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39 MAP 2020

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 39 MAP 2020

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

WILLIAM HENRY COSBY,
Appellant

BRIEF OF AMICUS CURIAE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE COMMONWEALTH

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

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INTEREST OF AMICUS CURIAE

The Pennsylvania District Attorneys Association is the only organization representing the interests of its District Attorney membership and their assistants in the Commonwealth of Pennsylvania. These prosecutors represent the collective interests of the people of the Commonwealth in criminal matters, which directly impact on citizens' well-being and safety. This Honorable Court's decision on the admissibility of prior bad act evidence will have a significant impact on the Commonwealth's ability to introduce relevant, non-character evidence at criminal trials, and is therefore of special interest to prosecutors throughout Pennsylvania.

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

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

STATEMENT OF THE CASE

Appellant, William H. Cosby, was convicted of sexually assaulting victim A.C. inside Appellant's home in Montgomery County, Pennsylvania in January 2004. The facts at trial demonstrated that A.C. trusted Appellant and considered him a mentor and friend, and visited him at his home at his invitation in order to seek career advice. The facts further showed that in order to facilitate his sexual assault of A.C., Appellant gave A.C. three blue pills under the guise that they would help her relax. Instead, those pills made A.C. unable to maintain consciousness and during her unconscious or semi-conscious state, Appellant engaged in sexual acts without A.C.'s consent. A.C. was unable to tell Appellant to stop nor was she able to physically stop the sexual assault. Appellant admitted that he had engaged in sexual conduct with A.C., but claimed that A.C. was not incapacitated as a result of the drugs and that the sexual contact was consensual.

In order to prove Appellant's common plan or scheme, which was relevant to his motive and intent, and to refute Appellant's claim of consensual sexual activity, the Commonwealth sought to introduce the testimony of nineteen different women who also claimed that Appellant had previously used drugs and/or alcohol to incapacitate and sexually assault them. The trial court ultimately granted the

Commonwealth's motion with respect to five such witnesses.[1] Four out of the five witnesses testified similarly to the following circumstances: (1) each was in a mentor-mentee type relationship with Appellant, who was ostensibly helping them with their careers; (2) each found themselves alone with Appellant either in a house or in a hotel room that was under Appellant's control, at Appellant's invitation; (3) each was given pills and/or drinks by Appellant; (4) after ingesting the pills or drinks, each witness ended up significantly impaired, going in and out of consciousness; (5) each woman remembers Appellant committing sexual acts on them (or in the case of one, the suggestion of sexual activity)[2] without their consent but was unable to stop it. The fifth witness differed from the remaining four only in that she had no prior relationship with Appellant, but was a hotel bartender who was invited to a house in which Appellant was staying for a "party," at which only Appellant and another female acquaintance were in attendance. Once Appellant gave this witness

[1] Appellant's initial trial in 2017 resulted in a mistrial due to the inability of the jurors to reach a unanimous verdict. Prior to Appellant's first trial, the Commonwealth sought to introduce the testimony of thirteen witnesses who had been previously sexually assaulted by Appellant. The trial court only granted the motion with respect to one such witness. Prior to Appellant's retrial in 2018, the Commonwealth then sought to introduce the testimony of nineteen other witnesses who alleged that they had been similarly assaulted by Appellant. The trial court granted the motion with respect to five such witnesses.

[2] One of the PBA witnesses recalled feeling substantially impaired after drinking two shots Appellant insisted she drink. She remembers then getting woozy, Appellant telling her to sit between his legs, Appellant stroking her hair, and then walking toward a hallway inside Appellant's hotel suite. The next thing this witness recalled was waking up the next morning in her own home and having no other recollection of what occurred between her and Appellant the night before.

pills and she began to lose consciousness, the acquaintance left and Appellant was alone with the witness, whom he then sexually assaulted.

On appeal to the Pennsylvania Superior Court, the Superior Court affirmed the decision of the trial court to admit the testimony of these five prior bad act ("PBA") witnesses under the common plan/scheme/design and absence of mistake exceptions set forth in Pennsylvania Rule of Evidence 404(b)(2), finding that the trial court did not abuse its discretion in admitting such evidence. *Commonwealth v. Cosby*, 224 A.3d 372, 379-406 (Pa. Super. 2019). This Honorable Court granted Appellant's petition for allocator as to Appellant's challenge to this holding.[3]

For the reasons set forth herein, the PDAA strongly urges this Honorable Court to deny Appellant's challenge to the trial court and Superior Court's rulings regarding the admissibility of the PBA evidence, and to reject the arguments of Appellant and his amici to limit the admissibility of such evidence in a way that unfairly precludes such relevant, non-character evidence and defies the plain language of Rule 404(b).

