Received 9/23/2020 12:39:07 PM Supreme Court Middle District

Filed 09/14/2020 Supreme Court Middle District

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 39 MAP 2020

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE,
v.

WILLIAM H. COSBY, JR.,
APPELLANT.

BRIEF FOR APPELLEE

APPEAL FROM THE ORDER OF THE PENNSYLVANIA SUPERIOR COURT ENTERED ON DECEMBER 10, 2019, AT DOCKET NO. 3314 EDA 2018, AFFIRMING THE JUDGMENT OF SENTENCE IMPOSED BY THE HONORABLE STEVEN T. O'NEILL ON SEPTEMBER 25, 2018, IN THE COURT OF COMMON PLEAS, MONTGOMERY COUNTY, AT NO. CP-46-CR-3932-2016.

ADRIENNE D. JAPPE
ASSISTANT DISTRICT ATTORNEY
ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY
CHIEF, APPELLATE DIVISION
EDWARD F. McCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY
KEVIN R. STEELE
DISTRICT ATTORNEY

OFFICE OF THE DISTRICT ATTORNEY
MONTGOMERY COUNTY COURTHOUSE
NORRISTOWN, PA 19404
(610) 278-3102

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the trial court properly admitted evidence of defendant's drug-facilitated sexual assaults of five women, and his admissions about his knowledge and use of Quaaludes, where the evidence was relevant and admissible?

(Answered in the affirmative by the lower courts.)

2. Whether the trial court properly denied defendant's non-prosecution agreement claim, where it found that there was no promise from the former district attorney not to prosecute and that defendant did not actually or reasonably rely on any alleged promise?

(Answered in the affirmative by the lower courts.)

COUNTER-STATEMENT OF THE CASE

Defendant, William H. Cosby, Jr., appeals the ruling of the Pennsylvania Superior Court, upholding his judgment of sentence for three counts of aggravated indecent assault.

I. FACTUAL HISTORY

A. THE SEXUAL ASSAULT

In January 2004, defendant invited Andrea Constand to his home in Cheltenham, Montgomery County, under the pretense of discussing her career. Ms. Constand was the Director of Operations for Temple University Women's Basketball Team. Defendant was a longtime trustee of the university and supporter of the basketball team. They met through her employment (N.T. 4/13/18, pp. 17, 23-28, 53, 57, 68).

When she arrived at defendant's home, they sat and talked; she explained that she had been feeling stressed. She later went to the bathroom and defendant went upstairs. When they returned to the kitchen, defendant opened his hand and produced three blue pills, telling her to "[p]ut them down" (*id.* at 57-60). He said, "These are your friends. They'll help take the edge off . . . They'll help you relax" (*id.*). She thought they were natural or herbal pills because she had told defendant that she

did not take medication but would take herbal and natural supplements. She trusted defendant, so she took the three pills, along with the water he provided. Defendant also encouraged her to drink some wine from a glass on the table. She took a sip (*id.* at 58-59).

Shortly after ingesting the wine, water, and the three blue pills, she began feeling ill; she was slurring her words, her mouth felt dry and "cottony," and she had double vision. She told defendant that she was seeing two of him. Eventually, she was unable to speak. She tried standing but could not stand on her own; her legs were "shaky" and felt "rubbery" (*id.* at 61-63). Defendant took her arm, helped her to a couch, laid her down on her side, and told her to relax (*id.* at 62).

She was soon unconscious. She later recalled, during a brief bout of semi-consciousness, defendant lying on the couch behind her, penetrating her vagina with his fingers and fondling her breasts. He also took her hand, placed it on his penis and masturbated himself with it. Throughout the assault, she was trying to move, but she could not. She wanted to speak to tell him to stop, but she could not. She was incapacitated (*id.* at 62-64). As she explained to the jury:

I wanted it to stop. I couldn't say a thing. I was

> trying to get my hands to move, my legs to move, and the message just wasn't getting there. I was weak. I was limp. And I could not fight him off

(*id.* at 64).

The next thing she remembered was waking up on the couch early in the morning, disheveled, with her bra around her neck and her pants partially unzipped. After composing herself, she stood up and walked to the kitchen door. Defendant was standing in the doorway, wearing a robe and slippers; he told her there was a muffin and a cup of tea for her on the table. She took two sips of tea, grabbed the muffin, and left (*id.* at 65-66).

She tried to confront him a couple months later. She wanted to know what pills he had given her. He was evasive; he simply said, "I thought you had an orgasm" (*id.* at 67-68). Because of her position at Temple and defendant's standing and affiliation with the university, she continued to have contact with him on basketball-related issues. She left Temple in March 2004 and moved to her parents' home in Canada (*id.* at 69-70).

B. THE RELATIONSHIP PRIOR TO THE ASSAULT

Defendant and Ms. Constand had developed what she thought was a friendship and a mentorship. He invited her to a couple group dinners at his home with local professionals so she could make contacts since she was

new to the city; he invited her to a dinner with a business associate who worked in broadcasting because she had discussed a career in broadcasting with him; and on another occasion, he invited her to dinner at his home to discuss her career goals. She never felt threatened during any of her prior interactions with defendant. She believed she was developing a legitimate friendship with him, and that he was genuinely interested in mentoring her with her career (*id.* at 23-25, 28-41, 53-54).

C. ANDREA CONSTAND'S DISCLOSURE

In January 2005, Ms. Constand awoke crying from a recurring bad dream. Unable to suppress the assault any longer, she told her mother, Gianna Constand. She relayed how defendant had given her three blue pills and then sexually violated her without her consent. She filed a police report in Canada (*id.* at 76-78).

Gianna Constand and her daughter soon made phone contact with defendant. He confirmed that he drugged Ms. Constand and that he had sexual contact with her. He apologized. Her mother tried to find out what drug he had given her daughter, to no avail. Defendant left the phone call at one point to find the prescription bottle, but when he returned, he said he could not read the name on the bottle. He said he would write it down

and mail it to them. He never did (*id.* at 83-85; N.T. 4/16/18, at 188-189). At the end of the conversation, defendant admitted that he was "a sick man" and that he felt like he was "a dirty old perverted man" (*id.* at 207).

Gianna Constand had another phone conversation with defendant. He asked her if her daughter was still interested in a career in sportscasting or television; offered to pay for graduate school for her; and suggested arranging for the Constands to travel to Miami to meet with him.[1] She wanted none of these things; she simply asked for an apology and the name of the drug he had given her daughter. She got the apology, but not the name of the drug (*id.* at 198-199, 203-206).

D. DEFENDANT'S STATEMENT TO POLICE

Defendant gave a statement to Montgomery County detectives at his attorney's office. He claimed that he gave Ms. Constand one-and-a-half Benadryl pills, though he admitted that he never told her what those pills were. He also stated that he routinely uses Benadryl and has been doing so for years, particularly when travelling; he said he takes two tablets, but they make him so drowsy he would never perform after taking them (N.T.

[1] Around the same time, one of defendant's representatives contacted Ms. Constand to arrange a trip for her to meet with defendant. Another representative called to set up an educational trust for her. She declined both offers (N.T. 4/13/18, at 87, 89, 92, 93).

4/17/18, at 113, 126-127, 150, 158-161).

When asked if he ever had sexual intercourse with Ms. Constand, defendant responded, "[n]ever asleep or awake" (*id.* at 130).

E. DEFENDANT'S CIVIL DEPOSITION TESTIMONY

The Commonwealth declined to prosecute defendant in 2005. Ms. Constand, instead, sought justice by suing him civilly. In 2005 and 2006, defendant gave sworn deposition testimony. The case settled. As part of the confidential settlement agreement, defendant paid Ms. Constand $3,380,000. In return, she had to sign an agreement stating that she "agrees that she will not initiate any criminal complaint against Cosby arising from the underlying facts of this case" (N.T. 4/13/18, at 104, 108, 110).

In 2015, a federal judge released defendant's deposition testimony for the first time and the Montgomery County Detective Bureau obtained a copy (N.T. 4/17/18, at 8).

1. Defendant's Romantic Interest in Andrea Constand

In this deposition, defendant stated that he developed a romantic interest in Ms. Constand the first time he saw her, though he never told her (*id.* at 20-21). By romantic interest, he meant "romance in terms of steps that will lead to some kind of permission or no permission or how you go

about getting to wherever you're going to wind up" (*id.* at 24-25).

2. Defendant's Knowledge of Central Nervous System Depressants

Defendant testified that he gave Ms. Constand one-and-a-half blue Benadryl pills on the night of the incident; he told her, "[y]our friends, I have three friends for you to make you relax" (*id.* at 46, 48-49, 54). He reiterated that he takes two Benadryl pills at a time, mostly when he travels so that he can adjust his sleep pattern for the time zone changes (*id.* at 46-48). Because of his own use of Benadryl, he gave Ms. Constand one-and-a-half pills "because Andrea is about the same size I am, not weight, former athlete. I take two" (*id.* at 55). He said that taking two Benadryl pills helps him relax and sleep; he then immediately stated that if he does not want to sleep, the Benadryl will not make him go to sleep (*id.* at 55-56).

Defendant admitted to having access to, and knowledge of, another central nervous system suppressant, Quaaludes. He said he obtained multiple prescriptions for them without intending to use the pills himself because they made him "sleepy,"[2] but instead "for young women [he]

[2] When asked how he would know the drug made him sleepy, he replied, "Quaaludes happen to be a depressant. I have had surgery and while being given pills that block the nervous system, in particular the areas of muscle, the back, I found that I get sleepy and I want to stay awake" (N.T. 4/18/18, at 41-43).

wanted to have sex with" (*id.* at 35, 40-41, 47-50). He discussed how the Quaaludes affected one woman: "[s]he became, in those days, what was called high" (*id.* at 36). When asked to clarify, defendant said she was unsteady and "[w]alking like [she] had too much to drink" (*id.* at 37).

3. Defendant's Actions After Andrea Constand's Disclosure

Defendant, in recalling the initial phone conversation with Gianna Constand, admitted that he told her he digitally penetrated her daughter, and he apologized, twice, "because I'm thinking this is a dirty old man with a young girl" (*id.* at 66).

II. PROCEDURAL HISTORY

A. PRIOR BAD ACTS

During its investigation, the Commonwealth learned that more than 50 other young women were victims of drug-induced sexual assaults committed by defendant. Before trial, it moved to admit evidence of 13 of these incidents to show a common plan or scheme and an absence of mistake. The trial court granted the motion in part, allowing the Commonwealth to introduce evidence pertaining to one woman. Defendant's trial ended with a deadlocked jury and mistrial.

The Commonwealth retried defendant. Before the second trial, the Commonwealth again moved to admit other act evidence. It sought to admit evidence of 19 prior bad acts[3]—again under the common plan or scheme and absence of mistake exceptions, but also under the "doctrine of chances" theory. The trial court granted the motion in part, permitting it to present evidence related to five of the eight[4] prior bad acts that occurred closest in time to the sexual assault of Ms. Constand. Five prior bad act victims testified at trial. The testimony of these witnesses consisted of a mere two days of a 14-day trial.

B. THE NON-PROSECUTION CLAIM

Before defendant's preliminary hearing, he filed a self-styled *habeas corpus* petition, alleging that prosecution was barred because he had a non-prosecution agreement with former district attorney Bruce L. Castor, Jr., Esquire. The trial court held a two-day hearing. Castor and John Schmitt, Esquire—a longtime general counsel for defendant—as witnesses. Dolores

[3] Some of the victims represented in the new motion were either not known to the Commonwealth at the time of its original motion or had not yet spoken with or given a statement to detectives.

[4] Defendant incorrectly asserts that the trial court allowed the Commonwealth to select any five of the 19 prior bad acts victims. Defendant's brief at 11.

Troiani, Esquire, and Bebe Kivitz, Esquire—Ms. Constand's civil attorneys—testified for the Commonwealth. After the hearing, the trial court found no promise not to prosecute existed and no reliance by defendant on anything Castor said.

C. DEFENDANT'S CONVICTION AND SENTENCE

The jury convicted defendant of three counts of aggravated indecent assault: 18 Pa. C.S. § 3125(a)(1) (without consent); § 3125(a)(4) (victim unconscious); and § 3125(a)(5) (administering an intoxicant).

The trial court designated defendant a Sexually Violent Predator and sentenced him to three to ten years' incarceration.

D. DEFENDANT'S APPEAL

Defendant appealed to the Superior Court, raising eight claims. The Court unanimously affirmed. *Commonwealth v. Cosby,* 224 A.3d 372, 430 (Pa. Super. 2019).

Defendant sought allowance of appeal with this Court on four issues. This Court granted his petition in part, agreeing to hear his prior bad act claim and his non-prosecution claim.

SUMMARY OF THE ARGUMENT

The trial court properly admitted evidence of five prior drug-facilitated sexual assaults defendant committed against young women in a strikingly similar fashion to his sexual assault of Andrea Constand. The evidence was relevant to prove a common scheme, plan, or design, and absence of mistake. It showed that where, over decades, defendant intentionally intoxicated women in a signature fashion, sexually assaulted them while they were incapacitated, he could not have been mistaken about whether Ms. Constand was conscious enough to consent to the sexual contact. Relatedly, the evidence was admissible under the "doctrine of chances" to show the objective improbability that defendant mistakenly assessed Ms. Constand's level of consciousness during the sexual contact with her given the heightened number of victims reporting similar sexual assaults.

Defendant's challenge to the Quaaludes evidence is equally unavailing. If it constituted prior bad acts at all, it was relevant to establish that defendant had access to, knowledge of, and a motive and intent to knowingly use a central nervous system depressant—a substance he knew could render a female unconscious—for engaging in sex acts. His own

words make clear that he knew about this type of drug. The evidence was also admissible to prove the strength of its already-ruled-admissible Rule 404(b) evidence

The trial court properly denied the non-prosecution claim. Its credibility determination and factual finding that there was no promise is supported by the record. Even if it existed, the district attorney lacked the authority to grant non-statutory immunity. Nor can defendant prevail on an estoppel theory. The credibility and factual finding that defendant did not rely on any promise in deciding to sit for the depositions is also supported by the record. Finally, even if there were a promise and actual reliance, defendant did not act in reasonable reliance. Instead, he acted in his own self-interest when he sat for the depositions.

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S DRUG-INDUCED SEXUAL ASSAULTS OF FIVE WOMEN AND HIS ADMISSIONS REGARDING QUAALUDES

Evidence that defendant committed drug-induced sexual assaults of five women in a strikingly similar fashion to his assault on Andrea Constand was logically relevant to establish a distinct pattern or plan where he could not have been mistaken about whether she was conscious enough to consent. It was also admissible under the "doctrine of chances" to demonstrate the objective improbability that defendant mistakenly assessed Ms. Constand's level of consciousness and her ability to consent.

Defendant's civil deposition admissions about his access to, knowledge of, and use of Quaaludes with women he wanted to have sex with were also relevant. They demonstrated his knowledge, motive, and intent to knowingly use a central nervous system depressant that he knew could render a female unconscious, for the purpose of engaging in sex acts.

