamond ring as the one belonging to the victim.

Detectives obtained the defendant's cell phone records from his cellular service provider pursuant to a warrant. These records showed that between 6:58 P.M. and 7:42 P.M. on July 3, 2013, the defendant made seven calls to four different pawn shops or jewelry buyers in the Boston area. He had made no such calls in the week preceding July 3. The defendant also called two pawn shops on the morning of July 6.

On July 9, 2013, detectives searched the defendant's apartment pursuant to a search warrant. A white gold or platinum diamond engagement ring was found underneath the mattress of the defendant's bed. The victim's son recognized this ring as the victim's engagement ring. A latent fingerprint on a plastic bag on the floor of the victim's bedroom matched the fingerprint of the defendant's left ring finger.

3. The defendant's statements to police officers. While police officers were at the house on July 7, 2013, the day the victim's body was discovered, one officer conducted interviews with the occupants of the first-floor and third-floor apartments of the house, including the defendant, as part of the investigation. The defendant told the officer that, on July 3, he had driven his girlfriend to work in the morning and returned to their apartment at around 7:30 or 8 A.M. At around noon, the defendant left to go to a store and to visit a friend, and returned at around 3 P.M. The defendant said that at that time

he saw the first-floor tenant speaking with the victim on the second-floor landing about having trouble accessing his apartment. The victim gave the first-floor tenant a spare key. A short time later, as the defendant was coming down the stairs, the victim told him that the lights in her apartment were not working. The defendant said that he went into her apartment to confirm that the lights were not working, and then went into the basement and fixed the circuit breakers. He then returned to her apartment, checked that the lights were working, and went up to the third-floor apartment.

The defendant said that, at around 4 P.M., he went to see a person named Ricky Crespo at an address in Chelsea for some automobile body repairs. The defendant then picked his girlfriend up from work at approximately 4:30 or 5 P.M. and returned to his apartment. When the defendant was asked to clarify his whereabouts between 3 and 6 P.M. on July 3, he said that he had been at home, painting a vanity at that time. The defendant also stated that, on July 4, he had spent time with a friend, Orlando "Oly" Crespo (Oly Crespo or Crespo), and they had driven around all day, but he could not remember exactly where they had gone. The defendant further stated that on July 6, he again had spent most of the day with Crespo and had discussed buying a motorcycle from him.

On July 8, two investigators returned to the house and asked the defendant to provide a buccal swab. The defendant agreed. After providing the sample, he said to the investigators, "Just to let you guys know, I've been in that apartment before." He said that, on July 3, he had been sitting in the victim's apartment, on a chair in the kitchen, when the first-floor tenant came upstairs to inform the victim that he was locked out of his apartment. After the first-floor tenant took a spare key from the victim, unlocked his apartment door, and returned the key to the victim, the defendant went up to his apartment for ten to fifteen minutes, then returned to the victim's apartment and watched television with her. The defendant told investigators that the victim did not look well and was unsteady on her feet. He said that he may have helped her around the apartment while she leaned on his arm. He also stated that he talked to the victim "all the time," and said, "Ask anyone. They'll tell you." The defendant also stated, "If I was that guy -- kind of guy, she was an easy target."

Further investigation revealed the following facts. The defendant's girlfriend's work records showed that she did not arrive at work until 1:15 P.M. on July 3. In addition, Ricky Crespo's automobile body shop is located in Dedham, not Chelsea. Oly Crespo, however, lives in Chelsea, at the address that the defendant had provided. Finally, the person who had delivered

the victim's Meals on Wheels lunch in the late morning on July 3 stated that the victim seemed fine, and the victim's son, who had spoken to her on the telephone that afternoon, also testified that she had sounded fine.

4. Search of the defendant's cell phone. During the July 9 search of the defendant's apartment pursuant to a warrant, police seized his cell phone. On August 21, 2013, detectives obtained a warrant to search it. Upon searching it, detectives observed the defendant's contact list; Internet search history; a Facebook Messenger instant messaging application chat thread (messenger chat); and the defendant's sent text messages. At trial, the Commonwealth introduced evidence that the messenger chat contained a photograph of a "notice to quit" for nonpayment of rent issued on June 25, 2013, to the defendant and his girlfriend. In addition, the defendant's list of contacts contained the contact details of various drug rehabilitation centers, pawn shops, and jewelry stores.

