

"Defendant" or "Getz") was charged with engaging in various sexual acts involving the victim, Mercedes Evans (hereinafter "Evans" or "M.E.") when she was between the ages of five and nine years old. On March 10, 2022, Getz was convicted by a jury of the following offenses: 1) Rape of a Child [18 Pa.C.S. §3121(a)]; 2) Involuntary Deviate Sexual Intercourse [18 Pa.C.S. §3123(b)]; 3) Aggravated Indecent Assault of a Child [18 Pa.C.S. §3125(b)]; and 4) Indecent Assault of a Child [18 Pa.C.S. §3126(a)(7)]. Sentencing occurred on July 15, 2022 with Getz being sentenced to an aggregate of not less than sixteen (16) years nor more than thirty-two (32) years in a state correctional institution followed by three (3) years of state probation supervision. Post-sentencing motions were filed on July 25, 2022, the majority of which were denied by Order and Opinion dated November 21, 2022.¹ A timely appeal was filed on December 19, 2022 by appellate counsel, Rory B. Driscole, Esquire² (hereinafter "Driscole"). On February 28, 2024, the Pennsylvania Superior Court affirmed the judgment of sentence *in toto*. No discretionary review by the Supreme Court was sought.

On August 16, 2024, Getz, through PCRA counsel, filed the instant petition. In addition to seeking the relief addressed

¹ The Court granted the motion pertaining to those aspects of sentencing dealing with restitution and registration under subchapter H of SORNA (Sex Offender Registration and Notification Act, 42 Pa.C.S.A. §9799.10 et seq.).

² Brian Collins, Esquire (hereinafter "Collins") represented Getz in all aspects of the case through post-sentencing motions. Attorney Driscole represented Getz throughout the appellate process.

herein, Getz also filed, as part thereof, a Motion to Compel/Request for Discovery.³ After dealing with a myriad of other voluminous motions filed by both parties, a hearing on the counselled PCRA Petition was held on January 23, 2025. This Court gave both sides an opportunity thereafter to lodge post-hearing briefs to address the remaining six (6) issues outlined in the petition.⁴ This Court is now prepared to address each seriatim.

LEGAL DISCUSSION

Prior to addressing Getz' claims of ineffectiveness of both Collins and Driscole, it is necessary to review the constitutional standards for evaluating such claims. Thus, to establish either counsels' ineffectiveness, Getz must demonstrate that:

(1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action or inaction chosen; and (3) counsel's action or inaction prejudiced the petitioner. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987).

Commonwealth v. Spatz, 84 A.3d 294, 303 n.3 (Pa. 2014).

In addition,

a PCRA petitioner will be granted relief only when he proves, by a preponderance of the evidence, that his conviction or sentence resulted from the ineffective assistance of counsel which, in the circumstances of the particular case, so undermined

³ These issues were addressed by Orders of Court prior to the hearing on the instant petition.

⁴ One of the issues raised in this petition dealt with an ineffectiveness claim on the part of trial counsel for not calling character witnesses at trial. This claim was abandoned by Getz at the January 23, 2025 hearing.

the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S. § 9543(a)(2)(ii). Counsel is presumed effective, and to rebut that presumption, the PCRA petitioner must demonstrate that counsel's performance was deficient and that such deficiency prejudiced him.

Spotz, 84 A.3d at 311-12 (internal quotation marks and other punctuation omitted).

Furthermore,

[g]enerally, counsel's assistance is deemed constitutionally effective if he chose a particular course of conduct that had some reasonable basis designed to effectuate his client's interests. Where matters of strategy and tactics are concerned, a finding that a chosen strategy lacked a reasonable basis is not warranted unless it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding.

Spotz, 84 A.3d at 311-12; *Commonwealth v. Dunbar*, 470 A.2d 74, 77 (Pa. 1983) ("Before a claim of ineffectiveness can be sustained, it must be determined that, in light of all the alternatives available to counsel, the strategy actually employed was so unreasonable that no competent lawyer would have chosen it.")⁵

⁵ Under *Strickland*, actual prejudice must be shown. In order to prove prejudice, Getz is required to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694.

"Counsel's assistance is deemed constitutionally effective if the Court determines that the defendant has not established any one of the prongs of the ineffectiveness test." *Commonwealth v. Rolan*, 964 A.2d 398, 406 (Pa. Super. 2008) (citations and internal quotation marks omitted) (emphasis in original).

In the evaluation of an ineffectiveness claim of error on direct appeal, the Pennsylvania Supreme Court in *Spotz* noted:

As a general and practical matter, it is more difficult for a defendant to prevail on a claim litigated through the lens of counsel ineffectiveness, rather than as a preserved claim of trial court error. *Commonwealth v. Gribble*, 580 Pa. 647, 863 A.2d 455, 472 (2004). This Court has addressed the difference as follows:

[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*, 515 Pa. at 162, 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*, 476 Pa. [391], 409, 383 A.2d [155], 164 [(1978)] (citations omitted), states that "[w]henver 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, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately

arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. *Pierce, supra*.

Spotz, 84 A.3d at 315.

The Pennsylvania Supreme Court, in the earlier case of *Commonwealth v. Howard*, 645 A.2d 1300 (Pa. 1994), outlined the different standards and burdens in a collateral challenge premised on counsel's ineffectiveness versus a "harmless error" analysis on direct appeal:

As noted above, this Court has held under *Pierce* and its progeny that a defendant 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*, 515 Pa. at 162, 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*, 476 Pa. at 409, 383 A.2d at 164 (citations omitted), states that "[w]henver 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, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the

stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. *Pierce, supra*. Id at 1308-1309.

