SJC-12951
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COMMONWEALTH vs. DONTE HENLEY (and three companion cases[1]).

Suffolk. November 6, 2020. - August 5, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

Homicide. Constitutional Law, Search and seizure, Reasonable suspicion, Investigatory stop, Stop and frisk, Privacy, Probable cause. Search and Seizure, Reasonable suspicion, Expectation of privacy, Protective frisk. Privacy. Cellular Telephone. Probable Cause. Practice, Criminal, Trial of defendants together, Severance, Opening statement, Argument by prosecutor, Instructions to jury, Assistance of counsel, Motion to suppress, Warrant. Evidence, Prior misconduct, Relevancy and materiality, Expert opinion. Witness, Expert.

Indictments found and returned in the Superior Court Department on April 2, 2015.

A pretrial motion to suppress evidence was heard by Mary K. Ames, J., and the cases were tried before Peter M. Lauriat, J.

The Supreme Judicial Court on its own initiative transferred the cases from the Appeals Court.

Katherine C. Essington for Donte Henley.
Jennifer H. O'Brien for Josiah Zachery.

[1] The companion cases are against Josiah Zachery.

Benjamin Shorey, Assistant District Attorney, for the Commonwealth.

The following submitted briefs for amici curiae:

Matthew Spurlock & David Rangaviz, Committee for Public Counsel Services, Jennifer Lynch & Andrew Crocker, of California, Oren Nimni, Matthew R. Segal, & Jessie J. Rossman for Committee for Public Counsel Services & others.

Alan Butler & Megan Iorio, of the District of Columbia, & Caitriona Fitzgerald for Electronic Privacy Information Center.

Martin F. Murphy for Boston Bar Association.

CYPHER, J. On the morning of February 11, 2015, the victim, Kenny Lamour, was shot in the head and killed. The defendants, Josiah Zachery and Donte Henley, were tried jointly before a jury. Both defendants were convicted of murder in the second degree. Zachery also was convicted of assault by means of a dangerous weapon and carrying a firearm without a license.

The defendants argued their appeals separately but joined in each other's arguments. The defendants argue that (1) the motion judge erred in denying their motion to suppress evidence obtained during an investigatory stop, a warrantless search of Zachery's Massachusetts Bay Transportation Authority (MBTA) CharlieCard,[2] and a search of Zachery's cell phone pursuant to a search warrant; (2) the trial judge abused his discretion by failing to sever the defendants' trials; (3) the judge erred in admitting evidence of prior misconduct that connected Henley to

[2] A CharlieCard, issued by the Massachusetts Bay Transportation Authority (MBTA), is a reusable card that can be loaded with cash value to pay bus and subway fares.

an earlier shooting; (4) the judge erred in allowing a police officer to testify that he had known Henley since 2005; (5) the judge erred in admitting certain testimony of the Commonwealth's gang expert; (6) the prosecutor made improper statements in his opening statement and closing argument; (7) the judge erred in failing to give Henley's proposed instruction on mistake or accident; (8) trial counsel failed to provide effective assistance; and (9) the cumulative impact of trial errors created a substantial risk of a miscarriage of justice, even if individual errors did not.

We discern no reversible error, and accordingly, we affirm the denial of the defendants' motion to suppress and their convictions.

Background. We summarize the facts that the jury could have found, reserving certain facts for the discussion of the defendants' arguments. In addition, we reserve the facts that the motion judge found for the discussion of the defendants' motion to suppress.

1. The shootings. Henley and the victim worked at a nonprofit organization (program) dedicated to providing at-risk youth with vocational training and job opportunities. The program often employed its participants to work as part of a larger team in the community. On February 11, 2015, the morning after a snowstorm, Henley sent a text message to his program

supervisor to let the supervisor know that he was on his way to work. Henley's supervisor responded, alerting him that the victim, "the kid from [Thetford Avenue]," was present, and asked Henley to "keep it cool." Henley was a member of the Franklin Hill Giants gang, and the victim was a member of a rival gang, the Thetford Avenue Buffalos gang. Zachery also was a member of the Franklin Hill Giants gang but was not involved with the program.

The program transported a group of individuals in a van to Centre Street in the Jamaica Plain section of Boston to shovel snow that morning. Henley joined the group late. The victim also was present. Around this time, Henley began exchanging text messages with and calling Zachery.

Zachery traveled via the MBTA, as evidenced by surveillance video footage and records associated with his CharlieCard, to the area where Henley and the victim were located. Zachery shot the victim in the head and ran from the scene down Centre Street. As he fled, he fired a shot at Boston police Officer William Louberry but did not hit him. Louberry used his police radio to call in a description of Zachery while pursuing him on foot. Louberry described Zachery physically and noted that he was dressed in all black clothing with a gray hooded sweatshirt over his head and was running with a gun in hand. Louberry

eventually lost sight of Zachery after he turned onto Aldworth Street.

2. The investigation. Shortly after the shot directed at Louberry was fired, Boston police Officer Ydritzabel Oller observed an individual, later identified as Zachery, walking across Centre Street wearing a gray hooded sweatshirt and black pants and carrying a shovel. Oller stopped Zachery and conducted a threshold inquiry. Zachery was not arrested but was handcuffed and put in a police cruiser.

While Zachery was detained in the police cruiser, the firearm that later was determined to have been used in the murder was recovered on the garage roof of a house near the corner of Centre and Aldworth Streets. The black jacket worn by Zachery during the murder was found under the porch of the house. Police also discovered that a shovel was taken from outside the same house. A resident of the house later identified the shovel that Zachery was observed carrying as the shovel that was taken from outside his house. Additionally, footprints consistent with Zachery's sneakers were found in the area surrounding the house.

Zachery was transported to police headquarters, where he was interviewed until he invoked his right to counsel. After the interview ended, Zachery was arrested. Henley, who was not a suspect at the time, also was transported to police

headquarters and interviewed as a witness. As part of the investigation, police seized Zachery's cell phone and obtained a search warrant to review its contents. Police discovered multiple text messages and telephone calls between Zachery and Henley on the morning of the murder. Shortly after Henley learned from his supervisor that the victim would be present on the work crew, he sent Zachery a text message that he might need Zachery to "hold [him] down." Henley sent a text message to Zachery stating his location, and Zachery began traveling to that location. Henley told Zachery via text message to "hurry up" because he wanted to "punch the kidd up." In the hours leading up to the murder, Henley and Zachery continued to coordinate a plan. Henley sent Zachery a text message stating, "I'll do I just need my steal," and shortly thereafter, "It's like it's me or him and I ain't going." Zachery responded, "fuck him your right." At 9:29 A.M., Henley sent Zachery a text message stating, "So how we gon do it?" At 9:30 A.M., Zachery called Henley. The call lasted nineteen seconds. Eventually, Henley sent Zachery a text message with a description of the victim's clothing and the work crew's exact location. At 10:20 A.M., Zachery sent Henley a text message stating, "I see the van Cant find yall." Two brief calls between them followed before the victim was shot.

Zachery and Henley were both charged with murder in the first degree under theories of premeditation and extreme atrocity or cruelty. The judge instructed the jury on murder in the first and second degree and the lesser included offense of involuntary manslaughter. The defendants were convicted of murder in the second degree.

Discussion. 1. Motion to suppress. Zachery argues that the motion judge erred in denying his motion to suppress evidence obtained during an investigatory stop, a warrantless search of his CharlieCard, and a search of his cell phone pursuant to a search warrant. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015). Henley's motion to join Zachery's motion to suppress as it related to Zachery's cell phone and text messages was allowed.[3] We conclude that the judge properly denied the defendants' motion to suppress.

a. The warrantless searches. The defendants challenge the stop and frisk of Zachary and the search of his CharlieCard without a warrant. "A warrantless search is presumptively

[3] The motion judge allowed Henley's motion to join Zachery's motion to suppress "out of an abundance of caution and in recognition of this rapidly evolving area of law and technology." Although the issue is not before us, we note that in Commonwealth v. Delgado-Rivera, 487 Mass. 551, 552 (2021), we concluded that the defendant should not have been allowed to join his codefendant's motion to suppress where he did not enjoy a reasonable expectation of privacy in the text messages sent by him that were stored on a cell phone belonging to, and possessed by, the codefendant.

unreasonable under both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, unless it falls within one of the 'few specifically established and well-delineated exceptions' to the warrant requirement." Commonwealth v. Johnson, 461 Mass. 44, 48 (2011), quoting Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). The Commonwealth bears the burden of proving that a warrantless search is reasonable. See Commonwealth v. Adallah, 475 Mass. 47, 51 (2016). An evidentiary hearing was held. "In reviewing the denial of a motion to suppress, we defer to the motion judge as to the weight and credibility of the evidence. We accept the motion judge's findings of fact unless they are clearly erroneous and assess the correctness of the judge's legal conclusions de novo." Commonwealth v. Weidman, 485 Mass. 679, 683 (2020), quoting Commonwealth v. Bell, 473 Mass. 131, 138 (2015), cert. denied, 136 S. Ct. 2467 (2016).

i. The evidentiary hearing. We summarize the facts found by the motion judge, supplemented by uncontroverted facts from the record. We note that the motion judge fully credited and adopted the testimony of the officers at the hearing on the defendants' motion to suppress.

On the morning of the murder, Henley contacted Zachery by cell phone to let him know of the work crew's location. After the victim was shot, the shooter fled the scene. While fleeing,

he fired once at Louberry. The officer gave chase, broadcasting the route of the chase and a description of the suspect over the radio. The officer described the shooter as a Black male, from six feet to six feet, one inch tall; from eighteen to twenty-four years old; and wearing black pants, a black jacket, and a gray hooded sweatshirt, with the hood over his head.

Minutes after Louberry's radio broadcast, Oller observed a young Black male, later identified as Zachery, coming from the location where Louberry had reported over the radio that he had last seen the shooter. At that time, Zachery was two blocks from the scene of the shooting. Zachery was wearing a gray hooded sweatshirt and black pants and carrying a snow shovel. He fit the description given by the other officer just moments before, except that he was not wearing a black jacket. Additionally, the officer observed that it was a very cold day and Zachery was wearing sneakers and low cut socks and was not wearing a jacket or gloves.