The messenger chat showed that, on June 19, the defendant sent a message his girlfriend that he would be "going on [his] journey," that he "need[ed] to get all of this poison out of [himself]," and that he "ha[d] been down this road before." His girlfriend responded that she hoped that he would "have the bed." The defendant's record of sent text messages showed that,

on July 9, the defendant sent text messages to his girlfriend, including the following:

> "My mother said thank you for telling her I'm using dope. . . .
>
> "Don't worry . . . . Chino [the defendant] is gone with the wind. You have a good life and your keys will be somewhere. I don't want nothing to do with this place. I'm going to move on. . . ."

The final text message on the cell phone, sent by the defendant on July 9, read, "I'm leaving. Bye, Mom."

5. Testimony of Oly Crespo. Oly Crespo, a friend of the defendant, testified[1] that he had met the defendant at a drug detoxification facility where he was being treated for heroin use. Crespo explained his own history of using heroin and that he had been in a drug rehabilitation program as recently as two weeks before testifying in September of 2016. Crespo did not remember seeing the defendant in the summer of 2013. He testified that he "might have" gone to a pawn or jewelry shop with the defendant "a long time" ago.

6. Theory of defense. At trial, the defendant called no witnesses and did not testify. On cross-examination of several witnesses called by the Commonwealth, trial counsel sought to

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[1] The Commonwealth obtained Crespo's contact information from the search of the defendant's cell phone. Crespo testified under a grant of immunity. Crespo was not questioned about the grant of immunity, and the immunity agreement was not admitted in evidence. See Commonwealth v. Ciampa, 406 Mass. 257, 261-262 (1989).

establish that police officers failed adequately to investigate the case. Trial counsel suggested that officers should have investigated whether the son of the defendant's girlfriend, who was living in the third-floor apartment as well, was the perpetrator. The son was wearing a global positioning system monitoring bracelet in July 2013 and admitted to drinking at the time. The son had passed out in the third-floor apartment on July 6, was awakened by his mother, and smelled smoke. Trial counsel also emphasized that the police failed to investigate discrepancies in the statements of the first-floor tenant; to obtain corroborating information about the location of the defendant's girlfriend's son at relevant times; and to obtain cell phone and text message records of the defendant's girlfriend's son.

Procedural history. A grand jury indicted the defendant on charges of murder, G. L. c. 265, § 1; unarmed robbery of a person aged sixty years or greater, G. L. c. 265, § 19 (a); and receiving stolen property of a value greater than $250, G. L. c. 266, § 60, as amended through St. 1987, c. 468, § 4.[2] The defendant was tried before a jury beginning on September 10,

[2] General Laws c. 266, § 60, was substantially revised subsequent to the facts giving rise to this case. See St. 2014, c. 451, § 3; St. 2018, c. 69, §§ 146-148. The defendant is liable for the crime as it was defined at the time of its commission. See Commonwealth v. Bradley, 466 Mass. 551, 552-553 (2013).

2015. The jury found the defendant guilty of receiving stolen property. The jury were unable to reach a unanimous verdict on the murder and robbery charges, and a mistrial was declared as to those counts only. The defendant's second jury trial, on only the murder and robbery charges, began on February 22, 2016. The second trial ended in a hung jury as to both counts, and a mistrial was declared.

The defendant was tried for a third time, beginning on September 19, 2016. At the close of the Commonwealth's case, the defendant filed a motion for a required finding of not guilty, and the motion was denied. The jury found the defendant guilty of murder on a theory of extreme atrocity or cruelty and not on theories of deliberate premeditation or felony-murder. The defendant was acquitted of the robbery charge. The defendant was sentenced to a term of life in State prison without the possibility of parole on the murder conviction and to three years in State prison on the conviction of receiving stolen property, to be served concurrently. The defendant timely filed a notice of appeal, and he subsequently filed a motion in this court for a new trial based on ineffective assistance of counsel, which we consolidated with his direct appeal.

