APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MICHAEL ERIC DRAKE,	:	
Appellant	:	No. 1359 EDA 2019

Appeal from the PCRA Order Entered April 12, 2019
in the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012343-2011

BEFORE: BOWES, J., McCAFFERY, J., and MUSMANNO, J.

MEMORANDUM BY MUSMANNO, J.: Filed: July 16, 2020

Michael Eric Drake ("Drake") appeals from the Order dismissing his first Petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"). ***See*** 42 Pa.C.S.A. §§ 9541-9546. We affirm.

In November 2010, Drake violently raped a woman whom he had met at a bar (the "Complainant"). On August 8, 2013, a jury convicted Drake, in *absentia*,[1] of aggravated assault, rape by forcible compulsion, sexual assault, and indecent assault by forcible compulsion.[2] The trial court sentenced Drake to an aggregate term of 20 to 40 years in prison. This Court subsequently affirmed Drake's judgment of sentence, and the Pennsylvania Supreme Court

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[1] In its Opinion, the PCRA court explained that Drake "was tried in *absentia* after he failed to appear for jury selection without cause on August 5, 2013." PCRA Court Opinion, 8/14/19, at 1 n.1.

[2] 18 Pa.C.S.A. §§ 2702(a)(1), 3121(a)(1), 3124.1, 3126(a)(2).

denied allowance of appeal. ***See Commonwealth v. Drake***, 122 A.3d 1136 (Pa. Super. 2015) (unpublished memorandum), ***appeal denied***, 128 A.3d 1205 (Pa. 2015).

On April 18, 2016, Drake, *pro se*, filed the instant, timely PCRA Petition, alleging that his trial counsel, William Chris Montoya, Esquire ("Attorney Montoya"), provided ineffective assistance. The PCRA court appointed Drake counsel, who filed an Amended PCRA Petition on his behalf. Drake, through counsel, also filed a Supplemental PCRA Petition.

On January 11, 2018, the Commonwealth filed a Motion to Dismiss Drake's PCRA Petition, asserting that his claims lacked merit.

Drake filed a Motion for Discovery on May 31, 2018, seeking information pertaining to the Complainant's arrest, and subsequent guilty plea to prostitution, which occurred during the pendency of the PCRA proceedings in this instant case. According to Drake, this information would support his trial theory, *i.e.*, that Drake had hired the Complainant for sex in exchange for drugs. The Commonwealth filed an Answer. The PCRA court denied Drake's Motion for Discovery.

Following a hearing on April 12, 2019, the PCRA court dismissed Drake's Petition. Drake filed a timely Notice of Appeal and a court-ordered Pa.R.A.P. 1925(b) Concise Statement of errors complained of on appeal.

On appeal, Drake raises the following issues for our review:

> 1. Did the [PCRA c]ourt err when it denied [Drake's] [M]otion for discovery regarding the Complainant's criminal history?

> 2. Did the [PCRA c]ourt err when it dismissed [Drake's] PCRA claim that trial counsel was ineffective for failing to object, move for a mistrial, or request curative instructions when the Complainant exposed the jury to prior bad acts testimony and other inflammatory and prejudicial remarks?
>
> 3. Did the [PCRA c]ourt err when it dismissed [Drake's] PCRA claim that trial counsel was ineffective for failing to investigate or call Keisha Palmer [("Palmer")] as a witness?

Brief for Appellant at 4.

> We review an order dismissing a petition under the PCRA in the light most favorable to the prevailing party at the PCRA level. This review is limited to the findings of PCRA court and the evidence of record. We will not disturb a PCRA court's ruling if it is supported by evidence of record and is free of legal error.

Commonwealth v. Rykard, 55 A.3d 1177, 1183 (Pa. Super. 2012) (citations omitted).

In his first claim, Drake argues that the trial court erred in denying his Motion for Discovery regarding the Complainant's prior criminal history. Brief for Appellant at 9. Drake specifically sought information relating to the location of the Complainant's arrests, as well as her real name. ***Id.***; ***see also id.*** (stating that Drake filed the Motion for Discovery "after realizing that the Complainant had probably testified under an assumed name after a search of her criminal background."). According to Drake, he told Attorney Montoya that he had met the Complainant at the Blue Moon Hotel. ***Id.*** at 10-11. Drake believes that the Complainant's other arrests occurred at the same location, and claims that this information would support his theory of the case, *i.e.*, that he had paid the Complainant for sex. ***Id.*** at 11-12. Drake also argues that

he was unable to fully investigate the Complainant's criminal background if she had been using a false identity. ***Id.*** at 12.

Pennsylvania Rule of Appellate Procedure 902(E)(1) prohibits discovery during collateral proceedings, "except upon leave of court after a showing of exceptional circumstances." Pa.R.A.P. 902(E)(1). "We review the denial of a discovery request in post-conviction proceedings for an abuse of discretion." ***Commonwealth v. Hanible***, 30 A.3d 426, 452 (Pa. 2011).

Initially, we observe that Drake does not argue in his appellate brief that he demonstrated "exceptional circumstances" before the PCRA court. ***See*** Pa.R.A.P. 902(E)(1). The PCRA court concluded that the information Drake sought to obtain was not relevant because the Complainant's arrests occurred *after* the rape underlying the instant case.[3] ***See*** PCRA Court Opinion, 8/14/19, at 6. We agree. Even assuming the Complainant's arrest records proved that her arrests took place at the Blue Moon Hotel, such evidence would not prove

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[3] The PCRA court points out that Drake specifically sought evidence of the Complainant's arrests to demonstrate her pattern of working as a prostitute at the Blue Moon Hotel. ***See*** PCRA Court Opinion, 8/14/19, at 7. Accordingly, the PCRA court also aptly concluded that, even if the Complainant's arrest had occurred prior to rape in the instant case, such evidence would be prohibited under the Rape Shield Law, 18 Pa.C.S.A. § 3104(a). ***See*** PCRA Court Opinion, 8/14/19, at 6-8 (citing ***Commonwealth v. Guy***, 868 A.2d 397, 401-02 (Pa. Super. 1996) (concluding that victim's history of solicitation was protected by Rape Shield Law, where appellant, as part of a consent defense, sought to introduce the victim's sexual history to show that she acted in conformity with past behavior)).

that the Complainant had not been raped. Therefore, we discern no abuse of discretion in the PCRA court's denial of Drake's Motion for Discovery.

Drake's second and third claims challenge the effectiveness of his trial counsel.

> It is well-established that counsel is presumed to have provided effective representation unless the PCRA petition pleads and proves all of the following: (1) the underlying legal claim is of arguable merit; (2) counsel's actions or inaction lacked any objectively reasonable basis designed to effectuate his client's interest; and (3) prejudice, to the effect that there was a reasonable probability of a different outcome if not for counsel's error. The PCRA court may deny an ineffectiveness claim if the petitioner's evidence fails to meet a single one of these prongs. Moreover, a PCRA petitioner bears the burden of demonstrating counsel's ineffectiveness.

Commonwealth v. Franklin, 990 A.2d 795, 797 (Pa. Super. 2010) (citations omitted).

In his second claim, Drake contends that Attorney Montoya was ineffective for failing to object, move for a mistrial, or request a curative instruction "when the Complainant brought up false prior bad acts information and multiple prejudicial statements." Brief for Appellant at 13-14, 21. Drake cites an exchange during which Attorney Montoya asked the Complainant if she knew Drake, and the Complainant responded, "I know he is the person that raped me. I did not know him. I know him from pointing him out in pictures to police officers and believing that he has a previous past of it, from what the officer is saying." ***Id.*** at 16 (citing N.T. (Trial), 8/6/13, at 118). According to Drake, the Complainant's statement was more than a "passing

reference," and that counsel should have objected, or requested a curative instruction or mistrial. ***Id.*** at 16-17. Drake points out that he had never previously been convicted of sexual offenses. ***Id.*** at 17-18. Additionally Drake claims that Attorney Montoya continuously allowed the Complainant to "lash out with inflammatory outbursts to cow him into retreat." ***Id.*** at 18.

"In the context of an ineffectiveness claim, counsel's failure to request a cautionary instruction regarding evidence of other crimes or prior bad acts does not constitute *per se* ineffectiveness...." ***Commonwealth v. Weiss***, 81 A.3d 767, 798 (Pa. 2013). "With regard to the reasonable basis prong of this test, it is incumbent upon the petitioner to demonstrate that counsel's chosen course of action had no reasonable basis designed to effectuate his client's interests." ***Id.***

Additionally "[m]istrials should be granted only when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial." ***Commonwealth v. Johnson***, 815 A.2d 563, 576 (Pa. 2002) (citation and quotation marks omitted).

