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SJC-13728

COMMONWEALTH vs. ADONIS CARVAJAL.

Essex. May 5, 2025. - August 28, 2025.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, Dewar, & Wolohojian, JJ.

Rape. Youthful Offender Act. Deoxyribonucleic Acid. Evidence, Buccal swab. Search and Seizure, Buccal swab, Probable cause, Fruits of illegal search. Probable Cause. Constitutional Law, Probable cause. Practice, Criminal, Instructions to jury, Verdict. Words, "Serious bodily injury."

Indictments found and returned in the Essex County Division of the Juvenile Court Department on January 7, 2019.

A motion to compel the defendant to provide a deoxyribonucleic acid sample was heard by Kerry A. Ahern, J., and the cases were tried before her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Chaleunphone Nokham for the defendant.

Kathryn L. Janssen, Assistant District Attorney, for the Commonwealth.

Taylor Henley & Sarah LoPresti, Committee for Public Counsel Services, for youth advocacy division of the Committee for Public Counsel Services & another, amici curiae, submitted a brief.

GEORGES, J. On a November morning in 2018, three males broke into a home in Methuen. During the home invasion, one of them raped the victim. Subsequent investigation led to the arrest of Adonis Carvajal, then a juvenile. After taking him into custody, police subjected him to a buccal swab[1] to obtain a sample of his deoxyribonucleic acid (DNA) -- without a warrant.

The Commonwealth later conceded that this initial swab was unlawful, and a Juvenile Court judge suppressed the resulting DNA evidence. Nonetheless, following the defendant's indictment as a youthful offender on multiple charges, the same judge granted the Commonwealth's motion to compel a second buccal swab. The DNA evidence originating from that second swab was admitted at trial. The defendant was convicted of aggravated rape and other offenses.

On appeal, the defendant challenges the order compelling a second DNA sample and the jury instructions on "serious bodily injury" as an element of aggravated rape. We discern no error in the judge's determination that the Commonwealth established probable cause to support the compelled postindictment DNA collection, and we affirm that order.

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[1] "A buccal swab 'involves the rubbing of a swab on the interior surface of the cheek.'" Commonwealth v. Maxwell, 441 Mass. 773, 774 n.1 (2004), quoting Doe v. Senechal, 431 Mass. 78, 79 n.4, cert. denied, 531 U.S. 825 (2000).

Although the jury instructions were not erroneous, the general verdict does not reveal which theory the jury accepted in finding the defendant guilty of aggravated rape. Because one of the alternate theories was not supported by sufficient evidence, the conviction cannot stand. Accordingly, we vacate the conviction of aggravated rape and remand the matter to the Superior Court. On remand, the Commonwealth may elect to proceed to sentencing on the lesser included offense of rape or retry the defendant on the aggravated rape charge limited to the underlying felony theory.[2]

Background. We begin with a summary of the evidence the jury could have found, reserving a fuller account of the facts for our analysis of the defendant's claims.

1. Underlying crime. On the morning of November 27, 2018, the victim was alone in her second-floor apartment in Methuen. She awoke to the sound of voices and footsteps approaching her bedroom. Three hooded males -- later identified as the defendant, Jonathan Thompson, and a juvenile -- entered the room, telling the victim, "Don't look at us," and "Don't scream." Although the victim did not see any weapons, she noticed a "big bulge" in the pocket of one of the intruders --

[2] We acknowledge the amicus brief in support of the defendant submitted by the youth advocacy division of the Committee for Public Counsel Services and Citizens for Juvenile Justice.

presumed to be the defendant -- who wore "a gray and green jacket," appeared "a little heavier" than the others, and "had a beard."

After the intruders demanded that she "[g]et the jewelry, get the money and the drugs," the victim pointed out the location of her jewelry but said that there were no drugs or money. When asked whether her husband had "a Mercedes Benz," she explained that the men "had made a mistake" -- that the car belonged to a neighbor in a different building.[3] Realizing their mistake, the defendant and the juvenile left, while Thompson stayed behind to watch the victim. After the juvenile and the defendant unsuccessfully attempted to break into the correct apartment, the defendant returned to the victim's apartment. There, he switched places with Thompson, who joined the juvenile outside of the neighboring apartment.