Given the similarities between the acts, the Commonwealth's need for the evidence, and the cautionary instructions given by the court, the probative value of the evidence outweighed a potential for unfair prejudice

A. PRIOR BAD ACT WITNESSES

1. Janice Baker-Kinney

Janice Baker-Kinney met the married defendant in 1982, while working as a bartender at Harrah's Casino in Reno, Nevada. A co-worker invited her to a "party" defendant was supposedly hosting at the home where he was staying while in town performing. Baker-Kinney was 24-years'-old; defendant was 45 (N.T. 4/11/18, at 164-167).

When Baker-Kinney and her co-worker arrived at the "party," no other guests were there. Defendant gave her a beer, then offered her a pill. He said it was a Quaalude. He then gave her a second pill to take. She thought, "[w]ell, if Bill Cosby says it's okay, it must be all right to take these" (*id.* at 167-172). She took both pills (*id.* at 172-173).

She quickly began feeling dizzy, her vision became blurry, and her head was spinning. She eventually "face-planted" into the backgammon game board she was playing and passed out. Her next memory is being on a couch in another room. When she opened her eyes, she realized her shirt was unbuttoned and her pants were unzipped; she had no idea how her clothing became undone. Defendant came over to the couch, sat behind her, and propped her up by leaning her back onto his chest. He put his

hand underneath her shirt and fondled her breasts, then moved his hand down toward her vagina. She was unable to move; she was extremely woozy; everything "was still swirling and blurry" (*id.* at 173-176, 179). Defendant led her to an upstairs bedroom; she could not walk without assistance (*id.* at 179).

She has no memory of what happened in the bedroom until the following morning, when she woke up in bed with defendant; they were both naked. She felt a sticky wetness between her legs. While she had no memory of it, she felt like she had sex the night before. She quickly got dressed and left (*id.* at 177-180).

2. <u>Janice Dickinson</u>

Janice Dickinson met defendant in 1982 when she was a 27-year-old model. The then-45-year-old defendant contacted her modeling agency to arrange a meeting, supposedly for a potential mentorship. She attended the meeting, accompanied by her business manager. Defendant later contacted her while she was on a modeling assignment overseas and offered her a plane ticket to Lake Tahoe to meet to discuss her career. She accepted his invitation. Upon her arrival, she met with defendant's musical director to practice her vocal range. Defendant later joined them,

and the three dined together (N.T. 4/12/18, at 8-16).

She drank red wine at dinner. When she mentioned having menstrual cramps, defendant gave her a small, round, blue pill. She took it and began feeling dizzy and woozy. When they finished eating, the musical director left and defendant invited Dickinson to his hotel room, supposedly to continue discussing her career. She accepted his invitation and accompanied him upstairs to his room (*id.* at 17-18).

When they got to the room, defendant changed into a bathrobe and made a telephone call. Dickinson sat on the bed. She began feeling lightheaded; she could not speak. Defendant finished his phone call, got on top of her and vaginally raped her. She could not move; she just laid there. She felt pain in her vaginal area. She passed out soon after defendant penetrated her (*id.* at 19-23).

She woke up the next morning in her own hotel room—not knowing how she got there—with no pajama bottoms on, semen between her legs, and feeling anal pain. She confronted defendant the next day before returning to her overseas photoshoot (*id.* at 24).

3. <u>Heidi Thomas</u>

Heidi Thomas, a 24-year-old aspiring actress and model, met the 46-

year-old defendant in 1984, after her agent informed her that an icon in the entertainment industry wanted to mentor promising young talent. He invited her to Reno, Nevada, for one-on-one acting coaching; he said that she came highly recommended, and he was looking forward to giving back to the industry that had given him so much (N.T. 4/10/18, at 5-7, 18-21).

Thomas accepted the invitation, and her agency made travel arrangements. She was supposed to stay at Harrah's Hotel and Casino in Reno, where defendant would be performing, but when she arrived at the airport, the car defendant had arranged took her to a ranch house outside Reno. Defendant greeted her at the door; the driver brought her bags inside showed her to her room. Thomas realized that she would not be staying at Harrah's as planned (*id.* at 21-25, 28-29).

She returned from her room and was alone with defendant. She read her monologue, but he wanted her to read a different script—one in which she was to play an intoxicated person. He was not impressed by her performance. He asked if she had ever been drunk. When she told him she had not, he asked how she expected to play the role of an intoxicated person if she had never been drunk. He then got her a glass of white wine and told her to use it as a prop and sip on it to try to relax (*id.* at 30-33).

Thomas took just one sip of the wine and immediately became incapacitated. She explained that things were "not even fuzzy" they were "just not there." She had little recollection—aside from periodic "snapshots"—of anything that happened over the next few days. She later explained, "There's just nothing. There's this blank until there's a picture. And then there's just blank, and then there's another picture" (*id.* at 33-34). In one of those snapshots, she woke up on a bed, feeling sick and wondering how she got there. Defendant was forcing himself in her mouth. In another snapshot, she was in bed with defendant, her head at the foot of the bed and his head at the top of the bed, and defendant was saying, "your friend is going to come again" (*id.* at 35-36). She then remembers waking up, shaking, and feeling sick (*id.* at 36-37).

4. <u>Chelan Lasha</u>

Chelan Lasha met defendant in 1986, through her employment as a model and actress.[5] She was 17 years old; defendant was 48. Defendant called her residence; he later visited her home. After their meeting, Lasha sent modeling shots to defendant, and spoke with him several times on the

[5] A family member who worked at a production company affiliated with defendant arranged for him to call Lasha to help her pursue her modeling and acting career.

telephone (N.T. 4/11/18, at 54-60).

Defendant asked her to meet him in the Elvis Presley Suite at the Las Vegas Hilton to discuss her modeling career; he told her that someone from the Ford Modeling Agency would be there to take pictures of her. He also told her a new character would be appearing on *The Cosby Show*, and implied that this might be an opportunity for her (*id.* at 63-64, 81-82).

As requested, Lasha met defendant at the hotel suite. When she arrived, someone came and took photographs of her; another person came and provided stress and relaxation therapy (*id.* at 64-65).

When she was alone in the room with defendant, he gave her a little blue pill; he said it was an antihistamine that would help with the cold she had. He encouraged her to take the pill, along with a shot of amaretto he provided. She took the pill and the shot because she trusted him. He then gave her another shot of amaretto (*id.* at 65-66).

Soon after, defendant sat behind Lasha on the couch and began rubbing her shoulder. She began to feel woozy; when she got up, she could barely move. Defendant helped her to the bedroom, where he laid her down on the bed. She could no longer move. Defendant lay next to her, pinching her breasts and humping her leg. She felt something warm

on her leg. The next thing she remembered was waking up, in only a robe, to defendant clapping his hands and telling her to wake up (*id.* at 66-67).

5. <u>Maud Lise-Lotte Lublin</u>

Maud Lise-Lotte Lublin, a 23-year-old aspiring actress and model, first met then-52-year-old defendant through her modeling agency. Her agent called and said defendant wanted to meet her. She thought he was interested in helping her with her modeling career. At their first meeting, she gave him her modeling photos; he said he would send them to a modeling agency in New York (N.T. 4/12/18, at 76-77).

Defendant began regularly calling Lublin. She considered him to be a mentor and father figure. Her perception of him changed drastically the second time she met with him to discuss her career. He invited her to his suite at the Hilton Hotel, supposedly to talk. When she arrived, they began discussing acting and improvisation. Defendant poured her a shot of alcohol and told her to drink it. She told him she did not drink alcohol, but defendant insisted. Lublin trusted him and took the drink. He then made her a second drink and told her to drink it. Once again, she accepted the drink because she trusted him. She soon began feeling dizzy and woozy, and she was having trouble hearing and standing (*id.* at 71-84).

Defendant asked her to sit with him on the couch. As requested, she sat between his legs, with her back to him. It seemed inappropriate, but she did not know what to do because she could not hold herself up. Defendant started to stroke her hair. She could hear him talking but could not make out anything that he was saying. She did not know why he was touching her—she thought it was odd and she felt uncomfortable—but she could do nothing about it because she "didn't have the power to move or to get up" (*id.* at 86, 139). The next thing she remembered was walking down a hallway, but she had no recollection of how she got there. After that, she remembered nothing until she woke up at home two days later, not knowing how she got there (*id.* at 83-88, 139).

B. THE EVIDENCE PERTAINING TO THE FIVE PRIOR BAD ACT VICTIMS WAS RELEVANT AND ADMISSIBLE

The admission of evidence is a matter vested within the sound discretion of the trial court and will only be reversed upon an abuse of discretion. *Commonwealth v. Antidormi*, 84 A.3d 736, 749 (Pa. Super. 2014). When a court uses its discretion to reach a conclusion, "there is a heavy burden to show that this discretion has been abused." *Commonwealth v. Norton*, 201 A.3d 112, 120 (Pa. 2019). An abuse of discretion is not a mere

error of judgment; rather, it is "the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality[.]" *Antidormi*, 84 A.3d at 749-50. An abuse of discretion may not be found simply because an appellate court might have reached a different result. *Commonwealth v. Eichinger*, 915 A.2d 1122, 1140 (Pa. 2007). There was no abuse of discretion here.

1. The Evidence was Relevant to Show a Common Plan, Scheme or Design

Defendant contends that the panel "diluted the rigorous standard" for admitting character evidence under the common plan or scheme exception by sanctioning an "unprecedented evidentiary standard." Defendant's Brief at 35. The panel did no such thing. Both lower courts followed the well-established standards.

Prior bad act evidence is not admissible to prove criminal propensity, but it is admissible for other relevant purposes if the probative value outweighs the likelihood of unfair prejudice. *Commonwealth v. Hicks,* 156 A.3d 1114, 1125 (Pa. 2017). Relevant evidence "logically tends to establish a material fact in the case, … make a fact at issue more or less probable or

supports a reasonable inference or presumption regarding a material fact." *Commonwealth v. Tyson*, 119 A.3d 353, 358 (Pa. Super. 2015).

Prior bad act evidence is relevant to prove, among other things, absence of mistake or accident and a "common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the other." *Commonwealth v. O'Brien*, 836 A.2d 966, 969 (Pa. Super. 2003); Pa. R.E. 404(b)(2). While the other acts must be "distinctive and so nearly identical as to become the signature of the same perpetrator," the common plan or scheme exception "does not require that two scenarios be identical in ***every*** respect." *Tyson*, 119 A.3d at 359, 360 n.3 (emphasis in original); *see Hicks*, 156 A.3d at 1128 n.8 ("a perfect match is not required"). Rather, there need only be "such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other." *Hicks*, 156 A.3d at 1125. Such a connection exists when "there are shared similarities in the details of the [acts]" so that "proof of one . . . tends to prove the others." *Commonwealth v. Robinson*, 864 A.2d 460, 481 (Pa. 2004). Thus, evidence is admissible under this exception "where there is a logical

connection between the two and where there is a high correlation in the details of the crimes." *Id.*

Relevant considerations include, "habits or patterns of action or conduct undertaken by the perpetrator to commit the crime[s]," types of victims typically chosen, place, and time. *Tyson,* 119 A.3d at 359. Thus, a signature-like crime is not based solely on a perpetrator's actions, but on the factual similarities ***in their entirety***. *Commonwealth v. Newman,* 598 A.2d 275, 278 (Pa. 1991). Sufficient common factors between the prior bad acts and the current crime "dispels the notion that they are merely coincidental and permits the contrary conclusion that they are so logically connected they share a perpetrator." *Hicks,* 156 A.3d at 1125.

Where prior sexual assaults are involved, different sexual contact in each case does not render evidence inadmissible under this exception. *See Commonwealth v. Frank*, 577 A.2d 609, 616 (Pa. Super. 1990) (evidence that defendant sexually assaulted six boys before sexually assaulting current victim was admissible to prove common plan or scheme even though sexual contact was different). Even in homicide cases courts allow evidence of prior assaults that did not lead to death. *See, e.g.*, *Hicks,* 156 A.3d at 1120-1122, 1128; *Commonwealth v. Arrington,* 83 A.3d 831 (Pa. 2014).

Here, there was a logical connection such that proof that defendant committed a drug-induced sexual assault on his first victim naturally tended to prove that he committed similar acts on his later victims, ending in the drug-induced sexual assault of Ms. Constand. Defendant used the same tactics each time: he sought out much younger women through their employment or career; he instilled trust in them because of his prominent and respected status in the entertainment industry; he developed a mentoring relationship with most of them; he was legitimately in each victim's presence because each accepted a pretextual social invitation; they met defendant in a setting he controlled so he could execute his plan without interruption or unexpected discovery; he drugged each victim, leaving her unconscious or incapacitated; he was aware of each victim's compromised state because he put her into that state; he had access to sedating drugs and knew their effect; he sexually assaulted each victim—or with one of his victims, engaged in, at minimum, untoward sexual conduct[6]—while she was not fully conscious and unable to resist his unwelcomed sexual contact, and; none of the victims consented. Simply

[6] As noted, Lublin has no recollection of being sexually assaulted because she blacked out shortly after defendant drugged her. A reasonable inference to draw from what she remembers, however, is that defendant sexually assault her while she was unconscious.

stated, this evidence shows that defendant engaged in a years-long plan of performing sexual acts on young women who were unresponsive, due to intoxicants he gave them, and the pattern he engaged in with each of these six women reflects a logical—indeed, compelling—connection.

The evidence established more than a connection; it exposed a unique signature.[7] Defendant's sexual assault of Ms. Constand was the culmination of a decades-long pattern uncovered by his prior bad acts that were "distinctive and so nearly identical as to become" his signature. *Tyson,* 119 A.3d at 357-359 (finding that defendant "engaged in a pattern of non-consensual sexual [contact] with [young women] who were in an unconscious or diminished state"). The similarities are "not confined to insignificant details that would likely be common elements regardless of … [offender]." *Commonwealth v. Aikens,* 990 A.2d 1181, 1185 (Pa. Super. 2010).

[7] The decisions discussing the common plan or scheme exception that reference "signature-like" similarities largely involve situations where identity is at issue. *See, e.g.*, *Commonwealth v. Elliott,* 700 A.2d 1243 (Pa. 1997). When identity is not at issue, such as here, "[t]wo conditions must be satisfied to admit prior-crimes evidence to establish a common scheme: (1) the probative value of the evidence must outweigh its potential for prejudice against the defendant and (2) a comparison of the crimes must establish a logical connection between them." *Commonwealth v. Ivy,* 146 A.3d 241, 253 (Pa. Super. 2016). In any event, here, the Commonwealth has established not only a logical connection but also a unique signature.

Rather, they are distinct from a typical sexual abuse pattern such that they are recognizable as the handiwork of the same perpetrator.

