SJC-10572

COMMONWEALTH vs. NORTON CARTRIGHT.

Suffolk. May 5, 2017. - November 2, 2017.

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

Homicide. Constitutional Law, Assistance of counsel, Admissions and confessions, Voluntariness of statement, Arrest, Probable cause. Evidence, Admissions and confessions, Voluntariness of statement. Arrest. Probable Cause. Larceny. Practice, Criminal, Capital case, Assistance of counsel, Admissions and confessions, Voluntariness of statement, Arraignment.

Indictment found and returned in the Superior Court Department on December 14, 2006.

A pretrial motion to suppress evidence was heard by Patrick J. Riley, J.; the case was tried before Christine M. McEvoy, J., and a motion for a new trial, filed on November 29, 2013, was considered by her.

Kevin S. Nixon for the defendant.

Paul B. Linn, Assistant District Attorney (David J. Fredette, Assistant District Attorney, also present) for the Commonwealth.

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

LENK, J. On Friday, August 25, 2006, the victim, Yolande Danestoir, left her home in Chelsea to work the overnight shift as a nurse at a hospital in Cambridge. After leaving work the next morning, she was not seen again. One and one-half weeks later, on the evening of Tuesday, September 5, 2006, police found the victim's body in her apartment, hidden in a sleeping bag at the back of a closet. The defendant, the victim's son, was arrested the same evening on charges of larceny from a person for theft of the victim's cellular telephone. Slightly more than six hours after his arrest, following a police interview lasting four hours and forty-seven minutes, the defendant confessed to having killed his mother.

The defendant's motion to suppress the statement was denied, and the statement was played in its entirety at trial. The defendant was convicted by a Superior Court jury of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty. He appeals from his conviction and from the denial of his motion for a new trial. The defendant's primary argument before us is that his confession should have been suppressed. He maintains that suppression was required because the waiver of his Miranda rights was involuntary; his confession was obtained absent a valid waiver of his right to prompt arraignment, and his counsel was ineffective for not seeking suppression of the statement on that ground; he was

arrested without probable cause; and his confession was coerced, and his trial counsel also was ineffective for failing to have sought suppression on this basis. The defendant also seeks relief under G. L. c. 278, § 33E. We discern no error by the trial judge warranting reversal, and no constitutionally ineffective assistance by trial counsel. Accordingly, we affirm the convictions and the denial of the motion for a new trial. Having carefully reviewed the entire record, we decline to exercise our authority under G. L. c. 278, § 33E, to order a new trial or reduce the degree of guilt.

1. Background. a. Suppression hearing. The key evidence at the hearing on the motion to suppress was an audio-video recording of the defendant's statement to police. In addition, there was testimony by the police officers who conducted the interview, concerning their interviewing techniques, and by other officers explaining the course of the investigation. The Commonwealth called the defendant's older brother to describe generally his family history and their joint upbringing in Haiti before coming to the United States. The defendant introduced testimony by an expert on false confessions. The parties do not dispute the facts presented during the live testimony, and agree that the judge's decision on the motion should be reviewed de novo. As the officers' testimony and the recorded statement were introduced at trial, and the defendant raises the same

arguments with respect to that evidence, we reserve discussion of the question whether the denial of the motion to suppress was error for our discussion of the issues at trial.

b. Evidence at trial. We summarize the facts the jury could have found, reserving certain details for later discussion. The victim owned a three-story home bordering both Chelsea and Everett. In August, 2006, she lived on the second floor with her youngest son, Noah, who was then nine years old. They shared the house with the victim's father, who was bedridden and confined to the third floor, and an unrelated family who rented the first floor apartment.

The defendant was nineteen at the time of the victim's death. Until shortly before then, the defendant had lived with the victim in the second-floor apartment, but he had been told to leave following an argument. Subsequently, he spent much of his time living with the family downstairs; he was involved in a romantic relationship with a member of that family. His girl friend knew of the negative feelings between the defendant and his mother, and testified that the defendant had told her "a few times" that he wanted to kill his mother. When the defendant was not sleeping in the first-floor apartment, he often would hide in the crawlspace on the third floor of the house.

The victim worked her scheduled overnight shift on the night of Friday, August 25, and Saturday, August 26, 2006.

Hospital surveillance video showed her leaving the parking lot at approximately 7 A.M on August 26. She was not seen alive again.

At some point on August 26, 2006, Noah saw the defendant cleaning the second-floor bathroom; the defendant told Noah that the cleaning solutions being used were dangerous, and to stay in his bedroom. That evening, the defendant called a movie theater and the 411 information hotline from his mother's cellular telephone. He and his girl friend went to a movie and then slept in the second-floor apartment. The girl friend was worried, as she knew that neither she nor the defendant were allowed to be on the second floor, but the defendant assured her that his mother would not enter the bedroom.

