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To prove one type of aggravated rape in Massachusetts, the Commonwealth must demonstrate beyond a reasonable doubt that the defendant forcibly compelled the victim to submit to sexual intercourse that also was committed with, or resulted in, acts causing serious bodily injury.\(^1\) Because of the obvious difficulties in establishing lack of consent where the victim died in connection with the aggravated rape, jurors may consider the totality of the circumstances in determining whether the sexual intercourse was consensual.\(^2\) In Commonwealth v.

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1. See Mass. Gen. Laws ch. 265, § 22(a), (b) (2022) (listing elements and aggravating factors for rape). This Case Comment uses the term “victim,” instead of “survivor,” to describe the legal status of someone who has been subjected to a crime for the purpose of encompassing both persons who died as a result of the crimes committed against them, as well as those who survived. See generally Rape, Abuse & Incest National Network et al., Victim or Survivor: Terminology from Investigation Through Prosecution, Sexual Assault Kit Initiative (last visited Feb. 21, 2023), https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf [https://perma.cc/D93N-VGPU] (discussing purposes underlying uses of both terms). The Massachusetts rape statute defines “sexual intercourse” as including “vaginal, oral or anal intercourse, including fellatio, cunnilingus or other intrusion of a part of a person’s body or an object into the genital or anal opening of another person’s body,” and this term and definition will be used for purposes of this Case Comment. See Mass. Gen. Laws ch. 265, § 22(c) (2022). As a matter of logic and policy, the timing of the acts that aggravate a basic rape charge—causing serious bodily injury, committing a felony, or attempting to commit a felony—is not critical. See Commonwealth v. McCourt, 781 N.E.2d 808, 814 (Mass. 2003) (recognizing potential penalty differences despite same injuries if timing mattered). Additionally, the defendant need not have engaged in the aggravating acts to compel the victim’s submission or otherwise facilitate the rape. See id. at 815-16 (noting Massachusetts legislature’s purpose of protecting victims served without this requirement). The Commonwealth only needs to demonstrate that the rape and aggravating acts constituted a single, ongoing episode and line of conduct for a defendant to be convicted of aggravated rape. See id. at 816 (concluding aggravated rape encompasses situation where rape precedes brutal beating); Commonwealth v. Billingslea, 143 N.E.3d 425, 450 (Mass. 2020) (affirming jury instruction providing aggravated offenses and rape need not occur at same exact time).

Paige, the Supreme Judicial Court of Massachusetts (SJC) considered whether the Commonwealth had presented sufficient evidence to support the jury’s finding that the defendant contemporaneously had nonconsensual sexual intercourse with and fatally injured the victim. The SJC affirmed the conviction, concluding that jurors may infer lack of consent where there is evidence that the defendant severely injured and killed the victim proximate to the act of sexual intercourse.

In 1987, Dora Brimage was at a Labor Day party in Boston when she asked James Paige’s brother for a ride home. After another person offered to drive her, Paige—whom Brimage did not know at the time—forcefully insisted that he and his brother would take her home. Brimage then reluctantly entered the vehicle with the two brothers. The next morning, construction workers found Brimage’s corpse inside a dirty work site where some of Paige’s family members worked, lying in a pool of blood on a piece of sheetrock. Brimage’s shirts were pulled up, her bottoms and underwear were pulled down around her ankles, and it appeared that someone had used a construction shovel to bludgeon her so severely that it seemed “she no longer had a face.” An autopsy revealed that Brimage died from blunt-force head injuries and ligature strangulation and that someone deposited sperm inside her vagina within twenty-four hours of her death—although the medical examiner did not find any sperm on her underwear.

The crime remained unsolved for decades until subsequent DNA testing revealed the sperm inside Brimage’s vagina matched Paige’s genetic profile. When officers interviewed Paige during their initial investigation in 1987, he told them that he and his brother had dropped Brimage off at a club nowhere near the

consent-defense rape trials). In contrast with a first offense of basic rape, which only has a maximum sentence of twenty years’ imprisonment, aggravated rape may serve as a predicate offense for felony murder if the victim dies contemporaneously with the commission or attempted commission of the crime because it is punishable by life in prison. See MASS. GEN. LAWS ch. 265, § 1 (2022) (providing felony-murder rule); Commonwealth v. Witkowski, 169 N.E.3d 496, 504 (Mass. 2021) (distinguishing aggravated rape from basic rape).

4. See id. at 153 (stating issue on appeal).
5. See id. at 154 (permitting lack-of-consent inference to establish aggravated rape for felony murder charge).
7. See 177 N.E.3d at 152 (identifying how Brimage met Paige for first time).
8. See id. (noting Brimage acted hesitant to get into vehicle following Paige’s insistence).
9. See id. at 153; Commonwealth’s Brief, supra note 6, at 25-26.
10. See 177 N.E.3d at 153 (highlighting severity of injuries); Commonwealth’s Brief, supra note 6, at 11, 25 (describing victim’s state upon discovery).
11. See 177 N.E.3d at 153 (noting findings related to sperm); Commonwealth’s Brief, supra note 6, at 15 (providing expert witness’s opinions at trial relating to cause of death).
12. See 177 N.E.3d at 153 (providing proof Paige had sexual intercourse with Brimage). In 2013, the Boston Police Department received federal funding to solve cold cases using DNA testing, and Brimage’s murder was among those selected. See id. (explaining why case reopened).
work site where her body was found.13 But during his 2015 interview, Paige admitted that he and his brother drove Brimage to the street next to the work site, although he denied ever having sexual intercourse with her.14

At trial, Paige unsuccessfully moved for a required finding of not guilty, alleging there was insufficient evidence to support a conviction of first-degree felony murder with a predicate offense of aggravated rape.15 The jury ultimately found Paige guilty.16 On appeal to the SJC, Paige reiterated his argument at trial, contending the Commonwealth failed to prove the necessary lack of consent to the sexual intercourse or that he killed Brimage.17 Paige reasoned that because there was no injury to Brimage’s genitals nor evidence of hostility between the two, and because it is equally likely that Brimage was killed at some later point after they had consensual sexual intercourse, the evidence did not support a guilty finding beyond a reasonable doubt.18 The SJC rejected Paige’s argument, concluding that the jurors rightfully inferred lack of consent because the evidence

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13. See id. (discussing Paige’s original statement to police).