> A mistrial is warranted when a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity. When the statement at issue relates to a reference to past criminal behavior, the nature of the reference and whether the remark was intentionally elicited by the Commonwealth are considerations relevant to the determination of whether a mistrial is required.

Commonwealth v. Parker, 957 A.2d 311, 319 (Pa. Super. 2008) (internal citations, quotation marks, and brackets omitted).

Here, the statement to which Drake objects was not intentionally elicited by the Commonwealth, and in fact, the statement was made in response to a question asked by Attorney Montoya. ***See*** PCRA Court Opinion, 8/14/19, at 13 (stating that the Commonwealth did not intentionally elicit the statement; the Complainant's answer was not responsive to the question posed; and the Commonwealth did not exploit the reference); ***see also Parker, supra***. Our review of the record discloses that the entire exchange occurred as follows:

> [Attorney Montoya]: Ma'am, you said that you didn't know him, right?
>
> [The Complainant]: I know he is the person that raped me. I did not know him. I know him from pointing him out in pictures to police officers and believing that he has a previous past of it, from what the officer is saying."
>
> The Court: Ms. ...--
>
> [The Complainant]: Can it just be over with?
>
> The Court: Ms. ..., you need to answer the question, which is, Did you know him?
>
> [The Complainant]: No, I did not know him.

N.T. (Trial), 8/6/13, at 118. Thus, the record confirms that the Complainant made only a passing statement, and that the trial court refocused the Complainant's testimony. ***See*** PCRA Court Opinion, 8/14/19, at 13 (explaining that Attorney Montoya believed that "a curative instruction would have unduly called attention to evidence that was only made in passing and not in response to any question posed to [the Complainant]." (citing N.T. (PCRA Hearing), 4/12/19, at 33-48)).

The record supports the PCRA court's conclusion that Drake's underlying claim lacks arguable merit, and we otherwise discern no error by the PCRA court. ***See Rykard, supra***. Accordingly, we cannot grant Drake relief on this claim.

In his third claim, Drake asserts that Attorney Montoya was ineffective for failing to investigate or call Palmer, a woman who lived across the street from Drake, as a witness at trial. Brief for Appellant at 22. Drake cites Palmer's testimony at the evidentiary hearing as evidence that she was willing and able to testify in his defense at trial. ***Id.*** at 23; ***see also id.*** (stating that Palmer had provided a statement at the time of the offense). According to Drake,

> [Palmer's] testimony was crucial to the defense case because she was the only witness besides the Complainant and [Drake] to see any of the events prior to the arrival of police. [Palmer] had crucial factual information that the Complainant smashed the windows after [Drake] left the home and contradicted the Complainant's claim that she jumped out of a window to escape. This buttressed the defense theory that the damage to the house was because the Complainant became enraged instead of being purely defensive wounds.

Id. Drake also argues that Palmer's testimony could have provided additional context to evidence presented at trial. ***Id.*** at 24.

A petitioner claiming ineffectiveness based on counsel's failure to call a potential witness

> satisfies the performance and prejudice requirements of the [ineffectiveness] test by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of

> the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

Commonwealth v. Sneed, 45 A.3d 1096, 1108-09 (Pa. 2012). Additionally, "[a] failure to call a witness is not *per se* ineffective assistance of counsel[,] for such decision usually involves matters of trial strategy." ***Id.*** at 1109 (citation omitted).

Palmer testified at the evidentiary hearing via videoconference. Palmer recalled that she lived across the street from Drake at the time of the incident in November 2010. N.T. (PCRA Hearing), 4/12/19, at 5. Additionally, Palmer acknowledged that she was an eyewitness to the events, and that she completed a witness statement that night. ***Id.*** at 5-6. After some apparent confusion on the part of Palmer, she asked to see the copy of her witness statement and explained, "I had an accident where I was shot [in the head in 2012;] I can't remember everything. My memory is like really off." ***Id.*** at 7; ***see also id.*** (wherein Palmer's witness statement was admitted into evidence as Exhibit D-1). Referencing her witness statement, Palmer testified that when the police responded, the Complainant told them that she had been raped. ***Id.*** at 8, 9. Palmer stated that she was never contacted by Attorney Montoya, nor did she receive a trial date or subpoena. ***Id.*** at 11, 15.

Attorney Montoya also testified at the evidentiary hearing. Attorney Montoya testified that he had spoken to Palmer, and that he sent her two

subpoenas. ***Id.*** at 26. Regarding his decision not to call Palmer as a witness, Attorney Montoya stated as follows:

> I believed at the time [] Palmer had given a statement. And she said that this lady had come out. Was breaking windows. And she said that she had told the police erroneous information. But the thing that struck me was that she said that [] a question that the detective had asked her was, Did she ever hear the [C]omplainant say the word rape? And she said, Yes. That's the first time I heard. And she said that she was raped when she was talking to the officers. And again, when I talked to her, I said, I don't think it's in your best interest.

Id. at 47; ***see also id.*** at 48 (wherein Attorney Montoya explained that he believed it was more prudent for the "defense to lie on [the Complainant's] credibility.").

Based upon the testimony presented at the evidentiary hearing, the PCRA court concluded that Attorney Montoya had a reasonable strategic basis for not calling Palmer as a witness. ***See*** PCRA Court Opinion, 8/14/19, at 10-11. Specifically, the PCRA court stated that it was reasonable for Attorney Montoya to believe that relying on the Complainant's lack of credibility was a stronger defense, and any testimony by Palmer that she heard the Complainant say she was raped would have corroborated the Complainant's story. ***See id.***

We agree with the PCRA court's reasoning and conclusion. Attorney Montoya's testimony at the evidentiary hearing, which the trial court credited, revealed that he had a reasonable strategic basis for declining to call Palmer as a witness. Thus, Drake has failed to establish the second prong of the

ineffectiveness test. ***See Franklin, supra***. Moreover, the "crucial" information, Drake believes, to which Palmer would have testified (*i.e.*, that the Complainant had smashed windows after Drake left the home), would not necessarily compel the jury to reach a different result. ***See id.*** Accordingly, Drake is not entitled to relief on this claim.

Based upon the foregoing, we affirm the Order of the PCRA court.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/16/20

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0012343-2011
VS.	:	FILED
MICHAEL DRAKE	:	AUG 14 2019
		Office of Judicial Records Appeals/Post Trial

OPINION

Following a jury trial in *absentia*,[1] Defendant Michael Drake was convicted of aggravated assault, rape by forcible compulsion, sexual assault, and indecent assault by forcible compulsion. The trial court sentenced Defendant to 20 to 40 years of incarceration. Defendant filed a timely petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, *et seq,* The PCRA court dismissed Defendant's PRCA petition following an evidentiary hearing. For the reasons stated herein, the Superior Court should affirm the PCRA court's order dismissing Defendant's PCRA petition.

FACTUAL BACKGROUND

1. The Evidence At Trial Regarding Defendant's Sexual Assault of Eugenia Lewis[2]

On November 27, 2010, Eugenia Lewis met Defendant at a bar, had one or two beers with him, and then told him that she was leaving the bar to meet a friend. Defendant left with Lewis and took her back to his house to wait for Lewis' friend to come home. While at Defendant's home, Defendant punched Lewis with an open fist, forced his penis into her mouth, and forced her to have vaginal sex with him. After this sexual assault ended, Defendant said he was going to have anal sex with Lewis. Fearing for her life, Lewis punched the glass of a china

[1] Defendant was tried in *absentia* after he failed to appear for jury selection without cause on August 5, 2013. N.T. 08/06/2013 at 138-42, 175-81.

[2] A more detailed discussion of the evidence and testimony at trial is contained in the "Factual Background" section from the trial court's prior opinion, dated October 8, 2014. *See* Trial Court Opinion, October 8, 2014 at 1-5, attached hereto as Exhibit A.

cabinet to obtain a piece of glass to use as a weapon against Defendant. Lewis then broke the front windows of the house to escape. Once out of Defendant's home, she went to the house next door. Lewis told the boy who answered the door that she needed help because she had just been raped. Lewis was later transported to Jefferson Hospital where a rape kit was performed. Prior to the rape kit being performed, doctors removed a tampon, which was pushed so far inside of Lewis' vagina that medical equipment was required to remove it. N.T. 08/06/2013 at 75-84.

