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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MAP 2020 NO. 39

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

WILLIAM HENRY COSBY, JR.,
Appellant

BRIEF OF AMICUS CURIAE DEFENDER ASSOCIATION OF PHILADELPHIA ON BEHALF OF APPELLANT WILLIAM H. COSBY, JR.

Appeal From The Order Of The Superior Court Of Pennsylvania Entered On December 10, 2019 At Docket No. 3314, EDA 2018, Affirming The Judgment Of Sentence Entered On September 25, 2018, With Post-Sentence Motions Denied On October 23, 2018, By The Honorable Steven T. O'Neill, Judge Of The Court Of Common Pleas, Criminal Trial Division, Montgomery County at CP-46-CR-0003932-2016.

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I. INTEREST OF THE AMICUS CURIAE

The Defender Association of Philadelphia is an independent, not-for-profit corporation who represents a substantial percentage of criminal defendants in Philadelphia at trial, at probation and parole revocation proceedings, and on appeal. The Defender Association has a significant amicus curiae presence within the Commonwealth, and specifically in cases before this Court.

In this latter role, the Defender Association attempts to present a high standard of legal analysis to aid this Court in its disposition of difficult and complex legal questions, which define the constitutional and/or other legal rights of persons in Pennsylvania.

Meredith Zeitzer, Esquire, counsel for the Defender Association in this matter, certifies that no person or entity other than the Defender Association paid in whole or in part for the preparation of this brief, or authored this brief in whole or in part.

II. STATEMENT OF QUESTION PRESENTED

This Court granted review to decide, in part, whether the Superior Court erred in affirming the admission of other-acts evidence in Appellant's trial. The Panel affirmed the trial court's admission of the evidence under both the plan and absence of mistake exception to Pa.R.E. 404(b)(1). Amicus limits its focus to the Panel's erroneous application of the plan exception, and presents the following question to the Court:

Did not the Superior Court err by holding that the testimony of five witnesses (and a de facto sixth through Appellant's civil deposition testimony) regarding prior uncharged, alleged sexual misconduct was admissible under the plan exception to the rule barring propensity evidence under Pa.R.E. 404(b)(1)?

III. SUMMARY OF ARGUMENT

Appellant's case raises an important evidentiary question necessitating a clear resolution for Pennsylvania litigants. What is the meaning of "plan" under Pa.R.E. 404(b)(2)? The Court's current treatment of plan stems from a decades-long, fundamental confusion between plan and modus operandi. The conflation of the two exceptions has resulted in the Court's implicit adoption of a theory of plan that invites jurors to decide ultimate issues based on an accused's conformity with bad character, as demonstrated in the instant case. To ensure fair trials, this Court should follow historical precedent and adopt a narrow definition of plan requiring proof that the charged and uncharged misconduct are both integral steps towards accomplishing an overarching goal previously conceived in the accused's mind. Because the Commonwealth did not present such proof, the judgment of the Superior Court should be reversed.

IV. ARGUMENT

THE SUPERIOR COURT ERRED IN UPHOLDING THE ADMISSION OF OTHER-ACTS EVIDENCE[1] AS "PLAN" UNDER PA.R.E. 404(B)(2) BY CONFLATING THE PLAN AND MODUS OPERANDI EXCEPTIONS, THUS UNDERMINING HISTORICAL PRECEDENT AND VIOLATING PENNSYLVANIA'S STRICT BAR TO PROPENSITY EVIDENCE

A. Background

Appellant's case is but one in a long and continuing line of criminal prosecutions in which the Commonwealth, this Court, and courts below have conflated the plan exception to the rule barring propensity evidence with that traditionally used to prove identity – modus operandi. See, e.g., Commonwealth v. Hicks, 156 A.3d 1114 (Pa. 2017); Commonwealth v. Arrington, 86 A.3d 831 (Pa. 2014); Commonwealth v. Elliott, 700 A.2d 1243 (Pa. 1997), abrogated on other grounds by, Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003); Commonwealth v. Miller, 664 A.2d 1310 (Pa. 1995), abrogated on other grounds by, Commonwealth v. Hanible, 836 A.2d 36 (Pa. 2003); Commonwealth v. Hughes, 555 A.2d 1264 (Pa. 1989); Commonwealth v. Wable, 114 A.2d 334 (Pa. 1955);

[1] To avoid repetition, Amicus incorporates, and relies upon, the trial court's summary of the evidence presented to the jury. See Trial Ct. Op., pgs. 1-40, 101-115.

Commonwealth v. Tyson, 119 A.3d 353 (Pa. Super. 2015); Commonwealth v. Judd, 897 A.2d 1224 (Pa. Super. 2006); Commonwealth v. Frank, 577 A.2d 609 (Pa. Super. 1990).

