SJC-12806

COMMONWEALTH vs. JAMES PAIGE.

Suffolk. September 13, 2021. - December 6, 2021.

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

Homicide. Felony-Murder Rule. Rape. Evidence, Consciousness of guilt, Videotape. Practice, Criminal, New trial, Assistance of counsel, Instructions to jury, Argument by prosecutor, Mistrial, Capital case.

Indictment found and returned in the Superior Court Department on June 27, 2016.

The case was tried before Christopher J. Muse, J., and a motion for a new trial, filed on November 8, 2019, was considered by Christine M. Roach, J.

Brian J. Kelly for the defendant.
Julianne Campbell, Assistant District Attorney (Craig Iannini, Assistant District Attorney, also present) for the Commonwealth.

LOWY, J. A grand jury returned an indictment in 2016 charging the defendant, James Paige, with murder in the first degree for the 1987 killing of Dora Brimage (victim). A jury convicted the defendant of felony-murder in the first degree

with aggravated rape as the predicate offense. The defendant appealed from his conviction. While his appeal was pending, he moved for a new trial, arguing that the judge erred in failing to give an instruction about consciousness of guilt and the defendant's trial counsel was ineffective in failing to request such an instruction. We remanded the motion to the Superior Court, where it was denied by another judge without a hearing, and the defendant appealed. We consolidated the defendant's appeal from his conviction with his appeal from the denial of his motion for a new trial.

Before this court, the defendant repeats his arguments pertaining to the lack of a consciousness of guilt instruction. He also argues there was insufficient evidence to support his conviction, that the prosecutor argued facts not in evidence during closing argument, that the judge should have declared a mistrial after the jury inadvertently were shown video footage unduly prejudicial to the defendant, and that we should reduce the verdict pursuant to G. L. c. 278, § 33E. We affirm.

Facts. Taking the evidence in the light most favorable to the Commonwealth, the jury could have found the following facts. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). The victim was at a party in Boston in 1987. She asked the defendant's brother for a ride from the party. Another individual offered to drive the victim, but the defendant, who

did not know the victim, said forcefully that the victim would go with his brother and him. The victim acted hesitant to get into the car, but she ultimately did so. The defendant and his brother drove the victim to Georgia Street. The defendant's brother was "upset" and "crying" the next morning.

The day after the party, construction workers found the victim's body at an indoor work site adjacent to Georgia Street, where the defendant's brother and other members of the defendant's family worked. The victim was on her back with her lower clothing, including her underwear, pulled down around one of her ankles. Her head was injured severely such that it appeared she no longer had a face; she had died from blunt force injuries to the head and strangulation. A construction shovel used to beat the victim was next to her, as was a piece that had broken off the shovel. There was sperm in the victim's vagina that had been deposited within twenty-four hours of her death. There was no sperm on the victim's underwear.

The murder investigation remained unsolved for decades, until Boston police reopened the case in 2013 after receiving Federal funding to solve cold cases using deoxyribonucleic acid (DNA) testing. DNA testing revealed that the sperm in the victim's vagina matched the defendant's genetic profile.

The defendant spoke with police in 1987 and 2015. In 1987, the defendant told police he and his brother had dropped off the

victim at a club not near where the victim's body was found. In 2015, the defendant told police that he and his brother had driven the victim to Georgia Street. The defendant also told police in 2015 that he never had had sexual intercourse with the victim.

Discussion. 1. Sufficiency of the evidence. The defendant argues that there was insufficient evidence to support his conviction of felony-murder in the first degree with a predicate offense of aggravated rape. He made the same argument at trial, moving unsuccessfully for a required finding of not guilty at the close of the Commonwealth's case and at the close of all the evidence. We conclude that there was sufficient evidence to support the defendant's conviction.

The denial of a motion for a required finding of not guilty will be affirmed if the Commonwealth's evidence, together with reasonable inferences from that evidence, is sufficient to persuade a "rational jury" of the defendant's guilt beyond a reasonable doubt. Commonwealth v. Copeland, 481 Mass. 255, 259 (2019). See Latimore, 378 Mass. at 677. The Commonwealth may prove its case using only circumstantial evidence, and the jury's inferences "need only be reasonable and possible, not necessary or inescapable" (citation and quotations omitted). Copeland, supra.