The evidence at trial included testimony of police officers Mark McDermott and Jeffery McMahon. Officer McDermott was on patrol at the time of the rape, observed Lewis in need of emergency assistance and observed the crime scene. Officer McMahon testified that he conducted a routine traffic stop of a vehicle being driven by Defendant. Officer McMahon testified that Defendant first gave him a fake name and then later provided his real name. N.T. 08/06/2013 at 44-47, 184-185.

Two DNA experts, Gamal Emira and David Hawkins, testified that Defendant's DNA matched the DNA evidence found inside Lewis, which was collected from the rape kit performed at Jefferson Hospital.

2. Defendant's PCRA Petitions

On April 18, 2016, Defendant filed a timely PCRA petition. On May 25, 2017, Defendant filed an amended PCRA petition that sought relief based on the claim that Defendant's trial counsel was ineffective for failing to object to prior bad acts testimony; abandoning a challenge to the sufficiency of the evidence for the aggravated assault charge; and not investigating two potential defense witnesses.

On October 27, 2017, Defendant filed a supplemental PCRA petition to preserve the claims he previously raised. On May 31, 2018, Defendant filed a Motion for Discovery, which was denied by the PCRA court for lacking merit.

3. The Evidentiary Hearing on Defendant's PCRA Petition

On April 12, 2019, the PCRA court held an evidentiary hearing on Defendant's PCRA petitions. Four witnesses testified including Keisha Palmer Nugent, Mary Francis Drake, Defendant Michael Drake, and Trial Counsel William Chris Montoya.

a. Testimony of Keisha Palmer Nugent

Keisha Palmer Nugent testified regarding events on the night of the rape on November 28, 2010, her statements to police, and other events surrounding the trial. Nugent was home at 5809 Master Street on the night of November 28, 2010. Nugent's home was directly across the street from the scene of Lewis's rape. She notes that her memory is "off" and that she cannot remember everything due to a head injury from when she was shot in the head in 2012. She remembered seeing Lewis breaking windows at Defendant's house, and heard Lewis tell the police that she was raped. Nugent's testimony was inconsistent with her previous witness statements. She also did not remember being subpoenaed as a witness or being present in the courthouse for Defendant's trial on August 7, 2013. N.T. 04/12/19 at 4-16.

b. Testimony of Mary Francis Drake

Defendant's mother Mary Francis Drake testified that she is the owner of the house on 5802 Master Street, which was the location of the rape on November 28, 2010. She testified that she had spoken with trial counsel before the trial and that she had contact information for Nugent. N.T. 04/12/19 at 17-22.

c. Testimony of Defendant Michael Drake

Defendant began with an apology to the Court for being absent at his trial. Defendant testified that he met Lewis on the street while walking towards the Blue Moon Hotel. He explained Lewis requested drugs in exchange for sex and that he later gave her $30. Defendant

admitted he had vaginal intercourse with Lewis on the night of November 28, 2010, but claimed it was consensual. N.T. 04/12/19 at 51-70

d. Testimony of Trial Counsel William Chris Montoya

Trial Counsel testified that he was an experienced criminal defense attorney with 21 years of experience including 20-40 jury trials. He testified regarding notes he took when he interviewed Defendant in advance of the Trial. These notes included that Defendant was asked for drugs in exchange for a "B.J." Trial Attorney's notes did not mention vaginal intercourse or other additional sexual acts. N.T. 04/12/19 at 41-50.

When asked why he did not call Nugent as a witness at Defendant's trial, Trial Counsel testified that he made a strategic decision not to call Nugent as a witness. He explained that while Nugent was ready, willing and available to testify, he did not believe that it was in Defendant's interest for her to testify because he believed her testimony would damage Defendant's case. In particular, Trial Counsel explained that if he called Nugent to testify she would have testified that she heard Lewis say she was raped and that her testimony also would draw attention to Defendant's absence at trial. Additionally, he explained that Nugent's demeanor and inconsistent statements would not benefit Defendant. Thus, on these bases, Trial Counsel made a strategic decision to not call Nugent as a witness. N.T. 04/12/2019 at 26-30, 41-42, 49-50

Trial Counsel was also questioned on the extent he cross-examined Lewis and why he did not make objections or request curative instructions at trial when Lewis made a vague statement related to Defendant's prior bad acts. In response, Trial Counsel testified that he believed an objection would have drawn the jury's attention to the absence of Defendant at trial. He did not request a curative instruction regarding the single reference to Defendant's prior bad act because such an instruction would have unduly highlighted that testimony to the jury. Finally, Trial Counsel testified that he did not extensively cross-examine Lewis because he believed that Lewis

damaged her own credibility as a witness through her demeanor and inconsistent testimony such the jury would not find her credible. N.T. 04/12/2019 at 33-48.

e. PCRA Court Decision

Following the hearing, the PCRA Court dismissed the petitions as without merit. N.T. 04/12/19 at 78-79.

DISCUSSION

On appeal, Defendant argues that the PCRA court improperly (1) denied Defendant's motion for discovery, (2) dismissed Defendant's claim that counsel was ineffective because he failed to object, move for a mistrial, or request curative instructions when Lewis vaguely alluded to a prior bad act, and (3) dismissed Defendant's claim that trial counsel was ineffective for failing to call Nugent as a witness.

1. Statement of Error #1: PCRA Court Properly Denied Defendant's Motion to Compel Discovery Regarding Lewis's Criminal History

a. Standard of Review

In a PCRA proceeding, discovery is only allowed "upon leave of court after a showing of exceptional circumstances." Pa.R.Crim.P. 902(E)(1). "Exceptional circumstances" is not defined or explained by the evidentiary rules, and the trial court has the discretion to determine whether the case is exceptional and therefore discovery is warranted. *Commonwealth v. Frey*, 41 A.3d 605 (Pa. Super. Ct. 2012) Where the discovery requested is related to the substantive PCRA claims, exceptional circumstances may exist. *Id.* at 609-10. Exceptional circumstances do not exist where there is mere speculation that exculpatory evidence could exist. *Commonwealth v. Dickerson*, 900 A.2d 407, 412 (Pa. Super. Ct. 2006).

A trial court's determination regarding the existence of exceptional circumstances will only be disturbed if the court abused its discretion. *Commonwealth v. Benson,* 10 A.3d 1268,

1274 (Pa. Super. Ct. 2010). The trial court's discretionary ruling cannot be overturned simply because the appellate court may have reached a different conclusion. *Id.* Abuse of discretion is not an error in judgement, but "is a decision based on bias, ill will, partiality, prejudice, manifest unreasonableness, or misapplication of law." *Commonwealth v. Riley*, 19 A.3d 1146, 1149 (Pa. Super. Ct. 2011). "[T]he PCRA court's findings will not be disturbed unless there is no support for the findings in the certified record. *Commonwealth v. Carr*, 768 A.2d 1164 (Pa. Super. Ct. 2001). The appellant has the duty to prove that an abuse has occurred. *Commonwealth v. Bennett*, 19 A.3d 541, 543 (Pa. Super. Ct. 2011).

b. PCRA Court Properly Denied Defendant's Motion for Discovery

The information Defendant requested in the Motion for Discovery is unrelated to the claims raised in his PCRA petition. For example, Defendant requested Preliminary Arraignment Reporting System ("PARS") reports associated with Docket Nos. MC-51-CR-0017039-2011 and MC-51-CR-0028909-2016 to discover information related to (1) any aliases used by Lewis, (2) Lewis's criminal history post-dating the rape, and (3) Lewis's arrests on the same block as the Blue Moon Hotel. First, all of these discovery requests are irrelevant because they relate to arrests that were after the November 27, 2010 rape.

Second, even if those arrests before occurred Defendant's rape of Lewis, such evidence was inadmissible pursuant to Pennsylvania's Rape Shield Law, which provides:

> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S. §3104(a); *see Commonwealth v. Sanders*, 617 A.2d 5, 7 (Pa. Super. Ct. 1992); *Commonwealth v. Nieves,* 582 A.2d 341, 347 (Pa. Super. Ct. 1990).

Here, Defendant failed to establish that his request would have met the narrow exceptions to the Rape Shield Law. Indeed, Defendant admitted that "the defense theory of the case was that Defendant hired Lewis for sex in exchange for drugs, but a problem in the deal caused Lewis to become enraged and violent." (Motion for Discovery at ¶ 2). As such, the Discovery Motion sought to introduce evidence of Lewis's past indiscretions that were barred by the Rape Shield Law, *i.e.,* to demonstrate that she "has a continuous pattern of working as a prostitute at the location of the Blue Moon Hotel." (*Id.* at ¶ 10).