The following day, August 27, 2006, at the urging of a member of the girl friend's family, the defendant called the Chelsea police department. He reported that his mother had not come home the previous morning, and that he was concerned that no one was available to take care of Noah and his grandfather. On the basis of this call, a Chelsea police officer and a social worker arrived to perform a well-being check. In the course of this visit, one of the officers asked the defendant for the telephone number belonging to Noah's father. Noah pointed to a cellular telephone that had been in the defendant's pocket. He

said it was his "mom's," and that the number would be stored on it. The defendant claimed that the telephone belonged to him.

On Monday, August 28, 2006, the defendant filed a missing persons report with the Chelsea police department. Officer Joseph P. Capistran accompanied the defendant into his mother's house. Capistran noted that the closet in the victim's bedroom was padlocked. When he approached the closet and asked to look inside, the defendant appeared nervous and told him that his mother had the only key. Capistran placed his nose against the closet door and smelled nothing unusual. Elsewhere in the house, however, he noticed a strong smell of cleaning fluid.

Police returned to the victim's apartment on Friday, September 1, 2006. The floor in the victim's bedroom smelled of cleaning fluid and appeared as if it had been recently cleaned. Near the closet, police smelled decaying flesh. When the door was forced open, police found nothing that could have caused the smell. While inside the house, Chelsea police Detective John Coen asked the defendant about any recent cleaning and about his mother's cellular telephone. The defendant explained that he had recently cleaned up after Noah's pet rabbit. When questioned about the telephone, which the defendant previously had told Coen the victim generally kept on her person, the defendant began to shake. He said that he did not have it and then said that his mother practiced voodoo.

On Tuesday, September 5, 2006, police obtained a search warrant and searched the house. The defendant waited outside during this search. Police found the victim's cellular telephone under a couch cushion in the living room. When they entered a hallway off the kitchen, they noticed a foul odor. They opened the hallway closet and found it "full from the floor almost to the top of the door frame" with items including tables, an animal cage, boxes, and clothing. After removing the items, police discovered a human body, later confirmed to be that of the victim, wrapped in a sleeping bag.

The defendant was subsequently arrested for larceny from a person (with reference to his mother's cellular telephone).[2] He was not told that police had found a body. The defendant entered an interview room at the Chelsea police station at approximately 11:10 P.M.[3] A few minutes later, he was joined by Sergeant Kevin Condon of the State police and Sergeant William J. Dana of the Chelsea police. Police immediately informed the defendant that they wanted to speak to him about the victim's

[2] The evidence supporting the arrest for larceny from a person included the fact that the defendant had been seen with the victim's telephone, that he had claimed it as his own, that telephone records showed that it had been used to call a movie theater and the 411 information line after the victim was last seen, and that the defendant told police the victim usually kept the telephone on her person.

[3] The defendant was arrested at approximately 8:45 P.M.

disappearance. A short while later, Condon reminded him that while he had been arrested for larceny of the cellular telephone, police wanted to talk "about broader issues." The officers confirmed with the defendant that he wished to have the interview audio-video recorded.[4] They reviewed his Miranda rights; the defendant agreed to speak with them and executed a written waiver. Condon then asked the defendant if he wanted anything to drink. The defendant responded that he had not had anything to eat or drink all day, and Dana brought him a cup of water.

Over the course of approximately the next two and one-half hours, the interrogating officers and the defendant held an open-ended discussion; the defendant did the majority of the talking. He said that immediately prior to the victim's disappearance, he had begun to live primarily with the family in the first-floor apartment. In response to his relationship with the family downstairs, his aunt, his mother's older sister, convinced his mother to bar him from the family home. The defendant talked at length about his hostility toward his aunt, and the strain that placed on his relationship with his mother. The defendant said that he had last seen his mother alive on Thursday, August 24, 2006, and that he had telephoned police on

[4] The recording was played in full at trial.

Sunday, August 27, 2006, when he realized that he could not care for Noah or his grandfather without her. Because she had been gone for extended periods in the past, he had not initially been concerned by her absence. The defendant told police that he had tried calling his mother a few times, but that he stopped trying to reach her when he realized that her cellular telephone was in the house.

At approximately 1:25 A.M., police asked the defendant what he believed had happened to his mother; he replied that he did not know. Although the officers occasionally challenged certain of the defendant's statements, the interview remained nonaccusatory until around 1:45 A.M., at which time there was a ten-minute break.

