STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellant.

FOR PUBLICATION
February 15, 2024
9:15 a.m.

No. 355925
Emmet Circuit Court
LC No. 20-005054-FC

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

MALDONADO, J.

This case arises from a jury's conclusion that defendant and his romantic partner, Brandie DeGroff, stole nearly $70,000 from their neighbor's safe. Thus, defendant was found guilty of safe breaking, MCL 750.531, larceny of property valued at $20,000 or more, MCL 750.356(2)(a), receiving or concealing stolen property valued at $20,000 or more, MCL 750.535(2)(a), larceny from a building, MCL 750.360, and conspiracy to commit each of those offenses, MCL 750.157a. Defendant was sentenced to serve concurrent terms of 10 to 20 years' imprisonment for the safe-breaking conviction, 9 to 20 years' imprisonment each for the larceny-of-property and receiving-or-concealing convictions, and 3 to 15 years' imprisonment for the larceny-from-a-building conviction, plus terms for each conspiracy conviction matching the sentence for its underlying offense. At defendant's trial, particularly damning was a series of text messages exchanged between defendant and DeGroff in which the couple made numerous references to the crimes for which defendant was convicted. Police obtained these messages following a search of defendant's phone which was executed pursuant to a warrant. However, the warrant was not obtained until after the phone was seized because the phone was seized incident to defendant's arrest. Defendant now raises numerous arguments, most of which framed as ineffective assistance of counsel, regarding the initial seizure of the phone, the warrant supporting the search of its contents, and the actual search of the phone.

As a threshold matter, we hold that it violates the prohibition against multiple punishments for the same offense for a person to be convicted of both larceny and receiving or concealing stolen property when the convictions arise from the same criminal act because a person who steals property necessarily possesses stolen property. Furthermore, it is well established that a search

made pursuant to a general warrant cannot stand; thus, we hold that the warrant authorizing the search of defendant's cell phone violated the particularity requirement because it authorized a general search of the entirety of the phone's contents. Finally, we hold that the fruits of this search cannot be saved by the good faith exception to the exclusionary rule because the warrant was plainly invalid. Accordingly, we reverse each of defendant's convictions and remand for additional proceedings. Because these holdings are sufficient to wholly resolve this appeal and provide guidance on remand, we decline to address other various matters raised by defendant.

I. BACKGROUND

A. UNDERLYING FACTS

Defendant and DeGroff were neighbors of Don Billings. Billings, due to his various health problems, was planning to sell off much of his property so that he could eventually move in with his brother. Defendant had experience with selling goods online, so Billings enlisted the assistance of defendant and DeGroff with selling his property in exchange for them receiving 20% of the proceeds. Defendant was given keys to Billings's home and was also granted license to look through and rearrange much of Billings's property. This operation was ongoing from the summer of 2019 until September or October of the same year.

Billings did not trust banks, so he stored his life's savings, along with miscellaneous other documents and valuable goods, in a pair of 40-year-old safes that he kept in his house. The cash was estimated to equal more than $60,000, and it was in hundred-dollar-bills that were divided into $1,000 bundles. The safes could be opened by combination or key, but Billings only used the combination and could not remember where in the house he stored the key. At some point after defendant and DeGroff were no longer assisting Billings, he decided for no particular reason to open the safes. However, he was not able to make the combinations work and ultimately needed to elicit the assistance of a locksmith. Upon opening the safes, Billings discovered that all of the cash was gone. Billings testified that between then and the last time he had opened the safe, only defendant and DeGroff had access to them. However, he never gave them permission to open the safes or attempt to sell any of the safes' contents.

Other circumstantial evidence connected defendant and DeGroff to the theft of the contents of the safes. For example, the police obtained records from a jewelry store indicating that defendant purchased a $1,490 wedding ring on August 6, 2019. The police also obtained a search warrant for records regarding defendant's and DeGroff's joint bank account for each month from October 2018 to November 2019. These records indicated that they had $283.13 in the account at the end of July 2019; that they deposited a total of $9,300 in September 2019; and that their September deposits exceeded every other month during that period by approximately $4,000. However, defendant's employer from April 2, 2019 until August 2, 2019 testified that defendant's net pay during that entire period was approximately $8,400. He further testified that defendant quit because "he ran across some money and some valuables, gold I believe, in a locker that he bought online, or through some kind of a transaction . . . so, [defendant] had a lot of money that [sic] he didn't need to work for a while, or something." Alan Olsen, who lived with and paid rent to defendant and DeGroff from August 2018 until September 2019, testified that the couple was having financial difficulties and that he paid extra rent the final month he lived there to help them.

However, Olsen also testified that in August 2019, the couple began going out "every night," and they would tell him that they were either getting dinner or going to the casino.

Finally, the Slot Director for the Odawa Casino testified that the casino used "players club cards" to track players' earnings because once a certain threshold was exceeded the earnings were subject to income taxation. He explained that the machines at the casino tracked the total money that a player put into the machine, irrespective of wins or losses. In 2019, defendant put a total of $122,000 into the gaming machines at the Odawa Casino, including approximately $57,000 in August of that year. In 2019, defendant's total losses were approximately $5,000, including just shy of $4,000 in losses from August of that year. Meanwhile, Brandy DeGroff put $47,619 into gaming machines at the Odawa Casino in 2019, including $12,919 in August. DeGroff lost $6,021 in 2019, including $2,368 in August.[1]

Defendant was arrested on February 26, 2020. Police arrived at defendant's home at approximately 4:00 a.m., and defendant answered the door wearing only shorts. Prior to escorting him out, Detective Midyett allowed defendant to smoke a cigarette and get dressed. Detective Midyett escorted defendant to his bedroom to get dressed, and while defendant was sitting on his bed tying his shoes, Detective Midyett noticed a cell phone connected to a charger nearby. Detective Midyett asked defendant if the cell phone was his, defendant answered in the affirmative, and the phone was seized. Later, police sought and obtained a warrant to search the phone's contents and discovered text messages exchanged between defendant and DeGroff that proved to be critical to the prosecution's case.

At the trial, the prosecution asked Detective Matt Leirstein to read from a text conversation extracted from defendant's phone, dating from August 5-6, 2019:

> *Q.* [C]an you tell us who's sending this text message?
>
> *A.* This looks like it is from [defendant].
>
> *Q.* Okay. What does it say?
>
> *A.* "Don and Judy were investors in the stock market, complete records for hundreds of thousands of dol1ars."
>
> *Q.* And what is [DeGroff's] response . . . ?

[1] At the time of the investigation, this author was employed as the Chief Judge of the Tribal Court for the Little Traverse Bay Bands of Odawa Indians, and as such, this author was the signatory of an order giving full faith and credit to a subpoena issued by the circuit court seeking these casino records. The parties were notified of this connection to their case in writing on August 23, 2023, and the parties were assured that this ministerial act in no way impacted the ability of this panel to fairly decide the issues before it. This Court did not receive any requests for this author's recusal, and any objections from defendant were affirmatively waived at oral arguments.

A. "Wow that's crazy. Have you found any records of what's in the space yet?"

Q. And . . . what's [defendant's] response to that?

A. [Defendant's] response is, "In the, what, yet?"

Q. And what does [DeGroff] say?

A. "Lol, laugh out loud, safe," meaning, safe.

Q. What is [defendant's] response to that text . . . ?

A. "No. I'm guessing it's all on the computer."

Q. How does [DeGroff] respond?

A. "I'm turning it on . . . when I get to go up there again."

Q. And then what's [defendant's] response?

A. "I just did. . . . Home screen says, 'Welcome Don.' "

Q. [DeGroff's] response?

A. "Does it ask for security?"

Q. What does [defendant] say to that?

A. "No. Opens right up. There isn't anything on it that I can see. You look later. This is more your field."

Q. The next text message that [defendant] sends to [DeGroff]—what does that say?

A. "We need to go through those pennies. If there's a 1943 copper penny in there, it's worth millions, these people said. Also, the 1943s pennies can go for twenty thousand dol1ars each—or, $20,000 each." It doesn't say dollars.

Q. What does [DeGroff] say?

A. "Holly Molly! [sic] That's a lot . . . of money."

Q. Alright. [Defendant's] response?

A. "I'm thinking that these guys cashed out stocks, and whatnot, and converted to cash and gold and silver in the safes."

* * *

Q. What's this text message [defendant] sends to [DeGroff] at about 4:29 p.m. on August 5 . . . ?

A. "These are the keys that you're thinking are safe keys, I think that these are lockbox keys from a bank."

Q. And what's [DeGroff's] response?

A. "Might be."

The prosecution later asked about an exchange between defendant and DeGroff from August 13, 2019:

Q. And what does [defendant] say to [DeGroff]?

A. "I'm totally confused. Does he not know there's a million dollars in those safes?"

Q. And how does [DeGroff] respond?

A. "I really don't think he does. I think he opened it up, . . . threw that money in there and closed it."

The prosecution asked about an exchange between defendant and DeGroff from September 2019:

Q. . . . Do you recall the testimony of Mr. Billings that he had confronted the defendant about coins missing from the bedroom of his house?

A. Yes, I do.

Q. Alright. When are the text messages . . . here, what's the dates ?

A. . . . It's gonna be September 15th, 2019 at 4 p.m.

Q. . . . The text message I'm highlighting, this is from [defendant] to [DeGroff], is that right?

A. Correct.

Q. And what does it say?

A. "It amazes me that he's worried about a few rolls of coins and never went into the safes."

* * *

Q. Go to page 6. This highlighted text from [defendant] to [DeGroff], when was that sent?

A. It looks like, September 15th, 2019 at 10:12 p.m.

Q. Okay. And what does [defendant] say to [DeGroff] in this text that I'm highlighting?

A. "He must've tried to get into the safe and couldn't and then thought there was a ton of money in that chest."

Finally, the prosecution asked about a pair of exchanges between the couple from October and November 2019:

Q. I want you to read for the jury the text message [defendant] sends [DeGroff] on October 29 at about 4:15 p.m. . . . What did [defendant] say to her?

