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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 232 CR 2010
	:	
MICHAEL T. DEGILIO,	:	
Defendant	:	

Criminal Law - PCRA - Ineffectiveness of Counsel – Prejudice - Character Evidence - Cross-Examination of Character Witnesses – Pa.R.E. 404(b) - Prior Bad Act Evidence - Failure to Call a Material Defense Witness

1. To prevail on an ineffectiveness claim, a PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying legal claim has arguable merit; (2) trial counsel had no reasonable basis for acting or failing to act; and (3) the petitioner suffered resulting prejudice.

2. In matters of strategy and tactics, to sustain a claim of ineffectiveness, it must be determined that, in light of all the alternatives available to trial counsel, the strategy actually employed was so unreasonable that no competent lawyer would have chosen it. 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.

3. In contrast to the "harmless error" standard applicable to claims of trial court error on direct appeal, where the burden is upon the Commonwealth to prove beyond a reasonable doubt that the error did not contribute to the verdict, the burden is upon the defendant in a post-conviction collateral proceeding to prove by a preponderance of the evidence that there is a reasonable likelihood that but for trial counsel's ineffectiveness the outcome of the proceedings would have been different.

4. Evidence of good character is substantive and positive evidence and, by itself, may be sufficient to raise a reasonable doubt and justify an acquittal.

5. In general, a witness who testifies as a character witness to defendant's reputation in the community for a relevant character trait may be cross-examined on specific acts or instances probative of the character traits to which the

witness testified, provided the purpose of such cross-examination is to test the accuracy of the witness's testimony by showing either that the witness is not familiar with the reputation concerning which he has testified or that his standard of what constitutes good repute is unsound, and not to prove the defendant committed an act or crime of which he has not been accused.

6. In a criminal case, the Commonwealth is prohibited from cross-examining a defense character witness about specific acts or instances of criminal misconduct allegedly committed by the defendant but for which he has not been convicted, regardless of whether the questions seek to test the character witness's familiarity with defendant's reputation and whether he has heard persons in the neighborhood attribute particular offenses to the defendant, or are directed to the witness's knowledge of other criminal misconduct.

7. Trial counsel is not ineffective for not calling defense character witnesses in a criminal case where counsel has an objective reasonable basis for believing that to do so would permit the Commonwealth to ask questions and present evidence of a contrary character harmful to the defense and which would otherwise be inadmissible, since the decision not to call character witnesses under these circumstances is a reasonable exercise of trial strategy.

8. Pennsylvania Rule of Evidence 404(b) prohibits the use of a crime, wrong or other act to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character.

9. Defendant's statement to police that he had been sexually active with multiple women in the three-year period immediately preceding his questioning by police, who were investigating a report of sexual assault of which the defendant was accused, to provide an alternate explanation of how the victim was able to identify a birthmark on a private area of his anatomy was neither character nor propensity evidence rendered inadmissible by Pa.R.E. 404(b), or required a cautionary instruction.

10. Trial counsel's decision not to call a particular witness for the defense does not constitute *per se* ineffectiveness without some showing that the testimony of the witness not called would have been beneficial or helpful to the defense, and its absence prejudicial.

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Cynthia A. Dyrda-Hatton, Esquire — Counsel for Commonwealth
Assistant District Attorney
David S. Nenner, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – February 27, 2019

In the post-conviction collateral proceedings now pending before us, Defendant, who was convicted of sexually assaulting a patient while counseling her for depression and anxiety, claims his trial counsel was ineffective for (1) failing to object to the admissibility of statements Defendant made to the police respecting sexual relations he had with other women to explain how the victim, who Defendant denied having any sexual contact with, knew about a birthmark located on an intimate area of his body; (2) failing to present character evidence on his behalf regarding his reputation for being peaceful, law-abiding and non-violent; and (3) failing to use the medical records of the victim's hospitalization admissions immediately before and after the date of the assault to impeach or otherwise challenge the testimony of both the victim and the Commonwealth's expert describing the effects the medication she was prescribed had on

her ability to resist and prevent the assault. For the reasons which follow, we deny Defendant's Petition for Post-Conviction Collateral Relief.

PROCEDURAL AND FACTUAL BACKGROUND

On May 15, 2014, a jury convicted Michael T. Degilio ("Defendant") of Involuntary Deviate Sexual Intercourse by Forcible Compulsion,[1] Indecent Assault by Forcible Compulsion,[2] and Indecent Exposure.[3] The sufficiency and strength of the evidence to support these convictions was upheld on direct appeal to the Superior Court and is not now in dispute.