With these standards in mind, this Court will now address Getz' claims.

I. Ineffectiveness of trial and direct appeal counsel for failing to take remedial steps to address a sentencing error based upon the Court's assumption that the Jury's verdict involved a course of conduct "over a period of time on multiple occasions" with the victim.

In this first ineffectiveness claim, this Court believes Getz is attempting to argue that both trial counsel and direct appeal counsel were ineffective in failing to raise the issue that the Court sentenced the Defendant based upon its belief and assumption that the Jury's Verdict was based on conduct which occurred over a period of time on multiple occasions. From what the Court can glean from this somewhat complex argument is that had Collins: 1) raised an issue with "an incomplete verdict slip" (it should have included special interrogatories pertaining to 'course of conduct'); 2) incomplete jury instructions (presumably related to a 'course of conduct' instruction on all other charges besides indecent assault); and 3) objected at sentencing that the Court "imposed sentence without a corresponding jury verdict (Court should not assume jury's verdict on rape and IDSI involved a course of conduct), he could have staved off or prevented an "illegal

sentence." Further, Getz argues that Driscole should have argued that the Court imposed an "illegal sentence" for these same reasons. Getz bases this argument on the Court's comments made at sentences which reads as follows:

"I agree that *these crimes* happened when your client was in his teen years, but I specifically recall that, while some of it may have happened as a juvenile, some of it clearly happened as an adult.

The events that occurred over this time frame undoubtedly caused psychological harm to the victim. And although closure of this case has come long after the event occurred, it will still have a lifetime effect on her.

The defendant is looking at some significant state time here which he may eventually serve out and someday be off supervision. But until the victim's dying day, she may be subject to the psychological scars that she's dealing with.

. . .

The bases for these sentences are as follows:

Number one, as I noted, these offenses have had a serious and long-lasting effect and will have a long-lasting effect on the psyche of the victim.

These events occurred over a period of time on multiple occasions with the victim.

Any lesser sentence would depreciate the seriousness of these offenses."⁶

Getz alleges it was improper for the Court to make these comments as the Court assumed facts that could not necessarily be based on the Jury's Verdict as there is no way for the Court to

⁶ Notes of Testimony, Sentencing Hearing of 7/15/22 pp. 45, 48. (Italics in Getz' Petition removed).

know what led to the Jury's findings of guilt on the rape and IDSI offenses. Did the Jury believe Wagner and not M.E.? Did the Jury believe M.E. and not Wagner? Were the findings of guilt based on one day's events or multiple events over a course of hours or years? Without knowing the answers to these questions, Getz argues, the Court should not have "assumed" the Jury believed M.E.'s testimony that Getz violated her multiple times over multiple years while he was a juvenile and then again as an adult.

One of the ways Getz suggests Collins was ineffective was by failing to ask the Court to provide a verdict slip with special interrogatories for the rape and IDSI offense similar to that of the indecent assault charge. At the hearing, Collins testified that he had no strategic reason to object to the verdict slip on this ground. While Getz proffers that this is ineffective on the basis that the verdict slip was "ambiguous and incomplete, he never explains how it was ambiguous and incomplete. Furthermore, at that moment in the case Collins would have no way of forecasting the circumstances which Getz is now claiming is conduct which he considers ineffective . . . Collins' failure to anticipate what the Court may say at sentencing based upon what Getz perceives as an assumption by the Court as to what the jury decided in its verdict. The same holds true for the same forecasting vis-à-vis any jury instructions.

Even assuming *arguendo* Collins did ask for special interrogatories or his chosen instructions to the Jury, not only has Getz not suggested what they could have been to negate any ambiguity or incompleteness, we see none. If Getz is suggesting verbiage regarding "course of conduct", such verbiage was neither necessary nor appropriate. "Course of conduct" is neither an element of rape nor IDSI. Further the instructions utilized were standard jury instructions widely used throughout the Commonwealth.

"A trial court possesses broad discretion in phrasing its instructions to the jury and will not be found to have abused its discretion unless the instructions fail to clearly, adequately and accurately present the law. Moreover, an appellants' belief that a court's instructions should contain additional explanation or his chosen dicta will not render a jury charge defective." *Commonwealth v. Hunzer*, 868 A.2d 498, 516 (Pa. Super. 2005) (internal citations omitted). The Court sees no issues with how the verdict slip was prepared and provided to the Jury, nor how the instructions were provided. Consequently, Collins cannot be said to have been ineffective for not speaking up about either of them.

Getz next claimed that Collins was ineffective for not objecting to the Court's sentencing comments, one of which was one of the bases for the sentences imposed, specifically the statements

referencing multiple events over a period of time; in other words, a course of conduct. He further alleges that there was no indication that the Jury convicted Getz of anything more than just the events of that one day where he claims the victim's and Wagner's testimonies corroborated themselves. Assuming arguendo, Getz is correct, what is the error in the Court sentencing the Defendant to consecutive sentences for rape and IDSI when that same corroborated testimony established for the Jury conduct constituting the separate offenses for separate acts . . . oral sex and anal sex perpetrated upon the victim by Getz? Assuming arguendo once again Getz would be re-sentenced because Collins was ineffective for not objecting to those comments, what prevents the Court from re-sentencing Getz to the exact same sentences and running them consecutive to one another without referencing those comments? Nothing, as far as this Court can tell.⁷ Even if Collins was ineffective for not objecting, this Court sees no prejudice to Getz. To establish prejudice, Getz must show that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceedings would have been different. *Commonwealth v. King*, 57 A.3d 607, 613 (2012). Since sentencing, without reference to those comments could have been the same as it is with those comments, there exists no prejudice.