A. "Yeah, right. It's all you've done is use me and cheat on me."

Q. . . . [DeGroff's] response . . . ?

A. "Right. Um, use you for what? 'Cause I haven't made any money or help you steal sixty thousand dollars? And cheat? When? Tell me when I had the opportunity to fucking cheat? You are the one who didn't work most of the summer and hasn't held a single job."

Q. . . . Like you to read the text message the defendant sent [DeGroff] on November 24 at 10:51 a.m. . . . What does [defendant] say to Brandy DeGroff in this text message?

A. "I just need to go. . . . I'm always full of anger and everyone at home is in line of fire and it's not fair to all of you. It's just best I, not, be there until I get some sort of help to calm me and help me sleep. It doesn't help that I'm overly stressed over our finances. . . . I wish now that I had a way to go rob those entire safes. Tomorrow I'm taking all that other money to the bank and just deposit it . . . . Fuck chasing shit around. I'm trying to sell shit and bring money in but it's not working. I'm a mixed ball of everything and I'm going fucking crazy."

B. POSTCONVICTION HISTORY

Defendant was found guilty as described in the opening paragraph of this opinion, *supra*, was sentenced in December 2020, and filed a claim of appeal in this Court on January 4, 2021. On September 10, 2021, while this appeal was pending, defendant filed a motion for a new trial in the circuit court. Defendant argued that his cell phone was seized pursuant to an impermissible warrantless search; that the police impermissibly questioned defendant regarding his ownership of the phone without having first issued *Miranda*[2] warnings; that the affidavit in support of the police's request for a search warrant was inadequate in that it failed to establish probable cause to

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed2d 694 (1966).

believe that the cell phone would contain relevant evidence; that the prosecution had impermissibly added charges in retaliation to defendant's motion to suppress; and that defense counsel's failure to raise these issues constituted ineffective assistance of counsel. On October 21, 2021, the circuit court ordered additional briefing, and on December 30, 2021, the trial court ordered a *Ginther*[3] hearing.

The *Ginther* hearing was conducted on April 28, 2022, and defendant's trial attorney, Duane Beach, testified extensively regarding the matters raised in defendant's motion. The relevant details of Beach's testimony are presented in Section II, *infra*, of this opinion. At the hearing's conclusion, the court elected to engage in further deliberations. On May 17, 2022, the circuit court issued a written opinion and order denying defendant's motion for a new trial. In relevant part, the court concluded that (1) Beach erred by failing to seek suppression of defendant's admission to police that he owned the cell phone, but this was harmless because the circumstantial evidence of defendant's ownership was overwhelming; (2) Beach should have filed a motion to suppress the contents of defendant's cell phone "if only to preserve the appeal," but this error was likewise harmless because even if the warrant was deficient, the good faith exception to the exclusionary rule would apply; (3) Beach's decision not to file a motion to quash the amended information was a reasonable strategic choice; (4) defendant's evidentiary arguments were without merit; and (5) defendant's convictions of both larceny of stolen property and receiving and concealing stolen property did not raise double jeopardy concerns.

Following the conclusion of postconviction matters in the circuit court, this appeal proceeded.

II. DISCUSSION

Defendant argues that finding him guilty of larceny and receiving and concealing stolen property for the same act violated his double jeopardy rights. Defendant further argues that the contents of his cell phone were inadmissible because they were seized pursuant to a facially invalid search warrant and that Beach rendered ineffective assistance by failing to seek exclusion pursuant to these grounds. We agree. Because these conclusions are dispositive, we do not reach defendant's remaining arguments.

Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error and legal conclusions are reviewed de novo. *Id*. Questions of constitutional law are reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A. DOUBLE JEOPARDY

Defendant's double jeopardy rights were violated because his convictions of larceny and receiving or concealing stolen property arose from the same act—the theft of the money taken from Billings's safe.[4]

The Double Jeopardy Clauses of the federal and state Constitutions prohibit placing a criminal defendant twice in jeopardy for a single offense. *People v Booker (After Remand)*, 208 Mich App 163, 172; 527 NW2d 42 (1994), citing US Const, Ams V, XIV and Const 1963, art 1, § 15. "The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

The Legislature retains the option, however, of punishing a crime through creating the possibility of multiple convictions and sentences stemming from a single criminal act. See *People v Wafer*, 509 Mich 31, 38; 983 NW2d 315 (2022). Where the Legislature has not clearly indicated its intent to allow cumulative punishments, it is necessary to "examine the *abstract legal elements* of the two offenses, rather than the facts of the case, to determine whether the protection against multiple punishments for the same offense has been violated." *People v Dickinson*, 321 Mich App 1, 15; 909 NW2d 24 (2017) (emphasis added). When applying the "abstract legal elements test," we are instructed to determine whether "each of the offenses for which defendant was convicted has an element that the other does not." *People v Miller*, 498 Mich 13, 19; 869 NW2d 204 (2015) (quotation marks, citation, and alteration omitted). This test can be satisfied and dual convictions may stand even if there is "a substantial overlap in the proof offered to establish the crimes." *Nutt*, 469 Mich at 576, quoting *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

This issue was addressed more than 30 years ago when this Court decided *People v Johnson*, 176 Mich App 312; 439 NW2d 345 (1989), a case which defendant views as dispositive. In *Johnson*, the defendant pleaded guilty to larceny of property worth more than $100 and possession of stolen property worth more than $100 following the theft of 14 shirts from a store. *Id*. at 313. To resolve the defendant's double jeopardy argument, this Court inquired "into whether the Legislature intended to authorize multiple punishment under different statutes for a single criminal transaction." *Id*. This Court concluded "that the Legislature did not intend to provide for multiple punishment under both these statutes" because "the punishment provided by each statute is exactly the same" and because "[e]ach statute prohibits conduct which violates the same social

[4] While the discussion regarding the contents of defendant's cell phone found in section II.B, *infra*, is sufficient to wholly adjudicate this appeal, the double jeopardy argument still merits addressing because it will be an issue if defendant is tried again on remand. See *People v Richmond*, 486 Mich 29, 34-35; 782 NW2d 187 (2010) (explaining that an issue is not moot if its resolution will have practical effects on the case).

norm: theft of property." *Id*. at 314. This Court concluded that the purpose of the statutory framework was "to enlarge the prosecutor's arsenal to allow alternate charging and conviction of a thief under either the larceny statute or the receiving and concealing statute. Defendant could have been charged and convicted under either statute for this theft, but not under both of them." *Id*. at 315.

The prosecution reminds us that *Johnson* predates the conflict rule, MCR 7.215(J)(1), and thus is not binding precedent. However, although "[d]ecisions published before November 1, 1990, are not binding on this Court . . . , those decisions are entitled to deference under traditional principles of stare decisis and should not be lightly disregarded." *People v Haynes*, 338 Mich App 392, 415 n 1; 980 NW2d 66 (2021). We view *Johnson*'s reasoning as sound, and we reaffirm its conclusion that the legislature did not intend for cumulative punishments pursuant to these two statutes. The true problem with *Johnson* as it applies now is that, because of the state of double jeopardy law at the time it was decided, it did not apply the abstract legal elements test. Thus, as the law currently stands, *Johnson*'s analysis is incomplete. We therefore will finish what *Johnson* started and apply the abstract legal elements test to these two statutes as they are currently written.

We conclude that it is not possible for a person to be guilty of larceny without also being guilty of receiving or concealing stolen property; therefore, the same act cannot give rise to convictions for both crimes. MCL 750.356(1) provides:

> A person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section:
>
> (a) Money, goods, or chattels.
>
> (b) A bank note, bank bill, bond, promissory note, due bill, bill of exchange or other bill, draft, order, or certificate.
>
> (c) A book of accounts for or concerning money or goods due, to become due, or to be delivered.
>
> (d) A deed or writing containing a conveyance of land or other valuable contract in force.
>
> (e) A receipt, release, or defeasance.
>
> (f) A writ, process, or public record.
>
> (g) Scrap metal.

On the other hand, MCL 750.535(1) provides: "A person shall not buy, receive, possess, conceal, or aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing, or having reason to know or reason to believe, that the money, goods, or property is stolen, embezzled, or converted."

The catchall term "property" as it is used in MCL 750.535(1) subsumes the entire list provided in MCL 750.356(1)(a)-(g). In other words, if a person steals one of the items articulated

in the list provided in MCL 750.356(1), then the person has necessarily stolen "money, goods, or property" as the term is used in MCL 750.535(1). Additionally, a person who steals necessarily possesses the item that was stolen. Thus, a person who steals one of the items articulated by MCL 750.356(1) has necessarily possessed stolen money, goods, or property. Moreover, MCL 750.356(1)(a) establishes that stealing another's money, goods, or chattels is a crime by itself; Subsections (2) through (5) set forth different penalties depending on the value of the property stolen, covering the whole gamut of possibilities, from under $200 under Subsection (5), to $20,000 or more under Subsection (2). Similarly, MCL 750.535(1) establishes that possessing property actually or constructively known to be stolen is a crime by itself, and the subsections that follow set forth different penalties depending on the value of the property stolen, covering values from under $200 under Subsection (5), to $20,000 or more under Subsection (2)(a). This alignment of statutory provisions thus guarantees that any theft pursuant to MCL 750.356 will constitute possession of stolen property pursuant to MCL 750.535.

For these reasons, we conclude that a person cannot be convicted of both larceny and receiving or concealing stolen property as a result of the same criminal act. However, for the purposes of this case, our analysis does not end here. This was raised through the analytical framework of ineffective assistance, and we still must establish whether defendant has established ineffective assistance of counsel. Little discussion is needed to answer this question in the affirmative. "To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for trial counsel's errors." *Head*, 323 Mich App at 539 (quotation marks, citation, and alteration omitted). Defense counsel erred by allowing defendant to be punished twice for the same offense, and the outcome of the proceeding would have been different if not for this error because it would have prevented defendant's conviction of one of these two offenses as well as the accompanying conspiracy charge. Therefore, defendant's double jeopardy argument establishes a claim of ineffective assistance of counsel.