For instance, in *Tyson*, the defendant was charged with rape. The victim called him to drive her home after she became ill at work. At her apartment, she fell asleep and awoke to Tyson having sex with her. The Commonwealth sought to admit a 10-year-old rape conviction where the victim drank alcohol at a party in her home and awoke to Tyson, who attended the party, having sex with her in her bed. The trial court precluded the evidence. 119 A.3d at 356 n.1.

The Superior Court reversed, finding the evidence admissible under, *inter alia,* the common plan or scheme exception. It noted the similarities that were not "generically common to many sexual assault cases"; rather, they reflected a "clear pattern" where Tyson was justifiably in his victim's home, knew of her compromised state, and sexually assaulted each victim in her bedroom during the night while she was unconscious. *Id.* at 360-361. This pattern was "sufficiently distinctive" to establish a "common scheme of nonconsensual intercourse with unconscious victims." *Id*.

Defendant, like Tyson, engaged in a pattern of non-consensual sexual intercourse with female acquaintances who were in a diminished state and purposely exploited each victim's diminished state and inability to consent.

In *Aikens*, the defendant was prosecuted for involuntary deviate sexual intercourse with his 14-year-old daughter. The appellate court ruled that evidence that he raped another daughter 15 years earlier was properly admitted because it showed a common plan or scheme. In each case, the victims were of like ages, both were his daughters, the incidents occurred during overnight visits to his home, he showed the victims pornography, and assaulted them in bed at night. These similarities, were "not confined to insignificant details that would likely be common elements regardless of … [offender]"; rather, the incidents were "unique" and "distinguish[able]" from a typical child-abuse fact pattern. 980 A.2d at 1185-86.

In *Elliott*, the defendant was prosecuted for rape and murder. The Court held that three prior assaults on women were admissible to show a common plan or scheme because they were sufficiently similar to the current attack. 700 A.2d at 1250. The victims were all white women in their twenties, choked and/or beaten in the early morning, after being alone with Elliot, and each assault had sexual overtones. *Id.* at 1249-50.

In *O'Brien,* the court found that evidence of sexual assaults of two minor boys 10 years prior was admissible in a sexual assault trial of a third minor boy to prove a common plan or scheme, and to bolster the victim's credibility, because each incident was sufficiently similar. 836 A.2d at 972.

Like in *Tyson, Aikens, Elliott,* and *O'Brien*, the similarities among the prior bad acts and Ms. Constand's assault are "not confined to insignificant details that would likely be common elements regardless of … [offender]." *Aikens,* 990 A.2d at 1185. Rather, the distinctive similarities show that the incidents are so related that proof of one tends to establish the other.

Defendant, though, insists there are "virtually no similarities." Defendant's Brief at 40. To the extent that he acknowledges any similarities, he either claims that they are unsupported or irrelevant. For instance, he claims the age difference is irrelevant because it is too general, but a cursory review of the applicable law makes clear that age is a relevant factor. *See, e.g.*, *Aikens,* 990 A.2d at 1185-86; *Tyson,* 119 A.3d at 360.

He also maintains that the record does not support the trial court's finding that the prior bad act witnesses were "physically fit." He is wrong. The record reveals that at the relevant time, Thomas, Lasha, Dickinson, and Lublin were all young, aspiring models and actresses—at a time where

young women in the industry were almost universally slim and fit. While Baker-Kinney was not an aspiring actress or model, she lived an extremely healthy and active lifestyle skiing, bowling, water-skiing, and aerobicizing. Lublin was a runner, and Constand was a former professional basketball player (N.T. 4/10/18, at 5-9; N.T. 4/11/18, at 54-57, 195; N.T. 4/12/18, at 8-11; N.T. 4/12/18, at 76-77).

He also argues that he met the victims under different conditions, but he met each one through her employment and, in most instances, he sought her out. Additionally, while he claims he had a different relationship with each victim, in almost every instance, he maintained a mentoring relationship with her. For instance, he offered to assist Dickinson in her acting and singing career; Thomas in her acting career; Lasha in her modeling career; Lublin in her acting and modeling career; and Andrea Constand in a potential sports casting or broadcasting career. Any differences in the relationships are insignificant. *See generally Tyson*, 119 A.3d 353 (finding sufficient similarities where victims had different relationships with defendant).

Defendant also claims that the manner of the sexual contact was not sufficiently similar to be relevant. Yet, this exception "does not require that

the two scenarios be identical in ***every*** respect." *Tyson,* 119 A.3d at 360 n.3 (emphasis in original); *see Cosby,* 224 A.3d at 402 ("no two events will ever be identical and it is simply unreasonable to hold the admission of PBA evidence to such a standard"). A "signature" is based on the totality of factual similarities, not just the perpetrator's actions; indeed, there may be a "signature" even though the incidents are not identical. *Newman,* 598 A.2d at 278 (requiring court to examine factual similarities of each incident not just acts performed by defendant); *see also Frank,* 577 A.2d at 612-14, 618 (finding PBA evidence admissible to prove common plan or scheme where assaults involved different sexual contact; it was sufficient that defendant initiated "some type of sexual contact"); *Commonwealth v. Luktisch,* 680 A.2d 877, 878-79 (Pa. Super. 1996) (upholding admission of prior sexual assaults involving oral sex where sexual assault on current victim did not).

Defendant next points to the geographical locations of the assaults. While he assaulted Ms. Constand in his home, the fact that he assaulted his other victims in his hotel room or a home where he was temporarily residing alone is of no consequence. Every time, he isolated his victim and assaulted her in a setting he exclusively controlled so that he could execute his plan without interruption or unexpected discovery. In any event,

location is just one factor to consider. *See Commonwealth v. Gordon,* 652 A.2d 317, 325 (Pa. Super. 1994) (finding trial court put undue emphasis on location of offenses and ignored similarities of offenses in their entirety).

Defendant next claims that even if the incidents shared sufficient similarities, they were inadmissible as they were too remote. The lower courts, he insists, disregarded remoteness. The record belies his claim.

To begin, remoteness is just one factor to consider in determining the probative value of other act evidence. *Luktisch*, 680 A.2d at 879. Moreover, the importance of any time gap is "inversely proportional" to the similarities between the acts. *Tyson,* 119 A.3d at 359. Thus, the more similar the acts, the less the remoteness of time between the acts matters. *See Aikens*, 990 A.2d at 1186 (finding that although defendant's abuse of prior victim occurred remotely, because parallels between cases were "striking," remoteness did not preclude admission). The prior bad acts here are strikingly similar; as such, remoteness did not weigh heavily.

Furthermore, several cases permitted prior bad act evidence despite a lengthy time gap where there were substantial similarities between the incidents. *See, e.g.*, *Commonwealth v. Smith,* 635 A.2d 1086, 1089 (Pa. Super. 1993) (sex assault 10 years before current assault admissible where so

similar that time lapse was "non-existent, or minimal at best"); *Aikens*, *supra* (admission of prior 15-year-old sex assault); *Commonwealth v. Odum*, 584 A.2d 953, 955 (Pa. Super. 1990) (13-year-old sex assault admissible); *Luktisch*, 680 A.2d at 878-879 (Sex assaults between 19 and 14 years before current assault admissible); *Commonwealth v. Patskin*, 93 A.2d 704 (Pa. 1953) (admission of 17-year-old prior assault). Thus, a lengthy gap between the prior bad acts and the current assault does not mechanically render the prior bad acts too remote. As the Superior Court cautioned, "[f]ocusing solely upon th[e] time lapse . . . is improper." *Luktisch*, 680 A.2d at 878.

Defendant also misconstrues the remoteness standard. The court must consider the sequential nature of the prior bad acts, not each act in isolation. *See Smith,* 635 A.2d at 1089 ("[R]emoteness … is determined by analyzing the time involved between each of the criminal incidents."); *Odum*, 584 A.2d at 955 (refusing "to consider the evidence entirely out of its sequential context"). This inquiry considers whether the evidence indicates "a recurring sequence of acts by this [defendant] over a continuous span of time, as opposed to random and remote acts." *Smith,* 635 A.2d at 1090.

Defendant places each prior bad act in isolation and in relation to his assault of Ms. Constand, ignoring the well-settled standard. Viewed in the

proper sequential context, however, the prior bad act evidence reveals that he repeatedly facilitated drug-induced sexual assaults for decades.[8]

Contrary to defendant's belief, the lower courts properly viewed the incidents in their sequential context and in proportion to their similarities. They simply did not assign as much weight to remoteness as defendant would have liked because of, in part, the frequency and the distinctive similarities between the incidents. *See* Opinion at 109; *see also Cosby,* 224 A.3d at 405. This was a proper exercise of discretion. *See Frank,* 577 A.2d at 617 ("[g]iven the degree of similarity in the details of each of the [prior bad act] witnesses and the testimony of the victim . . . the relevancy of this evidence indicated a recurring sequence of acts by this [defendant] over a continuous span of time, as opposed to random and remote acts").

The panel's reference to defendant's plan as akin to a "script or playbook of criminal tactics" in no way diluted the rigorous standard for admitting prior bad act evidence under this exception. Its decision makes clear that it repeatedly cited and, in fact, applied the demanding standard.

[8] While the Commonwealth proffered 19 prior bad act victims, as noted, dozens of other women came forward reporting similar drug-induced sexual assaults by defendant. When viewed in their sequential context, these added incidents further diminish the time periods between the incidents. *See Odum*, 584 A.2d at 955 ("there were additional incidents which were not submitted to the jury … [that] would further act to reduce the time periods between incidents").

See Cosby, 224 A.3d at 398 ("The [common plan or scheme] exception is demanding in its constraints, requiring nearly unique factual circumstances in the commission of a crime, so as to effectively eliminate the possibility that it could have been committed by anyone other than the accused").

Finally, defendant insists that there was no "logical connection" between the incidents. Citing the 1872 case of *Shaffner v. Commonwealth,* 72 Pa. 60 (Pa. 1872), and piggybacking off a dissent in *Hicks,* he seeks to upend decades worth of controlling authority on prior bad act law—common plan or scheme evidence, in particular— and have the Court revert to a century-and-a-half old case requiring there to be "overarching plan" in order to establish a logical connection.[9] Defendant's brief at 36-37. To this end, he argues that the evidence was inadmissible under this exception because it was not "part of an overarching plan to assault" Ms. Constand.[10] *Id.* at 38. He maintains that to be admissible under the common plan or scheme exception, the prior bad acts and the current crime must have been "'both

[9] Defendant's *amici* raise this theory, too, though they call it the "true link test" and the "linked act theory," respectively. *See Brief of Amicus Curiae the Pennsylvania Association of Criminal Defense Lawyers; Brief of Amicus Curiae Defender Association of Philadelphia.*

[10] Even if this were true (it is not), it is not dispositive. By his own admission, the evidence must satisfy ***either*** the "signature crime approach" ***or*** the "logical connection approach." *Id.* at 36-38.

contemplated by [the defendant] as parts of one plan in his mind' such that 'it is obvious' that committing the prior act 'was part of his purpose' in committing the charged crime." *Id.* at 37 (citing *Shaffner,* 72 Pa. at 65-66); *see also Hicks,* 156 A.3d at 1144 (Donohue, J., dissenting). His argument is waived and, in any event, meritless.

Defendant raises his "overarching plan" theory for this first time before this Court; neither his trial court filings nor his Superior Court briefs raised this theory—either expressly or by implication. A defendant may not raise a new theory for the first time on appeal, much less before this Court. He has thus waived this argument. *See Commonwealth v. Shabezz,* 166 A.3d 278, 288 (Pa. 2017) (finding waiver in Supreme Court where appellant "did not pursue this line of attack before the Superior Court"); *Commonwealth v. Cline,* 177 A.3d 922, 927 (Pa. Super. 2017) ("A new and different theory of relief may not be successfully advanced for the first time on appeal."); *Commonwealth v. Barnes,* 151 A.3d 121, 124 (Pa. 2016) ("an appellant waives any argument that is not properly raised in the first instance before the trial court and preserved at every stage of his appeal"); *see generally* Pa. R.A.P. 302(a) (providing that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal").

Nonetheless, admission of evidence under the common plan or scheme exception is not governed by whether a defendant had a goal to carry out his plan with respect to his ultimate victim. To be sure,

> 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."

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

Defendant's argument ignores the last half century of prior bad act case law from this Commonwealth that imposes no requirement of an overarching plan. *See, e.g., Ivy,* 146 A.3d at 253 ("comparison of the crimes must establish a logical connection between them"); *Arrington,* 86 A.3d at 842 (same); *Commonwealth v. Hughes,* 555 A.2d 1264, 1282-1283 (Pa. 1989) (same). ***None*** of these cases require—much less contemplate—defendant's new theory. Instead, they implicitly recognize that a defendant's "plan" includes his deliberate, yet opportunistic, resort to criminal tactics that worked to his advantage in the past.

For instance, in *Arrington,* the defendant killed his ex-girlfriend after she left him because of persistent physical and emotional abuse, and the Commonwealth was permitted to introduce evidence of prior bad acts he committed against three previous girlfriends to prove his common plan to control girlfriends through violence and intimidation. *Id.* at 841-842. His plan of controlling his girlfriends worked in the past, and he resorted to the same tactics with his current victim. Defendant, like Arrington, had a plan. But his was far more nefarious. It was a years-long, distinctive plan and sexually assaulting young women who were unconscious was his goal. And, like Arrington, defendant's plan worked in the past, so he continued to execute his plan, with great success, until it finally backfired.

Shaffner is antiquated, inconsistent with current case law, and distinguishable. It dealt with motive, which requires "a firm basis for concluding that the [current] crime … 'grew out of or was in any way caused by the prior set of facts and circumstances.'" *Ross,* 57 A.3d at 101. Such is not the case under the common plan or scheme exception.

In any event, defendant fits into the category considered by *Shaffner*. His prior bad acts were "part of a larger field of operation, previously conceived and in part executed." *Commonwealth v. Chalfa,* 169 A. 564, 565

(Pa. 1933) (citing *Shaffner,* 75 Pa. at 65-66). While he may not have planned to sexually assault Ms. Constand from the start—he could not have since she was not yet born—he planned to engage in a routine, distinctive pattern to sexually assault young women while they were incapacitated. Thus, no relief is due on his waived "overarching plan theory."

2. The Evidence was Relevant to Show an Absence of Mistake or Accident

Defendant next argues the prior bad act evidence was inadmissible under the absence of mistake exception. According to him, admitting the evidence to defeat an anticipated defense of consent in a sexual assault case is a "novel contention," unsupported by authority. Defendant's brief at 52. He also maintains that the exception is inapplicable because he supposedly conceded committing the *actus reus* of the crime.[11] His claims fail.

Absence of mistake is an enumerated exception to the general ban on prior bad act evidence. Pa. R.E. 404(b)(2). Prior bad act evidence is admissible to show a defendant's actions did not result from a mistake or accident where the manner and circumstances of the acts are "remarkably similar." *Tyson*, 119 A.3d at 359 (citation omitted)*; Commonwealth v.*

[11] Defendant advances this latter theory for the first time before this Court. It is, therefore, waived. *See Cline,* 177 A.3d at 927; *see generally* Pa. R.A.P. 302(a).