This evidence was also irrelevant because Defendant argued a consent defense, not an identity defense. In *Commonwealth v. Guy*, 686 A.2d 397 (Pa. Super. Ct. 1996), a defendant sought to establish a consent defense by introducing the victim's history of soliciting men for sex in exchange for drugs. *Id.* at 400. The trial court granted the defendant's request, and the Commonwealth appealed. The Superior Court reversed and held that a victim's past sexual solicitation is prohibited by the Rape Shield Law:

> To allow such evidence to be introduced at trial would have the immediate and direct effect of shifting the focal point of the trial away from a determination of the events of the night in question to a determination of whether the victims had, in the past, acted in a manner that was less than virtuous. This result is unacceptable. Regardless of whether appellee's proffer is accurate, the victim must not be made to suffer such prejudice, ridicule and humiliation in payment for past indiscretions.

Id. at 402. *See also Commonwealth v. Dear*, 492 A.2d 714, 718 (Pa. Super. Ct. 1985) (holding that a victim's criminal record, consisting of three convictions for solicitation and prostitution, was inadmissible to prove "consent to having sexual intercourse with the appellant on the occasion at hand").

For all of these reasons, Defendant's motion for discovery was properly denied by the PCRA court.

2. Statement of Error #2 and #3: PCRA Court Properly Dismissed Defendant's Claim Because Trial Attorney Was Not Ineffective

a. The Standard of Review for Ineffectiveness in PCRA Petitions

In *Commonwealth v. Cox*, 983 A.2d 666 (Pa. 2009), our Supreme Court set forth the standards governing claims brought pursuant to the PCRA alleging ineffective assistance of counsel:

> Under the PCRA, collateral relief is afforded to individuals who prove that they are innocent of the crimes of which they were convicted, and those receiving illegal sentences. 42 Pa.C.S. § 9542. "A petitioner is eligible for PCRA relief only when he proves by a preponderance of the evidence that his conviction or sentence resulted from one or more of the circumstances delineated in 42 Pa.C.S. § 9543(a)(2)." *Commonwealth v. Natividad*, 938 A.2d 310, 320 (Pa. 2007). One of the grounds enumerated in 42 Pa.C.S § 9542(a)(2) involves claims alleging ineffective assistance of counsel. Thus, the PCRA provides relief to those individuals whose convictions or sentences "resulted from ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9542(a)(2)(ii). This Court has interpreted this to mean that in order to obtain relief on a claim alleging ineffective assistance of counsel, a petitioner must prove that: (1) the claim underlying the ineffectiveness claim has arguable merit; (2) counsel's actions lacked any reasonable basis; and (3) counsel's actions resulted in prejudice to petitioner. *Commonwealth v. Collins*, 957 A.2d 237 (Pa. 2008); *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). A chosen strategy will not be found to have lacked a reasonable basis unless it is proven 'that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.'" *Commonwealth v. Williams*, 899 A.2d 1060, 1064 (Pa. 2006) (quoting *Commonwealth v. Howard*, 719 A.2d 233, 237 (Pa. 1998)). "Prejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Finally, the law presumes that counsel was effective and the burden of proving that this presumption is false rests with the petitioner. *Commonwealth v. Basemore*, 744 A.2d 717, 728 n.10 (Pa. 2000).

Cox, 983 A.2d at 678.

"Prejudice," as articulated in *Strickland* and *Pierce*, requires Defendant to show that "trial counsel's omission had an actual adverse effect on the outcome of the proceedings such that [Defendant] is entitled to a new trial." *Commonwealth v. Spotz*, 84 A.3d 294, 317 (Pa. 2014); *Commonwealth v. Gribble*, 863 A.2d 455, 472 (Pa. 2004). The Pennsylvania Supreme Court clarified the standard of proof required to establish prejudice in a PCRA proceeding and distinguished it from the harmless error standard on direct appeal:

> [A] defendant [raising a claim of ineffective assistance of counsel] *is required to show actual prejudice*; that is, that counsel's ineffectiveness was of such magnitude that it 'could have reasonably had an adverse effect on the outcome of the proceedings.' Pierce, 527 A.2d at 977. *This standard is different from the harmless error analysis* that is typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard, as set forth by this Court in Commonwealth v. Story, 383 A.2d [155], 164 [(Pa. 1978)] (citations omitted), states that "[w]henever there is a 'reasonable possibility' that an error 'might have contributed to the conviction,' the error is not harmless." This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the Pierce prejudice standard...."

Spotz, 84 A.3d at 315 (emphasis added). Thus, to establish the requisite prejudice in a PCRA proceeding, a defendant "must show there is a reasonable probability that, but for counsel's error or omission, the result of the proceeding would have different." *Id.* at 320-21.

The standard of review for an appeal from the denial of PCRA relief is "whether the findings of the PCRA court are supported by the record and free of legal error." *Commonwealth v. Gwynn*, 943 A.2d 940, 944 (Pa. 2008). "The level of deference accorded to the post-conviction court may vary depending upon whether the decision involved matters of credibility or matters of applying the governing law to the facts as so determined." *Commonwealth v. Williams*, 950 A.2d 294, 299 (Pa. 2008). "The PCRA court's factual determinations are entitled to deference, but its

legal conclusions are subject to plenary review." *Commonwealth v. Gorby*, 900 A.2d 346, 363 (Pa. 2006).

b. The PCRA Court Properly Dismissed Defendant's Claim That Trial Counsel Was Ineffective For Not Calling Keisha Palmer Nugent as a Witness at Trial

Defendant argued that his Trial Counsel was ineffective for failing to call Keisha Palmer Nugent as a witness. In order to prove that trial counsel was ineffective for failing to call a witness to testify, a petitioner must demonstrate that: (1) the witness existed; (2) the witness was available to testify; (3) counsel was aware of the existence of the witness, or should have known of her existence and availability; (4) the proposed witness was ready, willing and able to testify on behalf of the defendant; and (5) the absence of the proposed testimony prejudiced the defendant. *Commonwealth v. Johnson*, 966 A.2d 523, 536 (Pa. 1999). A defendant must satisfy these elements by offers of objective proof. *Commonwealth v. Lopez*, 739 A.2d 485, 496 (Pa. 1999). If defendant fails to do so, he is not entitled to relief on his claim. *Id.* Finally, "trial counsel will not be found ineffective for failing to investigate or call a witness unless there is some showing by the appellant that the witness's testimony would have been helpful to the defense." *Commonwealth v. Brown*, 767 A.2d 576, 582 (Pa. Super. Ct. 2001).

Here, the PCRA court properly dismissed Defendant's ineffectiveness claims because Defendant failed to prove that (1) trial counsel's actions lacked any reasonable basis, (2) trial counsel's actions resulted in actual prejudice to Defendant, and (3) the witness's testimony would have been helpful to the defense.

First, Trial Counsel had a reasonable basis to not call Nugent as a witness. Trial Counsel testified that he explained to her that he did not believe it was in Defendant's interest to testify. Relying upon his decades of experience, Trial Counsel explained that if he called Nugent to testify she would have testified that she heard Lewis say she was raped (corroborating Lewis's

testimony at trial) and that her testimony also would draw attention to Defendant's absence from trial. Additionally, he explained that Nugent's demeanor and inconsistent statements would not benefit Defendant. Instead, he relied on what he thought was Lewis's lack of credibility as a witness as a stronger defense. As such, Trial Counsel had a reasonable basis on his experience as a defense attorney for his decision not to call Nugent. N.T. 04/12/19 at 28-30, 41-42.

Second, Defendant did not suffer the requisite prejudice because – even if Nugent had testified – her testimony would not have changed the outcome of the trial. For example, Nugent would have corroborated that Lewis said that she was raped on the night of November 27, 2010. She also would not have even been considered a credible witness due to inconsistencies in her statements as well as her demeanor. Because Defendant "must show there is a reasonable probability that, but for the counsel's error or omission, the result of the proceeding would have been different," there is insufficient prejudice to Defendant because the result of the proceeding would not have been different if she testified. *Commonwealth v. Spotz*, 84 A.3d 294, 317 (Pa. 2014). N.T. 04/12/19 at 28-30, 41-42, 48-49. For the same reason, Defendant also failed to show that Nugent's testimony would have been helpful to Defendant.

