No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ASHLEY FERNANDES,
PETITIONER

vs.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT

_____

APPENDIX

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

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485 Mass. 172
Supreme Judicial Court of Massachusetts,
Essex..

COMMONWEALTH
v.
Ashley FERNANDES.

SJC-11732
|
Argued February 14, 2020.
|
Decided July 6, 2020.

Synopsis

Background: Defendant, a native and citizen of India, was convicted in the Superior Court Department, Essex County, Timothy Q. Feeley, J., of first-degree murder. Defendant appealed.

Holdings: The Supreme Judicial Court, Kafker, J., held that:

warrant to search defendant's digital camera was supported by probable cause;

any possible illegality in police officer's search of images on defendant's digital camera did not warrant exclusion of images;

violation of Vienna Convention on Consular Relations based on failure by authorities to advise defendant of his right to have authorities inform consulate of his arrest and detention was not constitutional error of structural magnitude warranting new trial;

violation of Convention did not implicate rights under Sixth Amendment and Massachusetts Declaration of Rights to counsel of choice;

appointed counsel's representation of defendant was not burdened by actual conflict of interest, in violation of defendant's constitutional right to counsel;

defendant was not entitled to new trial based on claim that trial counsel was ineffective for failure to bring to jury's attention victim's statements dismissing concerns about her safety; and evidence did not warrant instruction on voluntary intoxication.

Affirmed.

****365** Homicide. Constitutional Law, Search and seizure, Probable cause, Assistance of counsel. Search and Seizure, Warrant, Probable cause. Probable Cause. Vienna Convention. Practice, Criminal, Capital case, Motion to suppress, Assistance of counsel, Instructions to jury. Attorney at Law, Conflict of interest.

Indictments found and returned in the Superior Court on May 23, 2008.

Pretrial motions to suppress evidence were heard by Timothy Q. Feeley, J., the cases were tried before him, and motions for a new trial, filed on August 13, 2015, and December 15, 2017, were heard by him.

Attorneys and Law Firms

Leslie W. O'Brien, Boston, for the defendant.

Kenneth E. Steinfield, Assistant District Attorney, for the Commonwealth.

Present: Gants, C.J., Lenk, Budd, Cypher, & Kafker, JJ.

Opinion

KAFKER, J.

***173** A jury convicted the defendant, Ashley Fernandes, of murder in the first degree in connection with the strangulation death of his girlfriend, Jessica Herrera. At trial, the Commonwealth successfully pursued theories of both deliberate premeditation and extreme atrocity or cruelty. The defendant was also convicted of assault and battery, but acquitted of attempted murder by strangling, in connection with a separate domestic violence incident involving the victim three and one-half months before the murder.

Information about the murder first came to light on the night of April 5, 2008, just hours after the victim's death, when during a casual conversation with another patron at a bar the defendant twice “blurted out” that his girlfriend was dead in his apartment. The next morning, the concerned bar patron reported the conversation to the police. Further

investigation led to a motor vehicle stop of the defendant's car that afternoon. During the stop, the defendant spontaneously invited police to search his nearby apartment. In a back room of the Peabody apartment, police found the victim's naked body rolled in a blanket. Police took the defendant into custody, and later that evening he confessed to strangling the victim inside the apartment. Police immediately sought and executed a search warrant of the apartment, where they found graphic images of the victim, ****366** taken at or near the time of her death, stored in a digital camera tucked inside a kitchen drawer.

In this consolidated appeal from his convictions and from several related orders denying postconviction relief, the defendant asserts reversible error arising from the denial of his pretrial motion to suppress the digital camera images. He contends that the relevant warrant applications lacked sufficient information to connect either the camera or its contents to the homicide, such that the warrants issued without probable cause.

The defendant, who is from India and is not a citizen of the United States, also claims that violations of his consular notification and access rights under art. 36 of the Vienna Convention on Consular Relations resulted in constitutional errors of structural ***174** magnitude, namely deprivation of his constitutional rights to (a) representation by counsel of his choice, and (b) court-appointed conflict-free counsel. We also address additional claims that trial counsel's decision not to introduce certain evidence amounted to ineffective assistance, and that the trial judge's failure to give a requested intoxication instruction was error. The defendant also seeks extraordinary relief pursuant to G. L. c. 278, § 33E. Whereas each of the above claims lacks merit, and we discern no basis to grant extraordinary relief after plenary review of the record on appeal, we affirm the defendant's convictions and the orders denying each of his motions for postconviction relief.

Factual background. 1. The domestic homicide. The evidence, viewed in the light most favorable to the Commonwealth, Commonwealth v. Anderson, 396 Mass. 306, 311, 486 N.E.2d 19 (1985), permitted the jury to find the following facts. The defendant came to the United States in 2005, when he was twenty-five. In April or May of 2007, the defendant met the victim at a local bar. The victim, who was in her mid-twenties, was then working as a dental hygienist and living in Peabody with her husband and her two sons, both under two years old. The Department of Social Services (department) was involved with the family, and the victim's husband moved out shortly after she met the defendant. Although the defendant and the victim were not then involved in a romantic relationship, he moved in with her to help pay rent and expenses, and assisted with child care. By early September, the victim and the defendant had established an exclusive intimate relationship.

The severity of the victim's drinking problem soon contributed to growing turbulence in her relationship with the defendant. According to the defendant, one day in October 2007, he returned home from work early to find the victim's children in the living room crying and the victim "having sex" with a man he did not know in a different room. At the defendant's request, the man left. Unprompted by the defendant, the victim went with him. Finding himself alone with two distraught children, the defendant called the department. Representatives of the department arrived promptly and removed the children; the victim lost custody of both boys. By working with the department, she managed to regain custody, however briefly, just before Christmas.

On Christmas Eve, the children went for an overnight visit with their father's family. Since the defendant's birthday is the same day as Christmas, the defendant and the victim met up with another couple to celebrate. The festivities were cut short, however, ***175** because of the victim's excessive alcohol consumption. After their company left, the victim and the defendant went to sleep.

****367** According to the victim's later statements to police, she awoke suddenly to find herself on the floor with the defendant straddled over her, punching her, slamming her head against the floor, and calling her a "whore" and a "bitch." He told her that he would kill her, and that she would die and no one would hear her scream. The beating went on for more than two hours, as she struggled in and out of consciousness, trying to get up off the floor. He choked her until she could not breathe. She blacked out. When she regained consciousness, her ears were ringing, and she begged and pleaded with him to stop, "trying to say anything for him not to kill [her]." Finally, he relented. The area around the victim's left eye was black and blue, and the white of the eyeball was completely blood red.[1] She did not call police, fearing the department would take her boys away.[2]

1 At trial, the Commonwealth's medical expert testified that strangulation may cause "minute hemorrhages," apparent in the whites of the eyes when blood flowing

out from the brain is trapped and builds enough pressure to burst small blood vessels. This phenomenon was visible in the autopsy photographs, but it also served to corroborate the victim's report that she had been strangled on Christmas Eve, given the state of her left eyeball.

