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39 MAP 2020

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 39 MAP 2020

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

WILLIAM HENRY COSBY, JR.,
Appellant

BRIEF OF AMICUS CURIAE OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA IN SUPPORT OF THE COMMONWEALTH

Appeal from the December 10, 2019 Superior Court decision affirming the September 25, 2018 judgment of sentence of the Common Pleas Court of Montgomery County at CP-46-CR-0003932-2016.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court abuse its discretion in admitting five instances of prior crimes that refuted the sexual assault defendant's consent claim by revealing his common pattern or plan?

(Answered in the negative by the Superior Court).

2. Did the trial court err in refusing to enforce an alleged non-prosecution promise that did not in fact exist and failed to establish promissory estoppel?

(Answered in the negative by the Superior Court).

INTEREST OF AMICUS CURIAE

The Attorney General of Pennsylvania has a special interest in the ongoing development of the criminal law of the Commonwealth, including the rules of evidence and the law of promissory estoppel as applied to criminal prosecutions. The Attorney General is "the chief law enforcement officer of the Commonwealth," and is authorized "to investigate any criminal offense which he has the power to prosecute," as well as to "convene and conduct investigating grand juries." 71 Pa.C.S. § 732-206. In addition to directly investigating and prosecuting certain crimes, the Office of the Attorney General provides assistance and support to local District Attorneys upon request. Such assistance may include representation of the Commonwealth in any and all stages of criminal proceedings.

Certification pursuant to Pa.R.A.P. 531(b)(2):

No person or entity other than the amicus paid in whole or in part for the preparation of this brief, or authored this brief, in whole or in part.

STATEMENT OF THE CASE

Defendant presented himself as a mentor to the victim, a young woman. When they were alone, he persuaded her to take pills that he offered, ostensibly to relax her, but which altered her consciousness and induced paralysis. He then exploited the victim's helpless condition to sexually molest her. Later, when he was confronted with his conduct by the police and was sued in court, he claimed the victim consented.

In this appeal from his conviction on sexual assault charges, defendant claims the Superior Court should have found that the trial court abused its discretion in admitting five of his prior crimes that were relevant to rebut his consent defense. But the trial court's ruling is well supported by long-established law, and defendant cannot not meet his heavy burden of establishing an abuse of discretion.

In addition, defendant claims the Superior Court erred in affirming the trial court's finding that he enjoyed no enforceable non-prosecution promise, and he failed to meet the elements of promissory estoppel. Because the credibility determination of the trial court is controlling, and his alleged reliance on the supposed promise was unreasonable, there was no error.

Claim 1:

A.C., a former professional basketball player, met defendant in 2002 while she was working as Director of Basketball Operations at Temple University. After they were acquainted she became used to visiting defendant's home in Montgomery County. She regarded him as a mentor. As a celebrity in the entertainment industry, defendant indicated he could help her in such areas as "sportscasting or something in T.V." He also cultivated a relationship with her mother. At the time of the January 2004 sexual assault she was 30 years old and defendant was 66. On the night of the assault defendant invited A.C. over to discuss her planned career change, which she was finding stressful. After the victim returned from the bathroom defendant offered her three blue pills, telling her "These are your friends. They'll help take the edge off." Soon after taking the pills she began to experience double vision and began to slur her words. Defendant walked her to another room and put her on a sofa. The victim began to panic but was unable to speak or maintain consciousness. She was jolted awake when defendant forced his fingers into her vagina. He also fondled her breasts and placed her hand on his penis and masturbated himself with it. Paralyzed and unable to move or speak, A.C. was powerless to tell him to stop or physically resist the assault. In a later statement to police, defendant admitted giving the victim pills and also admitted to the sexual contact but claimed it was "petting" by mutual

consent. In a subsequent deposition he gave in a civil lawsuit, defendant admitted digitally penetrating A.C.'s vagina. He also discussed his use of Quaaludes with women he wanted to have sex with, but claimed the pills he gave A.C. were Benadryl (over-the-counter allergy medicine), and again claimed his sexual conduct with her was consensual.

Defendant was charged with three counts of aggravated indecent assault. At his April 2018 retrial[1] before the Honorable Steven T. O'Neill, the court admitted testimony concerning five prior crimes:

1. H.T. testified that in 1984 she was 22 years old and working as a model. Her agent told her that defendant was interested in mentoring young talent and had offered to assist her. After defendant spoke to H.T.'s parents on the phone she travelled to Reno, Nevada, where she was to meet with him at Harrah's. Instead a driver met H.T. at the airport and took her to a house outside of town, where defendant answered the door. Defendant then led H.T. through a purported acting lesson. At some point he left and returned with a glass of white wine. Although H.T. said she did not drink he instructed her it was a "prop" and to sip it to get into character. After doing so, H.T. suffered an altered mental state in which she could only recall "snap shots" of what happened. She recalled defendant asking if she

[1] A mistrial occurred in June 2017 because the jury deadlocked.

was relaxing into the part, and then waking up in a bed with defendant forcing his penis into her mouth. She did not immediately confront him or contact the police, but eventually described the assault to a psychologist and to her husband.