After the break, the interview took on a notably different tone. Condon told the defendant that it was "obvious to us that you were involved with your mom and her disappearance," and said that his mother had been found dead. After reciting some of the evidence tending to inculpate the defendant, Condon noted, "there's not a question of who was involved in killing your mom." The officers then began to emphasize their certainty as to the defendant's guilt. They also proffered reasons why he might have killed the victim without being "a bad guy," including mistake, intoxication, or the possibility that he had been provoked by mistreatment from his mother or his aunt. The

officers promised to inform the prosecutor if the defendant was cooperative. The officers acknowledged at trial that they had been trained in techniques known as "maximization" -- i.e., overstating their certainty of the defendant's guilt -- and "minimization" -- i.e., diminishing the severity of the crime and implying the possibility of leniency.

In addition to these tactics, police suggested that the defendant and his family would find peace if he told them "the truth." One of the officers said that the defendant's recent trouble sleeping, and his nightmares, stemmed from his guilt, and encouraged him to confess, to stop the guilt from "eat[ing] away" at him. They also encouraged him to confess to provide closure for his brothers. Dana told the defendant, "if you don't come forward and be a man and tell us the truth, [Noah] is going to grow up not knowing [what happened], and he's going to have nightmares, and he's going to have trouble sleeping." Dana also said that the defendant had "the power to relieve the burden" on his brothers "by getting [them] closure, so that they can get on with their lives." In addition, Dana repeatedly suggested that the victim could not "rest in peace" in the "afterlife" unless "the truth is out." Dana told the defendant he believed that he loved his mother, and encouraged him to confess to calm her restless soul, calling it "the last thing you can do for her."

At some point at approximately 2:30 A.M., the defendant said, "I'm fucking going to jail, huh?" and began giving a detailed confession. He said that he had been banned from his mother's apartment, and that, on the evening and night of August 25 to 26, 2006, he sneaked into the second-floor apartment through the crawlspace. He eventually fell asleep, and later awoke to the sound of his mother's arriving home. He hid until he no longer heard footsteps. He then got up and walked toward the door but, before he was able to leave the apartment, his mother saw him. She threw a glass at him. The glass did not hit him, but the defendant responded by throwing the head of a hammer[5] at her.[6] He then ran to his bedroom and stayed there for approximately twenty minutes. When he left the bedroom, he saw the victim "thrashing" and bleeding heavily, and saw chairs turned over in a pool of blood. He saw her prop herself against the refrigerator and kitchen door. She eventually fell to the floor again. The defendant then wrapped

[5] The defendant later described the hammerhead in a manner consistent with a ball peen hammerhead. He said that it was not a "regular claw hammer." A ball peen hammer has a rounded head opposite the face, while a claw hammer has a split and curved end that can be used to extract nails.

[6] The defendant's admission to police that he had thrown a hammerhead at the victim occurred at approximately 2:52 A.M., slightly more than six hours after his arrest. At that point, he had not yet waived his right to prompt arraignment, which he did shortly thereafter.

her in bed linens and put her in a bedroom closet. At some point, he heard her moving around inside the closet. He took chairs and placed them on top of her to prevent her from breaking free. He then hid bloody clothing and other items in the basement, and attempted to clean up the blood. At a later point, he moved the victim's body to the closet where police found it on September 5, 2006. The four hour and forty-seven minute interview ended at approximately 3:57 A.M.

Physical evidence at the scene was consistent with much of the defendant's confession. Police found dark-colored stains that appeared to be blood at various locations in the house, including in the bedroom closet, the kitchen, and both inside and on the outside of the refrigerator. Swabs were taken from some of these stains and submitted to the State police crime laboratory for testing. A number of other items, including stained chairs, four bags found in the basement, a claw hammer recovered from one of those bags, and a ball peen hammerhead found in a vase in the living room, also were sent to the State police laboratory for blood and deoxyribonucleic acid (DNA) testing. Police took comparison DNA samples from the victim, the defendant, his older brother, and his father.

Stains from the kitchen, the refrigerator, and the chairs tested positive for human blood and matched the victim's DNA

profile.[7] The ball peen hammerhead tested negative for human blood, but the claw hammer retrieved from the basement ceiling tested positive for human blood; DNA found on that hammer matched that of both the defendant and the victim. An autopsy indicated that the victim's wounds were consistent with having been made with a claw hammer.[8]

c. Prior proceedings. The defendant moved to suppress his confession as involuntary. He argued that his will was overborne by the police practices of "maximization" and "minimization," combined with their religious references. A copy of the audio-video recording of his statement was played for the judge. In addition, Condon and Dana testified regarding the tactics used in the interview, and two other police officers testified about the investigation that led to the defendant's arrest. The defendant introduced testimony by an expert on false confessions.