⁷ We would also note that the cumulative sentence imposed was also challenged on direct appeal and affirmed by the Superior Court.

The same holds true for direct appeal counsel, Driscole. Getz argues that the sentences imposed were illegal for the same reasons. Again, assuming arguendo Getz is correct, since the Court's questioned comments were but one reason for the imposition of these sentences in both length and their consecutive nature, objecting to them on the basis that they were improper would prove fruitless as did the appeal. Thus, no prejudice to Getz occurred and no ineffectiveness on the part of Driscole could be found either.

II. Ineffectiveness of trial and direct appeal counsel for failing to take remedial steps to address a sentencing error based upon the Court's assumption, without a corresponding verdict that the jury convicted Getz of both rape of a child and involuntary deviate sexual intercourse with a child on separate criminal acts.

As to this claim, Getz appears to be piggybacking off of his first argument. Here again Getz moves that neither the verdict slip nor the jury instructions requested nor informed the jury that in order to find Getz guilty of these two offenses, they "had to unanimously agree beyond a reasonable doubt that Getz committed separate criminal acts of either anal and oral sex" and that both Collins' and Driscole's failures to raise this issue results in the ineffectiveness of counsel. Getz goes on to say that had Collins raised this point before the trial court at sentencing or Driscole on appeal, if successful, would have resulted in the sentences on both of the Rape of a Child and Involuntary Deviate

Sexual Intercourse charges merging. This Court finds no merit to this argument.

At the PCRA hearing both Collins and Driscoble testified that they did not see a reason to make the merger argument.

Pursuant to the merger doctrine in 42 Pa.C.S.A. §9765

"No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense." Additionally, this statute "prohibits merger unless two distinct facts are present: 1) the crimes arise from a single criminal act; and 2) all of the statutory elements of one of the offenses are included in the statutory elements of the other." *Commonwealth v. Baldwin*, 604 Pa.34, 985 A.2d 830, 833 (2009).

In analyzing the elements of Rape of a Child and Involuntary Deviate Sexual Intercourse, this Court agrees that if the act alleged in both offenses was oral sex, the sentences would merge. Here, however, the acts alleged were both oral sex and anal sex and both the victim and Wagner testified to these "separate and distinct acts." Thus, the merger doctrine would not apply as the two crimes, Rape of a Child and Involuntary Deviate Sexual Intercourse did not arise from a single criminal act.

Further, Getz has failed to provide any caselaw requiring the Court to instruct the jury that they were required to find that two separate and distinct criminal acts occurred to allow them to convict on both offenses, nor has Getz provided caselaw requiring

special interrogatories for the jury to specify which specific act or acts were committed by Getz *vis-à-vis* these same offenses.

Since the merger doctrine would not come into play, the failure of both Collins and Driscole not raising the issue is not ineffective.

III. Ineffectiveness of trial and direct appeal counsel for failing to properly present a sufficient argument as to claimed trial court errors in prohibiting the defendant from introducing evidence of: 1) the Lehigh County police investigation into the victim's involvement in an open case in that county; and 2) Melissa Matsick's ARD disposition which, if permitted, would show their motivation to testify against Getz.

Getz' next argument raised in his PCRA Petition was that Collins, during the trial stage, but more so Driscole at the appellate level, were both ineffective for not raising other reasons for why Getz should have been permitted to bring up M.E.'s Lehigh County case and Melissa Matsick's ARD. In doing so, it would have proved that they both curried favor with the Commonwealth *vis-à-vis* their testimony against Getz at trial.

In order to further develop his argument as to M.E.'s Lehigh County case, Getz requested that Pennsylvania State Trooper Mirzet Sadikovic testify at the PCRA hearing. Simply put, the purpose of this request was for Getz to ask Trooper Sadikovic what he could relate involving the victim's Lehigh County case and how any possible deals in Lehigh County could prove crucial insofar as that deal was in consideration for M.E. testifying against Getz.

Unfortunately for Getz, his roll of the dice failed as the testimony did not reveal any connection between the two cases.

Having failed to establish that connection in his post PCRA hearing brief, he has since "re-couched" his argument as follows: "the Court erred in prohibiting the defense from introducing evidence of the pending criminal matters of Evans and Matsick to establish both witnesses had reason to curry the Commonwealth's favor and motivations to tailor their testimony against Getz accordingly." This was the exact argument raised by Driscole on direct appeal, however the Superior Court affirmed our decision precluding Getz from cross-examining either Matsick or Evans on these cases. Further, both Matsick and Evans testified at the pre-trial hearing, and Evans did as well at the PCRA hearing indicating that their motivation for testifying was not in exchange for more favorable treatment by the Commonwealth but rather to expose the truth about Getz. This Court finds, therefore, that this issue was previously litigated and deserves no further analysis as Getz claims above (See 42 Pa.C.S. §9543(a)(3)).

Notwithstanding, Getz argues that Driscole should have made other arguments before the Superior Court. Getz seems to intimate that as to M.E.'s situation, Driscole should have: 1) argued why the Court erred in preventing the jury from making the necessary credibility determinations; 2) argued why the trial court erred in requiring an iron-clad agreement or express promise of

consideration before allowing this pending matter to be used as impeachment; 3) cited to facts and legal argument in the record when he argued before the Superior Court. Getz also suggests that, as to Matsick, Driscole should have: 1) argued that her criminal charges were pending at the time she gave her statements to the police. Lastly, Getz claims that as to both Evans and Matsick, Driscole failed to preserve the Federal constitutional grounds of the claim.