The motion judge found that "[Zachery] appeared overly calm and seemed to actively avoid looking at or in the direction of the officers or the man on the ground"[4] and that "he appeared to

[4] Immediately after the shooting, police apprehended an individual who was seen running on the street near the scene of the crime. Ultimately, this individual was not charged.

act actively disinterested in all of the events around him including the saturation of police and cruisers in the area."

The officer stopped Zachery to conduct a threshold inquiry. She asked him from where he was coming, and Zachery said he was "shoveling snow for old ladies for free," but he did not respond when she asked him why he was not wearing gloves. He admitted to hearing shots but said that he was far away. Officers conducted a patfrisk for weapons and found a cell phone but did not seize it at that time. No weapons were discovered on Zachery's person. The officers did not formally arrest Zachery, but he was handcuffed and placed in a police cruiser on Centre Street, pending further investigation. The motion judge found that the moment of seizure occurred when Zachery was handcuffed and placed in the cruiser.

While Zachery was in the cruiser parked on Centre Street, officers conducted showup identification procedures with four witnesses and Louberry.[5] The witnesses were brought, one at a

[5] A showup identification procedure is a one-on-one identification procedure that usually occurs in the immediate aftermath of the crime. See Commonwealth v. Dew, 478 Mass. 304, 306-307 (2017) (showup identifications generally disfavored but often permitted in immediate aftermath of crime to secure prompt identification of suspect). In this case, one at a time, each witness was placed into the back seat of a police cruiser and given detailed instructions and a witness preparation form. After witnesses indicated that they understood the instructions and form, they were given a form to sign. Before the identification procedure, each witness gave a description of the

time, to see Zachery and the other individual police had apprehended.[6] No witness positively identified Zachery, and all except one indicated that he looked more like the shooter, or the individual they had seen running away from the scene of the crime with a gun, than the other individual the police had detained.

Louberry, who chased Zachery on foot, also was asked to make an identification. He asserted that the other individual police had detained was not the shooter. He observed that Zachery's appearance was consistent with the appearance of the shooter. However, he noted that Zachery was not wearing the black jacket the shooter had been wearing. Louberry later viewed the black jacket the police had recovered from the house near the corner of Centre and Aldworth Streets and said that it could have been the one the shooter was wearing.

ii. The stop of Zachery. Zachery argues that the police did not have reasonable suspicion to stop him. The motion judge found, and the parties agree, that Zachery was seized when he was handcuffed and detained in the police cruiser even though he

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shooter to the police. Witnesses were then shown two suspects, Zachery and one other individual, in person. We note that the motion judge also referred to the identification procedure as a "bring back."

[6] Zachery challenged the identification procedure before trial but has not pursued this issue on appeal.

was not under arrest at the time. See Commonwealth v. Barros, 435 Mass. 171, 173-174 (2001) (police seizure in constitutional sense occurs when, in view of totality of circumstances, reasonable person would have believed he or she was not free to leave). Accordingly, we consider whether Oller had reasonable suspicion to justify the stop.

To justify a police stop under art. 14, "police officers must have had 'reasonable suspicion, based on specific and articulable facts, that the defendant had committed, was committing, or was about to commit a crime.'" Commonwealth v. Evelyn, 485 Mass. 691, 704 (2020), quoting Commonwealth v. Depina, 456 Mass. 238, 242 (2010). See Terry v. Ohio, 392 U.S. 1, 21 (1986). Reasonable suspicion requires less than probable cause to arrest but must be based on more than just a hunch. See Commonwealth v. Lyons, 409 Mass. 16, 19 (1990). The standard of reasonable suspicion does not require that an officer exclude all possible explanations of the facts and circumstances. See Commonwealth v. Deramo, 436 Mass. 40, 44 (2002).

Here, the motion judge found several of these factors relevant to the reasonableness of the officers' suspicion. Zachery fit the physical description given by Louberry. With the exception of the black jacket, an item that easily could be removed, he was wearing the clothing that the officer described.

Additionally, Zachery's demeanor was unusual considering the events taking place around him. His attire also was inappropriate given the extreme weather conditions. The motion judge found that his explanation that he was "shoveling snow for old ladies for free" was implausible based on his attire. Finally, Zachery was observed two blocks from the scene of the crime, within five to six minutes of the time the officer had reported losing sight of the shooter.

Although, standing alone, any one of these factors might not have been sufficient to justify the stop, when viewed as a whole, we agree with the motion judge that they gave rise to reasonable suspicion. See Commonwealth v. Watson, 430 Mass. 725, 729 (2000) ("Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry"). See also Commonwealth v. Gomes, 453 Mass. 506, 511 (2009), quoting Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981) ("We view the 'facts and inferences underlying the officer's suspicion . . . as a whole when assessing the reasonableness of his [or her] acts").

First, the physical description of the suspect when combined with the other circumstances was particular enough to support Oller's reasonable suspicion that the defendant had committed a crime. See Commonwealth v. Hilaire, 92 Mass. App. Ct. 784, 791 (2018) (standing alone, description of suspects as

three young Black males wearing regular clothes with backpacks insufficiently particularized to support reasonable suspicion but enhanced by other factors known to police). The description was not so general that it would include a large number of people in the area where the stop occurred. See Depina, 456 Mass. at 245-246. Louberry described the suspect's race, height, and age, as well as the clothing he was wearing. See Commonwealth v. Staley, 98 Mass. App. Ct. 189, 192 (2020) (description of suspect that contained information about facial features, skin tone, height, weight, age, and clothing sufficiently detailed to establish reasonable suspicion). Contrast Commonwealth v. Warren, 475 Mass. 530, 535-536 (2016) (general description of suspects as three Black men, two wearing dark clothing and one wearing red hooded sweatshirt, lacked information about suspect's physical characteristics and was not sufficient to establish reasonable suspicion where defendant was with only one other person when stopped); Commonwealth v. Mock, 54 Mass. App. Ct. 276, 279, 282-283 (2002) (no reasonable suspicion to stop defendant where judge found that defendant only fit general description of suspect as Black male despite conflicting testimony about description of suspect).

Next, we consistently have held that geographic and temporal proximity are relevant factors in the reasonable suspicion analysis. See Evelyn, 485 Mass. at 704. "Proximity

is accorded greater probative value in the reasonable suspicion calculus when the distance is short and the timing is close." Warren, 475 Mass. at 536. Here, there is no question that Zachery's physical and temporal proximity to the crime supported reasonable suspicion. Zachery was stopped while walking on Centre Street, only two blocks away from where the shooting had occurred. He was coming from the location Louberry last reported seeing the suspect, and only five minutes had passed since the officer's radio transmissions. Compare Evelyn, supra at 704-705 (defendant's proximity to crime scene supported reasonable suspicion where defendant was found thirteen minutes after shooting, one-half mile distant from it). The facts in this case are in stark contrast to those in Warren, where the defendant was stopped thirty minutes after the crime occurred and it was estimated that the suspects could have traveled on foot within a two mile radius of the crime scene, or within 12.57 square miles, during that period. See Warren, supra at 536-537.

Finally, we consider that the circumstances of this crime, a shooting that left one victim dead, presented an ongoing risk to public safety. "The gravity of the crime and the present danger of the circumstances may be considered in the reasonable suspicion calculus." See Depina, 456 Mass. at 247. See also Evelyn, 486 Mass. at 705 ("circumstances indicated a potential

ongoing risk to public safety and therefore weighed in favor of reasonable suspicion"); Commonwealth v. Meneus, 476 Mass. 231, 239 (2017) ("the fact that the crime under investigation was a shooting, with implications for public safety, was relevant but not dispositive in determining the reasonableness of the stop"). In addition to shooting the victim, the shooter also had shot at Louberry. This, along with the fact that the murder was actively being investigated, further supported reasonable suspicion. Depina, supra. See Meneus, supra; Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 557 (2002). Although not dispositive, we consider in our reasonable suspicion calculus that the shootings, which occurred only minutes before the stop, presented an ongoing risk to public safety. See Meneus, supra.

We conclude that police had reasonable suspicion to justify an investigatory stop of the defendant based on a convergence of supporting factors, including the physical description detailed in the police dispatch, the defendant's physical and temporal proximity to the crime, the defendant's suspicious demeanor, and the ongoing danger to public safety. See Commonwealth v. Mercado, 422 Mass. 367, 371 (1996).

Having concluded that the stop of the defendant was constitutional, we consider whether Oller was permitted to frisk the defendant. "[T]o proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed

and dangerous." Commonwealth v. Narcisse, 457 Mass. 1, 7 (2010), quoting Arizona v. Johnson, 555 U.S. 323, 326-327 (2009).

The same factors that supported reasonable suspicion for the stop supported the officer's suspicion that Zachery was armed and dangerous. Based on the factors discussed infra, officers suspected that Zachery had committed two shootings. The officers' suspicion that Zachery was armed and dangerous when he was stopped approximately five minutes after the second shooting was reasonable. See Narcisse, 457 Mass. at 9-10 (suspicions that individual committed crime and was armed and dangerous may arise simultaneously).

We also agree with the Commonwealth that Zachery was properly detained to facilitate further investigation. "It is a well 'settled principle that a justifiable threshold inquiry permits a limited restraint of the individuals involved as long as their detention is commensurate with the purpose of the stop'" (quotation and alteration omitted). Commonwealth v. Sinforoso, 434 Mass. 320, 325 (2001), quoting Commonwealth v. Torres, 424 Mass. 153, 162 (1997). While Zachery was detained in the police cruiser, officers diligently pursued an investigation that confirmed many of their suspicions. During this time, officers discovered the footpath leading from where the shooter was last seen to a porch where the black jacket was

found and from where the shovel had been taken. The police also conducted identification procedures with witnesses. Although no witness definitively identified Zachery, all but one said Zachery looked more like the suspect than the other individual police had detained.

iii. Warrantless search of the CharlieCard. Zachery was transported from the scene of the crime to police headquarters for an interview.[7] After the interview, Zachery was placed under arrest and his CharlieCard was seized. Zachary argues that the motion judge erred in failing to suppress the data obtained from a warrantless search of the defendant's CharlieCard, including the location where he boarded an MBTA train and surveillance footage from that location. The Commonwealth counters that the actions of police in obtaining Zachery's CharlieCard transactions from the MBTA did not constitute a search in the constitutional sense and therefore no warrant was required. The Commonwealth also argues that the third-party doctrine applies to CharlieCard transactions and that the cell site location information (CSLI) exception to the third-party doctrine should not be extended.