The high standard for establishing the latter exception is well-settled in Pennsylvania. In Commonwealth v. Shively, 424 A.2d 1257, 1258-59 (Pa. 1981), the Commonwealth sought to admit facts supporting the defendant's prior sex conviction in his prosecution for rape. The Commonwealth argued the other-acts evidence established the defendant's modus operandi, which rebutted his alibi defense. With identity at issue, this Court reiterated that

> evidence of prior crimes is 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 1259 (quoting 1 McCormick on Evidence, § 190 (2d ed. 1972)) (internal quotation marks omitted). Finding an insufficient degree of similarity between the two crimes to show signature, the Court held the other-acts evidence was not admissible. Id.

Per Shively, an accused's signature is ascertained by identifying the similarities between the other-acts evidence and the charged conduct. See 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence, § 3:14 (2020) ("The prosecutor offering uncharged misconduct to establish modus operandi may

attempt to establish the unique character of the modus by listing all the points of similarity between the two crimes."). Similarity of the two crimes alone is insufficient to warrant the admission of other-acts evidence as modus operandi. Id. The question is not whether there are enough similarities, but whether the similarities demonstrate a pattern so distinct as to conclude that the same person committed both crimes. Commonwealth v. Hawkins, 626 A.2d 550, 552 (Pa. 1993). The accused's unique handiwork connects the other-acts evidence to the charged crime. Commonwealth v. Bryant, 530 A.2d 83, 86 (Pa. 1987).

The standard in Pennsylvania for establishing plan is not as clear. As discussed infra, the melding of what were intended to be two separate and distinct exceptions is evidenced by courts' lax application of the modus operandi similarity test to conclude that other-acts evidence demonstrates "plan." See Commonwealth v. May, 656 A.2d 1335, 1340-41 (Pa. 1995) (upholding trial court's conclusion that defendant's prior rape-assaults admissible in homicide trial because crimes were "sufficiently similar" to satisfy the "'common scheme' or 'signature crime exception'" to the rule barring other-acts evidence); Commonwealth v. O'Brien, 836 A.2d 966, 968-70 (Pa. Super. 2003) (although identity not at issue, defendant's prior convictions for sexual assault of two male children admissible in prosecution for same allegations because crimes so similar as to show common scheme or plan).

A significant problem arises from courts' use of a similarity test under the plan exception. While plan can be used to prove identity, it is oftentimes applied in cases where identity is not at issue. Because identity is not at issue, courts do not ask the necessary threshold question prior to admitting the other-acts evidence: do the similarities between the crimes establish a method so unique that no one other than the defendant could have committed both crimes? When a court is not required to ask if the same person committed both acts, the focus in applying a similarity test shifts from identifying a defendant's recognizable handiwork to identifying sufficient similarities short of a signature to show that a defendant acted in accordance with a predictive pattern of criminal conduct. That pattern is the defendant's "plan."[2]

Relying on a predictive pattern based on similar, yet unrelated conduct as proof, for example, of a defendant's intent at some later time requires an inference that both Pennsylvania common law and Pennsylvania Rule of Evidence 404(b) expressly forbid. That is, because a person committed similar crimes before, he or she intended to commit the same crime again. The connection supporting the pattern is the person's propensity, or disposition, to commit the same or similar crime. See Daniel J. Anders & Bobby Ochoa, III, Ohlbaum on the Pennsylvania

[2] Termed the unlinked act theory of plan, "[i]f the proponent can show a series of similar acts, [] courts admit the evidence on the theory that a pattern or systemic course of conduct is sufficient to establish a plan. . . . In these cases, the similarity of the crimes is ordinarily inadequate to satisfy the modus operandi doctrine." Imwinkelried, supra, § 3:26. The linked act theory, conversely, is discussed in Section B, infra.

Rules of Evidence, § 404.22[2][b] (2020) ("When the identification of the accused is not disputed . . . evidence of common plan, scheme, and design should be inadmissible, since it most often registers with a jury as evidence of propensity or conforming behavior."); Miguel A. Mendez & Edward J. Imwinkelried, People v. Ewoldt: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct, 28 Loy. L.A. L. Rev. 473, 478-79 (1995) (noting criticism that "many courts have converted plan into a 'euphemism' for bad character, and have allowed the theory to degenerate into a 'dumping ground' for inadmissible bad character evidence").

Even when the plan exception is invoked to prove identity, the same improper result occurs when the Court focuses exclusively on similarities between the crimes. Where a signature might not exist, the Court has nevertheless justified the admission of unlinked, uncharged instances of prior misconduct as proof of plan to show identity. For example, in Elliott, the defendant was charged with the rape and murder of a twenty-seven-year-old white woman whom he had met at a local nightclub. 700 A.2d at 1247. The defendant was accused of beating, raping, and strangling the victim to death in a house. Id. The defendant told the police that he and the victim had consensual rough sex, but that the victim was alive when he left. Id.