2. C.L. was 17 years old and attending high school in Las Vegas, Nevada, when she was put in touch with defendant in 1986. Defendant called C.L.'s home and spoke to her grandmother, and told C.L. he was interested in helping her with her planned career in acting and modeling. The first time she met defendant in person he came to her grandparents' home for a meal. C.L. graduated that same year and worked at the Las Vegas Hilton. Defendant invited her to meet with him in his room, the Elvis Presley Suite. C.L. understood that defendant was meeting with her to help her break into modeling. C.L. had a cold, and when they were alone defendant offered her a decongestant, then a shot of amaretto, and also a little blue pill, which she ingested, with a second shot of amaretto. As defendant sat behind C.L. and began to rub her shoulders, she felt woozy and said she wanted to lie down. He led her to a bedroom, and after lying on the bed she found she was no longer able to move. She was aware of what was happening but could do nothing to stop it. Defendant lay down next to her and began pinching her breasts and rubbing his genitals against her leg. She felt something warm on her leg. She next recalled defendant clapping to wake her, at which point she was wearing only her shorts and a Hilton robe. Her top was folded neatly on a table along with money;

defendant told her to hurry and get dressed and to use the money to buy something nice for herself and her grandmother. C.L. reported the sexual assault to the police in 2014.

3. J.B. was a 24-year-old bartender at Harrah's Casino in Reno, Nevada, in 1982 when one of the cocktail waitresses invited her to a pizza party hosted by defendant. J.B. had met several other itinerant celebrities and had attended a party at Wayne Newton's house, and knew that defendant was staying at a Harrah's-owned house outside of town. Defendant answered the door, and J.B. was surprised to find that she and her friend were the only guests. At some point defendant offered J.B. two pills that she thought he said were Quaaludes. She thought defendant was offering a mood-enhancing party drug rather than something that would render her unconscious. After ingesting them she became dizzy, her vision blurred, and she passed out. She awakened and could hear her friend leaving, and found that her shirt was unbuttoned and her pants were unzipped. Defendant sat down with her and put his hand inside her shirt and fondled her, then moved his hand toward her pants, but she was unable to move. She recalled defendant helping her into a bed and later waking up in the bed with him while they were both naked. She had a sticky wetness between her legs that she knew indicated they had sex, but she could not remember it. As she dressed to leave defendant told her it was just between them and that she should not tell

anyone. Within days of the assault J.B. told her sister, her roommate and one of her friends what had happened.

4. J.D. was 27 years old in 1982, and was working as a model. Defendant contacted her agency and arranged for her to meet him, along with her manager, in his townhouse in New York City. She was told that defendant mentored people and had taken an interest in her. They discussed her potential acting and singing career. Later, while she was working in Bali, defendant contacted her and arranged for her to meet him in Reno concerning her acting ambitions. During dinner she complained of menstrual cramps and defendant offered her a small blue pill which she ingested. Later, at defendant's hotel room, she felt very lightheaded and could not get her words to come out. She subsequently recalled defendant getting on top of her and feeling vaginal pain as he penetrated her. J.D. woke up in her own room, with semen between her legs and anal pain. When she confronted defendant he would not answer her. She did not report the assault to the police because she was afraid it would damage her career. Years later, in 2002, she attempted to describe defendant's attack in her memoir but for legal reasons her publisher prevented it. In 2010 she disclosed the assault to physician Drew Pinsky, M.D., and also to a hairdresser and makeup artist during her participation in a television production, "celebrity rehab," but her disclosures were not broadcast.

5. M.L. was working as a 23-year-old model in Las Vegas in 1989 when her agency told her defendant wanted to meet her. He offered to send her photos to a New York agency, and he later cultivated a relationship with her family. M.L. thought of defendant as a father figure or mentor. Later, defendant invited her to his suite at the Las Vegas Hilton, where he began talking to her about improvisation and acting. He poured her a shot, telling her to drink it in order to relax. She said she did not drink but defendant insisted, and also persuaded her to drink another. M.L. became dizzy and woozy and her hearing became muffled. She agreed to sit between defendant's knees on the couch and he began stroking her hair. She woke up in her home two days later, with no further memories of what had occurred, but thereafter felt uncomfortable in defendant's presence.