Finally, even if Trial Counsel was ineffective for failing to call Nugent, the clear weight of the evidence at trial demonstrated that Defendant was guilty, and therefore there is no actual prejudice to Defendant. First, Defendant's flight from the scene, extended abscondence, failure to attend trial, and use of an alias when stopped by the police are evidence of his consciousness of guilt. *See Commonwealth v. Gorby*, 588 A.2d 902, 909 (Pa. 1991) (evidence of flight admissible to establish an inference of guilt); *Commonwealth v. Harris*, 386 A.2d 108, 110-11 (Pa. Super. Ct. 1978) (use of aliases and false statements to police admissible as evidence of guilt.). Additionally, although Defendant claimed his sexual encounter with Lewis was consensual, the evidence at trial included the fact that hospital staff had to use medical equipment to remove a tampon from

Lewis's vagina because it was jammed so far up her vagina. The positioning of the tampon shows a lack of consent due to the force that would be required to push the tampon into such a position. Finally, the injuries on Lewis's hands and other parts of her body were consistent with someone who was in fear for her life and trying to escape harm.

Accordingly, PCRA Court properly dismissed Defendant's claim that trial counsel was ineffective for failing to call Nugent as a witness.

c. The PCRA Court Properly Dismissed the Claim That Trial Counsel Was Ineffective for Failing to Object, Move for a Mistrial, or Request Curative Instructions When Lewis Gave Prior Bad Acts Testimony

Defendant asserts that Trial Counsel was ineffective for failing to move for a mistrial or curative instruction in response to a single statement by Lewis that referred to Defendant's "previous past of it." Defendant argues that this passing reference was so prejudicial that no instruction to the jury could have cured its purported prejudicial effect. N.T. 08/06/2013 at 118.

Here, the PCRA court properly dismissed Defendant's ineffectiveness claims because Defendant failed to prove that (1) trial counsel's actions lacked any reasonable basis, (2) trial counsel's actions resulted in actual prejudice to Defendant, and (3) the claim underlying the ineffectiveness claim has arguable merit.

First, the claim underlying the ineffectiveness claim lacks arguable merit. A mistrial is an extreme remedy, which "may be granted only where the incident upon which the motion is based is of such a nature that its unavoidable effect is to deprive the defendant of a fair trial by preventing the jury from weighing and rendering a true verdict." *Commonwealth v. Simpson*, 754 A.2d 1264, 1272 (Pa. 2000). Only a "clear reference to prior unrelated criminal conduct by a defendant" would generally warrant the grant of a mistrial. *Commonwealth v. Bonace*, 571 A.2d 1079, 1082 (Pa. Super. Ct. 1990) (noting that "passing references" require a "definitive[]" showing of prejudice). A multi-factor test is used to determine the possible prejudicial effects of

a reference to prior criminal conduct made by a witness. *Commonwealth v. Richardson*, 437 A.2d 1162, 1165 (Pa. 1981). Among the factors that the PCRA court must consider are whether the remark was intentionally elicited by the Commonwealth (which it was not), whether witness's answer was responsive to the question posed (which it was not), and whether the Commonwealth exploited the reference (which it did not). *See Commonwealth v. Ragan*, 645 A.2d 811, 820 (Pa. 1994). Thus, there was no basis for the trial court to have granted a mistrial.

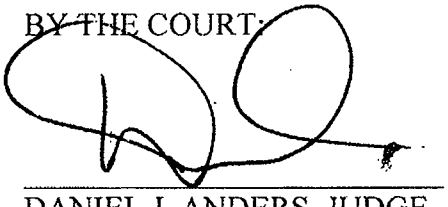
Second, Trial Counsel's actions at trial did not lack a reasonable basis. At the evidentiary hearing, Trial Counsel testified that he believed an objection would have drawn the jury's attention to both Defendant's absence at trial as well as the Defendant's alleged misconduct. *Bonace*, 571 A.2d at 1082; *Richardson*, 437 A.2d at 1165. In other words, Trial Counsel believed that a curative instruction would have unduly called attention to evidence that was only made in passing and not in response to any question posed to Lewis. Thus, Trial Counsel had a reasonable basis for the trial strategy conducted. N.T. 04/12/2019 at 33-48.

Finally, for the reasons discussed earlier, any alleged error was harmless because the evidence at trial overwhelmingly established Defendant's guilt. *Ragan, 645* A.2d at 820. As a result, Defendant failed to show that he suffered actual prejudice.

CONCLUSION

Based on the foregoing, the Superior Court should affirm the PCRA court's dismissal of Defendant's amended PCRA petitions.

BY THE COURT:



DANIEL J. ANDERS, JUDGE
Dated: August 13, 2019

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0012343-2013
VS.	:	753 EDA 2014
MICHAEL DRAKE	:	

OPINION

Following a jury trial in *absentia*,[1] Defendant Michael Drake was convicted of aggravated assault, rape by forcible compulsion, sexual assault, and indecent assault by forcible compulsion. The trial court imposed a total sentence of 20 to 40 years of incarceration. Defendant filed a timely appeal in which he argues that: (1) the trial court erred when it limited Defendant's attorney from cross-examining the Commonwealth's expert witness regarding the presence of another male's sperm in a DNA sample, and from making certain inferences regarding that evidence during closing argument; and (2) the evidence at trial was insufficient as a matter of law to support any of the convictions. For the reasons stated below, the Superior Court should affirm the judgment of sentence.

FACTUAL BACKGROUND

1. Defendant's Sexual Assault Of Eugenia Lewis

Late in the evening of November 27, 2010, Eugenia Lewis went to a bar located at 52nd and Girard Avenue with some friends. Before entering the bar, Lewis observed Defendant Michael Drake who was standing outside of the bar. He started a conversation with her and asked her if she wanted to get a drink. They then went into the bar to have a drink together. After drinking one or two beers, Lewis told Defendant that she was leaving the bar to meet a friend.

[1] Defendant was tried in *absentia* after he failed to appear for jury selection without cause on August 5, 2013. Court clerk Sharon Mascuilli testified that court records contained a subpoena signed by Defendant, which included a notice that his trial was to begin on August 5, 2013. The subpoena further notified Defendant that his failure to appear may be considered a waiver of his right to be present for trial. N.T. 08/06/2013 at 138-42, 175-81.

Defendant, who lived about a block away from Lewis' friend, asked to walk with her. As they were walking, Lewis called her friend and learned that he would not be home for another 10 minutes. While she waited for the friend to arrive, Lewis asked if she could use the bathroom at Defendant's house. N.T. 08/06/2013 at 57, 61-65.

After Lewis used the bathroom on the second floor, she walked downstairs toward the front door. Defendant asked her where she was going. Lewis replied that she was leaving to meet her friend. Defendant then grabbed Lewis from behind by her hair. He told her that she was not going anywhere and punched her several times on the left side of her face with a closed fist, which caused her face to swell and her mouth to bleed. He then dragged her to the dining room and laid down a blanket. Defendant, who had already taken off his clothes, started to rip off Lewis' clothes. He pushed Lewis to her knees and forced his penis into her mouth. Defendant also forced her to have vaginal sex. After he ejaculated, Lewis asked if she could use the bathroom to look at her face and put her clothes back on. *Id.* at 67-74.

After looking at her face in the bathroom, Lewis left the bathroom and walked back downstairs. Defendant asked her, "What was I doing?" Lewis replied, "I have family. I have kids. I have to go home. I have people waiting for me." In response, Defendant hit her again and threw her to the floor. He said, "Shut up, B. Be quiet. I didn't ask you to talk. You're not going anywhere. I'm not finished with you yet. I'm having anal sex with you. It's not over yet. I'm not finished with you." *Id.* at 69-70, 74-75.

At this point, Lewis feared for her life. She stood up and looked for anything that she could use as a weapon to ward off another assault by Defendant. With nothing in sight, Lewis decided to punch the glass window of a china cabinet to obtain a piece of broken glass as a weapon to cut Defendant. When she punched the glass, Lewis suffered severe cuts to her right arm and was bleeding heavily. As Lewis went to lash at Defendant with the broken shard of

glass, he fled the house wearing only his jeans. Defendant left his wallet, jacket, identification, and money in the dining room where he had assaulted Lewis. In an effort to alert someone, Lewis broke the front windows of the house. She ultimately went to the house next door and told the boy who answered the door that she needed help because she had just been raped. *Id.* at 75-78.