[7] Zachery also moved to suppress statements made during a police interview before his arrest, but he did not pursue this claim on appeal.

We provide context for the analysis, based on the motion judge's findings and uncontroverted testimony from the evidentiary hearing, by explaining how a CharlieCard records a user's activity and provides this data to the MBTA. A CharlieCard is a plastic stored-value card used to pay for MBTA bus and subway fares. Every card has a unique number, but the holder of the card is unknown unless that individual takes steps to register the card. Zachery's card was an "M-7" card, which is a reduced fare card issued to students through their schools. A user's name is not associated with an M-7 card. All CharlieCards record information each time they are used to pay the fare to board a bus, trolley, or train. Significantly, a CharlieCard is used only at a fare vending machine to enter the MBTA system, not to disembark from a bus or subway or to transfer from one subway line to another.

The information generated by a CharlieCard is stored for fourteen months on a central computer system database owned by the MBTA. The data stored is transactional in nature, with no directly personally identifiable information. It is kept only for ridership information and accounting purposes. The practice of the MBTA is to provide this information to law enforcement when requested. This practice is posted on the MBTA website as part of its privacy policy. The location information retrieved from the CharlieCard data can then be used to access

surveillance video recordings at bus and subway stations by the MBTA police.

A. Third-party doctrine. Before we consider the defendants' arguments that Zachery was subjected to a warrantless search of his CharlieCard, we take this opportunity to observe that the third-party doctrine is not a viable refuge for the Commonwealth. The central tenet of the third-party doctrine is that when an individual voluntarily conveys information to a third party, for instance a telephone company, that individual does not have a reasonable expectation of privacy because he or she knows that the company records information for legitimate business purposes and assumes the risk that the company may disclose that information to others, including the government. See Smith v. Maryland, 442 U.S. 735, 743-744 (1979).

In Commonwealth v. Augustine, 467 Mass. 230, 245, 251 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015), we concluded that even though CSLI is business information belonging to and existing in the records of private cellular service providers, it is substantively different from the third-party information identified by the United States Supreme Court. See Smith, 442 U.S. at 743-744 (petitioner had no legitimate expectation regarding numbers he dialed on telephone because numbers were turned over automatically to third-party telephone

company); United States v. Miller, 425 U.S. 435, 442-443 (1976) (bank depositor had no legitimate expectation of privacy in financial information voluntarily conveyed to third-party banks). We reasoned in Augustine that there is a reasonable expectation of privacy in CSLI because, unlike a record of telephone numbers, CSLI is not provided knowingly to a third party. Augustine, supra at 250. Further, CSLI has nothing to do with a cell phone user's primary purpose in owning and using the cell phone. See id. See also Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) ("Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection"). Instead, we noted, CSLI is the "location-identifying by-product of the cellular telephone technology." Augustine, supra at 251.

It similarly is inappropriate to apply the third-party doctrine to this case. The information conveyed to the MBTA when an individual pays a fare with his or her CharlieCard is far removed from the individual's primary purpose in owning and using a CharlieCard -- to pay for public transportation. See Augustine, 467 Mass. at 250. Unlike a telephone user, who takes the affirmative step of providing the telephone company information by dialing a number, a CharlieCard user does not knowingly transmit data to a third party. Individuals do not

purchase a CharlieCard with the purpose or expectation of sharing information about their location with the MBTA.

In the digital age, the technology of real-time monitoring has become commonplace. Before electronic monitoring, "law enforcement might have pursued a suspect for a brief stretch, but doing so 'for any extended period of time was difficult and costly and therefore rarely undertaken.'" Carpenter, 138 S. Ct. at 2217, quoting United States v. Jones, 565 U.S. 400, 429 (2012). Today, real-time monitoring can "provide[] an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" Carpenter, supra, quoting Jones, supra at 415. "[I]t is objectively reasonable for individuals to expect to be free from sustained electronic monitoring of their public movements." Commonwealth v. McCarthy, 484 Mass. 493, 503 (2020). See Jones, supra at 417 (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks" [citations omitted]). Accordingly, we decline to "mechanically apply[] the third-party doctrine," and we reject

the doctrine as applied to this case, where the data at issue has no connection to the limited purpose for which an individual uses a CharlieCard. Carpenter, supra at 2219.

B. The mosaic theory. The Fourth Amendment and art. 14 afford protections against unreasonable searches when a search or seizure is conducted by or at the direction of the government. See Augustine, 467 Mass. at 240. "Under both the Federal and Massachusetts Constitutions, a search in the constitutional sense occurs when the government's conduct intrudes on a person's reasonable expectation of privacy." Id. at 241, citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The defendant bears the burden of proving that he or she had a reasonable expectation of privacy in the items seized. See Commonwealth v. Miller, 475 Mass. 212, 219 (2016). The defendant must demonstrate that he had a subjective expectation of privacy in the item and that the expectation of privacy is one that society is prepared to recognize as reasonable. Id. at 219-220.

As we have observed in previous cases, the technological developments in surveillance of public space require us to take a careful look at society's reasonable expectation of privacy. See McCarthy, 484 Mass. at 499. We are guided by our historical understanding of what constitutes an unreasonable search and seizure; however, we recognize that technological developments

have placed "'extraordinarily powerful surveillance tool[s]' in the hands of police." Id. at 498, quoting Commonwealth v. Almonor, 482 Mass. 35, 46 (2019). We have acknowledged the usefulness of these tools in crime detection while, at the same time, cautioning against allowing the "power of technology to shrink the realm of guaranteed privacy." McCarthy, supra, quoting Almonor, supra at 41. In these circumstances, we have applied the "mosaic theory." The mosaic theory requires that we consider the governmental action as a whole and evaluate the collected data when aggregated. See McCarthy, supra at 503.

With this in mind, we first consider whether Zachery had a subjective expectation of privacy in the data obtained from his CharlieCard. Zachery argues that he had a subjective expectation of privacy in being able to move freely about the city, akin to cell phone users who use a cell phone to communicate with others, without sharing detailed information about his or her whereabouts with the government. See Augustine, 467 Mass. at 255 & n.38.

We are satisfied that the first prong of the analysis is met. In his affidavit, Zachery averred that he "did not know that the use of the [CharlieCard] generated a record of [his] whereabouts and travel history on the MBTA" and that "he did not consent to the police conducting a search of [his] MBTA travel history that was connected to the use of the [CharlieCard]."

See Commonwealth v. Mora, 485 Mass. 360, 366 (2020); Augustine, 467 Mass. at 255 & n.38.

Whether Zachery's expectation of privacy is one that society is prepared to recognize is a more difficult question. We have recognized that "a privacy interest in the whole of one's public movements" exists. McCarthy, 484 Mass. at 502. See Riley v. California, 573 U.S. 373, 403 (2014). This privacy interest can be implicated continually, as when the government affixes a location-tracking device to a suspect's vehicle. See Commonwealth v. Rousseau, 465 Mass. 372, 382 (2013). See also Jones, 565 U.S. at 404. Under the mosaic theory, it also can be implicated as a result of data aggregation. See McCarthy, supra 503. Indeed, "[w]hen collected for a long enough period, 'the cumulative nature of the information collected implicates a privacy interest on the part of the individual who is the target of the tracking.'" Id., quoting Augustine, 467 Mass. at 253. See Mora, 485 Mass. at 373 ("our analysis under art. 14 turns on whether the surveillance was so targeted and extensive that the data it generated, in the aggregate, exposed otherwise unknowable details of a person's life").

"The mosaic theory requires courts to apply the Fourth Amendment search doctrine to government conduct as a collective whole rather than in isolated steps." See Kerr, The Mosaic Theory of the Fourth Amendment, 111 Mich. L. Rev. 311, 320

(2012). Under the mosaic theory, while each individual piece of information collected may not amount to a search, the cumulative, aggregate nature of the data collected may. See id. In McCarthy, 484 Mass. at 506, we adopted the mosaic theory in the context of automatic license plate reader cameras. Although we held that four cameras located at the ends of two bridges did not reveal information that rose to the level of a search, we acknowledged that "[a] detailed account of a person's movements, drawn from electronic surveillance, encroaches upon a person's reasonable expectation of privacy because the whole reveals far more than the sum of the parts." Id. at 504.

Here, Zachery argues that the mosaic theory applies to the cumulative nature of the information collected from his CharlieCard. While we agree that an extensive record of an individual's MBTA activity could constitute a search under the mosaic theory, the minimal amount of data obtained in this case does not constitute a violation of art. 14 or the Fourth Amendment. Whether the aggregation of data collected by police implicates the mosaic theory depends on how much data police retrieved and the time period involved. See Mora, 485 Mass. at 370. See also Commonwealth v. Estabrook, 472 Mass. 852, 858 (2015). The MBTA has the ability to retain fourteen months of an individual's travel history through the individual's CharlieCard. There is no question that such extensive data, in

certain circumstances, could create a "highly detailed profile." Commonwealth v. Connolly, 454 Mass. 808, 834 (2009) (Gants, J., concurring), quoting People v. Weaver, 12 N.Y.3d 433, 442 (2009). From this information, MBTA police also can search for and retrieve video footage.

Here, a Boston police detective contacted an MBTA police lieutenant detective by telephone to request the travel history and corresponding video footage and still images for Zachery's CharlieCard. To do so, the Boston police detective provided the MBTA with Zachery's CharlieCard number. The detective who made the request did not specify what time frame of travel history he was interested in or limit the request in any way. The time frame the MBTA police used to check the activity on Zachery's CharlieCard is not stated in the record. On the same day, the MBTA police lieutenant detective reported back to the Boston police detective that he had recovered some travel history, as well as some video footage and still images. Boston police then received information about where the card had been used and corresponding video footage that was retrieved based on the time period in which the card was used.