The trial court found that these prior crimes established a distinct pattern of conduct: (1) the prior offenses involve a physically fit victim much younger than defendant; (2) defendant initiated contact with each woman through, or in relation to, her employment; (3) defendant sought to establish trust through his celebrity status, contact with the victim's family, and mentoring potential; (4) defendant acted when the victim was present in a place in his control; (5) defendant offered drugs and intoxicants and when necessary insisted that the victim ingest them; (6) each victim after ingesting the offered substances was subjected to altered or lost

consciousness, memory loss, and incapacitation; (7) defendant sexually assaulted the victim after she was rendered helpless by the drugs he administered.[2]

The court validly concluded that defendant's criminal pattern was sufficiently distinctive to be admissible, but the most compelling reason for admitting this evidence is its relevance to refute his consent claim. As shown below, rebuttal of defenses is a clear and well-established basis for admitting other crimes evidence; and the effectiveness of the rebuttal is enhanced by a pattern of similar crimes indicative of a common, conscious design. The trial court, therefore, did not abuse its discretion.

Claim 2:

On January 24, 2005, then Montgomery County District Attorney Bruce L. Castor, Jr., issued a release indicating that an investigation had commenced. Defendant, in the presence of his counsel, subsequently gave a voluntary statement to police.

[2] The inference that defendant sexually assaulted M.L. is supported by the totality of the circumstances. After he gave the victim an unknown substance she lost consciousness while isolated with him in his hotel suite, and while she had no conscious memory after that point, she subsequently felt uncomfortable in his presence. Alternately, that defendant put M.L. in a position to be sexually assaulted, but for some reason failed to complete the act, would still constitute criminal attempt under 18 Pa.C.S. § 901.

On February 17, 2005, District Attorney Castor issued a press release stating that he had decided not to prosecute. It referred to no agreement with, or promise to, defendant. Instead the press release explained that the decision not to prosecute was based on analysis of the law and the facts as currently known. It specified that the decision not to prosecute might be reconsidered in the future ("District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise").

Following the press release, civil proceedings were filed against defendant, and he testified in civil depositions in 2005 and 2006. He did not invoke the Fifth Amendment in those proceedings, nor did his counsel indicate on the record of those proceedings that defendant had been given immunity, or had been promised he would never be prosecuted.

After the depositions were made public, in July 2015, the Montgomery County District Attorney's Office, now led by (former First Assistant) District Attorney Risa V. Ferman, reopened the investigation, and later elected to charge defendant.

At a pretrial hearing on February 2 and 3, 2016, Mr. Castor testified that it had been his intention in 2005 to "confer transactional immunity" (trial court opinion, 57) in order to remove defendant's Fifth Amendment right to avoid being

civilly deposed. This was accomplished by issuing a press release announcing his decision not to prosecute. Mr. Castor said defendant's counsel had agreed with this legal assessment. Defendant produced a September 23, 2015 email sent by Mr. Castor to District Attorney Ferman, to the same effect. In his testimony, however, Mr. Castor indicated that there was no agreement and no quid pro quo. Mr. Castor's final email to District Attorney Ferman stated, "I never said we would not prosecute" the defendant.

The trial judge concluded that "no agreement or promise not to prosecute ever existed, only the exercise of prosecutorial discretion" (trial court opinion, 62). With specific regard to Mr. Castor, the court found that his testimony was "equivocal" and "internally inconsistent and inconsistent with his writings." Following a detailed analysis of Mr. Castor's testimony, the court found that, at the time of his alleged 2005 promise to never prosecute, "Mr. Castor did nothing more than decline prosecution" (*id*., 62-65).

SUMMARY OF ARGUMENT

It is well settled that other crimes evidence is admissible to rebut a defense, such as consent, to sexual assault. The relevance of such rebuttal is enhanced where the crimes establish a distinct and relevant pattern revealing a conscious plan. Defendant employed a pattern of criminal techniques that proved effective for him in the past, inducing victims to ingest drugs or intoxicants that rendered them helpless while they were in an isolated location in his control. They experienced severe memory loss and intermittent loss of consciousness, and were unable to cry out or physically resist the sexual assaults. Common plan evidence should include proof that the offender used proven criminal techniques of his own conscious design.

The trial court found as a fact that there was no agreement or promise not to prosecute, and its credibility finding is supported by the record. Defendant's legal argument, moreover, is one of promissory estoppel. That theory fails because the evidence supporting it is equivocal rather than clear, and defendant's alleged reliance in a grave matter on an alleged unwritten assurance, not formalized even by a handshake, was unreasonable under this Court's controlling decision in *Thatcher's Drug Store*.

ARGUMENT

I. Other crimes evidence was properly admitted to rebut a consent defense and establish a relevant criminal pattern.

Other crimes evidence may not be used to prove bad character based on criminal propensity. It is admissible, however, when "relevant to prove something *other* than the defendant's propensity for committing crimes." *Commonwealth v. Claypool*, 495 A.2d 176, 178 (Pa. 1985) (original emphasis).[3] The enumerated exceptions to the general rule are "neither mutually exclusive nor collectively exhaustive," 1 McCormick, *Evidence* § 190 (7th ed.),[4] because the ways in which such evidence can be otherwise relevant are effectively unlimited.