Discussion. 1. Ineffective assistance of counsel. a. Standard of review. "Because the defendant was convicted of

murder in the first degree, we do not evaluate his ineffective assistance claim under the traditional standard set forth in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)." Commonwealth v. Denson, 489 Mass. 138, 150 (2022), quoting Commonwealth v. Ayala, 481 Mass. 46, 62 (2018). See Commonwealth v. Gosselin, 486 Mass. 256, 259-260 (2020), cert. denied, 141 S. Ct. 2534 (2021). "Instead, we apply the more favorable standard of G. L. c. 278, § 33E, and review his claim to determine whether there was a substantial likelihood of a miscarriage of justice." Denson, supra at 150-151, quoting Ayala, supra. "Under this review, we first ask whether defense counsel committed an error," and then, if so, "whether it was likely to have influenced the jury's conclusion." Id. at 151, quoting Ayala, supra. "One such error would be if defense counsel failed 'to litigate a viable claim of an illegal search and seizure.'" Gosselin, supra at 260, quoting Commonwealth v. Comita, 441 Mass. 86, 90 (2004). "Whether trial counsel so failed depends on whether the defendant can 'demonstrate a likelihood that the motion to suppress would have been successful' when filed." Gosselin, supra, quoting Comita, supra at 91. "We analyze that likelihood objectively . . . and without 'the advantage of hindsight.'" Gosselin, supra, quoting Commonwealth v. Adams, 374 Mass. 722, 729 (1978).

The defendant argues that the affidavit in support of the application for a search warrant to extract personal data from his cell phone did not establish probable cause that evidence of the alleged crimes would be found on the cell phone. Therefore, he argues, trial counsel was ineffective in failing to file a motion to suppress the information derived from the search of the cell phone. We first consider whether the affidavit contained sufficient information to establish probable cause and conclude that it did not. For this reason, trial counsel erred in failing to file and litigate a motion to suppress. Nevertheless, as discussed in part 3, infra, we conclude that reversal is not warranted.

b. Sufficiency of the affidavit. "Both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights 'require a magistrate to determine that probable cause exists before issuing a search warrant' (citation omitted)." Commonwealth v. Holley, 478 Mass. 508, 521 (2017), quoting Commonwealth v. Cavitt, 460 Mass. 617, 626 (2011). "To establish probable cause, the facts contained in the warrant affidavit, and the reasonable inferences drawn from them, must be sufficient for the issuing judge to conclude that the police seek items related to criminal activity and that the items described 'reasonably may be expected to be located in the place to be searched at the time the warrant issues'"

(citation omitted). Commonwealth v. Henley, 488 Mass. 95, 114 (2021). "There must be probable cause to conclude not only that an individual committed a crime, but also that the particular source of evidence has a 'nexus' to the offense (citation omitted)." Holley, supra. "While 'definitive proof' is not necessary to meet this standard, the warrant application may not be based on mere speculation" (citation omitted). Id. See id., quoting Commonwealth v. Cinelli, 389 Mass. 197, 213, cert. denied, 464 U.S. 860 (1983) ("even 'strong reason to suspect is not adequate'").

"Our review of whether a search warrant was supported by probable cause is limited to review of the four corners of the affidavit." Henley, 488 Mass. at 114. "In determining whether an affidavit justifies a finding of probable cause, the affidavit is considered as a whole and in a commonsense and realistic fashion." Cavitt, 460 Mass. at 626. The affidavit should not be "parsed, severed, and subjected to hypercritical analysis" (citation omitted). Commonwealth v. Donahue, 430 Mass. 710, 712 (2000). "A magistrate's determination of probable cause is accorded 'considerable deference'" (citation omitted). Holley, 478 Mass. at 522. See Henley, supra. "Probable cause is a 'fact-intensive inquiry, and must be resolved based on the particular facts of each case'" (citation omitted). Holley, supra.

The affidavit accompanying the application for a search warrant in this case described how firefighters responded to a report of an electrical fire, conducted a wellness check of the victim, and discovered her body. The affidavit also described police officers' interview with the first-floor tenant, in which he described hearing a bang and a scream from the apartment above on July 3. In addition, the affidavit described the officers' interview with the defendant at the house following the discovery of the victim's body, in which he stated that he had fixed a circuit breaker for the victim on July 3, had been inside her apartment, and had put out the supposed electrical fire in the basement on the night of July 7. The affidavit went on to describe the findings of the investigation into the cause of the fire, which suggested that the fire pattern in the basement was inconsistent with an electrical fire and that the fire had been intentionally set. The investigation also revealed that the defendant's description of the circuit breaker on the day he said he helped the victim with an electrical problem was inaccurate. The affidavit described the officers' visit to the pawn shop on July 8, where they learned that the defendant had pawned four items on July 5, including a gold wedding band that matched a description of the victim's wedding band. The affidavit also described the search of the defendant's apartment, in which investigators seized a diamond

ring later identified as the victim's engagement ring, along with a cell phone that matched a description of the defendant's cell phone.