2 Although the children returned from their visit with their paternal family on Christmas morning and opened presents, the victim's fears were shortly realized. When representatives from the department came for an unannounced visit the next day, they removed the children immediately upon seeing the victim's injuries.

A few days after Christmas, the victim's stepfather drove to Peabody to bring the victim back with him to Cape Cod, where she stayed with her parents for a time. On January 4, 2008, the victim visited the Peabody police station, seeking help to "remove" the defendant from the apartment. She spoke with the head of the domestic violence unit, who asked what had happened. The victim described the attack, made a written statement, and permitted the officer to photograph her injuries.[3] Later the same day, police arrested the defendant and a complaint issued in the Peabody Division of the District Court Department charging him ***176** with assault and battery. Following a weekend in jail, and a Monday court hearing,[4] the defendant was released. The victim obtained a restraining order and "moved out" for a time.

3 At trial, the judge admitted both the officer's testimony about her meeting with the victim, including the victim's statements describing the Christmas Eve incident, and the victim's own written statement regarding the same, under the theory of forfeiture by wrongdoing. The judge applied that theory on the ground that precluding the victim's adverse testimony at the impending April 11 trial of the assault and battery charges arising from these events was a factor, perhaps among others, that motivated the defendant to kill the victim.

4 The victim arrived at the hearing drunk. When the hearing was over, her stepfather asked the court to have her civilly committed, so that she could get help. The defendant's work supervisor testified at trial that the defendant had told her about his arrest for choking his girlfriend to the point of unconsciousness, but she had not believed him. The supervisor also testified that the defendant had laughed with other workers during a cigarette break after joking that, in India, he could kill his girlfriend and nothing would happen to him.

On Valentine's Day, the defendant accompanied the victim to court, where she successfully moved to vacate the restraining order. Reconciliation was short lived, however, and during a telephone argument soon thereafter, the defendant told the victim's stepfather that he (the defendant) "would be sending [the victim] home in a box." Before February ended, the victim left Peabody again. Her stepfather convinced her to try a rehabilitation program, ****368** but she stayed only one day before leaving to reunite with the defendant. In early March, the victim again returned to her parents' home on Cape Cod, where she stayed with her stepfather for about three weeks. During this time, the victim met and began spending time with a man in his early twenties named Brett. She also interviewed for jobs in the area and started looking for an apartment nearby. The defendant's pending assault and battery case was scheduled for trial on April 11, and the department would not allow the children to visit the victim while she lived with him. Still, the victim allowed the defendant to visit her on Cape Cod and had moved back in with him by March 23. They then spent several days together at a hotel on Cape Cod, returning to Peabody on or about April 1.

On Thursday, April 3, the defendant visited Salem Hospital with symptoms including numbness and chest pain. Doctors admitted him overnight for testing and advised rest. On April 4, he returned home to find the apartment a mess and the victim drunk; she continued drinking and playing loud music, disturbing his efforts to rest. At 12:06 a.m. on April 5, the victim spoke to Brett by telephone and asked him to come to Peabody and drive her back to Cape Cod. Around 12:45 a.m., she called back to say that circumstances had "changed" and she would "be fine until the morning."

On the morning of Saturday, April 5, the defendant answered the victim's cell phone to a male voice saying, "hello sweetheart." ***177** Upset, the defendant asked the victim who was on the telephone. She ignored him, and then took the call in another room. That afternoon, around 2:30 p.m., the victim telephoned Brett to say that she had a ride to Harwich later. The defendant took the victim to buy a twelve-pack of beer, and then both returned to the apartment, where she invited him to have a drink with her. The defendant had two or three beers, and the victim drank the remaining nine or ten. At about 5 p.m., the victim called Brett again, sounding distressed. She asked him to drive from Plymouth to pick her up in Peabody, and Brett agreed to come.[5]

5 When Brett later telephoned the victim for more specific directions, as planned, he could not reach her, despite calling repeatedly for almost an hour.

Not long after the victim ended the telephone call, she and the defendant argued, and the verbal altercation escalated into a physical struggle on the living room floor. As the defendant himself described during the video-recorded confession to police the night of his arrest, he put his hands on the victim's neck and pushed hard, choking her until she urinated. The victim struggled, "trying kicks" to escape out from under the defendant; he knew she was not strong enough to succeed, told her "you can't fight me," and continued to press down "hard" on her neck. The victim soon died of asphyxia by strangulation. Between 5:29 p.m. and 5:36 p.m., the defendant used a camera to capture five digital images of the victim's body, two of them showing one of his hands wrapped around her neck.

After strangling the victim, the defendant then went out to a bar. He ordered a beer and appeared to be in a good mood. Later in the evening, the defendant was still nursing the same beer when he struck up a conversation with another patron. The bar patron testified that amidst pleasant small talk, the defendant eventually "blurted out" that his girlfriend was dead in his apartment, and later stated that the bar patron would be reading about him in the newspaper. After the bar closed and the defendant returned home, the victim was still lying on the floor. He stripped off her clothing and cut off her bra and a chunk of ****369** her hair. After wrapping the victim's naked body in a comforter and securing it with several pieces of rope, he moved it into the back bedroom.

2. Arguments at trial. The Commonwealth proceeded on theories of deliberate premeditation and extreme atrocity or cruelty, emphasizing the defendant's callous disregard of the victim, both during her life and after her death, and relying heavily on the five ***178** graphic images of the victim's body. During the Commonwealth's opening statement, the jury heard an explicit description of the strangling's physical effects on the victim's body, and then listened to the prosecutor recount how the defendant had seized his camera and taken "five photographs of the horrifying last moments of [the victim]'s life," before he headed out for a beer.

Other critical evidence suggesting premeditation was a calendar that police seized from the defendant's kitchen wall, opened to the month of April. The April 5 box was entirely colored over with red marker, but words written in red marker remained barely visible underneath: "END OF STORY -- NO MORE LOVE -- 5:00 P.M. -- FINISH." The calendar boxes representing April 6, 7, 8, and 9 were empty. In the April 10 box, the words "Jess Birthday" appeared in blue pen. The April 11 box was completely colored over in red marker, just like the April 5 box,[6] and peeking through from beneath were the words: "Bench Trial -- Court Peabody -- I am Ready!" All remaining boxes on the calendar page were empty.

6 The calendar boxes for each of April 1, 2, 3, and 4 were filled with a large "X" written in red marker, as were all of the boxes on calendar pages for prior months.