This Court's precedent establishes that the evidence here was admissible. First, it was relevant to rebut a consent defense. Second, it established a distinct pattern of relevant criminal conduct revealing a common design.

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[3] Pa.R.E. 404(b)(1)-(2) (other crimes "not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character" but "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan," *etc.*).

[4] *Commonwealth v. Lark*, 543 A.2d 491, 497 (Pa. 1988) (list "is not exhaustive"); Pa.R.E. 404, *comment* (list of proper purposes for admitting other crimes evidence is "non-exhaustive"); *see Commonwealth v. Billa*, 555 A.2d 835, 840 (Pa. 1989) ("this general proscription against admission of a defendant's distinct criminal acts is subject to numerous exceptions where special circumstances exist which render such evidence relevant for some legitimate evidentiary reason and not merely to prejudice the defendant by showing him to be a person of bad character").

Because this Court's precedent supports the trial court's ruling, the evidentiary issue here is not a close call. As recently explained in *Commonwealth v. Gill*, 206 A.3d 459, 466-467 (Pa. 2019) with regard to admitting other crimes evidence, "[w]hen a [trial] court comes to a conclusion through the exercise of its discretion, there is a heavy burden [on the appellant] to show that this discretion has been abused," and "to overcome this heavy burden, the appellant must demonstrate that the trial court actually abused its discretionary power." This standard requires the defendant to show that the trial court "reached a conclusion which overrides or misapplies the law" or "is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." Absent an abuse of discretion "an appellate court should not disturb a trial court's discretionary ruling." *Id*. (citations omitted).

1. The evidence rebutted a defense.

Admitting other crimes to rebut defenses is a staple of Pennsylvania evidence jurisprudence. In *Commonwealth v. Dillon*, 925 A.2d 131 (Pa. 2007), this Court remarked on the "basic relevance" of evidence of other crimes to address the victim's failure to promptly report the sexual abuse due to Dillon's intimidating physical abuse of her family members. This Court explained that such evidence was too probative to be restricted to rebuttal, but was admissible in the Commonwealth's case-in-chief, because the victim's delay in reporting, if not addressed, would constitute an implicit defense in the minds of the jurors.

Similarly, in *Commonwealth v. Gordon*, 673 A.2d 866 (Pa. 1996), an attorney was charged with indecent assault of a client, and the Commonwealth sought to introduce his similar assaults. The pattern included that each victim was alone with Gordon, emotionally vulnerable, and afraid to report the sexual misconduct due to his ability as counsel to do harm to her case. This Court concluded that that this evidence established a common scheme, and also served to rebut Gordon's claim that the victim was fabricating the assault.

In *Commonwealth v. Billa*, 555 A.2d 835, 840 (Pa. 1989), a capital case, this Court held that evidence of Billa's prior violent sexual assault against another female victim was admissible "to refute appellant's assertion that the victim's death was an accident inadvertently caused during the struggle for the knife." Recently, in *Commonwealth v. Hicks*, 156 A.3d 1114, 1128-1129 (Pa. 2017), the plurality upheld admitting Hicks' prior violent attacks on other female victims to rebut his claim that his current victim died from an accidental overdose.

This Court's decisions consistently confirm that other crimes may be admitted to rebut a defense. It held in *Commonwealth v. Weiss*, 81 A.3d 767, 799 (Pa. 2013) that explanation by a witness that her prior inconsistent statement resulted because appellant "had just beaten up her mother and her" was "a proper response" to the defense cross examination. In *Commonwealth v. Boczkowski*, 846 A.2d 75, 87-89 (Pa. 2004), this Court held that the "the remarkable similarity

between the manner in which both of appellant's wives were killed" was admissible to rebut a potential claim of accident and prove that the victim's death "was a result of appellant's deliberate act." In *Commonwealth v. Bracey*, 662 A.2d 1062, 1069-1070 (Pa. 1995), it held that other crimes were relevant to rebut Bracey's claim that he shot a police officer out of fear. In *Commonwealth v. Ragan*, 645 A.2d 811, 820 (Pa. 1994), it ruled that other crimes were relevant to show that Ragan's alibi witness was biased because she harbored Ragan despite knowing he was a fugitive. In *Commonwealth v. Travaglia*, 467 A.2d 288, 297 (Pa. 1983), this Court held that other crimes evidence was admissible to rebut "the theory that the shooting of Officer Miller was an accident, that Travaglia's finger had slipped from the gun's hammer," which would otherwise "be hard to refute." Similarly, it held in *Commonwealth v. Styles*, 431 A.2d 978, 980 (Pa. 1981) that other crimes evidence was admissible "to rebut [appellant's] claim that the shotgun discharged accidentally."