In conclusion, the constitutional double jeopardy protections bar defendant from being reconvicted of both larceny and receiving or concealing stolen property, as well as both corresponding conspiracy charges, if he is tried again on remand.[5]

B. CONTENTS OF DEFENDANT'S CELL PHONE

The warrant authorizing a search of the contents of defendant's cell phone was too broad in violation of the particularity requirement, and the good faith exception is inapplicable to these

[5] In other words, defendant can permissibly be convicted of conspiracy to commit larceny or conspiracy to commit receiving or concealing stolen property but not both. This is because, pursuant to the same analysis, a person cannot conspire to steal property without also conspiring to possess the same stolen property, so a conviction of both would violate the constitutional double jeopardy protections.

facts. Therefore, defense counsel's failure to seek exclusion of the phone's contents for these grounds was ineffective assistance warranting reversal.

1. PARTICULARITY REQUIREMENT

The search warrant in this case was invalid because it failed to particularly describe what the police sought to search and seize.

"[T]he general rule is that officers must obtain a warrant for a search to be reasonable under the Fourth Amendment." *People v Hughes*, 506 Mich 512, 525; 958 NW2d 98 (2020). The warrant requirement applies to searches of cell phone data. *Id.*, citing *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed2d 430 (2014). The Fourth Amendment only allows search warrants "particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV. A substantially similar provision can be found in the Michigan Constitution. Const 1963, art 1 § 11.[6] "The purpose of the particularity requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure." *People v Unger*, 278 Mich App 210, 245; 749 NW2d 272 (2008) (quotation marks and citation omitted). "A search warrant is sufficiently particular if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the people and property subject to the warrant." *People v Brcic*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 359497); slip op at 4 (quotation marks and citation omitted). Whether a warrant satisfied the particularity requirement depends on "the circumstances and the types of items involved." *Unger*, 278 Mich App at 245. It is "well settled that a search may not stand on a general warrant." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). In the context of cell phone data, the Michigan Supreme Court has concluded that "allowing a search of an entire device for evidence of a crime based upon the possibility that evidence of the crime could be found anywhere on the phone and that the incriminating data could be hidden or manipulated would render the warrant a general warrant . . . ." *Hughes*, 506 Mich at 542, quoting *People v Herrera*, 357 P3d 1227 (Colo 2015).

In this case, the warrant itself described the "person, place, or thing to be searched" as the "[c]ellular device belonging to [defendant] and seized from his person upon arrest."[7] The property to be searched for and seized was described as follows:

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[6] The Michigan Supreme Court has held that these two provisions are "to be construed to provide the same protection" unless there is a "*compelling reason to impose a different interpretation*." *People v Katzman*, 505 Mich 1053, 1053; 942 NW2d 36 (2020) (quotation marks and citation omitted).

[7] When assessing whether the warrant sufficiently described the places to be searched and items to be seized, we have *not* considered the contents of the supporting affidavit because the warrant did not contain "appropriate words of incorporation" directing the officers to refer to the affidavit during execution of the search. See *Brcic*, ___ Mich App ___; slip op at 4 (quotation marks and citation omitted).

> Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for such items, searching agents may seize and search the following: cellular devices; Any [sic] physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any [sic] passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This [sic] shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

Simply put, this was a general warrant that gave the police license to search *everything* on defendant's cell phone in the hopes of finding anything, but nothing in particular, that could help with the investigation. This warrant did not place any limitations on the permissible scope of the search of defendant's phone. The only hint of specificity was the opening reference to "the investigation of Larceny in a Building and Safe Breaking," but this small guardrail was negated by the ensuing instruction to search for such items by searching and seizing the entirety of the phone's contents.

The evidence clearly established that there was probable cause to believe that defendant and DeGroff collaborated to break into Billings's safe and steal its contents, which included his entire life's savings. Given the nature of defendant's and DeGroff's relationship, there was likewise probable cause to believe that defendant had used his phone to communicate with DeGroff regarding these crimes. Therefore, it would have been wholly appropriate to issue a warrant authorizing the police to engage in a search of the phone's contents limited in scope to correspondence between these two regarding the crimes; this would include SMS messages, internet-based messaging applications such as Messenger or SnapChat, direct messages sent through social media platforms such as Instagram or Twitter, emails, and other similar applications. The warrant that was actually issued placed no limitations on the scope of the search and authorized the police to search everything, specifically mentioning photographs and videos. Authorization for a search of defendant's photographs and videos, despite there being no evidence suggesting that these files would yield anything relevant, is particularly troubling in light of the tendency of people in our modern world to store compromising photographs and videos of themselves with romantic partners on their mobile devices. Moreover, people usually can directly access file storage systems such as Dropbox and Google Drive directly from their phones, creating a whole new realm of personal information that the police was given free license to peruse. The pandemic also saw the emergence of applications such as "BetterHelp" and "Talkspace" through

which people can have text message-based sessions with their psychotherapists, and applications such as "MyChart" allow mobile storage of detailed medical records as well as private conversations between patients and doctors. Simply put, this warrant authorized precisely the form "wide-ranging exploratory searches the framers intended to prohibit." *Hughes*, 506 Mich at 539 (quotation marks and citation omitted). Indeed, there are likely many people who would view an unfettered search of the contents of their mobile device as more deeply violative of their privacy than the sort of general search of a home that the framers originally intended to avoid.

We are living in a time during which it can be reasonably assumed that any given person essentially has their entire life accessible from their phones. The Unites States Supreme Court commented on this fact when it decided *Riley*:

> [T]here is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. . . . A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. [*Riley*, 573 US at 395 (citations omitted).]

Thus, warrants for searching and seizing the contents of a modern cell phone must be carefully limited in scope. This is not to say that the police must be told precisely what they are looking for or where to find it, but there must be guardrails in place. The warrant in this case authorized the modern equivalent of the police combing through a person's entire home in search of any evidence that might somehow implicate the person in the crime for which they were a suspect.

We are aware of no binding authority[8] discussing the analysis of whether the language of a warrant authoring a search of cell phone data comports with the particularity requirement; however, several other states have likewise concluded that it is inappropriate for a warrant to authorize an unfettered search of a phone's entire contents. For example, in *State v Smith*, 344 Conn 229, 250-252; 278 A3d 481 (2022), the Connecticut Supreme Court concluded that a warrant "which allowed for a search of the entire contents of the cell phone" was invalid "because it did not sufficiently limit the search of the contents of the cell phone by description of the areas within the cell phone to be searched, or by a time frame reasonably related to the crimes." In *State v Bock*, 310 Or App 329, 335; 485 P3d 931 (2021), the Oregon Court or Appeals concluded that a "warrant that authorizes seizure of any item on a cell phone that might later serve" as evidence of

[8] The specifics of the Michigan Supreme Court's opinion in *Hughes* are not entirely on point because the Court was examining whether the police, by examining the phone's entire contents, acted within scope of the warrant. See *Hughes*, 506 Mich at 539-550. In this case, the issue we are discussing is whether the scope of the warrant was too broad, not whether the police acted within the scope of the warrant.

a crime "is tantamount to a general warrant." Additionally, in *People v Coke*, 461 P3d 508, 516 (Colo 2020), Colorado's Supreme Court invalidated a search warrant that allowed police "to search all texts, videos, pictures, contact lists, phone records, and any data that showed ownership or possession." Numerous other examples establish that many states have joined in our conclusion that that the particularity requirement disallows the issuance of warrants authorizing police to search the entirety of a person's cell phone contents for evidence of a particular crime; the massive scale of the personal information people store on their mobile devices means that there must be some limits to the scope of the search. See, e.g., *Richardson v State*, 481 Md 423, 468; 282 A3d 98 (Md Ct App 2022) ("While reasonable minds may differ at times on whether a warrant is sufficiently particular, one thing is clear: given the privacy interests at stake, it is not reasonable for an issuing judge to approve a warrant that simply authorizes police officers to search everything on a cell phone."); *State v Wilson*, 315 Ga 613, 615; 884 SE2d 298 (2023) (invalidating warrant that provided a "limitless authorization to search for and seize any and all data that can be found on [the defendant's] cell phones").

For these reasons, we conclude that the search warrant in this case did not satisfy the particularity requirement.

2. GOOD FAITH EXCEPTION

The good faith exception to the exclusionary rule does not apply because this was a facially invalid general warrant upon which no reasonable officer could have relied in objective good faith.

"The exclusionary rule is a judicially created remedy that originated as a means to protect the Fourth Amendment right of citizens to be free from unreasonable searches and seizures." *People v Hawkins*, 468 Mich 488, 498; 668 NW2d 602 (2003). In general, this rule bars admission of evidence that was obtained during an unreasonable search. *Id*. at 498-499. However, the exclusionary rule has been "modified by several exceptions" that allow such evidence to be admitted under certain circumstances. *Id*. (citation omitted). The purpose of the exclusionary rule is not "to 'make whole' a citizen who has been subjected to an unconstitutional search or seizure. Rather," the rule's purpose is to deter future police misconduct. *Id*. at 499. For this reason, the United States Supreme Court carved out the "good-faith" exception to the exclusionary rule when it decided *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed2d 677 (1984). The good-faith exception "renders evidence seized pursuant to an invalid search warrant admissible as substantive evidence in criminal proceedings where the police acted in reasonable reliance on a presumptively valid search warrant that was later declared invalid." *People v Hughes*, 339 Mich App 99, 111; 981 NW2d 182 (2021). This exception has also been recognized by the Michigan Supreme Court. *People v Goldston*, 470 Mich 523, 525-526; 682 NW2d 479 (2004). The rationale behind this exception is that the exclusionary rule was crafted to deter police misconduct and therefore should not apply when a *magistrate* made an error rather than the police. *Hughes*, 339 Mich App at 111.

The good-faith exception does not mean that evidence obtained pursuant to a search warrant will always be admitted, and the United States Supreme Court explained scenarios in which this exception will not apply when it decided *Leon*:

> Suppression . . . remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role . . . ; in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in *failing to particularize the place to be searched or the things to be seized*—that the executing officers cannot reasonably presume it to be valid. [*Leon*, 468 US at 923 (citations omitted; emphasis added).]

