COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPREME JUDICIAL COURT
FAR No.

APPEALS COURT
No. 18-P-684

COMMONWEALTH

v.

FELIX RONDON

APPLICATION FOR FURTHER APPELLATE REVIEW

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(1) REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Now comes the Commonwealth pursuant to Mass. R. App. P. 27.1 and respectfully requests that this Court grant further appellate review of the defendant's conviction of Indecent Assault and Battery on a Person 14 or Over by a District Court jury, which conviction was recently vacated by the Appeals Court in an unpublished memorandum and order pursuant to its Rule 1:28, Commonwealth vs. Rondon, Mass. Appeals Court, 18-P-684, slip op. (May 30, 2019) (appended hereto as **Exhibit A**).

(2) STATEMENT OF PRIOR PROCEEDINGS[1]

On June 24, 2015, the Malden District Court

[1] References in this Application are as follows: to the defendant's brief and record appendices filed with the Appeals Court, (DBr.[page]) and (R[vol.].[page]), and to the transcript volumes, (T[vol.].[page]).

issued a complaint (Docket No. 1550CR001463), charging the defendant with one count of Indecent Assault and Battery on a Person 14 or Over ("Indecent A&B") in violation of G.L. c. 265, § 13H. (R1.4,11) He was arraigned the same day. (R1.4,6)

After an initial trial date of September 21, 2016, was continued by Justice Matthew J. Nestor, the defendant was tried before Justice Robert A. Brennan and a jury on October 11, 2016.[2] (R1.5,7,8;R2.32-40; T1.1) The jury convicted the defendant of Indecent Assault and Battery. (R1.5,46) That same day, Justice Brennan sentenced the defendant to 2.5 years in the house of correction, 18 months to serve with the balance suspended for 3 years during which time he was to remain alcohol free with random breath tests and to have no contact with the victim or witnesses. (R1.5, 47) The defendant filed a Notice of Appeal on October 11, 2016. (R1.8,48)

In a letter dated October 14, 2016, the Malden District Court clerk's office notified the parties that the recording device in the trial session was not fully operational for the defendant's trial and that, as a result, there would be no transcript of the trial. (R1.8;R2.14) Thereafter the parties submitted filings and participated in a hearing before the trial

[2] A docket entry purporting to record a trial date of "10-12-16" (R1.7) appears to be in error.

judge to reconstruct the record pursuant to then-applicable Mass. R. App. P. 8(c) (R1.8-9;R2.3-31;T2), ultimately submitting a Joint Proposed Statement of the Evidence and Proceedings, which Justice Brennan approved on January 17, 2018 (R1.9;R2.29-41). On February 7, 2018, the defendant filed a second Notice of Appeal. (R1.10;R2.42)

The defendant's appeal entered on the docket of the Appeals Court on May 8, 2018. On March 12, 2019, oral argument on this case was held in the Appeals Court before Justices Rubin, Kinder, and Singh. On May 30, 2019, the Appeals Court (Rubin, Kinder, Singh, JJ.) issued an unpublished Memorandum and Order Pursuant to its Rule 1:28, vacating the judgment of conviction of Indecent A&B and setting aside the jury's verdict. Neither party is currently seeking rehearing in the Appeals Court.

(3) SHORT STATEMENT OF FACTS[3]

On June 23, 2015, the victim was with her daughter and her daughter's friend outside an address

[3] Although the Appeals Court's decision includes a concise summary of the facts, the following statement presents a more complete factual picture based entirely on the Joint Proposed Statement approved by Justice Brennan. (R2.29-41) Where the defendant on appeal challenges the sufficiency of the evidence supporting his conviction (DBr.32-42), the evidence and the inferences therefrom are presented in the light most favorable to the Commonwealth. See Commonwealth v. Cowels, 425 Mass. 279, 280 (1997).

on Main Street in Everett around 8:00 P.M. (R2.33) Along with other neighbors who were outside on this summer evening, Elexis Benton was sitting on the steps of the house next door to the victim and her companions. (R2.33-34) The victim was talking to her daughter when she felt someone grab or squeeze her buttocks from behind. (R2.33) This was not a slap or a touch but a grab that the victim estimated lasted up to 15 seconds. (R2.33)

The victim turned around and saw an intoxicated man she did not know, later proved circumstantially to be the defendant. (R2.33-34) He was visibly drunk with red, bloodshot eyes and an odor of alcohol. (R2.34) Although unsteady on his feet, the defendant did not appear to have trouble walking and was not stumbling, tripping, or falling down as he walked. (R2.34) The victim yelled at the defendant for "sexually assaulting" her and told him to leave, and he walked in Ms. Benton's direction. (R2.34)

Benton had seen the man, whom she did not know, walking by the victim before he "sexually assaulted" her by grabbing her buttocks when walking past her. (R.34) When Ms. Benton also told him to leave, the man started screaming profanities.[4] (R2.34)

[4] A lone reference in the reconstruction of Benton's testimony to "the defendant" instead of "the man" (R2.34) appears to be an editing lapse that is not in any way reflective of an in-court identification.