[3] This Court also granted allocator as to a second issue, namely whether the trial court erred in finding that the Commonwealth was not bound by an alleged non-prosecution promise made by a prior District Attorney. The PDAA focuses its brief on the challenge to the admission of PBA evidence.

ARGUMENT

I. PBA evidence is not limited under common law or Rule 404(b) to only the two exceptions identified in *Shaffner v. Commonwealth* decided 150 years ago.

Appellant was accused and convicted of overcoming the victim's ability to deny consent to sexual acts by drugging her. Identity was not at issue. There was no dispute that Appellant engaged in sexual activity with the victim, A.C. Rather, the issues before the jury were whether Appellant purposefully drugged A.C. to incapacitate her and render her unable to deny consent, or whether the victim consented to the sexual activity, as Appellant claimed. The PBA evidence permitted by the trial court and introduced by the Commonwealth was directly relevant and material to those issues.

In particular, the PBA evidence admitted by the trial court and introduced by the Commonwealth demonstrated that Appellant had on numerous other occasions used drugs to incapacitate women and engage in sexual contact while they were in such a compromised state. This tactic constituted a common plan or scheme that was relevant to show Appellant's motive and intent in giving A.C. drugs: to overcome her ability to deny consent in order to sexually assault her. Such evidence also refuted any potential argument that Appellant mistakenly believed A.C. had consented to the sexual contact. The PBA evidence introduced at trial was also

highly probative to rebut Appellant's defense that A.C. had consented to such sexual acts.

Despite the highly probative nature of such evidence in the context of this case, Appellant and his amici contend that the trial court committed an abuse of discretion in permitting the Commonwealth to introduce five PBA witnesses of the nineteen it proffered. Specifically, Appellant's amici, like the dissent in *Commonwealth v. Hicks*, 644 Pa. 444, 494, 156 A.3d 1114, 1143-44 (2017) (Donahue, J. dissenting), mimic closely the language of *Shaffner v. Commonwealth*, 72 Pa. 60 (1872), suggesting that it properly limits PBA evidence to only two instances: the signature crime exception; and common plan or scheme where the current charge and the prior conduct are linked by an overarching purpose or motive that existed at the time of the prior conduct. Appellant and his amici further contend that the PBA evidence introduced in the instant case served only as impermissible propensity evidence. These contentions are without merit.

First, the argument that PBA evidence is only permitted if it fits under two narrow exceptions identified in *Shaffner* ignores the fact that both under common law and the plain language of Rule 404(b), there are various exceptions beyond just those two, all of which may independently justify the admission of the PBA evidence admitted here. Specifically, Appellant's amici, in urging the limitation of such

evidence, relies on the following language from *Shaffner*, decided almost 150 years ago:

> To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other.

Shaffner, 72 Pa. at 65. Indeed, the dissent in *Hicks*, on which Appellant's amici argument is largely based, relies on this passage from *Shaffner* to state the following:

> Two exceptions to the prohibition against propensity evidence are embedded in our decisional law: Bad act evidence is admissible if (1) a logical connection exists between the bad acts and the crime on trial, linking them together for some purpose the defendant intended to accomplish, or (2) the bad acts evince a signature crime.

Hicks, 638 Pa. at 494, 156 A.2d at 1143 (Donahue, J. dissenting).

Respectfully, the notion that only these two exceptions are embedded in decisional law is inaccurate. Indeed, numerous other exceptions have long been recognized under common law. For example, in *Goersen v. Commonwealth*, 99 Pa. 388 (1882), decided only ten years after *Shaffner*, this Honorable Court recognized the general rule that evidence of "independent and distinct crime[s]" cannot "be received to impeach [a defendant's] general character, nor merely to prove the disposition to commit crime." *Goersen*, 99 Pa. at 398. Yet, this Court recognized that such evidence may be admitted for other purposes:

> Thus it may be to establish identity; to show the act charged was intentional willful, not accidental; to prove motive; to show guilty

> knowledge and purpose, and to rebut any inference of mistake; in case of death by poison, to prove the defendant knew the substance administered, to be poison; to show him to be one of an organization banded together to commit crimes of the kind charged; and to connect the other offence with the one charged, as part of the same transaction.

Id. at 398-99.