14. See id. (highlighting inconsistency in Paige’s statements). Paige initially claimed that he did not remember giving a statement in 1987 about Brimage but subsequently recalled that he and his brother gave Brimage a ride after officers refreshed his memory. See Commonwealth’s Brief, supra note 6, at 15-16 (noting officers had to refresh Paige’s memory with part of his original statement). The rear entrance and parking lot of the work site were only accessible via the street where Paige admitted he dropped Brimage off during his 2015 interview. See id. at 26 n.15 (highlighting connection between drop-off location and crime scene). Paige also asserted that Brimage was involved in prostitution and had a boyfriend who abused women. See id. at 16. Brimage’s boyfriend’s DNA did not match the sperm fraction, however, nor was there any evidence indicating that Brimage was a prostitute. See Defendant/Appellant’s Brief on Appeal from a Judgment of the Superior Court at 14, Commonwealth v. Paige, 177 N.E.3d 149 (Mass. 2021) (No. SJC-12806), 2020 WL 10505463 at *4 [hereinafter Defendant’s Brief] (discussing DNA analysis performed on vaginal swab); Oral Argument at 22:47, Commonwealth v. Paige, 177 N.E.3d 149 (Mass. 2021) (No. SJC-12806), https://boston.suffolk.edu/sjc/pop.php?csnum=SJC_12806 [https://perma.cc/9B3J-AWLT] [hereinafter Oral Argument] (dismissing assertion after justice asked about Brimage’s potential prostitution involvement).

15. See 177 N.E.3d at 153 (noting Paige’s repeated motions for required finding of not guilty).

16. See id. at 152.

17. See id. at 153 (providing one of Paige’s appellate arguments); Defendant’s Brief, supra note 14, at 19-20 (arguing Commonwealth failed to prove necessary elements of offense, amounting to due process violation).

18. See Defendant’s Brief, supra note 14, at 19-23 (contending force, lack of consent, and identity of murderer not sufficiently proven). Put simply, Paige argued that no evidence indicated the sexual intercourse was nonconsensual and that he is not necessarily the murderer because he had sexual intercourse with Brimage and lied about it. See id. at 21-23 (arguing Commonwealth’s circular reasoning problematic). The Commonwealth counterargued that one can reasonably infer that Paige murdered Brimage in the course of an aggravated rape because: (1) Brimage was found lying on the floor of a dirty construction site with blunt force injuries to her head the morning after leaving a party with Paige and his brother; (2) Brimage and Paige did not previously know each other, but he deposited semen inside her within twenty-four hours of her death; (3) the absence of semen in Brimage’s underwear, which was wrapped around her ankles, indicates that she did not stand up after the sexual intercourse; and (4) Paige falsely denied ever having sexual intercourse with Brimage. See Commonwealth’s Brief, supra note 6, at 27-28 (asserting Paige “ignores the plethora of evidence and reasonable inferences” supporting guilty finding).
shows that Paige severely injured and killed Brimage proximate to the act of sexual intercourse.¹⁹

Historically, Massachusetts statutorily defined rape as the ravishing and carnal knowledge of any woman—who was not the accused’s wife—by force and against her will.²⁰ Despite the SJC’s statement in 1870 that the question of consent for a charge of rape is a “simple” one, this issue has been—and continues to be—far from simple, especially where the defendant murders the alleged rape victim so they are unable to testify to their lack of consent.²¹ And if there is

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¹⁹. See 177 N.E.3d at 154 (announcing permissible inference while acknowledging evidence of sexual intercourse alongside homicide, alone, insufficient).


²¹. See Commonwealth v. Burke, 105 Mass. 376, 377 (1870) (discussing element of lack of consent generally); Commonwealth v. Perkins, 883 N.E.2d 230, 238 (Mass. 2008) (concluding jury could find defendant killed rape victim to prevent her from identifying him); Commonwealth v. McCourt, 781 N.E.2d 808, 816 (Mass. 2003) (noting facts indicate defendant sought to kill victim to conceal rape and avoid punishment); see also Sabayasachi Nath & HK Prathibha, Why Murder After Rape?, 11 J. FORENSIC SCI & CRIM. INVESTIGATION 1, 1 (2018) (noting elimination of oral testimony one reason perpetrators murder rape victims). Many defendants accused of rape argue that the alleged victim consented, as this defense is generally their best chance for acquittal. See Ilene Seidman & Susan Vickers, The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform, 38 SUFFOLK U. L. REV. 467, 485 (2005) (recognizing consent defense most likely to result in acquittal for rape prosecutions). The only time that consent is not at issue for a rape prosecution is when the alleged victim is below the statutory age of consent. See MASS. GEN. LAWS ch. 265, § 23 (2022) (imposing strict liability for sexual intercourse with and abuse of child under sixteen years old); Commonwealth v. Moore, 269 N.E.2d 636, 640 (Mass. 1971) (rejecting mistake-of-fact affirmative defense to statutory rape). Similarly, one may not legally consent to receiving injuries from an assault and battery with a dangerous weapon, even if related to sexual activity. See Commonwealth v. Appleby, 402 N.E.2d 1051, 1060 (Mass. 1980) (concluding consent does not extend beyond sexual acts to accompanying violence). Where lack of consent is an essential element, the Commonwealth does not need to prove that the defendant intentionally or knowingly had nonconsensual sexual intercourse—the relevant inquiry is whether the alleged victim, in fact, did not consent. See Commonwealth v. Lopez, 745 N.E.2d 961, 964-66 (Mass. 2001) (emphasizing relevant inquiry limited to consent in fact); see also Commonwealth v. Sherman, 116 N.E.3d 597, 606 (Mass. 2019) (holding Commonwealth need not prove defendant knew victim withdrew consent during sexual intercourse). The defendant’s subjective understanding of the alleged victim’s willingness to engage in sexual intercourse has no bearing on whether they actually consented. See Commonwealth v. Lopez, 745 N.E.2d 961, 965-66 (Mass. 2001) (acknowledging rape statute requires only general intent); see also Katherine M. King, Paving the Way for Recognizing Postpenetration Rape Through the Mistake of Fact Defense, 61 B.C. L. REV. E-SUPP. II.-322, II.-325-26 (2020) (recognizing objective standard
evidence that the alleged victim is or was a prostitute, the issue of consent is even more complicated.22 Massachusetts, however, has not explicitly required rape victims to affirmatively demonstrate their lack of consent through physical resistance in order to receive justice.23 While evidence indicating that the alleged