Boczkowski, 846 A.2d 75, 89 (Pa. 2004). Thus, the logical relevance of evidence proving a lack of mistake or accident does not require "as great a degree of similarity" as the common scheme or plan exception. *Hicks,* 156 A.3d at 1132 (Saylor, C.J., concurring); *Ross*, 57 A.3d at 98-99 (noting absence of mistake exception does not require "unique signature," but a "close factual nexus sufficient to demonstrate connective relevance of prior bad acts to crime in question").[12] "[Some] differences between the . . . incidents are not essential to the question of whether [defendant] mistakenly believed [the victim] consented to sexual [contact]." *Tyson* 119 A.3d at 363. The basic premise remains that "as the number of . . . incidents grows, the likelihood that [the defendant's] conduct was unintentional decreases." *Commonwealth v. Donahue*, 549 A.2d 121, 127 (Pa. 1988).

Evidence of the prior drug-facilitated sexual assaults defendant committed on young, female victims was properly admitted under the absence of mistake exception to rebut a defense of consent. Implicit in such a defense is that if Ms. Constand was too incapacitated to consent, then

[12] Defendant recognized this reduced similarity threshold in his brief to the Superior Court. *See* Defendant's Superior Court Brief at 79 (stating that absence of mistake exception requires "remarkabl[e] similar[ity])." Now, he asserts that the similarity threshold for the absence of mistake exception is "identical" to that of the common plan or scheme exception. Defendant's brief at 52.

defendant was mistaken in his belief that the sexual contact was consensual. Thus, the evidence tended to prove that he did not mistakenly believe she was awake enough to consent to his sexual contact. Indeed, Ms. Constand, like his five prior victims, was incapacitated because ***he*** drugged her. He knew the debilitating effect of the intoxicants he used from his experience drugging and assaulting his prior victims. In fact, he previously admitted to giving a drug that he knew to be a central nervous system depressant, like Benadryl, to women he wanted to have sex with.

Tyson, once again, is instructive. The court held that where he knew each victim was in a compromised state, Tyson's prior rape of a woman in a diminished state was admissible under the absence of mistake exception. 119 A.3d at 362. The Commonwealth had a "significant need" for the evidence to prove non-consent, and it "tend[ed] to increase the probability that [Tyson] knowingly had non-consensual sex with [the current victim]." Despite some differences between the incidents, it was also "highly probative" of the fact that he "could not have reasonably believed [his current victim] was conscious enough to give her consent." *Id.* at 360-63 (noting certain differences are not essential to mistaken belief analysis).

Here, as in *Tyson,* the prior bad act evidence was highly probative of non-consent. That defendant, on at least five previous occasions, gave an intoxicant to a young woman that incapacitated her and then had indecent contact with her while she was incapacitated, was probative of the fact that he could not have reasonably believed that Ms. Constand was conscious enough to give her consent. Rather, the evidence tended to establish that he "intentionally exploited [yet] another opportunity to take advantage of a woman sexually, when he knew [she] was in a diminished state." *Id.* at 363.

Moreover, prior bad act evidence is routinely admitted under the absence of mistake or accident exception to rebut defenses. *See Boczkowski*, 846 A.2d at 88-89 (finding evidence of ex-wife's "remarkabl[y] similar" drowning death admissible under absence of mistake or accident exception in homicide trial for bathtub drowning of current wife to show death was result of Boczkoswki's deliberate actions); *Donahue*, 549 A.2d at 127 (finding court properly admitted evidence of prior uncharged child abuse allegation of another child to prove absence of mistake or accident in homicide trial stemming from child abuse to negate that child was injured in accidental fall); *Commonwealth v. Billa,* 555 A.2d 835, 840 (Pa. 1989) (finding evidence of prior rape and attempted murder of a young woman

admissible in homicide trial to negate defendant's claim he inadvertently stabbed his victim during struggle for knife); *Commonwealth v. Travaglia*, 467 A.2d 288, 297 (Pa. 1983) (upholding admission of prior criminal acts committed during defendant's crime spree to rebut claim that shooting was accident that occurred when his finger slipped). Accordingly, contrary to defendant's belief, the absence of mistake exception can be used to rebut an anticipated defense, including one of consent.

Perhaps realizing the incongruity in asserting that a proposition is "novel" when an *en banc* panel of the Superior Court recognized that proposition, defendant acknowledges *Tyson's* holding, but argues it does not apply because Tyson's prior sexual assault led to a conviction, putting him on notice of his victim's incapacity to consent. His logic is flawed.

That the prior bad act evidence here involves uncharged conduct is of no moment. "[Rule] 404(b) is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court. Rather, it encompasses both prior crimes ***and prior wrongs and acts.***" *Commonwealth v. Ardinger,* 839 A.2d 1143, 1145 (Pa. Super. 2003) (emphasis added); *see, e.g.*, *Donahue,* 549 A.2d at 125 (prior bad act admitted even though no charges). It was the ***fact*** of the prior bad act in *Tyson* that supported the court's finding that

Tyson knew or had reason to know of his victim's diminished state and resulting incapacity to consent, not that it resulted in a conviction.

Although the court noted that the prior bad act led to a conviction, it did so simply to show that Tyson was aware of the non-consent of a prior victim. While the prior bad acts did not lead to convictions, here defendant knew his victims were incapacitated and unable to consent because ***he*** was the one who drugged them. Further, he was informed by at least one of his victim's as to her non-consent well before his assault of Ms. Constand (N.T. 4/12/18, at 25-26 [Dickinson confronting defendant the day after he raped her]). Thus, despite the absence of a criminal conviction, his conduct with his prior victims tended to establish that he could not have reasonably believed that Ms. Constand was conscious enough to give her consent.

Defendant next raises a new theory why absence of mistake supposedly does not apply here: because he "does not deny that he committed the *actus reus* of the crime." Defendant's brief at 52. According to him, the *actus reus* is simply the physical act of penetration. He urges this Court to "reject the expansion of the absence of mistake/accident exception where the *actus reus* is undisputed." *Id.* at 56. Defendant's claim is flawed on many levels, along with being waived.

First, he misconstrues the definition of *actus reus,* particularly as it relates to the aggravated indecent assault statute. "[A] person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures commits aggravated indecent assault if: (1) the person does so without the complainant's consent. . . ." 18 Pa. C.S. § 3125(a)(1). As the statute recognizes, the act of penetrating the genitals for "good faith medical, hygienic or law enforcement procedures" is not a crime. Thus, the mere act of penetration is not itself a crime; rather, other conditions—such as lack of consent—must be present. Lack of consent is, therefore, part of the *actus reus* of the crime. *See State v. Lowther,* 398 P.3d 1032, 1040 (Ut. 2017) (stating that consent is "component of *actus reus* in a rape charge"); *People v. Shores,* 412 P.3d 894, 900 (Colo. App. 2016) (same).

Indeed, the statute makes clear that the *mens rea* component of the crime refers to purposes that are not medical, hygienic, or law enforcement, and the *actus reus* component refers to penetration without consent. *Compare* Black's Law Dictionary (11th ed. 2019), pp. 45-46 ("the *actus reus* for theft is the taking of or unlawful control over property ***without the owner's***

consent") *with id. at* 1181 ("the *mens rea* for theft is the intent to deprive the rightful owner of the property") (emphasis added). The Commonwealth must therefore prove the *actus reus* that defendant penetrated Ms. Constand's genitals ***without her consent***.

Even if this Court were to accept defendant's narrowed definition of *actus reus* to encompass only the genital penetration, his claim fails. This is so because while he may now, in a Monday-morning-quarterback capacity, say he concedes committing penetration, at the relevant time, he made no such concession. While he admitted in his deposition to digitally penetrating Ms. Constand's vagina, this is no way demonstrates that at the time of the prior bad acts motion—more than 10 years later—he conceded this element. To the contrary, he went to great lengths to preclude the introduction of his deposition testimony; and, any evidence presented to the jury showing that he did, in fact, admit to penetrating Ms. Constand's vagina, was presented ***by the Commonwealth,*** not defendant.

Even if the evidence established that defendant conceded the digital penetration component of the crime (it did not), and assuming further that his narrowed definition of *actus reus* is correct (it is not), his contention that the absence of mistake exception is inapplicable in such a situation still fails

because it is contradicted by the authority in this Commonwealth. *See Tyson*, 119 A.3d at 362-363 (finding evidence of prior rape was admissible under absence of mistake exception even though Tyson admitted to having sex with his victim and only issue was whether she consented).

This Court has regularly permitted prior bad act evidence under the absence of mistake or accident exception when a defendant conceded to committing the *actus reus*. *See Commonwealth v. Sherwood*, 982 A.2d 483, 490, 497 (Pa. 2009) (upholding admission of prior abuse of victim to show absence of mistake or accident where defendant admitted to administering fatal beating but denied intent to kill); *see also Commonwealth v. Smith,* 675 A.2d 1221, 1227-29 (Pa. 1996) (declining to find trial counsel ineffective for failing to object to admission of prior bad acts defendant committed against infant because evidence was relevant to rebut his claim of accident where he admitted injuring to infant but claimed it was accidental).

Accordingly, the lower court rulings did not improperly expand the absence of mistake exception. The trial court properly exercised its discretion in admitting the evidence to rebut the defense of consent.[13]

[13] Thus, even if this Court concludes that the evidence was inadmissible under the common plan or scheme exception, defendant's conviction should still be upheld. *See*

3. The Evidence was Relevant Under the "Doctrine of Chances"

Defendant next claims the trial court erred in permitting the evidence under the "doctrine of chances" because this Court has not "expressly adopt[ed]" the doctrine. Defendant's brief at 61.[14] His claim fails. The trial court properly found the doctrine of chances as an alternative basis for admitting the evidence.

The doctrine of chances is an alternative, non-character-based theory of logical relevance, with a reduced similarity threshold "that does not depend on an impermissible inference of bad character." *Hicks,* 156 A.3d at 1132 (Saylor, C.J., concurring). Evidence is admitted to establish "the objective improbability of so many accidents befalling the defendant ***or the defendant becoming innocently enmeshed in suspicious circumstances so frequently***." *Id.* at 1333 (citation omitted) (emphasis in original). Thus, the

---

Booth, 766 A.2d at 852 (noting Supreme Court can affirm Superior Court if it is correct on ***any*** ground); *compare Billa,* 555 A.2d at 840 (Court expressing no opinion on propriety of lower court's finding that prior bad act evidence was admissible under common plan or scheme exception where evidence was admissible to negate defendant's claim of accident).

[14] He also claims that the doctrine of chances is inapplicable because the *actus reus* is not in dispute. *Id.* at 62. This claim is waived, however, because he raises it for the first time before this Court. *See Cline,* 177 A.3d at 927; *see generally* Pa. R.A.P. 302(a). In any event, this claim is meritless; as discussed *supra,* his definition of *actus reus* is flawed and excludes the crucial component of consent. *See* 18 Pa. C.S. § 3125; *see also Lowther,* 398 P.3d at 1040 (stating that consent is a "component of *actus reus* in a rape charge").

more often a defendant commits the *actus reus,* the less likely it is that he acted innocently or accidentally. JONES ON EVIDENCE § 17:62 (7th ed.). This is not propensity evidence because it is founded on a logical inference deriving not from the personal, subjective character of a defendant, but the external circumstances—the objective probability of so many accidents befalling the defendant. *Hicks,* 156 A.3d at 1133 (Saylor, C.J., concurring); *see* David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge,* 81 Neb. L. Rev. 115, 161-162, 167 (2002).

Indeed, Professor Imwinkelried notes that the argument that the doctrine of chances is "nothing more than character reasoning in disguise" has been "largely rebutted." Edward J. Imwinkelried, *The Evidentiary Issue Crystalized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About an Accused's Uncharged Misconduct Under the Doctrine of Chances to Prove Identity*, 48 Sw. L. Rev. 1, 12-13 (2019).[15] As he explained, "the courts certainly continue to classify the doctrine of chances as a

[15] Although defendant and his *amici* cite various works of Professor Imwinkelried throughout their briefs, curiously, they fail to cite this article ***that specifically discusses this case***. Perhaps this is so because Mr. Imwinkelried concludes that the prior bad act evidence here was indeed admissible under the doctrine of chances. *See id.* at 34 (concluding that this case "crystalized the issue of the propriety of employing the doctrine of chances").

genuine non-character theory; and the better view is that uncharged misconduct evidence may be admitted by virtue of the doctrine without offending the character evidence prohibition." *Id.* at 13.

There are safeguards in place to ensure that the doctrine does not swallow the general proscription against prior bad act evidence: the other act evidence must be "roughly similar" to the current crime and "[fall] into the same general category"; the number of unusual occurrences the defendant has been involved in must exceed the frequency rate for the general population; and there must be a real dispute between the defense and the prosecution over whether the *actus reus* occurred. *Hicks,* 156 A.3d at 1136 (Saylor, C.J., concurring) (citations omitted).[16]

Despite defendant's assertion, the doctrine of chances ***has*** been applied in Pennsylvania. For instance, in his *Hicks* concurrence, Chief Justice Saylor applied the doctrine as his rationale for finding that the trial court properly admitted evidence of defendant's three prior assaults of

[16] Of course, the doctrine of chances need not be set forth in Rule 404(b) to be an acceptable theory upon which to admit prior bad act evidence. *See* Pa. R.E. 404, *cmt.* (noting that the list is "non-exhaustive"); *see also Commonwealth v. Lark,* 543 A.2d 491, 497 (Pa. 1988 (same); 23 C.J.S. CRIMINAL PROCEDURE AND RIGHTS OF ACCUSED § 1125 (2016) (discussing the additional "latitude in admitting other crimes evidence" where "[t]he list of purposes in an inclusionary rule of evidence are only examples of exceptions to the general prohibition").

women to prove absence of mistake or accident in his homicide trial for killing another woman with whom he had a similar relationship. *Id.* at 1133-1137 (Saylor, C.J., concurring). Instead of classifying the incidents as "strikingly similar," like the majority, he found that they were "roughly similar" and "f[e]ll into the same general category," which satisfied the threshold for the doctrine of chances. *Id.* 1137 (Saylor, C.J., concurring); *see* Leonard, *Use of Uncharged Misconduct Evidence,* 81 Neb. L. Rev. at 163 ("One advantage of the doctrine of chances theory is that it does not apply only to cases in which there is remarkable similarity between the … [incidents]."). In applying the doctrine, the Chief Justice recognized the "history of violent attacks [on] women . . . reduced the probability that, having been found to be closely associated with a badly bruised body of a woman whom the [prosecution] contended had been choked, there is an innocent explanation for his involvement prior to his admitted dismemberment of the body." *Id.* at 1137 (Saylor, C.J., concurring). He, therefore, concluded that this evidence satisfied the "logical non-character-based relevance criterion." *Id.*

This Court previously applied the doctrine in *Donahue*. In that child abuse homicide trial, the Commonwealth admitted evidence of a prior

child abuse allegation involving another child under a doctrine of chances rationale. *Id.* at 126-27. The Court described the doctrine as "the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." *Id.* at 126 (quoting II Wigmore, *On Evidence,* § 302, pp. 241 (Chadbourn Rev. 1979)). It further explained,

> [T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but that ***the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.***
>
> . . . ***In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act.*** . . .
>
> ***It is not here necessary to look for a general scheme or to discover a united system in all the acts;*** the attempt is merely to discover the intent accompanying the act in question; and the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent. The argument is based ***purely on the doctrine***

> ***of chances, and it is the mere repetition of instances, and not their system or scheme, that satisfies our logical demand.***
>
> Yet, in order to satisfy this demand, it is at least necessary that prior acts should be ***similar***. . . .