Lewis was transported to Jefferson Hospital where she received stitches to her arm and hand. Hospital staff documented injuries to her lip, swelling to her face, and cuts on the inside of her mouth. A rape kit was performed on Lewis. Prior to the rape kit being performed, however, doctors had to remove a tampon, which was pushed very far inside of Lewis' vagina. Lewis had used a tampon because she was in her menstrual period. *Id.* at 80-84.

Detective Laura Hammond of the Special Victims Unit met with Lewis at her home on November 29, 2010. Lewis provided a signed statement to Detective Hammond regarding the assault. Lewis also positively identified Defendant from a photo array. Detective Hammond issued a warrant for Defendant's arrest. Detective Hammond also collected evidence from and took photographs of Defendant's home. N.T. 08/07/2013 at 10-31, 33-35, 41.

At trial, Lewis testified that she never consented to sexual intercourse with Defendant, and that she never made any deal with him to trade sex for drugs. She admitted that, prior to going to the bar, she smoked two marijuana cigarettes laced with crack and took her prescribed medications of Flurazine and Remeron. During the trial, Lewis was in custody for violating her probation. She testified that the prosecutor made no promises to her regarding her violation of probation for her testifying at trial. On cross-examination, Lewis conceded that her statement to Detective Hammond contained inconsistencies, but stated that they were the result of her being hysterical at the time and "coming down off medicine from the hospital." N.T. 08/06/2013 at 58-60, 90-94, 96.

2. Testimony Of Police Officers Mark McDermott And Jeffrey McMahon

On November 28, 2010, at 5:38am, Philadelphia Police Officer Mark McDermott was on routine patrol in a marked police vehicle in the area of 58th and Master Streets when he observed Lewis "waving her arms, flailing as she was in a panic mode. As we got closer, we could see that she was covered in blood, and she looked to be in extreme need of emergency assistance." Officer McDermott asked Lewis what happened. Lewis replied that she had just been raped at 5802 Master Street. Officer McDermott went to the house and observed blood all over the porch, a broken front window, large amounts of blood in the living room, a china cabinet that had a broken pane of glass, and blankets and pillows next to the china cabinet. *Id.* at 44-47.

On July 19, 2011, Officer Jeffrey McMahon was on routine patrol in a marked police vehicle. Officer McMahon conducted a traffic stop of a gold Nissan Altima driven by Defendant to investigate the vehicle's brake light that was not operating. When Officer McMahon asked Defendant for his driver's license, Defendant provided the officer with a false name. After being unable to confirm his identity based upon the false name, Officer McMahon removed Defendant from his vehicle. Defendant then provided his real name and was arrested pursuant to the warrant by Detective Hammond. N.T. 08/06/2013 at 184-85.

3. Testimony Of Experts Gamal Emira And David Hawkins

Gamal Emira testified as an expert in forensic science. Based upon his review of certain samples from the rape kit performed on Lewis, he testified, *inter alia*, that the vaginal and vulva swabs were positive for sperm. *Id.* at 145-48, 153-54.

David Hawkins testified as an expert in forensic DNA analysis. Based upon his review of certain samples from the rape kit performed on Lewis and from a swab from Defendant, he testified, *inter alia*, that Defendant was a male source of the DNA mixture contained in the

vaginal swab sperm cell infraction and the rectal swab E cell fraction.[2] *Id.* at 155-58, 161-68, 173-74.

DISCUSSION

1. The Trial Court Properly Limited Defendant's Attorney From Cross-Examining The Commonwealth's DNA Expert Witness Regarding The Presence Of Another Male's Sperm And From Making Certain Inferences Regarding That Evidence During Closings

Defendant asserts that the trial court erred by limiting Defendant's attorney from cross-examining the Commonwealth's DNA expert witness regarding the presence of another male's sperm in a DNA sample, and from making certain inferences regarding that evidence during closing argument. Defendant's attorney argued that the Commonwealth's direct examination of the expert had pierced the protections of the Rape Shield Law, which would have otherwise barred the line of cross-examination sought by Defendant's attorney. Defendant's 1925 Statement of Errors at ¶ 1.

A trial court has broad discretion to determine whether evidence is admissible, and a trial court's ruling on an evidentiary issue will be reversed only if the court abused its discretion. *Commonwealth v. Benson*, 10 A.3d 1268, 1274 (Pa. Super. Ct. 2010). An abuse of discretion is not simply an error of judgment but an overriding or misapplication of the law. *Id.* Accordingly, a ruling of evidence "will not be disturbed on appeal unless that ruling reflects manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support to be clearly erroneous." *Commonwealth v. Huggins*, 68 A.3d 962, 966 (Pa. Super. Ct. 2013).

In sexual assault cases, there are statutory protections for alleged victims of sexual assault as codified by the Rape Shield Law, which states, in relevant part:

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[2] Hawkins also testified at trial regarding the first and fourth opinion in his report, *i.e.*, that: (1) Defendant was *excluded* as a male source of the DNA mixture contained in the vaginal swab E cell fraction and the rectal swab sperm fraction, and (2) another male was a source of the DNA mixture. N.T. 08/06/2013 at 162-67. As discussed *infra* at 7-8, the trial court specifically instructed the jury that the trial court admitted that testimony in error, that those two opinions were stricken from the record, and that the jury could not consider those stricken opinions in reaching a verdict. N.T. 08/07/2013 at 64-65.

> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S. § 3104(a). The purpose of the Rape Shield Law "is to prevent a sexual assault trial from degenerating into an attack upon the collateral issue of the complainant's reputation [for past sexual conduct,] rather than focusing on the relevant legal issues and the question of whether the [sexual assault at issue] actually occurred." *Commonwealth v. Jones*, 826 A.2d 900, 908 (Pa. Super. Ct. 2003).

Evidence of an alleged rape victim's past sexual history is inadmissible—unless and until—the evidence sought to be admitted is genuinely exculpatory. *Commonwealth v. Wall*, 606 A.2d 449, 457 (Pa. Super. Ct. 1992). The defendant must make a specific proffer of exactly what evidence he is seeking to admit and why it is relevant to the defense. *Id.* If the proffer is vague or conjectural, the evidence will be excluded without further inquiry. *Id.* If the defendant produces a sufficiently specific proffer, the trial court must undertake a three-part analysis during an *in camera* hearing to determine: (1) whether the proffered evidence is relevant to the defense at trial, (2) whether the proffered evidence is cumulative of evidence otherwise admissible at trial, and (3) whether the proffered evidence is more probative than prejudicial. *Id.* Where the "proffered evidence excluded by the Rape Shield law is relevant, non-cumulative, and more probative of the defense than prejudicial, it must be admitted." *Id.*

a. The Commonwealth Filed A Pre-Trial Motion *In Limine* To Preclude Any Testimony Regarding Another Male's Sperm In The DNA Sample

On the same day as jury selection and before Defendant was arraigned, the Commonwealth argued a motion *in limine* to "exclude any mention of the complainant's

consensual relations or to pierce the Rape Shield Statute. Specifically, the Commonwealth [sought] to exclude any mention in the DNA report of other male contributors other than the defendant." *See* Commonwealth's Pre-Trial Memorandum, Section V, Commonwealth's Motion *in Limine*, ¶ 1, attached hereto as Exhibit A. After oral argument, the trial court decided that certain portions of the first and fourth opinions from the DNA expert's report would be admitted at trial and other parts would be precluded. The trial court instructed counsel to see if they could stipulate to those portions that were admissible based upon the trial court's order on the motion *in limine*.

During the direct examination of the DNA expert, the Commonwealth introduced evidence regarding the first and fourth opinions from his expert report: (1) Defendant was *excluded* as a male source of the DNA mixture contained in the vaginal swab E cell fraction and the rectal swab sperm fraction, and (2) another male was a source of the DNA mixture on those swabs. On cross-examination, Defendant's counsel confirmed these two opinions. The Commonwealth then requested a sidebar with the trial court and Defendant's counsel. Although the sidebar discussion does not appear of record, it is the trial court's recollection that the Commonwealth objected to any further cross-examination by Defendant's counsel regarding the first and fourth opinions. N.T. 08/06/2013 at 167-69.