After the motion had been denied, the defendant sought to introduce at trial the testimony of the same expert on false confessions. The trial judge, a different judge from the one

---

[7] The probability of a random individual matching the victim's DNA profile was "approximately 1 in 6.075 quintillion of the Caucasian population, 1 in 64.47 quadrillion of the African-American population, and 1 in 19.18 quintillion of the Hispanic population."

[8] At least some of the wounds were not consistent with having been made with a ball peen hammerhead.

who had ruled on the motion to suppress, determined that the proffered expert testimony was not sufficiently reliable within the meaning of Commonwealth v. Lanigan, 419 Mass. 15, 25-26 (1994).

The theory of defense was that the confession was coerced and should not be credited. Defense counsel also attempted to suggest, through cross-examination, that the defendant's older brother had a stronger motive to kill the victim than did the defendant. The defendant was convicted of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty.

2. Discussion. The defendant argues that his confession should have been suppressed because police failed to inform him of the true ground for his arrest, rendering his subsequent Miranda waiver involuntary;[9] he did not adequately waive the right to prompt arraignment, and counsel was ineffective for failing to seek suppression on this basis; he was arrested without probable cause, tainting the subsequent confession, and trial counsel was ineffective for failing to seek suppression on that ground; and his confession was the product of police

[9] This issue was not raised in the motion to suppress or at trial. The defendant does not contend that trial counsel was ineffective for failing to raise the issue, instead arguing that the involuntary waiver created a substantial likelihood of a miscarriage of justice.

coercion and consequently involuntary. We discuss each contention in turn.

a. True grounds for arrest. The defendant argues that by arresting him on the ground of larceny from a person, notwithstanding that police already suspected him of involvement in his mother's death, the arresting officers violated G. L. c. 263, § 1. That statute provides that "whoever is taken into custody . . . has a right to know from the officer who arrests or claims to detain him the true ground on which the arrest is made." The defendant does not contend that a violation of G. L. c. 263, § 1, by its terms, requires the suppression of any postarrest statement. Rather, he maintains that the dishonesty inherent in a violation of the statute renders invalid the subsequent waiver of rights under Miranda v. Arizona, 384 U.S. 436 (1966).

We have not confronted directly the question whether G. L. c. 263, § 1, limits the ability of police to make valid arrests for minor charges when they suspect the defendant of more serious crimes.[10] Even if it did, however, any lack of disclosure regarding the ground for an arrest is not the type of "trick[ery]" that would prevent the defendant's waiver from being knowing, intelligent, and voluntary. See Commonwealth v.

[10] As discussed, infra, there was probable cause to arrest the defendant for the offense of larceny from a person.

Medeiros, 395 Mass. 336, 345 (1985). The law "does not require police to inform a suspect of the nature of the crime about which he is to be interrogated." Id. See Colorado v. Spring, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment [to the United States Constitution] privilege"). As has the United States Supreme Court, see, e.g., id. at 575-576, we repeatedly have held that a waiver obtained from a defendant who had been accused of a relatively minor offense, or had yet to be accused of any offense, remains valid when the questioning turns to a more serious offense. See, e.g., Commonwealth v. Raymond, 424 Mass. 382, 393 (1997), S.C., 450 Mass. 729 (2008); Commonwealth v. Wills, 398 Mass. 768, 777 (1986); Medeiros, supra at 345.

Moreover, in these circumstances, police did not deceive the defendant about the nature of the intended questioning. Although they told him that he had been arrested for larceny from a person, they also informed him, before he agreed to waive his Miranda rights, that "we want to speak to you . . . about broader issues," and explained these issues as wanting to talk about the "disappearance of your mom." "We are not confronted with a case in which the police surprised the accused by providing warnings with regard to one offense and then shifting the interrogation to the subject of a totally unrelated crime,"

Medeiros, 395 Mass. at 346, and the defendant was "unlikely to have been misled." Id.

b. Ineffective assistance. The defendant contends that his trial counsel was ineffective because he failed to include in his motion to suppress two additional grounds for suppression: that the defendant was arrested without probable cause, and that police obtained his confession more than six hours after his arrest without first obtaining a proper waiver of prompt arraignment. We conclude that any claim seeking suppression on either ground would have been of little merit, and thus that counsel could not have been ineffective for failing to raise these issues. See, e.g., Commonwealth v. Conceicao, 388 Mass. 255, 264 (1983), and cases cited.