Alone with the victim, the defendant asked, "Now, what am I going to do with you?" He told her she needed "to give [him] something" in exchange for not reporting him. Still noticing the "bulge" in his pocket, the victim began to cry and promised not to tell anyone. The defendant responded, "[T]hat [is] not enough," and began touching her breasts. He ordered her to "get

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[3] Another apartment building was located directly in front of the victim's apartment, with the two buildings sharing a driveway.

on all fours." When she refused, he exposed himself, touched his penis, grabbed her hand, and demanded she "touch him." After she complied, he grabbed her hair and forced his penis into her mouth. He then ejaculated into her mouth, and she "spat [the ejaculate] out to the side." He demanded that she clean him, but she was too shaken to move. He then instructed her to lock herself in the bathroom for ten to fifteen minutes. She complied.

Meanwhile, the juvenile and Thompson successfully broke into the neighboring apartment; stole clothes, jewelry, and shoes; and returned to Thompson's vehicle.[4] The juvenile then sent a text message to the defendant indicating that it was "time to go." About ten minutes later, the defendant rejoined them and said, "I hit that."

After some time, the victim left the bathroom and called her husband; it was 10:11 A.M. Her husband contacted the police. Methuen police officers responded and interviewed the victim. Additionally, personnel from the State police crime laboratory -- including a civilian analyst and sworn officers -- processed the crime scene and collected two swabs of biological material from the location the victim identified as the area where she had spat out the assailant's ejaculate. These samples

[4] The defendant, Thompson, and the juvenile had driven to the victim's home together.

were obtained before the defendant had been identified as a suspect. The subsequent investigation led to his identification, arrest, and indictment as a youthful offender for aggravated rape and other offenses.

2. Motion to compel DNA sample. As noted above, following the defendant's arrest, police obtained a DNA sample through a warrantless buccal swab. Before trial, the defendant moved to suppress that evidence, and the motion was allowed without opposition from the Commonwealth. Years after the initial buccal swab, the Commonwealth moved to compel the defendant to submit to a second, postindictment buccal swab.

The Commonwealth supported its motion with an assistant district attorney's affidavit describing the investigation. In the affidavit, which the motion judge credited, the assistant district attorney averred that she did not "rely on the DNA standard improperly obtained from the [defendant]." Exhibits attached to the affidavit included (1) a laboratory report detailing the DNA profile developed from the sperm collected from the crime scene prior to the defendant's identification and arrest, (2) a still image from doorbell camera footage showing an individual matching the victim's description of her assailant, and (3) a photograph from the social media profile of an individual named "Fatboy Amoney."

At an evidentiary hearing on the motion, the Commonwealth called two witnesses. The first, a Methuen police officer, testified that during the investigation officers recovered footage from a doorbell camera mounted outside the neighboring apartment. The recording, captured on the day of the rape, showed a male individual matching the victim's description of her assailant -- i.e., "a heavier set" male wearing a "white, blue, green type of jacket." A still image of this individual was admitted in evidence.

The Methuen officer further testified that a fingerprint recovered from the second break-in location -- the neighboring apartment -- was matched to Thompson. Based on this identification, officers proceeded to the address listed on Thompson's driver's license and probation records. There, they found Thompson seated in a running vehicle that matched one captured in the doorbell camera footage. As officers approached, a passenger got out of the vehicle, fled, and threw a firearm over a nearby fence. Both Thompson and the passenger, later identified as the juvenile, were apprehended.[5]

While in custody, Thompson and the juvenile admitted to breaking into both the victim's and the neighboring apartment.

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[5] According to the assistant district attorney's affidavit, Thompson was wearing shoes reported stolen from the neighboring apartment.

In their recorded interviews, which were admitted as exhibits at the evidentiary hearing, they identified the defendant as the third accomplice. They referred to him by the name "Anthony," as well as nicknames "A Money" and "FatBoy," and stated that he lived on a particular street in Lawrence. Police searched a popular social media website and located a profile under the name "Fatboy Amoney." A photograph taken from the social media profile, admitted in evidence at the evidentiary hearing, depicts a man wearing a jacket identical to the one seen in the doorbell camera footage and described by the victim.

Methuen police, with assistance from the Lawrence police department as described below, confirmed that the defendant resided on the Lawrence street identified by Thompson and the juvenile. The police then obtained and executed warrants for the defendant's arrest and search of his residence. At the defendant's home, police recovered the jacket seen in both the doorbell camera footage and social media photograph, as well as other items reported stolen from the neighboring apartment.