In addition to the above, the affidavit stated in general terms that the affiant knew that cell phones are capable of storing large amounts of information. The affidavit also observed that the cell phone that officers sought to search "may reveal" the defendant's "location before, during, and after" the victim's murder, as well as "any planning and correspondence" between the defendant and "potential accomplices." The affidavit further stated that information contained in the cell phone "may also show who [the defendant] contacted after the murder" and "may aid in the discovery of any unrecovered evidence." Based on this information, the affidavit asserted that probable cause existed to believe that evidence of the victim's murder and the robbery of her apartment would be found on the cell phone.

The defendant argues that the foregoing information was insufficient to establish the requisite probable cause. We agree. The information in the affidavit undoubtedly demonstrated probable cause to believe that the defendant committed the offenses described, but this alone does not suffice to justify a search of the cell phone. See Holley, 478 Mass. at 521. The affidavit lacked any information

"demonstrat[ing] a nexus between the alleged crime and the device to be searched." Henley, 488 Mass. at 115. At most, a commonsense reading of the affidavit, see Cavitt, 460 Mass. at 626, discloses that the defendant owned a cell phone and that the cell phone was recovered from the apartment where the defendant resided and where one fruit of the defendant's alleged crimes, the engagement ring, was discovered. That both items were found in the defendant's residence, standing alone, does not reasonably establish a nexus between the cell phone and the alleged crimes.

The officer's general statements that cell phones are capable of storing vast amounts of data and that a search of the defendant's cell phone "may reveal" or "may show" information about the defendant's whereabouts around the time of the murder or whom he contacted before or after the murder, including "possible accomplices," fails to rise beyond the level of speculation. See Henley, 488 Mass. at 116 ("Search warrants 'rely[ing] on . . . generalities that friends or coventurers often use cellular telephones to communicate,' are insufficient . . . . Instead, there must be 'specific, not speculative,' evidence linking the device in question to the criminal conduct" [citations omitted]); Holley, 478 Mass. at 521. The affidavit contained no specific information suggesting that the alleged crime was premeditated, or that there were accomplices with whom

the defendant may have communicated before or after the alleged murder; in fact, the affidavit did not even contain any statement that the defendant had used his cell phone at any point before, during, or after the events described. Contrast Henley, supra at 116-117 (probable cause where affidavit suggested murder coordinated by gang members, with defendant having traveled to area of crime, where coventurer had already been present, for no apparent reason and with apparent intent to murder); Commonwealth v. Louis, 487 Mass. 759, 764 (2021) (probable cause where affidavit established that coventurers communicated by text message and cell phone calls before and during alleged crimes, that coventurer said he called defendant on day of crime, and defendant was identified in affidavit as person who bought gun and shot victim); Commonwealth v. Chalue, 486 Mass. 847, 883 (2021) (probable cause where cell phone record showed defendant on three-way call with suspect within hours after crime); Holley, 478 Mass. at 522 (substantial basis to conclude defendant's text messages related to crime where defendant called victim's cell phone immediately before shooting, just as he was entering victim's apartment building).

The Commonwealth argues that it is reasonable to infer from the fact that certain items reportedly stolen from the victim's apartment were not recovered, either from the pawn shop or from the defendant's apartment, that the defendant had sold,

attempted to sell, or otherwise disposed of the remaining items at various unknown locations and that his cell phone would contain information related to this activity. The argument is likewise speculative in the absence of additional facts to support such inferences. There is nothing in the affidavit, for example, to suggest that the defendant was not already aware of the location of the pawn shop where certain items were recovered or any similar establishment, or that he needed to or did research such places using his cell phone. The facts contained within the four corners of the affidavit, see Henley, 488 Mass. at 114-115, therefore do not give rise to a reasonable inference that the defendant used his cell phone in connection with the crimes of which he was suspected at the time of the warrant application, see Donahue, 430 Mass. at 712.