Although the defendant walked away, he remained in the area and did not actually leave the scene. (R2.34) When police Officers Sabella and Butler arrived, the defendant was across the street from the victim, surrounded by a group of people who were screaming at him. (R2.34) Officer Sabella observed that the visibly drunk defendant was unsteady on his feet, had bloodshot and glassy eyes, was swaying while standing, and was slurring his speech. (R2.34) Officer Sabella also saw a bottle of alcohol by the defendant's feet. (R2.34) Officers Sabella and Butler arrested the defendant. (R2.34)

The victim observed the man who grabbed her speak to the responding police officers, and she saw that the man who grabbed her was eventually arrested by the police. (R2.34) When Officer Sabella spoke with the victim on scene, she appeared to be upset. (R2.34)

The defendant's theory of the case was that the incident was an accident. (R2.38) He did not testify himself but called Sue[5] as a witness. (R2.35) However, although Sue had been next door with Benton that evening and called 911, she testified that she did not see anything. (R2.35) Through impeachment with prior inconsistent statements, the defendant elicited that Sue had previously said that the

[5] A pseudonym. The witness's real name is impounded. (R1.6)

incident could have been an accident based on what Benton had described to her. (R2.35-36)

(4) STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

The Commonwealth is seeking further appellate review to dispel the Appeals Court's erroneous notion that the law governing opinions on "ultimate issues" (see Mass. G. Evid. § 704) categorically precludes Benton's non-expert testimony that she personally observed someone "sexually assault" the victim by grabbing her buttocks. The Appeals Court's reductivist formalism finds no support in the case law it cited and substitutes a reflexive "magic words" approach for the contextual, fact-sensitive analysis necessary to determine whether a civilian's colloquial shorthand conclusion based on first-hand observations sufficiently risks encroaching on the province of the jury that exclusion is appropriate.

Although confirmation that Benton's testimony was admissible would remove the legal basis for the Appeals Court's vacatur of the conviction, the Appeals Court's prejudice analysis was also fatally flawed.

(5) BRIEF STATEMENT INDICATING WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

A. The Appeals Court Erred In Concluding That Benton Was Precluded From Describing The Buttocks Grab She Saw In Colloquial Terms As A "Sexual Assault."

The Appeals Court concluded that Benton's use of the term "sexual assault" was "an opinion about the legal significance" of the buttocks grabbing she witnessed. (Slip Op. at 5) Especially where Benton is not a doctor, nurse examiner, police officer, or lawyer whom jurors would think was opining on the legal significance of anything in recounting what she saw with her own eyes, this was legal error.

This Court has repeatedly held that "[t]he rule that witnesses in describing conduct should tell what they saw and heard does not foreclose the use of words of summary description." Commonwealth v. Canty, 466 Mass. 535, 544 (2013), quoting Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 647 (1961). Here, Benton testified as a percipient witness to what she saw and heard and used words of summary description. The jury heard her underlying observations -- a visibly drunk man walked past the victim and grabbed her buttocks before screaming profanities (R2.34) -- and were free to assess her summary description for themselves. Benton at most permissibly "touche[d] on an ultimate issue" and did not "directly offer an opinion regarding the defendant's guilt." Canty, 466 Mass. at

543 (emphases added). In fact, where she did not identify the defendant at trial and only described the conduct of an unknown, unnamed individual, Benton did not directly offer any opinion about anything the defendant did at all.

Nor did Benton's observation that this incident was a "sexual assault" invade the province of the jury. It was the jury's province to determine whether the defendant was guilty of Indecent Assault and Battery (a specific crime with discrete elements that must be proved beyond a reasonable doubt) and not whether he had committed a "sexual assault," which is a colloquial shorthand used in daily conversation, the popular press, and on social media to describe a range of conduct.[6] See, e.g., Canty, 466 Mass. at 542, quoting 1 McCormick on Evidence § 11, at 70; Commonwealth v. Maylott, 65 Mass. App. Ct. 466, 470 (2006) (officers' use of word "resisting" in resisting arrest trial "falls under the umbrella of permissible shorthand expression"), citing Liacos, Brodin, & Avery, Massachusetts Evidence §§ 7.4, 7.5, at 379–383

[6] See https://www.womenshealth.gov/relationships-and-safety/sexual-assault-and-rape/sexual-assault#16 (explaining that "[s]exual assault can also be verbal, visual, or non-contact," and includes, inter alia, "[s]ending someone unwanted texts") (last accessed May 31, 2019); Lindy West, "Aziz, We Tried to Warn You," New York Times (Jan. 17, 2018) (observing that "what your dad called the thrill of the chase is now what some people are calling assault") (**Exhibit B**).

(7th ed. 1999); State v. Goss, 293 N.C. 147, 154 (1977) (rejecting defendant's claim that victim's use of "rape" was "impermissible legal conclusion" where term clearly "convenient shorthand" "amply defined" by balance of her testimony).