At trial, the Commonwealth introduced testimony from three similarly-aged white women, all of whom had met the defendant at or near the same club. Id. at 1248. Each woman, however, described being attacked by the defendant in a different way, both sexually and physically, and in a different location. Id. at 1250. This Court upheld the trial court's admission of the other-acts evidence under the "common scheme, plan, or design" exception. Id. Finding that (1) all four women were white and in their twenties; (2) they had all been attacked early in the morning while alone with the defendant; (3) all the attacks had "sexual overtones;" and (4) all the women were either "choked, beaten, or both," the Court concluded the similarities were so "close" as to show the defendant's plan and thus, his identity. Id. The Court neither expressly identified the defendant's integrated plan; how each of the attacks were part of that plan; nor how his unspecified plan proved that he committed the homicide. The Court, in effect, deduced that the defendant raped and murdered the victim because he had assaulted the other women in a quasi-similar way.

As demonstrated in Elliott, the danger in admitting propensity evidence under the Court's routine treatment of the plan exception is real. Criminal defendants are effectively stripped of their constitutionally-provided cloaks of innocence, as they, like Appellant, are forced to defend trials within trials. This feat becomes even more burdensome knowing it is very difficult for jurors, despite

cautionary instructions, to ignore the innate human reaction that occurs upon hearing that someone accused of committing a crime did the same before. See Shaffner v. Commonwealth, 72 Pa. 60, 65 (1872) ("[I]f one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief, that he might have committed the one with which he is charged; it . . . predisposes the mind of the juror[.]"); David P. Leonard, New Wigmore On Evidence Of Other Misconduct & Similar Events, § 9.4.2 (2019) (discussing jurors' inability to follow limiting instructions when other-acts evidence introduced under an expansive plan theory).

The above discussion suggests that substantial questions exist regarding the application of the plan exception in Pennsylvania. What is plan? How can this Court define plan without removing a defendant's presumption of innocence? Where does plan end and propensity begin? This Court recently faced these questions in Hicks, supra, while reviewing the admissibility of three prior assaults on women under the plan exception in the defendant's prosecution for the fatal strangulation and dismembering of a fourth woman. Despite the Court's best efforts to provide clarification in this important area of the law, a consensus could not be reached.

The plurality applied the controversial unlinked act theory of plan, as used in Elliott, to find a "sufficient commonality of factors" between the crimes to establish a "logical connection" and "virtual signature" proving common scheme,

intent and identity." Hicks, 156 A.3d at 1127-28. Identity, however, was not at issue. The defense averred accident, and that the decedent's injuries resulted from post-mortem efforts to hide the body. Id. at 1131 (Saylor, C.J., concurring). By failing to ask for what relevant purpose the other-acts evidence truly served, the plurality opinion demonstrated the flaw in a loose application of plan, which has become an amorphous pretext for propensity. See Leonard, supra, § 9.1 (discussing difficulty in evaluating plan cases because "courts neither set forth specifically the disputed issues nor state the ultimate purpose for which the uncharged misconduct evidence suggesting the existence of a plan was admitted"); 22B Federal Practice and Procedure § 5252, n.65 (2d ed. 2020) (noting plurality's "improper" application of plan in Hicks, and in other Pennsylvania decisions).

Writing separately, Chief Justice Saylor disagreed with the plurality's erosion of the traditionally strict applications of plan and modus operandi. The Chief Justice nevertheless found the evidence admissible under the doctrine of chances. Hicks, 156 A.3d at 1130-39 (Saylor, C.J., concurring). Justice Baer, in a separate concurrence, viewed the evidentiary ruling as a "close call," but found its admission to be harmless error. Id. at 1139-42 (Baer, J., concurring). Dissenting, Justice Donohue reiterated Chief Justice Saylor's concerns about the Court's long history of conflating the two exceptions. Justice Donohue asserted that plan only exists as a theory of logical relevance when both the charged and uncharged

misconduct are contemplated as parts of a preconceived, overarching design. Id. at 1142-57 (Donohue, J., dissenting). The Justice's position was well-rooted in both Pennsylvania's historical definition of plan and a grave concern with how other-acts evidence has been used to relieve "the Commonwealth of its constitutional burden of proof beyond a reasonable doubt." Id. at 1142. Lastly, agreeing with Justice Donohue, Justice Wecht emphasized "the obvious danger that the exceptions will devour the rule [if] courts do not adhere scrupulously to the terms and purposes" of the rule barring propensity evidence. Id. at 1157-59 (Wecht, J., dissenting).

The division among the Justices signals a need for clarity and change. As Chief Justice Saylor aptly noted, "[i]t may well be that the interests of justice would be well served were this Court to consider revamping the present approach." Id. at 1138 (Saylor, C.J., concurring). Amicus' participation is motivated by the implications that this Court's decision will have not just for Appellant, but also for the thousands of defendants who are routinely forced to defend other-acts evidence bearing no permissible logical relevance to the case for which they stand trial. The interests of justice and fairness would be well served if this Court were to end the untethered expansion of the plan exception, and reasonably limit its application in accordance with both this Court's historical precedent and Pennsylvania's commitment to the prohibition against propensity.