The Commonwealth argued that the calendar evidence "inextricably linked" the defendant's upcoming trial date with the murder of the only percipient witness to the incident resulting in the charge. That the April 5 and April 11 calendar boxes were colored over in the same manner, with the same marker, many days before April 11, suggested they were struck out simultaneously. According to the Commonwealth, this demonstrated the defendant's manifest purpose of solving the "problem" posed by the April 11 trial, by killing the victim on April 5. The defendant strangled the victim, because he could not risk permitting her to leave the apartment, apparently into the arms of a younger man and back to her family who would encourage her to testify against him.

The defense theory was heat of passion upon reasonable provocation in support of a verdict of voluntary manslaughter, rather than murder. The defendant testified on his own behalf as the sole defense witness, citing the detrimental effects of the victim's alcoholism, infidelity, and disrespectful behavior on his mental health. The defense also focused on oddities in the defendant's behavior after the murder to demonstrate lack of premeditation, particularly his confession to a stranger at a bar, and his spontaneous ***179** invitation to the police to search his apartment, find the victim's body, and arrest him -- all when he easily could have boarded an airplane back to India. The defense countered the prosecution's theory about the calendar by asking why the defendant would risk life in prison to prevent conviction on charges carrying a maximum sentence of two and one-half years. Based on the defendant's lack of any prior record, the defense argued that any sentence would likely have been less.

Discussion. 1. The digital camera warrants. The defendant's principal claim on appeal is that his motion to suppress the digital camera images should have been granted, because the relevant warrant applications lacked sufficient information to ****370** show that the camera or its contents were related to the homicide under investigation. Accordingly, he argues that the warrants permitting police to (a) seize the camera from his apartment, and then (b) search the camera's contents, violated his right to be "secure" from "unreasonable searches

and seizures" of his home and possessions, as guaranteed under art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution. After reviewing the two search warrant applications and their attendant supporting affidavits here at issue, we conclude that the nature of the crime -- domestic homicide -- combined with the particular facts and circumstances here, including the defendant's pending charge of assault and battery of the same victim just months earlier, provide a substantial basis to conclude that a search of the digital camera would provide evidence relevant to the crime and, consequently, probable cause for the warrants to issue.

a. Predicate facts. After discovery of the victim's body during the consent search of the defendant's apartment led to his arrest and subsequent confession, Peabody police sought a warrant to perform a further search of the apartment, and authority to seize the victim's body and, among other things, "[digital video disc and videocassette recorder (DVD/VCR)] tapes, recording devices, cameras and cellular phones (with chargers)." Upon Detective Sergeant Scott Richards's application and supporting affidavit, the warrant (first warrant) issued on the night of April 6, 2008. Police executed it that same night, at approximately 11 p.m., and seized items including the victim's body and an "HP Photo smart digital camera" (camera). The next day, State police Trooper Brian O'Neill applied for and obtained an additional warrant (second warrant) authorizing police to search the defendant's apartment ***180** for, and seize "computers, digital cameras, cell phones, digital storage devices and media (disks, tapes, thumb drives) and any and all software and hardware related to computers and other digital devices." The second warrant also authorized forensic examination of "two cellular phones, a digital camera, and a computer," each already in police custody, for "graphic evidence of the crime under investigation" and "any information linking the defendant to the victim, either through digital photography, digital documentation, e-mail, Internet and chat activity, cellular phone history and ... text messaging."

i. First warrant affidavit. In the affidavit he submitted with the application for the first warrant (first warrant affidavit), Richards averred as follows. On the morning of April 6, Peabody police received specific information about an identified informant's tip to Beverly police. The night before, the informant had conversed with a man seated next to him at a bar, who identified himself as Ashley Fernandes and later stated that (i) his girlfriend was dead in his apartment and (ii) the informant would read about him in the newspaper in the next fifteen days. That afternoon, Richards corroborated this account at an in-person meeting with the informant, who provided further information, including the defendant's age and the corporate name and location of his employer.

A police search of internal records showed that identifying information matched with the resident of a Peabody address, whom police had arrested for "domestic assault and battery" on January 4, 2008. Arrest records listed the victim as Jessica Herrera, the same woman whose body police later found dead inside that same apartment. Police also matched the defendant's name, date of birth, and address with registry of motor vehicles records showing no license status, and a registration listing him as the owner of a ****371** vehicle registered to that address. Richards located a booking photograph of the defendant, and the informant confirmed that the person in the photograph was the man he spoke with at the bar. The informant also told Richards that the defendant was jotting things down on a piece of paper throughout their conversation, including "Fuck the world" and his parents' address in India; before leaving, the defendant voiced that he had "too much freedom in this country" and was "ready to die."

Richards further attested that an officer he previously dispatched to surveil the defendant's address had made a motor vehicle stop of the defendant's car based on his license status. When stopped, the defendant had spontaneously (i) asked police if the stop was "about ***181** [his] girlfriend" and (ii) offered police consent to search his apartment. Richards quickly reported to the scene and obtained the defendant's verbal consent to search the apartment. The defendant unlocked the door to the apartment, and police then followed him inside, where Richards explained the written consent to search form and the defendant signed it. In the back room, police located the victim's body wrapped in a blanket secured with lengths of rope.

Richards cleared the building of police and had it secured as a crime scene. The defendant was transported to the station, where he was read Miranda warnings and consented to a Miranda-waived interview with Richards and O'Neill. During the interview, the defendant confessed to killing his girlfriend, Jessica Herrera, inside the apartment on April 5, and then wrapping her body in a blanket, tying rope around it, and placing it in the back room. At that time, he also told police that after he killed the victim, he called her cell phone from his cell phone and left her a message.

ii. Execution of first warrant. During police execution of the first warrant, a detective located the camera inside a kitchen drawer and handed it to Trooper James Crump, another member of the crime scene investigation team, assigned to take photographs documenting the search. When Crump first received the camera, it was powered off. He pressed the "ON/OFF" button to power it on, and then pressed the "back" button. A digital image of the victim lying dead on the floor of the defendant's living room appeared on the camera's rear image display screen. Crump continued to press the "back" button and discovered four additional graphic images of the victim's body, two of them close-up shots of the victim's head, showing the defendant's hands around her neck. Each of the images was stamped with a date and time in the bottom right corner. To enable better viewing of the images on a larger screen, Crump removed the memory card from the camera, inserted it into a laptop computer, and accessed its contents so that others on the crime scene team could also view the images. None of the information regarding opening the camera and viewing the images contained therein appeared in either warrant affidavit. Nor was this information presented at the hearings on the motions to suppress or otherwise provided to the judge.

iii. Second warrant affidavit. The affidavit O'Neill submitted with the second warrant application (second warrant affidavit) contained all of the same facts Richards included in the first warrant affidavit, recited supra, but substituted his own credentials, ***182** training, and experience, which included eight years with the State police, in which capacity he had investigated over 200 deaths.