The second witness to testify at the evidentiary hearing, a Lawrence police department employee, described that department's electronic report management system, which was used to identify the defendant as the third participant and to locate his address. The witness explained that the system allows users to search by street name or nickname and retrieve any reports

referencing those terms. By searching the street name associated with the defendant's address and known nicknames, officers were able to identify the defendant and confirm his residence.

Following the evidentiary hearing, the judge -- who had previously allowed the defendant's motion to suppress and later presided over the trial -- granted the Commonwealth's motion to compel a second buccal swab. The defendant complied with the order, and the resulting DNA evidence was admitted at trial.

3. Procedural history. The defendant was indicted as a youthful offender on six charges, including aggravated rape in violation of G. L. c. 265, § 22 (a).[6] Following a jury trial in the Juvenile Court, he was found guilty of aggravated rape, home invasion, and two counts of daytime breaking and entering with intent to commit a felony, one involving placing a person in fear. In a subsequent jury-waived trial, the defendant was

[6] The defendant was also charged with home invasion, in violation of G. L. c. 265, § 18C; breaking and entering in the daytime with the intent to commit a felony and placing a person in fear, in violation of G. L. c. 266, § 17 (as to the victim's apartment); breaking and entering in the daytime with the intent to commit a felony, in violation of G. L. c. 266, § 18 (as to the neighboring apartment); larceny of property with a value over $1,200, in violation of G. L. c. 266, § 30 (1); and carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a). At trial, the larceny charge was dismissed after the Commonwealth conceded there was insufficient evidence as to the value of the items taken, and the defendant was found not guilty of carrying a firearm without a license.

adjudicated a youthful offender. The judge sentenced him to from eighteen to twenty years in State prison on the aggravated rape conviction, followed by concurrent five-year probationary terms on the remaining convictions.

The defendant timely appealed, and we transferred the case from the Appeals Court on our own motion.

Discussion. 1. Buccal swab. Generally, once an indictment has been returned, the Commonwealth may obtain a buccal swab from a defendant upon a showing of probable cause -- specifically, by demonstrating "that the sample sought will probably provide evidence relevant to the question of the defendant's guilt." Commonwealth v. Maxwell, 441 Mass. 773, 778-779 & n.10 (2004). This showing may be made through affidavits and supporting documentary evidence, as appropriate to the circumstances and subject to judicial discretion. Id. at 779. In addition, the defendant is entitled to an adversarial hearing before the order may issue. Id.

Although the defendant argues that the second, court-ordered buccal swab must be suppressed as the inadmissible "fruit" of the initial, warrantless collection of his DNA, we are not persuaded. The proper inquiry is not whether the prior illegality can be undone, but whether the subsequently seized evidence has been obtained "by means sufficiently distinguishable to be purged of the primary taint."

Commonwealth v. Frodyma, 393 Mass. 438, 441 (1984), quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963). Here, the second buccal swab rests on precisely such a distinguishable foundation: a valid postindictment court order supported by probable cause.

Although DNA is often characterized as immutable, see Commonwealth v. Gaynor, 443 Mass. 245, 256 (2005) ("DNA remains the same no matter how many times [it] is . . . tested" [citation omitted]), this characterization reflects its practical constancy rather than absolute biological immutability. This consistent nature enables DNA to serve as a reliable identifier over time. Nonetheless, the enduring nature of DNA does not render all subsequent collections after an initial unlawful collection presumptively tainted. A second DNA sample obtained pursuant to a lawful postindictment order, supported by an independent probable cause determination, constitutes a distinct (and admissible) item of evidence. See Commonwealth v. Pinney, 97 Mass. App. Ct. 392, 402 n.8 (2020), S.C., 487 Mass. 1029 (2021) (noting that while buccal swab obtained after unlawful arrest was suppressed, "[n]othing in our decision should be interpreted as prohibiting the Commonwealth from seeking a court order for the defendant's buccal swab on remand. Such an application, of course, cannot rely on evidence suppressed under our decision").

The practical constancy of DNA is legally irrelevant where the subsequent collection is based on a constitutionally valid process, independent of any prior illegality. As we have emphasized, evidence is not rendered "sacred and inaccessible" merely because it follows an unlawful seizure. Frodyma, 393 Mass. at 441, quoting Nix v. Williams, 467 U.S. 431, 441 (1984). See Commonwealth v. Nickerson, 79 Mass. App. Ct. 642, 647 (2011).