Because the affidavit, on its face, contained insufficient information to establish probable cause to search the cell phone, trial counsel was ineffective for failing to file a motion to suppress the evidence recovered from the search of the cell phone. Gosselin, 486 Mass. at 260, quoting Comita, 441 Mass. at 90 (trial counsel ineffective for "fail[ing] 'to litigate a viable claim of an illegal search and seizure'"). Therefore, the portions of the defendant's list of contacts, his Internet browsing history, the messenger chat containing the image of the notice to quit, and his text messages with his

girlfriend and his mother should have been suppressed. Nevertheless, because the remaining evidence, viewed in the light most favorable to the Commonwealth, sufficed to support the defendant's conviction, see Commonwealth v. Dyous, 436 Mass. 719, 721 (2002), we conclude that no substantial likelihood of a miscarriage of justice occurred. See part 3, infra.

2. Evidence of addiction. The defendant argues that the judge erred in admitting evidence of the defendant's history of opiate addiction. The Commonwealth responds that the evidence was properly admitted because it was relevant to the defendant's motive in robbing the victim. Because the defendant objected to the admission of this evidence at trial,[3] the issue is preserved, and we review for prejudicial error. See Commonwealth v. Don, 483 Mass. 697, 713 (2019).

"Although evidence of a defendant's prior bad acts is not admissible to show a propensity to commit such acts, it may be admissible if relevant for another purpose, 'such as to show a common scheme, pattern of operation, absence of accident or mistake, identity, intent, motive, or state of mind.'" Commonwealth v. Philbrook, 475 Mass. 20, 25-26 (2016), quoting

[3] The defendant did not request a limiting instruction. See Commonwealth v. Teixeira, 486 Mass. 617, 629 n.7 (2021) ("It was not necessary for the judge, without any request from either party, specifically to instruct on the limited permissible uses of the prior bad act evidence").

Commonwealth v. Howard, 469 Mass. 721, 738 (2014), S.C., 479 Mass. 52 (2018). Prior bad act evidence is admissible for such a permissible purpose if its probative value is not outweighed by the risk of unfair prejudice. See Commonwealth v. Crayton, 470 Mass. 228, 249-250 & n.27 (2014). "Questions of admissibility, probative value, and unfair prejudice are left to the sound discretion of the trial judge[] and will not be overturned absent clear error." Philbrook, supra at 26.

The Commonwealth elicited testimony from Oly Crespo[4,5] that the defendant used heroin immediately after selling the victim's

[4] Crespo's testimony is not inadmissible even though police learned about the defendant's contacts with Crespo in part through an improperly obtained search of the defendant's cell phone. The defendant provided investigators with Crespo's name and stated that he had spent time with Crespo on July 4 and 6. In addition, the defendant gave investigators Crespo's home address under the pretense that it was the address of Ricky Crespo's garage, where the defendant stated he had been on the day of the murder. "Under the inevitable discovery doctrine, if . . . discovery of the evidence by lawful means was certain as a practical matter, the evidence may be admissible as long as the officers did not act in bad faith to accelerate the discovery of evidence, and the particular constitutional violation is not so severe as to require suppression" (citation omitted). Commonwealth v. Mattier (No. 2), 474 Mass. 261, 271 (2016) (discovery of cell phone inevitable where officers were authorized to search defendant's person even if they had not arrested him for purpose of looking for devices). Regardless of the information obtained from the defendant's cell phone indicating that he had called Crespo on July 5, investigators had sufficient information in the form of the defendant's own statements to locate Crespo during their investigation into the defendant's whereabouts in the days before and after the killing. Their basis for wanting to speak with Crespo, to verify the defendant's version of events, would have been the same, and they would have been able to locate him based on the address the defendant provided once they discovered that it was not connected with Ricky Crespo's garage. Thus, it is certain as a practical matter that the Commonwealth would inevitably have discovered all of the information that it obtained from Crespo. In addition, there is no indication in the record that investigators acted in bad faith to accelerate the discovery, and the constitutional violation, obtaining the warrant based on a defective affidavit, is not so serious as to require suppression. Furthermore, as discussed infra, Crespo's testimony was brief and suffered from problems of credibility. On the other hand, the evidence supporting the defendant's guilt -- including his being in possession of the victim's jewelry, his having sold some of it at a pawn shop in the days following the killing, and his having engaged in extensive behavior and made numerous statements that indicated consciousness of guilt -- was abundant. Even if Crespo's testimony had been admitted in