O'Neill further averred that "[d]uring the initial search and the subsequent search of [the defendant's apartment], the search warrant executing officers observed a digital camera and a home computer." ****372** He then added a series of generalized statements based on officer training and experience, including the following:

> "Based upon my own training and experience [and that of four other, more experienced State troopers], I know that it is not unusual for individuals involved in homicides to memorialize their victims' deaths through audio and or video media for later viewing, for guilt relief or for enjoyment as trophies.... [A twenty-nine year veteran of the State police assigned to the computer facilitated crime unit] advises [me] that the convenience afforded by the use of a digital camera, in addition to the anonymity provided to the user of a digital camera, creates a greater likelihood that perpetrators will record such information - - particularly given the ease with which they believe such images can be destroyed or deleted" (footnote omitted).

The affidavit did not mention that officers had already viewed images stored on the camera, or what those images depicted.

iv. The suppression hearing. Prior to trial, the defendant sought to suppress his statements to police and all physical and digital evidence recovered from searches of (1) his apartment, and (2) the seized electronic devices, including the camera. Among other arguments,[7] the defendant contended that the warrants were deficient due to lack of probable cause, in that neither of the supporting affidavits included sufficient information for the issuing magistrate to conclude that evidence relating to the homicide would be stored on the devices seized.

7 The defendant also challenged the legality of the "pretextual" motor vehicle stop of his car, the voluntariness of his consent for police to search the apartment, the validity of his Miranda waiver, and the voluntariness of his confession. In addition to contending that there was no probable cause for the warrant to issue, the defendant asserted that the warrants were defective because the examining magistrate had not signed them.

Following a two-day evidentiary hearing,[8] the motion judge, who was later the trial judge, issued a written decision rejecting ***183** all of the defendant's arguments and denying relief. In finding probable cause for the warrants to issue, the judge observed that the warrant affidavits established that the murder had occurred inside the apartment where the electronic devices were located and seized. The judge continued:

> "In today's age, computers, cameras, and cell phones often contain reflections and memorializations of one's relationships with other persons. That is especially true with respect to family members and romantic partners. O'Neill also stated in his affidavit, based on the training and experience of long-term members of the State Police, that 'it is not unusual for individuals involved in homicides to memorialize their victims' deaths through audio and or video means.' "

Finally, the judge found it "all the more likely" that electronic devices maintained in the apartment where the death occurred "could contain images or other reflections of the killing."

8 Where the judge's assessment of the warrant applications for probable cause was necessarily confined to the "four corners" of the affidavit, the hearing testimony

on December 10, 2010, and January 3, 2011, largely addressed facts bearing upon the defendant's other suppression theories.

b. Probable cause. "[W]hether there was probable cause to issue the search warrant is a question of law that we review de novo in a commonsense and realistic manner" (citations omitted). ****373** Commonwealth v. Perkins, 478 Mass. 97, 102, 82 N.E.3d 1024 (2017). "[O]ur inquiry as to the sufficiency of the search warrant application always begins and ends with the four corners of the affidavit" (quotation and citation omitted), Commonwealth v. O'Day, 440 Mass. 296, 297, 798 N.E.2d 275 (2003), such that "we consider only the facts recited in the affidavit and any reasonable inferences therefrom," Commonwealth v. Kaupp, 453 Mass. 102, 107, 899 N.E.2d 809 (2009). See Commonwealth v. Robertson, 480 Mass. 383, 387, 105 N.E.3d 253 (2018) ("Inferences drawn from the affidavit must be reasonable and possible, but no showing that the inferences are correct or more likely true than not true is required").

To support a finding of probable cause, "the search warrant affidavit must establish a 'substantial basis for concluding that evidence connected to the crime will be found on the specified premises.' " Perkins, 478 Mass. at 104, 82 N.E.3d 1024, quoting Commonwealth v. Tapia, 463 Mass. 721, 726, 978 N.E.2d 534 (2012). The "nexus between the items to be seized and the place to be searched need not be based on direct observation," Commonwealth v. Cinelli, 389 Mass. 197, 213, 449 N.E.2d 1207, cert. denied, 464 U.S. 860, 104 S.Ct. 186, 78 L.Ed.2d 165 (1983), and may be grounded in ***184** "the type of crime, the nature of the ... items [sought], the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to [keep the items sought]." Id. See Commonwealth v. Matias, 440 Mass. 787, 794, 802 N.E.2d 546 (2004) ("to find this nexus we look at all the allegations in the affidavit as a whole in a commonsense fashion, not at individual fragments").

Here, the "type of crime" was the homicide of a domestic partner inside the home. The defendant had also already confessed to killing the victim. In addition, the police knew that the defendant had a recent prior charge of domestic assault and battery against the same victim. In crimes of domestic violence, our cases have repeatedly recognized that evidence explaining the nature of the relationship between the defendant and the victim is relevant and admissible to prove state of mind and intent. See, e.g., Commonwealth v. Oberle, 476 Mass. 539, 550, 69 N.E.3d 993 (2017) (citing cases); Commonwealth v. Sarourt Nom, 426 Mass. 152, 160, 686 N.E.2d 1017 (1997); Commonwealth v. Martino, 412 Mass. 267, 281, 588 N.E.2d 651 (1992); Commonwealth v. Robertson, 408 Mass. 747, 751, 563 N.E.2d 223 (1990); Commonwealth v. Jordan (No. 1), 397 Mass. 489, 492, 492 N.E.2d 349 (1986).

The nature of the evidence sought here was images from a digital camera police found in the home one day after the killing. That evidence would obviously provide insights into the nature of the relationship, including the victim's appearance at identifiable time periods up to and possibly including the date of the crime.

All of this is apparent from facts either expressly stated in the warrant affidavits or reasonably inferred from that information. Accordingly, the affidavits contain a substantial basis to support a finding of probable cause that the digital camera found in the Peabody apartment -- where the defendant admittedly killed the victim, where police found her body, and where the defendant was living at the time police arrested him -- would contain evidence relevant to the nature of their relationship, the defendant's motive for the killing, and possibly the killing itself.[9]

9 We need not, and do not, rely on O'Neill's statements regarding the "not unusual" proclivity of defendants charged with homicide to memorialize the deaths of their victims by capturing images or recordings, and the advantages that digital cameras uniquely afford such perpetrators, to find probable cause here.

****374** The defendant's argument to the contrary relies heavily on our reasoning in Commonwealth v. White, 475 Mass. 583, 591, 59 N.E.3d 369 (2016), where we held:

> ***185** "In essence, the Commonwealth is suggesting that there exists a nexus between a suspect's criminal acts and his or her cellular telephone whenever there is probable cause that the suspect was involved in an offense, accompanied by an officer's averment that, given the type of crime under investigation, the device likely would contain evidence. If this were sufficient, however, it would be a rare case where probable cause to charge someone with a crime would not open the person's cellular telephone to seizure and subsequent search."