We are guided by Justice Lowy's apt analysis in Commonwealth vs. Pinney, Supreme Judicial Ct., No. SJ-2021-0085 (Mar. 29, 2021), where, in a closely analogous circumstance, he concluded that the legality of the preindictment sample becomes moot once that sample is suppressed. "This is . . . no longer a suppression issue," he wrote, where a second sample is lawfully sought, postindictment, based on evidence independent of the first buccal swab. Id.

Similarly, the Supreme Court of New Jersey has held that a fresh DNA sample, obtained through lawful means, retains its character as "evidence in its own right" (emphasis in original). State v. Camey, 239 N.J. 282, 308-310 (2019). "Notwithstanding the immutability of DNA information," the court wrote, "the second buccal swab does not lose its character as a second search and seizure merely because the new buccal evidence will

provide the same uniquely identifying information . . . that the initial buccal evidence provided." Id. at 289.

These persuasive authorities recognize a key point: the constitutional exclusion of one item of evidence does not bar the Commonwealth from later obtaining similar evidence through lawful means, provided it is supported by an independent and sufficient evidentiary basis. Simply put, where a defendant's DNA sample was initially obtained unlawfully, the exclusionary rule does not impose a blanket prohibition on all future access to the defendant's DNA; rather, it bars only the use of evidence that exploits that initial illegality. That distinction is dispositive here. The evidentiary record confirms that the subsequent collection of DNA was based on independent, lawful grounds, untainted by the prior violation.

In seeking the second swab, the Commonwealth submitted a credited affidavit from an assistant district attorney who had reviewed the relevant reports and interviewed both investigating officers and percipient witnesses. The affidavit expressly stated that the prosecutor did not rely on the previously obtained DNA profile in moving to compel the second sample. Instead, the motion was supported by independent evidence, including a forensic report analyzing the DNA profile generated from sperm recovered from the victim's bedroom floor that was

obtained before the defendant was identified, arrested, or subjected to the initial unlawful buccal swab.

Moreover, evidence was presented that visually connected the defendant to the victim's assailant. According to the testimony of the Methuen officer who helped prepare the warrant for the defendant's residence, the victim described her attacker as a heavier-set male wearing a white, blue, and green jacket. This description was consistent with one of the individuals captured on the doorbell camera footage, as could be seen in the still image taken from the footage. The jacket in the image not only appeared to be the same one the defendant wore in his social media profile photograph, but also matched the jacket later recovered from the defendant's home, further corroborating his identity as the suspect.

Information obtained from the other participants in the home invasion also linked the defendant to the crime. In their recorded interviews conducted the day after the assault, Thompson and the juvenile both identified the defendant as the third participant -- by name, nickname, and street address. Specifically, they referred to him as "Fatboy" and "A Money" -- nicknames linked to the defendant's social media account and corresponding images -- and told police that he lived in Lawrence. Finally, combining the testimony of the Methuen officer with that of the Lawrence police department employee,

the witnesses explained that, through coordination with the Lawrence police department and the use of its electronic records system, they were able to identify the defendant by his legal name and confirm his address.

Based on this evidence, the motion judge concluded that the Commonwealth had satisfied its burden under Maxwell, establishing probable cause to believe that a second DNA sample would likely yield evidence relevant to the question of the defendant's guilt. The judge appropriately found that this new request was rooted in lawfully obtained, independent evidence and not derivative of the suppressed DNA profile. We discern no error in that conclusion.

Finally, because the second buccal swab was obtained pursuant to a court order supported entirely by evidence untainted by the initial illegality, the exclusionary rule does not apply.[7] That rule -- designed to deter constitutional

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[7] In allowing the motion to compel the second buccal swab, the judge alternatively relied on the inevitable discovery exception to the exclusionary rule, finding the defendant's DNA would have been discovered by lawful means and that applying the exception would not undermine the deterrent purpose of the exclusionary rule.

On appeal, the defendant contends that the inevitable discovery doctrine is inapplicable because buccal swabs are not routinely performed by police and are typically used only to advance investigations against a particular suspect. The Commonwealth responds that discovery of the defendant's DNA was inevitable, as probable cause existed and a court order could have been obtained. However, the Commonwealth primarily relies

violations by suppressing illegally obtained evidence -- bars the admission not only of the unlawfully obtained item itself, see Commonwealth v. Fredericq, 482 Mass. 70, 78 (2019), but also of its derivatives, see Wong Sun, 371 U.S. at 488.