After listening to the DNA expert's testimony and the Commonwealth's objection during the sidebar, it became clear to the trial court that either (1) it had misapplied the Rape Shield Law when deciding the Commonwealth's motion *in limine*, or (2) counsel had misunderstood the trial court's decision when agreeing which portions of the first and fourth opinions were admissible. The next morning, the trial court called counsel sidebar and stated it was reconsidering its decision on the Commonwealth's motion *in limine*. The trial court then stated it was striking the first and fourth opinions as violating the Rape Shield Law. In making its

decision, the trial court confirmed with Defendant's counsel that his only proffered defense was consent rather than misidentification. N.T. 08/07/2013 at 44-50.

b. The Trial Court Properly Precluded
The DNA Expert's First And Fourth Opinions

Based upon the above circumstances, the Commonwealth did not—as argued by Defendant's counsel in its 1925(b) statement—open the door to Lewis' prior sexual history. Indeed, the Commonwealth consistently sought to invoke the protections provided by the Rape Shield Law, including arguing a pre-trial motion *in limine* that the trial court must "exclude any mention in the DNA report of other male contributors other than the defendant." Rather than voluntarily opening the door as argued by Defendant's attorney, the Commonwealth solicited the DNA expert's testimony on his first and fourth opinions only because (1) the Commonwealth was unsuccessful in arguing its motion *in limine*, and (2) it believed it was complying with the trial court's decision on the motion *in limine*. *Id.*

It is black letter law that any evidence regarding the presence of *another* male's sperm in the DNA mixture is not relevant to the proffered defense of consent, *i.e.*, that Lewis allegedly consented to sexual intercourse by agreeing to engage in sexual intercourse with Defendant in exchange for drugs. *See Commonwealth v. Fink*, 791 A.2d 1235, 1240 (Pa. Super. Ct. 2002) ("The Rape Shield Law bars prior instances of sexual conduct *except those with the defendant* where consent of the victim is at issue and the evidence is otherwise admissible." (emphasis added)). Stated differently, evidence tending to show that Lewis had sex with another male would only confuse, mislead, or prejudice the jury because it does not prove or disprove a material fact of the case, *i.e.*, whether Lewis consented to sexual intercourse with Defendant. *See Id.* at 1242 (reaffirming *Commonwealth v. Allburn*, 721 A.2d 363, 366 (Pa. Super. Ct. 1998), which "held that evidence of a victim's prior sexual activity is not admissible under the Rape Shield Law where the offer of proof showed only prior sexual conduct by the victim with others

in addition to the defendant, but did not show how the evidence would exonerate the defendant"). Thus, trial court properly precluded the first and fourth opinions because it was irrelevant to any material issue in the case and did not exculpate Defendant. *Wall*, 606 A.2d at 457-58.

Even assuming the trial court's evidentiary ruling was improper, this would constitute harmless error given the overwhelming and uncontradicted evidence of Defendant's guilt that is summarized *infra* at 10-13. *See generally Commonwealth v. Petroll*, 738 A.2d 993, 1005 (Pa. 1999) (stating that "Harmless error exists if the reviewing court is convinced from the record that (1) the error did not prejudice the defendant or the prejudice was de minimis, (2) the erroneously admitted evidence was merely cumulative of other untainted evidence, or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the guilty verdict.").

2. The Evidence Was Sufficient To Support The Convictions

Defendant asserts that the evidence was insufficient to support any of the convictions and, in particular, insufficient to support the conviction for aggravated assault because the "intent to cause serious bodily injury, or actual serious bodily injury was never shown beyond the complaining witness' unreliable testimony." Defendant's 1925 Statement of Errors at ¶ 2-5.

Appellate courts review claims regarding the sufficiency of the evidence by considering whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Bradley*, 69 A.3d 253, 255 (Pa. Super. Ct. 2013). The appellate court must evaluate the entire record and consider all evidence actually received. *Id.* Further, a conviction may be sustained wholly on circumstantial evidence, and the trier of

fact—while passing on the credibility of the witnesses and the weight of the evidence—is free to believe all, part, or none of the evidence. *Id.* In conducting this review, the appellate court may not weigh the evidence and substitute its judgment for the fact-finder. *Id.*

a. There Is Sufficient Evidence To Support The Aggravated Assault Conviction

A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa.C.S. § 2702(a)(1). "Serious bodily injury" is bodily injury that creates a substantial risk of death, or which causes serious, permanent disfigurement, or protracted loss or impairment of function of any bodily member or organ. 18 Pa.C.S. § 2301. Attempt is found where the defendant, with the required specific intent, acts in a manner that constitutes a substantial step toward perpetrating serious bodily injury upon another. *Commonwealth v. Gruff*, 822 A.2d 773, 776 (Pa. Super. Ct. 2003). A person acts intentionally when it is his conscious object to engage in conduct of that nature or to cause such a result. *Commonwealth v. Martuscelli*, 54 A.2d 940, 948 (Pa. Super. Ct. 2012).

If the victim does not sustain serious bodily injury, the Commonwealth must prove that the defendant acted with the specific intent to cause serious bodily injury. The Commonwealth may prove intent to cause serious bodily injury by circumstantial evidence. *Commonwealth v. Lewis*, 911 A.2d 558, 563 (Pa. Super. Ct. 2006) (victim with multiple stab and puncture wounds to arm, forehead, and scalp provided sufficient evidence for a fact-finder to infer an attempt to cause serious bodily injury); *Commonwealth v. Gray*, 867 A.2d 560 (Pa. Super. Ct. 2005).

As an initial matter, the trial court notes that Defendant asserts that the verdict was insufficient to support the conviction for aggravated assault because the "intent to cause serious bodily injury, or actual serious bodily injury was never shown *beyond the complaining witness' unreliable testimony.*" Defendant's 1925 Statement of Errors at ¶ 3 (emphasis added). This

argument is a weight of the evidence claim, not a sufficiency of the evidence claim. Defendant concedes that there was *some* evidence of Defendant's intent, albeit evidence that Defendant regards as unreliable. As such, Defendant's sufficiency claim is without merit given the standard of review for those claims.

Even assuming Defendant raised a proper sufficiency argument, the evidence at trial included that Lewis suffered swelling and bleeding to the left side of her face. While these injuries by themselves might not be severe enough to rise to the level of serious bodily injury, they are—in combination with Defendant's others actions—sufficient to establish his specific intent to cause serious bodily injury to Lewis. These actions include Defendant grabbing Lewis by the hair, punching her, throwing her to the floor, dragging her, and laying on top of her. Lewis ultimately submitted to Defendant's sexual assault to avoid further injury.[3] Her injuries were corroborated by the testimony of Officer McDermott and the medical records from Jefferson Hospital. N.T. 08/06/2013 at 68-77, 83.

Viewed in a light most favorable to the Commonwealth, Defendant's assaultive conduct combined with Lewis' injuries and her actions to avoid further injury proves beyond a reasonable doubt that Defendant specifically intended to cause serious bodily injury to Lewis. As such, there is sufficient direct and circumstantial evidence to support the conviction for aggravated assault.

b. There Is Sufficient Evidence To Support
<u>The Rape By Forcible Compulsion Conviction</u>

A person is guilty of rape by forcible compulsion, a felony of the first degree, if the

[3] That Lewis did not actually suffer serious bodily injury is of no moment because of her efforts to avoid the full brunt of Defendant's attack. Indeed, the jury was instructed to determine whether serious bodily injury "did not occur because of something outside the control of the defendant." One of the factors for determining this was "the ability of the alleged victim to avoid the full brunt of the attack." N.T. 08/07/2013 at 136. Lewis ultimately submitted to Defendant's sexual assault to avoid further injury. Then, before Defendant could attack her for a second time, Lewis punched through the window of a china cabinet to obtain a shard of broken glass to protect herself. Thus, Lewis avoided serious bodily injury by her own actions that were outside of Defendant's control.

defendant engaged in sexual intercourse with the complainant by force or by threat of force that would have prevented a reasonable person from resisting. 18 Pa.C.S. § 3121(a)(1) and (a)(2). "Sexual intercourse" is defined as, in addition to its ordinary meaning, including intercourse *per os* or *per anus* with some penetration, however sight; emission is not required. 18 Pa.C.S. § 3101. The ordinary meaning of intercourse is defined as penetration by the penis of the vagina, and intercourse *per os* or *per anus* is defined as penetration of the mouth or anus of one person and the genitalia of another. *Commonwealth v. Kelley*, 801 A.2d 551, 554-55 (Pa. 2002).

Forcible compulsion is established by proof that the defendant used either physical force, the threat of physical force, or psychological coercion upon the complainant. *Commonwealth v. Eckrote*, 12 A.3d 383, 387 (Pa. Super. Ct. 2010). The degree of force required to constitute rape is relative and depends upon the facts and particular circumstances of a given case. *Id.*; *see also Commonwealth v. Gabrielson*, 536 A.2d 401 (Pa. Super. Ct. 1988) (finding sufficient evidence of forcible compulsion where victim was taken to an isolated, wooded area and threatened to be beaten badly if she refused intercourse).