The instant case of domestic violence could not be more different for the reasons explained supra. These facts are readily distinguishable from the armed robbery in White, where the only connection between the suspect's cell phone and the crime was generalized police experience locating

useful cell phone evidence in other multiple-defendant criminal investigations. Here, the nexus between the crime of domestic violence and the camera was specific, not speculative; there was a substantial basis to believe it would provide a clear window into the nature of the relationship.

In sum, it was far from "mere speculation" for the magistrate to conclude that a camera found in the apartment likely would contain evidence of this crime of domestic violence. Commonwealth v. Holley, 478 Mass. 508, 521, 87 N.E.3d 77 (2017). There was probable cause for the warrants to issue.

c. Taint of illegality cured by independent source and inevitable discovery. At oral argument, the defense, for the first time, argued that the digital images stored on the defendant's camera should have been suppressed because a police officer turned on the camera and viewed its contents while executing the first warrant to search the apartment, which granted police the authority to search for, and seize, any "DVD/VCR tapes, recording devices, cameras and cellular phones (with chargers)," but did not contain a separate grant of authority to perform a further search of the contents of those devices. We disagree.

Even if a separate grant of authority was required to search the camera after it was properly seized, the officers did not reference any information about the evidence they discovered on the camera in the affidavit they submitted in support of the second search warrant, which authorized the search for digital images. "Evidence obtained during a search pursuant to a warrant that was ***186** issued after an earlier illegal ... search is admissible as long as the affidavit in support of the application for a [subsequent] search warrant contains information sufficient to establish probable cause to search the premises 'apart from' observations made during the initial illegal ... search." Commonwealth v. Tyree, 455 Mass. 676, 692, 919 N.E.2d 660 (2010), citing Commonwealth v. DeJesus, 439 Mass. 616, 625, 790 N.E.2d 231 (2003) (discussing "independent source" exception to our exclusionary rule).

There is also no doubt that the police agenda here included obtaining a search warrant for any "DVD/VCR tapes, recording devices, cameras and cellular phones" actually seized during execution of the first warrant: the only value these items could possibly add to the investigation relied upon a legal further search of ****375** their contents. It is clear that the decision to seek a warrant was not prompted by any prior illegal search. Murray v. United States, 487 U.S. 533, 542 & n.3, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). Under these circumstances, legal discovery of the images was inevitable, and the "inevitable discovery" exception to our exclusionary rule applies to "cleanse" the images of any "illegal taint" imputed to them by the police preview. See Martino, 412 Mass. at 277, 588 N.E.2d 651 (where valid warrant to search for, seize, and view videotape was en route, defendant precluded from arguing "that, but for the [unauthorized] warrantless viewing of the videotape, the police would never have acquired and viewed it").

2. Consular notification and counsel of choice. The defendant contends that the Commonwealth violated the rights conferred upon foreign nationals by art. 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (art. 36 or Convention) when (i) arresting authorities neglected to apprise him of his consular notification rights at any time, and (ii) other competent authorities failed to formally notify the consulate of his arrest and detention pending trial on homicide charges when the defendant later sought their assistance. The defendant further contends that these alleged art. 36 violations are constitutional error of structural magnitude, as they deprived him of a choice of counsel and forced him to proceed to trial with counsel who had a conflict of interest, and therefore entitle him to a new trial without any showing of prejudice.

We agree with the ruling of the judge who denied the defendant's first motion for a new trial, who was also the trial judge. Although the Commonwealth violated its art. 36 obligation to apprise the defendant of his art. 36 rights, that error was neither ***187** constitutional nor structural. The indigent defendant was promptly provided qualified appointed counsel, fulfilling the fundamental purpose of art. 36. See Commonwealth v. Gautreaux, 458 Mass. 741, 752-753, 941 N.E.2d 616 (2011). Neither the Sixth Amendment to the United States Constitution nor art. 12 of the Massachusetts Declaration of Rights entitles indigent defendants to choose the particular attorney appointed to represent them. Commonwealth v. Francis, 485 Mass. 86, 97, 147 N.E.3d 491, 503-04 (2020), citing United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Finally, for reasons discussed infra, defense counsel's representation here was never burdened by any "actual" conflict of interest. Declining to grant the defendant a new trial on these grounds was not an abuse of discretion.[10]

10 "Generally, we consider whether a motion judge committed a significant error of law or other abuse of discretion in [ruling on] a defendant's motion for a new trial." Commonwealth v. Martin, 427 Mass. 816, 817, 696 N.E.2d 904 (1998). We will find abuse of discretion where we determine that a decision resulted from "a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014). Where, as here, the motion judge was also the trial judge, we give "special deference" to the judge's findings of fact and ultimate decision on the motion. Commonwealth v. Lane, 462 Mass. 591, 597, 970 N.E.2d 284 (2012).

a. Relevant background. At all relevant times, the defendant, who was indigent, was represented by appointed counsel. About one month before the trial, the defendant wrote a letter to the Board of Bar Overseers (board), seeking guidance regarding the "proper way" to obtain copies of "discoveries" and items docketed in his case, as "years" of repeated requests to his ****376** appointed counsel had gone unheeded. He also stated his desire "to contact the diplomatic representative of [his] country as soon as possible," given that it was "very difficult [for him] to understand the law." Finally, he wrote that (i) at the time of his arrest, "they did not even call the [Indian] embassy to tell [him his] rights based on [art.] 36;" and (ii) he had not received any response to the "numerous letters" he sent to the embassy himself.

Approximately two weeks after the date of the letter to the board, with less than thirty days until trial, defense counsel moved to withdraw. In her motion, she asserted a "complete breakdown in communication" with her client, who had "lost confidence" in her. At the motion hearing, after a judge (motion judge), who was not the trial judge, conducted a sworn colloquy with the defendant, defense counsel alleged that the defendant's written "complaint" to ***188** the board gave rise to "an actual conflict [of interest]." She expressed doubt in her ability "to represent [the defendant] with zealousness" based on anticipated inability to divorce the representation from the stigma she associated with being the subject of such complaint.

The motion judge then told the defendant that it appeared that the defendant had "filed a complaint with Bar Counsel about [his] attorney, in an attempt to have her removed." The "next time" this happened, the motion judge warned, the defendant might be forced to decide between proceeding to trial with his next lawyer or representing himself. When the motion judge asked whether the defendant wanted defense counsel to withdraw, however, the defendant replied that counsel could withdraw if she wanted to. In response to a follow-up inquiry, he stated: "I didn't file a complaint, I just told her that I'm asking for -- I wrote a letter."

After reviewing a copy of the letter to the board,[11] the motion judge recessed to "carefully consider what is in the interest of justice" and "weigh[ ] all of the factor[s]." On reconvening the hearing, the motion judge summarized his written findings from the bench. He first concluded that the defendant was "satisfied with counsel," but sought "assistance with what the court [would] broadly categorize as discovery issues." The motion judge then promised to "ensure that [the defendant] has the discovery materials he desires and a meaning[ful] opportunity to study them."