Donahue, 549 A.2d at 126 (quoting II Wigmore, *On Evidence*, at 245-246) (emphasis in original).

In finding that the doctrine of chances applied, the Court reasoned, "although two different children may, at different times, be seriously injured or killed while in a person's care, . . . , ***as the number of such incidents grows, the likelihood that his conduct was unintentional decreases. It is merely a matter of probabilities***."[17] 549 A.2d at 127 (emphasis added). Thus, "[b]ecause the former case tends to decrease the likelihood that the same man would be involved in two such similar accidents, the former incident is admissible as probative evidence of whether the injuries in the second case were [from an accidental fall]." *Id.*

If evidence is admissible under the doctrine of chances where a ***single*** prior bad act is proffered, like in *Donahue*, then it clearly applies here, where the frequency requirement underpinning the doctrine is undeniably

[17] Defendant incorrectly asserts that the *Donahue* Court only "generally discussed" the doctrine of chances and did not "expressly adopt the doctrine as an exception to the bar on character evidence." Defendant's brief at 61.

present. The number of prior incidents proffered reached well into the double digits, and five were admitted; accordingly, the likelihood that defendant's conduct was unintentional plummeted. It would defy logic to maintain that he mistakenly assessed Ms. Constand's ability to consent to the sexual acts he performed after giving her an intoxicant when he engaged in strikingly similar acts with at least five other women. Indeed, his history of giving intoxicants to women and sexually assaulting them once they were incapacitated "reduced the probability that . . . there is an innocent explanation" for his conduct with Ms. Constand. *Hicks*, 156 A.3d at 1137 (Saylor, C.J., concurring). It is simply a matter of probabilities.

In *Tyson,* moreover, while the court did not reference the doctrine by name, its rationale makes clear that it relied on it—at least in part—in finding Tyson's prior rape admissible because "it tend[ed] to increase the probability that [he] knowingly had nonconsensual sex with [the victim]." *Id.* at 360. More recently, in *Commonwealth v. Bidwell,* the Superior Court applied the doctrine, though it concluded that the evidence was not admissible. 195 A.3d 610, 625 (Pa. Super. 2018). Importantly, though, it acknowledged that the doctrine of chances was indeed an accepted theory for admission of other act evidence in Pennsylvania. *See id.* (noting

doctrine is "a test new to Pennsylvania but widely used in other jurisdictions"). These cases make clear that the doctrine is a viable basis for admitting other act evidence in Pennsylvania and that it can be used to prove both *mens rea* and *actus reus*. *See Hicks,* 156 A.3d at 1132 n.7.

The Commonwealth has satisfied each safeguard built into the doctrine of chances. As discussed, the prior bad acts are strikingly similar to the current crime, thereby satisfying the "roughly similar" standard. Moreover, the prior "unusual occurrences"—*i.e.,* defendant administering intoxicants to young women and then sexually assaulting them while they were too incapacitated to either consent or ward off his unwanted advances—"exceeds the frequency rate for the general population." Finally, there was a dispute about whether the *actus reus* occurred.

Moreover, courts in other jurisdictions have applied the doctrine of chances when faced with circumstances, such as those here, to uphold the admission of prior bad act evidence to show a defendant's intent or other mental state, or *actus reus*.[18] *See, e.g.*, *People v. Robbins,* 755 P.2d 355, 362

[18] While mindful that authority from other jurisdictions is not binding on this Court, these cases provide persuasive authority for applying the doctrine of chances to this case. *See Verdini v. First Nat. Bank of Penn.*, 135 A.3d 616, 619 n.5 (Pa. Super. 2016) (stating that "[t]he decisions of the lower federal courts and other states' courts may provide persuasive, although not binding, authority"). This authority is especially

(Cal. 1988) (citing doctrine of chances in finding evidence that defendant previously sodomized and killed another young boy was admissible as proof of intent to kill in prosecution for rape and murder of young boy where defendant acknowledged homicide but contested rape and intent to kill); *United States v. Woods,* 484 F.2d 127 (4th Cir. 1973) (finding trial court properly admitted 20 prior instances of cyanosis to nine children in defendant's care in case involving murder of his infant foster son due to cyanosis to establish, pursuant to doctrine of chances, that death was not accidental); *Martin v. State,* 173 S.W.3d 463, 465-68 (Tex. Crim. App. 2005) (finding evidence of previous sexual assault admissible under doctrine to prove victim did not consent); *Lowther,* 398 P.3d at 1040 (finding evidence of prior sexual assaults relevant under doctrine to show lack of consent and defendant's intent to have sex with victim while she was sleeping).

Lowther is particularly instructive. There, after Lowther was charged with raping an intoxicated, unconscious young woman, the prosecutor sought to introduce evidence of two prior rapes and a prior sexual assault

---

important here because of defendant's contention that there is no precedent in Pennsylvania expressly adopting the doctrine of chances. *Cf. Branham v. Rohm & Haas Co.,* 19 A.3d 1094, 1107 (Pa. Super. 2011) ("[w]here there is controlling authority in Pennsylvania law, we need not consult the decisions of sister jurisdictions to reach a disposition").

that he committed on young women who were incapacitated from intoxication. Although the appellate court reversed the trial court's ruling allowing the evidence because it applied the wrong balancing test, it found that the evidence was relevant under the doctrine of chances because both the *actus reus* and the *mens rea* were in dispute. 398 P.3d at 1040. It noted that in a rape case, "[t]o prove a*ctus reus,* the State must prove that [the defendant] had sex with [the victim] without her consent." *Id.* The doctrine of chances, the court concluded, "is one tool the State may use to prove that [the victim] did not consent to sex with [the defendant]." *Id.*

Courts in other jurisdictions have routinely held that the doctrine of chances applies where, as here, a defendant claims consent to a sexual assault. In *People v. Kelly*, 895 N.W.2d 230 (Mich. Ct. App. 2016), the court found that the trial court abused its discretion in excluding other act evidence in a sexual assault case. The defendant claimed consent, yet had seven prior assaults over 25 years. The court explained, "employing the doctrine . . ., it strikes us as extraordinarily improbable that eight unrelated women in four different states would fabricate reports of sexual assaults after engaging in consensual sex with defendant." *Id.* at 235.

Similarly, in *People v. Everett,* 250 P.3d 649, 656-657 (Colo. App. 2010), a sexual assault prosecution where the defendant claimed the victim consented, the court held that evidence that the defendant committed other sexual offenses was admissible under the doctrine of chances because

> [w]hen one person claims rape, the unusual and abnormal element of lying by the … witness may be present. But, when two (or more) persons tell similar stories, the chances are reduced that both are lying or that one is telling the truth and the other is coincidentally telling a similar false story.

Id. (citation omitted).

As in *Kelly,* it should strike this Court as "extraordinarily improbable" that numerous unrelated women in states throughout the country would "fabricate reports of [drug-facilitated] sexual assaults" committed by defendant. 895 N.W.2d at 235. Moreover, as in *Everett,* when two or more persons tell similar stories, "the chances are reduced that [all] are lying or that one is telling the truth and the other[s are] coincidentally telling a similar false story." 250 P.3d at 657.

For these reasons, the trial court properly concluded that the doctrine of chances offered a "related, compelling basis for admission." Opinion at

99.[19] The repeated nature of defendant's conduct negated any non-criminal intent; the sheer number of times defendant had sexual contact with a young woman to whom he provided an intoxicant, that caused her to become incapacitated, renders any claim that he was mistaken when he assessed Ms. Constand's ability to consent implausible. Indeed, there is an objective improbability of so many accidental, inadvertent occurrences.

Finally, as Professor Imwinkelried noted in concluding that the prior bad act evidence here was properly admitted under the doctrine of chances, the doctrine can prove "the *actus reus* and negate a claim of accident." Imwinkelried, *The Evidentiary Issue Crystalized,* at 13. "That the same accident should repeatedly occur to the same person is unusual, especially when it confers a benefit on him."[20] This logic applies here. It is unusual, to say the least, that defendant has repeatedly been accused of engaging in sexual conduct with unconscious or incapacitated young women, especially because of the benefit he continued to reap: sexually

---

[19] The Superior Court did not address the doctrine of chances given its finding that the evidence was admissible under both the common plan or scheme and absence of mistake exceptions. *See Cosby,* 224 A.3d at 406.

[20] *Id.* (quoting *R v. Bond* [1906] 2 KB 389 at 420-21 (Eng.)).

assaulting unresponsive young women with no consequences. The evidence, thus, was properly admitted under the doctrine of chances.[21]

4. The Probative Value of the Evidence Outweighed any Potential for Unfair Prejudice

Defendant claims that the lower courts failed to conduct a weighing inquiry. Before the ink was dry, however, he admits that the trial court did, in fact, conduct such an inquiry, but maintains that it placed too much emphasis on the "so-called 'need'" for the evidence. Defendant's brief at 57-58. He also claims—for the first time—that the courts ignored whether the evidence was "needlessly cumulative" under Rule. 403. His claims fail.

Prior bad act evidence is not prohibited simply because it is harmful or prejudicial; it is ***designed*** to be prejudicial. *Commonwealth v. Dillon,* 925 A.2d 131, 141 (Pa. 2007); *Commonwealth v. Gordon,* 673 A.2d 866, 870 (Pa. 1996). When prior bad act evidence is relevant for a legitimate purpose, it is admissible unless its potential for unfair prejudice outweighs its probative value. *Commonwealth v. Hairston,* 84 A.3d 657, 664 (Pa. 2014); Pa.

[21] Even if the trial court erred in admitting the prior bad act evidence under the doctrine of chances (it did not), any error was harmless because the evidence was properly admitted under the common plan or scheme and absence of mistake exceptions. *See Commonwealth v. Johnson,* 941 A.2d 1286, 1290 (Pa. Super. 2008) (an appellate court may affirm trial court if there is ***any*** proper basis for the result reached and it is "not constrained to affirm on the grounds relied upon by the trial court").

R.E. 404(b)(2). Unfair prejudice is "a tendency to suggest [a] decision on an improper basis or to divert the jury's attention away from its duty to weigh the evidence impartially." *Tyson,* 119 A.3d at 360. The court "is not required to sanitize the trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is charged." *Dillon,* 925 A.2d at 141.

The court must balance the potential for unfair prejudice with the degree of similarity between the incidents, the Commonwealth's need to present the evidence, and the ability of the court to caution the jury. *Tyson,* 119 A.3d at 359. "When examining the potential for undue prejudice, a cautionary instruction may ameliorate the prejudicial effect of the proffered evidence." *Id.* at 360. This is so because the law presumes that the jury follows the court's cautionary instructions. *Commonwealth v. Jones,* 668 A.2d 491, 504 (Pa. 1995).

Here, the incidents were incredibly similar; each time, the-much-older defendant contacted his victim, isolated her in an area he controlled, gave her an intoxicant that he knew would render her incapacitated, and sexually assaulted her when she was unconscious or unable to consent.

These substantial similarities between the incidents give the prior incidents "considerable probative value." *Tyson,* 119 A.3d at 361; *see Frank,* 577 A.2d at 616-618 (admission of six prior sexual assaults where high degree of similarities and court issued cautionary instructions).

Moreover, the Commonwealth had a substantial need for the evidence. Defendant was charged with three counts of aggravated indecent assault. To convict him, the Commonwealth needed to prove, in part, that he intentionally engaged in non-consensual penetration of Ms. Constand's vagina. *See* 18 Pa. C.S. § 3125(a). In his deposition, he admitted to digital penetration, but claimed it was consensual (N.T. 4/17/18, at 29-32). Thus, at trial, a crucial issue became consent. The prior bad act evidence was needed to establish that Ms. Constand did not consent.

Without the prior bad act evidence, the Commonwealth would have had to rely on the uncorroborated testimony of the victim about the lack of consent. In *Tyson*, this exact scenario created a heightened need for the evidence. The court explained that where "the Commonwealth must rely solely on the [victim's] uncorroborated testimony . . . to counter . . . defense of consent" it "has a significant need for the prior crime evidence to prove [he] had non-consensual sex with [her]." *Id.* at 362.

The Commonwealth's need for the evidence was even greater because Ms. Constand did not report the assault immediately. *See Smith,* 635 A.2d at 1090 (finding prosecution "demonstrate[d] a need to present testimony of [defendant's] sexual abuse of [his other daughter] because the victim . . . failed to reveal promptly that she had been molested"); *see also Frank, supra* (same). This was especially so given Pennsylvania's standard suggested jury instruction, which was read in this case (N.T. 4/25/18, at 37), that advises the jury that it may consider the victim's failure to make a prompt complaint when assessing her credibility. Pa. SSJI (Crim) 4.13A.

The evidence was also necessary to counter the defense's attacks on the victim's credibility, which were rampant during defendant's first trial and even more widespread leading up to and during his second trial. *See*, *e.g.*, N.T. 4/10/18, at 25 [counsel stating during opening that Ms. Constand talked to woman about fabricating sexual assault claim to "set up a celebrity and get a lot of money for my education and my business"]; *id.* at 35 [stating that Ms. Constand "lied" and "kept changing her story"]; N.T. 4/24/18, at 18, 67 [describing Ms. Constand in closing argument as "someone who gives inconsistent statements one after the other, after the other, after the other" and a "pathological liar"]).

Because of the extensive attacks on Ms. Constand's credibility, the Commonwealth demonstrated a significant need for the evidence. *See O'Brien,* 836 A.2d at 970 (evidence of prior sexual assaults needed to counter attacks on victim's testimony); *see also Luktisch*, 680 A.2d at 879 (when credibility of victim and prior bad act witness became "crippled," the need to present another prior bad act victim became "inflated").

Defendant, nonetheless, claims—with no support—that there was no need because the Commonwealth had evidence "beyond [c]omplainant's testimony," particularly, that of Dr. Barbara Ziv, who testified on behaviors of sexual assault victims. Defendant's brief at 60. That an expert testified about the reasons why sexual assault victims delay reporting in no way obviates the need for the prior bad act evidence—especially given the lack of forensic evidence and the relentless attacks on Ms. Constand.