To the extent that, as the Appeals Court concluded (Slip Op. at 6), Benton's use of the term "sexual assault" communicated her inferential conclusion that the conduct she observed was intentional, it conveyed no more than her unequivocally permissible testimony that she observed someone "grab" the victim's buttocks. Nor would she have been prevented from communicating that same inferential conclusion of intentional conduct in even stronger terms by, e.g., testifying to a "sexual attack." Although "attack" is synonymous with "assault" and also connotes intentional conduct, it has no independent legal significance. The term "sexual" is also not prohibited in this context. To the extent it overlaps with the statutory term "indecent," the jury could have been instructed as a matter of law that a woman's buttocks are a "private area" the unjustified touching of which is "indecent." Commonwealth v. Mosby, 30 Mass. App. Ct. 181, 184 (1991). "[A] lay opinion by a percipient witness" like this "shaped by observations too numerous or subtle to mention," Canty, 466 Mass. at 542, is invaluable to a jury. See Mass. G. Evid. §

701. It was likely for this reason that the defendant repeatedly tried to put evidence before the jury that Sue believed the touching was accidental (R2.35-36), testimony that would have "touched" on the ultimate issue of intentionality to the same extent.

The cases cited by the Appeals Court in support of its conclusion that "the lay witness's characterization of the incident as a sexual assault sufficed to invade the province of the jury" (Slip Op. at 8) do not remotely support the proposition and, in fact, do not even address "ultimate issue" claims. In Commonwealth v. Montanino, 409 Mass. 500, 504 (1991), a non-percipient, experienced sexual assault investigator offered an opinion that impermissibly bolstered the victim's credibility. Commonwealth v. Pleasant, 366 Mass. 100, 102-103 (1974), involved the erroneous admission of a non-percipient witness's hearsay statement that she had told the defendant that she had heard "that he and his brother had killed the victim." In Commonwealth v. Duff, 245 Mass. 81, 85 (1923), the Court found inadmissible as "harmful to the defendant" a hearsay statement attributed to the defendant's wife that she suspected her husband "of having improper relations" with the minor he was charged with carnally abusing. Of the many reasons the Duff court listed for excluding this testimony (key among them that it was speculation voiced outside

the defendant's presence by an out-of-court declarant), invading the province of the jury on an ultimate issue was not one of them. Id. Nothing in the case suggests that a civilian witness could not have used the colloquial shorthand of "improper relations" in conjunction with other direct observations of the defendant and the victim.

Benton's percipient testimony is also distinguishable from cases where this Court and the Appeals Court have limited expert conclusions that risk vouching for the credibility of a victim's report of abuse. See, e.g., Commonwealth v. Colin C., 419 Mass. 54, 57-61 (1994); Commonwealth v. McNickles, 22 Mass. App. Ct. 114, 120-121 (1986); Commonwealth v. Mendrala, 20 Mass. App. Ct. 398, 402-404 (1985). Cf. Commonwealth v. Dargon, 457 Mass. 387, 394-398 (2010). In observing that "similar testimony by someone qualified as an expert might have been even more prejudicial" (Slip Op. at 8), the Appeals Court here purported to follow Canty, 466 Mass. at 545, while actually flipping it on its head. Under Mass. G. Evid. § 704, "[a]n opinion is not objectionable just because it embraces an ultimate issue," and Canty teaches that "the risk of prejudice arising from the admission of an opinion that closely touches on the ultimate issue of guilt is less with lay opinion than with expert opinion . . . because it is less likely

that a jury would forego independent analysis of the facts and bow too readily to the opinion where it is not reached through the specialized knowledge of an expert." 466 Mass. at 545 (internal quotation omitted). Thus even if Benton's testimony is deemed to touch or embrace an "ultimate issue," it was presumptively admissible under § 704 and not subject to exclusion based on the balancing envisioned by Canty, 466 Mass. at 542-544: her observations were not "enhanced with a cloak of professional [or] institutional authority," Dargon, 457 Mass. at 394-395 (quotation omitted), so there was little risk the jury would forego independent analysis and bow to her.

B. The Appeals Court's Decision Will Sow Confusion.

The Appeals Court stated that "when a witness in fact expresses an opinion on the defendant's guilt or innocence, as in this case, it is categorically inadmissible, and the witness's lay or expert status is irrelevant." (Slip Op at 5-6 (second emphasis added)) Aside from noting a possible exception in child sexual assault cases, the court did not contemplate any potential nuances, such as concomitant salutary instructions. See, e.g., Commonwealth v. Lugo, 63 Mass. App. Ct. 204, 206–209 (2005) (no error in fire investigator's expert testimony that fire was intentionally set where he did not offer opinion as to

guilt or innocence and judge told jurors they would be instructed on expert testimony, were ultimate judges of facts, and could accept or reject opinion).