Here, the Commonwealth did not seek to admit the original, unlawfully obtained buccal swab, nor evidence derived from it. Instead, it introduced a second swab obtained through an independent, constitutionally sound process: a court order based on probable cause developed from sources wholly unrelated to the initial misconduct. Although the DNA profile obtained from the second swab is biologically identical to that derived from the first, the second swab constitutes a distinct item of evidence lawfully acquired through an independent legal process -- not the same evidence as the first swab.

The doctrines of independent source and inevitable discovery apply where the Commonwealth seeks to admit the same evidence initially discovered through unlawful means but can later demonstrate that the evidence either would have been or, in fact, was obtained through a constitutionally sound process. For example, in Commonwealth v. Wilson, 486 Mass. 328, 335-337 (2020), the independent source exception permitted admission of

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on the independent source doctrine, which permits admission of evidence initially discovered through unlawful means but later acquired independently and untainted -- such as the postindictment swab here.

evidence seized under a warrant untainted by a prior unlawful search for the same information. Similarly, in Commonwealth v. Estabrook, 472 Mass. 852, 865, 870 (2015), S.C., 496 Mass. (2025), a lawful warrant authorized seizure of the very evidence previously viewed in an earlier, invalid search.

The same is true of the inevitable discovery doctrine. In Commonwealth v. O'Connor, 406 Mass. 112, 114-115 (1989), we affirmed admission of a plastic bag unlawfully seized because it would inevitably have been found moments later during a valid inventory search. See Commonwealth v. Hernandez, 473 Mass. 379, 386-387 (2015) (inevitable discovery exception applied to same evidence obtained from what was otherwise unlawful search); Commonwealth v. Linton, 456 Mass. 534, 557-559 (2010), S.C., 483 Mass. 227 (2019) (same). In each of these cases, the Commonwealth was permitted to introduce the same evidence initially discovered unlawfully but later shown to be independently or inevitably discovered through lawful means.

This case is fundamentally different. Here, the Commonwealth initiated a new evidentiary process, rooted in constitutionally obtained evidence, to collect a distinct sample. Although the initial buccal swab of the defendant was unlawfully gathered, that unlawful search does not require the exclusion of the DNA evidence obtained as a result of a second, different buccal swab gathered through an independent and lawful

chain of events. Because the second buccal swab was not obtained through the exploitation of the earlier constitutional violation, the exclusionary rule -- and, by extension, its exceptions -- are simply inapplicable.

2. Jury instruction. Having concluded that the DNA evidence was properly admitted, we turn to the defendant's challenge to the jury instructions. He contends that the judge erred by failing to define "serious bodily injury" as an aggravating factor for rape.[8]

We disagree. The statutory definition the defendant invokes -- drawn from the assault and battery statute, G. L. c. 265, § 13A (c) -- does not apply to aggravated rape under G. L. c. 265, § 22 (a), and the judge's instructions accurately reflected the applicable law.[9]

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[8] The judge instructed the jury, in relevant part:

> "This is an aggravated rape, which is a more serious form of rape, and it requires the Commonwealth to prove a third element beyond a reasonable doubt. In order to prove the defendant guilty of aggravated rape, the Commonwealth must prove beyond a reasonable doubt that the rape resulted in or was committed with acts resulting in serious bodily injury . . . ."

[9] The Commonwealth contends that the defendant's claim is unpreserved because he did not object to the jury instruction on aggravated rape as given, nor did he request any additional instruction on serious bodily injury as an aggravating factor for aggravated rape. The defendant instead requested instruction on the "serious bodily harm" element under the youthful offender statute. "We need not decide whether the defendant's claim of error was preserved, because we conclude

We evaluate jury instructions as a whole to determine how a reasonable juror would understand them. Commonwealth v. Young, 461 Mass. 198, 207 (2012). While trial judges are not required to use any particular phrasing, the instructions must convey the correct legal standard. Commonwealth v. Marrero, 427 Mass. 65, 72 (1998), S.C., 493 Mass. 338 (2024). Furthermore, "[i]nstructions that convey the proper legal standard . . . are deemed correct" (citation omitted). Commonwealth v. Adams, 495 Mass. 600, 607 (2025).