Getz' statements that Driscole failed to do these things on appeal are not automatic grounds for a finding of ineffective assistance of counsel. To prevail, one of the prongs he must satisfy in the ineffective assistance of counsel test is that "counsel had no reasonable basis for his action or inaction." *Commonwealth v. Pierce*, 527 A.2d 973, 975-76 (1987). "In determining whether counsel's actions were reasonable, this Court does not question whether there were other more logical courses of action which counsel could have pursued; rather, this Court must examine whether counsel's decisions had any reasonable basis." *Commonwealth v. Washington*, 927 A.2d 586, 595 (2007). Also, Getz must be able to show, in the third prong, the prejudice prong, that "there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's ineffectiveness." *Commonwealth v. Paddy*, 15 A.3d 431, 433 (2011).

Getz acknowledges that at the PCRA hearing he did not question Driscole as to whether he had any strategic reasons for not briefing these issues he claims here are Driscole's failures. How could Getz expect the Court to determine if Driscole was ineffective for not raising these issues if he is not questioned as to why he did not raise them? Simply making the assertion that these are errors on Driscole's part are insufficient to satisfy prongs two and three. "[B]oilerplate allegations and bald assertions of no reasonable basis and/or ensuing prejudice cannot satisfy a petitioner's burden to prove that counsel is ineffective." *Paddy, Supra.*

Getz raises a further issue here regarding the Commonwealth's failure to disclose what he calls "the full nature of the conversations it had with Evans that would have induced her to cooperate with the Commonwealth." This Court believes he is referring to, again, Sadikovic's testimony at the PCRA hearing. Testimony which this Court found did not shed any further light on Getz' claims that Evans' received or expected favorable treatment in Lehigh County in exchange for testifying against Getz. Thus, contrary to Getz' belief, allowing him to further cross-examine Evans on a fully concocted theory of currying favor where it did not exist would have been improper. Therefore, even if this evidence had been fully developed by the Commonwealth or Collins pre-trial, it would not have made a difference in the Court's

ruling to prohibit its use. This Court was not going to permit Getz to attempt to discredit Evans based on his assumptions and innuendos. Had the facts to support his theory been present, then and only then would he have been able to use them. To the extent Getz is arguing here that Collins was somehow ineffective for not developing this issue further pre-trial, this Court declines to so rule.

IV. Trial Counsel was ineffective for failing to object to the Court instructing the jury that it was prohibited from relying solely on the victim's years long delay in reporting Getz' conduct as a basis for finding reasonable doubt to acquit him.

A significant portion of Getz' defense centered around the victim's failure to report the conduct she claimed Getz committed against her in order to establish reasonable doubt as to the charges filed against him. Collins' conducting of ardent cross-examination of the victim as well as the examination of other witnesses show this strategy. Likewise, the prosecutor spent a considerable amount of time defending this delay, including calling an expert witness who spoke about that very issue. No doubt, this was a central theme in the case.

18 Pa.C.S. §3105 provides:

3105.Prompt Complaint. Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant's failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.

Thus, a criminal defendant has every right, and even an obligation, to explore a failure of a victim to promptly report the commission of an offense against him or her. Consistent with that is the Commonwealth's right to refute that the failure to promptly report a sexual assault raises a reasonable doubt that it occurred.

Consequently, this court in its closing instructions read to the jury the standard jury instruction set forth in the Pennsylvania Suggested Standard Criminal Jury Instructions, 3rd Edition⁸, in place at the time of the trial. The following is that excerpt:

Now, before you find the Defendant guilty of the crimes charged in this case, you must be convinced beyond a reasonable doubt that the acts charged did in fact occur and were applicable to a particular charge. The evidence of Mercedes Evans' delay in making a complaint does not necessarily make her testimony unreliable, but may remove from it the assurance of reliability accompanying the prompt complaint or outcry that the victim of a crime such as this would ordinarily be expected to make. Therefore, the delay in making a complaint should be considered in evaluating her testimony and in deciding whether the act occurred at all you must not consider Mercedes Evans' delay in making the complaint as conclusive evidence that the act did not occur. Mercedes Evans'

⁸ Pa JICrim.4.13A, Pa SSJI(Crim), §4.13A(2019).

failure to complain promptly and in the nature of any explanation for that failure are factors bearing upon the believability of her testimony and must be considered by you in light of all the evidence in this case.”⁹

Getz argues that Collins should have objected to this instruction claiming the instruction “distorted a rule” and was “arguably defective” and that Collins could have “no strategic reason to forego objecting to this damaging instruction.” When questioning Collins at the PCRA hearing, Getz made a point to get Collins to acknowledge that the prompt complaint issue was important, however when asking Collins if he identified any errors in the Court’s instructions, Collins responded that he did not.

Lastly, Collins was asked if he had any strategic reason for not objecting to this instruction and he replied that he did not. On cross-examination, Collins acknowledged knowing of no caselaw that held that the phrase “you must not consider Mercedes Evans’ delay in making the complaint as conclusive evidence that the act did not occur” was unlawful. Also, on cross-examination, Collins even acknowledged that as part of his proposed instructions to the Court, he offered 4.13A and requested that it be given. Why then does Getz believe now it should have been objected to at trial?

⁹ Notes of Testimony, May 17, 2022, pp 146-147.