Briefly,[4] the evidence at trial established that the Defendant, a practicing licensed psychologist, sexually assaulted one of his patients, Jane Doe,[5] when she was in his office on February 24, 2009 for out-patient therapy. The Commonwealth claimed Mrs. Doe's emotional and mental state at the time of the assault, together with the prescription medication she was taking, made her particularly vulnerable and subject to physical and psychological manipulation. Days earlier

[1] 18 Pa.C.S.A. § 3123 (a)(1).
[2] 18 Pa.C.S.A. § 3126 (a)(2).
[3] 18 Pa.C.S.A. § 3127 (a).
[4] For further detail regarding the factual background on which Defendant's conviction was based, reference is made to our Memorandum Opinion of April 24, 2015, explaining the reasons we denied Defendant's post-sentence motion.
[5] As was the case with our Memorandum Opinion dated April 24, 2015, out of respect for the victim's privacy, her true name has not been used in this published opinion. *Cf.* 42 Pa.C.S.A. § 5988(a) (prohibiting disclosure of names of child victims of sexual or physical abuse by officers or employees of the court to the public and excluding any records revealing this information from public inspection).

she had experienced a nervous breakdown following a domestic dispute with her husband and was admitted into the Behavioral Health Unit of the Gnaden Huetten Memorial Hospital where she was treated for major depression and severe anxiety. While at the Behavioral Health Unit, Mrs. Doe was seen and treated by Dr. Clifford H. Schilke, a psychiatrist, who prescribed Cymbalta for her depression and Klonopin for her anxiety. Although Mrs. Doe had a history of depression and emotional issues, this was the first time she was prescribed Klonopin.

Mrs. Doe was discharged from the Behavioral Health Unit on February 18, 2009, four days after her admission. Upon her discharge, her prescription for Klonopin was increased from 6 milligrams to 8 milligrams daily - 2 milligrams, four times a day – and Mrs. Doe was referred to Defendant for a psychological consult; her medical records while at the Behavioral Health Unit were also forwarded to Defendant. Mrs. Doe testified that following her discharge from the Behavioral Health Unit, she felt extremely tired, confused and disoriented.

Dr. Ilan Levinson, a board-certified psychiatrist called by the Commonwealth as an expert witness at the time of trial and who was also Mrs. Doe's treating psychiatrist, described Klonopin as a sedative hypnotic. Dr. Levinson testified that the dosage of Klonopin prescribed for Mrs. Doe at the time of her discharge from the Behavioral Health Unit on February 18,

2009, was extremely high and would likely result in symptoms of extreme confusion, fatigue and gait impairment, especially for a person such as Mrs. Doe who was not accustomed to this medication. Dr. Levinson further testified that when a person who suffers from depression takes high dosages of Klonopin they are extremely vulnerable and susceptible to manipulation by a dominant person. (N.T., 5/13/14, pp.31-32).

February 24, 2009 - the date of the assault - was Mrs. Doe's second appointment with Defendant following her discharge from the Behavioral Health Unit. At her first appointment on February 20, 2009, Defendant intimated that he wanted to engage in sexual relations with her: he told her that she was too pretty to be in a mental health unit; he inquired whether she ever strayed from her marriage; he stated that he enjoyed being with women and, though engaged, often cheated on his fiancée; and he mentioned that if anything occurred between them, it would have to be kept secret because his license was on the line. (N.T., 5/12/14, pp.56-57). At Mrs. Doe's second appointment on February 24, 2009, Defendant kissed Mrs. Doe on the lips, pulled down her blouse and kissed her exposed right breast, and then physically and psychologically forced her to perform oral sex on him, taking advantage of her fragile state of mind, and overpowering her will to resist. (N.T., 5/12/14, pp.74-79).

Immediately after the assault, Mrs. Doe reported the assault to a close friend, Tracey Sherwood, who testified that Mrs. Doe was extremely upset and emotional about what had happened. Two days later, on February 26 2009, Mrs. Doe was re-admitted to the Behavioral Health Unit where she was again placed under Dr. Schilke's care until her discharge on March 3, 2009.

At trial, the Defendant presented two basic defenses. First, Defendant attacked the strength of the Commonwealth's case-in-chief, claiming the Commonwealth failed to prove its case beyond a reasonable doubt since Mrs. Doe had a documented history of mental health illness for over eight years; was heavily medicated on the day of the alleged offense, including her use of 8 milligrams of Klonopin daily; and had been diagnosed with major depressive disorder with recurrent, severe, and psychotic features involving delusions - false beliefs - and admitted, while hospitalized in the Behavioral Health Unit, that she was not sure whether the assault had taken place. (N.T., 5/12/14 (Opening Statement), pp.22-23; N.T., 5/15/14 (Closing Argument), pp.22-24). Defendant's trial counsel argued that Mrs. Doe either imagined the assault or misinterpreted what had actually happened and that even if Mrs. Does' testimony were accepted, what she described was – according to her own description - consensual and not against her will. (N.T.,

5/12/14 (Opening Statement), pp.21-22; N.T., 5/15/14 (Closing Argument), pp.24-26).

Defendant's second line of defense was an alibi. Defendant testified that when Mrs. Doe failed to appear for a tentative appointment he had scheduled with her on February 24, 2009, he left the office; that he was not in his office on the date and time claimed by Mrs. Doe; and that he in fact was several miles away - at his father's home - where he was engaged in sexual relations with a former girlfriend, Bernadette Beckett, not his fiancée, but who herself was engaged to another. (N.T., 5/12/14 (Opening Statement), p.21; N.T., 5/15/14 (Closing Argument), pp.27-28). Ms. Beckett took the stand and confirmed her meeting with Defendant on February 24, 2009, as described by Defendant, and corroborated Defendant's version of the two meeting and engaging in sexual relations with one another.