To prove felony-murder in the first degree with a predicate felony of aggravated rape, the Commonwealth had to prove that (1) the defendant committed or attempted to commit aggravated rape; (2) the death was caused by an act of the defendant in the commission or attempted commission of the aggravated rape; (3) the act that caused the death occurred during the commission or attempted commission of the aggravated rape; and (4) the defendant intended to kill the victim, intended to cause grievous bodily harm to the victim, or intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. Model Jury Instructions on Homicide 59-60 (2018). See Commonwealth v. Brown, 477 Mass. 805, 825 (2017) (Gants, C.J., concurring).

To prove aggravated rape, the Commonwealth had to show, as relevant here, that (1) the defendant had sexual intercourse with the victim; (2) the defendant compelled the victim to submit by force and against her will or compelled the victim to submit by threat of bodily injury; and (3) the sexual intercourse resulted in or was committed with acts resulting in serious bodily injury.[1] G. L. c. 265, § 22 (a). See Commonwealth v. Witkowski, 487 Mass. 675, 681-682 (2021).

[1] This third prong is one of several aggravating factors that turn rape into aggravated rape. See G. L. c. 265,

The evidence at trial, taken in the light most favorable to the Commonwealth, showed that the defendant did not know the victim, that the defendant and his brother drove the victim to a street adjacent to where her body was found the next morning, that the victim's body was found at a construction site where the defendant's brother and other members of the defendant's family worked, that the defendant's sperm was deposited in the victim's vagina within twenty-four hours of the victim's death despite the defendant's statement to police that he had not had sexual intercourse with the victim, that no sperm was found on the victim's underwear, and that the victim was injured severely and died from blunt force injuries to the head and strangulation. This evidence was sufficient to satisfy all the elements of felony-murder in the first degree with a predicate offense of aggravated rape.

We take this opportunity to raise concerns about our holding in another case where the victim had sex with the defendant proximate to suffering severe and fatal injuries. See Commonwealth v. Scesny, 472 Mass. 185, 192-193 (2015). In that case, the victim died by strangulation, two of her teeth were broken off, she had blood in her mouth, and there were injuries to various other parts of her body. Id. at 188. We concluded

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§ 22 (a). Here, the only aggravating factor on which the judge instructed the jury was serious bodily injury.

that there was insufficient evidence of aggravated rape, although we also decided that there was sufficient evidence of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty. Id. at 192-193. With respect to the charge of aggravated rape, we reasoned that the Commonwealth had not proved the necessary lack of consent because the victim's clothing had not been ripped, her genitalia and anus had not been injured, and the victim may have been acting as a prostitute the evening she was killed.[2] Id. at 193. We thus concluded that "there was no evidence favoring the inference that the defendant raped the victim before killing her over the inference that he had consensual sex with the victim and then killed her." Id. at 193-194.

Where there is evidence of sexual intercourse between the defendant and the victim alongside a homicide, that alone is insufficient to prove felony-murder. We now conclude, however, that where there is evidence that the defendant severely injured and killed the victim proximate to having sex with the victim,

[2] Evidence that an individual is a prostitute does not enhance the likelihood of consent. Indeed, it may well be that prostitutes are more likely to be raped than other individuals. See Commonwealth v. Harris, 443 Mass. 714, 737 (2005) (Marshall, C.J., concurring in part and dissenting in part) ("Prostitutes are frequent victims of rape. Yet societal beliefs persist that prostitutes cannot be raped, or that they are not harmed by rape, or that they somehow deserve to be raped" [citation omitted]).

the jury may infer that the victim did not consent to the sexual intercourse. See Commonwealth v. Waters, 420 Mass. 276, 280 (1995) (sufficient evidence of lack of consent where, among other things, victim had had sexual intercourse and was stabbed twenty-six times while alive). See also People v. Story, 45 Cal. 4th 1282, 1298-1299 (2009) ("the circumstance that defendant strangled [the victim] to death strongly evidences lack of consent to sexual intercourse. It is possible . . . that the two engaged in consensual sex, then defendant strangled her for no apparent reason. But the jury was not compelled to so find. The strangulation strongly suggests absence of consent").