Here, the unrefuted and credible testimony of Lewis showed that, as she walked to the front door, Defendant told her that she was not leaving the house. He then grabbed Lewis by the hair and punched her in the face, causing swelling and bleeding from her mouth. Defendant then pushed Lewis to the floor, tore off her clothing, and laid on top of her. All of these acts took place before he engaged in sexual intercourse with Lewis, and they each satisfy the forcible compulsion component for rape. In addition to this evidence, Lewis testified that she did not consent to sexual intercourse. Doctors at Jefferson Hospital also had to medically extract a tampon pushed far inside Lewis' vagina, a circumstance from which the jury could reasonably infer a lack of consent. Defendant also provided a false name during a traffic stop, which could have been used by the jury as evidence that Defendant was conscious of his guilt.

Viewing this evidence in a light most favorable to the Commonwealth, there is sufficient direct and circumstantial evidence to support the conviction for rape by forcible compulsion.

c. There Is Sufficient Evidence To Support The Sexual Assault Conviction

A person is guilty of sexual assault when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent. 18 Pa.C.S. § 3124.1. The determination of consent is for the fact-finder to decide by making credibility determinations, and the fact-finder may believe all, part, or none of a complainant's testimony. *Commonwealth v. Adams*, 882 A.2d 496, 499 (Pa. Super. Ct. 2005). Lack of consent is what criminalizes the acts at issue, and frequently the only evidence of lack of consent is the conflicting testimony of the parties who engaged in the acts. *Commonwealth v. Prince*, 719 A.2d 1086, 1090 (Pa. Super. Ct. 1998). Of course, resistance by the complainant to sexual assault is not required to sustain a conviction. 18 Pa.C.S. § 3107; *Commonwealth v. Smith*, 863 A.2d 1172, 1176 (Pa. Super. Ct. 2004).

The jury, as the finder of fact, is free to accept the complainant's characterization of what transpired with a defendant, particularly the complainant's representation that sexual intercourse occurred without consent. *Commonwealth v. Andrulewicz*, 911 A.2d 162, 166 (Pa. Super. Ct. 2006). The uncorroborated testimony of the complainant in a sexual assault case, if believed by the trier of fact, is sufficient to convict a defendant. *Id.*

Here, Lewis testified that she did not consent to sex with Defendant or agree to exchange sex for drugs. She further testified that Defendant grabbed her, punched her several times, pushed her to the floor, and forced his penis into her mouth. Defendant then laid on top her and had vaginal sex until he ejaculated. Lewis' lack of consent is corroborated by the injuries observed by Officer McDermott and reported in the medical records from Jefferson Hospital.

Viewing this evidence in a light most favorable to the Commonwealth, there is sufficient direct and circumstantial evidence to support the conviction for sexual assault.

d. There Is Sufficient Evidence To Support The Indecent Assault By Forcible Compulsion Conviction

A person is guilty of indecent assault by forcible compulsion "if the person has indecent contact with the complainant, causes the complaint to have indecent contact with the person, or intentionally causes the complaint to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and does so by forcible compulsion." 18 Pa.C.S. § 3126(a)(2). "Indecent contact" is defined as any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person. 18 Pa.C.S. § 3101.

As discussed *supra* at 9-13, there is sufficient direct and circumstantial evidence to support the conviction for indecent assault by forcible compulsion when viewed in a light most favorable to the Commonwealth.

CONCLUSION

Based on the foregoing, the judgment of sentence should be affirmed.

BY THE COURT:

DANIEL J. ANDERS, JUDGE
Dated: October 8, 2014

EXHIBIT A

Commonwealth's Pre-Trial Memorandum

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	CP-51-CR-0012343-2011
v.	:	
	:	
MICHAEL ERIC DRAKE	:	

COMMONWEALTH'S PRE-TRIAL MEMORANDUM

I INCIDENT:

It is alleged that on November 28, 2010, the defendant, Michael Drake, engaged in vaginal and oral intercourse with the victim, Eugenia Lewis, by force or threat of force and without her consent. These allegations occurred at 5802 Master Street in Philadelphia.

II. PERSONS WHO MAY BE CALLED AS WITNESSES OR WHOSE NAMES MAY BE MENTIONED:

Eugenia Lewis
Keisha Palmer — Rick Abrams
Mary Drake
Francis Drake
Officer Mark McDermott, 19th Police District
Officer Adam Stennett Jr., 19th Police District
Officer McMahon, 22nd Police District
Officer Eugene Donahue, 22nd Police District
Officer Christopher Brennan, Special Victims Unit
Detective Laura Hammond, Special Victims Unit
Detective William Brophy, Special Victims Unit
Detective Edward McLaughlin, District Attorney's Office
Gamal Emira, Forensic Scientist 2, Criminalistics Laboratory, Philadelphia Police Department
David Hawkins, Forensic Scientist 2, DNA Laboratory, Philadelphia Police Department
Erin O'Brien, Assistant District Attorney

III. CHARGES COMMONWEALTH IS PROCEEDING UPON:

2702	Aggravated Assault	F-1
3121	Rape	F-1
	- By Force (a)	
	- By Threat of Force (b)	

3123	Involuntary Deviate Sexual Intercourse - By Force (a) - By Threat of Force (b)	F-1
3124	Sexual Assault	F-2
3126	Indecent Assault - By Force (a) (2) - By Threat of Force (a) (3)	M-1
3126	Indecent Assault - Without consent (a) (1)	M-2

IV. COMMONWEALTH'S REQUESTED VOIR DIRE QUESTIONS:

1. Have you or anyone close to you, either relatives or friends, ever been a victim of a sexual assault, whether or not it was reported to the police?

2. Have you or anyone close to you, either relatives or friends, ever been accused of sexual assault, whether or not it was reported to the police?

3. The law in Pennsylvania states that the testimony of a complaining witness, standing alone, if believed by you, is sufficient proof upon which to find the defendant guilty in this type of case. If you were chosen to be a member of the jury, would you be able to follow that point of law?

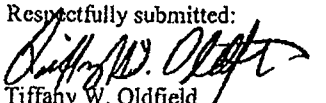
V. COMMONWEALTH'S MOTION IN LIMINES

1. Commonwealth's Motion in Limine to exclude any mention of the complainant's consensual sexual relations or to pierce the Rape Shield Statute. Specifically, the Commonwealth seeks to exclude any mention in the DNA report of other male contributors other than the defendant.

2. Commonwealth's Motion in Limine to exclude the complainant's psychiatric history during cross-examination and/or referenced by the defense at trial.

3. Commonwealth's Motion in Limine to exclude sensitive material found within the complainant's medical records and/or referenced by the defense at trial.

Respectfully submitted:



Tiffany W. Oldfield
Assistant District Attorney
Family Violence & Sexual Assault Unit

Commonwealth v. Michael Eric Drake
CP-51-CR-0012343-2011
753 EDA 2014

PROOF OF SERVICE

I hereby certify that I am this day caused to be served the foregoing this person(s), and in the manner indicated below:

Attorney for the Commonwealth:

Hugh Burns, Esquire
District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
Hugh.Burns@phila.gov

Type of Service: ( ) Personal (X) Regular mail () CJC mailbox (X) Email

Attorney for Defendant:

William Montoya, Esquire
Montoya Shaffer LLC
100 S. Broad Street, Suite 1216
Philadelphia, PA 19110-1015
wcmontoya@gmail.com

Type of Service: ( ) Personal (X) Regular mail () CJC mailbox (X) Email

Defendant:

Michael Eric Drake
DOB: 01/05/1960; Inmate #: LK2454,
PID/PP#: 0581530, SID: 14060561
SCI Benner Township
301 Institution Drive
Bellefonte, PA 16823

Type of Service: ( ) Personal (X) Regular mail () CJC mailbox

DATED: 10/08/2014

Bobby Ochoa, Esquire
Law Clerk to Hon. Daniel J. Anders

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 282 EAL 2020
Respondent	:	
	:	Petition for Allowance of Appeal
	:	from the Order of the Superior Court
v.	:	
MICHAEL ERIC DRAKE,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 1st day of December, 2020, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Phoenicia D. W. Wallace, Esquire
As Of 12/01/2020

Attest: _____
Deputy Prothonotary
Supreme Court of Pennsylvania