Where a defendant has been convicted of murder in the first degree, to prevail on a claim of ineffective assistance of counsel, he or she must show that there was error by trial counsel, and that this error likely influenced the verdict. See, e.g., Commonwealth v. Weaver, 474 Mass. 787, 808 (2016), aff'd, 137 S. Ct. 1899 (2017). Where the asserted error involves the failure to raise an objection, the standard governing the ineffective assistance claim is essentially the same as that for reviewing the underlying unpreserved error, see, e.g., Commonwealth v. Azar, 435 Mass. 675, 686 (2002), S.C., 444 Mass. 72 (2005), and cases cited. Failure to raise a

nonmeritorious objection does not constitute ineffective assistance.

i. Probable cause to arrest. The defendant contends that his arrest was unlawful and his statement to police should have been suppressed because police lacked probable cause to arrest him at the time they did so. We agree with the Commonwealth that, when the defendant was arrested, police had probable cause to arrest him on the charge of larceny from a person because of the theft of the victim's cellular telephone that police found under a couch cushion.

An arrest is supported by probable cause, and therefore lawful, "where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested had committed . . . an offense" for which arrest is authorized. Commonwealth v. Jewett, 471 Mass. 624, 629 (2015), quoting Commonwealth v. Franco, 419 Mass. 635, 639 (1995). Probable cause to arrest "requires more than mere suspicion but something less than evidence [that would be] sufficient to [sustain] a conviction." Jewett, supra at 629, quoting Commonwealth v. Hason, 387 Mass. 169, 174 (1982). "In dealing with probable cause . . . we deal with probabilities. These are not technical; they are . . . practical considerations of everyday life, on which reasonable and prudent [people], not

legal technicians, act." Jewett, supra, quoting Hason, supra. "Probable cause does not require . . . that police [have] resolved all their doubts." Commonwealth v. Warren, 418 Mass. 86, 90 (1994).

To establish larceny from a person requires that the Commonwealth prove, beyond a reasonable doubt, that (i) a defendant took property; (ii) the property was owned or possessed by another; (iii) the defendant took the property from the person of the possessor or from the possessor's area of control; and (iv) the defendant did so with the intent to deprive the possessor of the property permanently.[11] See G. L. c. 266, § 25; Commonwealth v. Subilosky, 352 Mass. 153, 166

[11] Larceny from a person is a felony regardless of the value of the items stolen. See G. L. c. 266, § 25 (outlining possible sentence of incarceration in State prison); G. L. c. 274, § 1 ("crime punishable by . . . imprisonment in the [S]tate prison is a felony"). Cf. Commonwealth v. Nolan, 5 Cush. 288, 288 (1850) ("The offen[s]e . . . is that of stealing from the person[,] and the degree of punishment is not . . . made to depend on the value of the property stolen"). Simple larceny, by contrast, which includes the first, second, and fourth elements of larceny from a person but not the third, is a misdemeanor unless the items stolen are valued at more than $250 or where the property consists of at least one firearm. See G. L. c. 266, § 30 (sentence in State prison only in those circumstances); Commonwealth v. Willard, 53 Mass. App. Ct. 650, 654 n.5 (2002); Model Jury Instructions for Use in the District Court § 8.520 (2009). As a general matter, warrantless arrest is not permissible for a misdemeanor, such as simple larceny, that does not include a breach of the peace. See, e.g., Commonwealth v. Jewett, 471 Mass. 624, 630 (2015), citing Commonwealth v. Howe, 405 Mass. 332, 334 (1989) (explaining limited circumstances in which warrantless arrests for misdemeanors are permissible).

(1967); Model Jury Instructions for Use in the District Court § 8.560 (2009). The third prong can be satisfied either by taking the property directly from the victim's person or by taking it from his or her "area of control." See Subilosky, supra; Model Jury Instruction for Use in the District Court § 8.560.

When the defendant was arrested, police had probable cause as to all four elements. The defendant had been seen in possession of the victim's cellular telephone; there was evidence that he had used it to place at least two calls after the victim's disappearance; and, when Noah identified the telephone the defendant was carrying as belonging to the victim, the defendant falsely asserted that it belonged to him. In light of this evidence, the defendant does not challenge the determination that there was probable cause for the first, second, and fourth elements of the offense.[12] The defendant contends, however, that police could not have concluded that he had taken the telephone from the victim's "person," "presence," or "area of control." This claim is unavailing. The defendant

[12] In other words, the defendant concedes that there was probable cause that he had committed a simple larceny. He argues, however, that because police had no reason to believe that the value of the cellular telephone, later determined to be $200, surpassed the threshold value separating the misdemeanor offense of simple larceny from the felony of larceny from a person, the existence of probable cause for the former would not justify his warrantless arrest.

previously had told police that the victim usually carried her telephone on her person. That is enough to "warrant a prudent person in believing" that she had had it on her person when the defendant took it from her. See Jewett, 471 Mass. at 629.