jewelry on July 5 and introduced evidence from the defendant's cell phone records that, within a week, he called two drug rehabilitation centers.[6] This evidence supported the Commonwealth's theory of motive that the defendant attacked and robbed the victim in order to sell the items stolen to fund his drug use. See Commonwealth v. O'Laughlin, 446 Mass. 188, 199 (2006) (jury permissibly could find that defendant had motive to rob victim's apartment where evidence that defendant had been using drugs, had run out of both drugs and money, had been in victim's apartment previously, and had reason to believe that

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error, no substantial likelihood of a miscarriage of justice would have occurred. See Commonwealth v. Cutts, 444 Mass. 821, 835 (2005).

[5] As noted, see note 1, supra, Crespo testified under a grant of immunity. Trial counsel did not cross-examine Crespo on this point or request a cautionary instruction on the credibility of witnesses testifying under a grant of immunity. See Commonwealth v. Brousseau, 421 Mass. 647, 654 (1996) (judge not required to give cautionary instruction regarding immunity sua sponte).

[6] The defendant's cell phone records were obtained pursuant to a warrant that the defendant does not challenge, and the defendant did not object to the admission of these records in evidence. In our examination of the record pursuant to G. L. c. 278, § 33E, we find no grounds to conclude that the Commonwealth's conduct in obtaining these records failed to comply with the requirements of the Federal Stored Communications Act, 18 U.S.C. §§ 2701-2712, and G. L. c. 276, §§ 1 and 1B. Cf. Preventive Med. Assocs. v. Commonwealth, 465 Mass. 810, 819 (2013). These records supplied evidence of the defendant's calls to drug rehabilitation centers independent from the call logs obtained from his cell phone, which should have been suppressed. See part 1, supra.

she might have cash or valuables suggested that "defendant needed money and the victim was a nearby and likely source"); Commonwealth v. Mendes, 441 Mass. 459, 464 (2004) (evidence of defendant's spending increasing amounts of money on cocaine and prostitutes was properly admitted to show motive to murder wife and obtain full access to her inheritance).

Such "[e]vidence of motive is generally admissible" (citation omitted). Mendes, 441 Mass. at 464. "Without the challenged evidence [the murder] could have appeared to the jury as an essentially inexplicable act of violence." Id., quoting Commonwealth v. Bradshaw, 385 Mass. 244, 269 (1982). "The prosecution was entitled to present as full a picture as possible of the events surrounding the incident itself." Bradshaw, supra at 269-270 (evidence of other crimes properly admitted to show motive where Commonwealth "sought to cast the defendant's activities on the day of the murder as a desperate search for money"). The evidence of the defendant's addiction therefore was relevant to show motive.

Furthermore, "[t]he prejudice likely to be generated by the admission of this evidence did not so outweigh its probative value that it was error to admit it." Bradshaw, 385 Mass. at 270. As discussed infra, the evidence linking the defendant to the killing through his possession and sale of the victim's jewelry and the evidence of his conduct and statements

indicating consciousness of guilt was strong and received much more attention at trial than the evidence of his addiction. See Commonwealth v. Rutherford, 476 Mass. 639, 649 (2017) (prior bad act evidence not unduly prejudicial where it "paled in comparison" to evidence of defendant's conceded participation in victim's death and received minimal attention at trial). Crespo's testimony, on the other hand, was brief and equivocal, and it suffered from credibility problems due to Crespo's inability to remember many details and his own admitted drug use. For example, when asked whether he used drugs with the defendant following their visit to the pawn shop, he responded, "Probably. I'm not sure. I do drugs all the time." Trial counsel pointed out these deficiencies on cross-examination. Likewise, the fact that the defendant called drug rehabilitation centers disclosed only that he was struggling with addiction and did not suggest any violent tendencies resulting from his addiction. Contrast Bradshaw, supra (prior bad act evidence not unduly prejudicial even where "some of it . . . resembled the crime with which the defendant was charged). The challenged evidence was relevant and not unduly prejudicial, and therefore the judge did not abuse his discretion in admitting it.