B. The Erroneous Erosion of Pennsylvania's Historical View of Plan

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Pa.R.E. 404(b)(1). Other acts are admissible, however, if properly applied to a non-character based theory of logical relevance – the exceptions. See Pa.R.E. 404(b)(2). Mere satisfaction of an exception on its face does not render other acts admissible. See Stephen T. Strong, What Is a Plan? Judicial Expansion of the Plan Theory of Military Rule of Evidence 404(b) in Sexual Misconduct Cases, 1992 June Army Law. 13, 15-16 (1992) (noting judicial tendency to treat evaluation of other-acts evidence as "labelling exercise, rather than a careful examination of the inferences that the factfinder might draw from the uncharged misconduct").

The evidence supporting the exception is only admissible if it is relevant to prove one or more of three ultimate facts at issue: (1) the identity of the perpetrator of the charged offense; (2) the perpetrator's applicable mens rea; or (3) the occurrence of the act itself. Leonard, supra, § 9.1. The evidence is not admissible if the application of the exception solely invites a character-based inference to prove the ultimate issue, or if the potential for unfair prejudice outweighs the probative value of the evidence. Pa.R.E. 404(b)(2).

Rule 404(b)(2)'s oft-quoted list of exceptions is derived from common law. In Shaffner, the Court carved out two separate and distinct exceptions to the strict rule barring the introduction of "a distinct crime, unconnected with that laid in the indictment." 72 Pa. at 65. The Court held that

> [t]o 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.

Id. (emphasis added). The first exception established "plan" -- each act, including the crime charged, must be linked together as steps taken to achieve a predetermined goal. See Hicks, 156 A.3d at 1143-44 (Donohue, J., dissenting). The second exception established signature, or modus operandi. Shaffner's "linking" definition of plan suggests the Court's efforts to limit its application. To that end, the Court emphasized the required connection under both exceptions, cautioning that absent the link to either a single, overt plan, or to signature, a defendant is forced to "acquit himself of two offences instead of one," while jurors are potentially misled and confused by "multiplied issues." Shaffner, 72 Pa. at 65.

The defendant in Shaffner was accused of killing his wife by poison. The Commonwealth sought to offer evidence that the defendant had killed his lover's husband in the same manner four months earlier. Id. at 65-66. The Commonwealth argued the evidence was relevant to show plan and motive, which rebutted the

defendant's suicide defense. The Court summarized the Commonwealth's theory as follows:

> It is argued that the motive of the prisoner for taking the life of Nancy his wife, was to enable him to obtain her money; and to enable him also to marry Susan, the wife of John Sharlock, who had been the prisoner's paramour, as the means of obtaining her money, which was in the form of an insurance policy, on the life of her husband, John Sharlock, and that in order to carry out this plan, it was necessary first to put Sharlock out of the way.

Id. at 66 (emphasis added). To be admissible, both crimes "must have been contemplated by the prisoner as parts of one plan in his mind, in which the taking of Sharlock's life was part of his purpose of taking the life of Nancy." Id. He must have "contemplated the death of Nancy before taking the life of Sharlock." Id. Sharlock's poisoning would not be admissible absent facts establishing this "pre-existing determination." Id. Because no such evidence existed, the Court held the other-acts evidence inadmissible. Id. at 66-68.

Shaffner's standard for plan is known academically as the linked act theory. The Commonwealth must show the accused had "in fact and in mind formed a plan including the charged and uncharged crimes as stages in the plan's execution." Imwinkelried, supra, § 3:24. While temporal proximity is required under the unlinked act theory, see Mendez & Imwinkelried, People v. Ewoldt, supra, at 483, the other-acts evidence need neither be similar to, nor contemporaneous with, the charged crime under the linked act theory. Imwinkelried, supra, § 3:24. The

inferential link between the other-acts evidence and the crime charged is not the defendant's conformity with bad character, but the commitment to a previously-devised "plan that required the accused to commit both the charged and uncharged offenses to attain a specific goal." Strong, supra, at 16.

In later true plan cases, the Court strictly applied Shaffner by looking not to the mere similarities between the charged and uncharged misconduct, but rather for the existence of a larger, pre-existing goal encompassing both. See Goersen v. Commonwealth, 99 Pa. 388, 398 (Pa. 1882) (evidence that defendant killed mother-in-law by poison admissible in prosecution for poisoning of defendant's wife to show poison administered "in pursuance of a design on [defendant's] part to obtain their property"); Commonwealth v. Chalfa, 169 A. 564, 565 (Pa. 1933) (prior killings of heirs admissible in homicide trial of different heir as proof of "previously conceived" murder-for-insurance "field of operation" encompassing all misconduct).