ensures victims need not forcefully resist to communicate lack of consent). Consequently, Massachusetts defendants cannot successfully defend a rape charge by arguing that they mistakenly believed the alleged victim consented, although this is a common defense in acquaintance rape cases nationwide. See Commonwealth v. Lopez, 745 N.E.2d 961, 966 (Mass. 2001) (affirming inapplicability of mistake-of-fact defense to lack-of-consent element); Dana Berliner, Rethinking the Reasonable Belief Defense to Rape, 100 YALE L.J. 2687, 2687-88 (1991) (asserting prevalence of mistake-of-fact defense in rape cases). If the evidence shows that the alleged victim previously engaged in consensual sexual acts with the defendant or that they initially consented but then revoked such consent after penetration, however, jurors often disbelieve the alleged victim’s testimony as to their unwillingness to engage in sexual intercourse. See Note, Acquaintance Rape and Degrees of Consent: “No” Means “No,” but What Does “Yes” Mean?, 117 HARV. L. REV. 2341, 2342 (2004) (discussing general presumption of consent where alleged victim previously consented to sexual intercourse with defendant); King, supra, at Ill-323 (noting Massachusetts in minority of jurisdictions explicitly recognizing victims’ ability to withdraw consent).

See Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51, 117 (2002) (highlighting negative societal attitudes surrounding prostitutes and rape); Cheryl Hanna, Sex Is Not a Sport: Consent and Violence in Criminal Law, 42 B.C. L. REV. 239, 272 (2001) (explaining jurors may find prostitutes unworthy of legal protection from rape based on their status). Although courts have not explicitly contended that prostitutes cannot be raped, it was a common law principle that prostitutes are more likely to consent to sexual intercourse than chaste people. See Karin S. Portlock, Note, Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation, 107 COLUM. L. REV. 1404, 1409-11 (2007) (discussing common law’s efforts to protect chastity and punish unchastity); see also Commonwealth v. Harris, 825 N.E.2d 58, 65 (Mass. 2005) (noting alleged rape victim’s “reputation for unchastity” previously admissible and probative of consent). Even though the SJC stated that an alleged victim’s consent to sexual intercourse with one person does not imply their consent to sexual intercourse with another in Commonwealth v. McKay, trial judges have discretion to permit parties to impeach an alleged victim in a sexual assault case with evidence of a prior prostitution conviction if the requirements of MASS. GEN. LAWS ch. 233, § 21 are met and its probative value outweighs prejudice to them and the Commonwealth. See Commonwealth v. McKay, 294 N.E.2d 213, 218 (Mass. 1973) (stating consent in one instance cannot be transferred to another circumstance); Commonwealth v. Harris, 825 N.E.2d 58, 63-69 (Mass. 2005) (carving out exception to rape shield statute for prior prostitution convictions). Despite evidence demonstrating that prostitutes are frequent victims of rape and are no more likely to consent in any given circumstance than others, harmful societal beliefs—such as that prostitutes cannot be raped, are not harmed by rape, or deserve to be raped—persist today. See Commonwealth v. Harris, 825 N.E.2d 58, 75-76 (Mass. 2005) (Marshall, C.J., concurring in part and dissenting in part) (supporting legislature’s implicit decision to forbid evidence of prostitution convictions to impeach alleged rape victims); Anderson, supra, at 113-14 (noting rape certainly not exceptional experience for prostitutes).

See Commonwealth v. McDonald, 110 Mass. 405, 405-06 (1872) (rejecting common law principle requiring victims to use utmost resistance); see also Robin D. Wiener, Shifting the Communication Burden: A Meaningful Consent Standard in Rape, 6 HARV. WOMEN’S L.J. 143, 145 (1983) (explaining courts consider resistance outward manifestation of lack of consent). Traditionally, the victim’s physical resistance—rather than lack of consent—was an essential element prosecutors had to prove to convict a defendant of rape, although this has never been the law of Massachusetts. See Commonwealth v. Sherry, 437 N.E.2d 224, 228 (Mass. 1982) (articulating victim not required to use physical force to resist); Berliner, supra note 21, at 2691 (recognizing rape law traditionally emphasized victim’s actions); Beatrice Diehl, Note, Affirmative Consent in Sexual Assault: Prosecutors’ Duty, 28 GEO. J. LEGAL ETHICS 503, 504 (2015) (highlighting absence of lack-of-consent element in majority of rape statutes); Kari Hong, Rape by Malice, 78 MONT. L. REV. 187, 198 (2017) (noting cruix of rape inquiry often whether victim’s physical resistance convincing enough to dispel consent); Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. ILL. L. REV. 953, 962-63 (1998) (discussing common law’s utmost resistance requirement). On the other hand, evidence of the victim’s passivity—or lack of physical resistance—
victim used physical resistance is frequently essential to establishing lack of consent, the ultimate question for the jury is whether the evidence shows that the alleged lack of consent was “honest and real.” Jurors may infer lack of consent from circumstantial evidence alone, and their inferences need not be necessary or inescapable—only reasonable and possible. In *Commonwealth v. Scesny*, the SJC unanimously held that there was insufficient evidence of aggravated rape, even though the defendant’s sperm was found inside the victim; the victim was found with her pants and underwear pulled down to her knees; she sustained brutal injuries; and her cause of death was strangulation by ligature. The SJC concluded that evidence from which