Finally, the court was able to alleviate any unfair prejudice with cautionary instructions; it cautioned the jury ***no less than 6 times*** about the limited purpose for which it could consider the prior bad act evidence. Immediately after the first prior bad act witness testified, the court gave the following instruction:

> *… This defendant is not on trial for the testimony you just heard. This evidence is before you for a limited purpose. That is for the purpose of tending to show – and again, this is what is going to be called, and you'll hear them argue, something called common plan, scheme, design, absence of mistake. And it is for that limited purpose only.*
>
> *This evidence must not be considered by you in any way other than for the purpose that I've just stated. You must not regard this evidence as showing that the defedant is a person of bad character or of criminal tendencies from which you might be inclined to infer guilt.*
>
> Again, the defendant is not on trial for this conduct and you are not to use this for any purpose of showing that . . . he is a person of bad character or has criminal tendencies from which he – from which you might infer – be inclined to infer guilt.
>
> * * *
>
> So that's a very important instruction. For the limited purpose to either show course of conduct, common plan, whatever it is, that you determine what you find from the testimony, it is not to be used to infer guilt or anything about the defendant's character.

(N.T. 4/11/18, at 44-46) (emphasis added). The court gave similar instructions before and after each of the remaining prior bad act witnesses' testimony. Each time, it expressly told that jury that it could only consider

the evidence for the stated limited purpose (*id.* at 50-51; N.T. 4/12/18, at 65-67, 69-70, 166-168).

The court reiterated this instruction during its closing charge, reading almost verbatim from the suggested standard jury instruction, Pa. SSJI 3.08 (Crim) (N.T. 4/25/18, at 35-36). Because the law presumes that the jury followed this instruction, and defendant has offered no basis to contest this prevailing presumption, he has not established unfair prejudice. *See Arrington*, 86 A.3d at 845 (holding probative value of prior bad act evidence outweighed prejudicial value where court gave jury limiting instruction advising it of narrow purpose for which evidence was admitted).

Despite the careful balancing analysis employed by the trial court, defendant maintains—with no supporting authority—that the court had a "heightened obligation" to conduct a "thoughtful and impassive" unfair prejudice analysis because "the influence of the widely recognized #MeToo movement peaked" at the time of his trial. Defendant's brief at 59. The court's obligation in this regard was no different than with any defendant charged with sexual offenses. Defendant deserved no special treatment.[22]

[22] In any event, each seated juror made clear during *voir dire* that they could put aside anything they heard or knew about the #MeToo movement, and that any knowledge

Defendant also claims that he suffered prejudice because some of the prior victims testified that they were involved in efforts to abolish the statute of limitations for crimes involving sexual assault. What he fails to mention, however, is that when this was brought up at trial, it was either on cross-examination ***by the defense***, or on re-direct examination by the prosecutor ***after defendant opened the door*** to that testimony (*see, e.g*, N.T. 4/12/18, at 8-9, 42-43, 118-126, 138). In any event, defendant failed to establish how this testimony unfairly prejudiced him.

Finally, defendant contends that the prior bad evidence was "needlessly cumulative," and the court ignored its cumulative nature. To the contrary, the trial court obviously considered the cumulative nature of the prior bad act evidence because, despite finding that the testimony of ***all 19*** proffered prior bad acts victims was relevant, it still limited the number of victims who testified at trial to five. Opinion at 110.

---

they had of the movement would not affect their ability to be a fair and impartial juror (N.T. 4/2/18, at 104-105; N.T. 4/3/18, at 15, 29-30, 90, 107-111, 119-120; N.T. 4/4/18, at 31-32, 90-91, 112, 132-134, 167-168). Additionally, the trial court explicitly cautioned the jury, several times, that it was to avoid outside influences and only consider information presented at trial (N.T. 4/9/18, at 197-198). The jury is presumed to have followed these instructions. *See Jones,* 668 A.2d at 504.

The court properly exercised its discretion when it allowed highly relevant prior bad act evidence because the probative value of the evidence outweighed any potential for unfair prejudice. Defendant failed to meet his "heavy burden" to show otherwise and prove that the trial court abused his discretion.

C. DEFENDANT'S ADMISSIONS REGARDING QUAALUDES WERE RELEVANT AND ADMISSIBLE

Defendant next claims that the admissions he made during his deposition regarding Quaaludes were irrelevant and prejudicial. Defendant's brief at 64. He is wrong. The evidence was relevant to prove he had access to, knowledge of, and a motive and intent to use, a central nervous system depressant that would render his victims unconscious so he could engage in sex acts with them. It was also admissible to show the strength of the prior bad act evidence that was already deemed admissible.

1. Defendant's Statements Were Admissions by a Party-Opponent

"[A] defendant's out-of-court statements are party admissions and … exceptions to the hearsay rule" and can be used against a defendant at trial. *Commonwealth v. Edwards,* 903 A.2d 1139, 1157–1158 (Pa. 2006); Pa. R.E. 803(25). "[A] party can hardly complain of his inability to cross-examine

himself. A party can put himself on the stand and explain or contradict his former statements." *Edwards,* 903 A.2d at 1157.

To qualify as a party-opponent admission, the statement must be offered against the party and must be "the party's own statement in either an individual or a representative capacity." Pa. R.E. 803(25). Defendant's deposition testimony falls into this category. He made the statements, and the Commonwealth offered them against him at trial.

2. <u>Defendant's Admissions Were Relevant</u>

The fact that defendant knew the effect a central nervous system depressant such as Quaaludes can have on a person, the fact that he gave Quaaludes to women he wanted to have sex with in the 1970s, and the fact that at least one woman had taken a Quaalude voluntarily, does not constitute prior bad act evidence at all. In fact, as defendant notes, "no evidence was presented to show that [he] had non-consensual sex with ***any*** women from the 1970s." Defendant's Brief at 64 (emphasis in original).

At best, his admissions simply ***imply*** misconduct. This does not trigger the requirements of Rule 404(b). *See, e.g.*, *Commonwealth v. Johnson,* 160 A.3d 127 (Pa. 2017) (holding Rule 404(b) was not implicated because defendant's "alleged statements were not evidence of any particular 'crime,

wrong or act' . . . [r]ather they constituted mere statements of [his] desire to make money . . . and his willingness to do anything (even kill) to accomplish this end"); *Commonwealth v. LeClair,* 2020 WL 4249461, at *7 (Pa. Super. Jul. 24, 2020) (defendant's statements were not evidence of particular crime, wrong or act, but were "mere statements demonstrating [his] longstanding desire to get rid of [his wife]" and they "merely advanced the inference" that his plans to kill his wife "finally came into fruition"). Indeed, defendant offers no authority to the contrary.[23]

a. The Evidence Established Knowledge, Intent and Motive

In his deposition, defendant stated he had access to, and knowledge of Quaaludes, a drug that he knew acted as a central nervous system depressant. Without intending to use the pills himself, he filled multiple prescriptions to give to "young women [he] wanted to have sex with" (N.T. 4/18/18, at 35, 40-42, 47). He knew their effects because he took a similar medication following surgery. The drugs made him "sleepy" and he "wanted to stay awake"; for that reason, he did not take the drugs (*id.* at

[23] Even if these oblique references to other acts were enough to trigger the requirements of Rule 404(b), they were, nonetheless, admissible because they established knowledge, motive and intent—all enumerated Rule 404(b) exceptions. *See* Pa. R.E. 404(b)(2) (permitting prior bad act evidence to show "motive . . . intent . . . [and] knowledge").

41-43). He knew the drugs caused at least one woman to get "high," seem "unsteady," and "walk[] like [she] had too much to drink" (*id.* at 35-37).

Forensic toxicologist Dr. Timothy Rohrig testified that Quaaludes are in the same class of drugs as Benadryl, the drug defendant claims he gave Ms. Constand. He explained that both drugs are central nervous system depressants that slow the brain down and aid in falling asleep. He further stated that the effects described by Ms. Constand—a dry, "cottony" mouth; blurred vision; poor muscle coordination; and significant sedation—match a central nervous system depressant. And, while the effects she suffered could be consistent with diphenhydramine, the active ingredient in Benadryl, other central nervous system depressants could have caused similar effects (N.T. 4/19/18, at 70-72, 83-88).

Defendant's admissions were critical to the Commonwealth's case. To meet its burden under 18 Pa. C.S. § 3125(a)(4), it had to prove that he knew or recklessly disregarded Ms. Constand's unconsciousness. Similarly, under subsection (a)(1), the Commonwealth had to prove that he knew or recklessly disregarded Ms. Constand's non-consent. Pa. SSJI (Crim) 3125A. Defendant's admission that he gave women Quaaludes, knowing their effects, was crucial to proving knowledge and/or

recklessness; it tended to show that he knew or at least disregarded the risk that the supposed Benadryl he gave Ms. Constand would render her unconscious, or nearly unconscious, and unable to consent. His knowledge of the effects of these drugs was critically relevant to the case because it showed his familiarity with prescription drugs in the same class of drugs he claims to have given Ms. Constand. The Commonwealth therefore needed this evidence to help prove his knowledge and/or recklessness.

This same evidence was also probative of defendant's motive and intent in executing his signature pattern and plan of providing an intoxicant to a young woman to engage in non-consensual sex acts. Evidence of intent and motive is always relevant and admissible in a criminal case. *Commonwealth v. Tedford,* 960 A.2d 1, 41-42 (Pa. 2008).

Defendant told police officers that he gave Ms. Constand Benadryl. He acknowledged that the same medication—which he had a tolerance to—made him "sleepy," and he "would not take this and . . . perform" (N.T. 4/17/18, at 127, 150). He also admitted that Quaaludes made him "sleepy" because "they happen to be a depressant" (N.T. 4/18/18, at 42).

Defendant's familiarity with one drug and its effects in an overall class of drugs is highly probative where he claims to have used a different

drug with similar effects in the same class. That is, his use and knowledge of a central nervous system depressant, coupled with his admissions claiming to have given Ms. Constand Benadryl, were relevant to show his intent and motive in giving her a central nervous system depressant; to wit, to render her unconscious so that he could facilitate a sexual assault.[24]

b. The Evidence was Relevant to Show the Strength of the Already Admissible Rule 404(b) Evidence

When the court granted the Commonwealth's motion to introduce defendant's admissions, it had already determined that the testimony of five prior bad act witnesses was admissible.[25] Thus, assuming defendant's admissions constituted prior bad acts, they were nonetheless admissible to demonstrate the strength of the Commonwealth's already-ruled-admissible Rule 404(b) evidence. *See Commonwealth v. Flamer,* 53 A.3d 82, 87-88 (Pa. Super. 2012) (finding trial court error in prohibiting Commonwealth from

[24] The relevance of this evidence is even more compelling because the Commonwealth never conceded that Benadryl was the intoxicant defendant provided to Ms. Constand (*see* N.T. 4/24/18, at 131-132, 205). Rather, there is an open question about what drug he administered to her. It is clear that the victim was drugged, but only he knows what intoxicant—or intoxicants—he gave her. Thus, his admissions that he knew of drugs that would render a woman unconscious, sought them out and possessed them, and administered them to women with whom he wanted to have sex, is indeed relevant.

[25] In fact, the court did not grant the motion until after the prior bad act witnesses testified at trial (N.T. 4/17/18, at 29-30).

presenting all evidence it wanted to in support of Rule 404(b) exception court had deemed applicable).

Once a Rule 404(b) exception is proven, the Commonwealth "must be given the opportunity to demonstrate the strength" of the exception "through all available evidence." *Id.*, 53. A.3d at 88. "It is a fundamental precept of our criminal jurisprudence that the Commonwealth is entitled to prove its case by relevant evidence ***of its choosing***." *Commonwealth v. Hicks,* 91 A.3d 47, 55 (Pa. 2014) (emphasis added).

In *Flamer*, the trial court significantly limited the Commonwealth's proffered Rule 404(b) evidence; it allowed a mere sampling of the evidence the Commonwealth proffered to establish consciousness of guilt. 53 A.3d 84-85. The appellate court criticized the trial court for handicapping the prosecution. It found that the evidence was "highly relevant to the determination of guilt," and that "the [prosecution] must be given the opportunity to show the strength of the defendant's consciousness of guilt through all admissible evidence." *Id*. at 87-88; *see also Paddy,* 800 A.2d at 307-308 (finding trial court properly allowed "extensive evidence" of motive because limiting evidence would not convey "the intensity with which [the defendant] pursued his goal of silencing [his murder victim]").

Here, the trial court already authorized the admission of prior bad act evidence under common plan or scheme and absence of mistake, both of which impact motive and intent. The ability to establish defendant's motive and intent through the absence of mistake was especially critical here where consent was a defense. The court properly refused to limit the evidence. Just as in *Flamer* and *Paddy,* here, the Commonwealth "must be given the opportunity to show the strength" of its Rule 404(b) evidence "through all available evidence," including defendant's admissions about Quaaludes. *Flamer,* 53 A.2d at 87-88; *Paddy,* 800 A.2d at 308. There is no stronger, or more critical, evidence of defendant's signature of luring his prey to a place he controlled and administering an intoxicant to facilitate a sexual assault, or of the clear absence of any mistaken belief on his part as to his victim's consent, than the admissions directly from his own mouth.

3. The Probative Value of Defendant's Admissions Outweighed the Potential for Unfair Prejudice

Without providing any support or analysis, defendant claims that his admissions were "extraordinarily prejudicial." Defendant's brief at 64. "It is not for this Court to develop [his] arguments." *Commonwealth v. Rush,* 959 A.2d 945, 950 (Pa. Super. 2008) (citation omitted). Instead, he must

"provide an adequately developed argument by identifying the factual bases of his claim and providing citation to and discussion of relevant authority in relation to those facts." *Commonwealth v. Thomas,* 783 A.2d 328, 336 (Pa. Super. 2001). Where he fails to develop an argument, the appellate court may find it waived. *Rush,* 959 A.2d at 951.

Defendant's bald assertion of prejudice is waived due to his failure to develop the claim. *See Commonwealth v. Richard*, 150 A.3d 504, 514 (Pa. Super. 2016) (finding claim that "highly prejudicial" prior bad act evidence "confused, mislead and inflamed the emotions of the jury" waived because appellant failed to develop meaningful argument but made bald allegation of prejudice); *Hicks,* 156 A.3d at 1138 n.17 (Saylor, C.J., concurring) (noting that defendant "did not meaningfully apply" Rule 404(b)'s balancing requirement because he failed to sufficiently developed the issue). Since defendant waived this crucial component of a prior bad act analysis, his challenge to the admission of the Quaaludes evidence fails.