11 The defendant provided the motion judge with a copy of his letter to the board, which defense counsel had not yet seen. Counsel explained that she had only learned about the defendant's "complaint" from a telephone conversation with Bar Counsel.

Respecting defense counsel's request to withdraw, the motion judge determined that counsel had filed her motion "in an abundance of caution" on learning of the letter to the board, which the motion judge considered "more an expression of concern [about the defendant's discovery issues] than a complaint." Based on "personal knowledge and [defense counsel's] reputation," the motion judge then characterized defense counsel as a "strong advocate" who would be well prepared and organized at trial and whose "zealous advocacy [would] not be limited in any way by these circumstances." Finally, the motion judge held that the considerations set forth in Commonwealth v. Carsetti, 53 Mass. App. Ct. 558, 760 N.E.2d 785 (2002),[12] "overwhelmingly ****377** compel[led]" that he deny the motion: conflict of interest and breakdown in communication ***189** were both absent from the representation, and there was "no threat to [the defendant]'s right to a fair trial." At the time of this decision, the case was more than four years old.[13]

12 In Commonwealth v. Carsetti, 53 Mass. App. Ct. 558, 561, 760 N.E.2d 785 (2002), the Appeals Court suggested factors for a judge's consideration in the exercise of discretion to grant or deny a request for new counsel, and generally advised: "While there is no mechanical test for determining [whether to grant a request for new counsel on the eve of trial] ..., the judge

should make findings showing a balancing between the defendant's rights and the interests of the Commonwealth and demonstrating that discretion was in fact exercised."

13 Following extensive pretrial suppression efforts, trial was initially set for early April 2012, but was twice continued at defense counsel's request.

As the hearing was coming to an end, the defendant addressed the court directly, to ask whether he might "request somebody from the Country of India, like a Diplomatic Representative so [he could] speak to anybody from [his] country." Rather than entertain the request, the motion judge instead resolved to "leave that to [the defendant] and [his] lawyer."[14] Just before trial, the defendant filed a pro se pleading purporting to "preserve [his] rights," and stating that the he had "tried to get hold of his Indian Consulate to get in touch with the Diplomatic Representative" but had neither "heard from his Indian Consulate" nor received their "help ... based on [art. 36]." The pleading did not contain any complaint about defense counsel's representation, or any indication of a desire to replace her with different counsel.

14 In an affidavit appended to the first part of the defendant's motion for a new trial, defense counsel admitted that the defendant had asked for her assistance in contacting the Indian Consulate, but that she advised him to write to the consulate himself instead of providing that assistance.

Following his convictions, new postconviction defense counsel contacted the Indian consulate in New York,[15] and ultimately obtained a written letter therefrom (consular letter) in support of the arguments advanced in the defendant's motion for a new trial. The consular letter did not acknowledge or address whether the consulate had received any communications from the defendant. It nonetheless expressed concern that the consulate had not received formal notification from the Commonwealth of the charges ***190** against the defendant,[16] stated regret that the defendant "appear[ed] to have been unfortunately denied of his request to contact the Consulate since the time of his arrest several years ago," and then contended:

> "Had the consulate known [the defendant's] attorney had delayed the trial due to other matters and told the court that she was unable to represent [him] due to conflict of interest and breakdown in communications, the Consulate would have assisted and furnished counsel of [the defendant]'s choice."

In closing, the consular letter added that "the Consulate [had] no financial or legal or liability obligation in this matter."

15 In an affidavit filed with the sealed copy of the consulate's letter to the court, postconviction counsel explained: " I asked the Consulate to confirm and document that, pursuant to India's policy of legal assistance under Article 36 of the Vienna Convention, India would have provided [the defendant] with his choice of counsel had the Consulate been contacted as [the defendant] had consistently requested." She further reported: "I am informed by the Consulate that due to consular immunity the Consulate is immune from process and unavailable to testify."

16 The consular letter stated: "[A]s a Consulate, we are always concerned about Indian citizens within our jurisdiction and will render help to the maximum possible within the permissible rules and regulations of the Government of India. It is also essential on the part of the local authorities to report every case of Indians to the closest Consulate."

b. Art. 36. The United States is party to the multinational Convention, which it ratified ****378** in 1969. Article 36 of the Convention,[17] which is binding upon both Federal and State authorities, "sets out the procedure to be followed when a foreign national is arrested or detained." Gautreaux, 458 Mass. at 746, 941 N.E.2d 616. In its 2006 opinion in Sanchez-Llamas v. Oregon, 548 U.S. 331, 347, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006), the United States Supreme Court left it to each of the several States to determine whether art. 36 grants individually enforceable ***191** rights and, if so, to establish an appropriate remedy in the event of breach. See id. at 343, 347, 360, 126 S.Ct. 2669 ("assum[ing], without deciding," that art. 36 vests foreign nationals with such individual rights, but declining to dictate particular remedy for State authorities' breach of such rights where Convention failed to prescribe one).

17 In relevant part, art. 36 states:

> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
> "...
> "(b) if [a national of the sending State] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay.

> The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
> "(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."

In 2011, this court first confronted alleged violations by the Commonwealth of art. 36 obligations in Gautreaux. The defendant in Gautreaux was born in the Dominican Republic; he moved to the United States at age fourteen, but never became a naturalized citizen or achieved English fluency. Gautreaux, 458 Mass. at 742, 941 N.E.2d 616. In 2003, he pleaded guilty to criminal charges arising from three separate arrests. Id. Like the defendant in the instant case, Gautreaux was never apprised of his art. 36 right as a foreign national to have the consulate of the Dominican Republic informed of his arrests, and there was no indication that the consulate was so informed of any of his arrests or the accompanying charges by the appropriate authorities.[18] Id. at 744, 941 N.E.2d 616. Like the defendant in the instant case, he was also indigent and the court appointed counsel to represent him. Id. at 744, 752-753, 941 N.E.2d 616. Years later, notice of Federal deportation proceedings prompted Gautreaux to file a motion to vacate his plea and for a new trial. Id. at 742, 941 N.E.2d 616.

18 Our conclusion in Gautreaux that "the notifications required by art. 36 must be provided to foreign nationals on their arrest" does not signify that the Commonwealth's art. 36 obligations evaporate once the opportunity for "prompt" performance upon arrest has passed (emphasis added). Commonwealth v. Gautreaux, 458 Mass. 741, 744, 941 N.E.2d 616 (2011). To the contrary, the Commonwealth's art. 36 obligations to provide such notice continue. "Consular notification is always 'better late than never.' " United States Department of State, Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, at 29 (5th ed. Sept. 2018). Thus, the Commonwealth's art. 36 obligations are not the exclusive province of the police or prison officials interacting with a foreign national at the time of arrest or detention.