In *Commonwealth v. Roots*, 306 A.2d 873 (Pa. 1973), Roots claimed she stabbed the victim in self-defense. As she told it, he attacked her because she was a witness to his robbery of a hotel in which she had tried to help the clerk. The Commonwealth, however, introduced evidence that Roots was the lookout in that robbery, which was not committed by the murder victim, but by someone else who was Roots' accomplice. This Court held that Roots' claim "that she killed in self-

defense when the decedent threatened to kill her for reporting his involvement in a robbery" made it "entirely appropriate" to allow evidence of her other offense "to show that the decedent was not a robber and that appellant was not a good Samaritan." 306 A.2d at 875-876.

Here, evidence of defendant's other crimes was relevant to rebut his consent defense. It established that he employed a pattern of criminal techniques to overcome resistance and negate non-consent. This included inducing victims to ingest drugs or intoxicants that rendered them helpless while they were in an isolated location in his control. They experienced severe memory loss and intermittent loss of consciousness, and were unable to cry out or physically resist the sexual assaults. For this reason alone, the trial court did not abuse its discretion in admitting the disputed evidence.

2. The evidence established a relevant criminal pattern.

Other crimes that establish a distinct pattern may be relevant to prove "motive, intent, or plan." *Commonwealth v. Arrington*, 86 A.3d 831, 842 (Pa. 2014). A distinct pattern does not require outlandish or bizarre criminal conduct, nor does it demand proof that the current crime was anticipated as part of an overarching master plan. Rather, what is essential is that the similarities "are not confined to insignificant details that would likely be common elements regardless

of who had committed the crimes." *Commonwealth v. Hughes*, 555 A.2d 1264, 1283 (Pa. 1989). A criminal "plan" may be likened to a script or playbook of criminal tactics that worked for the offender when committing past crimes.

The dissent in *Hicks* argued that appellate decisions of this Court over the last 65 years are wrong, and that other crimes should never be admitted to prove a "plan" unless each individual crime was specifically "contemplated by the [accused] as parts of one plan in his mind." 156 A.3d at 1144 (dissenting opinion). That dissent, however, relied heavily on cases of this Court—most prominently *Shaffner v. Commonwealth*, 72 Pa. 60, 63 (1872)—dating through 1955. But later decisions of this Court, noted herein, implicitly recognize that the concept of "plan" should include an offender's conscious, but opportunistic, resort to criminal techniques that succeeded for him previously:

> The concept "plan," and its frequent companion "common scheme," sometimes refers to a pattern of conduct, not envisioned by the defendant as a coherent whole, in which he repeatedly achieves similar results by similar methods. These plans could be called "unlinked" plans. The defendant never pictures all the crimes at once, but rather plans a crime thinking, "It worked before, I'll try the same plan again." Some commentators have criticized courts for admitting such "spurious plan" evidence. In a California acquaintance rape case, for example, the court described "common scheme or plan" as merely an unacceptable euphemism for "disposition."
>
> Yet this concept of "plan" is a textually plausible interpretation of the rule against character reasoning. One could construe the concept of "character" as referring only to traits manifesting a general propensity, such as a propensity toward violence or dishonesty. Under this interpretation, a

> situationally specific propensity, such as a propensity to lurk in the back seats of empty cars in shopping centers as a prelude to sexual assaults on the owners, would be too specific to be called a trait of character. The probative value of the evidence is, of course, enhanced by the situational similarity.

David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529, 546–48 (1994) (footnotes omitted).

Contrary to the argument of the Defender Association of Philadelphia, the law of evidence is not governed by "original intent" (Defender Association amicus, 25). Instead the law of evidence has continued to develop with experience, as demonstrated by this Court's modern day rulings. Indeed, were that not so, this case would be controlled by *Commonwealth v. Kline*, 65 A.2d 348, 351-352 (Pa. 1949), which held that the kind of propensity shown by prior sex crimes is a *permissible* consideration. The law is not, and should not be, permanently frozen at some point in the past.[5]

The same defense amicus contends that, if prior crimes evidence is not restricted to offenses specifically contemplated by the offender in advance, the

[5] In *Kline* this Court held that evidence of other crimes was admissible to show an "abnormal mental or moral nature as would likely lead [the defendant] to commit the offence charged," and noted that this view was supported by then-current treatises on evidence including Wigmore. *Id*. at 352. Like *Shaffner*, *Kline* has been superseded rather than formally overruled. The case that purported to do so, *Commonwealth v. Shively*, 424 A.2d 1257, 1259-1260 (Pa. 1981), is an opinion by only two Justices, with two concurring in the result and two dissenting, on a six-member court.