Several decades later, this Honorable Court again recognized the "many well-recognized exceptions" to the general prohibition against admitting evidence of a defendant's commission of other criminal offenses:

> Prior convictions can be admitted in evidence to show intent, scienter, motive, identity, plan, or the accused to be one of an organization banded together to commit crimes of the sort charged, or that such prior conviction or criminal act formed a part of a chain, or was one of a sequence of acts, or became part of the history of the event on trial, or was part of the natural development of the facts; also to prove the mental condition when the defense was insanity, or to rebut the inference of mistake, or to show a guilty knowledge.

Commonwealth v. Williams, 307 Pa. 134, 148, 160 A. 602, 607 (1932) (citations omitted). *Cf. Commonwealth v. Russo*, 111 A.2d 359, 363 (Pa.Super. 1955) (addressing consolidation motion and noting that evidence against one defendant would be admissible in trial of co-defendants "to show that the acts were intentional and wilfull, not accidental; to prove motive; to show a plan, design or scheme, and a common purpose and to rebut any inference or mistake") (citing *Goersen*, *supra* and *Commonwealth v. Chalfa*, 313 Pa. 175, 169 A. 564 (Pa. 1933)).

A decade before Pennsylvania Rule of Evidence 404 was adopted, this Court again set forth the following list of distinct (though often related) exceptions to the general prohibition against bad acts evidence:

> (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one naturally tends to prove the others; (5) to establish the identity of the person charged with the commission of the crime on trial where there is such a logical connection between the crimes that proof of one will naturally tend to show that the accused is the person who committed the other; (6) to impeach the credibility of a defendant who testifies in his trial; (7) situations where defendant's prior criminal history had been used by him to threaten or intimidate the victim; (8) situations where the distinct crimes were part of a chain or sequence of events which formed the history of the case and were part of its natural development (sometimes called "*res gestae*" exception).

Commonwealth v. Billa, 521 Pa. 168, 177, 555 A.2d 835, 840 (1989). As the *Billa* Court observed, such exceptions exist because in certain circumstances, evidence of a defendant's distinct criminal acts is "relevant for some legitimate evidentiary reason and not merely to prejudice the defendant by showing him to be a person of bad character." *Id.*

Thus, when Rule of Evidence 404(b) was adopted in 1998, its non-exhaustive list of exceptions to the general prohibition against evidence of crimes, wrongs or other acts to prove a person's character or propensity to act in accordance with that character on a particular occasion, was a codification of the various exceptions that already had been long-recognized under common law. *See* Pa.R.E. 404(b)(2). Any

contention that PBA evidence should be limited to only the two instances identified in *Shaffner* almost 150 years ago therefore lacks support both in decisional law dating back to at least 140 years ago and in the plain language of the rule itself, which establishes that there are in fact various permissible purposes for admitting evidence of a defendant's other criminal acts distinct from the two specific purposes identified in *Shaffner*.[4]

To suggest, then, that the PBA evidence admitted against Appellant at trial was overbroad because it did not fit within the signature crime exception to prove identity (which was not at issue), or because it was not part of a common scheme or plan that contemplated all PBA victims, is to ignore the other exceptions that made such evidence both relevant and admissible. In fact, as both the Superior Court in the instant case and the plurality of this Honorable Court in *Hicks* observed, appellate courts in Pennsylvania have long admitted evidence of other criminal acts when such evidence is relevant to more than a defendant's propensity for criminal activity, even

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[4] In the dissent in *Hicks*, Justice Donahue opines that "*Shaffner* [ ] provides substantial guidance as to the type of link that will create an exception to the 'general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner'," and that only when such a link exists may bad act evidence "be admitted to prove motive, common scheme, intent lack of accident, or identity." *Hicks*, 638 Pa. at 494, 156 A3d at 1144 (J. Donahue dissenting). Respectfully, the requirement for such a link is nowhere stated in the plain language of Rule 404(b) itself, and has not been established by case law either.

Amicus Curiae Defender Association of Philadelphia similarly notes that Rule 404(b)'s exceptions are derived from common law, but then limits the common law on which it's based to the two exceptions identified in *Shaffner*. Brief of Amicus Curiae Defender Association of Philadelphia, p. 14. Quite obviously, the exceptions identified both in decisional law after *Shaffner*, discussed above, and in the plain language of Rule 404(b) set forth more than the two *Shaffner* exceptions.

when the prior conduct did not fit within one of the two *Shaffner* exceptions. *See Hicks*, 638 Pa. at 465-67, 156 A.2d at 1125-27; *Cosby*, 224 A.3d at 398-99. Here, because the PBA evidence established a criminal "playbook," a common plan or scheme, by which Appellant achieved a similar result – sexual assault – such evidence was legally and logically relevant to the contested issues at trial and permissible under Rule 404(b)(2) to prove intent to commit a sexual assault, motive in providing A.C. pills, and absence of mistake as to whether A.C. consented to sexual contact; and to refute the defense of consensual sexual activity.