The Boston police detective testified that he received travel history, surveillance video footage, and still images from two dates -- February 11, 2015, the day of the murder; and

January 26, 2015[8] -- and that he did not recall if there were other dates and times he received. The detective also testified that although he was aware that a printout detailing an individual's CharlieCard activity could be generated, he did not recall receiving one in this case. When asked again whether Boston police had received a printout of the travel history associated with Zachery's CharlieCard, the detective said he did not recall.

The motion judge found that police obtained CharlieCard activity and coinciding surveillance video footage from January 26, 2015, and from February 11, 2015, the day of the murder, but did not make any findings regarding the MBTA's collection or review of the data.

On appeal, Zachery reiterates his argument that he has a reasonable expectation of privacy in the data from his CharlieCard where the MBTA retains this data for fourteen months. The Commonwealth counters that the actions by police in obtaining Zachery's CharlieCard transactions from the MBTA did not constitute a search in the constitutional sense because Zachery has failed to establish a privacy interest in a few, recent CharlieCard transactions. Our review of the record confirms the motion judge's finding that police obtained

[8] There is nothing in the record to explain how MBTA officers located data from January 26, 2015.

Zachery's CharlieCard activity and coinciding surveillance video footage and still images from January 26 and February 11, 2015. Accepting the detective's testimony, as the motion judge did, that he did not receive a printout of Zachery's CharlieCard activity, there is no indication in the record that MBTA police turned over any evidence outside of the data, video recordings, and still images from the day of the murder and from January 26, 2015. Although the MBTA retains fourteen months of data and police made an open-ended request for information relating to Zachery's CharlieCard, the record supports the judge's finding that police received information from only two days.[9]

The data from Zachery's CharlieCard on the day of the murder, and the coinciding video footage, revealed his travel path to the scene of the crime. Zachery used his CharlieCard to travel from the MBTA station in Jackson Square to the MBTA station in Forest Hills within one hour before the shooting. Officers received surveillance video recordings from both MBTA stations. Even though Zachery did not use his CharlieCard when disembarking from the train at Forest Hills, MBTA police were able to locate surveillance video footage of Zachery's exit from the train toward the busway wearing black pants, a gray hooded sweatshirt, and a black jacket covered by a camouflage jacket on

[9] There is nothing in the record to better explain the parameters of the request or the response.

the day of the murder. Surveillance video footage recovered from January 26, 2015, shows an individual matching Zachery's description wearing a black jacket similar to the jacket recovered near the corner of Centre and Aldworth Streets on the day of the murder.

In Augustine, we held that a person has a reasonable expectation of privacy in CSLI data relating to his or her cell phone that covered a two-week period. Augustine, 467 Mass. at 232. We concluded, however, that there may be some period of time for which the Commonwealth could obtain an individual's CSLI data without a warrant "because the duration is too brief to implicate the person's reasonable privacy interest." Id. at 254. In Estabrook, we adopted a bright-line rule that "the Commonwealth may obtain historical CSLI for a period of six hours or less relating to an identified person's cellular telephone from the cellular service provider without obtaining a search warrant, because such a request does not violate the

person's constitutionally protected expectation of privacy." Estabrook, 472 Mass. at 858.[10,11]

In Mora, 485 Mass. at 370, we analyzed the applicability of the mosaic theory in the context of pole cameras. There, we concluded that "the limited pole camera surveillance of [the defendants] away from their homes did not collect aggregate data about the defendants over an extended period." Id. Although these pole cameras surveilled twenty-four hours a day, seven days a week, they captured the defendants on only a few

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[10] We noted, however, that this exception applies only to "telephone call" CSLI and not "registration" CSLI. The distinction is an important one. "Telephone call" CSLI "indicates the 'approximate physical location . . . of a cellular telephone only when a telephone call is made or received by that telephone.'" Commonwealth v. Estabrook, 472 Mass. 852, 858 n.12 (2015), quoting Commonwealth v. Augustine, 467 Mass. 230, 258-259 (2014) (Gants, J., dissenting), S.C., 470 Mass. 837 and 472 Mass. 448 (2015). "By contrast, 'registration' CSLI 'provides the approximate physical location of a cellular telephone every seven seconds unless the telephone is "powered off," regardless of whether any telephone call is made to or from the telephone.'" Estabrook, supra, quoting Augustine, supra at 259 (Gants, J., dissenting).

[11] The court in Estabrook distinguished between the length of time for which a person's CSLI is requested and the length of time covered by the person's CSLI that the Commonwealth ultimately seeks to use as trial evidence. Estabrook, 472 Mass. at 858-859. We note that the distinction in this case is slightly different. Here, police made an open-ended request to the MBTA for data stemming from Zachery's CharlieCard. Nonetheless, police were provided only two days of data and the Commonwealth received only two days of data. The salient consideration here is not the police's initial open-ended request, which could have encompassed fourteen months of data, but rather the data that actually was obtained by police and then provided to the Commonwealth.

occasions. Id. at 362, 369. Pole cameras that targeted the defendants' residences for an uninterrupted period of five months and two months, however, "were able to uncover the defendants' private behaviors, patterns and associations." Id. at 373-374. Accordingly, we concluded that even though the surveillance did not extend inside the defendants' homes, "the targeted, long-duration pole camera surveillance . . . provided the police with a far richer profile of those defendants' lives than would have been possible through human surveillance." Id. at 375. At the same time, we recognized that "[a] briefer period of pole camera use, or one that is not targeted at a home, might not implicate the same reasonable expectation of privacy." Id. at 375-376.

Here, we conclude that the limited extent and use of the MBTA data does not implicate the defendant's expectation of privacy in the whole of his public movements. See Estabrook, 472 Mass. at 858. See also Commonwealth v. Johnson, 481 Mass. 710, 726-727, cert. denied, 140 S. Ct. 247 (2019). The data garnered from a CharlieCard is generated only when an individual pays a fare to enter the MBTA system. Once an individual is traveling within the MBTA system, a CharlieCard does not track his or her movements. In addition, as the Commonwealth notes, surveillance cameras are present in plain view everywhere a CharlieCard transaction can occur. Zachery did not have a

reasonable expectation in his MBTA travel history for two isolated days. The data that the Commonwealth received from those two days was a far cry from the months of uninterrupted monitoring in Mora, 485 Mass. at 373-374. This short time period and the limited data generated by Zachery's CharlieCard did not constitute an aggregation of data points that revealed extensive detail about Zachery's movements, much less a profile of his life. See id. at 375. See also United States v. Hammond, 996 F.3d 374, 389 (7th Cir. 2021), quoting Carpenter, 138 S. Ct. at 2217 ("the record of [the defendant's] movements for a matter of hours on public roads does not provide a 'window into [the] person's life, revealing . . . his familial, political, professional, religious, and sexual associations' to the same, intrusive degree as the collection of historical CSLI"). Zachery's CharlieCard generated far less data than other types of location tracking, such as global positioning system monitoring or CSLI gathered from a cell phone. Thus, under the mosaic theory, the police investigation of Zachery's CharlieCard travel history did not constitute a search.

Because we conclude that the government's use of MBTA data did not constitute a search in the constitutional sense, the

Commonwealth's use of the surveillance video footage coinciding with the data from Zachery's CharlieCard was lawful.[12]

b. Search of Zachery's cell phone. Before transporting Zachery to police headquarters to be interviewed, police seized his cell phone. A search warrant for Zachery's cell phone issued six days after the murder. Our review of whether a search warrant was supported by probable cause is limited to review of the four corners of the affidavit. Commonwealth v. Snow, 486 Mass. 582, 586 (2021). "[W]e give considerable deference to a magistrate's determination of probable cause." Commonwealth v. Keown, 478 Mass. 232, 238 (2017), cert. denied, 138 S. Ct. 1038 (2018), quoting Commonwealth v. Dorelas, 473 Mass. 496, 501 (2016). "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.'" Commonwealth v. Perkins, 478 Mass. 97, 102 (2017), quoting Commonwealth v. Walker, 438 Mass. 246, 249 (2002). "[T]he burden of establishing that evidence is

[12] In this kind of case, the better course may be for police to obtain a search warrant for the data. This is especially so where they do not appear to be in control of the amount of data they receive or the time span covered by the data.

illegally obtained is on the defendant when the search is under warrant" (quotation and citation omitted). Commonwealth v. Taylor, 383 Mass. 272, 280 (1981). See Commonwealth v. Forbes, 85 Mass. App. Ct. 168, 173 (2014).

Police applied for a search warrant to search Zachery's cell phone.[13] Zachery argues that the four corners of the affidavit in support of the search warrant failed to establish probable cause that the cell phone was used before or during the commission of a crime and failed to establish a sufficient nexus between the alleged criminal activity and the device. Zachery also argues that the warrant lacked particularity. The Commonwealth counters that the warrant was supported by probable cause and the search warrant affidavit did not lack particularity because it enumerated eight types of evidence likely to be found on Zachery's cell phone.

i. Probable cause. Under the Fourth Amendment and art. 14, "a search warrant may issue only on a showing of probable cause." Commonwealth v. Anthony, 451 Mass. 59, 68 (2008). "In order to establish probable cause to issue a search warrant, the affidavit must 'contain enough information for the issuing magistrate to determine that the items sought are related to the

[13] Zachery does not challenge the motion judge's conclusion that his cell phone properly was seized before he formally was arrested. Accordingly, we do not address it.

criminal activity under investigation, and that they may reasonably be expected to be located in the place to be searched.'" Connolly, 454 Mass. at 813, quoting Commonwealth v. O'Day, 440 Mass. 296, 300 (2003). Probable cause to support the issuance of a search warrant does not require definitive proof of criminal activity. See Anthony, supra at 69. Our review of whether probable cause exists for a search warrant to issue "begins and ends with the 'four corners of the affidavit.'" Commonwealth v. Cavitt, 460 Mass. 617, 626 (2011), quoting O'Day, supra at 297.