From Shaffner's narrowly tailored exceptions there grew, perhaps inadvertently, a broader reliance on the general principle that other-acts evidence must have some logical connection to the crime charged. See Commonwealth v. Coles, 108 A. 826, 827 (Pa. 1919) (citing Shaffner to hold evidence of gunpoint robbery fifteen minutes before shooting of responding police officer admissible in prosecution for latter because the two distinct crimes were "so inseparably

connected that the proof of one necessarily involve[d] proving the other"); Commonwealth v. Weiss, 130 A. 403, 404 (Pa. 1925) (citing Coles to hold spontaneous robbery following robbery-homicide admissible in prosecution for latter because the two crimes were closely connected; robbery showed plan to secure funds during flight from robbery-homicide, despite lack of evidence showing later robbery previously contemplated as part of robbery-homicide).

The Court continued to blur the lines of Shaffner's holding by applying the "closely connected" standard in cases where the Court found a generalized "plan" to commit crime based on generic similarities, but without evidence of a predetermined design. See Commonwealth v. Brooks, 50 A.2d 325, 326-27 (Pa. 1947) (subsequent, spontaneous robbery of storeowner admissible in prosecution for robbery-homicide of different storeowner because temporal and geographic similarities demonstrated "chain of closely connected crimes for the common purpose of obtaining money by robbery," and jury entitled to know defendant's true character); Commonwealth v. Darcy, 66 A.2d 663, 674-75 (Pa. 1949) (impromptu robbery committed thirty minutes after shooting of bystander to prior, unrelated robbery admissible to show "course of conduct" because "[i]t is always permissible to show that a defendant and his confederates in a murder case have entered upon a plan . . . for the commission of murder and related felonies.").

The above decisions reflect the early stages of the Court's transformation of a clearly defined, non-character based theory of plan into a nebulous, propensity-based standard used to admit similar, but disconnected crimes. The Court's decision in Wable, supra, signals the moment when the Court expressly blended Shaffner's distinct formulations of plan and modus operandi. The Wable Court's conflation led to "a decades-long misunderstanding about what type of connection is truly required for the purpose of proving a common scheme." Hicks, 156 A.3d at 1146 (Donohue, J., dissenting).

In Wable, the defendant was accused of killing a truck driver found shot in the head while asleep in his truck on the Pennsylvania Turnpike. 114 A.2d at 335-36. The identity of the shooter was at issue.[3] The trial court admitted into evidence testimony establishing that the defendant had allegedly shot two other truck drivers while asleep in their trucks on the Pennsylvania Turnpike. Id. at 336-37. Those shootings occurred in the three days before and the three days after the murder for which the defendant stood trial. Each, like the charged offense, was motivated by robbery, and the defendant's gun was used in all three crimes. Id. Reviewing the admissibility of the uncharged shootings, the Court analyzed the similarities between all three shootings, finding a "striking similarity in the manner in which they were committed." Id. at 336.

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[3] Although the defendant confessed to being present at the scene, he argued someone else was the shooter and asserted an alibi defense. Id. at 337-38.

Concluding the uncharged misconduct showed "an almost uncanny similarity in all the details of their perpetration" to the charged murder, id. at 337, the Court provided the following standard for the admissibility of other-acts evidence under the plan exception:

> [O]ther crimes [evidence] is admissible when it tends to prove a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others or to establish the identity of the person charged with the commission of the crime on trial,—in other words 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.

Id. at 336 (emphasis added). The Court eliminated Shaffner's language limiting evidence of plan to those acts existing "in the mind of the actor, linking them together for some purpose he intended to accomplish." Shaffner, 72 Pa. at 65. Instead, the Court substituted the broader "proof of one tends to prove the other" language derived from Coles, supra, which did not apply plan, but rather the res gestae exception to the propensity bar. See Wable, 114 A.2d at 337, n.2 (relying upon, inter alia, Coles, Weiss, Brooks, Darcy).

Despite the Court's identification of uncanny similarities, or signature, it did not apply the modus operandi exception. Instead, the Court held "it would be difficult to conceive of a clearer example of crimes committed in the course of a common scheme, plan, or design." Id. at 337. Notably, the Court did not identify any facts demonstrating that the three shootings were each part of an overarching

plan, or that when the defendant committed the first shooting, he had contemplated the second and third. Unlinked by any predetermined goal, each shooting was a disconnected, but similar act demonstrating a mere predictive pattern.

The Wable Court also never expressly identified the defendant's "plan." By conflating the plan and modus operandi standards, the Court essentially concluded that the striking similarities between the three shootings proved that the defendant had a plan to commit strikingly similar robbery/murders of truck drivers. To achieve what end? The Court's logic was circular. See Leonard, supra, § 9.4.2 (criticizing circular logic of "common features prove a plan when they prove a plan" accompanying application of plan to similar, but unlinked acts); see also Hughes, 555 A.2d at 1282-83 (concluding signature-like similarities between other-acts and charged offense demonstrated "a common scheme, plan, or design" to commit similar crimes).