has traditionally indicated consent. See Berliner, *supra* note 21, at 2692 (noting how courts have interpreted victim acquiescence). See *Commonwealth v. Sherry*, 437 N.E.2d 224, 228 (Mass. 1982) (recognizing relevant inquiry not whether victim used physical force to resist). Although resistance has been formally abolished as an elemental requirement in most states due to the concern that requiring it would increase the victim’s risk of serious bodily injury or death, resistance generally remains highly relevant to—and in some cases, determinative of—the issues of both consent and force. See, e.g., Berliner, *supra* note 21, at 2692 (acknowledging failure of statutory revisions to eliminate need for victims to physically resist); Anderson, *supra* note 23, at 967-68 (cautioning many courts still define force and consent in terms of resistance or require it); Hong, *supra* note 23, at 201-02 (discussing legislative response to criticisms of resistance requirement). Certain types of injuries related to the victim’s resistance tend to be more probative of rape than others—for example, injuries to sexual organs strongly indicate force and lack of consent. See *Commonwealth v. Miller*, 755 N.E.2d 1266, 1270-71 (Mass. 2001) (recognizing injuries to victim’s thighs and vaginal opening consistent with rape). See *Commonwealth v. Witkowski*, 169 N.E.3d 496, 502-03 (Mass. 2021) (providing standard for permissible inferences); *Commonwealth v. Copeland*, 114 N.E.3d 569, 575 (Mass. 2019) (noting *Commonwealth* may prove case using solely circumstantial evidence). So long as the circumstantial evidence does not require piling “inference upon inference or conjecture and speculation” to support each essential element of the offense and does not “tend[] equally to sustain either of two inconsistent propositions,” it will be sufficient to support a conviction. See *Corson v. Commonwealth*, 699 N.E.2d 814, 817-18 (Mass. 1998) (articulating circumstances when evidence insufficient); *Commonwealth v. Fancy*, 207 N.E.2d 276, 280 (Mass. 1965) (explaining if evidence could equally sustain either of two inconsistent propositions, neither sufficiently established). The standard on appeal for evaluating the sufficiency of the evidence is whether the Commonwealth’s evidence and all reasonable inferences that follow from it, viewed in the light most favorable to the Commonwealth, is sufficient to persuade a rational jury of the defendant’s guilt beyond a reasonable doubt. See *Commonwealth v. Latimore*, 393 N.E.2d 370, 374 (Mass. 1979) (establishing sufficient-evidence standard in Massachusetts). The *Witkowski* court applied this standard in concluding that a reasonable jury could have found that the rape and fatal suffocation of the victim were part of a single, continuous transaction where the evidence suggested that the victim, who was naked and lying face down on the bed, had not gotten up after semen was deposited inside her. See *Commonwealth v. Witkowski*, 169 N.E.3d 496, 503-04 (Mass. 2021) (concluding jury could infer victim’s death occurred during, or shortly after, sexual intercourse); see also *Commonwealth v. Perkins*, 883 N.E.2d 230, 236 (Mass. 2008) (asserting fact victim found on back with no sperm in underwear supports felony-murder conviction). The defendant argued that the evidence could also support a finding that a considerably longer interval had elapsed between the killing and the rape, but the SJC has stated that when the evidence makes conflicting inferences possible, “it is for the jury to determine where the truth lies.” See *Commonwealth v. Witkowski*, 169 N.E.3d 496, 504 n.6 (Mass. 2021) (quoting *Commonwealth v. Garuti*, 907 N.E.2d 221, 228 (2009)). See *Commonwealth v. Scesny*, 34 N.E.3d 17 (Mass. 2015) (reversing aggravated rape conviction). Although the defendant could not be convicted of felony murder with a predicate offense of aggravated rape, the evidence still supported a first-degree murder conviction on the theories of deliberate premeditation and
the jury could reasonably infer lack of consent was absent because the victim had worked as a prostitute in the past and may have been working in that role on the night of her murder; the police found her body about a mile away from an area prostitutes frequent; her clothing was not ripped or torn; and there were no injuries to her sexual organs.28 Because the SJC reasoned that the totality of the circumstances could equally favor the inference that the defendant had consensual sexual intercourse with the victim before murdering her, the court concluded that the evidence did not establish lack of consent, nor consent, beyond a reasonable doubt.29

In an effort to prevent sexual abuse and make the path to justice easier for rape victims, some jurisdictions have turned toward an affirmative consent standard.30 Affirmative consent generally requires both parties to freely, voluntarily, and consciously express their willingness to participate in sexual intercourse—either verbally or through actions that would indicate such willingness to the other party in light of the totality of the circumstances—for the act to be consensual.31

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28. See Commonwealth v. Seesny, 34 N.E.3d 17, 25-26 (Mass. 2015) (listing evidence seeming to negate lack-of-consent inference); see also supra note 22 (noting how some courts allow admission of evidence of alleged victim’s prostitution); supra note 24 and accompanying text (discussing use of resistance evidence to establish lack of consent).