II. The signature crime exception to prove identity is distinct from the exception for a common plan, which does not require the same high correlation of details when introduced for purposes other than establishing identity as in this case.

To be sure, over the decades, there has been some conflation of the signature crime exception, and the exception for common plan or scheme, as Appellant's amici and the concurrence and dissent in *Hicks* all suggest. Both exceptions require some level of commonality among the currently charged offense and the PBA evidence sought to be introduced in order to have logical and legal relevance.

As Chief Justice Saylor observed in his *Hicks'* concurrence, signature crime evidence requires a high level of similarity among the criminal acts because of the reason for permitting such evidence: to establish the identity of the defendant as the perpetrator. *Hicks* 638 Pa. at 473, 156 A.3dat 1130 (Saylor, C.J., concurring). As

this Court observed in *Commonwealth v. Shively*, 492 Pa. 411, 424 A.2d 1257 (1981), evidence of prior crimes may be admissible

> to prove other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused. Here, *much more is demanded than the mere repeated commission of crimes of the same class*, such as repeated burglaries or thefts. *The device used must be so unusual and distinctive as to be like a signature.*

Id. at 415, 424 A.2d at 1259 (emphasis in original) (citing McCormick on Evidence § 190 (1972 2d ed.)). *See also Commonwealth v. Weakley*, 972 A.2d 1182, 1189 (Pa. Super. 2009) ("Identity as to the charged crime may be proven with evidence of another crime where the separate crimes share a method so distinctive and circumstances so nearly identical as to constitute the virtual signature of the defendant.") (citation omitted). Stated another way, when identity is at issue, "a high correlation in the details of the crimes" is required in order for such evidence to serve as logical proof that it is "very unlikely that anyone else committed" them. *Commonwealth v. Novasak*, 606 A.2d 477, 484 n.7 (Pa. Super. 1992).

In contrast, where the identity of the perpetrator is not disputed, as it was not in the instant case, the PBA evidence is not offered or admitted to prove that the defendant is the perpetrator because he committed nearly identical offenses on other occasions. The logical nexus is not that the jury can conclude the defendant is the perpetrator of the instant offense because he has used the same signature method to

commit other crimes. Thus, there is no need for the details of the instant crime and the PBA evidence to share the same "high correlation." As one commentator noted:

> If we ask, does [the] misconduct have to exhibit striking similarity with the misconduct being investigated, the answer is, only if similarity is relied on. Otherwise not. There are only two classes of case[s] [those in which similarity is relied on and those in which it is not], and they do not depend on the nature of the evidence, but on the nature of the argument.

D.W. Elliot, "The Young Person's Guide to Similar Fact Evidence – I," 1983 Crim.L.R. 284, 288.

The purpose of the PBA evidence introduced in the instant case was to corroborate A.C.'s testimony that Appellant gave her a drug for the purpose of overcoming her ability to refuse consent to sexual acts. Appellant denied that accusation and claimed that he did not give A.C. pills to incapacitate her, that she was not incapable of consenting to sexual contact, and that the sexual conduct was consensual. The fact that five other women testified that Appellant also gave them drugs, which caused them to become unconscious or semi-conscious, and then engaged in sexual acts without their consent is logically relevant to the contested issues at trial: whether Appellant gave A.C. the pills for the purpose of rendering her unable to refuse consent and whether A.C. voluntarily consented to the sexual acts. It did not matter what the victims looked like, or that these acts occurred in different geographic locations and time periods, or that Appellant may have used different types of drugs on each woman, or that he engaged in different types of sexual contact

with each. What was relevant to the issues at trial was that Appellant on numerous prior occasions used his power and influence to be alone with women in a private residence or hotel room, drugged them, and engaged in sexual acts when they no longer had the ability to deny consent to such acts – just as he did to A.C.

It was the purpose for which this PBA evidence was admitted in this case that makes it distinct from the signature crime exception for proving identity, and obviates the need for the same high level of correlation between the charged offense and the PBA evidence. Clearly what made the PBA evidence logically and legally relevant in this case was the similarity in Appellant's tactics for committing sexual assault, *i.e.* his common plan/scheme or "playbook." Those similarities rendered the PBA evidence material to Appellant's motive and intent and his claim that A.C. consented to the sexual contact. Yet, to ignore the distinct logical and legal relevance of such evidence by insisting it fit within the stringent requirements of the signature crime exception when identity was not contested is to allow this single exception to swallow up the other enumerated exceptions for PBA evidence recognized in Rule 404(b)(2).