As noted, not only did the Court choose to give the instruction in question, it was proffered by trial counsel himself, knowing that it was a suggested jury instruction and knowing that part of that instruction was needed to bolster his client's argument that reasonable doubt existed partly because of a failure to promptly report this conduct.

"An instruction will be upheld if it clearly, adequately and accurately reflects the law." *Commonwealth v. Spatz*, 759 A.2d 1280, 1287 (2000), cert denied, 534 U.S. 1104 (2002). Having been provided with no caselaw suggesting that the instruction the Court gave on prompt reporting did not reflect the law and not being aware of any ourselves, this court finds that the instruction was not only informative to the jury but also in accordance with the law. [See also *Comm v. Prosdocimo*, 578 A.2d 1273, 1276-1277 (Pa. Super. 1990) which noted that a jury charge that closely tracked the language of the suggested standard jury instruction was "accurate, adequate and sufficiently clear to inform the jury of the law applicable to the case."] Getz' claim that the instruction was improper is meritless and trial counsel was not ineffective for failing to make a meritless objection. *Comm. v. Manigault*, 462 A,2d 239, 241 (1983).

Getz also raised an issue, albeit not in any supplemental PCRA petition, but rather in a supplemental brief lodged on January 16, 2025, that in September 2024, this specific instruction was

deleted from the Suggested Standard Criminal Jury Instructions altogether. Getz seems to suggest that by deleting this instruction, he is correct in his assessment that the instruction is unlawful as this instruction is incompatible with 18 Pa.C.S.A. §3106, which reads in pertinent part, "no instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainants' testimony is viewed." He also pointed out that the subcommittee note explaining why it was deleting this instruction spelled out the fact that "instruction 4.13A allowed the testimony of witnesses who did not promptly complain to be viewed differently."¹⁰ This Getz claims is the crux of his ineffectiveness claim.

The Commonwealth countered that the instruction was not deleted because it prejudiced defendants, but rather that it prejudiced the victims.

This Court agrees with the Commonwealth that §4.13A tended to show favoritism towards defendants, specifically when it states that, ". . . delay in making a complaint does not necessarily make . . . testimony unreliable, but may remove from it the assurance of reliability." (emphasis ours). Victims could still be credible and reliable despite not coming forward immediately, yet this part of the instructions questions that credibility and

¹⁰ Pa JICRIM 4.13 A., Pa SSJI (CRIM) §4.13A (2024).

reliability only because the conduct was not complained of immediately. This Court also believes the subcommittee note which finds the instruction incompatible with 18 Pa.C.S. §3106 is accurate in the sense that the prohibition set forth in §3106 could be viewed in such a way that a failure to make a prompt complaint is "another way to view a complainant's testimony." In other words, a jury could disbelieve a complainant simply because of a lack of prompt complaint of the conduct of the defendant despite there being credibility in that testimony as to the merits of that conduct.

Further, in *Commonwealth v. Snoke*, 580 A.2d 295 (Pa 1990), the Court noted:

"We stated in *Lane*, "[u]nquestionably, a prompt complaint is a factor which must be assessed with all of the other pertinent evidence bearing upon the question of the credibility of the complaining witness." *Id.* at 397, 555 A.2d 1250. We further stated, "[t]he lack of a prompt complaint by a victim of a crime, although not dispositive of the merits of the case, may justifiably produce a doubt as to whether the offense indeed occurred, or whether it was a recent fabrication by the complaining witness." *Id.* at 398, 555 A.2d 1250. See also, Note, Rape Reform Legislation and Evidentiary Concerns, 44 U.Pitt.L.Rev. 955 (1983). However, the Court in *Lane* recognized that consideration should be given to factors inherent in cases involving minor victims which may explain the delay without reflecting unfavorably on the minor witness' credibility." *Id.* at 301.

The operative terminology, "although not dispositive of the merits of the case" suggests that the victim's testimony may in fact be credible and support a conviction beyond a reasonable doubt yet a

failure to promptly complain may negate that credibility and vindicate an otherwise guilty defendant. To utilize 4.13A in a closing instruction to a jury, the law they must follow in reaching a verdict, bolsters that plausible conclusion. In doing so, it evidences its incompatibility with §3106. Not giving it to a jury and allowing counsel to simply argue the issue of "failure to make prompt complaint" is a more feasible and appropriate way to address this issue. Thus, this Court does not accept Getz' interpretation of the rationale and purpose behind deleting this instruction as one that disfavored defendants such as Getz. The deletion does not lend credence to his argument that Collins should have objected to it.

Lastly, in *Commonwealth v. Drummond*, 285 A.3d 625(2022), our Supreme Court addressed this very issue of defense counsel not "anticipating" the deletion of a jury instruction years later. In that case, the court stated, . . . "counsel was under no reasonable obligation to raise a challenge to the instruction, as any such objection would have lacked a then-existing legal foundation. Counsel was not required to anticipate, nor could he have foreseen, that this Court would find the instruction to be constitutionally defective over a decade later. For this reason, counsel cannot be deemed ineffective." at 646.

In conclusion, this Court finds that Collins was not ineffective as to this claim alleged herein by Getz.

V. Trial Counsel was ineffective for failing to investigate and present character witnesses on Getz' behalf at trial to evidence his excellent reputation for being a law-abiding, honest, and peaceful person.

While this claim was initially raised in Defendant's original PCRA Petition, it was not developed through the course of these proceedings and eventually withdrawn by counsel at the PCRA hearing. Thus, it warrants no further discussion here.

VI. Ineffectiveness of trial counsel for failing to object to a number of comments made by Attorney Rebecca Elo in her closing argument to the jury.