30. See, e.g., Diehl, supra note 23, at 504-05 (arguing affirmative consent standard helps further prosecutors’ duty to justice); Noah Hilbert, Note, The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault Laws, 58 Ariz. L. Rev. 867, 872-73 (2016) (outlining origins and purpose of affirmative consent standard); C. Ashley Saferight, Note, Clear as Mud: Constitutional Concerns with Clear Affirmative Consent, 67 Clev. St. L. Rev. 431, 438 (2019) (discussing historical shift of rape law in some jurisdictions). Affirmative consent may be understood as a response to the historical sexism of the common law, as well as the underreporting, undercounting, and underprosecution of rape. See id. at 873 (explaining affirmative consent responds to “the far reaches of an entrenched patriarchy”); see also Saferight, supra, at 435 (describing inextricability of sexism and misogyny from history of rape law). Early reform proponents argued that the traditional consent standard impermissibly puts the focus on the victim, rather than the defendant. See Hilbert, supra, at 872-73 (describing how defendants often acquitted of rape if alleged victim’s level of fear or resistance insufficient). California, one of the leaders of the affirmative consent movement, requires colleges to adopt a sexual assault, domestic violence, dating violence, and stalking policy—applicable both on and off campus—that includes an affirmative consent standard to receive state funds for student financial aid. See Cal. Educ. Code § 67386 (West 2020); Brown et al., Rape & Sexual Assault, 21 Geo. J. Gender & L. 367, 405 (2020) (discussing California’s attempt to help prevent campus sexual violence); Diehl, supra note 23, at 507 (noting California’s law created in part to define sexual actors’ responsibilities and acceptable behaviors).

Absent evidence of words or overt conduct that would lead an objectively reasonable person in the defendant’s position to believe that the alleged victim affirmatively consented, lack of consent is presumed.\textsuperscript{32} It follows that an alleged victim’s silence, lack of physical resistance, or prior consent to a sexual encounter, in and of themselves, are legally insufficient to overcome the presumption of lack of consent under an affirmative consent standard.\textsuperscript{33} Thus, the focus of a rape prosecution shifts to whether the defendant obtained the alleged victim’s affirmative consent, rather than whether the alleged victim demonstrated their lack of consent.\textsuperscript{34}

\textsuperscript{32} See Deborah Tuerkheimer, \textit{Affirmative Consent}, 13 OHIO ST. J. CRIM. L. 441, 448-49 (2016) (stating alleged victim deemed not to have consented absent some indication of consent); \textit{see also} Mary Graw Leary, \textit{Affirmatively Replacing Rape Culture with Consent Culture}, 49 TEX. TECH. L. REV. 1, 46 (2016) (explaining affirmative consent standards demand parties request and obtain consent). Although the issue has been debated by scholars due to the existence of different articulations of the standard, affirmative consent generally does not shift the ultimate burden of proof to the defendant—the prosecution must still prove every element of the crime of rape, including lack of consent, beyond a reasonable doubt. See Tuerkheimer, supra, at 448-49 n.34 (clarifying affirmative consent merely reflects legal presumption under certain circumstances); Leary, supra, at 8 (stating affirmative consent does not affect prosecution’s ultimate burden of proof); Nicholas J. Little, \textit{Note, From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law}, 58 VAND. L. REV. 1321, 1349 (2005) (noting rape not necessarily turned into strict liability offense under affirmative consent standard). Additionally, the defendant does not need to prove that the alleged victim, in fact, consented in order to be acquitted of rape in an affirmative consent jurisdiction. See Leary, supra, at 47 (explaining how affirmative consent standards allow for acquittal in certain situations); Diehl, supra note 23, at 518-19 (stating affirmative consent benefits defendants and victims); Little, supra, at 1347 (discussing how affirmative consent puts defendant’s story of events, rather than alleged victim’s, under examination).

\textsuperscript{33} See Leary, supra note 32, at 50 (clarifying affirmative consent changes legal significance of passivity); Diehl, supra note 23, at 504-05 (arguing affirmative consent combats misperception of absence of verbal “no” indicating consent). Accordingly, jurors cannot simply discredit an alleged victim’s claim of lack of consent because they were so debilitated by fear or too small to meaningfully resist, their clothes were not ripped, or they have previously been unchaste—if there is no evidence of affirmative consent to engage in sexual intercourse and all elements of the crime have been established, the jury may convict the defendant of rape. See Tuerkheimer, supra note 32, at 459-63 (discussing fact patterns where affirmative consent allows victims who remain passive to receive justice); Diehl, supra note 23, at 505 (proffering standard clarifies absence of affirmative consent indicates rape).

\textsuperscript{34} See Leary, supra note 32, at 8 (arguing people should have to obtain another’s affirmative agreement prior to engaging in sexual acts); Diehl, supra note 23, at 511 (explaining standard helps prevent victim blaming
In Commonwealth v. Paige, the SJC firmly rejected its reasoning in Scensny, concluding jurors may infer lack of consent where the evidence shows that the defendant severely injured and killed the victim proximate to having sexual intercourse with them, even where consent remains a logical possibility. Additionally, the SJC clarified that evidence of prostitution, which was lacking here but strongly supported the Scensny holding, does not make it any more likely that the alleged victim consented to sexual intercourse—in fact, prostitutes may be more frequently raped than other individuals. Writing separately, Justice Cypher rejected Scensny more firmly and addressed the continuing epidemic of violence against women and historical common law sexism when it comes to sex-based offenses. Justice Cypher explained that even if the traditional indicia of torn clothing or injured sex organs is lacking, courts must allow jurors to infer lack of consent if the defendant contemporaneously had sexual intercourse with, severely injured, and killed the victim, as the victim is effectively silenced from testifying about their unwillingness to engage in sexual intercourse.

by asking why defendant did not procure affirmative consent); Little, supra note 32, at 1348 (distinguishing affirmative consent from traditional system where victim required to demonstrate lack of consent). Some scholars argue that affirmative consent standards align rape with other crimes involving a lack of consent element, including theft, unauthorized use of property, and identity theft. See Leary, supra note 32, at 41-42 (comparing rape to other crimes). With these crimes, the law does not require the alleged victim to outwardly demonstrate their lack of consent to the offender but instead considers whether the defendant had permission to take the property. See id. (arguing consent law lenient on rape defendants although violation more personal than taking of property); Little, supra note 32, at 1349 n.174 (noting theft does not require force or resistance on victim’s part, while rape traditionally does).