Relying on Wable and its progeny, the Court's mistaken application of the modus operandi similarity test under the plan exception has become embedded in the Court's articulation of the standard for plan. See Arrington, 86 A.3d at 842 (quoting Miller, 664 A.2d at 1318) (To establish plan, "'a comparison of the crimes must establish a logical connection between them.'"). In Arrington, the defendant was accused of killing his girlfriend, T.D., after she had ended their relationship. Id. at 837-39. Despite strong circumstantial evidence demonstrating,

inter alia, the defendant's abusive relationship with T.D., and that she was with him shortly before her death, the killer's identity was at issue. Id.

The Commonwealth sought to admit testimony from the defendant's former girlfriends regarding his violent behavior towards them as proof of "plan" or, "a demonstrated pattern of conduct that was highly relevant to demonstrating his malice, intent, and motivation in shooting [T.D.] to death." Commonwealth Supreme Court Brief, pg. 25. In framing the issue for this Court, the Commonwealth applied the vague "proof of one tends to prove another" standard from Wable to argue that the "shared similarities" between the crimes proved the defendant's intent and motive as it related to T.D. Id. at 24. While failing to pinpoint the defendant's "plan," the Commonwealth asserted the other-acts evidence was necessary as additional circumstantial evidence to help "place [the defendant's] conduct towards [T.D.] into context and show that it was consistent with defendant's reaction to perceived rejection within a relationship." Id. at 26. Thus, the other acts, combined with the remaining evidence, allowed the jury to infer that the defendant was the shooter. Id.

By the Commonwealth's own admission, its argument was premised on the defendant's conformity, or consistency, with the violent character he exhibited in similar situations. Under the Commonwealth's logic, the general similarities shared between the crimes showed the defendant's disposition to react violently towards

romantic partners when they ended the relationship, which in turn proved his motive to kill T.D. after she ended their relationship, which in turn proved that he was the shooter.[4] The Commonwealth never explained how the other acts proved identity beyond "consistency" with past behavior. It appears, however, the defendant, as the appellant, never fully appreciated this error, and the Court framed its opinion around the Commonwealth's propensity-driven analysis. 86 A.3d at 844-45.

Implicitly adopting the unlinked act theory of plan, similarity short of signature, rather than the defendant's overarching design, is the Court's hallmark leading to the admission of disconnected acts. The confusion between the exceptions is further solidified by the Court's reliance upon modus operandi cases for the principle that under plan, remoteness in time is "inversely proportional to the similarity of the crimes in question." Miller, 664 A.2d at 1319-20 (citing Shively, 424 A.2d at 1259). The Court's reliance on distinguishable principles of law to establish the parameters of the plan exception in Pennsylvania is reflective

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[4] The Commonwealth relied upon the other-acts evidence as proof of two intermediate inferences, plan and motive, leading to proof of the ultimate issue, identity. The Commonwealth's argument as to motive was equally flawed, as other acts are only admissible as proof of motive if there is a "'logical connection' between the other act and the crime at issue which establishes that the 'crime currently being considered grew out of or was in any way caused by the prior set of facts and circumstances.'" Commonwealth v. Ross, 57 A.3d 85, 100 (Pa. Super. 2012) (quoting Commonwealth v. Martin, 387 A.2d 835, 838 (1978)); see also 27 Standard Pennsylvania Practice § 135:236 (2020) (same); e.g., Coles, supra, at 827 (shooting of responding officer grew out of defendant's escape from preceding robbery). Beyond arguing the existence of the same motive in each instance, the Commonwealth failed to present evidence that the prior instances of domestic violence involving former girlfriends provided the defendant with the motive to kill T.D.

of a need for accuracy and clarity. Amicus, therefore, urges this Court to revamp its approach to plan.

C. This Court Should Re-Adopt Shaffner's Linked Act Theory of Plan

The question of adopting the linked act theory versus the unlinked act theory is not one of antiquity versus modernity. The Attorney General of Pennsylvania (A.G.) filed as amicus curiae in the court below criticizing Justice Donohue's dissent in Hicks for relying "on cases dating from 1872 through 1955." Amicus Superior Court Brief, pg. 19, n.8. The A.G. instead urged the Superior Court to follow the "modern approach" to plan, which "should include an offender's opportunistic resort to criminal techniques that succeeded in the past." Id.[5] The

[5] The A.G. defined plan as "a script or playbook of criminal tactics that worked for the offender when committing past crimes." Amicus Superior Court Brief, pg. 19. The Superior Court adopted the A.G.'s language, and further referred to plan as a "predictable pattern." Commonwealth v. Cosby, 224 A.3d 372, 402 (Pa. Super. 2019). This is implicit advocacy for the flawed unlinked act theory. The sole legal commentary on which the A.G. relied in support of its definition described this formulation of plan as "a pattern of conduct, not envisioned by the defendant as a coherent whole, in which he repeatedly achieves similar results by similar methods. These plans could be called 'unlinked' plans." David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529, 547 (1994). Explaining further, "[t]he defendant never pictures all the crimes at once, but rather plans a crime thinking, 'It worked before, I'll try the same plan again.'" Id.