While the defendant essentially concedes that there was probable cause to believe he took the cellular telephone from his mother's body, he argues that there was no evidence that she was alive, or, if alive, conscious, at the time he did so. He maintains that such evidence is required to establish that he took the telephone from her "person." We have not previously had occasion to confront the question whether taking property from a deceased or unconscious victim constitutes taking property from the victim's "person" within the meaning of G. L. c. 266, § 25. For purposes of the armed robbery statute, however, taking property from a deceased or unconscious victim may constitute stealing from the victim's "person." See G. L. c. 265, § 17. See also, e.g., Commonwealth v. Christian, 430 Mass. 552, 555 (2000), overruled on other grounds by Commonwealth v. Paulding, 438 Mass. 1 (2002) (evidence supported armed robbery conviction where defendant stole from victim's pockets after coventurer had shot and killed victim); Commonwealth v. Olivera, 48 Mass. App. Ct. 907, 908 (1999) (unconscious victim); Commonwealth v. Hamm, 19 Mass. App. Ct. 72, 74 (1984) (same).

Larceny from a person is a lesser included offense of both armed and unarmed robbery. See, e.g., Commonwealth v. Dean-Ganek, 461 Mass. 305, 306 n.2 (2012); Commonwealth v. Drewnowski, 44 Mass. App. Ct. 687, 693 (1998). The offense of larceny from a person includes all of the elements of robbery "except the element that the taking was accomplished by force or fear."[13] Drewnowski, supra, quoting Commonwealth v. Santo, 375 Mass. 299, 307 (1978). Therefore, we see no reason to interpret the requirement of being taken "from a person" differently for purposes of the offense of larceny under G. L. c. 266, § 25, than for the offenses of armed and unarmed robbery under G. L. c. 265, § 17.

The Appeals Court's decision in Commonwealth v. Willard, 53 Mass. App. Ct. 650, 655 (2002), on which the defendant relies, is not to the contrary. In that case, the Appeals Court held that property stolen from the living room of a sleeping family was under "the protection of the building," rather than the persons therein, and therefore affirmed a burglary conviction based on an attempted larceny from a building, G. L. c. 266, § 30. Willard, supra. That case does not, as the

[13] In addition, in the case of armed robbery, the Commonwealth must establish possession of a weapon. See generally Commonwealth v. Olivera, 48 Mass. App. Ct. 907, 908 (1999) (explaining relationship between armed robbery, robbery, and larceny from person).

defendant claims, stand for the broad proposition that larceny from a deceased or unconscious victim may never constitute larceny from a person.

As an initial matter, Willard does not directly address whether the defendant's actions in that case violated G. L. c. 266, § 25, prohibiting larceny from a person statute. It holds only that the defendant violated the statute prohibiting larceny from a building, G. L. c. 266, § 30, because the sleeping victims were "relying on" the building "to safeguard their possessions." Willard, supra. To the extent that Willard suggested that the property stolen in that case was not within the victims' "area of control," because they were unconscious, the holding has no bearing on this case, where there was probable cause to believe that the defendant took the property directly from the victim's body, i.e., her person. Cf. Model Jury Instruction for Use in the District Court § 8.560 (explaining two separate ways to satisfy "from a person" requirement). Therefore, the defendant properly was arrested for larceny from a person, and any motion seeking to suppress his subsequent confession on this ground stood little chance of success. Accordingly, counsel was not ineffective for failing to raise this argument.

ii. Waiver of prompt arraignment. The defendant contends also that trial counsel was ineffective for failing to have

sought suppression on the ground that the defendant's confession was obtained more than six hours after his arrest, that is, beyond the "safe-harbor" period for police interrogations established by Commonwealth v. Rosario, 422 Mass. 48, 56 (1996). The defendant acknowledges that he did waive his right to a prompt arraignment, but emphasizes that the waiver itself was executed more than six hours after his arrest and, accordingly, was invalid.

Because an informed and voluntary waiver of the right to prompt arraignment ordinarily is effective, regardless of when it is executed, trial counsel was not ineffective in failing to seek suppression on this ground.

Pursuant to the safe harbor rule in Rosario, 422 Mass. at 56, an "otherwise admissible statement is not to be excluded on the ground of unreasonable delay in arraignment if the statement is made within six hours of the arrest (day or night), or if (at any time) the defendant made an informed and voluntary . . . waiver of his right to be arraigned without unreasonable delay" (emphasis supplied). While such a waiver ordinarily should be obtained expeditiously, we have given effect to waivers of the right to prompt arraignment executed more than six hours after a defendant's arrest. See, e.g., Commonwealth v. Spray, 467 Mass. 456, 461, 468 (2014); Commonwealth v. Morgan, 460 Mass. 277, 281 (2011).