A major difficulty with Defendant's attack on Mrs. Doe's credibility was that when Mrs. Doe reported the assault to Chief Barnes of the Mahoning Township Police Department and described what had happened, she also identified a distinctive birthmark or skin tag below Defendant's beltline on the left side of his groin, which she claimed she observed during the assault. When Chief Barnes met with Defendant on July 7, 2009, to execute a search warrant on Defendant's office and take photographs of the area of Defendant's body where Mrs. Doe claimed the birthmark

was located, Defendant denied having any sexual relations with Mrs. Doe, either consensual or by force, but did admit to the birthmark. Photographs of the birthmark were taken that same day by Officer Jeffrey Frace, the primary investigator in the case. When Chief Barnes asked Defendant how Mrs. Doe would know of this birthmark if she did not observe it as she claimed, Defendant responded that he had had sexual relations with approximately five women since 2006, and Mrs. Doe must have overheard someone talking about his birthmark. (N.T., 5/12/14, pp.185-88). At the time of this interview, Defendant made no mention of being with Ms. Beckett at the time Mrs. Doe claimed the assault occurred. (N.T., 5/14/14, p.174).

At Defendant's trial, Chief Barnes was called as a Commonwealth witness. As part of his testimony, Chief Barnes described his meeting with Defendant on July 7, 2009, and testified to Defendant's response when asked how Mrs. Doe would know of the birthmark. In giving this testimony, Chief Barnes made clear that Defendant stated that the relations he had with these other women were all consensual and none were patients. No objection was made to this testimony.

No character evidence was presented on Defendant's behalf at the time of trial. Defendant's trial counsel testified that he had considered the use of character witnesses and discussed this briefly with Defendant, but decided against using character

witnesses because of information provided to him by the Commonwealth during discovery. (PCRA N.T., 4/11/18, pp.187-89; PCRA N.T., 5/3/18, pp.6-7, 16-18, 20, 25-26). Specifically, Defendant's trial counsel testified to being provided copies of complaints made by Candy McMurray, the mother of one of Defendant's patients, who reported that Defendant claimed she too was in need of treatment, that she was bipolar and had a personality disorder, and that Defendant could help her by having sex with her, a statement similar to one he made to Mrs. Doe on February 24, 2009. (PCRA N.T., 5/3/18, pp.6-7, 22-25; PCRA Exhibit D-6). This occurred during counseling sessions on January 11, January 13, and January 14, 2010. The second complaint the Commonwealth brought to defense counsel's attention was one made by Brianna Edgar, a part-time summer intern who worked with Defendant in the Carbon County Children & Youth Office during the spring of 2009, and towards whom Defendant allegedly made inappropriate and unwanted sexual advances and innuendos. (PCRA N.T., 5/3/18, pp.25-26).

After sentencing and denial by the Superior Court of Defendant's direct appeal, Defendant filed a timely PCRA[6] petition on August 3, 2017. The petition relies solely on claims of ineffectiveness of trial counsel and points primarily to trial counsel's alleged failure to call character witnesses

[6] Post-Conviction Relief Act, 42 Pa.C.S.A. §§ 9541-46.

on Defendant's behalf and to object or, in the alternative, seek a cautionary instruction with respect to the testimony of Chief Barnes concerning Defendant's sexual relations with other women. (PCRA N.T., 5/3/18, p.153). The petition also contends trial counsel was ineffective in failing to use information contained in Mrs. Doe's medical records during her hospitalization in the Behavioral Health Unit immediately preceding and succeeding the assault to contradict the Commonwealth's assertions that her depression and over-medication with Klonopin compromised her ability to resist Defendant's sexual advances. Hearings on Defendant's Petition for Post-Conviction Collateral Relief were held on April 11, and May 3, 2018.

DISCUSSION

To prevail on an ineffectiveness claim, a PCRA petitioner must plead and prove by a preponderance of the evidence that (1) the underlying legal claim has arguable merit; (2) trial counsel had no reasonable basis for acting or failing to act; and (3) the petitioner suffered resulting prejudice. Commonwealth v. Baumhammers, 92 A.3d 708, 719 (Pa. 2014). If the petitioner fails to establish any one of these factors, the claim of ineffectiveness fails. *Id.*

> [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 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.

Commonwealth v. Spotz, 84 A.3d 294, 311-12 (Pa. 2014) (internal quotation marks and other punctuation omitted).

To this must be added that

> [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 (internal quotation marks and other punctuation omitted); 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.").

In contrasting the degree of prejudice necessary to sustain a claim of ineffectiveness of counsel in the context of a post-conviction collateral proceeding with that applicable to a

preserved claim of trial court error on direct appeal, the Pennsylvania Supreme Court in Spotz stated:

> 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]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, 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; *see also* Commonwealth v. Brennan, 696 A.2d 1201, 1203 (Pa.Super. 1997) ("Harmless error exists where the appellate court is convinced beyond a reasonable doubt that the erroneously admitted evidence could not have contributed to the verdict. If there is a reasonable possibility that an error may have contributed to the verdict, the error is not harmless.") (internal citations omitted).