2. Consciousness of guilt instruction. The defendant argues, as he did in his motion for a new trial, that the judge should have instructed on consciousness of guilt, and his trial counsel was ineffective for failing to request such an instruction. The Commonwealth requested a consciousness of guilt instruction at trial, pointing to the defendant's changing story to police about where he dropped off the victim the night before her body was discovered and the defendant's lying to police about having had sex with the victim. The judge was reluctant to give the instruction because he considered the discrepancies to be "inconsistent statement[s]" rather than "consciousness of guilt." The judge said he would not give the

instruction unless defense counsel wanted it, and defense counsel responded he did not.

According to the defendant, a consciousness of guilt instruction would have benefited him by notifying the jury that false statements need not indicate consciousness of guilt and evidence of consciousness of guilt alone is insufficient to support a conviction. See Commonwealth v. Toney, 385 Mass. 575, 585 (1982). We discern no error in either defense counsel's strategic decision not to request the instruction or the judge's decision not to give it.

"[A] defense attorney, as a matter of trial tactics, might not want to request a consciousness of guilt charge because it would not assist the defendant's case to have the judge focus the jury's attention on such matters" (citation and alterations omitted). Commonwealth v. Billingslea, 484 Mass. 606, 629 (2020). That was defense counsel's rationale here. In an affidavit submitted in support of the defendant's motion for a new trial, defense counsel explained: "I felt that an instruction on consciousness of guilt . . . would be more harmful than helpful to the defense by calling the attention of the jury to the issue, such that I made a tactical decision to ask that it not be given." This tactical decision was not unreasonable. See Commonwealth v. Kolenovic, 471 Mass. 664, 674 (2015) ("Where, as here, the defendant's ineffective assistance

of counsel claim is based on a tactical or strategic decision, the test is whether the decision was 'manifestly unreasonable' when made" [quotation and citation omitted]). Moreover, the judge was not required to give a consciousness of guilt instruction in the face of defense counsel's tactical decision not to request one. See Billingslea, supra at 630 ("Because the defendant did not request a consciousness of guilt instruction, and the judge properly exercised sound discretion, we find no error").

The motion for a new trial properly was denied.

3. Commonwealth's closing argument. The defendant asserts that the prosecutor stated improperly in closing argument that the lack of semen on the victim's underwear was evidence that she did not stand up after having sex with the defendant. We disagree.

The prosecutor stated in his closing argument that "they probably found no semen in [the victim's] underwear for two reasons . . . . One, she never had a chance to put her underwear back on[,] and [t]wo, she never got off the floor after [the defendant] was done with her." This argument was a permissible inference grounded in the testimony at trial and the jurors' common sense. See Commonwealth v. Paradise, 405 Mass. 141, 152 (1989) ("The prosecutor is entitled to argue the evidence and fair inferences to be drawn therefrom").

An employee with the Boston police department's crime laboratory testified that semen could "flow down into the crotch area of the underwear," and there was evidence that the victim was found with her underwear pulled down around one of her ankles. It is a reasonable inference from this evidence that there was no semen on the victim's underwear because the victim never pulled up her underwear or got off the ground. See Commonwealth v. Perkins, 450 Mass. 834, 837-838 (2008) ("Because death had occurred while [the victim] was lying on her back, and because no sperm cells were found on the crotch area of her panties, death probably occurred after intercourse and before [the victim] could pull up her clothes such that her panties would collect sperm cells draining from her body"). There was no error.

4. Motion for mistrial. The defendant asserts that the judge should have granted the defendant's motion for a mistrial after the Commonwealth inadvertently showed the jury video footage unduly prejudicial to the defendant. We conclude that the judge did not abuse his discretion in denying the defendant's motion. See Commonwealth v. Wiggins, 477 Mass. 732, 741 (2017).

At trial, the Commonwealth attempted to play for the jury a redacted video recording of the defendant's 2015 interview with police. The Commonwealth instead played an unredacted version

of the recording in which the defendant said, "I don't understand why I should be having more cases," and a detective referred to the defendant as being "in custody."