In this case, the defendant signed a waiver of his right to prompt arraignment approximately six and one-half hours after being arrested, just after the expiration of the safe-harbor period. The waiver was made knowingly and voluntarily and was, therefore, fully valid. Any motion seeking to suppress his statement under Rosario would have been unlikely to succeed, and trial counsel was not ineffective for failing to file such a motion.

c. Involuntary confession. Finally, the defendant argues that his confession was involuntary because it was obtained through police coercion, and therefore that his motion to suppress on this ground should have been allowed. The defendant maintains that police obtained his confession by overstating the strength of the case against him ("maximization"), minimizing the severity of the offense and impliedly promising leniency ("minimization"), and, above all, appealing to the defendant's religious sensibilities. Having carefully reviewed the audio-video recording, we discern no indication that the defendant's will was overborne. We conclude, as did the motion judge, that the defendant's confession was voluntary, and therefore admissible.[14]

[14] The parties agree that the judge's decision on this claim should be reviewed de novo. The primary evidence at the hearing on the motion to suppress was a recording of the police

Where the Commonwealth intends to rely on a defendant's confession, it bears the burden of establishing that the confession was voluntary. Spray, 467 Mass. at 467, quoting Commonwealth v. Baye, 462 Mass. 246, 256 (2012). "In meeting this burden, the Commonwealth must prove beyond a reasonable doubt that, in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was [not] overborne, but rather the statement was a free and voluntary act" (quotations omitted). Spray, 467 Mass. at 467, quoting Baye, supra.

We turn first to the techniques of "maximization" and "minimization," which the defendant contends contributed to his purportedly involuntary confession. As mentioned, the investigating officers told the defendant that they were certain that he had killed his mother. They suggested, however, that her death might have been an accident, or that, if intentional, the defendant might have been provoked or under the influence of alcohol. The officers also told the defendant that, if he cooperated, they would "speak to the district attorney" and tell the prosecutor of his cooperation.

---

interview, which also is before us. See Commonwealth v. Novo, 442 Mass. 262, 266 (2004). The parties do not dispute the facts in any of the live testimony before the motion judge.

A false comment concerning the strength of the Commonwealth's case, in conjunction with minimization of the severity of the charges, may in some cases render a confession involuntary and thus inadmissible. See Commonwealth v. DiGiambattista, 442 Mass. 423, 439 (2004). That being said, we have not acted to prevent police investigators from suggesting to a suspect being interviewed that the investigators are convinced, based on evidence, of the defendant's guilt. See Spray, 467 Mass. at 467-468. Nor have we concluded that an interviewing officer's efforts to minimize a suspect's moral culpability, by, for example, suggesting theories of accident or provocation, are inappropriate, or sought to preclude suggestions by the interviewers "broadly that it would be better for a suspect to tell the truth, [and] . . . that the person's cooperation would be brought to the attention of [those] involved." Commonwealth v. O'Brian, 445 Mass. 720, 725, cert. denied, 549 U.S. 898 (2006), quoting Commonwealth v. Meehan, 377 Mass. 552, 564 (1979), cert. dismissed, 445 U.S. 39 (1980).

In this case, even if police expressed an unwarranted level of certainty about the defendant's guilt, their statements fell "far short of an intentional misrepresentation that 'may undermine the defendant's ability to make a free choice.'" See Spray, 467 Mass. at 467-468, quoting Commonwealth v. Scoggins, 439 Mass. 571, 576 (2003). Indeed, in describing their view of

the defendant's guilt, the investigating officers pointed accurately at the evidence arrayed against him. Contrast, e.g., Commonwealth v. Edwards, 420 Mass. 666, 669, 673-674 (1995) (false claim that defendant's hand print had been identified at crime scene was factor in favor of, but not alone requiring, suppression). Similarly, the suggestion by investigating officers that mitigating factors might have led to the killing, and the promise to communicate any cooperation to the district attorney, were within the bounds of acceptable interrogation methods. See O'Brian, 445 Mass. at 725-727 (suggesting to defendant possibility of accidental killing and that cooperation would be communicated to district attorney such that defendant "may see the light of day").

Our decision in DiGiambattista is not to the contrary. In that case, we held only that minimization techniques, combined with intentionally false statements of fact, rendered a confession involuntary. See DiGiambattista, 442 Mass. at 432 (labeling such techniques "calculated trickery"). Moreover, we note that the DiGiambattista court itself expressly disclaimed the suggestion that "an officer's use of the standard interrogation tactic of 'minimization,' by itself, compels the conclusion that a confession is involuntary." Id. at 438-439.