In this claim, Getz argues that Collins was ineffective for failing to object to a number of comments made by Elo during her closing argument to the jury. In his petition, Getz claims Collins should have objected to the following: 1) When explaining why Edwin Evans, the victim's father, did not appear and also vouch for her recitation of the events as she portrayed them to him¹¹ Elo noted that he was "in jail"; 2) when explaining why the Commonwealth did not call the victim's two brothers to testify, Elo commented that the reason they were not called was because she saw no reason to call two witnesses to say they did not see anything¹²; 3) Elo's

¹¹ During her testimony, Evans noted that she also told her father about the events with Getz. Collins made a point in his closing argument to mention that he had not been called as a witness to corroborate her testimony, asking the jury to "think about the missing witness. He was not here. He was not here to back it up. I wonder why, was that something invented? He wasn't here to corroborate it. He was not here."

¹² In her testimony, Evans testified her two brothers also lived in the same house where the crimes occurred. In his closing, Collins argued that the integrity of the Commonwealth's case was called into question because they were not called to testify. Elo responded in her closing that, "they never said

vouching for the credibility of her two main witnesses, Evans and Wagner; and 4) Elo's bolstering of Wagner's credibility.

In order to determine whether or not Collins was ineffective for failing to object to each of these comments or series of comments we must examine that conduct in conjunction with the *Strickland* standard.

As a threshold issue, it is important to note that in addressing claims of prosecutorial misconduct, such as these alleged by Getz, the focus is not on whether a defendant received a perfect trial, but whether the trial was fair. *Commonwealth v. DeJesus*, 782 A.2d 394, 407 (2001) cert. denied, 537 U.S. 1028, S. Ct. 580, 154 L.Ed. 2d 441 (2002). When dealing with statements such as these, the focus is on the prejudicial effect on the jury which resulted from them and how it may create bias and hostile beliefs by a jury towards the defendant that would cloud their ability to weigh the evidence and render a true verdict. If so, then and only then are those comments so damaging that they warrant a new trial. *Commonwealth v. Paddy*, 800 A.2d 294, 316 (Pa. 2002). Further, the Commonwealth may argue any reasonable inferences that can be drawn from the evidence. *Commonwealth v. Cox*, 728 A.2d 923, 931 (1999). "A prosecutor has great discretion during closing argument." *Commonwealth v. Brown*, 911 A.2d 576, 580 (Pa. Super.

they did [see anything] so there is no reason for me to call them to the stand to tell you they did not see anything."

2006) *appeal denied*, 920 A.2d 830 (Pa. 2007). This is true, especially in response to comments made by defense counsel in their closing argument as "it is well settled that the prosecutor may fairly respond to points made in the defense closing." *Commonwealth v. Judy*, 978 A.2d 1015, 1019-1020 (Pa. Super. 2010).

Missing dad

In his closing argument, Collins alluded to the fact that the Commonwealth failed to produce the victim's father as a witness to corroborate the fact that she told him about what had happened to her. Getz' argument herein is that Collins was ineffective in not objecting to Attorney Elo's "response" which Getz today construes to be Elo "calling Collins out" by stating that the reason he is not here is because he was incarcerated, which is a fact not in evidence. This Court agrees with the Commonwealth where they said that Getz had taken that portion of Attorney Elo's closing out of context. Her comments surrounding the victim's father dealt with him not doing anything to help the victim to get this case prosecuted. She referenced that the father was in and out of her life, in and out of jail, and was at that time "in jail currently." Getz argues that Elo's comment was not a fair response to Collins' "missing witness" statement because it created a false impression that perhaps Collins was pulling a fast one on the jury thereby placing him in a bad light with the jury.

At no time did Attorney Elo ever indicate that this particular comment was in response to Collins' comment about Edwin Evans. While this Court agrees that saying to the jury that Edwin Evans was in jail when it is not a fact in evidence, it was not stated as any response let alone an attempt at a fair response to Collins' comment as contemplated by *Judy*, supra.

Lastly, at the PCRA hearing, Collins testified that he does not "like to object to a prosecutor's closing, unless it is a more egregious thing¹³", and that the Judge's instructions inform the jury that counsel's arguments are not evidence. Collins also stated on cross-examination, that he does not usually object to a Commonwealth closing because if he interrupts a closing argument and his objection is overruled, the jury may think that counsel is making a baseless objection and therefore objecting is risky.

This Court finds that under *Strickland*, Getz has failed to establish at a minimum, the second prong. Collins testified as to why he had a basis not to object to this argument. Beyond that this Court does not find, contrary to Getz' claim that this was not a fair response, that this was a response at all to Collins comments about Mercedes Evans' father's absence at trial.

¹³ N.T., PCRA hearing 1/23/25, p. 67.

Missing brothers

Next, Getz takes issue with the fact that Attorney Elo "testified" in her closing argument to the jury as to why Austin and Jonathan, Mercedes' brothers were not called to testify. Getz argues as he did on the "missing dad" issue, that Elo's comments were not a fair response to Collins comments about them missing as well.

In his closing, Collins stated to the jury the following:
A couple other missing witnesses, Austin Wagner, Jonathan Wagner. They were in the house. They were kids. One was older than [M.E.], one was younger. They grew up in the span of years there. I mean, small house. They didn't notice anything? Didn't notice my client doing something? Where are they?¹⁴

In response, Attorney Elo stated: "Defense counsel also talked to you about people we didn't call. Where is Austin? Seated in the courtroom with his sister. Where is Jonathan? Seated in the courtroom with his sister. The Commonwealth isn't going to call people to tell you that they didn't see anything. Nobody suggested over the course of this trial that Austin saw the defendant having sexual contact with [M.E.] I didn't pull anybody off the street to say they didn't see it either, because I am not going to try to prove to you that somebody didn't see something.