The Appeals court did not include any citation to authority following its assertion of this expansive "categorical" rule, and any such rule prohibiting words that evoke in some way the language of the charged offense would create problems across a range of offenses. By investing certain common terms with such profound significance, the Appeals Court would require witnesses to assiduously avoid their normal, everyday vocabulary in favor of unnecessary circumlocutions whenever statutory offense language overlaps with common parlance. For example, the Appeals Court's logic would preclude the victim in Commonwealth v. Dabney, 478 Mass. 839, 842, 844, cert. denied, 139 S. Ct. 127 (2018), from testifying that her trafficker "choke[d]" her because that is a synonym for strangling that communicates intentional conduct and the case also charged Strangulation (G.L. c. 265, § 15D); a doctor in a case of Poisoning (G.L. c. 265, § 28) could not testify that the cause of observed symptoms was acute and chronic "poisoning," cf. Commonwealth v. Keown, 478 Mass. 232, 234 (2017), cert. denied, 138 S. Ct. 1038 (2018); and the civilian in Commonwealth v. Hokanson, 74 Mass. App. Ct. 403, 403-404, (2009), whom defendant, while simulating a

trigger finger, told that "next time I come in here, boom, boom, boom, boom. Every fuckin' one of them. Nobody will be standing," could not testify that he decided to grab the first person he could and tell them "That guy just threatened to shoot a bunch of you officers" (emphasis added) because the case charged Threats (G.L. c. 275, § 2). The Appeals Court's erroneous categorical rule would also preclude First Complaint testimony that the victim told the defendant's mother "she would not be returning to the house because the defendant had raped her." Commonwealth v. Sealy, 467 Mass. 617, 621 (2014) (emphasis added). This would frustrate the purposes of the First Complaint doctrine by keeping the key details of a victim's exact words from the jury.

The Appeals Court's designation of certain words as essentially radioactive would give rise to a motion for mistrial or appellate claim whenever a witness lapsed into the vernacular to describe conduct in terms used by the operative statute. It is therefore essential for this Court to clarify that the question of when testimony that "touches on an ultimate issue" becomes a prohibited "opinion regarding the defendant's guilt or innocence," Canty, 466 Mass. at 543, does not reduce to any magic words formula.

C. The Appeals Court Erred In Its Prejudice Analysis.

Even assuming that the challenged aspect of Benton's testimony should not have been admitted, further appellate review is still appropriate to correct the Appeals Court's flawed prejudice analysis.

The Appeals Court erroneously concluded that "the evidence of intent was not overwhelming" (Slip Op. at 6). Particularly given the inherent limitations of a reconstructed record (a fact the Appeals Court glossed over (Slip Op. at 12 n.3)),[7] the evidence of intentional conduct was indeed overwhelming. The victim testified that she felt someone grab or squeeze her buttocks from behind for up to 15 seconds and that it was not a slap or a touch. (R2.33) Where she yelled at the man for "sexually assaulting" her,[8] it is clear that she did not experience this touching as accidental. Benton's testimony (minus the cumulative "sexual assault" language) also conclusively establi-

[7] The defendant in fact suggested that this and other "potential meritorious claims" could not properly be reviewed on appeal because the record reconstruction was inadequate. (DBr.8,21,51)

[8] The Appeals Court did not address the admissibility of this fact testimony relating what the victim yelled in the heat of the moment. Indeed, it was part of the incident itself, not a post-hoc assessment of it, and so was "admissible to establish fully what occurred during the main episode in suit; it also bore directly on the frame of mind of the victim, her apprehension as to the defendant's intentions, which went to the proof of the crimes," and its probative value was not substantially outweighed by "danger of prejudice not correctible by the good sense of the jury." Commonwealth v. Chalifoux, 362 Mass. 811, 816 (1973).

shed an intentional touching. She testified that the unnamed person she observed was walking by the victim and, when passing her, "grabb[ed]" her buttocks. (R2. 34) She specifically said that he was unsteady on his feet but not stumbling or falling down. (R2.34) When he was told to leave, he did not make apologies or excuses for his lack of balance but instead screamed profanities at Benton and Sue. (R2.34)

The defendant tried repeatedly to elicit substantive testimony from Sue that the touching was an accident but never actually managed to do so. There was thus no affirmative evidence supporting the defense. Contrast Mendrala, supra, at 398 n.5. The Appeals Court (Slip Op. at 6) focused on evidence of the defendant's alcohol consumption, but intoxication on its own is not a defense to the general intent crime of Indecent A&B. See Commonwealth v. Egerton, 396 Mass. 499, 504 (1986). Where no one saw the defendant fall at any point, his intoxicated conduct supports an inference of intentional touching prompted by lowered inhibitions and poor judgment more readily than it does a drunken accident.

Finally, where the parties debated whether or not this was intentional or accidental in their closing arguments (R2.38), the jury would have understood that the ultimate decision on intentionality was theirs notwithstanding anything Benton said on the stand.

CONCLUSION

For the foregoing reasons, this Court should allow the Commonwealth's Application for Further Appellate Review.

Respectfully Submitted,

For the Commonwealth,
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Dated: June 6, 2019

Exhibit A

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 18-P-684

COMMONWEALTH

vs.

FELIX RONDON.

Pending in the Malden District

Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

Judgment vacated.
Verdict set aside.