This Honorable Court has previously defined the common plan exception to encompass the "commission of two or more crimes so related to each other that proof of one tends to prove the others." *Commonwealth v. Lark*, 518 Pa. 290, 303, 543 A.2d 491, 497 (1987) (citation omitted). Here, Appellant's past uncharged crimes

were so related in terms of methodology and purpose that evidence of each did tend to prove the crime charged against A.C. Whether the commonalities between all such crimes would fit under the signature crime exception for Rule 404(b)(2) is immaterial where, as here, such evidence clearly constituted a common plan relevant to prove intent and motive, absence of mistake, and lack of consent. *Cf. Hicks* 638 Pa. at 465, 156 A.3d at 1125 ("'Sufficient commonality of factors' between the other incidents and the underlying crime 'dispels the notion that they are merely coincidental ....") (quoting *Weakley*, 972 A.2d at 1189).

III. The PBA evidence introduced in this case was relevant, noncharacter evidence permissible under Rule 404.

Despite the logical relevance of the PBA evidence in this case, Appellant's amici argue that such evidence should only have been permitted as part of common plan or scheme if the Commonwealth could prove that Appellant had "in fact and in mind formed a plan including the charged and uncharged crimes as stages in the plan's execution." Brief of Amicus Curiae Defender Association of Philadelphia, p. 15 (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence*, §3:24). *See also* Brief of Amicus Curiae the Pennsylvania Association of Criminal Defense Lawyers, pp. 18-19. Under such a theory, the PBA evidence introduced at Appellant's trial should not have been admitted unless the Commonwealth could demonstrate that when Appellant drugged and sexually assaulted the five PBA

witnesses in the 1980s, he did so to further his plan of drugging and sexually assaulting A.C. in 2004.

Yet, to suggest that because Appellant did not have it in his mind when he drugged and sexually assaulted women in the 1980s that he would also drug and sexually assault A.C. in 2004 such PBA evidence was thus inadmissible is to ignore the logical connection and legal relevance of the prior conduct to the contested issues at trial, as discussed, *supra*.

"Logical relevance is the 'touchstone' of the admissibility of uncharged misconduct evidence." Imwinkelried, *Uncharged Misconduct Evidence*, §2:17, pp. 45-46. When considering the limitation placed on relevant evidence by Rule 404(b), "[t]he question is not whether the evidence falls within an exception to a supposed rule of exclusion, but rather whether the 'evidence [is] in any way relevant to a fact in issue" other than by showing mere propensity." *People v. VanderVliet*, 508 N.W.2d 114, 121 (Mich. 1993) (citing Stone, "The Rule of Exclusion of Similar Fact Evidence: America," 51 Harv. L.R. 988, 1004 (1938)). In this way, then, Rule 404(b) is *inclusionary* rather than exclusionary. *VanderVliet, supra*, at 123 (citation omitted).

Accordingly, the question to be answered by this Honorable Court is not whether the PBA evidence was relevant, as it most assuredly was, but whether there was some other legal prohibition against using such evidence. *See Huddleston v.*

U.S., 485 U.S. 681, 687 (1988) ("Rules [of Evidence] 401 and 402 establish the broad principle that relevant evidence – evidence that makes the existence of any fact at issue more or less probable – is admissible unless the Rules provide otherwise."). Appellant and his amici claim that the admission of PBA evidence in this case was tantamount to impermissible propensity or character evidence. Not so.

Imwinkelried, *supra*, explained the reason for the prohibition of propensity evidence:

> [T]he forbidden theory rests on two inferences that pose serious legal relevant issues.
>
> [T]he first step in this theory of logical relevant is inferring the defendant's character from the defendant's prior misdeeds. Rule 404(b) refers to this step as introducing the uncharged acts "to prove the character of a person." This step poses the legal relevance danger of prejudice. In the process of deciding whether to draw the inference, the jury must focus on the type of person the defendant is....
>
> The second step in this theory of logical relevance compounds the legal relevance dangers. The second step is inferring the defendant's conduct on a particular occasion from his or her subjective character. In the words of Rule 404(b), the plaintiff or prosecutor introduces the evidence of the defendant's subjective character "in order to show he acted in conformity therewith."

Imwinkelried, *Uncharged Misconduct Evidence*, at §2:18, pp. 48-49.