¹⁴ Notes of Testimony, March 10, 2022, p. 100.

They never said they did so there's no reason for me to call them to the stand to tell you they didn't see anything."¹⁵

Getz argues here that once again Elo "testified" when she pointed out that both of them were physically present in the courtroom, but more importantly, were not called to testify because it would make no sense to call them as witnesses because neither saw anything in terms of the sexual contact between Getz and their sister.

This Court first notes that while Getz again raises the "Attorney Elo is testifying claim", it was Collins who first provided information to the jury that calls into question what if anything Austin and Jonathan may or may not have seen in that house vis-à-vis the Defendant and the victim, and specifically them, not noticing his client doing anything. However, it should be noted that during the direct examination of Mercedes Evans by Attorney Elo, when the question was asked, "Did you ever say anything to them or anyone else in the house at the time he was raping you?" It was in the context of Gregory Wagner raping her and not Brent Getz.¹⁶

¹⁵ Notes of Testimony, March 10, 2022 p.122-23.

¹⁶ The following colloquy took place directly after the above question was posed to Evans:

Q. Now, you also mentioned there was another person. You said Brent Getz.

A. Yes.

Q. Do you see him here in the courtroom?

It is evident here that Elo was questioning the victim about whether her brothers knew anything about what Greg Wagner did to her, not Brent Getz, so when Getz argues that the comment made by Elo that the victim did not tell her brothers anything, the testimony suggests that she was referring to Wagner, not Getz. Regardless, the comments by Elo that there would be no reason to call them to testify because they had not seen Getz sexually assault their sister is a fair response to Collins's comment regarding why they were not called to buttress the victim's testimony. Collins was simply questioning why, if they lived in the same house with their sister, they did not notice anything happening to their sister at the hands of Getz; Elo was simply answering that question for Collins. This Court sees no reasonable basis why Collins would need to object to this comment.¹⁷

A. Yes, over there.

MS. ELO: Let the record reflect she identified the Defendant.

The Court: So noted.

BY MS. ELO:

Q. So tell me how Brent Getz became involved in this too.

Notes of Testimony March 10, 2022 p. 39.

¹⁷ Collins also testified that he says no basis to object to these comments because he felt that it bolstered his argument that they should have seen something happen, if it happened, because of the length of time they are living in that same house during the relevant time period. He went on to say that if the jury felt that way then he believed it impacted the victim's credibility.

Vouching for Credibility of Victim

Next Getz claims that Elo improperly vouched for the credibility of Evans. He points specifically to three (3) occasions when Elo made comments in her closing that Getz argues vouched for Evans' credibility.

1. Disclosing of Sexual Assault

Getz first points to two comments Elo makes in her closing argument which he believes vouched for Evans' credibility as she provided "drip-by-drip disclosure" of the events that led up to the filing of charges against Getz and Wagner, and for which Getz should have objected. Elo commented "we see it all the time" and "it's a long time usually before you get the full story."¹⁸

This Court must point out that the Commonwealth called Dr. Barbara Liv, a forensic psychiatrist to testify in this case. Dr. Ziv testified about a myriad of things involving sexual assault. One of the items she was queried on was "piecemeal disclosure." Dr. Ziv explained this concept as follows:

"So piecemeal disclosure means that somebody comes out and tells a part. And again, it's sort of a test balloon. They will tell you a part. Then they will give more information depending on how it is received.

. . .
So a piecemeal approach or disclosure means that they will say, depending on the age of the child, he touched me where I don't want to be touched and leave it at that. Because again, sometimes depending on the age of the child, they don't have the words for it. They don't really know what they should be disclosing. Again,

¹⁸ Notes of Testimony, March 10, 2022 p. 116.

depending on the age of the child, you know, if they are at an age where they are being baited by a parent, what is the difference between that and having somebody put their hands between your legs? So sometimes it's the knowledge deficit. It's also, I mean, if it's an older child or teenager, this is embarrassing. This is embarrassing stuff to talk about. So there are multiple reasons why people do not come out and say here's what happened and here's everything that happened. I think people, especially children, would like to give, you know, enough information really sort of to make it stop. More than that, they don't want to get into because it's embarrassing.

Also, you know, when you are talking about childhood sexual abuse, sometimes it's not uncommon for people to not -- to become - to come to the realization slowly, A, that it's not their fault, B, that it was inappropriate, and C, what exactly happened to them. So it may be until somebody gets into their 20's and into a normal sexual relationship and they, you know, wouldn't have thought to say that when they said he had sex with me, because they don't know that's just not what happens when you are a child. So there's a lot of reasons. So piecemeal disclosure does not mean anything and it's usual for all of these reasons."¹⁹

Attorney Elo's comments were a characterization of Dr. Ziv's testimony on piecemeal disclosure as it related to what happened here. Dr. Ziv gave many examples of how piecemeal disclosure happens in sexual assault cases involving victims of all ages as well as disclosures by victims of all ages. This Court sees no viable nexus between Elo's comments and vouching for Evans' credibility that would warrant the need for Collins to object. Instead, this Court sees Elo simply reiterating to the jury what Dr. Ziv was explaining in her testimony, testimony which, in and

¹⁹ Notes of Testimony, 3/10/22 at 159-160.

of itself, not only explains why Evans could have piecemealed her disclosure of the sexual assaults, but lends credence to Evans' testimony.²⁰ This Court sees no reason to find Collins ineffective for not objecting here.