By the Court,

Joseph F. Stanton, Clerk

Date May 30, 2019.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-684

COMMONWEALTH

vs.

FELIX RONDON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from his conviction of indecent assault and battery, G. L. c. 265, § 13H. We vacate the conviction.

Sufficiency of the evidence. The defendant first argues that the Commonwealth presented insufficient evidence, viewed in the light most favorable to the Commonwealth, for a rational finder of fact to find each element of the crime beyond a reasonable doubt. See Commonwealth v. Latimore, 378 Mass. 671, 676-678 (1979). The complainant testified that she felt a man, who smelled like alcohol but did not have trouble walking, "grab or squeeze" her buttocks from behind for up to fifteen seconds. The complainant also testified that she yelled at the man for "sexually assaulting" her. The man then walked away but remained in the area until police arrived. Another witness for

the Commonwealth testified that she observed the whole incident and that the man "sexually assaulted" the complainant by grabbing her buttocks. According to this witness, he appeared intoxicated and was unsteady on his feet, but was not stumbling or falling down. The man was identified as the defendant by a police officer witness who responded to the scene.

The defendant called a witness who had been present at the scene, and she testified that she did not see any of the incident. She also testified that she had never told either the defendant's private investigator or defense counsel's supervisor that she had observed the incident and thought that it looked like an accident. The defendant then called his investigator and defense counsel's supervisor, both of whom testified that this witness had told them that she had observed the incident and that it looked like an accident. The judge instructed the jury that the investigator's and the supervisor's testimony could only be used for impeachment purposes.

"To prove indecent assault and battery on a person age fourteen or older, the Commonwealth is required to establish that the defendant committed 'an intentional, unprivileged, and indecent touching of the victim.'" Commonwealth v. Kennedy, 478 Mass. 804, 810 (2018), quoting Commonwealth v. Marzilli, 457 Mass. 64, 67 (2010). The defendant argues that the evidence did not establish the element of intent because it does not disprove

accident beyond a reasonable doubt. We disagree. A rational juror could have found that a "grab or squeeze" of the complainant's buttocks by the defendant lasting up to fifteen seconds was not accidental despite his apparent drunkenness.

The defendant also argues that the Commonwealth's case deteriorated to the point of insufficiency because of evidence that the first defense witness had at some point told the defendant's other two witnesses that she thought the incident looked like an accident. Even assuming, counterfactually, that the jury were permitted to consider this evidence substantively, it would at best show a witness's characterization of the series of the events that the jury were free to reject, especially where, as here, the witness denied ever making those statements. See Commonwealth v. Valentin, 420 Mass. 263, 267 n.4 (1995) (mere conflict in evidence does not constitute deterioration). There was sufficient evidence.

Improper testimony. Although we conclude that there was sufficient evidence to convict, the conviction must be vacated because the percipient witness's testimony, given over the defendant's objection, that the defendant "sexually assaulted" the complainant invaded the province of the jury.

"It is fundamental that '[n]o witness should be permitted to give his opinion directly that a person is guilty or innocent . . . . [S]uch matters are not subjects of opinion testimony.'"

Commonwealth v. Hesketh, 386 Mass. 153, 161 (1982), quoting Grismore v. Consolidated Prods. Co., 232 Iowa 328, 361 (1942). The witness's statement that the defendant sexually assaulted the complainant was in effect a statement that the defendant was guilty of indecent assault and battery. See Commonwealth v. Mendrala, 20 Mass. App. Ct. 398, 402, 404 (1985) (doctor's opinion that patient "was a victim of a sexual assault" constituted "direct opinion . . . beyond the witness's appropriate province as an expert witness," where defendant was convicted of indecent assault and battery and attempted rape), quoting Commonwealth v. Montmeny, 360 Mass. 526, 528 (1971). As Mendrala makes clear, "sexual assault" is a vernacular term for an assaultive sex crime, including indecent assault and battery. See Commonwealth v. Aitahmedlamara, 63 Mass. App. Ct. 76, 76 (2005) (describing victim of indecent assault and battery under G. L. c. 265, § 13F, as "sexual assault victim"). Indeed, the statute criminalizing kidnapping aggravated by sexual assault refers to indecent assault and battery as a crime that constitutes "sexual assault." G. L. c. 265, § 26. And, of course, a witness need not use the precise name of the crime to express an opinion that the defendant is guilty of it. See Commonwealth v. Woods, 419 Mass. 366, 375 (1995) (police officer's testimony that defendant "was involved in a drug sale" impermissibly expressed opinion on defendant's guilt of two

charges, including distribution of cocaine within 1,000 feet of building).