Surely had the Commonwealth sought to introduce witnesses who claimed prior sexual contact with Appellant merely to show that Appellant was sexually promiscuous or had engaged in extramarital affairs, such evidence would constitute impermissible character evidence. The inference that because one engages in

arguably immoral sexual conduct is not logically related to whether that same person has committed a sexual assault. Nor would it be logical to suggest that because one commits burglaries or thefts, this prior criminal conduct is proof that such a person committed a sexual assault. Propensity to commit crimes generally has no bearing on whether one committed the charged crime specifically. Absent some logical and legally relevant connection between the past and present conduct, introduction of a defendant's prior misconduct impermissibly relies on an inference about the defendant's character.

In this case, however, there was a logical and legally relevant connection between Appellant's prior misconducts and the charged crime: that Appellant repeatedly used the same methodology or tactic to commit the same crime of sexual assault. This is not propensity to act in conformity with a particular character trait. Rather, the logical relevance of such evidence is Appellant's propensity to use the same criminal tactic – drugging his victims – in order to achieve the same result – sexual assault. Where Appellant's intent and motive were at issue, such evidence regarding Appellant's prior *actions*, as opposed to character, was highly probative. *See Huddleston* 485 U.S. at 685 ("Extrinsic acts evidence may be critical to establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."). *See also Commonwealth v. Ransom*, 82 A.2d

547, 551 (Pa.Super. 1951) ("[E]vidence of offenses other than the one for which a defendant is on trial is admissible if the prior misconduct tends to show the state of mind of the prisoner upon the act of which he is accused.").

Such evidence is also logically relevant to refute Appellant's defense that A.C. consented to the sexual contact and was now fabricating that a sexual assault occurred. As Chief Justice Saylor recognized in his concurrence in *Hicks*, when similar past conduct is introduced to refute a defense at trial, said conduct is logically relevant under the "doctrine of chances" or "doctrine of objective improbability," which does not depend on an impermissible inference regarding character. *Hicks*, 638 Pa. at 475, 156 A.2d at 1132 (Saylor, C.J., concurring). Rather, this doctrine relies on the "instinctive logical process that reasonably determines that unusual and abnormal events are unlikely to recur by chance." *Id.* (citation omitted).

> [T]he proponent does not offer the evidence of the uncharged misconduct to establish an intermediate inference as to the defendant's personal, subjective bad character. Rather, the proponent offers the evidence to establish the objective improbability of so many accidents befalling the defendant *or the defendant becoming innocently enmeshed in suspicious circumstances so frequently.*

Id. (emphasis in original) (quoting Edward J. Imwinkelried, "An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances," 40 U. Rich. L. Rev. 419, 437 (2006)). Chief Justice Saylor observed that there is "a material difference between the use of evidence to prove 'general evil disposition' and

advancement to demonstrate 'the intention which composes a part of the crime,' including a lack of accident or mistake." *Hicks*, 638 Pa. at 478-79, 156 A.3d at 1134 (citing *State v. Johns*, 725 P.2d 312, 322 n.2 (Or. 1986)). *See also Ransom*, 82 A.2d at 550 ("Where the charge is rape, the committing of a single previous rape or rape attempt upon another woman may, with other circumstances, give strong indication of a design (not a disposition) to rape.") (citing 2 Wigmore, Evidence, § 357, pp. 266, 267 (3d Ed.)).

This doctrine is no less applicable to rebut a defense of consent in a sexual assault case than it is to rebut a defense of lack of accident or mistake in a homicide case. Appellant claimed that A.C. fabricated an assault and had in fact consented to engage in sexual conduct with Appellant. He similarly attacked the credibility of the five PBA witnesses, all of whom also alleged that Appellant drugged them and sexually assaulted them. The doctrine of chances makes it highly improbable that Appellant was falsely accused by no less than six women of engaging in very similar conduct: drugging and sexually assaulting them while they were unconscious or semi-conscious and unable to refuse consent. In this way, the PBA evidence admitted at trial was logically relevant, highly probative, and legally permissible without any reliance on unlawful and prejudicial character inferences.