"undeniable effect … in practice" will be "use of … an impermissible character inference" (*Id*.). But that does not follow at all. This Court's own decisions, applying no such restriction, clearly reject the use of such evidence to prove an inference of bad character. A trial court's standard instructions forbid such use. Here Judge O'Neill repeatedly instructed the jurors throughout the trial that the evidence could not be regarded as proving criminal tendencies or bad character. Further, the inference actually arising from what defendant's amicus would call "unlinked" common scheme evidence is that the crimes *are* linked. Where an offender is following a plan of his own creation, the fact that the plan is flexible enough to facilitate unforeseen crimes of opportunity does not alter the fact that it is the product of *calculation* and not *character*.[6]

Defendant's other amicus, the Pennsylvania Association of Criminal Defense Lawyers, contends that Pennsylvania law should be defined by "distaste" for other crimes evidence, so much so that instructions for its proper use should be deemed useless, and the evidence excluded notwithstanding its probative value

[6] To support the argument that supposedly "unlinked" crimes are usable only to prove bad character, defendant's amicus cites *State v. Verde*, 296 P.3d 673 (Utah, 2012). But that Court concluded that the evidence "was not plausibly aimed at a proper purpose." *Id*. at 681. Further, five years later the same Court repudiated its former "scrupulous examination" rule that led to its decision in *Verde* in *State v. Thornton*, 391 P.3d 1016, 1024-1025 (Utah 2017). The law of evidence thus continues to develop in other states, as here.

(PACDL amicus, 19 & n.5). But this Court's decisions say otherwise. The potential for unfair prejudice is acceptably diminished where evidence is introduced for a proper purpose and the jury is properly instructed. *Commonwealth v. Jemison*, 98 A.3d 1254, 1262-1263 (Pa. 2014) ("Any possibility of unfair prejudice [from evidence of prior offense] is greatly mitigated by the use of proper cautionary instructions to the jury … We reiterate that here, as in so many other contexts, the jury is presumed to follow the court's instructions") (citation omitted); *Commonwealth v. Tedford,* 960 A.2d 1, 37 (Pa. 2008) (law presumes jury will follow limiting instruction when other crimes evidence admitted for a proper purpose); *Commonwealth v. Dillon*, 925 A.2d at 141 (other crimes evidence admissible when relevant to a proper purpose even where "extremely grotesque and highly prejudicial"); *Commonwealth v. Fisher*, 769 A.2d 1116, 1128 (Pa. 2001) (other crimes evidence offered for a proper purpose is "not unduly prejudicial merely because it [is] damaging to [the defendant's] case," but is admissible so long as the jury is not allowed to treat it as proof of criminal propensity or bad character); *Commonwealth v. Gordon*, 673 A.2d at 870 (proper for other crimes evidence to be prejudicial, and admissible if not unduly prejudicial; "Whether relevant [other crimes] evidence is unduly prejudicial is a function in part of the degree to which it is necessary to prove the case of the opposing party"); *Commonwealth v. Nolen*, 634 A.2d 192, 198 (Pa. 1993) ("any

prejudicial effect that this [other crimes] evidence may have had was minimized by the trial court's cautionary instructions"); *Commonwealth v. McCutchen*, 454 A.2d 547, 549 (Pa. 1982) ("the value of this evidence ... fully compensates for any likelihood that [it] may inflame the passions of the jury"). The presumption that jurors follow the court's instructions is "[a] pillar of our system of trial by jury." *Commonwealth v. Means*, 773 A.2d 143, 157 (Pa. 2001).

A rape case decided by the Superior Court *en banc*, *Commonwealth v. Tyson*, 119 A.3d 353 (Pa. Super. 2015) (*en banc*), is persuasive. There, as here, "the key issue for the factfinder" was "whether [the vitctim] consented." The Court noted that the current crime followed a pattern or plan established by Tyson's other offenses. Among other factors, he "was aware that each victim was in a weakened or compromised state," each victim "ultimately lost consciousness," and while thus incapacitated was unable to resist or consent to the sexual assault. Such evidence was probative because it tended "to increase the probability that Appellee knowingly had non-consensual sex with [the victim] in the present case." In addition to being relevant to rebut the consent defense, the similarity between the offenses was sufficient to show that they were not merely "of the same general class," or that Tyson merely "sexually assaulted two different women or that [his] actions are generically common to many sexual assault cases." *Tyson*, 119 A.3d at 357-360. Here the evidence is stronger than in *Tyson*. Defendant's well-practiced

scheme was to exploit the victims' trust in his mentor or celebrity status in order to drug them, inducing a state of helplessness that enabled the older defendant to sexually assault a much younger woman.

Tyson is in accord with *Commonwealth v. Arrington*, decided by this Court the year before. There, murder charges were properly supported by prior violent assaults by the appellant against three former girlfriends when they tried to break off their romantic relationship. This Court held that the evidence was sufficient to establish a "distinct behavioral pattern" where Arrington: "(1) monitored his girlfriend's daily activities; (2) resorted to violence when his partner wanted to end a relationship or interacted with other men; (3) inflicted head or neck injuries with his fist, a handgun, or an edged weapon; and (4) harmed or threatened to harm members of his girlfriend's family or male acquaintances that he viewed as romantic rivals." 86 A.3d at 844 (footnote omitted). *Arrington* cited with approval this Court's decisions in *Commonwealth v. Miller*, 664 A.2d 1310 (Pa. 1995) ("logical connection" between current rape-murder and two prior rapes established by similar manner of commission), and *Commonwealth v. May*, 656 A.2d 1335, 1341 (Pa. 1995) (prior victims physically similar, attacks were of similar nature, and body of current victim was found close to where May left other assault victims).