The Commonwealth argues that the rule against expressing opinions on a defendant's guilt does not "foreclose the use of words of summary description." Commonwealth v. Canty, 466 Mass. 535, 544 (2013), quoting Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 647 (1961). But "sexual assault" is not a summary description of the act that the witness observed, namely the defendant grabbing the victim's buttocks. It is an opinion about the legal significance of that act. Contrast Canty, supra (police officer's statement that defendant was "probably impaired" was summary description of his observation that defendant was modestly inebriated). The Commonwealth is also wrong that the fact that this statement was made by a lay witness as opposed to an expert affects the analysis whether the statement expressed an opinion on the defendant's guilt. The identity of the speaker might be relevant in determining the admissibility of evidence that, while not expressing an opinion about the defendant's guilt, comes close to it. In those cases, "where an opinion comes close to an opinion on the ultimate issue of guilt or innocence, the probative value of the opinion must be weighed against the danger of unfair prejudice," id. at 543-544, and it is possible that an expert opinion might be more unfairly prejudicial than a lay opinion. But, when a witness in

fact expresses an opinion on the defendant's guilt or innocence, as in this case, it is categorically inadmissible,[1] and the witness's lay or expert status is irrelevant.

Because the claim of error was preserved, vacatur is required unless the error was not prejudicial. "An error is not prejudicial if it 'did not influence the jury, or had but very slight effect'" (citation omitted). Id. at 545.

Here, the defendant's only argument to the jury was that he drunkenly stumbled into the complainant by accident, and he therefore contested only the element of intent: he did not dispute that he touched the complainant on the buttocks, and did not argue that the touching was consensual. Because it would be unnatural to describe a sexual assault as unintentional, the witness's inadmissible statement thus went directly to the only contested issue in the case. And the evidence of intent was not overwhelming, as the police officer that testified for the Commonwealth provided evidence that could have supported the defendant's accident theory: the police officer testified that the defendant was "visibly drunk[,] was unsteady on his feet, had bloodshot and glassy eyes, was swaying while standing, and was slurring his speech. The [defendant] had a bottle of alcohol by his feet as well." This evidence is far weaker than

[1] A possible exception to this rule, inapplicable here, relates to child sexual assault victims. See Mendrala, 20 Mass. App. Ct. at 404 n.7.

the evidence in Mendrala, where we reversed convictions of indecent assault and battery and attempted rape based solely on the prejudicial effect of inadmissible sexual assault opinion testimony even though the complaining witness testified that the defendants took turns poking and touching her vagina with their fingers near a car in which they had been driving, a police witness who happened to be nearby testified that he saw "a young woman with her pants down coming out of the darkness near the rear of the . . . car," and a doctor testified for the Commonwealth that there was "increased redness" in the complaining witness's vaginal area. Mendrala, 20 Mass. App. Ct. at 399, 402, 406. Finally, the Commonwealth argued in closing that the complainant was "sexually assaulted" by the defendant. Though the defendant objected to the trial prosecutor's use of the term "sexually assaulted," this objection was overruled. In light of this, we cannot say our "conviction is sure that the error did not influence the jury, or had but very slight effect" (citation omitted). Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983). See Commonwealth v. Montanino, 409 Mass. 500, 504 (1991) (police officer's testimony, "be he considered as a lay witness or as an expert witness," that bolstered complaining witness's credibility constituted prejudicial error); Commonwealth v. Pleasant, 366 Mass. 100, 101-103 (1974) (witness's testimony that she said to defendant, "I heard that

you . . . killed . . . [the victim]" was prejudicial error even though defendant responded, "I didn't do anything," and even though defendant had been seen pointing shotgun at victim, who was found dead later that evening of shotgun wounds); Commonwealth v. Duff, 245 Mass. 81, 85 (1923) (admission of opinion evidence that defendant's wife believed him to have had "improper relations" with complainant required reversal).

We disagree with the Commonwealth's argument that the error was not prejudicial because the witness also testified that the defendant grabbed the complainant's buttocks. Prejudice is not vitiated by the fact that the witness also described the crime she testified the defendant committed. Nor do we agree with the Commonwealth's argument that the witness's lay status rendered her statement nonprejudicial. While similar testimony by someone qualified as an expert might have been even more prejudicial, see Canty, 466 Mass. at 545, the lay witness's characterization of the incident as a sexual assault sufficed to invade the province of the jury. See Montanino, 409 Mass. at 504; Pleasant, 366 Mass. at 103; Duff, 245 Mass. at 85.

Speedy trial. The defendant argues that retrial should not be permitted because the violation of his constitutional right to a speedy trial requires dismissal of the indictment with prejudice. See Commonwealth v. Balliro, 385 Mass. 618, 624

(1982). We disagree, because we hold that his constitutional speedy trial right was not violated.[2]

As an initial matter, the Commonwealth is incorrect that constitutional speedy trial claims can be waived by mere failure to raise the claim below. See Commonwealth v. Horne, 362 Mass. 738, 742 (1973). A constitutional speedy trial claim can be waived only if the waiver "was knowingly and voluntarily made," id., quoting Barker v. Wingo, 407 U.S. 514, 529 (1972), and there is no suggestion in the record that the defendant knowingly and voluntarily waived his constitutional speedy trial claim.