Character Evidence

In a criminal trial, character evidence presented by a defendant can be critical, particularly where the evidence comes down to the testimony of only two direct witnesses - the alleged victim and the defendant - as to what happened. Commonwealth v. Weiss, 606 A.2d 439, 442 (Pa. 1992). Evidence of good character is substantive and positive evidence and, by itself, may be sufficient to raise a reasonable doubt and justify an acquittal. *Id*; In re R.D., 44 A.3d 657, 667-68 (Pa.Super. 2012), *appeal denied*, 56 A.3d 398 (Pa. 2012). As a matter of law, when character evidence is presented, the defendant is entitled to a jury instruction advising the jury that "[e]vidence of a good character may by itself raise a reasonable doubt of guilt and require a verdict of not guilty." Commonwealth v. Neely, 561 A.2d 1, 3 (Pa. 1989).

At the PCRA hearing in this case, Defendant presented the testimony of four witnesses who, he argues, would have been

called as character witnesses on his behalf had his trial counsel made him aware of his right to present character evidence and of the importance of character evidence in a case of this nature. Trial counsel, who has thirty-six years' experience in trying criminal cases, credibly testified that he did in fact discuss with Defendant the possible use of character witnesses but advised against it because it would have opened the door for the Commonwealth to discredit such witnesses and present evidence of a contrary character which trial counsel reasonably believed existed and was available to the Commonwealth, namely that of Candy McMurray and Brianna Edgar. (PCRA N.T., 5/3/18, pp.6-7, 9-10, 12, 26-29, 65-66). *See* Commonwealth v. Keaton, 45 A.3d 1050, 1073 (Pa. 2012).

Defendant counters that to the extent this evidence dealt with specific instances of sexual misconduct, it could not be used to cross-examine defense character witnesses called to testify to Defendant's general reputation in the community, citing Commonwealth v. Scott, 436 A.2d 607, 611-12 (Pa. 1981) (barring cross-examination of defense character witnesses about defendant's prior arrests for offenses implicating the same character trait vouched for on direct but which did not result in convictions) and Commonwealth v. Morgan, 739 A.2d 1033, 1036 (Pa. 1999) (barring cross-examination of defense character witnesses about specific instances of prior criminal conduct by

the defendant probative of the character traits in question but for which defendant was neither arrested nor charged). Defendant generalizes too broadly the bar of these cases. Scott and Morgan prohibited only cross-examination of defense character witnesses with specific instances or acts of criminal misconduct allegedly committed by the defendant, but for which he had not been convicted, and not, as here, with specific instances of misconduct which in themselves are not criminal in nature. (*See* PCRA N.T., 5/3/18, pp.173-74).

Before Scott and Morgan were decided, a distinction was made between cross-examination of a reputation witness seeking to prove particular acts of misconduct - whether or not criminal in nature – were committed by the defendant, which was improper, and that seeking "to test the accuracy of the [witness'] testimony by showing either that the witness [was] not familiar with the reputation concerning which he [had] testified or that his standard of what constitutes good repute [was] unsound." Commonwealth v. Becker, 191 A. 351, 356 (Pa. 1937). Under this standard, it was proper, under certain circumstances, "to inquire whether the witness [had] ever *heard* persons in the neighborhood attribute to the defendant particular offenses, but it [was] never permissible for any purpose to interrogate the witness as to his *knowledge* of another specific crime laid at the defendant's door. . . . A witness [could not] be asked

questions to elicit his knowledge of particular acts as distinguished from what he [had] heard." *Id.* at 356-57 (emphasis in original) (citation and quotation marks omitted); *see also* Commonwealth v. Jenkins, 198 A.2d 497, 498 (Pa. 1964).[7]

Scott and Morgan overruled prior case law only to the extent it allowed cross-examination of character witnesses with respect to allegations of other criminal conduct by the defendant which had never resulted in a conviction, regardless of whether the questions were addressed to whether the witness had heard persons in the neighborhood attribute particular offenses to the defendant or were directed to the witness's knowledge of certain criminal acts attributable to the defendant. Commonwealth v. Morgan, 739 A.2d at 1036-37. This limitation on the cross-examination of character witnesses in a criminal case is recognized in the Pennsylvania Rules of

[7] If a character witness is believed to have personal knowledge of specific acts or conduct of the defendant which are contradictory to or inconsistent with the defendant's reputation for a character trait on which the witness has testified, the witness' credibility may be attacked, just like any other witness, by cross-examination whose purpose is not to show the defendant committed an act or crime for which he is not now accused, but to test the accuracy of the testimony by showing either that the witness is not familiar with the reputation concerning which he has testified or that his standard of what constitutes good repute is unsound. *See* Commonwealth v. Butts, 204 A.2d 481, 486 (Pa.Super. 1964) (*en banc*) (allowing character witness who testified to defendant's reputation for being a sober, careful, law-abiding citizen to be cross-examined and his credibility tested by showing that he was actually one of defendant's drinking buddies, and that his standard of what constitutes good repute for sobriety was unsound); Commonwealth v. Adams, 626 A.2d 1231, 1233 (Pa.Super. 1993) (allowing character witness who testified to defendant's reputation for being a peaceful, law-abiding citizen to be cross-examined with statements he previously made to the police that defendant sold powder cocaine as properly testing the credibility of the witness and the soundness of the witness' evaluation of defendant's reputation), *appeal denied*, 636 A.2d 631 (Pa. 1993).

