Received 7/24/2019 7:55:26 PM Superior Court Eastern District

Filed 7/24/2019 7:55:00 PM Superior Court Eastern District
3314 EDA 2018

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 3314 EDA 2018

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

WILLIAM HENRY COSBY, JR.,
Appellant

BRIEF OF AMICUS CURIAE OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA IN SUPPORT OF THE COMMONWEALTH

Appeal from the September 25, 2018 judgment of sentence of the Common Pleas Court of Montgomery County at CP-46-CR-0003932-2016.

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
MICHELLE A. HENRY
First Deputy Attorney General
JENNIFER C. SELBER
Executive Deputy Attorney General
Criminal Law Division
JAMES BARKER
Chief Deputy Attorney General
Appeals & Legal Services Section
HUGH J. BURNS JR.
Senior Appellate Counsel

Office of Attorney General
1600 Arch Street
Philadelphia, PA 19103
(484) 390-5143
hburns@attorneygeneral.gov

TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes:

Rules:

Other Authorities:

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the trial court abuse its discretion in admitting five instances of prior crimes that refuted the sexual assault defendant's consent claim?

(Answered in the negative by the trial court).

INTEREST OF AMICUS CURIAE

The Attorney General of Pennsylvania has a special interest in the ongoing development of the criminal law of the Commonwealth, including the rules of evidence as applied to criminal prosecutions. The Attorney General is "the chief law enforcement officer of the Commonwealth," and is authorized "to investigate any criminal offense which he has the power to prosecute," as well as to "convene and conduct investigating grand juries." 71 Pa.C.S. § 732-206. In addition to directly investigating and prosecuting certain crimes, the Office of the Attorney General provides assistance and support to local District Attorneys upon request. Such assistance may include representation of the Commonwealth in any and all stages of criminal proceedings.

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

Defendant presented himself as a mentor to the victim, a young woman. When they were alone, he persuaded her to take pills that he offered, ostensibly to relax her, but which altered her consciousness and induced paralysis. He then exploited the victim's helpless condition to sexually molest her. Later, when he was confronted with his conduct by the police and was sued in court, he claimed the victim consented. On appeal from his conviction on sexual assault charges, defendant claims (inter alia) that the trial court abused its discretion in admitting five of his prior crimes that were relevant to rebut his consent defense. Because the trial court's ruling is well supported by long-established law, defendant cannot not meet his heavy burden of establishing an abuse of discretion.

A.C., a former professional basketball player, met defendant in 2002 while she was working as Director of Basketball Operations at Temple University. After they were acquainted she became used to visiting defendant's home in Montgomery County. She regarded him as a mentor. As a celebrity in the entertainment industry, defendant indicated he could help her in such areas as "sportscasting or something in T.V." He also cultivated a relationship with her mother. At the time of the January 2004 sexual assault she was 30 years old and defendant was 66. On the night of the assault defendant invited A.C. over to discuss her planned career change, which she was finding stressful. After the victim returned from the bathroom defendant offered

her three blue pills, telling her "These are your friends. They'll help take the edge off." Soon after taking the pills she began to experience double vision and began to slur her words. Defendant walked her to another room and put her on a sofa. The victim began to panic but was unable to speak or maintain consciousness. She was jolted awake when defendant forced his fingers into her vagina. He also fondled her breasts and placed her hand on his penis and masturbated himself with it. Paralyzed and unable to move or speak, A.C. was powerless to tell him to stop or physically resist the assault. In a later statement to police, defendant admitted giving the victim pills and also admitted to the sexual contact but claimed it was "petting" by mutual consent. In a subsequent deposition he gave in a civil lawsuit, defendant admitted digitally penetrating A.C.'s vagina. He also discussed his use of Quaaludes with women he wanted to have sex with, but claimed the pills he gave A.C. were Benadryl (an over-the-counter allergen), and again claimed his sexual conduct with her was consensual.

Defendant was charged with three counts of aggravated indecent assault. At his April 2018 retrial[1] before the Honorable Steven T. O'Neill, the court admitted testimony concerning five prior crimes:

[1] A mistrial occurred in June 2017 because the jury deadlocked.