According to Professors Bryden and Park, the A.G.'s proposed standard defies the forbidden character reasoning only if one views "character" as "referring . . . to traits manifesting a general propensity," such as one towards violence. Id. A specific propensity to, for example, "lurk in the back seats of empty cars in shopping centers as a prelude to sexual assaults on the owners, would be too specific to be called a trait of character." Id. Such theoretical nuance, however, ignores how evidence of repeated, similar crimes registers with jurors who generally cannot make such a distinction. Whether one labels plan a "playbook," "pattern," or "script," the inference the evidence seeks from the jury is the same regardless of how one construes character in the abstract – he did it before, therefore, he did it again. Courts and commentators alike have discredited this theory for that very reason. See Section A, infra. Additionally, the A.G. failed to properly contextualize the article's premise regarding unlinked plans, as its authors advocated for the different treatment of

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A.G.'s superficial dismissal of Justice Donohue's reliance on the same cases on which Amicus relies here is indicative of the very problem that Chief Justice Saylor observed in Hicks -- the lax treatment of separate and distinct theories of logical relevance. 156 A.3d at 1138 (Saylor, C.J., concurring).

By urging the Superior Court to adopt the "modern approach" to plan, the A.G. ignored not only the erroneous evolution of the unlinked act theory in Pennsylvania, but also the undeniable effect that the application of this approach has had in practice -- jurors' innate use of similar, but unlinked crimes to draw an impermissible character inference. See State v. Verde, 296 P.3d 673, 682 (Utah 2012), abrogated on other grounds by, State v. Thornton, 391 P.3d 1016 (Utah 2017) (separate acts of inviting teenage males to defendant's home to entice them to be friends "with the motive of exploiting their trust for his sexual gratification" not plan absent overarching design; subtle difference between evidence of general plan to commit similar crimes and general disposition to commit crime "likely to be lost on a jury").

When establishing a clearly-defined, uniform standard for plan, the question for this Court is not what has been used most recently. The question is which theory of logical relevance will most accurately convey to jurors how other-acts

[5]...continue
other-acts evidence in certain types of sex cases. This Court, however, expressly held "that sexual and non-sexual crimes must be treated alike in deciding whether evidence of prior criminal activity should be admitted." Shively, 424 A.2d at 1259-60.

evidence is relevant to prove an ultimate fact at issue without invoking a character-based inference. The answer is the linked act theory. This Court, therefore, should hold that evidence of other crimes is only admissible as proof of plan under Rule 404(b)(2) if the Commonwealth can show that the accused had in mind a preconceived, overarching goal encompassing both the charged and uncharged misconduct. Both crimes must have been contemplated when that goal was conceived, and both crimes must have been integral steps towards accomplishing that goal. See McCormick, supra, § 190.2 (rejecting broad interpretation of plan in favor of narrow definition under which "each crime should be an integral part of an over-arching plan explicitly conceived and executed by the defendant or his confederates").

This Court should adopt a narrow standard for plan for several reasons. First, this standard reflects the Court's original intent in Shaffner to make plan a separate and distinct exception from modus operandi. Second, unlike the unlinked act theory, this standard does not require any similarity analysis, which has led to the frequent conflation of the two exceptions, and to the lax admission of evidence that would not otherwise meet the high, signature-seeking standard for modus operandi. Additionally, the looser similarity analysis as applied to plan is prone to inconsistent rulings given the relative nature of similarity as a concept. See Commonwealth v. Gill, 206 A.3d 459, 468 (Pa. 2019) (noting in "reverse 404(b)"

context that "reasonable minds may differ . . . given the highly subjective nature of whether" two crimes are "sufficiently similar and close enough in time for purposes of admissibility"); see also Ted Sampsell-Jones, Spreigl Evidence: Still Searching for a Principled Rule, 35 Wm. Mitchell L. Rev. 1368, 1391-92 (criticizing unlinked act theory for its subjective inquiry by asking "[i]f a man rapes one woman in Duluth and another in Minneapolis, are the two rapes geographically similar because they both took place in the same state, or are they geographically different because they took place 150 miles apart?")