There is little guidance offered by Michigan caselaw on the applicability of the good-faith exception in the context of a search warrant violative of the particularity requirement. This Court has suggested that a search warrant is "plainly invalid" if "it failed to describe the type of evidence to be sought." *Brcic*, ___ Mich App at ___; slip op at 4, quoting *Groh v Ramirez*, 540 US 551, 557; 124 S Ct 1284; 157 L Ed2d 1068 (2004). However, this statement was not made in the context of a good-faith exception analysis. There is some guidance from other jurisdictions, but the results are mixed. For example, in *Richardson*, 481 Md at 470-472, the Maryland Court of appeals concluded that the good-faith exception did apply, reasoning that the officers who executed the warrant could not have known that it was impermissible to search the entire phone. However, in *Burns v United States*, 235 A 3d 758 (DC Ct App 2020), the District of Columbia Court of Appeals concluded that the good-faith exception did not apply because of the obvious overbreadth of the warrant. One difficulty that arises when looking to other states for guidance is that there is significant variance in the extent to which each state has adopted this exception to the exclusionary rule. For example, in *State v McLawhorn*, 636 SW3d 210, 245 (Tenn Ct Crim App 2020), the Tennessee Criminal Court of Appeals concluded that the good-faith exception did not apply in a case in which a warrant impermissibly authorized "an unfettered search of all data on the Defendant's cell phone," but Tennessee had only adopted a limited version of the good-faith exception that applied to "evidence which had been seized in accord with binding precedent existing at the time," cases involving technical flaws to otherwise valid warrants, and cases involving negligence as opposed to "systemic error or reckless disregard of constitutional requirement." *Id*. (quotation marks and citation omitted). In Michigan, while there is no caselaw suggesting that our good-faith exception is coextensive with its federal counterpart, there likewise appears to be no caselaw restricting its applicability in manners not present in federal caselaw.

We conclude that the warrant in this specific case was so facially deficient by virtue of its failure to particularize the places to be searched and things to be seized that the executing officers could not have reasonably presumed it to be valid. See *Leon*, 468 US at 923. As discussed in detail in section II.A, *supra*, this case involved a general warrant authorizing a search of the phone's entire contents for any incriminating evidence. It is common knowledge that people store an incredible amount of personal data on their phones, and the prohibition against general warrants is long-established. The plainly invalid breadth of this warrant is further evidenced by the fact that the police ultimately seized approximately *1,000 pages of personal information* from defendant's phone that consisted of all of its contents. No officer could reasonably have believed that such a

far-reaching search complied with the constitutional demand for particularity. Lack of good-faith is further evidenced by the affidavit submitted by the police when they sought the search warrant because the police made no secret of their intent to engage in a fishing expedition. In particular, the following paragraph is alarming:

> Records created by mobile communication devices can also assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing a larger segment of records ranging prior to and after the incident under investigation if possible.

The preparing officer essentially admitted knowledge of the breadth of personal information available on modern cell phones, as was detailed above,[9] and stated his intent to comb through all of it.

To be clear, we do *not* hold that searches executed pursuant to a warrant that is defective by virtue of allowing an overly broad search of a person's cell phone can *never* be saved by the good-faith exception. However, given the particularly egregious facts of this case, we conclude that the good faith exception does not apply, and the contents of defendant's cell phone should not have been admitted at his trial.

3. INEFFECTIVE ASSISTANCE

Reversal of defendant's conviction is warranted because defense counsel's failure to seek exclusion of the cell phone's contents on this basis constituted defective representation, and there is a reasonable probability that the outcome of defendant's trial would have been different but for defense counsel's error.

The Sixth Amendment of the United States Constitution guarantees that criminal defendants receive effective assistance of counsel. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed2d 674 (1984). Michigan's Constitution affords this right the same level of protection as the United States Constitution. *People v Pickens*, 446 Mich 298, 318-320; 521 NW2d 797 (1994). Accordingly, "[t]o prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for trial counsel's errors." *Head*, 323 Mich App at 539 (quotation marks, citation, and alteration omitted). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018). This Court presumes counsel was effective, and defendant carries a heavy burden to overcome this presumption. *Head*, 323 Mich App at 539.

As discussed above, the contents of defendant's cell phone were inadmissible because the warrant's total failure to comply with the particularity requirement rendered it facially invalid. Despite this, defense counsel did not move for the exclusion of the cell phone records on this basis.

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[9] See section II.A, *supra*.

Such matters are presumed to be an exercise of reasonable trial strategy by defense counsel, *People v Traver*, 328 Mich App 418, 422-423; 937 NW2d 398 (2019), but after reviewing the record, we conclude that the presumption has been overcome. Defense counsel did not have a valid strategic reason for failing to seek exclusion of the cell phone's contents as violative of the particularity requirement.

Attorney Beach testified about this issue at the *Ginther* hearing. Beach described portions of the warrant's supporting affidavit as "weasel language" and acknowledged that the warrant authorized seizure of all of the phone's contents, but he did not believe suppression on this basis would have been warranted because it "got really specific towards the end." Beach explained why he did not file a motion to suppress the contents of the cell phone in addition to his motion to suppress the phone itself:

> Well, because the Affidavit was fine. I—I thought in my mind that [the trial judge erred by not granting the motion to suppress the cell phone] . . . . [A]nd then I look at this search warrant, and frankly, this search warrant probably provides a basis to look for that cell phone. And after that, the content of the cell phone is basically pro forma. I'm surprised it said as much as it did. If they got the cell phone, they're going to look at it.

Beach appeared to be suggesting a mistaken belief that once the police had a lawful basis for seizing the phone they also had the right to search the entirety of its contents. Therefore, once he failed to convince the court that the warrantless seizure of the device itself was unlawful, he did not seem to believe he had any recourse. In other words, Beach's failure to seek exclusion of the phone's contents was based on a misunderstanding of the law rather than trial strategy.

Turning to the second prong, it is not difficult for us to conclude that there is a reasonable probability that the trial would have had a different outcome had the contents of the cell phone not been admitted.[10] We acknowledge that there was persuasive circumstantial evidence outside of the phone's contents connecting defendant to the crimes. The properly admitted evidence established that defendant did not have a significant source of income when he began selling property for Billings and that he and DeGroff only had $283.13 in their joint bank account at the end of July 2019. However, in September 2019, not long before Billings discovered that the contents of the safes were missing, defendant deposited nearly $10,000 into the bank account he shared with DeGroff, and in August 2019 defendant put $57,000 into the gaming machines at the Odawa Casino. Also, defendant quit his job and told his boss that he no longer needed the work because he had found valuables in a locker he purchased online. Moreover, Billings testified that only defendant and DeGroff could have accessed the safes during the period when they were

[10] Indeed, even the trial court, following the *Ginther* hearing, described "[t]he contents of the phone—specifically the text messages" as "integral to the Prosecutor's case" and opined that there was "a reasonable probability that the outcome of the trial would have been different" if the phone's contents had been excluded. The reason the court did not grant a new trial, however, was due to its erroneous conclusion that the good-faith exception applied.

emptied. This evidence was sufficient to prove beyond a reasonable doubt that defendant and DeGroff conspired to steal the contents of Billings's safe.[11]

While the properly admitted evidence was persuasive, the tainted evidence was essentially definitive. Indeed, defendant and DeGroff each made several statements that could fairly be characterized as confessions. For example, on August 5, defendant sent DeGroff a text telling her that he believed he had found keys to the safes. On August 13, defendant told DeGroff that there was "a million dollars in those safes," and DeGroff speculated that Billings just "threw that money in [the safe] and closed it." On October 29, DeGroff insinuated that she helped defendant "steal sixty thousand dollars." On November 24, defendant wished he "had a way to go rob those entire safes." The value of these text messages to the prosecution's case-in-chief, other persuasive evidence notwithstanding, cannot be overstated.

Had the jury been presented only the properly admitted evidence, a guilty verdict would have been unsurprising. When this evidence is taken in conjunction with the text messages, a not guilty verdict would have been shocking. Therefore, we conclude that there is a reasonable probability that the outcome of the proceeding would have been different if not for Beach's mistakes.

III. CONCLUSION

Defendant's convictions are reversed. We remand for additional proceedings consistent with this opinion. If defendant is retried, evidence regarding the contents of defendant's cell phone shall not be admitted. Additionally, defendant shall not be reconvicted of both larceny of property valued at $20,000 or more and receiving and concealing stolen property valued at $20,000 or more. Nor shall defendant be convicted of the corresponding conspiracy counts for both of those charges. We do not retain jurisdiction.

/s/ Allie Greenleaf Maldonado
/s/ Noah P. Hood

[11] Indeed, given the strength of the properly admitted evidence, it is not obvious that the outcome of this appeal would be the same if we were reviewing through a different reversal standard, such as plain error or harmless error, rather than the *Strickland* "reasonable probability" test.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellant.

FOR PUBLICATION
February 15, 2024

No. 355925
Emmet Circuit Court
LC No. 20-005054-FC

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

HOOD, P.J. (*concurring*)

I agree completely with the majority's analysis and conclusions. I write separately only to highlight that in addition to the warrant being overbroad and therefore facially deficient, I would conclude that the warrant affidavit fails the nexus requirement for search warrants. *People v Hughes*, 506 Mich 512, 527 n 6; 958 NW2d 98 (2020). The description of probable cause does not describe the target phone or in any way link it to the underlying investigation. It contains only the most general description of criminals (like everyone else) using cellphones. This is insufficient.

The majority opinion accurately states the factual and procedural background of this case. One point however warrants amplification: the affidavit supporting the search warrant application failed to explain how or why the target device would contain evidence, fruits, or contraband related to the crimes under investigation: namely, larceny and safe breaking.

As the majority observes, the warrant application and affidavit identified the target device as a "Cellular device belonging to Michael Georgie Carson and seized from his person upon his arrest." It further identified the device by make, serial number, and location (the county sheriff's property room). Again, the majority correctly observes that the items to be seized encompassed all data on the device with little to no limitation, an obvious issue regarding particularity and overbreadth.