Zachery's probable cause argument focuses on an allegedly insufficient nexus between his cell phone and the murder. The government must demonstrate a nexus between the alleged crime and the device to be searched or seized. See Commonwealth v. White, 475 Mass. 583, 588 (2016). We have defined a nexus as a "substantial basis" for concluding that the item searched or seized contains "evidence connected to the crime" under investigation (citation omitted). See Perkins, 478 Mass. at 104. The opinions of investigating officers do "not, alone, furnish the requisite nexus between the criminal activity and the [device] to be searched." Anthony, 451 Mass. at 72. See Burns v. United States, 235 A.3d 758, 774 (D.C. 2020) (bare bones affidavit stating only detective's belief that probable cause existed to search cell phones did not establish nexus

between data on cell phones and homicide). Rather, "particularized evidence" is required to create this connection. Dorelas, 473 Mass. at 502.

Search warrants "rely[ing] on the ubiquitous presence of cellular telephones and text messaging in daily life, or generalities that friends or coventurers often use cellular telephones to communicate" are insufficient to establish the nexus for a search of such a device. See Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 750 (2017). Instead, there must be "specific, not speculative," evidence linking the device in question to the criminal conduct. Commonwealth v. Fernandes, 485 Mass. 172, 185 (2020), cert. denied, 141 S. Ct. 1111 (2021).

We are, however, mindful that "[s]earch warrants should not be 'subjected to hypercritical analysis' but, rather, should be 'interpreted in a realistic and commonsense manner.'" Keown, 478 Mass. at 238, quoting Anthony, 451 Mass. at 68. "In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Anthony, supra, quoting Commonwealth v. Hason, 387 Mass. 169, 174 (1982). See generally J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 8-2 (2020 ed.).

Accordingly, "[t]he nexus 'need not be based on direct observation' and it 'may be found in the type of crime, the nature of the [evidence] sought, and normal inferences as to where such evidence may be found.'" Commonwealth v. Hobbs, 482 Mass. 538, 546 (2019), quoting White, 475 Mass. at 589. As with other locations searched, the nexus required to establish that a cell phone may contain evidence of a crime requires only a "fair probability that evidence of such a crime would be found in [the cell phone]." Anthony, 451 Mass. at 72.

Here, the affidavit in support of the search warrant established probable cause and set forth a sufficient nexus between Zachery's cell phone and the crimes alleged. The affidavit presented evidence that Zachery murdered the victim and shot at an officer and that the murder was part of a coordinated effort.

It was reasonable to infer that Zachery was coordinating with a coconspirator to murder the victim for several reasons. To begin, there was no apparent instigating event. Instead, the murder appeared to be planned and targeted. The affidavit presented evidence that Zachery traveled to the area of the crime with the intent to murder the victim. There was no apparent reason for Zachery, who lived in the Hyde Park section of Boston and was supposed to be in school at the time, to be near the crime scene. This suspicion was compounded by the fact

that Zachery provided a false explanation for why he was in the area and how he arrived. Zachery told police that he had been traveling throughout Boston by public transportation to help people shovel snow. He claimed that he had a shovel as he traveled and that he had been wearing the same clothing all day. However, in the hour before the shooting, surveillance video footage revealed that Zachery was walking without a shovel and wearing several layers of clothing on top of what he was wearing when he was arrested. In the video footage, he was wearing a camouflage jacket that appeared to be bulky and have another article of clothing underneath it. That article of clothing was black and had a high collar that was visible under the camouflage jacket. The black article of clothing was consistent with the black jacket found underneath the stairwell. Zachery also appeared to be wearing a gray hooded sweatshirt under both of these layers of clothing.

Additionally, the affidavit sets out that the only apparent motive for the murder was gang rivalry. The affidavit states that Zachery was listed in the Boston police gang database as being an active, primary member of the Franklin Hill Giants gang. The victim was listed as being a primary member of the Thetford Avenue gang. Henley, who was part of the same work crew as the victim, also was listed as being an active, primary member of the Franklin Hill Giants gang. The two gangs are

known to be rival gangs. Based on the information that the victim and Zachery were in rival gangs, and the fact that there was another person in the work crew with the victim who was part of the same rival gang as Zachery, police found it to be extremely unlikely that Zachery arrived there by coincidence. It was far more likely that Zachery was directed to or alerted to the work crew location in real time. The reasonable inference that Zachery used his cell phone to coordinate the murder follows logically. This evidence of likely coordination was sufficient to establish a nexus between the murder and Zachery's cell phone.

The facts of this case can be distinguished from those in White, 475 Mass. at 590, where we concluded that the seizure of the defendant's cell phone was not supported by probable cause because the nexus requirement was not satisfied. There, police did not have any information on which to base a belief that a cell phone was used in the commission of the crime; rather, the decision to seize the defendant's cell phone was made because officers had reason to believe that the defendant had coventurers and owned a cell phone.[14] Id. The facts here are far more compelling than the broad assertions made in White,

[14] We also note that the issue here, unlike in Commonwealth v. White, 475 Mass. 583, 590 (2016), is not whether the seizure of the cell phone was proper but rather whether there was probable cause to issue a warrant to search the cell phone.

which were supported by only the assumption that cell phones are commonly used to communicate. Compare id. with Snow, 486 Mass. at 587-589 (nexus between crime and cell phone where defendant called girlfriend after crime, defendant sent threatening text messages to victim, and evidence existed that crime had been planned ahead of time), and Commonwealth v. Holley, 478 Mass. 508, 522 (2017) (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).

We emphasize that this case presents a highly unusual combination of factors: there was no apparent instigating event for the murder; two rival gang members, one of whom was the victim, were part of the same work crew at the time of the murder; and, finally, another rival gang member of the victim, who did not live near the work site or have any plausible reason to be there, arrived at the work site at around the time of murder. Based on these factors, it was reasonable for police to believe that the murder was planned. More specifically, the fact that Henley, one of Zachery's fellow gang members, was part of the same work crew as the victim on the day of the murder permitted the inference that Henley may have coordinated the murder with Zachery. This type of coordination is improbable without real-time communication through cell phone calls or text

messages. Accordingly, these facts, combined with police experience and expertise, established a sufficient nexus for the search warrant.

ii. Particularity. "Under the Fourth Amendment, warrants must 'particularly describ[e] the place to be searched, and the persons or things to be seized.'" Keown, 478 Mass. at 239. Searches of cell phones "must be done with special care and satisfy a more narrow and demanding standard" than physical searches. Dorelas, 473 Mass. at 502. It is not enough to limit the search to the virtual contents of an electronic device. "[W]hat might have been an appropriate limitation in the physical world becomes a limitation without consequence in the virtual one." Id. Nevertheless, a search of an electronic device is proper when officers are clear about what they are seeking on the device. "[A] computer search 'may be as extensive as reasonably required to locate the items described in the warrant.'" United States v. Grimmett, 439 F.3d 1263, 1270 (10th Cir. 2006), quoting United States v. Wuagneux, 683 F.2d 1343, 1352 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

Here, the search warrant application sought eight types of evidence: ownership of the cell phone, contacts with persons at the homicide, discussion or knowledge of the homicide, familiarity with persons involved in the homicide, familiarity

or contact with locations or items associated with the homicide, communications that led Zachery to arrive at the scene of the shooting, evidence of gang activity, and discussions of firearms. The application did not, however, specify where on the cell phone the evidence might be found. Indeed, the affiant stated that evidence sought could "be found anywhere in the entire electronic contents of the phone." Even though the scope of the warrant was broad, it was sufficiently particular in these circumstances where officers had no knowledge of where on the cell phone evidence might be located, or in what format, but specifically identified the type of evidence sought. See United States v. Ulbricht, 858 F.3d 71, 102 (2d Cir. 2017), cert. denied, 138 S. Ct. 2708 (2018) ("A warrant may be broad, in that it authorizes the government to search an identified location or object for a wide range of potentially relevant material, without violating the particularity requirement").

Our conclusion in Dorelas that "[o]fficers must . . . conduct the search in a way that avoids searching files of types not identified in the warrant," Dorelas, 473 Mass. at 502, quoting United States v. Walser, 275 F.3d 981, 986 (10th Cir. 2001), cert. denied, 535 U.S. 1069 (2002), requires some clarification. Although general or exploratory searches are not permitted, requiring a search warrant application to identify specific locations or files on a cell phone to be searched

places an unrealistic burden on law enforcement and restricts legitimate search objectives, given the storage capacity and file structure of most cell phones. See United States v. Bass, 785 F.3d 1043, 1050 (6th Cir.), cert. denied, 577 U.S. 884 (2015). In most cases, at the time of the seizure, officers are unable to know "where [the] information [is] located in the phone or in what format."[15] Id.

Although police specified eight categories of relevant evidence for which they were searching, they did not know the precise identity or content of the evidence that would be found. Compare United States vs. Juarez, U.S. Dist. Ct., No. 12-CR-59 (RRM) (E.D.N.Y. Jan. 29, 2013) (warrant "properly cabined the discretion of the officers by limiting the search to a specific phone for enumerated categories of evidence related to a specific crime"), with United States v. Winn, 79 F. Supp. 3d 904, 919-921 (S.D. Ill. 2015) (warrant describing category of data rather than specific items not particular enough where police knew precise identity and content of evidence sought). Without knowing precisely what evidence existed, police did not know, nor could they have known, the precise location within the cell phone where the evidence would be found. In this case, and

[15] We have not required digital search protocols in Massachusetts. See Commonwealth v. Martinez, 476 Mass. 410, 422 n.11 (2017); Commonwealth v. Molina, 476 Mass. 388, 398 (2017).

other cases where the location of evidence on a cell phone is unknowable to law enforcement, the Dorelas requirement that officers identify file types to be searched in the warrant is impractical.[16] Accordingly, the warrant properly limited the search to enumerated categories of evidence related to the crime without limiting where in the electronic contents of the cell phone the search would take place.[17] See Hedgepath v. Commonwealth, 441 S.W.3d 119, 130 (Ky. 2014) ("the warrant did not limit the parts of the cell phone that could be searched, or the types of files or data that were to be sought, [but] the clear thrust of the warrant was for evidence related to the physical and sexual assaults committed").

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[16] In a case where police know precisely where the evidence for which they are searching is stored, the Dorelas requirement limiting the parts of the cell phone or types of files on the cell phone to be searched stands. See Winn, 79 F. Supp. 3d at 919-920.