1. H.T. testified that in 1984 she was 22 years old and working as a model. Her agent told her that defendant was interested in mentoring young talent and had offered to assist her. After defendant spoke to H.T.'s parents on the phone she travelled to Reno, Nevada, where she was to meet with him at Harrah's. Instead a driver met H.T. at the airport and took her to a house outside of town, where defendant answered the door. Defendant then led H.T. through a purported acting lesson. At some point he left and returned with a glass of white wine. Although H.T. said she did not drink he instructed her it was a "prop" and to sip it to get into character. After doing so, H.T. suffered an altered mental state in which she could only recall "snap shots" of what happened. She recalled defendant asking if she was relaxing into the part, and then waking up in a bed with defendant forcing his penis into her mouth. She did not immediately confront him or contact the police, but eventually described the assault to a psychologist and to her husband.[2]

2. C.L. was 17 years old and attending high school in Las Vegas, Nevada, when she was put in touch with defendant in 1986. Defendant called C.L.'s home

[2] As discussed in part 3 below, that the prior crimes occurred in the 1980s does not establish an abuse of discretion in admitting them. Remoteness in time is only one "factor to be considered," and even a large time lapse may be considered "minimal" where, as here, the offenses are highly similar and amount to "a recurring sequence … as opposed to random and remote acts." *Commonwealth v. Smith*, 635 A.2d 1086, 1189-1190 (Pa. 1993) (prior crimes up to 20 years old admissible).

and spoke to her grandmother, and told C.L. he was interested in helping her with her planned career in acting and modeling. The first time she met defendant in person he came to her grandparents' home for a meal. C.L. graduated that same year and worked at the Las Vegas Hilton. Defendant invited her to meet with him in his room, the Elvis Presley Suite. C.L. understood that defendant was meeting with her to help her break into modeling. C.L. had a cold, and when they were alone defendant offered her a decongestant, then a shot of amaretto, and also a little blue pill, which she ingested, with a second shot of amaretto. As defendant sat behind C.L. and began to rub her shoulders, she felt woozy and said she wanted to lie down. He led her to a bedroom, and after lying on the bed she found she was no longer able to move. She was aware of what was happening but could do nothing to stop it. Defendant lay down next to her and began pinching her breasts and rubbing his genitals against her leg. She felt something warm on her leg. She next recalled defendant clapping to wake her, at which point she was wearing only her shorts and a Hilton robe. Her top was folded neatly on a table along with money; defendant told her to hurry and get dressed and to use the money to buy something nice for herself and her grandmother. C.L. reported the sexual assault to the police in 2014.

3. J.B. was a 24-year-old bartender at Harrah's Casino in Reno in 1982 when one of the cocktail waitresses invited her to a pizza party hosted by defendant. J.B. had met several other itinerant celebrities and had attended a party at Wayne

Newton's house, and knew that defendant was staying at a Harrah's-owned house outside of town. Defendant answered the door, and J.B. was surprised to find that she and her friend were the only guests. At some point defendant offered J.B. two pills that she thought he said were Quaaludes. She thought defendant was offering a mood-enhancing party drug rather than something that would render her unconscious. After ingesting them she became dizzy, her vision blurred, and she passed out. She awakened and could hear her friend leaving, and found that her shirt was unbuttoned and her pants were unzipped. Defendant sat down with her and put his hand inside her shirt and fondled her, then moved his hand toward her pants, but she was unable to move. She recalled defendant helping her into a bed and later waking up in the bed with him while they were both naked. She had a sticky wetness between her legs that she knew indicated they had sex, but she could not remember it. As she dressed to leave defendant told her it was just between them and that she should not tell anyone. Within days of the assault J.B. told her sister, her roommate and one of her friends what had happened.