Evidence. Rule 405(a) states:

> Rule 405. Methods of Proving Character
>
> (a) By Reputation. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. Testimony about the witness's opinion as to the character or character trait of the person is not admissible.
>
> (1) On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct probative of the character trait in question.
>
> (2) In a criminal case, on cross-examination of a character witness, inquiry into allegations of *other criminal conduct* by the defendant, not resulting in conviction, is not permissible.

Pa.R.E. 405(a) (emphasis added). *See also* Commonwealth v. Puksar, 951 A.2d 267, 281 (Pa. 2008) ("While character witnesses may not be impeached with specific acts of misconduct, a character witness may be cross-examined regarding his or her knowledge of particular acts of misconduct to test the accuracy of the testimony.").

In sum, while the prosecution may cross-examine character witnesses about specific instances of conduct relevant to the character traits in question, "the Commonwealth may not question the witnesses about allegations of other criminal misconduct by the accused where those allegations did not result in a conviction." Commonwealth v. Hoover, 16 A.3d 1148, 1149-50 (Pa.Super. 2011) (barring cross-examination of character witnesses with respect to defendant's prior DUI arrest and/or

admission into an ARD program); *see also* Commonwealth v. Kouma, 53 A.3d 760, 770 (Pa.Super. 2012) (allowing proffered character witnesses to defendant's reputation for being law-abiding to be cross-examined as to their knowledge that defendant was in this country illegally, in violation of the immigration laws, which defense counsel argued was a civil, and not criminal, violation).

Given the above, trial counsel was rightly concerned that if character evidence directed to Defendant's reputation for chastity, for being of sound moral character, or for honorable conduct around women was presented, the witness could be cross-examined on whether he had ever heard about Defendant's conduct toward Candy McMurray and Brianna Edgar. A further concern was that these witnesses, having experienced what they claimed occurred, would also likely have spoken to others about what happened – clearly, they reported these incidences to legal authorities - and might qualify as reputation witnesses to rebut Defendant's character evidence and, if not them, Sally Schatz, Director of the Children & Youth Office, to whom the complaints were made. (PCRA N.T., 4/11/18, pp.187-88, 190; PCRA N.T., 5/3/18, pp.26-29, 66).

With this in mind, while we agree Defendant's underlying claim of ineffectiveness for failing to present character evidence has arguable merit, we also believe the risk of cross-

examination about specific acts of Defendant's misconduct for which a good faith basis existed, and/or the presentation of reputation evidence in rebuttal, was substantial and would, if successful, have been devastating to the defense. This decision was not as Defendant's PCRA counsel suggests a failure to investigate and interview potential defense character witnesses, but a reasonable tactical decision based on the threat of opening the door to Commonwealth questioning and evidence which would otherwise be inadmissible. *See* Commonwealth v. Treiber, 121 A.3d 435, 463-64 (Pa. 2015) (quoting Puksar, 951 A.2d at 281, and concluding that counsel's decision not to call character witnesses was a reasonable exercise of trial strategy since to have done otherwise would likely have opened the door to substantial evidence of bad character).[8] As such, trial counsel had an objectively reasonable basis for not presenting such evidence.

But, Defendant argues, it is Defendant who chooses what character traits to place in issue and rather than selecting the traits of chastity, morality, and decency in the treatment of women - the traits considered by trial counsel (PCRA N.T.,

[8] Had Defendant called character witnesses on his behalf, this, by itself, would not have opened the door to either Candy McMurray or Brianna Edgar testifying to what had happened to them, which is prohibited by the rule against impeaching a character witness with extrinsic evidence of particular acts of misconduct. Commonwealth v. Becker, 191 A.351, 356-57 (Pa. 1937). Whether such evidence, particularly that with respect to Ms. McMurray, would be admissible to show intent or for some other proper purpose under Pa.R.E. 404(b), is a separate question neither party raised at trial. (PCRA N.T., 5/3/18, pp.10-11, 13).

5/3/18, pp.6-7, 11-12, 22) - the three character traits Defendant claims should have been presented at trial, and on which character witness testimony was presented at the PCRA hearing, were his reputation for being peaceful, law-abiding and non-violent. We do not dispute that these also are pertinent character traits in a case of this nature. *See* Commonwealth v. Luther, 463 A.2d 1073, 1078 (Pa.Super. 1983) (noting that in a rape case, evidence of the character of the defendant is limited to testimony of general reputation in the community with regard to such traits as non-violence, peacefulness, quietness, good moral character, chastity and a disposition to observe good order). And while perhaps the selection of these traits may have foreclosed cross-examination regarding Defendant's alleged solicitation of Candy McMurray and Brianna Edgar - and this is by no means clear – the danger of Ms. McMurray, Ms. Edgar or Ms. Schatz testifying to Defendant's reputation in rebuttal or of the prosecution asking such character witnesses on cross-examination – "So, you are not familiar with the Defendant's reputation for chastity, morality or decency?" - and then arguing to the jury that such traits of character would be more pertinent in a case of this nature, still existed. (PCRA N.T., 5/3/18, p.31).