[17] We have yet to address whether the plain view doctrine applies to digital searches. See Snow, 486 Mass. at 595 n.12. Here, there is no showing that police came across any of the data from Zachery's cell phone inadvertently. We note, however, that in a case where police do come across evidence inadvertently, but are within the scope of the search authorized by the warrant, the proper course is for police to stop their search and apply for another warrant. See United States v. Williams, 592 F.3d 511, 524 (4th Cir.), cert. denied, 562 U.S. 1044 (2010) ("We have applied [the plain view doctrine] successfully in the context of warrants authorizing the search and seizure of non-electronic files, and we see no reason to depart from them in the [context] of electronic files" [citation omitted]). But see Dorelas, 473 Mass. at 505 n.16 ("we recognize that the application of that doctrine to digital file searches may, at times, need to be limited").

That the warrant failed to require a temporal limit, however, raises a different concern in regard to particularity. "[T]o be sufficiently particular, a warrant for a cell phone search presumptively must contain some temporal limit." Snow, 486 Mass. at 594. When considering a temporal limit on a search warrant, "the inquiry can be based on 'the type of crime, the nature of the [evidence] sought, and normal inferences' about how far back in time the evidence could be found." Id., quoting White, 475 Mass. at 589. Cf. Hobbs, 482 Mass. at 549 ("defining the permissible parameters of time for CSLI searches that are justified by probable cause is difficult" and requires "fact-intensive inquiry" [citation omitted]). In Snow, we concluded that because the feud between the defendant and victim began only days before the murder, the facts did not "support a reasonable inference that evidence related to the crime could be found in the defendant's cell phone data from years, months, or even weeks before the murder." Snow, supra at 595. In contrast, we have recognized that in certain circumstances, such as "in an insider trading case where the tenor of the parties' relationship is critical to the claim, it could be reasonable to look back further in time." Id. at 594, citing United States v. Pinto-Thomaz, 352 F. Supp. 3d 287, 307 (S.D.N.Y. 2018).

Here, the detective averred that "it is both impractical and imprudent to restrict the electronic search by time frame."

This absence of a temporal limit altogether rendered the warrant impermissibly broad. Because a cell phone can store many years of data, some temporal restriction is required. Furthermore, there is little need to carry out a search quickly once a cell phone is seized. Police should "err on the side of narrowness" in an initial search warrant to protect the privacy interests at stake. Snow, 486 Mass. at 594. If officers uncover information during the initial search that supports probable cause to expand the search, they can request a broader warrant. Id. Accordingly, to be sufficiently particular, the warrant should have included some temporal limit.

In determining the permissible temporal parameters for a warrant, we first consider that the crime was a gang-related murder. The relationship between the victim and the defendants is relevant to the theory of the case that the murder was a result of a feud between rival gang members. Unlike in Snow, the record here supports an inference that there was a long-standing relationship between the defendants and the victim. Therefore, a reasonable temporal limit would extend beyond just the day of the murder or even the days leading up to the murder. In fact, evidence was presented that in December 2014, approximately two months before the murder, Henley told his mother about safety concerns he had at the program because of a member of a rival gang who also worked there. We can reasonably

infer that evidence relating to the feud between Henley and the victim could be found as far back as two months before the murder. Based on the particular facts of this case, a temporal limit of two months would have been reasonable. We emphasize that this determination is based on a fact-intensive inquiry and "[does] not amount to a general rule as to the temporal scope of cell phone searches." Snow, 486 Mass. at 595.

In any event, a "defendant is not prejudiced by an overbroad warrant if the Commonwealth does not seek to exploit the lack of particularity in the warrant." Snow, 486 Mass. at 591, citing Holley, 478 Mass. at 525. See Hobbs, 482 Mass. at 550-551 (defendant was not prejudiced by overbroad temporal limit where Commonwealth only meaningfully used and relied on evidence from date of killing). At trial, the Commonwealth introduced only text messages and telephone calls from the morning of the murder. Because we conclude that the requisite nexus existed between these text messages and the murder, and that the Commonwealth had probable cause to search Zachery's text messages from that day, we conclude that Zachery was not prejudiced by the lack of temporal limit in the warrant. "[T]he text messages were 'sufficiently limited in content and scope such that the Commonwealth did not capitalize on the lack of particularity in the warrant.'" Hobbs, supra at 551, quoting Holley, supra.

2. Failure to sever cases. Before trial, the judge denied Zachery's motion to sever his case from Henley's. Zachery also raised the issue repeatedly at trial.[18] Zachery argues that the judge abused his discretion in denying his repeated requests for severance and eventually for a mistrial. Matters of severance are left to the sound discretion of the trial judge. See Commonwealth v. McAfee, 430 Mass. 483, 485 (1999); Commonwealth v. Moran, 387 Mass. 644, 658 (1982). We weigh the efficiencies of joinder against the rights of the accused. Moran, supra. Failure to sever a trial is only an abuse of discretion when the prejudice from a joint trial deprives the defendant of a fair trial. Id.

Where parties present mutually antagonistic defenses and "the acceptance of one party's defense will preclude the acquittal of the other," the prejudice requires severance. Commonwealth v. DePina, 476 Mass. 614, 628 (2017), quoting Commonwealth v. Ramos, 470 Mass. 740, 749 (2015). The defenses must be "irreconcilable and mutually exclusive." United States v. Crawford, 581 F.2d 489, 491 (5th Cir. 1978). Defenses that merely are hostile or inconsistent do not require severance.

[18] Henley did not raise this issue at trial. On appeal, Henley "join[ed] in the arguments contained in the brief of his codefendant," but did not specifically address the trial judge's failure to sever the cases or how the failure to sever affected him in particular.

McAfee, 430 Mass. at 486 (defenses were not mutually antagonistic where defendant claimed misidentification and codefendant claimed diminished culpability because his coventurer, whom he did not identify as defendant, was shooter). See Commonwealth v. Watson, 487 Mass. 156, 167-169 (2021) (severance was not warranted where defendants had inconsistent arguments about specific testimony but did not seek to inculpate one another); Holley, 478 Mass. at 531-532 (denial of motion to sever was proper where evidence against one defendant was substantially greater than that against other but neither defense rested solely on guilt of other defendant); Commonwealth v. Hernandez, 473 Mass. 379, 391-392 (2015) (denial of motion to sever was proper where codefendants differed in descriptive characteristics they wanted jury to remember about intruders but all named third parties as perpetrators, not each other); Commonwealth v. Rivera, 464 Mass. 56, 72, cert. denied, 570 U.S. 907 (2013) (defenses were not mutually antagonistic where one defendant presented alibi witness and other claimed he had withdrawn from joint venture before murders). Further, where there is sufficient other evidence of guilt, even mutually antagonistic and irreconcilable defenses do not justify severance. Commonwealth v. Vasquez, 462 Mass. 827, 838 (2012).

Zachery argues that his trial should have been severed from Henley's trial because he was prejudiced by evidence that Henley

was involved in another shooting using the murder weapon from this case. Zachery also argues that the trial should have been severed because his defense at trial that there was insufficient evidence to prove he was the shooter was entirely antagonistic to Henley's defense of miscommunication. Neither of these arguments justifies severance.

Regarding Zachery's first argument, whether Zachery was prejudiced by evidence that Henley was involved in another shooting is not relevant to the issue of severance. The question is not whether a defendant is prejudiced by evidence introduced against a codefendant, but, rather, whether the codefendants' "defenses are . . . mutually antagonistic (or mutually exclusive) and irreconcilable." Vazquez, 462 Mass. at 836. In any event, there was no prejudice to Zachery where the judge gave a contemporaneous limiting instruction that this evidence "may not be considered for any purpose whatsoever against [Zachery]." Moreover, evidence that Henley was involved in another shooting where the murder weapon was used is not prejudicial to Zachery where his defense was that he was not the shooter in this case.

Zachery's second argument is equally unavailing. Zachery's defense at trial was that he was not the shooter. Henley's defense was that he asked Zachery to bring him the gun for protection but did not intend for Zachery to shoot the victim.

These defenses are merely inconsistent and, at best, hostile. See McAfee, 430 Mass. at 486. The jury could have accepted either defense without implicating the other. See DePina, 476 Mass. at 628. Because Zachery did not show that he was unfairly prejudiced by a joint trial, the trial judge did not abuse his discretion in denying Zachery's motion and requests for severance.

3. Evidence of prior misconduct. Henley argues that the trial judge erred in admitting evidence, over his objection, of prior misconduct that connected Henley to an earlier shooting.[19] The Commonwealth argues that the probative value of the evidence of the prior shooting was not outweighed by unfair prejudice because it established Henley's access to a firearm and was intertwined with the Commonwealth's theory of Henley's involvement in the murder as a coconspirator.

Following a pretrial hearing, the judge ruled that the Commonwealth's witnesses could testify that, approximately five months before the murder, Henley and another individual[20] were observed running away from a location where shots were fired.

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[19] In his brief, Zachery joined in Henley's argument that the judge erred in admitting evidence of prior misconduct that connected Henley to an earlier shooting but did not argue that the alleged error prejudiced him personally.

[20] The parties stipulated that the other individual running away was not Zachery.

The Commonwealth also presented evidence that the firearm used in that incident was the same one used to kill the victim in this case. A judge's decision to allow the admission of such evidence is "not disturbed absent palpable error" (citation omitted). Commonwealth v. McGee, 467 Mass. 141, 156 (2014).

"A weapon that could have been used in the course of a crime is admissible, in the judge's discretion, even without direct proof that the particular weapon was in fact used in the commission of the crime." Commonwealth v. Barbosa, 463 Mass. 116, 122 (2012). Nevertheless, evidence relevant to showing that a defendant has the means to commit a crime will not be admitted if its probative value is outweighed by the risk of prejudice to the defendant. See Commonwealth v. Crayton, 470 Mass. 228, 249 (2014). Henley's contention that the evidence is not probative because it did not demonstrate that Henley possessed or had access to the gun in the earlier incident is unavailing. While the firearm in the earlier incident was, at most, tenuously linked to Henley at the time, the fact remains that it was the same firearm used to carry out the murder in this case. Henley's presence at the earlier incident where the firearm was used established that he may have had access to the firearm, even if he did not possess it at the time. See Holley, 478 Mass. at 532 (evidence of prior uncharged gun theft relevant to show defendant had means of committing crime).