Even so, the highly relevant nature of this evidence outweighed any potential for unfair prejudice. "Whether relevant 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." *Gordon,* 673 A.2d at 870. Need can

arise through anticipated defenses. As noted, defendant's admissions about Quaaludes and his familiarity with this central nervous system depressants go toward knowledge and intent and proving beyond a reasonable doubt his—at minimum—reckless disregard and absence of mistake. While the testimony from the five named prior bad act witnesses also tended to establish an absence of mistake, and thereby tended to satisfy the lack of consent element, the Commonwealth did not have to be limited solely by this evidence. *See Paddy, supra; Flamer, supra; see also Commonwealth v. Claypool,* 495 A.2d 176, 177-180 (Pa. 1985) (finding defendant's admissions to rape victim regarding prior bad acts admissible to show force element of rape despite other evidence of force against victim because courts must "not hamper the Commonwealth's ability to present all of its relevant evidence to the jury to prove each and every element of the crimes charged"). As in *Claypool,* defendant's admissions go toward an element of the offense—his knowledge and use of drugs of the same class he purportedly gave the victim and, therefore, go directly to recklessness.

Defendant's admissions were also relevant to rebut his consent defense—he knew the drugs he gave Ms. Constand would render her debilitated, and therefore unable to consent. Evidence of his familiarity of

central nervous system depressants was vital given the Commonwealth's burden to prove knowledge and intent. He admitted to digital penetration after administering a drug that puts him to sleep. Under this scenario, the fact that he had experience, apart from this incident, administering a specific drug to women with whom he wanted to have sex, knowing that the same drug would make him sleepy, and had made at least one woman seem like she had too much to drink, renders his admissions necessary.

Given the cautionary instruction read to the jury (N.T. 4/25/18, at 35), this evidence did not have "a tendency to suggest [a] decision on an improper basis." *Tyson,* 119 A.3d at 360. *See Jones,* 668 A.2d at 504 (noting the presumption that jurors follow the court's instructions).

Finally, defendant actually ***benefitted***, to some extent, from the court's ruling because he was permitted to introduce favorable portions of his testimony—which would have otherwise been inadmissible hearsay—based on the "Rule of Completeness," Pa. R.E. 106 (*See* N.T. 3/30/18, at 93). Further, as he acknowledges in his brief, the admissions that were introduced in no way established that "Jane Doe Number 1" was forced to take Quaaludes; that she did not know she was taking Quaaludes; or that she actually had sex, consensual or otherwise, with defendant. Instead,

defendant stated in his deposition that she voluntarily took the Quaaludes (N.T. 4/18/18, at 36). He, therefore, has not shown unfair prejudice.

II. THE TRIAL COURT PROPERLY DENIED THE NON-PROSECUTION CLAIM

Defendant raises three arguments. First, he argues that "a prosecutor wields [authority] to forever decline to prosecute a case." Defendant's brief at 69. According to him, a prosecutor may confer transactional immunity without a binding contract or court approval. Second, he argues that "[w]hen an elected prosecutor makes a non-prosecution commitment, that prosecutor binds the office of the prosecutor, including any successor in office." *Id.* at 31. Lastly, he contends that if a prosecutor cannot confer transactional immunity with "a decision never to prosecute an individual," promissory estoppel applies because he allegedly relied to his detriment. *Id.* at 82.

"Facts are stubborn things."[26] When a trial judge finds them against a litigant, there's not much the litigant can do on appeal. But that has not discouraged defendant from raising a claim resolved against him on

[26] "Facts are stubborn things ... and whatever may be our wishes … they cannot alter the state of facts and evidence." David McCullough, *John Adams* 52 (Simon & Schuster 2001).

credibility and factual grounds—the trial court found that the district attorney in 2005 did not promise "forever" non-prosecution and that defendant did not rely on it (even if it existed). Defendant scarcely mentions these pivotal rulings. He instead beckons this Court down a different path to address his legal theories. He leads it astray. This claim is about facts. If there was no promise or actual reliance, his legal theories are academic. As is so often the case in the law, hopes and "what ifs" are of no moment; what matters is whether the finder of fact believed defendant's evidence. It did not. And it said so. Whistling past the graveyard, defendant ignores this inconvenient truth.

A. THE TRIAL COURT'S CREDIBILITY AND FACTUAL FINDINGS ARE SUPPORTED BY THE RECORD

Defendant's claim hinges on two allegations: Castor promised never to prosecute him, and defendant relied on that promise when he testified at the depositions. The trial court, however, found that the "promise" not to prosecute never existed. It also found that, even if it existed, defendant did not rely on it. Those findings are supported by the record, and that is fatal to the claim.

1. The Standard of Review is Difficult to Overcome

Because this claim challenges credibility and factual findings, the standard of review is deferential to the lower court:

> Questions of credibility and conflicts in the evidence presented are for the trial court to resolve, not our appellate courts. . . . As long as sufficient evidence exists in the record which is adequate to support the finding found by the trial court, as factfinder, we are precluded from overturning that finding and must affirm, thereby paying the proper deference due to the factfinder who heard the witnesses testify and was in the sole position to observe the demeanor of the witnesses and assess their credibility.

Commonwealth of Pennsylvania, Dep't of Transp., Bureau of Driver Licensing v. O'Connell, 555 A.2d 873, 875 (Pa. 1989).

This Court leaves credibility assessments to the factfinder. It is in the best position to assess the truth of a statement from the witness stand, not just by stacking it up against the evidence offered to corroborate or contradict, but by observing a witness' demeanor and physical presentation. *Robinson v. Robinson*, 645 A.2d 836, 838 (Pa. 1994); *cf. Trigg v. Children's Hospital of Pittsburgh of UPMC*, 229 A.3d 260, 277–78 (Pa. 2020) (Wecht, J., concurring) ("Demeanor encompasses all of the subtle non-

verbal cues that comprise communication, such as facial expressions, body language, hesitation, nervousness, tone, inflection, and gestures.").

Defendant concedes that the credibility and factual findings of the trial court are subject to this deferential standard. Defendant's brief at 6.

2. The Evidence at the Hearing

The trial court held a two-day hearing on defendant's allegation that he had a non-prosecution agreement with Castor.

a. Day 1 of the Hearing

Castor testified for the defense. He denied there was an agreement, explaining that there was no "*quid pro quo*" (N.T. 2/2/16, at 99).[27] He testified that he decided not to go forward with a difficult criminal prosecution, even though he believed Ms. Constand (*id.* at 63, 113, 115). He said he still "wanted some measure of justice" (*id.* at 63). He thus made what he called "a final determination as the sovereign" not to prosecute defendant, the functional equivalent of transactional immunity (*id.*). He testified that he told defendant's criminal defense attorney at the time,

[27] Defendant refers, interchangeably, to the concept Castor espoused on the stand as, among others, a "promise," "agreement," and "judgment." Castor offered many different characterizations of what he claimed to do in 2005 before finally settling on the version he testified to at the hearing.

Walter Phillips, Esquire,[28] that he believed that his decision and press release would strip defendant of his Fifth Amendment rights in a future civil lawsuit (*id.* at 64-65). There was no documentation of the arrangement. Castor insisted that he did this to benefit Ms. Constand in her then-unfiled civil action and that he did so with the agreement of Ms. Constand's civil attorneys (*id.* at 98).

The Commonwealth extensively cross-examined Castor. Despite his testimony that he gave defendant transactional immunity, his 2005 press release left open the possibility that he could ***reconsider*** his decision not to prosecute: "District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise" (*id.* at 217).[29] The Commonwealth also confronted Castor with an article from *The Philadelphia*

[28] Phillips is now deceased. Patrick J. O'Connor, Esquire, along with several other attorneys, also represented defendant.

[29] Castor testified that this sentence referred to his earlier statement in the release about not intending further comment (*id.* at 217). Earlier in the release, however, he referred to "his decision" not to prosecute; in the next sentence, he said he might reconsider "the decision." Reasonable people would read the second sentence as referring to the decision not to prosecute. That was the important announcement, not Castor's availability for comment. At any rate, if there were an attempted grant of transactional immunity, Castor would have been more careful with language in a press release that suggested the case could be reopened. Likewise, defendant's attorneys would have spotted the language, sought to clarify it, or otherwise document the supposed immunity.

Inquirer published in 2016. The article quoted him saying, "***I put in there that if any evidence surfaced that was admissible then I would revisit the issue***. And that evidently is what the D.A. is doing" (*id.* at 220) (emphasis added).

The quote in the article was not the only statement that contradicted Castor's testimony about his press release forever shutting down the possibility of charges. In 2015, Castor sent several emails to then-District Attorney Risa Vetri Ferman[30] to "help" her remember what had happened in 2005. Ferman was Castor's top prosecutor, and she led the investigation. (In response to the emails, Ferman said she had not heard of any such arrangement until the day before in an interview Castor gave a local reporter.) In the emails, Castor stated that he had only granted defendant use immunity and that prosecution was still possible. He repeated that the Commonwealth could not use anything from the deposition against defendant in a criminal case at least ***12 times*** in three emails. He wrote in one email: "Naturally, if a prosecution could be made out without using what Cosby said, or anything derived from what Cosby said, I believed then and continue to believe, that a prosecution is not precluded" (*id.* at

[30] She is now a judge of the Court of Common Pleas, Montgomery County.

222). He wrote in another, "I never agreed we would not prosecute Cosby. I only agreed … that anything said would not be used to advance a prosecution" (*id*. at 108). This all changed at the hearing, where he unveiled his sovereign edict theory of transactional immunity for the first time.

The contradictions did not stop there. Castor testified and wrote in his three emails to District Attorney Ferman about his alleged intent in 2005 to create the "best possible environment" for Ms. Constand to win a civil lawsuit (*id*. at 106). His public statements in 2005, however, contradict his claim. In 2005, for example, he suggested that he did not find Ms. Constand credible, called her case "weak," and credited defendant for "not withholding anything" in the police interview (*id*. at 141-142; 148-149). He commented that he does not charge people for making a "mistake" (*id*. at 154). Castor's past statements casting doubt on Ms. Constand conflict with his testimony and emails that in 2005 he was trying to create "the best possible environment" for her to succeed in a lawsuit (*id*. at 106).

As mentioned, Castor was adamant in his emails that he had given defendant only use immunity, but he changed his story at the hearing. He was similarly adamant in his emails that he had resolved the investigation

with the approval of Ms. Constand's attorneys, but he once again changed his story at the hearing. In the first email, Castor wrote many times that he had reached "an agreement" with defendant's attorney, and Ms. Constand's attorneys. In that one email, he wrote:

- "With the agreement of . . . Andrea's lawyers, I wrote the attached [press release] as the only comment I would make" (*id.* at 188).

- "With the agreement of . . . Andrea's lawyers, I intentionally and specifically bound the Commonwealth" (*id.* at 190).

- "In fact, that was the specific intent of all parties involved, including the Commonwealth and the Plaintiff's lawyers" (*id.* at 191).

- "The Commonwealth, defense and civil plaintiff's lawyers were all in agreement that the attached decision from me stripped Cosby of his Fifth Amendment privilege" (*id.* at 195).

Castor said the same sort of things in his other two emails—***repeatedly***. These statements strongly imply that he discussed the matter with the involved parties, but he distanced himself from that conclusion in his testimony. He testified that he remembered delegating contact with Ms. Constand's attorneys to then-First Assistant Ferman and instructing her what to do (*id.* at 187-188; 209). He eventually acknowledged that he never spoke with Ms. Constand's attorneys and did not know where he got

the information. His backtracking at the hearing contrasts with his steadfast commitment in his 2015 emails (*e.g.*, "[o]ne thing is fact") that Troiani and Kivitz were supporters, and even advocates, of his arrangement (*id*. at 96).

b. Day 2 of the Hearing

The defense concluded its case by presenting Schmitt, the former general counsel for defendant who had represented him since 1983 (N.T. 2/3/16, 7). He testified that he never spoke with Castor, but Phillips had told him that Castor had made "an irrevocable commitment" not to prosecute (*id.* at 11). Schmitt testified that, but for this alleged commitment, he would not have allowed defendant to sit for the civil depositions (*id.* at 14).

Schmitt's testimony about the alleged "irrevocable commitment" was dubious. His failure to obtain such an important agreement in writing—or even to make it part of the record anytime during the civil lawsuit—is remarkable given his experience and past practice (*id.* at 16-17, 25-26, 33-34). For example, during the criminal investigation, he negotiated with the *National Enquirer*. In exchange for that publication tanking a story about another accuser, defendant offered to give it an exclusive interview about

Ms. Constand. Schmitt meticulously negotiated the deal, in writing, setting the terms and limits of the agreement (*id.*). If there had been an agreement with Castor—one of such breadth that it would absolve him of criminal liability forever—Schmitt would have taken basic steps, as he did with the *National Enquirer*, to protect his client's interests. Further, as part of the civil settlement, he tried to negotiate an agreement that precluded Ms. Constand from ever cooperating with the police—something that would have been unnecessary if there really were an "irrevocable commitment" (*id.* at 47-48).

Schmitt's testimony that he would have advised defendant to plead the Fifth at the depositions but for the "irrevocable commitment" was equally dubious. Schmitt permitted detectives to interview defendant during the criminal investigation, and at no time did he invoke his Fifth Amendment rights (*id.* at 18). Schmitt did this because he was confident defendant would not incriminate himself. That strategy worked, since no charges were filed at that time. And defendant gave the interview to the *National Enquirer* after the investigation (*id.* at 33, 176). Finally, at the civil depositions, defendant maintained his innocence, as he did in the interviews before. He refused to answer many questions about Constand,

until compelled by the court. He did not invoke his Fifth Amendment rights, on the other hand, when questioned about ***other*** potential victims (*id.* at 58-59). If defendant had forever immunity for the Constand case, he would have freely answered questions about Ms. Constand, but pleaded the Fifth when questioned about other victims who the supposed arrangement with Castor would not have covered.

The Commonwealth presented Troiani and Kivitz. They testified that Castor never mentioned any understanding he had with Phillips that defendant could not invoke his Fifth Amendment rights in a civil lawsuit. In fact, the press release announcing no charges blindsided them (*id.* at 184, 236-237). Neither defendant nor his several attorneys, according to Troiani and Kivitz, ever mentioned the supposed arrangement during the civil litigation.

Troiani, an experienced civil practitioner, testified that if an agreement existed, it would be customary to note it for the record before the deposition. While the parties put some stipulations and agreements on the record at the start of defendant's deposition, there was no mention of the supposed agreement (*id.* at 178-179). Troiani also testified that if defendant had pleaded the Fifth, it would have ***benefited*** their case (*id.* at

176). It could have led to an adverse-inference instruction at trial and thus "the only testimony in our case would have been [Constand's] version of the facts" (N.T. 2/3/16, at 176). *See Harmon v. Mifflin County Sch. Dist.*, 713 A.2d 620, 623-24 (Pa. 1998) ("a party's failure to testify can support an inference that whatever testimony he could have given would have been unfavorable to him").

Troiani also described the atmosphere during the depositions. Far from a man unburdened from the threat of criminal prosecution, defendant—sometimes at the behest of counsel—either refused to answer many questions or was intentionally non-responsive. Defendant, while trying to be charming at first, became more contentious as the depositions went on. His obstreperous behavior forced Troiani to file motions to compel, most of which were granted, to force defendant to answer questions about Ms. Constand (*id.* at 41-42, 181-184, 248-249).