But the warrant affidavit also fails to explain what basis the investigator's had for believing evidence of larceny in a building and safe breaking would be on Carson's cell phone. Unquestionably, the warrant affidavit provides a detailed description of the investigation current

through the date of the affidavit, including evidence linking Carson to the suspected larceny and safe breaking. The affidavit, however, makes little mention of cell phones generally and no mention of Carson's specific cell phone. The only references are in paragraphs 3.w., 3.x., and 3.y. of the affidavit. The affiant attested:

> w) Based on your affiant's training and experience, it is known that mobile communication devices are often used to plan, commit, and conceal criminal activity and evidence. Therefore, data obtained from mobile communication devices and records created by these devices can assist law enforcement in establishing the involvement of a possible suspect or suspects.
>
> x) Records created by mobile communication devices can also assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the identity of the device user. This is most effectively accomplished by reviewing a larger segment of records ranging prior to and after the incident under investigation if possible.
>
> y) The aforementioned information combined with your affiant's training and experience causes him to believe that the execution of this search warrant will assist with the furtherance of this criminal investigation.

None of these paragraphs discuss how, based on the affiant's training and experience, cell phone data impacts investigations involving larceny or safe cracking. Critically, the affidavit does not mention the target cell phone at all. On its terms, there is no information about how the cell phone was seized, whether Carson used or possessed it, or how long he used or possessed it (including whether he had the same phone at the time of the suspected offense). The affidavit is conspicuously silent on any link between the cell phone and Carson or the cell phone and the investigation into larceny and safe breaking.

The majority correctly states the standard of review. Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). We review the fact findings for clear error. *Id.* We review de novo legal questions including questions of constitutional law. *Id.*

I agree with the majority that the warrant here was overly broad. But I believe the warrant was invalid for another reason: the supporting affidavit failed to establish a nexus between the target cell phone, Carson, and the alleged conduct. *Hughes*, 506 Mich at 527 n 6. See *Zurcher v Stanford Daily*, 436 US 547, 556; 98 S Ct 1970; 56 L Ed 2d 525 (1978); *Riley v California*, 573 US 373, 399; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

The so-called "nexus" requirement is an aspect of both probable cause and particularity. See *Hughes*, 506 Mich at 527 n 6 and 538-539. "Generally, in order for a search executed pursuant to a warrant to be valid, the warrant must be based on probable cause." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). See also US Const Am IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); Const 1963, art 1, § 11 ("No warrant to search any place or to seize any person or things or to access electronic data or electronic

communications shall issue without describing them, nor without probable cause, supported by oath or affirmation."). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418, 605 NW2d 667 (2000) (citation omitted). Regarding the nexus requirement, our Supreme Court has stated that "some context must be supplied by the affidavit and warrant that connects the particularized descriptions of the venue to be searched and the objects to be seized with the criminal behavior that is suspected, for even particularized descriptions will not always speak for themselves in evidencing criminality." *Hughes*, 506 Mich at 538-539, citing *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967) ("There must, of course, be a nexus . . . between the item to be seized and criminal behavior. Thus . . . , probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.").

"A magistrate's finding of probable cause and his or her decision to issue a search warrant should be given great deference and only disturbed in limited circumstances." *People v Franklin*, 500 Mich 92, 101; 894 NW2d 561 (2017). Our Fourth Amendment jurisprudence requires a magistrate to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). See also *United States v Carpenter*, 360 F3d 591, 594 (CA 6, 2004) ("To justify a search, the circumstances must indicate why evidence of illegal activity will be found in a particular place. There must, in other words, be a nexus between the place to be searched and the evidence sought.") (quotation marks and citation omitted); *United States v Corleto*, 56 F4th 169, 175 (CA 1, 2022); *United States v Lindsey*, 3 F4th 32, 39 (CA 1 2021); *United States v Mora*, 989 F.3d 794, 800 (CA 10, 2021); *United States v Johnson*, 848 F3d 872, 878 (CA 8, 2017); *United States v Freeman*, 685 F2d 942, 949 (CA 5, 1982).[1] Without a sufficient nexus, a judge may not issue a search warrant. See *United States v Tellez*, 217 F3d 547, 550 (CA 8, 2000) ("We agree, of course, that there must be evidence of a nexus between the contraband and the place to be searched before a warrant may properly issue"). Like other probable cause determinations, whether a sufficient nexus exists is a fact specific question requiring consideration of the totality of the circumstances. *Gates*, 462 US at 238. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher* 436 US at 556. To simplify, if law enforcement seeks a warrant to search an individual's cell phone for evidence of safe breaking, the warrant application needs to explain not only why an individual is suspected of safe breaking, but also why law enforcement expects to find that evidence *in the individual's cell phone*.

Applying these principles to this case, the warrant fails the nexus requirement for two reasons: (1) the general description of the usefulness of cell phone data in investigations is insufficient to establish a nexus to the suspected crimes in this case; and (2) the warrant does not

[1] Though nonbinding on state courts, we may consider lower federal court decisions for their persuasiveness. *People v Brcic*, 342 Mich App 271, 280 n 3; 994 NW2d 812 (2022).

provide the magistrate with any factual information about the phone: who owned it, who used it, how it was recovered, or how long it was used. These failings are obvious from the face of the warrant and affidavit.

Regarding the first issue, the warrant affidavit only contains bald assertions regarding crime and cell phones; there is nothing specific to larceny, safe breaking, or this defendant. In *Hughes*, our Supreme Court expressed reservation about finding a sufficient nexus to issue a warrant to search and seize cell-phone data based solely on the nature of the crime alleged. *Hughes*, 506 Mich at 527 n 6. The Court ultimately declined to answer the question whether the affidavit, stating that the detective's training and experience informed him that drug traffickers commonly use cell phones to aid their criminal enterprise, was insufficient to provide probable cause that the defendant's cell phone would contain evidence of drug trafficking because it concluded that the warrant was invalid for other reasons. *Id*. But even in that case, the affidavit provided some minimal link between the suspected class of crime and use of cell phones. Here, however, that is wholly absent. There is only a reference to criminals using cell phones. This is insufficient. See *id*. (citing approvingly language in *Riley*, 573 US at 399, that "[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone"); *United States v Brown*, 828 F3d 375, 384 (CA 6, 2016) ("[I]f the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, . . . it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer"). If we were to conclude that the bald assertions in paragraphs 3.w. and 3.x, that criminals use cell phones, are sufficient to authorize the search in this case, then we will effectively render the warrant requirement a mere formality.

Second, and more critically, even if we were to look past the limited discussion of the affiant's experience regarding criminals generally using cell phones, the affidavit in this case does not identify the target cell phone, let alone who owned it, who used it, when they used it, how it was seized, or how in any way that cell phone specifically ties to this case. The affidavit does not contain even the most minimal connection between the cell phone identified on the first page of the warrant application and the investigation. The investigators could have provided this information through common investigative tactics (i.e., a search warrant to Carson's service provider to determine how long he had the device or when it was last used), or even by adding details about Carson's arrest and the seizure of the device. We cannot overlook this glaring deficiency. The reviewing magistrate also should not have overlooked this.

These reasons, in addition to those stated in the majority opinion, provide a basis for concluding that the warrant was invalid, law enforcement could not have reasonably relied on it, and the good-faith exception does not apply.

/s/ Noah P. Hood

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellant.

FOR PUBLICATION
February 15, 2024

No. 355925
Emmet Circuit Court
LC No. 20-005054-FC

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

REDFORD, J. (*dissenting*).

I conclude that the record does not support the majority's determination that there was a double jeopardy violation that warrants vacating some of defendant's convictions. Therefore, defendant's trial counsel did not render ineffective assistance by failing to raise a double jeopardy argument. I further conclude that the search warrant authorizing the search of defendant's cell phone did not violate the "particularity" requirement of the Fourth Amendment. To the extent that the search warrant satisfied the Fourth Amendment only with respect to retrieval of the text messages, the constitutionally infirm portion of the warrant could be severed, allowing admission of the text messages. Moreover, even were the search warrant constitutionally defective, the good-faith exception to the exclusionary rule would apply. Additionally, assuming that the text messages extracted from defendant's cell phone were inadmissible under the exclusionary rule, defendant has not established the requisite prejudice in light of the overwhelming untainted evidence of guilt. Thus, defendant's claim of ineffective assistance of counsel relative to his Fourth Amendment "particularity" argument cannot serve as a basis to reverse his convictions. Finally, in my view, none of defendant's appellate arguments left unaddressed by the majority merit reversal. I would affirm defendant's convictions and sentences. Accordingly, I respectfully dissent.

I. INEFFECTIVE ASSISTANCE OF COUNSEL – GENERAL PRINCIPLES

Whether defense counsel was ineffective presents a mixed question of fact and constitutional law, and factual findings are reviewed for clear error, whereas questions of law are subject to de novo review. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In

People v Carbin, 463 Mich 590, 599-600; 623 NW2d 884 (2001), the Michigan Supreme Court recited the principles that govern our analysis of a claim of ineffective assistance of counsel:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test . . . . First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Quotation marks and citations omitted.]

An attorney's performance is deficient if the representation falls below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

"This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Traver (On Remand)*, 328 Mich App 418, 422-423; 937 NW2d 398 (2019) (quotation marks and citation omitted). But "a court cannot insulate the review of counsel's performance by [simply] calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "Initially, a court must determine whether the strategic choices were made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. (quotation marks, citation, and brackets omitted).

II. DOUBLE JEOPARDY

Under the Michigan and federal constitutions, the state cannot twice place an accused in jeopardy for the same criminal offense. See US Const, Am V; Const 1963, art 1, § 15; *People v Beck*, 510 Mich 1, 11-12; 987 NW2d 1 (2022).[1] The protection against double jeopardy attaches when a defendant is placed on trial before a jury or a judge. *Beck*, 510 Mich at 12.[2] Although we need not construe our Constitution consistently with comparable provisions of the United States Constitution, "past interpretations of the [Fifth Amendment's] Double Jeopardy Clause have

[1] I also note that the double jeopardy prohibition secured by the Fifth Amendment constitutes a fundamental constitutional right applicable to the states through the Fourteenth Amendment. *Beck*, 510 Mich at 11 n 1.