In this case, the trial court found that defendant's prior crimes established a distinct pattern proving a conscious plan of criminal conduct. In particular, defendant targeted victims in connection with their employment, often posing as a mentor. He induced them to ingest drugs and/or other intoxicants of his selection. This rendered them helpless while they were in an isolated location in his control. They experienced severe memory loss, intermittent loss of consciousness, and were deprived of the ability to cry out or physically resist the sexual assaults. They often did not confront defendant or report the attacks for fear of professional harm. The court held that this evidence was relevant and admissible to rebut defendant's claim that the instant victim, whom he sexually assaulted using the same pattern of conduct, consented. The defendant's "heavy burden," *Commonwealth v. Gill*, 206 A.3d at 466-467, therefore, has not been met. There was no abuse of discretion.[7]

[7] This pattern of evidence was likewise admissible under the concept Chief Justice Saylor referenced in his concurring opinion in *Hicks* as the "doctrine of chances." *See also Commonwealth v. Donahue*, 549 A.2d 121, 125-127 (Pa. 1988) (opinion announcing the judgment of the court) (discussing same doctrine). The "doctrine of chances" simply describes relevance. Evidence that "has any tendency to make a fact"—a common plan, for example—"more … probable," Pa.R.E. 401, is admissible, provided the fact is not criminal propensity. *Billa*, 555 A.2d at 840 (other crimes evidence admissible if "relevant for some legitimate evidentiary reason and not merely to prejudice the defendant by showing him to be a person of bad character"). The "doctrine of chances" acknowledges the common-sense inference that offenses committed by the same offender with similar methods imply a conscious design. Finally, that the prior crimes occurred in the 1980s does not establish an abuse of discretion in admitting them. Pa.R.E. 404(b) does not exclude evidence on this basis. While remoteness is one discretionary factor to

II. There was no enforceable promise of non-prosecution.

The Superior Court correctly rejected defendant's claim that there was an enforceable "agreement" or "promise" that he would never be prosecuted (defendant's brief, 68). The claim fails for two reasons. First, as a matter of fact, no such promise was given. Second, even if the credibility determination of the trial court could be avoided (and it cannot), defendant's theory of promissory estoppel fails because his alleged reliance on the supposed promise was unreasonable.[8]

Defendant's claim depends on the testimony of former District Attorney Castor.[9] But as the Superior Court observed, the trial court "did not find Mr. Castor's testimony regarding the promise not to prosecute to be credible." *Commonwealth v. Cosby*, 224 A.3d 372, 413 n.15 (Pa. Super. 2019). "[W]hen

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consider, even a large time lapse may be outweighed where, as here, the offenses amount to "a recurring sequence … as opposed to random and remote acts." *Commonwealth v. Smith*, 635 A.2d 1086, 1189-1190 (Pa. Super. 1993).

[8] Defendant's legal theory is narrowed to promissory estoppel by process of elimination. He waived constitutional due process by not raising it (trial court opinion, 46). This Court has never held that contract law applies to alleged non-prosecution agreements, though it "utilizes concepts closely associated with contract law" when "evaluating issues involving plea agreements." *Commonwealth v. Martinez*, 147 A.3d 517, 531 (Pa. 2016). Here there is no plea, and there could be no contract because there was no consideration. No one claimed that the Commonwealth bargained for anything in exchange for the alleged promise. To the contrary, Mr. Castor testified that there was no "quid pro quo" (N.T. 2/2/16, 99).

[9] While defendant also presented the testimony of an attorney who represented him at the time, that attorney admitted he never spoke to Mr. Castor. He therefore could not testify to any oral commitment Mr. Castor allegedly made.

appellate review involves the trial court's findings of fact and credibility determinations, those findings are binding on the reviewing court if they find support in the record." *Commonwealth v. Myers*, 722 A.2d 649, 652 (Pa. 1998) (citation omitted).

While this brief will not discuss the testimony in detail, no plausible argument that the trial court's credibility determination was unsupported is possible. The finding that there was no promise at all is therefore dispositive. *See Thatcher's Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc*., 636 A.2d 156, 160 (Pa. 1994) (on claim of promissory estoppel "this Court is bound by the trial court's findings of fact, unless those findings are not based on competent evidence … absent an abuse of discretion, this Court is bound by the trial court's assessment of the credibility of the parties") (citations omitted). Moreover, even if the facts were debatable on appeal to some degree, defendant clearly failed to meet his burden of producing "clear, precise and unequivocal evidence." *Funds for Business Growth, Inc. v. Woodland Marble & Tile Co*., 278 A.2d 922, 926 (Pa. 1971) ("One who asserts estoppel must establish the essentials thereof by clear, precise and unequivocal evidence") (citation omitted).