Indeed, both the courts of this Commonwealth as well as courts in other jurisdictions have recognized the legal relevance of PBA evidence with respect to

the issue of consent in sexual assault cases. *See, e.g., Commonwealth v. Elliott*, 549 Pa. 143, 145-46, 700 A.2d 1243, 1249-50 (1997) (holding that evidence of prior violent assaults of sexual nature against three other women sufficiently similar to instant offense to constitute common scheme, plan or design where defense at trial was consensual sex with victim), *abrogated on other grounds by Commonwealth v. Freeman*, 573 Pa. 531, 827 A.2d 385 (2003); *Commonwealth v. Tyson*, 119 A.3d 353, 360 (Pa.Super. 2015) (concluding that evidence of prior similar rape was admissible in rape case in which defense was consent because prior rape "tend[ed] to increase the probability that Appellee knowingly had non-consensual sex with [victim] in the present case."); *Legette v. U.S.*, 69 A.3d 373, 382-85 (D.C. 2013) (permitting evidence of prior sexual assault to show appellant's intent to commit sexual intercourse by force when defense at trial was consensual sex); *Houston v. State*, 852 So.2d 425, 427 (Fla.Dist.Ct.App. 2003) (recognizing that under rule of evidence similar to Pa.R.E. 404(b) "evidence of prior sexual batteries on other women may be relevant... to rebut the defense of consent by demonstrating that the defendant had a common plan or scheme to perpetrate the crime" and affirming admission of evidence of appellant's prior attacks on other homeless women at trial); *State v. Nelson-Waggoner*, 6 P.3d 1120, 1126 (Utah 2000) (affirming admission of evidence regarding prior rapes in rape case where defense was consent, and noting that the admission of bad acts evidence is admissible for non-character purpose of

proving lack of consent particularly where "defendant allegedly obviates the victim's consent in a strikingly similar manner"). *Cf. VanderVliet*, 508 N.W.2d at 128 (recognizing that other acts evidence was relevant to and probative of defendant's innocent intent where defendant was accused of sexually molesting disabled victim and claimed that the contact was not sexual in nature).

The fear-mongering in which Appellant and his amici engage to suggest that defendants are routinely deprived of their due process rights as a result of an overly-expansive view of PBA evidence is not well-founded. As one court observed about this very argument more than two decades ago: "This fear conflicts with the intuitive sense that some bad acts evidence is so powerfully probative that it would pervert the truth-seeking process to prevent a jury from using what looks like ordinary common sense." *VanderVliet*, 508 N.W.2d at 125. In the instant case, to suggest that the jury should not have heard from other witnesses who were drugged by Appellant and sexually assault when considering whether Appellant intended to and did drug and sexually assault A.C. defies common sense and is not dictated by any constitutional or other legal mandate.

Furthermore, both the gate-keeping function in which trial courts engage under Rule 404(b), in addition to the use of cautionary instructions like the one the trial court gave in Appellant's case, will help ensure that such evidence is properly admitted for a permissible purpose and is not used for an impermissible one.

Speculative fears that juries cannot distinguish between the permissible and impermissible uses of such evidence, even in the face of repeated cautionary instructions, flies in the face of long-held principles that jurors are presumed to follow the court's instructions, and that "evidence that is admissible for one purpose does not become inadmissible because its use for a different purpose would be precluded." *Id.* at 126 (citations omitted). Indeed, Rule 404(b) specifically provides that such evidence may be admitted at trial for one purpose but not another. To curtail the use of PBA evidence for permissible, non-character purposes under Rule 404(b)(2) based on a speculative fear that the jury will use it for unintended character purposes threatens to diminish relevance as the touchstone of admissibility, minimize the discretion trial courts have in rendering evidentiary rulings, and thwart the intended purpose of Rule 404(b).

Particularly as it pertains to Appellant's case, there is little reason to believe that the jury relied on the PBA evidence as impermissible character or propensity evidence, particularly where the trial court instructed the jury on the proper use of such evidence. The testimony establishing Appellant's "playbook" of drugging women to sexually assault them was logically relevant to prove that Appellant intentionally gave A.C. pills to incapacitate her so that he could sexually assault her, and negate Appellant's claim that the sexual contact was consensual. There is no reason to believe that the jury heard the PBA testimony, concluded from it that

Appellant was a person of bad character, and then determined his guilt with respect to the charges relating to A.C. based on inferences regarding Appellant's character, rather than on the logical connection between Appellant's past conduct and charged conduct. In short, the import of the PBA evidence introduced at trial was its reflection on Appellant's specific conduct, not on his character.