3. Sufficiency of the evidence. The defendant argues that the evidence was insufficient to establish his guilt beyond a

reasonable doubt on the charge of murder in the first degree,[7] and that a required finding of not guilty therefore should enter. Specifically, he contends that, after excluding the evidence that was admitted in error, the Commonwealth's case lacked evidence identifying the defendant as the person who killed the victim, including evidence of motive and consciousness of guilt. The Commonwealth argues that, even if evidence from the defendant's cell phone was erroneously admitted, this evidence was cumulative of other, stronger evidence that was properly admitted, and that therefore the judgment should be affirmed.

"In evaluating a claim of sufficiency, we 'determine whether, viewing the evidence in the light most favorable to the Commonwealth, any rational finder of fact could have found each of the elements of the offense beyond a reasonable doubt.'" Commonwealth v. Andrade, 488 Mass. 522, 543 (2021), quoting Commonwealth v. Jones, 477 Mass. 307, 316 (2017). "A conviction may rest exclusively on circumstantial evidence." Jones, supra. While a conviction resting on circumstantial evidence may not "be based on conjecture or on inference piled upon inference,"

[7] The defendant does not challenge the sufficiency of the evidence with respect to his conviction of receiving stolen property.

when evaluating the evidence, "we draw all reasonable inferences in favor of the Commonwealth." Id.

At the time of the defendant's trial, to convict a defendant of murder in the first degree on a theory of extreme atrocity or cruelty, the Commonwealth was required to prove beyond a reasonable doubt that the defendant committed an unlawful killing with malice aforethought, Commonwealth v. West, 487 Mass. 794, 800 (2021), and with extreme atrocity or cruelty, indicated by "indifference to or taking pleasure in the victim's suffering, consciousness and degree of suffering of the victim, extent of physical injuries, number of blows, manner and force with which delivered, instrument employed, [or] disproportion between the means needed to cause death and those employed,"[8] Commonwealth v. Sun, 490 Mass. 196, 207 (2022), quoting Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983). Malice is "an intent to cause death, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a

[8] As we noted in Commonwealth v. Sun, 490 Mass. 196, 207 n.10 (2022), "[t]his court since has refined this standard in Commonwealth v. Castillo, 485 Mass. 852, 860-866 (2020)." In Castillo, supra at 864-865, we held that a jury must consider whether the defendant's conduct was extreme in its brutality or its cruelty, and the jury may not base a conviction only on the degree of the victim's suffering. The refinement does not affect this case, as we conclude infra that the evidence sufficed to show that the defendant's method of killing -- inflicting blunt force trauma through numerous blows which caused multiple injuries sufficient to cause death -- satisfied multiple Cunneen factors.

reasonable person would have known created a plain and strong likelihood that death would follow" (alterations omitted). Sun, supra, quoting Commonwealth v. Watson, 487 Mass. 156, 164 (2021).

When viewed in the light most favorable to the Commonwealth, the evidence at trial was sufficient to prove that the defendant committed murder in the first degree on a theory of extreme atrocity or cruelty. See Andrade, 488 Mass. at 543. So viewed, the evidence established that the victim was killed, her apartment was ransacked, and her valuables were removed . The Commonwealth's evidence showed that the defendant lived on the third floor of the house and that he was at home on July 3 at the suspected time of the victim's death. Although the defendant offered differing versions of the events in his two statements to investigators, he indicated that he was friendly with the victim and that he spent time with the victim within an hour of her death. The first-floor tenant testified that, on July 3, after he heard a bang from the room of the second-floor apartment where the victim's body was found, he did not hear anyone come down the stairs or leave the house. A fingerprint matching that of the defendant's left ring finger was found on a plastic bag in the victim's bedroom. This evidence supported the inference that the defendant was able to and did gain entry

to the victim's apartment and kill her, and then returned to the third-floor apartment without leaving the house.