Defendant's promissory estoppel claim also fails because his reliance on the alleged promise was unreasonable. In *Thatcher's Drug Store* this Court relied on

comment "b" to *Restatement (Second) of Contracts § 90(1)*. 636 A.2d at 160.[10] The comment states that enforcement of an alleged promise "may depend on the reasonableness of the promisee's reliance, on its definite and substantial character in relation to the remedy sought, [and] on the formality with which the promise is made[.]"

Here, Mr. Castor's authority to issue what amounted to a promise of perpetual testimonial immunity was at best unclear. *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (Pa. 1995) (non-prosecution agreement "invalid" because police "did not have authority" to make it). According to defendant's own argument (defendant's brief, 75), the alleged promise was intended to force him to testify in civil depositions by eliminating the possibility of prosecution. But this Court has held that "witness immunity in Pennsylvania is governed by statute," and "[w]hether use immunity for a witness' testimony is an available legal tool in Pennsylvania is for the Legislature to decide." *Commonwealth v. Johnson*, 487 A.2d 1320, 1322 (Pa. 1985). Prosecutorial discretion in this regard is therefore constrained by 42 Pa.C.S. § 5947, which requires a court order to confer the kind of immunity defendant claims to possess.

[10] "The doctrine embodied in s 90 [sic] of the Restatement (Second) of Contracts, the doctrine of promissory estoppel, is the law of Pennsylvania." *Central Storage & Transfer Co. v. Kaplan*, 410 A.2d 292, 294 (Pa. 1979).

Defendant's argument that § 5947 is not "applicable" (defendant's brief, 68-69), while dubious,[11] misses the point. Under *Johnson* the statute created a substantial likelihood that the alleged promise on which defendant claimed to rely was void *ab initio*, making such reliance unreasonable.

Defendant's reliance on an alleged oral promise that was unwritten, unrecorded, and vague was also unreasonable, if not reckless. While defendant points to Mr. Castor's press release, that document explicitly held open the possibility that Mr. Castor could "reconsider" his then-current decision not to prosecute "should the need arise." The press release contradicts, rather than supports, a claim that Mr. Castor issued an unconditional promise of permanent non-prosecution. The absence of a written record of the alleged promise is highlighted by Mr. Castor's testimony, which was "equivocal," "internally

[11] Contrary to defendant's argument, the statute is applicable on its face. It applies when, *inter alia*, "a witness … is likely to refuse to testify … on the basis of his privilege against self-incrimination." The statute is not "inapplicable" when no specified "proceeding" exists. The existence of a proceeding is not a limit on applicability of the statute, but a limit on the ability of a prosecutor to obtain the necessary order. To confer immunity to force a witness to testify, the prosecutor must wait until there is an appropriate "proceeding" before a "[c]ourt[]" (here, civil depositions in federal court) and obtain the required order from the "designated court," ordinarily the Court of Common Pleas, in the "judicial district in which the proceeding is taking place" (here, the venue of the civil action). Here, none of that was done. Finally, the statute does not interfere with a District Attorney's discretion not to prosecute (defendant's brief, 70-71). Nothing in it requires a decision to prosecute or prevents a decision not to prosecute.

inconsistent," and "inconsistent with his writings" (trial court opinion, 63). Despite the extreme gravity of the matter, defendant claims to have relied on an alleged promise that was not described even in a subsequent letter, or, for all the record shows, even formalized by a handshake. As this Court concluded in *Thatcher's Drug Store*, it is unreasonable to rely, in an important matter, on "an indefinitely worded promise uttered in an informal conversation." 636 A.2d at 161 ("Despite the gravity of these matters, the record fails to reveal that the parties even so much as shook hands to formalize their agreement. This weighs against enforcing any promise").

Finally, as defendant admits, there is no authority (defendant's brief, 77) for his contention that a District Attorney may make a decision not to prosecute binding on the Commonwealth in perpetuity. To the contrary, his argument would effectively assign pardon power to District Attorneys, something this Court has already rejected as unconstitutional. *Commonwealth v. Brown*, 196 A.3d 130, 144 & n.5 (Pa. 2018) (pardon "can be granted only by the authority in which the pardoning power resides," i.e., the Governor).

The Superior Court should be affirmed.

CONCLUSION

For these reasons, this Court should affirm the order of the Superior Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 531

This amicus brief complies with Pa.R.App.P. 531(b)(3), as it contains fewer than 7,000 words. *See* Pa.R.A.P. 2135(b) ("the cover of the brief and pages containing the table of contents, tables of citations, proof of service and any addendum containing opinions, signature blocks or any other similar supplementary matter … shall not count against the word count limitations").

CERTIFICATE OF COMPLIANCE WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*, which require that confidential information and documents be filed differently than non-confidential information and documents.

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