Moreover, the risk of prejudice to Henley was limited where the Commonwealth alleged only that Henley was present when the misconduct occurred. While the jurors could have inferred that Henley had some association with the firearm used during that incident, based on the evidence presented, it was not a reasonable inference that Henley fired the gun or had any physical involvement in the shooting.

Finally, any potential risk that the jury would use the evidence to impermissibly infer that Henley had bad character or a propensity to commit the crime was offset by the judge's limiting instruction. See McGee, 467 Mass. at 158. Although the judge did not give a contemporaneous limiting instruction, he included a limiting instruction in his final charge. The judge stated: "If you find the evidence concerning the prior incident credible you may consider that evidence only for a limited purpose; that is, on the issue of whether . . . Henley had knowledge of or access to that particular weapon. You may not use the evidence to conclude that . . . Henley has a bad character or that he has a propensity to commit crimes or that he has committed any crime on that earlier date in September of 2014." We presume that the jury followed the judge's instructions. See Commonwealth v. Medina, 430 Mass. 800, 803 (2000).

4. Officer testimony that he had known Henley since 2005. Henley argues that the judge erred in allowing, over his objection, an officer's testimony that he recognized Henley as part of the work crew at the scene of the crime and had been familiar with Henley since 2005. Henley argues that this testimony impermissibly encouraged the jury to infer that the officer knew Henley as a result of previous stops or arrests. Henley further argues that whether the officer knew Henley and for how long he knew Henley had no probative value where the prosecutor could have simply asked the officer to identify Henley in the court room. The Commonwealth counters that the testimony was admissible because its probative value outweighed any undue prejudice.

We agree that the testimony about the officer's familiarity with Henley and the officer's recognition of Henley at the scene of the crime was probative evidence, central to the Commonwealth's theory that Henley conspired with Zachery to kill the victim. Similarly, the length of time that the officer had known Henley was relevant to the strength of his identification. See Commonwealth v. Adams, 458 Mass. 766, 771 (2011). The probative value, however, is lessened where Henley does not dispute that he was present at the scene of the crime as part of the work crew.

There is no question that officer testimony regarding familiarity with a defendant can be prejudicial. Commonwealth v. Pleas, 49 Mass. App. Ct. 321, 327 (2000) ("Identification testimony from a police officer who is so designated increases the potential for inappropriate prejudice to the defendant"). The question, however, is not whether admission of the officer's testimony was prejudicial; "it is rather whether it was unduly prejudicial, or more prejudicial than probative." Commonwealth v. Rosa, 468 Mass. 231, 241 (2014). Here, Henley's claim of undue prejudice is premised on the notion that the jury were likely to infer from the testimony that Henley had a long history of police contact. Because Henley himself used his gang involvement as part of his theory of defense throughout the trial, the officer's testimony about his familiarity with Henley did not amount to undue prejudice.

Furthermore, even if we were to conclude that the probative value of this evidence did not outweigh the prejudice to Henley, there was no prejudicial error because, as stated, Henley's defense included his history of gang involvement. Accordingly, the officer's testimony did not contribute substantively to the Commonwealth's case and was unlikely to have affected the jury.

5. Testimony of the Commonwealth's gang expert. Henley argues that the trial judge improperly admitted portions of the

Commonwealth's expert witness's gang testimony.[21,22] Specifically, Henley contends that certain of the expert testimony was inadmissible because it was either unduly prejudicial or outside the witness's expertise and that the judge's limiting instruction to the jury permitted consideration of the gang evidence for too many purposes.

Zachery raised a timely objection to the expert's testimony regarding general gang violence.[23] Accordingly, as to that claim, we review for prejudicial error and "inquire[] whether there is a reasonable possibility that the error might have contributed to the jury's verdict." Commonwealth v. Wolfe, 478 Mass. 142, 150 (2017), quoting Commonwealth v. Alphas, 430 Mass. 8, 23 (1999) (Greaney, J., concurring). As to Henley's other unpreserved claims regarding the gang expert's testimony, our review is limited to whether any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Oliveira, 431 Mass. 609, 612 (2000), S.C., 438 Mass. 325 (2002).

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[21] The expert, a Boston police detective, provided testimony on gangs but did not testify about other issues in the case.

[22] Zachery joined in the argument contained in Henley's brief that the judge erred in admitting certain testimony from the Commonwealth's gang expert. Zachery did not advance any additional arguments regarding the alleged error.

[23] Zachery's objection to the expert's testimony regarding gang violence was sufficient to preserve the claim for both defendants. See Commonwealth v. Charles, 57 Mass. App. Ct. 595, 598 n.7 (2003).

"Expert testimony 'is admissible whenever it will aid the jury in reaching a decision, even if the expert's opinion touches on the ultimate issues that the jury must decide.'" Commonwealth v. Evans, 469 Mass. 834, 849 (2014), quoting Commonwealth v. Dockham, 405 Mass. 618, 628 (1989). "Expert opinion testimony must rest on a proper basis, else inadmissible evidence might enter in the guise of expert opinion." Commonwealth v. Wardsworth, 482 Mass. 454, 466 (2019), quoting Commonwealth v. Barbosa, 477 Mass. 658, 667 (2017). "Proper bases include 'facts within the witness's direct personal knowledge,' facts already introduced in evidence, or 'unadmitted but independently admissible evidence.'" Wardsworth, supra, quoting Barbosa, supra.

Here, the evidence relating to the rival gangs and both defendants' gang membership was relevant to the Commonwealth's theory of the case. The evidence established motive and was relevant to the Commonwealth's theory that Zachery and Henley conspired together to murder the victim. We disagree with Henley's claim that the Commonwealth's expert was unqualified to opine on the meaning of certain phrases in the defendants' text messages. "Expert testimony is useful where speakers engage in coded conversation or speak about a subject using specialized vocabulary." Rosa, 468 Mass. at 240. Although expert testimony is not permitted to interpret clear conversations, an expert

opinion as to "street-level jargon" is admissible. Id. at 240 n.12. The expert's extensive history of gang-related police work gave him a specialized knowledge and familiarity with common gang terminology. The expert properly testified that to "hold somebody down" was an expression of loyalty and to "punch somebody up" meant to shoot someone. Additionally, the expert properly testified that a "crash" or "crash test dummy" was slang for a younger gang member who may commit violent acts to gain status in a gang.

We conclude, however, that the expert's testimony regarding general gang violence was overbroad. The expert testified extensively about the general presence of gangs in Boston, as well as prior instances of gang violence in the city. Although the expert's testimony regarding the gangs with which the defendants and the victim were affiliated was relevant to establish motive and joint venture between Zachery and Henley, his more general comments regarding gangs in the Boston area went beyond what was probative of the defendants' criminal liability. Such testimony risked "prejudice to the defendant in that it [suggested] a propensity to criminality or violence" resulting from his gang affiliation. Commonwealth v. Phim, 462 Mass. 470, 477 (2012). Contrast Commonwealth v. Akara, 465 Mass. 245, 267-269 (2013) (no error where "[t]he prosecutor did

not suggest that the gang or its members had a history of violence" and "did not discuss any criminal activity").

We disagree with Henley that the circumstances here are analogous to Wardsworth, 482 Mass. at 471-472. In Wardsworth, the erroneous admission of the gang expert's opinion that the defendant fit the criteria of a gang member constituted reversible error. Id. at 473. There, the Commonwealth's case depended upon the jury believing that the defendant was a member of a gang. Id. at 455. While we concluded that testimony about general gang violence was part of the totality of gang-related testimony that "went well beyond that which was probative of the facts at issue," we had no need to reach what effect this evidence would have had on the jury alone. Id. at 473.

The circumstances here are far different. First, the defendants' gang membership is not in dispute and, in fact, it is a crucial part of Henley's defense. Second, unlike in Wardsworth, the judge gave an effective limiting instruction regarding the jury's use of the expert testimony. Henley argues that this limiting instruction was overbroad. We disagree.

The judge's limiting instructions drew a direct connection between the alleged gang involvement of the defendants and the murder. Most significantly, the judge effectively instructed the jury regarding the limited purpose of the expert's evidence. The judge gave this limiting instruction at the start of the

expert's testimony and in the judge's final charge to the jury. In the limiting instruction, the judge said that the "so-called gang evidence" should be considered for three limited purposes, "if [the jury] credit it":

> "first, as evidence of the defendants' state of mind, including whether either or both of the defendants had a motive to commit the killing of [the victim], and as evidence of any hostility or fear that either of the defendants held for [the victim] or his group; second, as evidence, again if you credit it, of whether there was a joint venture or common purpose or plan between the two defendants to commit the killing; and third, whether any reported gang affiliations may have influenced certain decisions or actions by members of the [program]. If you conclude that either defendant is affiliated with a gang or group that in itself is no proof that either defendant committed the crimes with which he is charged in this case."

In his final charge to the jury, the judge repeated the limited purposes for which the expert gang testimony could be considered but did not add the caveat that the evidence should be considered for these purposes only "if the jury credit it." Henley contends that the judge erred in failing to use this language. Considering the judge's instructions as a whole, we disagree.

At the close of evidence, the judge separately instructed the jury on expert witness testimony. The judge instructed: "[Y]ou are to treat the so-called expert witness just as you would treat any other witness. In other words, as with any other witness it is completely up to you to decide whether you

accept the testimony of an expert witness including the opinions that the witness has given." Although the gang expert's testimony was overbroad, we conclude that any material risk of prejudice to the defendants was remedied by the judge's limiting instruction at the time the expert testified and the judge's final instruction.

6. Opening statement and closing argument. Zachery argues that portions of the prosecutor's opening statement and closing argument were improper and require a new trial.[24] We conclude that the prosecutor's statements were within the bounds of proper argument.