Finally, Appellant's amicus, the Pennsylvania Association of Criminal Defense Lawyers, argues against treating sex crimes cases differently than other crimes. *See* Brief of Amicus Curiae the Pennsylvania Association of Criminal Defense Lawyers, pp. 15-16. Yet, the PDAA does not ask this Honorable Court to create a special PBA rule for sex crimes cases, but merely asks this Court not to carve out sex crimes cases from the normal analysis that Rule 404(b) permits.[5] Not every sex crime case warrants the admission of PBA evidence. But when, as here, PBA evidence is logically and legally relevant for purposes specifically contemplated by Rule 404(b)(2), including common plan or scheme, intent, motive, and absence of mistake, and when such evidence is logically and legally relevant to refute the defense at trial, such evidence should not be precluded merely because it

[5] The PDAA is aware that some other jurisdictions have specifically adopted statutes and/or rules of evidence that permit the introduction of other sexual offenses when a sexual crime has been alleged. *See, e.g.*, Fed. R.E. 412; Ariz. R.E. 404(c); Cal.Evid.Code § 1108; CO ST §16-10-301; 725 ILCS §5/115-7.3; K.S.A. §60-455(d); MD CTS & JUD PRO § 10-923. The PDAA is not herein advocating for such a rule to be adopted in the Commonwealth, as it believes the current Rule of Evidence 404(b) already permits the type of PBA evidence that was admitted in this case.

does not fit under the inapplicable signature crimes exception or because a defendant does not contemplate committing specific future sexual offenses at the time he commits a prior sexual offense.

Proving consent of the victim, or lack thereof, is an element that is largely unique to the prosecution of sexual crimes. So too, then, is the need to establish beyond a reasonable doubt that in such cases a defendant intended to engage in sexual acts even knowing the victim did not or could not consent. As such, when a defendant engages in similar conduct on other occasions with the intent and purpose of engaging in sexual contact without the victim's consent, such PBA evidence is highly probative of a necessary element of the crime charged. It is also material to refute a defense unique to sex crimes: the victim consented. Relevant PBA evidence should not be excluded then merely because the disputed issues to which such evidence relates are unique to the sex crimes arena. To hold otherwise would be to unfairly hamper the ability of prosecutors to use relevant, non-character evidence to prove a disputed element in the very type of cases where proof of intent is often difficult to prove given the typical lack of corroborating evidence. Such a rule indeed defies common sense and is not supported by the law.

IV. The trial court did not abuse its discretion in this case even if this Honorable Court decides to adopt a new rule regarding limitations on PBA evidence.

As a final matter, even were this Honorable Court to use the instant case to announce new limitations on the appropriate use of PBA evidence under Rule 404(b), such a holding should not result in a reversal of Appellant's judgment of sentence given the applicable standard of review.

It is axiomatic that "[a]dmissibility of evidence is within the sound discretion of the trial court" and evidentiary rulings will not be disturbed on appeal "absent an abuse of that discretion." *Hicks*, 638 Pa. at 463, 156 A.3d at 1125 (citations omitted). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." *Commonwealth v. Dengler*, 586 Pa. 54, 65, 890 A.2d 372, 379 (2005).

In the instant case, the trial court carefully considered the voluminous PBA evidence the Commonwealth had at its disposal, whittled it down to only five witnesses whose experiences with Appellant were sufficiently similar to the charged conduct to render it relevant to permissible purposes under Rule 404(b)(2), and issued multiple cautionary instructions throughout the trial to the jury regarding the

permissible use of such evidence. As the Superior Court's analysis makes clear, the trial court's ruling was consistent with and supported by precedent.

Appellant and his amici now urge this Honorable Court to impose new restrictions on the use of PBA evidence, particularly with respect to the proper interpretation of common plan or scheme evidence. While the PDAA opposes any such restrictions, should this Court be inclined to impose them prospectively, such a ruling would not render the trial court's appropriate reliance on past precedent interpreting Rule 404(b) to be the product of prejudice, bias, partiality or ill-will, and would certainly not render the ruling manifestly unreasonable for failing to anticipate any such changes this Court may announce. As such, the PDAA respectfully urges this Court to affirm the Superior Court's ruling that the trial court did not abuse its discretion and to thus affirm the judgment of sentence in this case.

CONCLUSION

For these reasons, the PDAA requests that this Court deny Appellant's challenge to the trial court's ruling that permitted the Commonwealth to introduce PBA evidence at trial and affirm Appellant's judgment of sentence.

Respectfully submitted,

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CONCLUSION

For these reasons, the PDAA requests that this Court deny Appellant's challenge to the trial court's ruling that permitted the Commonwealth to introduce PBA evidence at trial and affirm Appellant's judgment of sentence.

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

This brief complies with Pa. R.A.P. 2135(d) (certificate of compliance) and Pa. R.A.P. 531(b)(3) (length of amicus briefs), as it contains not more than 7,000 words, but contains 6840 words, excluding all supplementary matters that may be excluded under Rule 2135(b).

CERTIFICATE OF COMPLIANCE WITH RULE 127

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

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CERTIFICATE OF SERVICE

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