[2] In a jury trial, jeopardy generally attaches when the jurors are selected and sworn. *Id.*

accurately conveyed the meaning of Const 1963, art. 1, § 15. … Therefore, our analysis is the same under each." *Id.* at 11 n 1.

"The prohibition against double-jeopardy protects individuals in three ways: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Miller*, 498 Mich 13, 17; 869 NW2d 204 (2015) (quotation marks and citation omitted). Relevant to the instant case, the third constitutional protection is referred to as the "multiple punishments" strand of double jeopardy. *Id.* With respect to the multiple punishments strand, the Supreme Court in *Miller* explained:

> The multiple punishments strand of double jeopardy is designed to ensure that courts confine their sentences to the limits established by the Legislature and therefore acts as a restraint on the prosecutor and the Courts. The multiple punishments strand is not violated where a legislature specifically authorizes cumulative punishment under two statutes. Conversely, where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial. Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.
>
> The Legislature, however, does not always clearly indicate its intent with regard to the permissibility of multiple punishments. *When legislative intent is not clear*, Michigan courts apply the "abstract legal elements" test[.] [*Id.* at 17-19 (quotation marks, citations, brackets, and ellipses omitted; emphasis added).]

In this case, the majority frames the issue as concerning multiple punishments for the "same act." I cannot conclude, however, that the double jeopardy issue squarely and solely involves multiple punishments for the "same act." At trial, the prosecution focused on defendant's actions in "concealing" the money stolen from the safes for purposes of proving the charge of receiving or concealing stolen property valued at $20,000 or more (RCSP), MCL 750.535(2)(a).[3] MCL

[3] In his closing argument, the prosecutor contended:

> Now, the defendant, basically, commits this crime once he takes possession of Don's property. So at that point he's possessing stolen property knowing that it's stolen. But the defendant[] commits the crime in another way. Also, it has to be twenty thousand dollars or more. But the defendant also commits this crime in another way. We don't have to prove he committed it two ways, but he did, 'cause he concealed the stolen property, he concealed the stuff he stole from Don. Concealed means to hid[e], disguise, get rid of, or do any other act to keep the property from being discovered. And the defendant did that [in] all sorts of ways in this case. He got rid of it in all sorts of ways. He ran a bunch of it through the casino. He bought a pickup truck with it. He paid for the engagement ring on Brandy's

750.535(1) provides that "[a] person shall not buy, receive, possess, conceal, *or* aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing, or having reason to know or reason to believe, that the money, goods, or property is stolen, embezzled, or converted." (Emphasis added.) The crime can be accomplished by knowingly *concealing* stolen property. When instructing the jury on the elements of RCSP, the trial court touched on the various ways to commit the offense, i.e., buying, possessing, receiving, or concealing stolen property. Consistently with M Crim JI 26.2(4), the trial court instructed the jury that "[t]o conceal means to intentionally hide, disguise, get rid of or do any other act to keep the property from being discovered."

With respect to the elements of larceny, a prosecutor is required to prove beyond a reasonable doubt that the defendant took someone else's property without consent, that there was some movement of the property, that the defendant intended to permanently deprive the owner of the property, and that the property had a certain fair market value. See M Crim JI 23.1; see also *People v Williams*, 323 Mich App 202, 205; 916 NW2d 647 (2018), rev'd in part on other grounds 504 Mich 892 (2019).[4] In this case, the evidence demonstrated that defendant committed and completed the crime of larceny when, without consent, he removed the cash from the safes owned by Mr. Billings and left Billings's home with the money. Although defendant possessed and arguably "received" stolen money at that point for purposes of adjudicating the RCSP charge, the acts of concealment of the stolen cash as argued and relied on by the prosecution occurred long after the larceny. In other words, the offense of larceny was completed before the crime of *concealment* of stolen property—as urged and theorized by the prosecutor—took place, even though the offense of RCSP would have occurred almost simultaneously with the larceny if "possessing" or "receiving" stolen property served as the basis of the charge. This Court has ruled that a defendant's protection against double jeopardy is not violated if one crime is complete before the other crime takes place, even when the offenses share common elements or one constitutes a lesser offense of the other. *People v Bulls*, 262 Mich App 618, 629; 687 NW2d 159 (2004); *People v Colon*, 250 Mich App 59, 63; 644 NW2d 790 (2002); *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

There is no way for us to ascertain whether the jury convicted defendant of RCSP premised on concealment, possession, or receipt of the stolen money, or a combination of these theories.[5] But if the jury convicted defendant of the crime of RCSP in whole or in part on the basis of concealment of the stolen cash long after the larceny was completed, which is certainly possible if not likely in light of the evidence and the prosecution's closing argument, the majority's finding

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> finger with it. That's how he got rid of – concealed this, he converted it into other things: into gaming at the casino, into personal property, into rent payments, into all sorts of stuff.

[4] The jury was instructed consistently with M Crim JI 23.1.

[5] I recognize the likelihood that if the jury found that defendant had concealed the stolen money, it also found that defendant had received and possessed the cash because concealment would be difficult to accomplish without first having received and possessed the property.

of a double jeopardy violation effectively vacates convictions that were supported by a theory—post-larceny concealment of the stolen cash—that did not trigger double jeopardy protection. While a double jeopardy infringement warranting reversal might very well be found if the jury convicted defendant of RCSP on the basis of possessing or receiving the stolen cash and not concealment, the same is not true in relation to an RCSP conviction predicated on post-larceny concealment of the stolen money because that crime had yet to occur when the offense of larceny had been completed. The "act" of stealing the money was separate and distinct from the subsequent "act" of concealing the cash; they were not the "same act."[6] I agree with the following position adopted by the Texas appellate courts as set forth in *Langs v State*, 183 SW3d 680, 687 (Tex Crim App, 2006):

> [W]e [have] reasoned that, when separate theories for an offense are issued to the jury disjunctively, a double jeopardy violation is not clearly apparent on the face of the record if one of the theories charged would not constitute a double jeopardy violation and there is sufficient evidence to support that valid theory. The fact that the jury's verdict could have relied on a theory that would violate the Double Jeopardy Clause, is not sufficient to show a constitutional violation clearly apparent on the face of the record. [Quotation marks and citation omitted.]

In this case, there was more than sufficient evidence to convict defendant of RCSP on the post-larceny concealment theory proffered by the prosecution, which, in my opinion, did not result in a double jeopardy violation. The majority necessarily and implicitly finds a double jeopardy violation meriting the vacation of convictions on the basis of an assumption that the jury did not convict defendant of RCSP under the concealment theory framed by the prosecutor, even though that theory was the focus of the prosecution's RCSP closing argument and, again, patently supported by the evidence. And then the majority compounds that error by concluding that trial counsel's performance was deficient because of a failure to raise the double jeopardy argument. That analysis and ruling are much too tenuous given the existing record.

Because the jury may have convicted defendant in whole or in part of RCSP on the post-larceny concealment theory, I conclude that the record does not support vacating the RCSP or larceny conviction, or the related conspiracy convictions, on double jeopardy grounds. Contrary to the majority's holding, a defendant can be convicted of larceny and RCSP without offending the Double Jeopardy Clauses of the Michigan and federal constitutions where the RCSP conviction is based on the theory that the defendant engaged in acts to conceal the stolen property after earlier having completed the theft of the property. And counsel does not render ineffective assistance by failing to raise a futile or meritless objection or issue. See *People v Putman*, 309 Mich App 240, 245; 870 NW2d 593 (2015). Moreover, on the record before us, I cannot conclude that trial counsel's performance was deficient and fell below an objective of reasonableness. See *Toma*, 462 Mich at 302.

[6] Of course, concealment of stolen property can occur almost immediately after or hand-in-hand with a larceny, but in this case the prosecution pointed the jury to acts of concealment that took place well after the larceny had transpired.

The majority states that it views the reasoning in *People v Johnson*, 176 Mich App 312; 439 NW2d 345 (1989), "as sound, and [that] we reaffirm its conclusion that the [L]egislature did not intend for cumulative punishments" in relation to the offenses of RCSP and larceny. In *Johnson*, the Court's full recitation of the facts was as follows:

> Defendant's convictions arose out of his theft of fourteen shirts from a store in February of 1987. Defendant ran into the store, snatched the shirts from a rack, and ran back out and into a waiting car. Police stopped defendant and his driver later that day. [*Id.* at 313.]

The *Johnson* panel indicated that its analysis required an inquiry into "whether the Legislature intended to authorize multiple punishment[s] under [the] different statutes for a single criminal transaction." *Id.* The Court ruled:

> Each statute prohibits conduct which violates the same social norm: theft of property. Although one statute prohibits the actual theft and the other prohibits reaping the fruits by buying, receiving, possessing, or concealing stolen property, each statute operates so as to discourage the theft of property, although in different manners. Thus, we must conclude that the Legislature did not intend to provide for multiple punishment under both these statutes.
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> * * *
>
> We conclude that the Legislature did not intend to authorize punishment under both these statutes for a single criminal act. Defendant's multiple convictions for this single theft violate the constitutional prohibition against double jeopardy. In view of this conclusion, we vacate defendant's conviction and sentence on the charge of possession of stolen property under MCL 750.535[.] [*Id.* at 314-315.]

Johnson is distinguishable because it spoke of "single" criminal transactions or acts and, as I stated earlier, defendant's actions here in concealing the money were separate and distinct from his much-earlier act involving the larcenous taking of money. Indeed, there is no indication that the defendant in *Johnson* concealed the stolen shirts or that the prosecution even pursued a theory or made an accusation that the defendant had concealed the shirts.[7] Moreover, *Johnson* does not constitute binding precedent, MCR 7.215(J)(1), and I do not find it persuasive for our purposes because it did not take into consideration the subtleties created by the different theories that can be charged or argued by a prosecutor under MCL 750.535.