4. J.D. was 27 years old in 1982, and was working as a model. Defendant contacted her agency and arranged for her to meet him, along with her manager, in his townhouse in New York City. She was told that defendant mentored people and had taken an interest in her. They discussed her potential acting and singing career. Later, while she was working in Bali, defendant contacted her and arranged for her

to meet him in Reno concerning her acting ambitions. During dinner she complained of menstrual cramps and defendant offered her a small blue pill which she ingested. Later, at defendant's hotel room, she felt very lightheaded and could not get her words to come out. She subsequently recalled defendant getting on top of her and feeling vaginal pain as he penetrated her. J.D. woke up in her own room, with semen between her legs and anal pain. When she confronted defendant he would not answer her. She did not report the assault to the police because she was afraid it would damage her career. Years later, in 2002, she attempted to describe defendant's attack in her memoir but for legal reasons her publisher prevented it. In 2010 she disclosed the assault to physician Drew Pinsky, M.D., and also to a hairdresser and makeup artist during her participation in a television production, "celebrity rehab," but her disclosures were not broadcast.

5. M.L. was working as a 23-year-old model in Las Vegas in 1989 when her agency told her defendant wanted to meet her. He offered to send her photos to a New York agency, and he later cultivated a relationship with her family. M.L. thought of defendant as a father figure or mentor. Later, defendant invited her to his suite at the Las Vegas Hilton, where he began talking to her about improvisation and acting. He poured her a shot, telling her to drink it in order to relax. She said she did not drink but defendant insisted, and also persuaded her to drink another. M.L. became dizzy and woozy and her hearing became muffled. She agreed to sit between

defendant's knees on the couch and he began stroking her hair. She woke up in her home two days later, with no further memories of what had occurred, but thereafter felt uncomfortable in defendant's presence.

The trial court found that these prior crimes established a distinct pattern of conduct: (1) the prior offenses involve a physically fit victim much younger than defendant; (2) defendant initiated contact with each woman through, or in relation to, her employment; (3) defendant sought to establish trust through his celebrity status, contact with the victim's family, and mentoring potential; (4) defendant acted when the victim was present in a place in his control; (5) defendant offered drugs and intoxicants and when necessary insisted that the victim ingest them; (6) each victim after ingesting the offered substances was subjected to altered or lost consciousness, memory loss, and incapacitation; (7) defendant sexually assaulted the victim after she was rendered helpless by the drugs he administered.[3]

The court validly concluded that defendant's criminal pattern was sufficiently distinctive to constitute a "signature," but the most compelling reason for admitting

[3] The inference that defendant sexually assaulted M.L. is supported by the totality of the circumstances. After he gave the victim an unknown substance she lost consciousness while isolated with him in his hotel suite, and while she had no conscious memory after that point, she subsequently felt uncomfortable in his presence. Alternately, that defendant put M.L. in a position to be sexually assaulted, but for some reason failed to complete the act, would still constitute criminal attempt under 18 Pa.C.S. § 901.

this evidence is its relevance to refute his consent claim. As shown below, rebuttal of defenses is a clear and well-established basis for admitting other crimes evidence; and the effectiveness of the rebuttal is enhanced by a pattern of similar crimes indicative of a common, conscious design. The trial court, therefore, did not abuse its discretion.

SUMMARY OF ARGUMENT

Consistent rulings of this Court and the Supreme Court hold that other crimes evidence is admissible to rebut a defense, including (as here) a defense of consent to a charge of sexual assault. The relevance of such rebuttal evidence is enhanced where (again, as here) the other crimes establish a distinct pattern and reveal a common, conscious plan. Common plan evidence includes crimes showing that the offender applied a series of criminal tactics that worked for him in the past.

Here, the defendant targeted victims in connection with their employment, often posing as a mentor. He induced them to ingest drugs and/or other intoxicants of his selection. This rendered them helpless while they were in an isolated location in his control. They experienced severe memory loss and intermittent loss of consciousness, and were deprived the ability to cry out or physically resist the sexual assaults. Under the Supreme Court's decision in *Commonwealth v. Gordon*, because this case pitted the victim's otherwise-uncorroborated credibility against that of a popular, internationally-known celebrity entertainer, evidence of his relevant pattern of prior criminal conduct to rebut his consent claim was clearly admissible.

Given the highly deferential standard of review that applies to evidentiary rulings, this is not a close case. The defendant has not met his "heavy burden" of establishing an abuse of discretion.