35. See 177 N.E.3d at 154 (addressing concerns with Scensny). While the majority opinion did not provide a clear definition of “proximate to,” Justice Cypher’s concurring opinion indicates that it is similar to the standard for when aggravated rape can serve as a predicate offense to support a felony murder conviction—i.e., the murder occurs within the same, continuous episode as the aggravated rape. See id. at 160 (Cypher, J., concurring) (noting sexual encounter and murder “contemporaneous” in both Paige and Scensny); Commonwealth v. Witkowski, 169 N.E.3d 496, 503 (Mass. 2021) (explaining killing and predicate felony must occur at substantially same time and place).

36. See 177 N.E.3d at 154 n.2 (demystifying misconceptions about prostitutes’ victimization).

37. See id. at 157 (Cypher, J., concurring) (joining majority opinion in its entirety and elaborating on holding). Justice Cypher referred to Brimage’s death as a “femicide,” which is defined similarly to a hate crime as “the intentional killing of a woman because she is a woman.” See id. (addressing concept of femicide for first time in SJC’s history); see also Taylor, supra note 20, at 576-77 (arguing for punishing femicide like other bias crimes). Although femicide is at the most extreme end of the continuum of sexual violence, it is often ignored in the statistical data because there may be no survivor to tell the victim’s story, given its definite finality. See 177 N.E.3d at 157-60 (Cypher, J., concurring) (examining statistical, legal, and sociological treatment of femicide). Justice Cypher also noted that traces of the common law’s subordination of women still remain, including how some jurisdictions allow evidence of an alleged victim’s prior prostitution convictions, even if the legislature has not explicitly authorized such admissions as exceptions to the rape shield statutes. See id. at 158-59 (Cypher, J., concurring) (explaining law still blames certain women for violence inflicted upon them); see also Anderson, supra note 22, at 113 (acknowledging absurdity of allowing prostitution evidence in light of studies showing many prostitutes experience rape).

38. See 177 N.E.3d at 160-61 (Cypher, J., concurring) (affirming majority’s rejection of Scensny in context of femicide’s finality). Justice Cypher also supported permitting this inference with the SJC’s longstanding rule that consent is not a defense to serious injuries allegedly inflicted during sexual encounters. See id. at 161
The SJC was correct in upholding Paige’s conviction for first-degree felony murder with a predicate offense of aggravated rape, as the evidence sufficiently established that he forcibly compelled Brimage to submit to nonconsensual sexual intercourse and brutally murdered her as part of a single, continuous episode.\textsuperscript{39} The evidence does not require piling “inference upon inference or conjecture and speculation” for a jury to infer that Brimage did not consent—even if it is still logically possible that Paige and Brimage had consensual sexual intercourse before he murdered her.\textsuperscript{40} Paige and Brimage were strangers who had sexual intercourse at a dirty construction site soon after he forcefully insisted on giving her a ride nearby, and Paige brutally injured and strangled Brimage before she could even get up.\textsuperscript{41} The additional surrounding circumstances, including that Paige’s family worked at the construction site; that officers found Brimage with her shirts pulled up and bottoms around her ankles; that the murder weapon was left next to her body; and Paige’s inconsistent statements and denial of

\footnotesize{(Cypher, J., concurring) (explaining inference not far-fetched); see also Commonwealth v. Appleby, 402 N.E.2d 1051, 1060 (Mass. 1980) (concluding consent defense only applies to sexual intercourse, not related acts of violence).

\textsuperscript{39} See 177 N.E.3d at 153-54 (listing evidence satisfying all elements of felony murder with predicate offense of aggravated rape). This decision is in line with similar cases upholding felony-murder convictions with aggravated rape as the predicate offense. See, e.g., Commonwealth v. Witkowski, 169 N.E.3d 496, 503-04 (Mass. 2021) (affirming conviction where victim suffocated, found naked, and had not moved after semen deposited); Commonwealth v. McCourt, 781 N.E.2d 808, 816-17 (Mass. 2003) (holding evidence shows defendant raped and inflicted serious bodily injuries with explicit goal of killing her); Commonwealth v. Waters, 649 N.E.2d 724, 726 (Mass. 1995) (concluding sufficient evidence where victim stabbed profusely while alive and cried for help); see also Commonwealth v. Perkins, 883 N.E.2d 230, 238 (Mass. 2008) (contending felony murder sufficiently established although theory not submitted to jury).

\textsuperscript{40} See 177 N.E.3d at 160-61 (Cypher, J., concurring) (explaining while killing may follow consensual sexual intercourse, evidence sufficiently established this did not occur); supra text accompanying note 25 (noting necessary or inescapable jury inferences not required for conviction). The fact that no semen was found in Brimage’s underwear demonstrates that Paige murdered her proximate to the aggravated rape, as it indicates that she did not have the chance to stand up after the sexual intercourse occurred. See 177 N.E.3d at 160 (Cypher, J., concurring) (stressing importance of this fact in establishing contemporaneous killing and aggravated rape). It is plain that a person would be more likely to contemporaneously murder someone after engaging in nonconsensual sexual intercourse than consensual sexual intercourse. See 177 N.E.3d at 160-61 (Cypher, J., concurring) (highlighting murder’s effect of eliminating victim’s testimony at trial); Nath & Pratihari, supra note 21 at 1 (listing reasons why rapists murder their victims). The murdered victim is entirely unable to report the rape and then testify against the defendant, but the defendant has no similar reason to silence the victim through murder if the parties engaged in consensual sexual intercourse. See, e.g., supra text accompanying note 21 (highlighting how victim’s death complicates issue of consent); Commonwealth v. Perkins, 883 N.E.2d 230, 238 (Mass. 2008) (identifying defendant’s motive of preventing rape victim from identifying him); Commonwealth v. McCourt, 781 N.E.2d 808, 816 (Mass. 2003) (recognizing defendant inflicted fatal injuries on victim to conceal and avoid punishment for rape); Bryden, supra note 2, at 349 (emphasizing value of victim testimony in rape prosecutions).