The victim's engagement ring, one of the items missing from the apartment, was found in the defendant's apartment, hidden under his mattress. Based on records obtained from a pawn shop and the testimony of the pawn shop owner, the jury could have found that the defendant sold two other rings belonging to the victim and that he attempted to use a false name when doing so. This inference was strengthened by records that the Commonwealth obtained directly from the defendant's cell service provider pursuant to a warrant that showed that the defendant had called a number of pawn shops on July 3 and then again on July 6. This evidence provided further support for a finding that the defendant was the person who killed the victim and removed her valuables from the apartment.

On the night when the victim's body was discovered, the defendant assisted police officers in accessing the victim's apartment. After leading the officers to the victim's apartment door, the defendant banged on the door without first knocking or calling out to anyone. After officers had asked him to stop and begun looking for an alternative way to enter the apartment, without prompting, the defendant reached through a damaged door panel and opened the door. The defendant then entered the apartment and proceeded directly to the dining room where the

victim's body was found. This behavior supported the inference that the defendant already knew that the victim was dead and where her body was located. In addition, the jury could have found from the evidence that the defendant repeatedly attempted to gain access to the victim's apartment while police officers were securing the scene, including under the apparent pretense of looking for his car keys, because of his guilty state of mind. The jury also could have inferred from the defendant's going out onto the third-floor porch to smoke a cigarette while investigators were talking on the second-floor porch that the defendant was attempting to eavesdrop.

The defendant's statements to police officers also supported an inference of guilt. He made a number of statements about his whereabouts on July 3, including about bringing his girlfriend to work and seeing Ricky Crespo, that the jury could have found to be false based on information obtained in the subsequent investigation. The jury also could have found that his statements about helping the victim with her lights, watching television with her, and helping her by the arm because she looked ill on July 3 all were part of an attempt to explain why his deoxyribonucleic acid and fingerprints might be found in the victim's apartment.

This evidence, taken together, was sufficient to support an inference that the defendant was the person who killed the

victim and took her belongings.[9] In addition, the evidence of the victim's extensive injuries, including injuries to her neck and chest, either of which independently could have caused her death, supported the inference that the defendant inflicted the injuries with intent to cause death or grievous bodily harm, or that a reasonable person would have recognized a plain and strong likelihood that the injuries would cause death to the victim, an eighty-eight year old woman. See West, 487 Mass. at 800. The extent of these injuries, the presence of multiple injuries sufficient to cause death, and the manner in which they were inflicted -- blunt force trauma through numerous blows -- also supported a finding that the killing was performed with extreme atrocity or cruelty. See Cunneen, 389 Mass. at 227.

Together, all of this evidence, viewed in the light most favorable to the Commonwealth, provided a sufficient basis for

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[9] The defendant argues that, if the information obtained from the unlawful search of his cell phone had been suppressed, the Commonwealth's case would have been devoid of evidence of consciousness of guilt and motive. As discussed supra, the defendant's behavior in the presence of police officers and statements to them provided evidence of consciousness of guilt that supported the inference that the defendant was the murderer, and this evidence was entirely independent of the search of his cell phone. While motive is not an essential element of murder that the Commonwealth was required to prove, Commonwealth v. Martinez, 487 Mass. 265, 275 n.11 (2021), the call records obtained from the defendant's cell service provider and Crepo's testimony provided independent evidence of his drug addiction as a motive for the killing notwithstanding the suppression of the cell phone evidence. See notes 4, 6, supra.

the jury to conclude that the defendant was guilty of the victim's murder.

4. Double jeopardy. Because we affirm the defendant's conviction, we need not reach his arguments regarding whether subjecting him to further retrial would violate his double jeopardy rights. The defendant also argues that he should not have been tried for a third time. He asks us to dismiss the indictment of murder for this reason and to declare a bright-line rule requiring that an indictment be dismissed after two trials have ended in hung juries. We discern no grounds to alter our long-standing rule that a defendant may be retried after a mistrial due to a hung jury has been declared. See Perrier v. Commonwealth, 489 Mass. 28, 31 n.3 (2022). While an exception exists where the evidence at trial was insufficient to sustain a conviction, that exception is not implicated in this case. See id.

5. Review under G. L. c. 278, § 33E. Finally, after a thorough review of the case, we find no basis to exercise our discretion under G. L. c. 278, § 33E, to reduce the verdict or order a new trial.

Judgments affirmed.

Motion for a new trial denied.