2. "She is not lying"

The next comment made by Elo in her closing which Getz argues Collins should have objected to was when she commented that "she (Mercedes) is not lying."²¹ Getz claims this too is vouching for the victim's credibility along with the fact that Elo was expressing her opinion about Evans' credibility. The Commonwealth counters that Elo's comment was simply a fair response to Collins calling the Commonwealth witnesses and specifically the victim, "liars."

At the hearing, when asked by Getz' PCRA counsel as to whether there should have been an objection to this comment, Collins responded, "Normally, there would be. She is bolstering the credibility of the witness in her closing. It may be that because of the - obviously, credibility was a severe issue in this case. It may have been a fair comment or response to my closing and the direction I took at trial."²²

²⁰ It should be noted that Collins was not questioned at the PCRA hearing as to what reasonable basis he had for not objecting to these comments. This alone is sufficient to find that Getz had not established ineffectiveness on this claim.

²¹ Notes of Testimony, 3/10/22 p. 120.

²² Notes of Testimony, PCRA hearing 1/23/25 p.73.

It should be noted that Collins testified that the main theme of the defense was that the events never happened and that the witnesses were lying. In his closing argument to the jury, he made it a point many times to use words such as "lies", "liars", and "lying." Clearly, he was claiming a conspiratorial effort by the Commonwealth witnesses to pin heinous crimes on his client that did not happen. Fair response by Elo would be to counter that argument. In saying things such as "she is not lying" and explaining why and how is a fair response to Collins' argument.

Additionally, Getz argues here that it was not just a response to Collins's closing, but Elo expressing her own personal opinion as to Evans' credibility. It is settled that it is improper for a prosecutor to express a personal belief as to the credibility of the defendant or other witnesses. However, the prosecutor may comment on the credibility of witnesses. Further, a prosecutor is allowed to respond to defense arguments with logical force and vigor. If defense counsel has attacked the credibility of witnesses in closing, the prosecutor may present argument addressing the witnesses' credibility. *Judy, supra*, at 1020. This Court agrees with Getz that a prosecutor cannot express her personal opinion as to a witness's credibility. *Commonwealth v. Carpenter*, 515 A.2d 531 (1987). However, we do not find Elo's comment that "she is not lying" was her personal belief. At no time did she expressly state that nor implied that it was either. Instead, since credibility

was the crux of this case as to whether the Commonwealth witnesses were believable, she had every right to counter Collins' argument made on behalf of Getz that the Commonwealth witnesses were liars. [See *Commonwealth v. Fisher*, 813 A.2d 761, 768 (Pa. 2002), *Commonwealth v. Lawrence*, 165 A.3d 34, 44 (Pa. Super. 2017)].

This Court sees no ineffectiveness on Collins' part in not objecting to the statement either.

Bolstering Wagner's Credibility

Similarly, Getz argues that Collins was ineffective for not objecting to Elo's attempt at bolstering Wagner's credibility. Inasmuch as we have exhaustively analyzed Elo's comments about Evans' credibility and inasmuch as this argument as to Wagner's credibility parallels it, and finding a similar rationale for why Elo said what she said, this Court sees no ineffectiveness on Collins' part in not objecting to these comments as well.

In conclusion, as to these claims under section VI of Getz' petition, this Court does not find that Getz has met the *Strickland* Standard for his PCRA claim.

VII. Cumulative impact of constitutional violations at trial renders the trial unfair in violation of Getz' due process rights under the 14th Amendment.

Getz' last argument suggests that an accumulation of all violations of his rights could lead to only one conclusion: the trial in which the jury convicted him on all charges was unfair

warranting a new trial. Having found no such violations as raised in his PCRA petition, this Court finds this claim meritless.

CONCLUSION

In *toto*, this Court finds that Getz has failed to establish a cognizable violation of his constitutional right in the manner in which Collins represented him at the trial level or in the manner Driscole represented him at the Appellate level. Finding no viable ineffectiveness, this Court denied all relief requested.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

vs. :

BRENT GETZ,
Defendant :

No. CR-437-2019

Kari Mahler, Esquire

Counsel for Commonwealth
Senior Deputy Attorney General

Daniel Silverman, Esquire

Counsel for Defendant

ORDER OF COURT

AND NOW, this ~~5th~~ day of December, 2025, upon consideration of Defendant's "Petition for Post-Conviction collateral Relief" filed on August 16, 2024, and following an evidentiary hearing thereon and our review of the post-hearing memoranda of counsel, and in accordance with our Memorandum Opinion bearing even date herewith, it is hereby **ORDERED and DECREED** that the Defendant's "Petition for Post-Conviction Collateral Relief" is **DENIED in toto.**

BY THE COURT:


Joseph J. Matika, J.

[FM-10-25]

FILED IN OFFICE
2025 DEC -5 A 11:19

Notice to Defendant

1. You have the right to appeal to the Pennsylvania Superior Court from this Order denying your PCRA Petition and such appeal must be filed within 30 days from the entry of this order, Pa.R.A.P. Rules 108 & 903;
2. You have the right to assistance of legal counsel in the preparation of the appeal; and
3. You have the right to proceed in forma pauperis and to have an attorney appointed to assist you in preparation of the appeal, if you are indigent. However, you may also "proceed pro se, or by privately retained counsel, or not at all." Commonwealth v. Turner, 544 A.2d 927, 926 (Pa. 1988)