The defendant was arraigned on June 24, 2015, and the one-day trial occurred on October 11, 2016. We will assume without deciding that this delay of approximately one year and four months was sufficient to constitute a "'presumptively prejudicial' delay" that suffices to trigger a constitutional speedy trial analysis. Commonwealth v. Butler, 464 Mass. 706, 710 (2013), quoting Doggett v. United States, 505 U.S. 647, 652 (1992). This analysis requires us to consider four factors: "the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and

[2] In his reply brief, the defendant clarified that his speedy trial argument was only under the Massachusetts and United States Constitutions, not Mass. R. Crim. P. 36, 378 Mass. 909 (1979).

prejudice to the defendant." Commonwealth v. Dirico, 480 Mass. 491, 506 (2018).

Although a delay of one year and four months is not ideal, it is one-half of the length of the delay in Dirico, which the Supreme Judicial Court held was not sufficient to violate the defendant's speedy trial rights. Next, although several reasons account for the delay, the defendant complains only about a three-week continuance of the trial. The docket shows four scheduled discovery compliance and jury selection (DCE) dates, one of which was continued, accounting for 149 days. (The docket shows that one of the four DCE dates was held, but is unclear whether the other two were held or continued.) The defendant also filed a motion to suppress on March 1, 2016. A hearing on that motion was originally scheduled to be heard on April 12, but was continued to June 21 because there was no interpreter available. The judge denied the motion that same day. The motion to suppress thus took 112 days to resolve, seventy of which were due to the interpreter issue. The trial was scheduled for September 21, 2016. The defendant appears to have acquiesced in all these delays.

The defendant appeared ready for trial on the scheduled date, at which point the prosecutor represented that a police witness whose testimony was essential to identify the defendant had not received a summons because, while the district

attorney's office had sent the summons to the police department, the officer had not received it. The prosecutor offered at the hearing to attempt to establish identification through another witness who was present, but the judge ruled that that witness's in-court identification would be inadmissible. It is therefore clear that in seeking a continuance the prosecution was not "deliberately attempting to delay the trial for the purpose of hindering the defense," id., and that this three-week delay resulted from the Commonwealth's negligence. "[O]ur toleration of . . . negligence varies inversely with its protractedness" (citation omitted), id., and here the Commonwealth's negligence caused only a three-week delay.

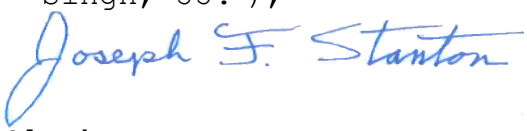
The third factor, the defendant's assertion of his rights, weighs strongly against the defendant, for, although he objected to the three-week continuance, he did not raise a speedy trial claim below. There is also no indication that he objected to any other parts of the delay. The fourth factor, that of prejudice, also weighs against the defendant. The defendant asserts that the delay caused his own witness, whom he had to impeach as described above, to testify that she did not observe the incident. While impairment of the defense is the "'most serious' concern when evaluating whether the defendant was prejudiced," id. at 508, quoting Barker, 407 U.S. at 532, the defendant's assertion that the delay impaired his defense is

pure speculation -- there is no suggestion in the record that it was the delay that caused the witness to testify this way. The defendant also points out that the delay caused him to be subject to three weeks of global positioning system monitoring. This does constitute prejudice, but it cannot suffice to turn a three-week delay into a speedy trial violation. See id. (eight days of pretrial incarceration does not create a speedy trial violation).

The judgment is vacated and the verdict is set aside.[3]

So ordered.

By the Court (Rubin, Kinder & Singh, JJ.[4]),



Clerk

Entered: May 30, 2019.

[3] In light of our disposition, we need not address the defendant's arguments regarding purported errors in jury instructions and the inadequacy of the reconstructed record.

[4] The panelists are listed in order of seniority.

Exhibit B

The New York Times

Aziz, We Tried to Warn You

By Lindy West

Jan. 17, 2018

In 1975, 42 years before the comedian Aziz Ansari reportedly brought a date home to his apartment and repeatedly tried to initiate sex with her after she told him “next time” and “I don’t want to feel forced,” Susan Brownmiller published “Against Our Will: Men, Women, and Rape.”

“All rape is an exercise in power,” Brownmiller wrote in 1975, “but some rapists have an edge that is more than physical.” Sometimes, the 1975 text suggests, rapists “operate within an emotional setting or within a dependent relationship that provides a hierarchical, authoritarian structure of its own that weakens a victim’s resistance, distorts her perspective and confounds her will.” “Against Our Will” has been available in American libraries since its publication, which was in 1975.

Ansari would have been 7 or 8 years old in 1991 when a feminist group at Antioch College fought to establish the school’s Sexual Offense Prevention Policy (informally the “Antioch rules” or, more commonly, the “infamous Antioch rules”) requiring affirmative and sustained consent throughout all sexual encounters, and he was 10 when “Saturday Night Live” mocked the Antioch rules in a sketch that cast Shannen Doherty as a “Victimization Studies” major.