Regardless, even if such evidence had been presented, it is unlikely that the results of the proceedings would have been

different, that had such evidence been presented "there is a reasonable probability that. . . the factfinder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defendant's defense was not that he was present and did not do what Mrs. Doe claimed, but that he was never there. As to this alibi, the jury clearly did not believe Defendant or Ms. Beckett. Having so found, it appears extremely unlikely that the jury would have found Defendant and Ms. Beckett incredulous on this critical and central piece of direct evidence, and yet find that he was present but did not assault Mrs. Doe because of his reputation in the community for being a peaceful, law-abiding citizen.[9]

Much more likely is for the jury to have concluded Defendant concocted an alibi and convinced Ms. Beckett to corroborate this defense because of her feelings for him, and that such cover-up was further evidence of Defendant's guilt. This conclusion likely extended to and overshadowed Defendant's second line of defense, that Mrs. Doe was not credible and

[9] Also to be considered in this respect is the source of Defendant's character evidence. Three of the four character witnesses Defendant intended to present were his wife's sisters who, as familial character witnesses, would generally lack the credibility of unbiased non-familial witnesses. The fourth was a close, long-term personal friend of Defendant's. *See* Commonwealth v. Johnson, 719 A.2d 778, 788 (Pa.Super. 1998) (*en banc*) (allowing Commonwealth to argue that reputation evidence presented by relatives, friends and neighbors of the defendant should be given little probative value since these witnesses have an obvious bias in favor of the defendant), *appeal denied*, 739 A.2d 1056 (Pa. 1999). (*See also* PCRA N.T., 5/3/18, pp.15-16).

should not be believed. In addition, the one very real and undisputed fact which lends credence to Mrs. Doe's testimony and which Defendant could not shake or plausibly explain – even had character evidence been presented - was Mrs. Doe's knowledge of his birthmark. Thus, Defendant has not proven he was prejudiced by the omission of character evidence.[10]

Testimony of Chief Barnes

Defendant next claims trial counsel was ineffective for failing to object to and/or failing to request a cautionary instruction to Defendant's statements made to Chief Barnes on July 7, 2009, that he had been sexually active with four or five women since 2006. This statement was made after Defendant denied ever having sexual relations with Mrs. Doe and in response to Chief Barnes' inquiry as to how Mrs. Doe would know of his birthmark if they had not been intimate. Defendant premises his claim of error on Pa.R.E. 404(b) which prohibits the use of a crime, wrong or other act to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character.

[10] Of further significance is that the two primary cases on which Defendant relies for this issue, Scott and Morgan, were not PCRA cases. Both involved direct appeals where the burden was upon the Commonwealth to show beyond a reasonable doubt that the error was "harmless error" – that it did not contribute to the verdict, in contrast to the Pierce PCRA standard of prejudice, which places the burden upon the defendant to affirmatively establish that counsel's conduct had "an actual adverse effect on the outcome of the proceedings." Commonwealth v. Spotz, 84 A.3d 294, 315 (Pa. 2014).

This evidence was not presented by the Commonwealth to evidence any misconduct on Defendant's part or to evidence any criminal propensity by Defendant to engage in wrongful conduct. To the contrary, the evidence, as presented, expressly included Defendant's explanation that this was consensual sex and it never involved a patient. As such, the evidence was clearly not introduced to establish that Defendant's contact with Mrs. Doe was in conformity with his behavior towards other women in the past. Nor is it a crime or necessarily wrong for a single man, even if engaged,[11] to engage in consensual sexual relations with another woman such that this conduct should be considered as propensity or "prior bad act" evidence. (PCRA N.T., 4/11/18, pp.191-92; PCRA N.T., 5/3/18, pp.40, 46-49, 63).

The evidence was relevant to showing at least one explanation given by Defendant as to how Mrs. Doe would know of his birthmark and to assist the jury in judging Defendant's credibility in the context of his denial that he and Mrs. Doe ever engaged in sexual relations with one another,[12] defense counsel having previously advised the jury in opening statements

[11] At trial, Defendant testified that his relationship with his fiancée was an open one, under which he was free to engage in sexual relations with others, but his fiancée didn't want to know about it. (N.T., 5/14/14, pp.47-48, 148-49, 184-85).

[12] Whereas Defendant told Chief Barnes on July 7, 2009, that he suspected that Mrs. Doe somehow learned of his birthmark through one of the women he had had sexual relations with, at the time of trial, Rebecca Kadingo, who was called as a defense witness, testified that she was present in the waiting area outside of Defendant's office on February 20, 2009, that Mrs. Doe was also present, and that on that date Defendant told Ms. Kadingo about his birthmark. (N.T., 5/13/14, pp.211-14).

that Defendant would be testifying. (N.T., 5/12/14 (Opening Statement), p.21; PCRA N.T., 5/3/18, p.56). This evidence also corroborated Mrs. Doe's later testimony that during her first meeting with Defendant in his office on February 20, 2009, he told her that although he was engaged, he enjoyed sexual relations with other women. We do not view this as character or propensity evidence barred by Rule 404(b), but as a relevant statement Defendant made to the police as part of Chief Barnes' criminal investigation of Mrs. Doe's accusations.

It also needs to be understood that at the time this evidence was presented, trial counsel knew his alibi witness, Ms. Beckett, as well as the Defendant would be testifying to their sexual relations with one another on the date of the offense. (N.T., 5/12/14 (Opening Statement), p.21; PCRA N.T., 5/3/18, pp.41-42, 53). For Defendant to object or request a cautionary instruction to evidence of the same type he intended to present would only lessen the credibility of the defense in the eyes of the jury. As part of trial strategy it made no sense to object, and with respect to the element of prejudice necessary to support a claim of ineffectiveness of counsel, we see none.