Here, the judge properly instructed the jury. See Massachusetts Superior Court Criminal Practice Jury Instructions § 3.1.1(d) (Mass. Cont. Legal Educ. 3d ed. 2018).[10] See also

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there was no error." Commonwealth v. Benson, 453 Mass. 90, 94 n.4 (2009).

[10] The Superior Court jury instruction for aggravated rape states, in relevant part:

> "The defendant is also charged with aggravated rape. Aggravated rape is a more serious offense than rape, and it requires the Commonwealth to prove one additional element beyond a reasonable doubt. In order to prove the defendant guilty of aggravated rape, the Commonwealth must prove beyond a reasonable doubt that the rape resulted in or was committed with acts resulting in serious bodily injury . . . .
>
> "[It is for you to determine whether (the complainant/name) was raped with acts resulting in serious bodily injury.]" (Footnotes omitted.)

Massachusetts Superior Court Criminal Practice Jury Instructions § 3.1.1(d) (Mass. Cont. Legal Educ. 3d ed. 2018).

Adams, 495 Mass. at 607. Neither G. L. c. 265, § 22, nor the Superior Court instructions define "serious bodily injury," and the term is not so obscure as to require further explanation. Cf. Commonwealth v. The Ngoc Tran, 471 Mass. 179, 186-187 (2015) (term "mental impairment" need not be defined in jury instruction).

We decline the defendant's invitation to graft the definition of "serious bodily injury" from the assault and battery statute, G. L. c. 265, § 13A (c), onto the aggravated rape statute, G. L. c. 265, § 22 (a). The statutory history forecloses such an approach. The Legislature added "serious bodily injury" as an aggravator in the rape statute in 1980. See St. 1980, c. 459, § 6 (enacting new definition of forcible rape that included serious bodily injury as aggravating factor). By contrast, the definition of "serious bodily injury" in § 13A (c) was not enacted until 2002 -- more than two decades later. See St. 2002, c. 35, § 1. Had the Legislature intended to align the meaning of the term across statutes, it could have done so at that time or in the years since. It has not.

Moreover, long before the enactment of § 13A (c), Massachusetts courts consistently recognized that injuries such as abrasions, bruising, and physical pain, sufficed to establish the "serious bodily injury" aggravating factor under § 22 (a). See, e.g., Commonwealth v. Pontes, 402 Mass. 311, 319 n.7 (1988)

(abrasions on victim's head and lower abdominal pain sufficient to establish serious bodily injury); Commonwealth v. Coleman, 30 Mass. App. Ct. 229, 235 (1991) (jury could have found "swollen eye, swollen face, and facial bruises" constituted serious bodily injury); Commonwealth v. Sumner, 18 Mass. App. Ct. 349, 352, 354 (1984) (bruises and scrapes on victim sufficient to establish serious bodily injury).

That settled interpretive history confirms that the term, as used in the aggravated rape statute, stands on its own and need not mirror the later-adopted definition in an unrelated statute. Had the Legislature intended to define "serious bodily injury" in the context of aggravated rape, it could have amended § 22 (a) accordingly -- but it has not done so, despite adopting multiple other amendments in the almost fifty years since the law's enactment. See Commonwealth v. J.G., 100 Mass. App. Ct. 731, 737-738 (2022). See also Commonwealth v. Fleury, 489 Mass. 421, 427 (2022) ("We presume that the Legislature enacts legislation with an aware[ness] of the prior state of the law as explicated by the decisions of this court" [quotation and citation omitted]). Accordingly, the judge did not err by declining to define "serious bodily injury" in the aggravated rape jury instructions.[11]

[11] The defendant further argues that the trial court's instruction on "serious bodily harm" under the youthful offender

However, the absence of instructional error does not resolve all concerns, as a distinct issue -- apparent from the record -- compels us to vacate the aggravated rape conviction. See Commonwealth v. Simpson, 428 Mass. 646, 648-649 (1999) (appellate court may consider issue apparent on record). The Commonwealth proceeded on three aggravating theories: (1) serious bodily injury, (2) commission during an underlying felony, and (3) joint enterprise. The jury returned a verdict without specifying which theory it adopted.