Also in 1991, Anita Hill testified before the Senate Judiciary Committee, detailing repeated sexual harassment at the hands of her boss, Clarence Thomas, who is still on the Supreme Court. Like Ansari, I, too, was 8 in 1991, and I vividly recall my mother explaining sexual harassment to me in the living room of my childhood home: “For example, a man might say, ‘I have a big penis, and I bet you’d like me to —’ well, you know.” She cut off, disgusted.

In 2008, Jessica Valenti and Jaclyn Friedman edited the anthology “Yes Means Yes!: Visions of Female Sexual Power and a World Without Rape,” seven years before Ansari released his own book, “Modern Romance: An Investigation,” in which he explores dating and sex in the digital age.

In the summer of 2014 (perhaps as Ansari was writing his own book), the California Legislature passed a bill requiring “affirmative, conscious, and voluntary agreement to engage in sexual activity,” unleashing a debate on the efficacy of “yes means yes” that consumed the blogosphere for months. “Lack of protest or resistance does not mean consent, nor does silence mean consent,” the bill stated. Feminist publications covered the issue exhaustively. In October 2014, Ansari appeared on “The Late Show With David Letterman” and declared himself a feminist.

In 2015, two years before Ansari stuck his fingers in a woman’s mouth who’d just told him “no, I don’t think I’m ready to do this,” according to the woman’s account, which was published this past weekend, Kate Harding published “Asking for It: The Alarming Rise of Rape Culture — and What We Can Do About It,” in which she described sexual assault as “not a ‘mistake’ but a deliberate decision to treat another person like

a soulless object." The same year, Rebecca Traister of New York Magazine argued for the need to look beyond consent to systems of power in an essay titled "The Game Is Rigged: Why Sex That's Consensual Can Still Be Bad."

There is a reflexive tendency, when grappling with stories of sexual misconduct like the accusations leveled at Ansari this past weekend — incidents that seem to exist in that vast gray area between assault and a skewed power dynamic — to point out that sexual norms have changed. This is true. The line between seduction and coercion has shifted, and shifted quickly, over the past few years (the past few months, even). When I was in my 20s, a decade ago, sex was something of a melee. "No means no" was the only rule, and it was still solidly acceptable in mainstream social circles to bother somebody until they agreed to have sex with you. (At the movies, this was called romantic comedy.)

What's not true is the suggestion that complex conversations about consent are new territory, or that men weren't given ample opportunity to catch up.

The books and articles and incidents and perspectives I listed above are nowhere near comprehensive, nor are they perfect, nor are they all in alignment with one another. But they are part of an extensive body of scholarship and activism, and they have been there this whole time for anyone who cared enough to pay attention. You don't have to agree with the Antioch rules to be aware that they exist. You don't have to build a shrine to Brownmiller to internalize the fact that women and femmes are autonomous human beings, many of whom felt dehumanized and unsatisfied by the old paradigm.

The notion of affirmative consent did not fall from space in October 2017 to confound well-meaning but bumbling men; it was built, loudly and painstakingly and in public, at great personal cost to its proponents, over decades. If you're fretting about the perceived overreach of #MeToo, maybe start by examining the ways you've upheld the stigmatization of feminism. Nuanced conversations about consent and gendered socialization have been happening every single day that Aziz Ansari has spent as a living, sentient human on this earth. The reason they feel foreign to so many men is that so many men never felt like they needed to listen. Rape is a women's issue, right? Men don't major in women's studies.

It may feel like the rules shifted overnight, and what your dad called the thrill of the chase is now what some people are calling assault. Unfortunately, no one — even plenty of men who call themselves feminists — wanted to listen to feminist women themselves. We tried to warn you. We wish you'd listened, too.

Lindy West is the author of "Shrill: Notes From a Loud Woman" and a contributing opinion writer.

CERTIFICATE OF SERVICE

RE: Commonwealth v. Felix Rondon,
Supreme Judicial Court FAR No.
Appeals Court No. 18-P-684

I, Gabriel Pell, do hereby certify that on the date below I served the Commonwealth's Application for Further Appellate Review on the defendant by causing a copy of the same to be placed in our office depository for mailing, first class mail, postage prepaid, and by causing a copy to be electronically mailed, to his attorney:

Kathleen J. Hill, Esq.
Post Office Box 576
Swampscott, MA 01907
lookjhill@gmail.com

Signed under the pains and penalties of perjury,

Gabriel Pell

Gabriel Pell
Assistant District Attorney
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gabriel.pell@state.ma.us
BBO No. 672749

Dated: June 6, 2019

CERTIFICATE OF COMPLIANCE
Mass. R.A.P. 27.1(b)

Re: Commonwealth v. Felix Rondon,
Appeals Court No. 18-P-684

I, Gabriel Pell, hereby certify that this Application for Further Appellate Review complies with Rules 16(k), 20(a), and 27.1(b)(5) of the Massachusetts Rules of Appellate Procedure. Compliance with the applicable length limit of Rule 27.1(b)(5) was ascertained by use of Courier New size 12 font that produced 10 characters per inch on a total of 10 pages that are 8.5 inches in width and 11 inches in height.

By: Gabriel Pell

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Dated: June 6, 2019