The defendant moved for a mistrial. The judge asked counsel to brief the relevant issues so that he could rule on the motion the next day. The judge also conferred with counsel about whether to tell the jury that he would dismiss them early because the Commonwealth had played an unredacted recording. Defense counsel said, "No, I don't want that, Judge, because it gives the impression that we have something to hide." The judge responded, "All right, then I won't."

The next day, the judge explained to counsel that he had not ruled on the motion on the day it had been made because he had not been prepared to give a "carefully craft[ed]" curative instruction. He then denied the defendant's motion and stated to the jury, in part,

> "So yesterday even though best efforts were made, part of the video that was shown to you had segments in it which were not admissible, and through no deliberate or intended conduct it simply was a mistake. That's what all the parties agree.
>
> "And if you remember, there was two or three or four or five minutes of video presentation where the Boston Police officers introduced themselves to the defendant who was sitting in an interview room in the Manchester Police Department building. That was the scene that you saw.
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> . . .

> "I'm going to ask you to completely wipe out any recollection of anything that you saw yesterday on the video. I'm going to ask you to discipline yourselves to make sure that you don't even think about it or consider it or review [it]. I'm going to ask that if it creeps into your consciousness in any way, that you will firmly to yourself say that's not important, it's not relevant, I can't consider it. It's not part of this case."

"When a jury have been exposed to inadmissible evidence, the judge may rely on a curative instruction to correct any error and to remedy any prejudice. As long as the judge's instructions are prompt and the jury do not again hear the inadmissible evidence a mistrial is unnecessary" (quotations, citations, and alterations omitted). Commonwealth v. Durand, 475 Mass. 657, 668 (2016), cert. denied, 138 S. Ct. 259 (2017). Here, the judge's excellent instruction, given before the parties presented additional evidence, cured any prejudice to the defendant. The judge no doubt would have given an instruction sooner if defense counsel had not asked him to refrain from doing so. In any event, the instruction was given promptly. See Commonwealth v. Amirault, 404 Mass. 221, 237 (1989) ("that the judge instructed the jury to disregard the prosecutor's comment a day after the closing arguments does not render the instruction ineffective").

The motion for a mistrial properly was denied.

5. Review under G. L. c. 278, § 33E. Having reviewed the entire record, we decline to reduce the verdict to a lesser degree of guilt or order a new trial.

Judgment affirmed.

Order denying motion for a new trial affirmed.

CYPHER, J. (concurring). I join the court's opinion in its entirety. I write separately to more firmly reject our reasoning in Commonwealth v. Scesny, 472 Mass. 185 (2015), and to address the continuing epidemic of violence against women, including femicide. We have not used the term "femicide" in our case law, but I think it should be recognized as a distinct phenomenon. To illustrate the importance of this language, and to frame the discussion of Scesny, I address femicide generally, the historical sexism of the common law, and the prevalence of femicide today.

Femicide is the intentional killing of a woman because she is a woman.[1] Because the victims of femicide are targeted based on their sex, femicide may be understood as a type of hate crime. See Taylor, Note, Treating Male Violence Against Women as a Bias Crime, 76 B.U. L. Rev. 575, 576-577 (1996). The violence of these offenses serves to terrorize the victims and, thus, to subjugate women as a group. Id. at 585-586. As such, hate crimes exact a greater toll on society and women, both individually and as a group, than isolated incidents of violence. Id. at 586.

[1] Various definitions of femicide are used by different groups. For a more comprehensive overview of definitions, see Femicide Watch, The Must-Knows on Femicide, http://femicide-watch.org/readers/must-knows-femicide#item-10731 [https://perma.cc/69F6-L5TH].

Femicide also exists on a continuum of sexual violence, including sex trafficking, rape, aggravated rape, and sexual harassment.[2] See J. Radford, Introduction, Femicide: The Politics of Women Killing 3, 3 (J. Radford & D.E.H. Russell eds., 1992). When any one of these forms of sexual violence results in death, a femicide has been committed. Femicide is thus "the most extreme form of sexist terrorism, motivated by hatred, contempt, pleasure, or a sense of ownership of women." J. Caputi & D.E.H. Russell, Femicide: Sexist Terrorism against Women, in Femicide: The Politics of Women Killing 13, 15 (J. Radford & D.E.H. Russell eds., 1992). Where, as here, the jury apparently found that the victim's murder stemmed from the same criminal episode as her aggravated rape, I believe it is appropriate to refer to her killing as a femicide.