First, Zachery argues that, in the prosecutor's opening statement, he argued facts not in evidence with respect to the footprints found on the porch. The prosecutor stated, "Through the part of the yard that was shoveled and up onto the back porch left sneaker prints in the fresh snow on that back porch. Sneaker prints of the exact same size, make, model and tread pattern of the sneakers . . . Zachery was wearing." "[A] prosecutor in a criminal action may state anything in [his or her] opening argument that [he or she] expects to be able to prove by evidence." Commonwealth v. Johnson, 429 Mass. 745, 748

[24] Henley joins in the arguments regarding prosecutorial misconduct in Zachery's brief but does not make any additional arguments relating to this issue in his brief.

(1999), quoting Commonwealth v. Cohen, 412 Mass. 375, 382 (1992).

The Commonwealth's expert was not able to individualize the sneaker print to Zachery's sneaker. The expert did, however, testify that the print was the same make, model, and size as Zachery's sneaker. While she did not speak to whether the tread pattern was identical, this assertion was independently supported by an exhibit that showed the matching tread patterns side by side.

Next, Zachery argues that, in his closing argument, the prosecutor "made light of the importance of the jurors' obligation to be convinced of the defendant's guilt," mocked the closing argument of Zachery's attorney and his theory of defense, and incorrectly characterized defense counsel's argument. Specifically, Zachery argues that the following statement in the prosecutor's closing was improper: "[Defense counsel] hammered on that phrase moral certainty like it's suppose[d] to scare you, like it's suppose[d] to scare you out of decisions that juries make in trials every day." As the Commonwealth contends, this statement was a response to Zachary's counsel's closing argument, which repeatedly mentioned moral certainty. The prosecutor is entitled to respond to the defendant's closing argument. See Commonwealth v. Smith, 404 Mass. 1, 7 (1989).

Zachery also takes issue with the prosecutor's statement in his closing that "[defense counsel] has very honorably represented . . . Zachery and done what he could, but his argument amounts to let's pretend. Let's pretend there's no evidence. Let's pretend the content of those text messages isn't there. Let's pretend that the MBTA video doesn't show . . . Zachery." A "prosecutor [is] permitted to comment on the defense strategy and tactics," and even to argue "that the strategy was intended to confuse." Commonwealth v. Scesny, 472 Mass. 185, 202 (2015). At trial, Zachery's theory of the case was that the Commonwealth's identification evidence was insufficient. We agree with the Commonwealth that the prosecutor's argument that Zachery's case amounts to "let's pretend" was not an improper response to Zachery's argument and should be understood as comment on the weakness of Zachery's case.

Finally, Zachery argues that in both his opening statement and closing argument, the prosecutor improperly appealed to the jury's compassion for the decedent. First, Zachery argues that it was improper for the prosecutor to state in his opening statement, "down [the victim] went in the gutter, gasping for breath. Lungs filling up with blood as well, bleeding and dying." Zachery also argues that the prosecutor improperly revisited this theme in his closing argument when he stated,

"I'm not going to show you the pictures again of [the victim's] body in the gutter, the way he died bleeding into his hoodie, lungs filling up with blood. I'm not going to show you again now during my closing the picture of the bullet hole that these two men put in [the victim's] head. No, once is enough seeing that stuff unless for any reason you feel like you need to look at it again to refresh your memory, it's going to be there. While it is improper for a prosecutor to inflame the jury to evoke an emotional, rather than intellectual response, "'[w]here a charge of murder in the first degree is based on the theory of extreme atrocity or cruelty' . . . the Commonwealth may 'illustrate the magnitude of the crime' by discussing the details of the victim's death." Commonwealth v. Camacho, 472 Mass. 587, 607 (2015), quoting Commonwealth v. Siny Van Tran, 460 Mass. 535, 554 (2011), and Commonwealth v. Torres, 437 Mass. 460, 465 (2002). Moreover, if a prosecutor's statement "falls into the category of 'enthusiastic rhetoric, strong advocacy, and excusable hyperbole,'" it is not grounds for reversal. Commonwealth v. Silva, 455 Mass. 503, 515 (2009), quoting Commonwealth v. Wilson, 427 Mass. 336, 350 (1998).

Here, we agree with the Commonwealth that the prosecutor's arguments were based in fact and relevant to the issue of extreme atrocity or cruelty. Although this evidence may have been upsetting, it was "inherent in the odious . . . nature of

the crime[] committed." Barbosa, 477 Mass. at 669-670, quoting Johnson, 429 Mass. at 749. Details regarding how the victim died were relevant to the jury's determination as to the manner of killing necessary to justify a conviction of murder in the first degree. See Johnson, supra at 748.

Neither defendant objected to any of the alleged misstatements at trial. Even if the prosecutor's statements were improper, none of the statements created a substantial risk of a miscarriage of justice, given that the Commonwealth's case was particularly strong. Moreover, the judge instructed the jury on the limited purpose of opening statements and closing arguments. He instructed that these statements were not evidence, that the verdict should not be swayed by sympathy for the victim, and that only the evidence presented at trial could be used to determine the verdict. See Commonwealth v. Lopes, 478 Mass. 593, 607 (2018).

7. Henley's proposed instruction on mistake or accident. Henley argues that the judge was required to instruct the jury that Henley could not be convicted if his participation in the crime was the result of "mistake, accident, negligence or other innocent reason" because the instruction went to the heart of his case. The Commonwealth asserts that the judge's instructions on aiding and abetting, as well as intent, were sufficient.

"Where the evidence fairly raises the possibility of accident, the defendant is entitled, if he requests, to have the judge instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt that the death was not accidental." Commonwealth v. Jewett, 442 Mass. 356, 370 (2004). A judge should not, however, instruct on accident when there is no evidence of accident. See Commonwealth v. Hutchinson, 395 Mass. 568, 578-579 (1985). Here, Henley was charged under a joint venture theory of liability, which required that he knowingly participated in the commission of the crime. In both his opening statement and closing argument, Henley argued that he did not share an intent to kill the victim but rather had sent Zachery a text message to bring him a gun only for protection. He argued that Zachery simply misunderstood his message. Henley argues that an accident or mistake instruction should have been given in relation to the "knowingly" element of the offense. Accordingly, we conclude that Henley fairly raised the defense of accident at trial.[25]

[25] Zachery would not, however, have been entitled to an affirmative defense accident instruction. "A defendant is entitled to an accident instruction in a shooting death 'only where there is evidence of an unintentional or accidental discharge of a firearm.'" Commonwealth v. Pina, 481 Mass. 413, 418 (2019), quoting Commonwealth v. Millyan, 399 Mass. 171, 182 (1987).

Even where a defendant was entitled to an accident instruction, we have concluded that absence of such an instruction is prejudicial only where the jury instructions improperly shifted the burden of proof to the defendant. See Commonwealth v. Lowe, 391 Mass. 97, 110-111, cert. denied, 469 U.S. 840 (1984) ("if a charge, viewed as a whole, adequately informs a jury of the burden of the Commonwealth to establish each element of the crime, including the disproof of a so called affirmative defense [e.g., self-defense, insanity, alibi, accident], there is no error"). See also Commonwealth v. Robinson, 382 Mass. 189, 207-208 (1981) (no error where judge adequately charged jury as to burden of Commonwealth to establish free will of defendant to commit crime without shifting burden of proof). Contrast Commonwealth v. Zezima, 387 Mass. 748, 756-757 (1982) (prejudicial error where judge's failure to instruct on accident could have led jury to shift burden of proof from Commonwealth to defendant).

Here, the judge's charge to the jury was sufficient to inform the jury of their "true duty." Robinson, 382 Mass. at 208. Although the judge did not give an explicit instruction on mistake or accident, he repeatedly instructed the jury that the Commonwealth is required to prove all elements of a charge, including intent, beyond a reasonable doubt. Moreover, the judge extensively described intentional conduct to logically

exclude conduct resulting from mistake or accident. The judge stated, "To find . . . Henley guilty of murder there must be proof that he intentionally participated in some fashion in committing that particular crime and that he had or shared the intent required to commit the crime. It's not enough to show that . . . Henley simply was present when the crime was committed or that he knew about it in advance."

"[T]his is a case where the jury charge 'clearly placed the burden of proving malice beyond a reasonable doubt on the Commonwealth and contained other discussion which, although not referring to the burden of proof as to [accident], adequately defined [that factor] and established [it] as negating a finding of malice.'" Lowe, 391 Mass. at 112, quoting Reddick v. Commonwealth, 381 Mass. 398, 405 (1980).

8. Zachery's claim of ineffective assistance of counsel. Zachary filed a brief pursuant to Commonwealth v. Moffett, 383 Mass. 201, 208-209 (1981), in which he argued that trial counsel provided ineffective assistance by failing to call a witness who reported seeing a white man running from the crime scene with a gun. The Commonwealth counters that Zachery has not satisfied either prong of Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), required to establish ineffective assistance of counsel. We agree.

To prevail on a claim on ineffective assistance of counsel under Saferian, 366 Mass. at 96, the defendant bears the burden of proving that (1) "there has been serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer"; and (2) as a result, the defendant was "likely deprived . . . of an otherwise available, substantial ground of defence." "A strategic or tactical decision by counsel will not be considered ineffective assistance unless the decision was 'manifestly unreasonable' when made." Commonwealth v. Boria, 460 Mass. 249, 252-253 (2011), quoting Commonwealth v. Watson, 455 Mass. 246, 256 (2009). A determination whether to call a witness, although not immune from scrutiny, is a tactical decision. See Commonwealth v. Adams, 374 Mass. 722, 728-729 (1978).

Zachery has failed to satisfy the first prong of Saferian, given that the record reflects that counsel explicitly considered the possibility of calling the witness at trial. While it is unclear why counsel decided not to call the witness, this is a tactical decision that does not amount to "serious incompetency, inefficiency, or inattention of counsel." Saferian, 366 Mass. at 96. It is unnecessary for us to proceed to the second prong of Saferian. In any event, we note that Zachery could not have been deprived of an otherwise available

third-party culprit defense, given that an officer testified that a witness described a Caucasian man with the gun.

9. Cumulative error analysis. Finally, the defendants argue that the alleged errors cumulatively created a substantial risk of a miscarriage of justice. We disagree. Given our conclusions stated supra, we conclude that there was no cumulative error necessitating a new trial.

Conclusion. For these reasons, we affirm the order denying the defendants' motion to suppress and their convictions.

So ordered.