Questioning the Effects of Klonopin

Finally, Defendant claims trial counsel was ineffective for failing to call Dr. Clifford H. Schilke as a defense witness and

failing to call into question the testimony of Mrs. Doe and Dr. Levinson on the side effects of the Klonopin prescribed for her by Dr. Schilke by reference to the entries contained in Mrs. Doe's medical records. Defendant claims Dr. Schilke should have been called as both a fact and opinion witness to refute Dr. Levinson's testimony that the dosage of Klonopin prescribed for Mrs. Doe at the time of her discharge from the Behavioral Health Unit on February 18, 2009, was excessive and, together with her severe depressive state, compromised Mrs. Doe's ability to resist Defendant's advances. (N.T., 5/13/14, pp.31-32). Also, that the side effects Mrs. Doe claims - fatigue, confusion and impaired judgment - were never observed by Dr. Schilke during either Mrs. Doe's first hospitalization between February 14, 2009 through February 18, 2009, or her second hospitalization between February 26 2009 through March 3, 2009. Defendant contends that "Dr. Schilke was a material and essential fact witness, who *most probably would have provided* favorable defense evidence on the issues of forcible compulsion and the effects of Klonopin on [Mrs. Doe]." (Defendant's Brief in support of his Motion for Post-Conviction Relief, p.57) (emphasis added).[13]

[13] Sometime after February 24, 2009, Mrs. Doe and her husband commenced a civil suit against Defendant, Dr. Schilke and the Gnaden Huetten Memorial Hospital. It was during the course of this civil litigation that Mrs. Doe's medical records were obtained through discovery by Defendant's civil defense counsel and, in turn, provided to trial counsel. Trial counsel testified at the PCRA hearing that he spoke with Dr. Schilke's civil defense counsel on one or more occasions about having Dr. Schilke testify as a defense witness in Defendant's criminal trial. Dr. Schilke's attorney advised trial counsel

To the extent Defendant claims trial counsel was ineffective for failing to call Dr. Schilke as a defense witness to testify that the dosage of Klonopin he prescribed to Mrs. Doe was not excessive or abnormal, of the effects of varying dosages of Klonopin on a patient, or that Mrs. Doe displayed none of the side effects she claimed to experience regarding her physical mobility and mental judgment, it was Defendant's burden to prove that such evidence existed and was available to the defense. Commonwealth v. Johnson, 966 A.2d 523, 536 (Pa. 2009); Commonwealth v. Puksar, 951 A.2d at 257. Without calling Dr. Schilke as a witness at the PCRA hearing and presenting direct evidence from him as to what his testimony would have been at trial, Defendant's beliefs as to what he thinks Dr. Schilke would have testified to are speculative and cannot prove that the failure to call this witness was so prejudicial as to deny Defendant a fair trial. *See* Commonwealth v. Reyes-Rodriguez, 111 A.3d 775, 781 (Pa.Super. 2015) (*en banc*), *appeal denied*, 123 A.3d 331 (Pa. 2015); *see also* Commonwealth v. Chmiel, 889 A.2d 501, 546 (Pa. 2005) ("Trial counsel's failure to call a particular witness does not constitute ineffective assistance

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that Dr. Schilke would not be helpful to Defendant. (PCRA N.T., 4/11/18, p.180; PCRA N.T., 5/3/18, pp.79, 92-94). Because Dr. Schilke was represented by counsel in this related litigation, trial counsel did not feel it was appropriate for him to contact Dr. Schilke directly. (PCRA N.T., 5/3/18, pp.78-79). Trial counsel further testified that the risk was too great to subpoena Dr. Schilke and call him as a defense witness without first knowing what he would say. (PCRA N.T., 4/11/18, pp.181, 210-11). Accordingly, trial counsel did not call Dr. Schilke as a witness at Defendant's trial.

without some showing that the absent witness' testimony would have been beneficial or helpful in establishing the asserted defense.").[14]

With respect to the use of Mrs. Doe's medical records to impeach Mrs. Doe and Dr. Levinson, Defendant claims none of Mrs. Doe's hospital records for her first or second hospitalization in the Behavioral Health Unit evidence any complaints made by Mrs. Doe or any side effects observed by hospital personnel with respect to her use of Klonopin. In contrast, trial counsel testified that the medical records cut both ways, that some were helpful and some harmful to his trial strategy, and that he used those which fit in with his theory of defense. (*See*, *e.g.*, PCRA N.T., 4/11/18, pp.111-117, 119-123, 183, 194; PCRA N.T., 5/3/18, p.133). To avoid having the jury look at medical documents which both supported and undermined the defense, or presented Mrs. Doe in an overly sympathetic light, trial counsel felt it best to make some points through use of the medical records and others by way of cross-examination. (PCRA N.T., 4/11/18, pp.196-98). Trial counsel also presented evidence of Mrs. Doe's active family life and how she was able to meet her family responsibilities notwithstanding her use of Klonopin. (PCRA

[14] In lieu of calling Dr. Schilke, the defense did, however, call a separate independent expert witness, Gladys Fenichel, to testify that Mrs. Doe's use of Klonopin did not affect her behavior or make her more susceptible to mistakes and manipulation. (PCRA N.T., 4/11/18, p.82; PCRA N.T., 5/3/18, pp.91, 134-35).