A brief, but necessarily incomplete, review of the legal history of the treatment of women is necessary to remind us of the context in which the crime of femicide arises. In early

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[2] This continuum necessarily also includes street harassment. See Olney, Note, Toward a Socially Responsible Application of the Criminal Law to the Problem of Street Harassment, 22 Wm. & Mary J. Women & L. 129, 129 (2015). Street harassment is a verbal or nonverbal act, committed in a public place, by a man toward a female stranger, generally regarding her appearance. Id. Street harassment invades women's privacy, creating "an environment of fear and sexual terrorism" (quotation and citation omitted). Id. at 135. Like other forms of sexual violence, it serves to perpetuate the subordination of women, while exacting a physical and psychological toll. See id. at 136-137.

common law, women lacked an independent legal identity. See Butler v. Ives, 139 Mass. 202, 203 (1885) ("at common law, husband and wife were regarded as one"). Known as the doctrine of coverture,[3] a woman became, for legal purposes, her husband's chattel. See Nolin v. Pearson, 191 Mass. 283, 284 (1906). Thus, when a wife was injured by another or enticed away by a lover, a husband could recover damages for the loss of his marital privileges. Id. at 288. This merger of husband and wife as one legal person allowed for violence against wives by their husbands. While the Massachusetts Bay Colony prohibited a husband from beating his wife, he was permitted to "chastise" her. Id. at 285. Additionally, a husband could not, as a matter of law, rape his wife. Commonwealth v. Chretien, 383 Mass. 123, 127-128 (1981). It was not until 1981 that this court expressly eliminated a husband's right to rape his wife. Id. at 132.[4]

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[3] Under the common law's doctrine of coverture, a married woman became a "feme covert." See D. Rowland, The Boundaries of Her Body: The Troubling History of Women's Rights in America 17 (2004). Upon marriage, the feme covert's personal property became her husband's. Id. In 1845, the Massachusetts Legislature gave women the same rights as her husband to own and acquire property during their marriages. St. 1845, c. 208, §§ 1, 3, 5.

[4] The court's decision in this case was interpreting G. L. c. 265, § 22, as amended by St. 1974, c. 474, § 7. Chretien, 383 Mass. at 129-130. The 1974 amendment redefined the legal elements of rape and removed the prior common-law language. Id.

Vestiges remain of the common law's subordination of women. While men no longer legally may abuse and rape their wives, women may be blamed for the violence inflicted upon them. One example resides within the law of provocation, or "heat of passion" doctrine. See Coker, Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill, 2 S. Cal. Rev. L. & Women's Stud. 71, 72 (1992). This doctrine provides that murder may be mitigated to voluntary manslaughter where there is evidence that the defendant was provoked and lost his self-control in the heat of passion. Commonwealth v. Andrade, 422 Mass. 236, 237 (1996). The discovery of infidelity is the prototypical form of provocation. See id. at 237-238. Although we have modified the law of provocation over the years,[5] we have not eliminated its application. This doctrine implies that the victim, by committing adultery, is partly to blame for the defendant's violence, and that the defendant was excused in the killing.

By doing so, the court concluded that the Legislature abandoned the common-law spousal exclusion to rape. Id. at 130.

[5] Many of these modifications concern what we will consider "adequate provocation." For example, we held that a voluntary manslaughter instruction is not warranted where the discovery of spousal infidelity was over a period of months, rather than a sudden discovery. Commonwealth v. Rodriguez, 431 Mass. 804, 812 (2000). We also have held that evidence of the victim stalking the defendant is insufficient provocation. Commonwealth v. Benson, 453 Mass. 90, 97 (2009). Additionally, we repeatedly have held that insults and verbal arguments alone cannot create reasonable provocation. Commonwealth v. Vatcher, 438 Mass. 584, 588-589 (2003) (citing cases holding same).

Coker, supra at 101. Where the law treats homicide as a reasonable reaction to infidelity, it condones femicide.[6] Femicide is thus already part of our jurisprudence.