In our decision in Gautreaux, we recognized that art. 36 confers enforceable individual rights on foreign nationals to receive ****379** "the notifications required by art. 36" upon arrest. Id. at 743-744, 941 N.E.2d 616. We held that to warrant a new trial upon clear violation of that right, a defendant must "[a]t a minimum ... establish"[19] that "his consulate would have assisted him in a way that likely would ***192** have favorably affected the outcome of his [criminal] case."[20] Id. at 752, 941 N.E.2d 616. We concluded that the Commonwealth's failure to apprise Gautreaux of his art. 36 right to consular notification was not reversible error entitling him to a new trial, because

> "[the defendant] produced no evidence of the practices and protocols of the [consulate of the Dominican Republic], or of the advice and assistance it would have provided on notification of the detention of one of its citizens. An assumption with respect to such matters is not evidence, and is woefully insufficient to demonstrate that the outcome of the defendant's case -- his pleading guilty to a significantly reduced set of charges with no sentence of incarceration -- likely would have been different, had he been informed of his right to have his consulate so notified."

Id. We also concluded that Gautreaux had received "the principal type of assistance envisioned by [art. 36]," that is, "assist[ance] ... in retaining counsel," by virtue of the court's prompt appointment of counsel to represent him throughout the proceedings, in accordance with the constitutional right accorded any indigent defendant. Id.

19 The Convention does not prescribe a set remedy for violation of art. 36 in individual cases where the detainee is subsequently convicted of a crime, but in Gautreaux, we "acknowledge[d] and accept[ed]" that the Commonwealth has an obligation, respecting cases where "clear violations of [art. 36] notice protocols have been established," to designate "some process by which the soundness of a subsequent conviction can be reviewed in light of the violation." Gautreaux, 458 Mass. at 751, 941 N.E.2d 616. To fulfill that obligation, we designated the motion process pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), as the applicable procedure, and a "substantial risk of a miscarriage of justice" the applicable standard of review. Gautreaux, supra.

20 Article 36 certainly does not obligate the consulate of a "sending State" to provide any assistance at all, although art. 36(1)(c) provides the consulate with that right. "The provision secures only a right of foreign nationals to have their consulate informed of their arrest or detention -- not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention." Sanchez-Llamas v. Oregon, 548 U.S. 331, 349, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006).

Similarly, here, the defendant was never apprised of his right to have authorities inform his consulate of his arrest upon his request, and authorities never thus apprised his consulate.[21] Nonetheless, the defendant, who was indigent, was promptly appointed ***193** competent counsel to represent him. Apart from his argument that consular notification would have provided him with a choice of counsel, which we separately address infra, the record here is silent as to what, if anything, proper notice would have provided that the defendant had not received already. We therefore conclude, as we did in Gautreaux, that the defendant did not make the minimum showing that "his consulate would have assisted him in a way that likely would have favorably affected the ****380** outcome of his case." Gautreaux, 458 Mass. at 752, 941 N.E.2d 616.

21 We do not subscribe to the Commonwealth's rationale that the defendant's own efforts to contact the consulate achieved the purpose of, and thereby released the Commonwealth from, its art. 36 obligation to inform the consulate of the defendant's arrest or detention upon the defendant's request. The Commonwealth's notification obligations are not contingent upon the success or failure of the defendant independently to contact the consulate.

c. Right to counsel of choice. We also agree with the judge that none of the asserted failures by the Commonwealth to observe art. 36 obligations resulted in any violation of the Sixth Amendment or art. 12 right to representation by "counsel of choice." The defendant here remained indigent throughout the relevant period, and it is axiomatic that defendants who require counsel to be appointed for them are not entitled to choose the attorney appointed and have no "unbridled right to ... replace one competent [and prepared] attorney with another" (quotation and citation omitted). Commonwealth v. Dunne, 394 Mass. 10, 15, 474 N.E.2d 538 (1985). See Gonzalez-Lopez, 548 U.S. at 151, 126 S.Ct. 2557 (Sixth Amendment right to counsel of choice "does not extend to defendants who require counsel to be appointed for them"). See also Francis, 485 Mass. at 96-97, 147 N.E.3d at 503-04, citing Commonwealth v. Pena, 462 Mass. 183, 191, 967 N.E.2d 603 (2012) ("[w]ith regard to an indigent defendant, the right to an attorney does not guarantee the right to any particular court-appointed counsel").

In a confusing and cryptic letter written in response to a letter from the defendant's first appointed appellate counsel, the Consulate General of India advised the Superior Court:

> "Had the consulate known his attorney had delayed the trial due to other matters and told the court that she was unable to represent [the defendant] due to conflict of interest and breakdown in communications, the Consulate would have assisted and furnished counsel of [the defendant]'s choice. The Consulate has no objection if [the defendant's first appointed appellate counsel] represents [the defendant] and [the defendant] has no reservation about the same. It may however be noted that the Consulate has no financial or legal or liability obligation in this matter."

***194** We interpret the meaning of the consular letter de novo, as this court is in as good a position as the judge to evaluate posttrial documentary evidence. Commonwealth v. Phinney, 446 Mass. 155, 158, 843 N.E.2d 1024 (2006), S.C., 448 Mass. 621, 863 N.E.2d 496 (2007). As was its right, the consulate declined to testify or otherwise appear in court. We read the letter as carefully avoiding any commitment to provide the indigent defendant with counsel at the consulate's expense. As such, the indigent defendant had no choice of counsel.

Furthermore, even if we were to adopt the more generous interpretation of the letter posited by the judge, we still would conclude, for the same reasons he did, that no deprivation of a right to choice of private counsel resulted. As the judge found:

> "Despite his contentions in this motion for new trial, and until this motion, [the defendant] never tied his desire for communication with his consulate to a desire or intention to replace [defense counsel] with an attorney of his choice. See Commonwealth v. Francil, 15 Mass. App. Ct. 35, 41, 443 N.E.2d 420 (1982) (defendant's 'complaint that he was deprived of his counsel of his choice smacks of afterthought')."

Without such record support, and without a financial commitment from the consulate, the choice of counsel argument amounted to nothing more than "speculation on top of speculation." The judge succinctly identified and then dismissed each assumption in turn.

To begin, the judge rejected the assumption that, upon making Commonwealth-facilitated contact with the consulate in August 2012, the defendant would have sought assistance to obtain successor ****381** counsel. The only dissatisfaction the defendant ever expressed with his counsel was limited to her asserted failure to provide him with copies of discovery and court filings; he neither criticized her ability, preparation, or performance in court, nor asked for her to be replaced. The judge found that "within thirty-days of a twice continued, four-year old first degree murder case," the defendant would not have sought successor counsel but instead would have continued with the representation of experienced appointed counsel familiar with the case.