When a general verdict may rest on multiple theories, at least one of which is unsupported by sufficient evidence, the conviction cannot stand unless the record demonstrates that the jury "necessarily and unavoidably" relied on a theory supported by sufficient evidence. Commonwealth v. Plunkett, 422 Mass. 634, 638 (1996). See Commonwealth v. Quiles, 488 Mass. 298, 308-309 (2021), cert. denied, 142 S. Ct. 1237 (2022).

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statute confused or misled the jury regarding the Commonwealth's burden to prove "serious bodily injury" as an aggravating factor for aggravated rape. We disagree. Before addressing "serious bodily harm," the judge made clear that the instruction pertained to the elements of a youthful offender adjudication. The court then described what would constitute "serious bodily harm" in that context. Assuming without deciding that "serious bodily harm" and "serious bodily injury" are distinct standards -- but see Commonwealth v. J.A., 478 Mass. 385, 388 n.6 (2017) ("We use 'serious bodily harm' and 'serious bodily injury' interchangeably") -- we presume the jury followed the judge's clear instructions and did not conflate the two. Commonwealth v. Jeune, 494 Mass. 808, 821 (2024).

In this case, while the evidence was sufficient to support the aggravating factor of an underlying felony,[12] it did not support the other two alternative theories of aggravated rape submitted to the jury. Specifically, there was insufficient evidence to support a joint enterprise theory. The victim testified unequivocally that the defendant alone committed the rape. See Commonwealth v. Jansen, 459 Mass. 21, 27–28 (2011) (no joint enterprise where evidence was insufficient that sexual acts amounted to "united act"). See also Commonwealth v. Medeiros, 456 Mass. 52, 60 (2010) (Commonwealth must prove beyond reasonable doubt that at least two individuals committed rape to establish joint enterprise).

Nor does the record support the theory that the rape resulted in serious bodily injury. Although not dispositive, the victim gave no testimony -- on either direct or cross-examination -- that she sustained any physical harm. The only reference to a possible injury appears in the victim's medical record, admitted as a trial exhibit, which notes that the victim "endorse[d] a mild headache." However, the same record also reflects the victim's statement to medical personnel that "there

[12] In the jury instructions, the judge identified two possible underlying offense: breaking and entering with intent to commit a felony, placing a person in fear; and unlawfully carrying a firearm. As previously noted, the jury found the defendant not guilty as to the latter charge.

was no physical assault." While courts have recognized that serious bodily injury can exist even in the absence of life-threatening harm,[13] the evidence here falls short. A brief, unelaborated reference to a mild headache -- uncorroborated by testimony or clinical context -- is insufficient to establish beyond a reasonable doubt that the rape caused serious bodily injury. See Commonwealth v. McCourt, 438 Mass. 486, 497 (2003).

Because the jury were instructed on all three alternative theories of aggravated rape, only one of which was supported by the evidence, and the general verdict does not disclose which theory the jury adopted, the conviction cannot stand. Plunkett, 422 Mass. at 638 ("the general rule in the Commonwealth is that there must be a new trial if, as here, a jury, given two theories of guilt, returned a general verdict, and the evidence supported a guilty verdict on only one of those theories"); Commonwealth v. Kickery, 31 Mass. App. Ct. 720, 724 (1991), overruled on other grounds by McCourt, 438 Mass. at 496 n.12.

Although the evidence was insufficient to support the aggravated rape conviction, it does support the lesser included offense of rape. See Commonwealth v. French, 462 Mass. 41, 47 (2012) ("Any failure as to the element of aggravation [in

[13] See, e.g., Pontes, 402 Mass. at 319 n.7; Coleman, 30 Mass. App. Ct. at 235; Sumner, 18 Mass. App. Ct. at 352, 354.

aggravated rape] does not affect the lesser included offense"). Accordingly, we vacate the conviction of aggravated rape and remand the matter to the Superior Court. On remand, the Commonwealth may elect to proceed with sentencing on the lesser included offense of rape or to retry the aggravated rape charge, limited to the underlying felony theory, the only theory for which there was sufficient evidence at the first trial. See Commonwealth v. Morrison, 494 Mass. 763, 775 n.12 (2024); Commonwealth v. Niemic, 483 Mass. 571, 599 (2019); Kickery, 31 Mass. App. Ct. at 725.

Conclusion. We affirm the order compelling postindictment DNA collection. The conviction of aggravated rape is vacated, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.