To that end, absent a similarity analysis, questions of remoteness would no longer be based on a court's subjective determination of the number of similarities present. See, e.g., Miller, 664 A.2d at 1319-20. The question simply becomes whether the defendant contemplated the prior act and the charged offense as parts of a larger, predetermined plan. If not, then the prior act is inadmissible.[6] See Commonwealth v. Bradley, 364 A.2d 944, 946-47 (Pa. Super. 1976) (similar, yet unrelated sexual assaults of mentally disabled boys inadmissible in prosecution for same allegation because prior acts too remote to establish "premeditated plan" to assault the victim); State v. McFarland, 721 S.E.2d 62, 72-73 (W.Va. 2011) (per curiam) (prior sexual assaults demonstrating reliance on specific method of sexual gratification also used in charged offense inadmissible because "no evidence that

[6] The longer the time span between the uncharged and charged misconduct, the harder it is to infer the necessary link. Imwinkelried, supra, § 3:24.

[defendant's] crime in the instant case was part of a common scheme or plan that began several years earlier in California").

Lastly, this narrow definition of true plan does not invite an impermissible inference based on character. Unlike the unlinked act theory, the connection between the uncharged and charged misconduct is not the defendant's disposition to repeatedly commit similar crimes. The connection, instead, is the defendant's preconceived, integrated plan of which each crime is an element or part – whether that is stealing a key to later steal from a safety deposit box, or killing a series of heirs to obtain the family fortune. The inference on which a jury can rely is that "regardless of character, a person who has formulated a plan is more likely to carry out the elements of the plan." McCormick, supra, § 190.2. The exception is necessarily tailored and communicates a clear non-character based purpose for the other-acts evidence.

Although elementary, when the Commonwealth seeks to admit evidence of other acts under either plan, or any other exception, the Court must first identify the ultimate fact at issue. See Leonard, supra, § 9.1. As the case law demonstrates, the Court has not always precisely stated the element for which the other-acts evidence is necessary to prove. Proof of plan is not proof of plan. That the Commonwealth's case is based largely on circumstantial evidence, see Hicks, supra, at 1119, 1128, or that a victim's testimony requires bolstering, see O'Brien,

supra, at 970, are not ultimate, disputed issues properly requiring the admission of other-acts evidence.[7] The necessary question is whether the inference sought by the evidence "bears upon a matter in issue in the case," and whether the evidence makes that inference more or less probable than it would be without it. Commonwealth v. Seiders, 614 A.2d 689, 691 (Pa. 1992).

Upon identifying the ultimate fact at issue, the Court must then ask *how* the other-acts evidence proves that fact. Courts repeatedly fail to analyze how uncharged misconduct is relevant to prove, for example, intent or identity. See Sampsell-Jones, supra, at 1389. "Uncharged misconduct is almost always relevant to identity or intent . . . because the propensity inference itself almost always provides relevance." Id. The crucial question is "whether the uncharged misconduct is relevant in some way that does not rely on propensity." Id. As explained, the linked act theory of plan does not invoke propensity. Its definitive parameters eliminate the genuine risk that defendants will be convicted for who they are, or for what they may or may not have done before.

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[7] See also Anders & Ochoa, supra, § 404.22[4] (doubting viability of logic that a "victim's account is credible because the defendant . . . behaved similarly with others[;]" further commenting that such logic violates Pa.R.E. 404(b)'s non-propensity rule); People v. Engelman, 453 N.W. 2d 656, 665 (Mich. 1990) (holding other-acts evidence inadmissible to corroborate victim's testimony "in cases involving prior acts between the defendant and persons other than the complainant").

D. The Other-Acts Evidence Here Does Not Satisfy the Linked Act Theory of Plan

The other-acts evidence in the instant case was not admissible under the linked act theory. The Commonwealth failed to present any evidence that Appellant had previously conceived in his mind a larger, integrated plan encompassing the recreational use of Quaaludes as a party drug in the 1970s (Trial Ct. Op., pg. 113), the alleged assaults from the 1980s (Trial Ct. Op., pgs. 21-33), and the alleged assault of Andrea Constand in 2004 (Trial Ct. Op., pgs. 1-3). The remoteness of the other-acts evidence suggests that there was no such plan, as there was no indication that Appellant knew of Ms. Constand's existence when he met Jane Doe in the 1970s. See Bradley, supra; Imwinkelried, supra, § 3:24. Untethered to any analysis as to the ultimate fact at issue, the lower court's erroneous focus on the mere existence of similarities between the acts established, at most, the commission of a series of disconnected, similarly-performed acts over an almost thirty-year period in different places. It did not, however, establish proof of Appellant's premeditated, overarching design, as required under the true plan exception to the rule barring propensity evidence.

V. CONCLUSION

For the above reasons, the judgment of the Superior Court should be reversed.

Respectfully submitted,

/S/

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CERTIFICATION OF COMPLIANCE WITH RULE 531

I do hereby certify on this 12th day of August, 2020, that the Brief Of Amicus Curiae filed in the above captioned case on this day does not exceed 7,000 words. Using the word processor used to prepare this document, the word count is 6,998 as counted by Microsoft Word.

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CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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