N.T., 4/11/18, p.201). The record supports that trial counsel's chosen course of action had a reasonable basis.

Moreover, trial counsel was walking a minefield between at least three possible scenarios: (1) that the effects of Klonopin so clouded Mrs. Doe's mind that she was irrationally paranoid and delusional and could not be relied upon to accurately recall what had actually happened;[15] (2) that the side effects of

[15] The medical records for March 1, 2009, showed that when Mrs. Doe was questioned about whether the sexual assault by Defendant actually occurred, she stated, "I'm not a hundred percent certain, it seemed so real." (N.T., 5/12/14, pp.139-40). In explaining why she gave this statement, Mrs. Doe testified that no one in the hospital believed her and that both Dr. Schilke and Kristyn Walters, her social worker, were trying to convince her that it didn't happen, that it was all made up. (N.T., 5/12/14, pp.89, 140).

Trial counsel cross-examined Dr. Levinson about this statement in Mrs. Doe's medical records. (N.T., 5/13/14, pp.65-70, 132-43). Dr. Levinson testified that he asked Mrs. Doe why she would make such a statement and was told that because she was heavily medicated at the time and it was clear no one believed her, when asked if there was any chance it didn't happen, she admitted that was possible, even though she firmly believed she was assaulted. (N.T., 5/13/14, p.67).

When trial counsel asked Dr. Levinson to see his notes about discussing this statement with Mrs. Doe, Dr. Levinson testified that he didn't have his notes with him, but could get them. (N.T., 5/13/14, pp.68-69). Trial counsel requested he do so. (N.T., 5/13/14, p.69). Later that same day, Dr. Levinson returned to the witness stand with an undated handwritten intake note of his first meeting with Mrs. Doe on June 24, 2009, Commonwealth Exhibit No.10, and a second typewritten note dated April 29, 2014, Commonwealth Exhibit No.11, which he testified were his notes documenting his conversations with Mrs. Doe about the hospital trying to convince her that she was delusional and had fabricated the whole incident. (N.T., 5/13/14, pp.122-133). The last sentence of Commonwealth Exhibit No.10 contains the statement attributed to Mrs. Doe that "they were trying to convince me that I was delusional." On cross-examination, trial counsel attempted to show that Dr. Levinson had fabricated Commonwealth Exhibit No.10, pointing out that it was handwritten and undated, that it was only produced for the first time to the Commonwealth and to the defense ten minutes earlier, and that it was unsigned. (N.T., 5/13/14, pp.136-40; PCRA N.T., 4/11/18, pp.198, 219; PCRA N.T., 5/3/18, p.120).

Although Defendant includes in his PCRA Petition a claim that trial counsel was ineffective for not requesting a continuance and investigating further the circumstances under which Commonwealth Exhibit No.10 was belatedly provided by Dr. Levinson, and not pointing out in his cross-examination that this document was not included in the medical records Dr. Levinson previously produced in the civil litigation or its subject referenced in Dr. Levinson's medical review psychotherapy notes of the same date, Defendant has failed to

Klonopin were either non-existent or so minimal that the jury would need to decide whether Mrs. Doe was either an accurate reporter of what had happened or for some unknown and unexplained reason fabricated the assault; or (3) that the Klonopin, in fact, dulled Mrs. Doe's senses and judgment, not to the point of being unable to differentiate between what was real and what was imaginary, but to the point of being easy prey for Defendant. Of these three alternatives, trial counsel reasonably chose the first which best matched up with his alibi defense. (N.T., 5/15/14 (Closing Argument), pp.22-24). PCRA counsel's position that appropriate use of the medical records would have suggested that Mrs. Doe suffered none of the side effects of Klonopin which she claimed at trial and "was steady on her feet, well oriented to time and place, and fully cognizant of her surroundings and situation," would have required the jury to make the stark decision posited in scenario two above, made even less likely to favor Defendant given his alibi that he was not present when Mrs. Doe claims this

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provide any additional evidence to support his belief that this evidence was manufactured. (PCRA N.T., 5/3/18, pp.121-24, 129-30, 150-51, 154-55). More importantly, the underlying issue was whether Mrs. Doe had imagined the assault and whether it was only in her mind. On this issue, Patrolman Jeffrey Frace testified at trial that "most of the information I got from the hospital staff was that this possibly could not have happened." (N.T., 5/12/14, p.252). Under the circumstances, we do not find that trial counsel's course of action when confronted for the first time at trial with the undated, handwritten note of Dr. Levinson was contrary to Defendant's interests or prejudiced the outcome.

happened. (Defendant's Brief in support of his Motion for Post-Conviction Relief, p.55).

CONCLUSION

In these proceedings, Defendant does not claim he is not guilty, but that he was denied a fair opportunity to establish his innocence because of the ineffectiveness of his trial counsel. For the reasons discussed above, we are not persuaded that Defendant's trial counsel was ineffective or that any ineffectiveness claimed by Defendant "so undermined the truth-determining process that no reliable adjudication of guilt . . . could have taken place." 42 Pa.C.S.A. § 9543(a)(2)(ii).

BY THE COURT:

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P.J.