Additionally, the reasoning in *Johnson* that the Legislature did not intend multiple punishments simply because the statutes both generally addressed the "theft" of property is legally questionable. First, the *Johnson* panel did not state whether the legislative intent was *clearly* indicated, which assessment is required by Supreme Court precedent. See *Miller*, 498 Mich at 18 (multiple punishments for the same offense violate double jeopardy when "the Legislature

[7] I note that the opinion in *Johnson* merely stated that the defendant had pleaded guilty to "*possession* of stolen property over $100." *Johnson*, 176 Mich App at 313 (emphasis added).

expresses a clear intention in the plain language of a statute to prohibit multiple punishments"). Second, as but one example, convictions for armed robbery and bank robbery arising out of the same incident are not barred by double jeopardy protections, even though both offenses involve "theft." See *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004) ("[N]either the Double Jeopardy Clause of the United States Constitution nor the Double Jeopardy Clause of the Michigan Constitution precludes defendant's conviction and sentence for both bank robbery and armed robbery arising out of the same incident."). With respect to legislative intent, I see nothing in the two statutes at issue, MCL 750.356 and MCL 750.535, that, pertinent to this case, "specifically authorizes cumulative punishment," or that "expresses a clear intention in the plain language of [the] statute[s] to prohibit multiple punishments[.]" *Miller*, 498 Mich at 18 (quotation marks, citations, and brackets omitted).

After concluding that the Legislature did not intend for multiple punishments in regard to convictions for larceny of property and RCSP, the majority posits that it is next necessary to apply the abstract-legal-elements test because the *Johnson* panel did not do so given that it was decided before the test was adopted by our Supreme Court. In *Miller*, 498 Mich at 19, the Supreme Court defined the abstract-legal-elements test:

> This test focuses on the statutory elements of the offense to determine whether the Legislature intended for multiple punishments. Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if each of the offenses for which defendant was convicted has an element that the other does not. This means that, under the . . . test, two offenses will only be considered the "same offense" where it is impossible to commit the greater offense without also committing the lesser offense. [Quotation marks, citations, and ellipses omitted.]

I respectfully disagree with the majority's analysis because caselaw provides that once it is determined that the Legislature clearly intended to either authorize or prohibit multiple punishments, the analysis must stop, absent the need to apply the abstract-legal-elements test. In *People v Wafer*, 509 Mich 31, 38-39; 983 NW2d 315 (2022), our Supreme Court observed:

> [W]e set forth a two-part test to determine when multiple punishments are, or are not, permitted. The first step is to look to the ordinary meaning of the statute. If the Legislature has *clearly indicated* its intent with regard to the permissibility of multiple punishments, *the inquiry ends here*. The touchstone of legislative intent is the statute's language, and we accord clear and unambiguous language its ordinary meaning. However, if the intent is not apparent from the text, Michigan courts apply the abstract-legal-elements test. [Quotation marks, citations, and brackets omitted; emphasis added.]

Both *Miller* and *Wafer* expressed that the Legislature's intent is to be evaluated with respect to both the authorization of and the prohibition against cumulative or multiple punishments, and the abstract-legal-elements test is only analyzed if clear legislative intent cannot be discerned one way or the other. *Wafer*, 509 Mich at 38; *Miller*, 498 Mich at 18. In *Miller*, the Court determined that the Legislature had clearly intended to prohibit multiple punishments under the statutory

provisions in dispute, and the Court therefore did not apply the abstract-legal-elements test. *Miller*, 498 Mich at 25-26.

Accordingly, after determining that the Legislature did not intend multiple punishments for the crimes of larceny and RCSP, the majority's analysis should have ended without consideration and application of the abstract-legal-elements test. The majority opinion incorrectly suggests that even when legislative intent can be ascertained, the abstract-legal-elements test must still be analyzed. I also note that the majority concludes that the Legislature "did not intend for cumulative punishments," but as stated in *Wafer*, we are required to assess whether the Legislature has "*clearly* indicated its intent." *Wafer*, 509 Mich at 39 (emphasis added).

With respect to the majority's application of the abstract-legal-elements test, it concludes "that it is not possible for a person to be guilty of larceny without also being guilty of receiving or concealing stolen property; therefore, the same act cannot give rise to convictions for both crimes."[8] While it is arguable that one cannot commit a larceny without committing the offense of RCSP because merely *possessing* stolen property suffices for a conviction under MCL 750.535(1), the crime of larceny can be committed without "concealing" pilfered property. For example, if, with the requisite intent and without consent, an individual grabbed an unattended purse belonging to another and openly walked away with it and was then caught, there would be a larceny yet no basis for an RCSP conviction predicated on concealment. In a somewhat similar vein, a defendant can be guilty of merely possessing, receiving, or concealing stolen property without having committed the underlying crime of larceny in regard to that property. The point of my discussion is that when a prosecutor proceeds on a theory that a defendant stole property and then subsequently concealed the property, the crimes of larceny and RCSP each have elements that the other does not—taking or stealing property and concealing stolen property. This creates a problem with the majority's application of the abstract-legal-elements test to find a double jeopardy violation that warrants vacating any conviction.

Respectfully, the primary flaw in the majority's resolution of the double jeopardy issue is the failure to consider that the crime of RCSP can be based on concealment of stolen property that took place long after the property was stolen, which theory was argued by the prosecution at trial and supported by the evidence yet disregarded by the majority in its opinion.

III. VALIDITY OF THE SEARCH WARRANT

I generally agree with the majority's recitation of the law regarding the search of a cell phone pursuant to a search warrant and the principles regarding the "particularity" requirement of the Fourth Amendment. In *People v Hughes*, 506 Mich 512, 537-539; 958 NW2d 98 (2020), the Michigan Supreme Court explained:

> This Court has yet to specifically address the Fourth Amendment requirements for a search of digital data from a cell phone authorized by a warrant.

[8] The majority appears to take the position that the offense of RCSP is a lesser offense of larceny of property (greater offense); however, both crimes are ten-year felonies. See MCL 750.356(2)(a) and MCL 750.535(2)(a).

> In considering this issue, we are guided by two fundamental sources of relevant law: (a) the Fourth Amendment's "particularity" requirement, which limits an officer's discretion when conducting a search pursuant to a warrant and (b) [the] recognition of the extensive privacy interests in cellular data. In light of these legal predicates, we conclude that as with any other search conducted pursuant to a warrant, a search of digital data from a cell phone must be "reasonably directed at uncovering" evidence of the criminal activity alleged in the warrant and that any search that is not so directed but is directed instead toward finding evidence of other and unrelated criminal activity is beyond the scope of the warrant.
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> The Fourth Amendment requires that search warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." US Const, Am IV. A search warrant thus must state with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant. . . . That is, some context must be supplied by the affidavit and warrant that connects the particularized descriptions of the venue to be searched and the objects to be seized with the criminal behavior that is suspected, for even particularized descriptions will not always speak for themselves in evidencing criminality. . . . . [Quotation marks, citations, and emphasis omitted; second alteration in original.]

The manifest purpose of the particularity requirement is to prevent law enforcement from conducting general searches. *Id.* at 539. The particularity requirement guarantees that a search will be carefully tailored to its justifications by limiting the authorization to search to the specific areas and things for which there existed probable cause to search. *Id.* The requirement is meant to prevent wide-ranging exploratory searches that the Framers intended to prohibit. *Id.*

In this case, the search warrant indicated that it pertained to defendant's cell phone that had been seized when he was arrested, and it described the data, materials, and information subject to search and seizure as follows:

> Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data

> on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

The majority rules that "this was a general warrant that gave the police license to search *everything* on defendant's cell phone in the hopes of finding anything, but nothing in particular, that could help with the investigation." The majority further concludes that the search "warrant did not place any limitations on the permissible scope of the search of defendant's phone."

I do not agree with this construction of the search warrant in light of the introductory sentence, which, again, provided for the search and seizure of "[a]ny and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking." This opening sentence provided context for all that followed in the paragraph, necessarily placing limitations and parameters on the nature and scope of the information and data that could be sought or retrieved by law enforcement when searching the cell phone's digital record. Indeed, the second sentence of the search warrant began, "*As used above*, the term records or documents includes . . . ." (Emphasis added.) This language necessarily pulled all of the subsequent references in the paragraph to data, e-mails, text messages, and other electronic information into the introductory sentence and its confinement to the investigation of larceny and safe breaking. The search warrant supplied context connecting the particularized description of the venue to be searched, i.e., the cell phone, and the data and information to be seized with the larcenous, safe-breaking criminal conduct that was suspected. See *Hughes*, 506 Mich at 538. The search warrant was not directed toward finding evidence of other or unrelated criminal activity. *Id.*

The majority acknowledges the search warrant's opening sentence but then states that "this small guardrail was negated by the ensuing instruction to search for such items by searching and seizing the entirety of the phone's contents." For the reasons I noted above, the majority too easily dispenses of the first sentence of the warrant. The language was not a small guardrail; rather, the sentence plainly set forth the boundaries of the entire warrant. The majority cites nonbinding opinions from other jurisdictions regarding cell-phone search warrants in which the courts found that there was a lack of compliance with the particularity requirement of the Fourth Amendment. We are compelled, however, to comply with Michigan precedent, and in *Hughes*, 506 Mich at 552-554, our Supreme Court held:

> The ultimate holding of this opinion is simple and straightforward—a warrant to search a suspect's digital cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant. Nothing herein should be construed to restrict an officer's ability to conduct a reasonably thorough search of digital cell-phone data to uncover evidence of the criminal activity alleged in a warrant, and an officer is not required to discontinue a search when he or she discovers evidence of other criminal activity while reasonably searching for evidence of the criminal activity alleged in the warrant. However, respect for the Fourth Amendment's requirement of particularity and the extensive privacy interests implicated by cell-phone data . . . requires that officers reasonably limit the scope of their searches to evidence related to the criminal activity alleged in the warrant and not employ that

> authorization as a basis for seizing and searching digital data in the manner of a general warrant in search of evidence of any and all criminal activity. We hold that, as with any other search, an officer must limit a search of digital data from a cell phone in a manner reasonably directed to uncover evidence of the criminal activity alleged in the warrant.