To use the term "femicide" also acknowledges its prevalence in our society at large. Reliable data on the incidence of femicide is unfortunately lacking. No official sources directly study male-on-female homicide or its motivations. An analysis of cross-sex homicide rates generally, however, suggests that femicide is on the rise in the United States. See Violence Policy Center, When Men Murder Women: An Analysis of 2019 Homicide Data 2 (Sept. 2021) ("Since reaching its low . . . in

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[6] Although provocation is a sex-neutral doctrine, its sexism is evident when compared to the common law's reticence to accept battered woman syndrome. Battered woman syndrome refers to the characteristics of a woman who has been abused physically and psychologically, which may induce her to kill or injure her male victim in self-defense. Commonwealth v. Moore, 25 Mass. App. Ct. 63, 66 (1987). While a pattern of abuse is undeniably more extreme than the discovery of infidelity, it was not until 1993 that defendants in Massachusetts were permitted to introduce evidence of the syndrome. See G. L. c. 233, § 23E, inserted by St. 1993, c. 477, § 1, recodified as G. L. c. 233, § 23F, by St. 1996, c. 450, § 248. See also Commonwealth v. Rodriguez, 418 Mass. 1, 7 & n.7 (1994). Before these statutory changes, courts across jurisdictions were reluctant to accept that the battered woman's actions could constitute self-defense. See Comment, Killing One's Abuser: Premeditation, Pathology, or Provocation?, 59 Emory L.J. 769, 774-775 (2010). Courts took issue with the reasonableness and imminence elements of self-defense, especially where the battered woman killed her abuser while he was sleeping. Id. at 775. As a matter of law, the abuse was not considered imminent, despite its consistent and ongoing nature, and the battered woman's actions were unreasonable. Id. In so holding, the law ignored and denied the battered woman's experience.

2014, the rate [of women murdered by men in incidents with one victim and one offender] has increased, with 2019's rate . . . up nine percent since 2014").

The Federal Bureau of Investigation (FBI) Uniform Crime Reporting (UCR) Program provides the primary source of data on such homicides. Yet the UCR receives its data voluntarily from law enforcement agencies across the country and consequently does not include all offenses.[7] Additionally, the data lacks important context, including how many of the killings by men were an extension of other violence against women and how many of the killings by women were committed in self-defense.

Nonetheless, the FBI's data record the age, sex, race, and ethnicity of the murder victim and the offender, as well as known information about the circumstances of the murder.[8] The UCR shows that in the year 2019, there were 1,647 known killings of women committed by men, compared to 477 killings of men by women.[9] The year before, there were 1,731 killings of women

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[7] FBI, UCR Publications, https://www.fbi.gov/services/cjis/ucr [https://perma.cc/333C-4668].

[8] FBI, 2019 Crime in the United States, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/expanded-homicide [https://perma.cc/MS4M-F46H].

[9] FBI, Expanded Homicide Data Table 6 (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/expanded-homicide-data-table-6.xls [https://perma.cc/AC7E-8VHZ].

committed by men.[10] While these statistics paint a blurry portrait of femicide in the United States, they demonstrate that its occurrence is significant.[11]

The paucity of statistics is partly to blame for femicide's lack of recognition. More importantly, femicide also is ignored because of its finality. As Jill Radford appropriately notes, "When a woman is killed, there may be no survivor to tell her story." Radford, Introduction, Femicide: The Politics of Women Killing at 4. While there may be valid reasons for society's

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[10] FBI, Expanded Homicide Data Table 6 (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-6.xls [https://perma.cc/683L-ZYG2].