Next, the judge dismissed the "pure speculation" that he would have permitted new counsel to appear in the defendant's case, given its age, serial continuances, and inevitable Commonwealth objection, especially where the "competency and effectiveness" of existing counsel were unquestioned. Rather, the judge found ***195** that he would not have further continued the trial to allow counsel to be replaced and prepare anew. We discern no error in that analysis. Even where the defendant has a choice of counsel, which this defendant did not have, such choice is not absolute. As we explained in Francis, "[t]he court need not unduly delay trial to provide the defendant with counsel of his choice." Francis, 485 Mass. at 96, 147 N.E.3d at 503, citing Burton v. Renico, 391 F.3d 764, 771 (6th Cir. 2004), cert. denied, 546 U.S. 821, 126 S.Ct. 353, 163 L.Ed.2d 62 (2005).

d. "Actual" conflict of interest in representation. On appeal here, the defendant for the first time claims that defense counsel's representation at trial was impaired by an actual conflict of interest. Article 12 entitles the criminally accused to "the untrammeled and unimpaired assistance of counsel free of any conflict of interest and unrestrained by commitments to others." Commonwealth v. Davis, 376 Mass. 777, 780-781, 384 N.E.2d 181 (1978). An "actual" or "genuine" conflict of interest exists only where an attorney's own interests or the interests of another client impair the attorney's independent exercise of professional judgment, see Commonwealth v. Shraiar, 397 Mass. 16, 20, 489 N.E.2d 689 (1986), such that "prejudice is 'inherent in the situation,' " Commonwealth v. Mosher, 455 Mass. 811, 819, 920 N.E.2d 285 (2010), quoting Commonwealth v. Epsom, 399 Mass. 254, 262, 503 N.E.2d 954 (1987). The defendant must marshal "sufficient, concrete evidence" of an attorney's divided loyalty to carry "the burden of proving both the existence and precise character of the alleged conflict of interest." Commonwealth v. Cousin, 478 Mass. 608, 617-618, 88 N.E.3d 822 (2018). Once a defendant establishes that an actual conflict exists, a new trial typically is required without any need to demonstrate resulting prejudice. See Shraiar, 397 Mass. at 20, 489 N.E.2d 689.

Defense counsel's continued representation of the defendant was not burdened by an actual conflict of interest at any time for the reasons found by the judge who ruled on defense counsel's pretrial motion to withdraw. He found that counsel filed her motion to withdraw in an abundance of caution following the defendant's "complaint" to the board, which the judge expressly found was "not a true complaint in the sense that is often understood within the Bar." Based upon defense counsel's reputation and the judge's personal knowledge, he further concluded that no threat to "zealous advocacy" was present, and that defense counsel would be "well prepared and organized for trial." Even when defense counsel objected to the judge's decision denying her motion to withdraw, and moved to reconsider, the judge made ***196** further findings, emphasizing the time he took to review the applicable ****382** case law, even though the defendant had not in fact expressed a desire for replacement counsel. Counsel's continued representation following denial of the motion to withdraw was therefore not burdened by any actual conflict.[22]

22 To the extent that the defendant now complains about defense counsel's requests to continue his trial date to attend to other client matters, the practical reality that public counsel carry heavy caseloads, often necessitating triage, is not the type of "sufficient, concrete evidence" of counsel's divided loyalty due to other clients' adverse interests that will establish existence of an "actual" conflict. See Commonwealth v. Cousin, 478 Mass. 608, 617-618, 88 N.E.3d 822 (2018), citing Commonwealth v. Mosher, 455 Mass. 811, 820, 920 N.E.2d 285 (2010).

3. Ineffective assistance claims. On appeal from his second motion for a new trial, the defendant maintains that he was deprived of the effective assistance of counsel because his attorney failed to apprise the court of certain additional evidence refuting the prosecution theory that the murder of the victim was premeditated to preclude her adverse testimony at his impending domestic assault trial. This additional evidence was supposedly to the effect that the victim was unwilling to testify against the defendant. The evidence at issue was a one-page document memorializing the record of a telephone call from the defendant to an intake coordinator of the employee assistance program available through his employer on April 2, 2008 (call summary) -- three days before the murder. According to the call summary, the defendant "related he is prone to rages and violence against his [girlfriend] ... when they drink together," and then reported that "last night he repeatedly tried to choke her 'maybe 10 times' after arguing about her playing her music too loud." The call summary further reflects that the victim was also on the telephone call with the intake coordinator the entire time, "telling [the defendant] how to answer questions," and "making statements such as 'you have control issues, you act like the devil.' " She dismissed questions about her own medical and future safety needs, stating, "I'm not getting into all that with the police again." It is this last statement that

the defendant apparently considers of significant value to his defense.

According to the defendant, counsel ineffectively squandered this available evidence where its absence (i) impaired his ability to contest the Commonwealth's interpretation of the calendar evidence by substantiating his asserted lack of concern that the victim would offer cooperating testimony; and (ii) ultimately led ***197** to the judge ruling the victim's statements to police describing the December 24, 2007 assault admissible under the theory of forfeiture by wrongdoing.

Because we conclude that the evidence at issue was far more likely to be prejudicial than beneficial, and there is no reason to doubt the determination by the motion judge, who was also the trial judge, that it would not have altered his pretrial ruling applying the doctrine of forfeiture by wrongdoing, the defendant's ineffective assistance claim must fail. Accordingly, the judge's order denying the defendant's second motion for a new trial is affirmed.

4. Intoxication instruction. Finally, the defendant contends that the judge committed reversible error by declining to instruct the jury on voluntary intoxication, as his counsel requested. As we have previously explained: "[a] jury instruction on voluntary intoxication is required only where there is evidence of 'debilitating intoxication' that could support a reasonable doubt as to the defendant's ability to form the requisite criminal intent." ****383** Commonwealth v. Carter, 475 Mass. 512, 524, 58 N.E.3d 318 (2016), quoting Commonwealth v. Lennon, 463 Mass. 520, 523, 977 N.E.2d 33 (2012). There is no such evidence here. The defendant could at best show that he consumed "two to three beers" over several hours on the day of the murder, which was insufficient to require an intoxication instruction. See Carter, 475 Mass. at 524, 58 N.E.3d 318 (no evidence that defendant's condition at time of murder approached "debilitating intoxication"). Evidence that the defendant consumed alcohol in proximity to the crime does not itself establish a resulting state of "debilitating intoxication" such as could support reasonable doubt about the defendant's capability to form the requisite criminal intent. Lennon, 463 Mass. at 523, 977 N.E.2d 33.[23]

23 We decline the defendant's invitation to revisit our holding in Commonwealth v. Carter, 475 Mass. 512, 524, 58 N.E.3d 318 (2016), that a defendant's "self-serving statements are insufficient to warrant an intoxication instruction."

Conclusion. Having carefully observed our G. L. c. 278, § 33E, duty to review the entire record, we discern no reason to reduce or set aside the verdicts. The defendant's convictions and the orders denying his first and second motions for a new trial are affirmed.

So ordered.

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