\textsuperscript{41} See 177 N.E.3d at 154 (considering evidence in light most favorable to Commonwealth); id. at 160-61 (Cypher, J., concurring) (supporting jury’s inference of nonconsensual sexual intercourse under these circumstances); see also Commonwealth v. Witkowski, 169 N.E.3d 496, 503-04 (Mass. 2021) (noting jurors may infer victim had not moved after rape where no semen in underwear); Commonwealth v. Waters, 649 N.E.2d 724, 726 (Mass. 1995) (concluding sufficient evidence of lack of consent where victim stabbed and cried for help pre-mortem); People v. Story, 204 P.3d 306, 318 (Cal. 2009) (concluding jury not compelled to find lack of consent where victim strangled to death).}
having sexual intercourse with Brimage despite DNA evidence to the contrary, are sufficient to persuade a rational jury of Paige’s guilt beyond a reasonable doubt. 42

Although the SJC could have ended their discussion on the sufficiency of the evidence, it rightfully seized the opportunity to explicitly reject its reasoning in *Scesny*. 43 The *Scesny* court concluded that there was insufficient evidence to find the defendant guilty of aggravated rape by relying on misconceptions surrounding prostitutes’ victimization and lack of traditional indicia suggesting the victim used the utmost resistance—even though ample evidence indicated a lack of consent. 44 While evidence of resistance is useful in determining if the victim consented, it has never been essential to a conviction of rape in Massachusetts. 45 Further, consent to one sexual act does not imply consent to another, and studies suggest that prostitutes are actually more frequently raped than others. 46 As Justice Cypher pointed out, the *Scesny* holding furthers the traditional, common-law

42. See 177 N.E.3d at 154 (concluding evidence sufficient to satisfy all elements of charged offense); Commonwealth’s Brief, supra note 6, at 25-27 (discussing facts showing Paige raped Brimage with such brutality and force to cause her death).
43. See 177 N.E.3d at 154 (addressing flawed reasoning in *Scesny*).
44. See id. at 160-61 (Cypher, J., concurring) (explaining problems with *Scesny* holding); see also Commonwealth v. Witkowski, 169 N.E.3d 496, 504-05 (Mass. 2021) (rejecting defendant’s insufficient evidence argument although conflicting inference logically possible); Commonwealth v. Waters, 649 N.E.2d 724, 726 (Mass. 1995) (affirming jury’s lack-of-consent finding where victim had sexual intercourse with defendant and stabbed twenty-six times); People v. Story, 204 P.3d 306, 318 (Cal. 2009) (reasoning death by strangulation strongly suggests lack of consent to sexual intercourse). Stated simply, the *Scesny* court could not have properly considered the evidence and all reasonable inferences from it, in the light most favorable to the Commonwealth, in concluding that the only evidence from which a jury could reasonably infer lack of consent was that the victim was found with her pants and underwear pulled down to her knees and suffered severe injuries. See Commonwealth v. *Scesny*, 34 N.E.3d 17, 25-26 (Mass. 2015) (concluding insufficient evidence of lack of consent). In so concluding, the *Scesny* court impossibly relied upon the prejudicial misconception that the victim must have consented because she was a prostitute and did not resist hard enough for her clothing to rip or sexual organs to sustain injuries from the sexual intercourse. See id. at 25 (negating finding of lack of consent); see also supra notes 22-23 (explaining traditional, but rejected, views of prostitution and resistance evidence).
45. See supra note 23 and accompanying text (discussing use of physical resistance to establish consent despite insufficiency); Anderson, supra note 23, at 968 (noting whether or not resistance required, it often determines consent). But even if resistance evidence was essential at the time of this holding, that the defendant brutally beat the victim and some of his blood was deposited onto her body at an angle suggesting “some type of action or force had been involved” indicates that she exercised some physical resistance, especially because ligature strangulation—not the beating—was her cause of death. See Commonwealth v. *Scesny*, 34 N.E.3d 17, 21, 23-24 (Mass. 2015) (conceding these facts, despite not concluding they support charge of rape).
46. See 177 N.E.3d at 161 (Cypher, J., concurring) (dismissing notion of prostitutes more likely to consent than others); supra note 22 (overviewing persistence of false, harmful beliefs relating to prostitutes in common law). The *Scesny* court accepted the defendant’s argument that “the victim was a prostitute and therefore had consensual sex with men,” even though the SJC had previously rejected the idea that consent in one instance implies consent in another. See Commonwealth v. *Scesny*, 34 N.E.3d 17, 24-25 (Mass. 2015) (articulating defendant’s argument); Commonwealth v. McKay, 294 N.E.2d 213, 218 (Mass. 1973) (highlighting little probative value of victim’s unchastity on consent issue).
subordination of women by obscuring the violent context in which the sexual intercourse occurred, so the SJC properly rejected its reasoning here.47

Commonwealth v. Paige is a step in the right direction toward reforming rape law in Massachusetts, but the legislature should go further and adopt an affirmative consent standard.48 An affirmative consent standard would more effectively serve the legislative purpose of protecting aggravated rape victims because it would eliminate many of the prosecutorial issues that arise under current law.49 The presiding court would no longer consider arbitrary matters that effectively put the alleged victim on trial and bar many people from receiving justice as indicators of consent, such as the victim’s silence; prior sexual history with the defendant and others; and lack of physical injuries to sexual organs.50 The focus