In this case, the search warrant, as I construe it, was consistent with the directives set forth by the *Hughes* Court—it limited the extent of the search of defendant's cell phone by the police to data and information related to the acts of larceny and safe breaking.[9] The search warrant did not authorize the police to search for evidence of any and all criminal activity, and nothing seized by law enforcement was used to charge defendant with crimes unrelated to the theft of Billings's money.

The majority takes particular exception with the fact that the search warrant encompassed photographs and videos, indicating that there was "no evidence suggesting that these files would yield anything relevant[.]" As reflected in the search warrant affidavit, the police had information that defendant and Brandie DeGroff had stolen the money out of Billings's safes and were living lavishly on the cash. I believe that it would certainly be reasonable for the police to have believed that photos or videos on defendant's cell phone might lend support for those averments. The fact that there were no such photos or videos did not render the search warrant constitutionally defective. "Courts should . . . keep in mind that in the process of ferreting out incriminating digital data it is almost inevitable that officers will have to review some data that is unrelated to the criminal activity alleged in the authorizing warrant." *Hughes*, 506 Mich at 547. "So long as it is reasonable under all of the circumstances for officers to believe that a particular piece of data will contain evidence relating to the criminal activity identified in the warrant, officers may review that data[.]" *Id.*

Nevertheless, assuming that the search warrant was constitutionally defective by authorizing the search of photos and videos on defendant's cell phone, as well as other data except for text messages, the exclusionary rule would not require us to bar the admission of the text messages. The United States Court of Appeals for the Sixth Circuit has stated that "infirmity due to overbreadth does not doom the entire warrant; rather, it requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in the valid portions of the warrant[.]" *United States v Greene*, 250 F3d 471, 477 (CA 6, 2001) (quotation marks, citation, and ellipses omitted); see also *United States v Blakeney*, 942 F2d 1001, 1027 (CA 6, 1991) ("Our finding of overbreadth regarding the use of the generic term 'jewelry' does not require suppression of all of the items seized pursuant to the warrant. We believe

[9] The majority discounts *Hughes* to a degree by asserting that *Hughes* dealt with the question whether the police in searching the entirety of a cell phone's contents acted within the scope of the search warrant, whereas in the instant case we are addressing whether the scope of the warrant was overly broad. Although this distinction is accurate, the *Hughes* Court's discussion setting the parameters of what the police can seek and seize when conducting a search of a cell phone necessarily translates to setting the parameters required of a search warrant regarding a cell phone.

the proper approach to this dilemma is to sever the infirm portion of the search warrant from the remainder which passes constitutional muster."). "When a warrant is severed (or redacted) the constitutionally infirm portion—usually for lack of particularity or probable cause—is separated from the remainder and evidence seized pursuant to that portion is suppressed; evidence seized under the valid portion may be admitted." *United States v George*, 975 F2d 72, 79 (CA 2, 1992).[10]

With respect to the text messages, and regardless of the other data and information mentioned in the search warrant, I simply cannot find a violation of the particularity requirement of the Fourth Amendment. The search warrant authorized the search for text messages on defendant's cell phone pertaining to the investigation of the larceny and safe breaking in which thousands of dollars were stolen. The search warrant affidavit contained numerous averments regarding defendant and DeGroff and their *joint connection* to the crimes and their spending spree thereafter, and the affiant averred that based on his "training and experience, it is known that mobile communication devices are often used to plan, commit, and conceal criminal activity and evidence." Commonsense and reasonable inferences arising from the averments dictated that the couple likely had cell-phone communications by text or otherwise that touched on the crimes and the pair's use of the cash that was stolen from Billings.[11] See *People v Nunez*, 242 Mich App 610, 612-613; 619 NW2d 550 (2000) (search warrants and underlying affidavits must be read in a commonsense and realistic manner); *People v Sloan*, 206 Mich App 484, 486; 522 NW2d 684 (1994) (search warrant affidavits must contain averments that justify any inferences). This issue is all about the text messages, and even assuming a constitutional infirmity concerning almost all the data and information referenced in the search warrant, if the warrant was constitutionally sound

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[10] In *United States v Cook*, 657 F2d 730, 735 (CA 5, 1981), the United States Court of Appeals for the Fifth Circuit observed:

> We . . . hold that in the usual case the district judge should sever the infirm portion of the search warrant from so much of the warrant as passes constitutional muster. Items that were not described with the requisite particularity in the warrant should be suppressed, but suppression of all of the fruits of the search is hardly consistent with the purposes underlying exclusion. Suppression of only the items improperly described prohibits the Government from profiting from its own wrong and removes the court from considering illegally obtained evidence. Moreover, suppression of only those items that were not particularly described serves as an effective deterrent to those in the Government who would be tempted to secure a warrant without the necessary description. [Citations omitted.]

[11] The concurrence argues that the search warrant affidavit failed the nexus requirement for search warrants. Quoting three of 24 averments, my concurring colleague maintains that "[n]one of these paragraphs discuss how, based on the affiant's training and experience, cell phone data impacts investigations involving larceny or safe cracking." This argument essentially gives no weight to the 21 other averments in the affidavit, fails to appreciate the substance of those assertions that discussed defendant and DeGroff's joint connection to the crimes and expenditures, and pays no heed to the commonsense inference that the couple likely communicated by phone, some of which communications may have entailed texts or e-mails that provided some evidence or insight regarding the crimes.

in regard to the text messages, which I believe is the case, severance should take place and the exclusionary rule should not be applied to preclude the admission of the text messages.

Next, assuming that the search warrant was constitutionally defective in total, I would find that the good-faith exception to the exclusionary rule would apply. In *People v Goldston*, 470 Mich 523, 525-526; 682 NW2d 479 (2004), our Supreme Court held:

> In this case, we must determine whether to recognize a "good-faith" exception to the exclusionary rule. In *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984), the United States Supreme Court interpreted US Const, Am IV and adopted a good-faith exception to the exclusionary rule as a remedy for unreasonable searches and seizures. Under *Leon*, the exclusionary rule does not bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant ultimately found to have been defective. The exclusionary rule in Michigan is a judicially created remedy that is not based on the text of our constitutional search and seizure provision, Const 1963, art 1, § 11. Indeed, records of the 1961 Constitutional Convention evidence an intent on behalf of the people of Michigan to retreat from the judge-made exclusionary rule consistent with the United States Supreme Court's interpretation of the Fourth Amendment in *Leon*. We therefore adopt the good-faith exception to the exclusionary rule in Michigan. The purpose of the exclusionary rule is to deter police misconduct. That purpose would not be furthered by excluding evidence that the police recovered in objective, good-faith reliance on a search warrant.

In *People v Czuprynski*, 325 Mich App 449, 472; 926 NW2d 282 (2018), this Court discussed the circumstances in which the good-faith exception does not apply, stating:

> Reliance on a warrant is reasonable even if the warrant is later invalidated for lack of probable cause, except under three circumstances: (1) if the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his or her reckless disregard of the truth; (2) if the issuing judge or magistrate wholly abandons his or her judicial role; or (3) if an officer relies on a warrant based on a "bare bones" affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

The majority holds "that the warrant in this specific case was so facially deficient by virtue of its failure to particularize the places to be searched and things to be seized that the executing officers could not have reasonably presumed it to be valid."

For the reasons stated earlier, I conclude that the search warrant was not facially deficient and that the particularity requirement of the Fourth Amendment was not violated. Therefore, in my opinion, there is no basis to find that law enforcement acted in any manner other than good faith. The police recovered the text messages in objective, good-faith reliance on a search warrant that was confined to seeking evidence pertaining to defendant's participation, if any, in the acts of larceny and safe breaking. There was no police misconduct; therefore, application of the exclusionary rule serves no valid purpose.

Finally, assuming that the text messages extracted from defendant's cell phone were inadmissible under the exclusionary rule, defendant has not established the requisite prejudice in light of the overwhelming untainted evidence of guilt. *Carbin*, 463 Mich at 600. The following evidence was presented at trial: defendant and DeGroff had direct access to the safes; the balance in the couple's joint bank account dramatically increased after the larceny absent explanation for the funds; defendant quit his job following the theft indicating that he "ran across some money"; defendant and DeGroff began making costly purchases after the larceny; the couple started regularly going out to dinner and the casino following the theft, spending enormous sums of money; items belonging to victim Billings other than the money were found in defendant's home; and the amounts spent by defendant and DeGroff corresponded to the sums stolen from Billings. This evidence constituted overwhelming untainted evidence of guilt. Defendant has not shown the existence of a reasonable probability that, but for counsel's presumed error, the result of the proceedings would have been different. *Id.* While the text messages undoubtedly strengthened the prosecution's case, they simply made an overwhelming case of guilt an insurmountable case of guilt. My confidence in the outcome has not been undermined. *Id.* I cannot conceive of any possibility that the jury would have acquitted defendant absent the text messages.

IV. CONCLUSION

I conclude that the record does not support the majority's determination that there was a double jeopardy violation that would warrant vacating some of defendant's convictions. Therefore, defendant's trial counsel did not render ineffective assistance by failing to raise a double jeopardy argument. I further conclude that the search warrant authorizing the search of defendant's cell phone did not violate the "particularity" requirement of the Fourth Amendment. To the extent that the search warrant satisfied the Fourth Amendment only with respect to retrieval of the text messages, the constitutionally infirm portion of the warrant could be severed, allowing admission of the text messages. Moreover, even were the search warrant constitutionally defective, the good-faith exception to the exclusionary rule would apply. Assuming that the text messages extracted from defendant's cell phone were inadmissible under the exclusionary rule, defendant has not established the requisite prejudice in light of the overwhelming untainted evidence of guilt. Thus, defendant's claim of ineffective assistance of counsel relative to his Fourth Amendment "particularity" argument cannot serve as a basis to reverse his convictions. Finally, in my view, none of defendant's appellate arguments left unaddressed by the majority merit reversal.[12] I would affirm defendant's convictions and sentences. Accordingly, I respectfully dissent.

/s/ James Robert Redford

[12] For purposes of my dissent, it is unnecessary to engage in an analysis of defendant's arguments that the majority did not need to reach. I have examined these arguments and conclude that none of them merit reversal.