[11] Indigenous communities in the United States are particularly susceptible to femicide. The Centers for Disease Control and Prevention (CDC) identify homicide as the sixth leading cause of death for indigenous women under forty-five years old. CDC, CDC Works to Address Violence Against American Indian and Alaska Native People 1, https://www.cdc.gov/injury/pdfs/tribal/Violence-Against-Native-Peoples-Fact-Sheet.pdf [https://perma.cc/EQ5F-SRYV]. A study conducted by the Urban Indian Health Institute found 506 cases of missing and murdered indigenous women and girls across seventy-one selected cities. Urban Indian Health Institute, Missing and Murdered Indigenous Women & Girls: A Snapshot of Data from 71 Urban Cities in the United States 6 (2018), https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf [https://perma.cc/6Y67-EFHH]. Of the known perpetrators, over eighty percent were male. Id. Despite its known prevalence, femicide largely is unreported and understudied in indigenous communities. See id. at 4. The Federal government, however, recently has committed to increasing the collection of indigenous homicide data. See Savanna's Act, Pub. L. No. 116-165, § 2, 134 Stat. 760 (2020).

reluctance to relive the violent murders of women,[12] the failure to do so risks femicide being forgotten or denied.

It is in the context of this finality that I wish to make clear that I reject the reasoning in Commonwealth v. Scesny, 472 Mass. at 193-194. In both Scesny and the present case, the evidence tended to establish that in each case, the sexual encounter with and the killing of the victim were contemporaneous. While it is certainly true that a killing may follow a consensual sexual encounter, that does not appear to have occurred in either case; each woman was apparently murdered so immediately after her rape that neither woman even had the chance to stand up after the assault. Id. at 189-190. Nonetheless, in Scesny, we concluded that there was insufficient evidence of rape because its traditional indicia, such as torn clothing or injured genitalia, were absent. Id. at 193.

This reasoning obscures the context in which the rape occurred: femicide. When a killing takes place following a rape, the victim no longer can testify about the absence of consent in the sexual encounter. She effectively has been

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[12] See Radford, supra at 5 ("In many cultures coming to terms with death is considered a private matter. Women who do speak out have had to be mindful of the impact their words may have on those close to the dead woman. There is also the danger of being faced with the accusation of making 'political capital' out of grief. For these reasons femicide is perhaps one of the most harrowing and sensitive dimensions of male violence for feminists to address.").

silenced. In cases such as these, the jury must be permitted to infer from the evidence of a killing that the sexual encounter was nonconsensual. This is not a "piling [of] 'inference upon inference'" or "conjecture and speculation." Commonwealth v. Merry, 453 Mass. 653, 661 (2009), quoting Corson v. Commonwealth, 428 Mass. 193, 197 (1998). These are reasonable inferences that the jury are entitled to draw. Commonwealth v. Coonan, 428 Mass. 823, 829 (1999).

Additionally, such inferences wholly are in line with our previous holdings that consent is not a defense to serious injuries allegedly inflicted during sexual encounters. See Commonwealth v. Appleby, 380 Mass. 296, 297, 309-311 (1980) (rejecting defendant's argument that victim consented to assault and battery by means of dangerous weapon as part of sadomasochistic sexual relationship). Analogously, consent is not present where the jury find that the sexual encounter took place at the same time as a violent killing.

I also wish to address directly the implication that prostituted women are more likely to consent to a sexual encounter before being killed. A prostituted woman is no more likely to do so than a nonprostituted woman. Even outside the context of homicide, evidence that a woman is prostituted does not decrease the likelihood that she was raped. Rather, studies suggest that prostituted women are more likely to be raped than

others. See, e.g., Cooney, "They Don't Want to Include Women Like Me": Sex Workers Say They're Being Left Out of the #MeToo Movement, Time (Feb. 13, 2018), https://time.com/5104951/sex-workers-me-too-movement/ (although "[t]here are no comprehensive, up-to-date statistics on how many sex workers in the U.S. have experienced sexual violence," "[o]ne systematic review of research found that globally, sex workers have a 45% to 75% chance of experiencing . . . sexual violence on the job"). Additionally, evidence suggests that homicides occur with similar frequency alongside prostitution as they do alongside rape. See FBI, Expanded Homicide Data Table 11 (2019), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/expanded-homicide-data-table-11.xls [https://perma.cc/58LV-DA87] (listing twelve incidents of homicide occurring in context of prostitution and commercialized vice and eight homicides occurring in context of rape).

Regardless whether the victims in Scesny and the present case were prostituted, I agree with the court that the jury should be permitted to infer that a sexual encounter was nonconsensual where it occurred contemporaneous with a killing. Permitting the jury to make such a finding acknowledges that femicide and rape both exist on a continuum of sexual violence.