47. See 177 N.E.3d at 157-61 (Cypher, J., concurring) (rejecting Scesny’s reasoning in context of femicide’s finality). Rape is a crime that encompasses more than just sexual intercourse—it also involves violence and domination that is calculated to humiliate, injure, and degrade the typically-woman victim, and this is especially so with aggravated rape. See Commonwealth v. McCourt, 781 N.E.2d 808, 815 (Mass. 2003) (discussing reason for broad application of rape statute); see also Crocker, supra note 20, at 690 (noting rape overwhelmingly affects women). Additionally, consent is not a defense to a charge based on serious injuries allegedly inflicted during sexual encounters in Massachusetts, so consent should similarly not be a defense to felony murder with a predicate offense of aggravated rape involving the infliction of serious bodily injury. See 177 N.E.3d at 161 (Cypher, J., concurring) (explaining prior holdings support this lack-of-consent inference); see also Commonwealth v. Appleby, 402 N.E.2d 1051, 1060 (Mass. 1980) (holding consent defense inapplicable to acts of violence committed during sexual encounters).

48. See Hilgert, supra note 30, at 899 (stating real reform requires state legislatures to adopt affirmative consent standard); Little, supra note 32, at 1324–25 (arguing affirmative consent standard addresses present issues with rape law). Although critics of affirmative consent speculate that such a standard would make for unjust prosecutions, it instead creates a realistic framework for courts to evaluate the cases that are complicated by the current standard, including those where traditional indicia suggesting utmost lack is lacking. See Tuerkheimer, supra note 32, at 467-68 (dismissing critics’ fears in light of case history in “pure” affirmative consent jurisdictions); Brown et al., supra note 30, at 406-07 (arguing affirmative consent tailored to every challenging situation); Leary, supra note 32, at 8 (proffering affirmative consent provides legal clarity). Critics also argue that an affirmative consent standard impinges on the spontaneity of sexual acts and implicitly requires people to “carry permission slips,” but it is not hard or burdensome to ensure there is mutual desire and enthusiasm through words or actions. See Brown et al., supra note 30, at 406 (contrasting arguments of advocates and critics); Little, supra note 32, at 1347 (dismissing claim of affirmative consent resulting in death of romance or spontaneous sexuality).

49. See supra note 33 and accompanying text (highlighting issues with current consent standard solved by adoption of affirmative consent); see also Commonwealth v. McCourt, 781 N.E.2d 808, 815-16 (Mass. 2003) (explaining legislature’s purpose of protecting victims in criminalizing aggravated rape). Massachusetts could adopt a criminal statute from California’s education statute, which explicitly addresses many pertinent issues in its definition of affirmative consent and subsequent provisions eliminating a mistake-of-fact defense in certain circumstances, although Massachusetts does not recognize such a defense to rape under any circumstances. See CAL. EDUC. CODE § 67386 (West 2020); Commonwealth v. Lopez, 745 N.E.2d 961, 966 (Mass. 2001) (recognizing mistake-of-fact defense inapplicable to lack of consent element).  

50. See Leary, supra note 32, at 33-34 (discussing how affirmative consent standards assist with otherwise difficult prosecutions); Acquaintance Rape, supra note 21, at 2342 (noting general presumption of consent if victim previously consented to sexual intercourse with defendant); Anderson, supra note 22, at 52 (explaining rape law morally condemns unchaste women); Wiener, supra note 23, at 145-46 (urging courts to examine consent, rather than evidence of victim’s resistance). Today, many cases are not even prosecuted at all because the prosecutor deems it unlikely that a jury will find lack of consent, even in the absence of outward manifestations of consent. See Leary, supra note 32, at 29-30 (noting prosecutors influenced by victim’s character, credibility,
would instead be whether the person who is actually on trial obtained the alleged victim’s affirmative consent through overt words or actions.51 The benefits of presuming lack of consent—absent evidence of affirmative consent—are especially clear in a case where the victim has been murdered, as they are unable to testify to their outward manifestations of lack of consent.52

In Commonwealth v. Paige, the SJC rejected the erroneous view that jurors cannot infer lack of consent where the evidence shows that the defendant severely injured and killed the victim proximate to having sexual intercourse with them. It properly did so in this case, where the facts certainly warranted the finding that Paige contemporaneously raped and murdered Brimage. While this holding will make it slightly easier for a jury to find lack of consent in cases where the defendant effectively silenced the victim through murder, it is but one small step toward a larger reform that is necessary in Massachusetts. The legislature should adopt an affirmative consent standard to bring Massachusetts even farther away from its historically sexist past and provide justice to a greater number of victims.

51. See supra text accompanying notes 30, 33 (highlighting issues affirmative consent helps to resolve). If the clear legislative purpose of the aggravated rape statute was to protect victims and punish violent sex offenders, then it makes sense to move away from a standard that focuses on what the alleged victim did to show their lack of consent. See Commonwealth v. McCourt, 781 N.E.2d 808, 815-16 (Mass. 2003) (interpreting aggravated rape offense’s purpose); Saferight, supra note 30, at 436 (noting common law rape definition largely designed to protect men’s interests, not victims’ rights). Because the victim’s silence, lack of outward resistance, or prior sexual history would no longer carry the same weight as they generally have for so long in the common law, victims will have a clearer path to justice. See text accompanying note 33 (noting these facts insufficient, standing alone, to establish consent); Hilgert, supra note 30, at 899 (arguing laws predicated on accused’s actions provide greater clarity and protection for victims).

52. See 177 N.E.3d at 160-61 (Cypher, J., concurring) (stressing why jurors should infer lack of consent under like circumstances); see also Bryden, supra note 2, at 349 (emphasizing rape conviction easier to obtain when victims testify); Diehl, supra note 23, at 511-12 (noting victim testimony often only way to prove lack of consent).