In addition to the common interrogation tactics of "maximization" and "minimization," which we have had repeated

occasion to consider, this case also presents a less common scenario: the invocation of religion in an effort to obtain a confession. Over the course of the interview, police mentioned several times that the victim could not "rest in peace" without the closure that would come from telling "the truth." Dana explicitly said that he was referring to the victim's soul, which was "restless" in the "afterlife."[15]

The parties do not cite any published Massachusetts case dealing with this situation, nor are we aware of any. A review of the law in other jurisdictions suggests that, while such questioning should be approached with caution, in the circumstances here it did not render the defendant's statement involuntary. In general, courts condemn "the tactic of exploiting a suspect's [specific] religious anxieties," but will not order suppression where the commentary on religion is limited and not "calculated to exploit a particular psychological vulnerability of the defendant." People v. Kelly, 51 Cal. 3d 931, 953 (1990), cert. denied, 502 U.S. 842 (1991). Compare id. (generalized appeal to Christianity did not render

[15] The defendant also cites multiple statements in which he claims police threatened his brothers with the "vengeful spirit[]" of the victim. The statements he cites do not support his claim. In them, police simply suggest that his brothers would be better off without the burden of not knowing what happened to their mother. There is nothing in itself improper about appeals to the well-being of a defendant's family. See Commonwealth v. Berg, 37 Mass. App. Ct. 200, 203-204 (1994).

statement involuntary); People v. Bowen, 87 Ill. App. 3d 221, 223 (1980) ("now is the time to make peace with yourself, your God, and your [deceased] children" did not render statement involuntary); Thong Le v. State, 913 So. 2d 913, 930-931, 934, cert. denied, 546 U.S. 1004 (Miss. 2005), overruled on other grounds by Bonds v. State, 138 So. 3d 914 (Miss. 2014) (calling on Buddhist defendant to "give [victims] back [their] soul[s]" by confessing did not render statement involuntary); with People v. Montano, 226 Cal. App. 3d 914, 935 (1991) (discussion with known Catholic of Catholic divine punishment was factor rendering statement involuntary); People v. Adams, 143 Cal. App. 3d 970, 979, 983 (1983) (using member of defendant's church to exploit defendant's particular religious insecurities rendered statement involuntary). Cf. Brewer v. Williams, 430 U.S. 387, 392, 397-398 (1977) (appeal to religion in form of "Christian burial speech" interfered with right to counsel; Court did not reach question whether this also rendered confession involuntary).

Contrary to the defendant's contention, the religious references here were of a type that other courts have concluded were permissible. Nothing indicates that police took advantage of, or knew of, the defendant's personal religious beliefs, or of any special susceptibility he might have had to religious appeals. While the defendant argues that police exploited his

fear of voodoo, the record suggests that the defendant mentioned voodoo to police on two occasions, once before his arrest and once during the police interview. Both times he made reference only to his mother's and aunt's participation in voodoo and did not mention his own religious beliefs. During the interview, police did not mention voodoo, or any beliefs specific to that faith, and did not belabor the theme of religion. While they mentioned restlessness in the afterlife repeatedly over the course of the nearly five-hour interview, each mention was relatively brief.

We emphasize that any discussion of religion cannot be taken alone, but must be considered in the "totality of the circumstances." Spray, 467 Mass. at 467. In considering the totality of the circumstances here, we look to the decision of the California Supreme Court in a substantially similar case. See People v. Carrington, 47 Cal. 4th 145 (2009), cert. denied, 559 U.S. 1094 (2010).

In that case, the defendant was interviewed by a series of police officers over the course of eight hours. See id. at 175. The defendant in that case, as here, was arrested on a lesser charge, and then informed that police wanted to speak with her about a homicide. See id. at 169. Over the course of the lengthy interview, police employed a number of the tactics at issue here. They suggested that the case against the defendant

was airtight, id. at 173, that cooperation with the interrogators would be in the defendant's best interest, id. at 169; that confession would make the defendant feel better, id. at 173, 174; and that it would provide peace to the defendant's family, id. at 170. They also minimized the defendant's culpability by suggesting the possibility of mistake, id. at 173. Moreover, as in this case, police appealed to religion, telling the defendant, "there's someone up above, bigger than both of us looking down and saying [Defendant], you know you shot that person in San Carlos and it's time to purge it all." Id. at 176. The California Supreme Court determined that the totality of the circumstances in that case did "not reflect coercive tactics." Id. We conclude similarly here.

Finally, we note that nothing about the defendant's personal characteristics made him particularly vulnerable to coercive tactics. Our review of the audio-video recording indicates that the defendant was alert and responsive, and that he spoke fluently in English. Although he is an immigrant, he had lived in the United States since childhood. In sum, the defendant's will was not overborne, and the judge correctly determined that his confession was voluntary.

3. Review under G. L. c. 278, § 33E. Having reviewed the entire record in accordance with our duty under G. L. c. 278,

§ 33E, we discern no reason to reduce the degree of guilt or to order a new trial.

Judgments affirmed.