The trial court dismissed defendant's "non-prosecution agreement" claim. It stated its specific credibility and fact-findings. It found defendant's evidence incredible, and the Commonwealth's evidence credible. It found that there was no promise by Castor and that there was no actual reliance by defendant. Opinion at 46-73.

3. Defendant Barely Challenges the Credibility and Fact Findings

Defendant skates around Castor's lack of credibility. He instead continues to view it in the light most favorable to him. While he clings to Castor's revisionist narrative, he gives no basis for interfering with the trial court's findings. As for Schmitt, defendant tries to rehabilitate him, but to no avail.

a. Castor was Incredible

As the trial court found, the factual premise of defendant's argument is false; there was no promise by Castor. The first time it was reflected in any written form was in Castor's 2015 emails. This alone calls its existence into question. That an experienced district attorney, a veteran criminal defense attorney, and several competent civil attorneys would fail to leave a paper trail of such a significant agreement beggars belief. And Castor wrote those emails in the midst of a political campaign for district attorney, after he had learned of a renewed investigation into the case. He would face negative publicity if criminal charges were filed before the election.[31]

[31] This, no doubt, is one reason behind Castor's public about face when it came to his view of defendant. In 2005, he all but cleared defendant and spoke glowingly about him halfway through the investigation because he sat for an interview with detectives.

He tried to discourage then-District Attorney Ferman from filing charges by rewriting history in light of the political facts on the ground in 2015. His testimony at the hearing was also inconsistent with his 2005 press release, his statements to journalists over the years, and irreconcilable with his September 2015 emails to District Attorney Ferman.

Indeed, listening to Castor's testimony was like trying to follow two—maybe more—movies projected onto one screen. His versions of what happened bristle with contradictions: defendant was not "withholding anything" during his police interview, but he was lying at the same time. Defendant did nothing criminal; but he did, and Castor believed Ms. Constand. Defendant could never be prosecuted for this crime for any reason, but he could be prosecuted so long as the depositions were not used. Castor made promises to defendant with the express consent of Ms. Constand and her attorneys, but he didn't. The press release did not leave open the possibility of reconsideration if new evidence were discovered; but then again, it did. Castor wanted to create an atmosphere that would help Ms. Constand win her civil suit, but he

---

Then, in 2015, with the public winds changing, Castor called defendant a liar and sorrowed over his inability to do more ten years before.

attacked her credibility publicly. He told his top deputy who he placed in charge of the investigation everything, but he didn't. Just as Castor claimed to be the only one—"the sovereign"—with authority to forever immunize defendant from prosecution, he too is apparently the only one who can make sense of the irreparably conflicting tale of what he did and why. His testimony and past statements were jumbled beyond any coherent, reliable narrative. That's why the trial court found his testimony incredible, and rightly so.

While this Court need go no further than the credibility determination made by the trial court based on the legion of contradictions in Castor's testimony, it is also worth viewing the incredible nature of Castor's testimony if taken at face value. He believed that defendant sexually assaulted the victim. He thought, however, it would be too difficult a criminal case to prosecute. He might lose a high-profile case against a hometown celebrity. So he decided to let that wealthy and famous defendant ***buy*** his way out of justice in what can only be called a secret arrangement. His proposed plan of action: he anticipated that the victim would file a civil suit (although the prospects of that had never been discussed with him). He thought if he assured defendant he would never

be prosecuted he would have to answer questions at a yet-unscheduled deposition in a yet-unfiled civil case, and that this would help the victim become "a millionaire" (N.T. 2/3/16, at 91). (Even though if defendant refused to testify, the victim would have received a beneficial jury instruction, and her attorneys preferred this.) He did all this without discussing it with the victim, her attorneys, his First Assistant District Attorney to whom he entrusted the investigation, or apparently anyone else besides the now-deceased criminal attorney for defendant. Nor did he document it in any way other than the press release, which says nothing about the alleged forever immunity and leaves open reconsideration. He also intended the press release to threaten the victim and her attorneys into silence so that they would not complain about his decision not to prosecute. This is an outlandish tale. And even if it were all true (it is not), is it something this Court wants to encourage as a matter of public policy?

b. Schmitt was Incredible

Defendant at least tries to defend some of the weaknesses in Schmitt's testimony. He contends that the panel "ignore[d] the law" when it supposedly held that defendant could not legally invoke his Fifth Amendment right at the deposition because his lawyer thought he would

not incriminate himself. Defendant's Brief at 88, quoting *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam) (holding that Fifth Amendment may be invoked by those claiming to be innocent). This is an obtuse reading of the opinion. At the hearing, Schmitt admitted that he had interviewed defendant and was confident that he would not incriminate himself at the police interview (N.T. 2/3/16, at 23-24). Based on this, the panel stated the obvious conclusion about why defendant testified at the depositions—because he and his defense team did not believe he would incriminate himself, so there was "no basis" to exercise his Fifth Amendment right. *Cosby*, 224 A.3d at 414. The panel did not rule that defendant had no right to invoke the Fifth. It was echoing the trial court's finding that Schmitt had no concerns and no reason to invoke the Fifth Amendment. That is why defendant did not plead the Fifth, not because of the alleged "sovereign edict."

Defendant's core premise, relying on Schmitt, is that he begrudgingly sacrificed his Fifth Amendment right and agreed to sit for the civil depositions if it meant he'd get perpetual immunity for his sexual assault of Ms. Constand. He sacrificed nothing. He answered questions at the deposition because he believed it benefitted his legal strategy and personal

image. He was a world-famous performer who thought the depositions would be his stage. He would use his skills acquired over a lifetime of performing, just as he had when he sat for the police interview. That had worked for him, and he and his counsel believed sitting for the depositions would, too. He would dodge, weave, and obstruct; and, when that did not work, provide a self-serving exculpatory account to skirt the tarnish of "America's Dad" pleading the Fifth while avoiding a dangerous instruction at trial. But this time, his strategy backfired. There was no reliance.

Defendant next offers an explanation why Schmitt had no reservations about him sitting for an interview with detectives in a criminal investigation, but allegedly had concerns about him sitting for civil depositions. He speculates that the depositions were a more frightening prospect for him because the questions asked in a deposition are "virtually boundless" and go beyond the complaint. Defendant's brief at 90.

Yet even if defendant had the supposed protection of the "sovereign edict," it would not have protected him from questions that went beyond the complaint. At the depositions, Ms. Constand's attorneys asked him questions about other victims. Even he must concede that the supposed arrangement with Castor did not extend to them. Yet he did not invoke the

Fifth Amendment, even though he could have done so. This is more proof that he and his legal team believed he could perform his way through the depositions, just as he had done before.

Defendant next asserts that Schmitt would have counseled him to invoke the Fifth at the depositions, but not the police interview, because if a deponent walks out of a deposition, "there are likely adverse consequences." Defendant's brief at 90. In contrast, according to defendant, a police interview can be terminated "by the accused at any time."[32] *Id*. Defendant, curiously, does not identify these "adverse consequences." *Id*. But assuming they exist, there are adverse consequences to invoking the Fifth Amendment at a deposition, too. The other party will get the benefit of a jury instruction; and, in this case, the negative publicity and damage to his brand associated with a celebrity with a once-wholesome reputation pleading the Fifth when accused of sex crimes. (And defendant seems to have forgotten that he did, in fact, walk out of at least one of the depositions, seemingly without an "adverse consequence." N.T. 2/3/16, at 183.) Defendant's explanation why Schmitt

[32] Unless the accused incriminates himself during the interview, and it becomes a custodial interrogation, which would be a serious concern for a competent defense attorney.

was willing to let detectives interrogate his client without invoking the Fifth, but was intent on doing so during civil depositions unless he had immunity therefore rings hollow.

Finally, defendant waves a magic wand over the settlement agreement and tells this Court "there's nothing to see here." As discussed above, defendant tried to get Ms. Constand to absolve him of criminal liability and, when that failed, had her agree not to initiate a criminal complaint. This shows that defendant did not think he had immunity for the criminal charges—why negotiate for something you already have? He now incants conclusory statements, such as "no different than that which occurs in most civil cases," "[s]uch is not inconsistent," and "the settlement agreement has no bearing." Defendant's brief at 90-91. That empty paragraph underscores that there is no reasonable explanation why, if defendant had forever non-prosecution, he would seek protection from criminal prosecution in the settlement agreement.

B. EVEN IF THE TRIAL COURT HAD NOT REJECTED THE FACTUAL BASIS FOR DEFENDANT'S CLAIM, HIS LEGAL THEORIES LACK MERIT

Defendant's three legal theories collapse because the trial court removed their factual foundations with its credibility and fact findings

against him. In any event, his theories fail. They can be reduced to one question: Assuming promissory estoppel applies when a prosecutor represents perpetual immunity without a valid contract, did defendant reasonably rely on the alleged representation? The answer is no.

1. Defendant's Claim That a Prosecutor Wields the Power to "Forever Decline" to Prosecute a Suspect and Bind all Successor District Attorneys is Waived

Defendant tries to defend Castor's sovereign edict theory. He abandoned that issue in the Superior Court, however, arguing only that promissory estoppel applied. He thus waived it. *See Shabezz,* 166 A.3d at 288 (issue is waived where the appellant "did not pursue this line of attack before the Superior Court").

2. Defendant's Theory Gives Prosecutors Authority to Dispense Transactional Immunity Without a Court Order, and That is Contrary to Law

In any event, defendant cites no authority to support his proposition that, without contract, a prosecutor may "forever decline" to prosecute a case and that decision forbids in perpetuity later prosecutors from filing charges, no matter what new evidence they may discover. Defendant's brief at 69.

The law undermines such a postulation. Castor's stated purpose was to immunize defendant so that he could not invoke the Fifth Amendment in a civil proceeding.[33] But a prosecutor has no non-statutory authority to confer use or transactional immunity.[34] In *Commonwealth v. Swinehart*, 642 A.2d 504 (Pa. Super. 1994), *aff'd*, 664 A.2d 957 (Pa. 1995), the Superior Court explained the differences between transactional and use immunity. Right after doing so, it stated: "Our Supreme Court has determined that under Pennsylvania law only use immunity is available to a witness." *Id.*, 642 A.2d at 506. This use immunity is available in Pennsylvania only through the immunity statute; put differently, district attorneys lack authority to bestow use immunity—much less transactional immunity—without a court order. *See Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992) (oral

[33] Defendant's baffled why the panel examined the immunity statute when searching for a legal basis for Castor's strange beast—the "sovereign edict." Defendant's brief at 68-74. What Castor says he did is so odd, the panel had to play legal taxonomist to put a name to it. The stated purpose for his unconventional scheme was to immunize defendant so he could not invoke the Fifth in a civil case. That's immunity. The panel thus looked to the immunity statute to see if Castor had authority to do what he said he did.

[34] A prosecutor may of course negotiate a valid contract with a defendant, such as a plea agreement, supported by consideration, but that is not what happened here.

grant of immunity by a prosecutor is defective); *Commonwealth v. Carrera*, 227 A.2d 627, 630 (Pa. 1967) (same).[35]

As a policy matter, the question must be asked whether it is appropriate for a prosecutor to pick sides in a civil case after they have determined not to file criminal charges. What Castor purportedly tried to do here is a good example of why it is not. He allowed a multi-millionaire defendant to buy his way out of criminal charges by agreeing to concessions during a one-party "negotiation" in a private party's civil suit—an option off-the-table for ordinary defendants. If a prosecutor believes a complainant deserves justice, he or she should seek it in a court of criminal law. A secret arrangement that allows a wealthy suspect to avoid criminal charges like this should not be encouraged. *Cf. generally Bowman v. Sunoco, Inc.*, 986 A.2d 883, 886 (Pa. Super. 2009) (contracts violating public policy are unenforceable).

[35] Defendant's "argument would effectively assign pardon power to District Attorneys, something this Court has already rejected as unconstitutional." *Brief of Amicus Curiae Office of the Attorney General of Pennsylvania in Support of the Commonwealth* at 30.

3. Defendant did not Reasonably Rely on the Alleged Promise

This Court need not address promissory estoppel because of the factual findings, discussed above. In any event, no relief is due.

The party who seeks the benefit of promissory estoppel must show: "(1) the promisor made a promise that he should have reasonably expected would induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise." *Shoemaker v. Commonwealth Bank*, 700 A.2d 1003, 1006 (Pa. Super. 1997). Satisfaction of the third requirement depends, in part, on the reasonableness of the promisee's reliance. *Thatcher's Drug Store v. Consolidated Supermarkets*, 636 A.2d 156, 160 (Pa. 1994).

Even if there were a promise and actual reliance, defendant's reliance on an informal, unwritten promise of non-prosecution was unreasonable. A team of highly regarded lawyers represented him. They had the professional responsibility to ensure that they accurately advised him about any potential adverse consequences of testifying at the deposition. They should have known that Castor's alleged attempt to unilaterally

confer transactional immunity was defective. *See Swinehart*, 642 A.2d at 506. They also should have known that a defective attempt to confer immunity did not strip their client of his Fifth Amendment rights. *See United States v. Doe*, 465 U.S. 605, 616-17 (1984) (promise of immunity without court order does not strip individual of Fifth Amendment right). Perhaps counsel failed in that duty and advised him to rely on Castor's mistaken representation. At most, that might provide him grounds for a malpractice case against his attorneys for giving bad advice; but that failure, even if it occurred, does not affect the criminal case against him. Any alleged reliance was unreasonable; and so his estoppel claim is meritless.[36]

[36] Defendant misstates the remedy. The proper remedy, ***if the claim is proven***, is suppression, not dismissal. *Parker*, 611 A.2d at 201; *see also Commonwealth v. Stipetich*, 652 A.2d 1299, 1296 (Pa. 1995) (same).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to affirm the judgment of sentence.

RESPECTFULLY SUBMITTED:

/s/ Adrienne D. Jappe

_____

ADRIENNE D. JAPPE
ASSISTANT DISTRICT ATTORNEY

/s/ Robert M. Falin

_____

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY
EDWARD F. McCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY
KEVIN R. STEELE
DISTRICT ATTORNEY

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, APPELLEE,	:	NO. 39 MAP 2020
v.	:	
WILLIAM COSBY, APPELLANT.	:	

Certification of Word Count

I, Adrienne D. Jappe, Montgomery County Assistant District Attorney, do hereby certify that the brief in the above-captioned matter, filed today, contains 22,463 words.

The Commonwealth has filed an Application for Leave to File Brief in Excess of Word Limit, not to exceed 22,463, immediately prior to filing this brief. That application is currently pending.

Respectfully submitted,

/s/ Adrienne D. Jappe

_____

ADRIENNE D. JAPPE
ASSISTANT DISTRICT ATTORNEY
ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY
EDWARD F. MCCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY
KEVIN R. STEELE
DISTRICT ATTORNEY