ARGUMENT

Other crimes evidence was properly admitted to rebut a defense of consent to charges of sexual assault.

Evidence of other crimes is inadmissible to prove bad character in the form of criminal propensity, but is admissible when "relevant to prove something *other* than the defendant's propensity for committing crimes." *Commonwealth v. Claypool*, 508 Pa. 198, 204, 495 A.2d 176, 178 (Pa. 1985) (original emphasis).[4] The enumerated exceptions to the general rule are "neither mutually exclusive nor collectively exhaustive," 1 McCormick, *Evidence* § 190 (7th ed.),[5] because there is no limit to the ways in which such evidence can be relevant to prove something other than propensity.

On appeal, the evidentiary issue here is not a close call. As recently explained by the Supreme Court in *Commonwealth v. Gill*, 206 A.3d 459, 466-467 (Pa. 2019) with regard to the admission of other crimes evidence, "[w]hen a [trial] court comes

[4] *Commonwealth v. Dean*, 693 A.2d 1360, 1366 (Pa. Super. 1997) ("admissible if relevant to prove something other than a defendant's propensity to commit crimes"); Pa.R.E. 404(b)(1)-(2) (other crimes "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" but "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan," *etc.*).

[5] *Commonwealth v. Lark*, 543 A.2d 491, 497 (Pa. 1988) (list "is not exhaustive"); Pa.R.E. 404, *comment* (list of proper purposes for admitting other crimes evidence is "non-exhaustive").

to a conclusion through the exercise of its discretion, there is a heavy burden [on the appellant] to show that this discretion has been abused," and "to overcome this heavy burden, the appellant must demonstrate that the trial court actually abused its discretionary power." That requires the defendant to show that the trial court "reached a conclusion which overrides or misapplies the law" or "is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." Absent an abuse of discretion "an appellate court should not disturb a trial court's discretionary ruling." *Id*. (citations omitted). Here the evidence established a distinct pattern of criminal conduct that was relevant to rebut a defense of consent. Because well-established case law supports the trial court's ruling, there was no abuse of discretion.

1. Other crimes are admissible to rebut a defense.

The other crimes evidence was relevant to rebut the defendant's claim of consent. Rebutting defenses has long been an established and valid purpose for such evidence.

This Court *en banc* applied the rebuttal rationale in *Commonwealth v. Barger*, 743 A.2d 477 (Pa. Super. 1999) (*en banc*), where the defense attacked the credibility of the victim by arguing that she failed to raise a prompt complaint. The *en banc* panel ruled that evidence of Barger's history of physically abusive conduct towards

the victim and her mother was admissible because the other crimes intimidated the victim into silence. The evidence was not offered to prove propensity, but "was relevant insofar as it pertained to the victim's failure to promptly report the crimes," which rebutted the defense attack on the credibility of the victim. 743 A.2d at 480-481.

The Supreme Court upheld and cited *Barger* with approval in a case with similar facts, *Commonwealth v. Dillon*, 925 A.2d 131 (Pa. 2007). The Court remarked on the "basic relevance" of evidence of other crimes to address a potential challenge to the victim's credibility, where the victim did not promptly complain of sexual abuse due to Dillon's intimidating physical abuse of her family members. Indeed, the Supreme Court explained that such evidence could not be restricted to rebuttal, but was admissible in the Commonwealth's case-in-chief, because the victim's credibility would constitute an implicit defense in the minds of the jurors. The Court applied the same reasoning in *Commonwealth v. Boczkowski*, 846 A.2d 75, 87-89 (Pa. 2004), holding that the "the remarkable similarity between the manner in which both of appellant's wives were killed" was admissible to rebut a potential claim of accident and prove that the victim's death "was a result of appellant's deliberate act."

Admitting other crimes to rebut defenses is a staple of Pennsylvania evidence jurisprudence. In *Commonwealth v. Billa*, 555 A.2d 835, 840 (Pa. 1989), a capital

case, the Supreme Court held that evidence of Billa's prior violent sexual assault against another female victim was admissible "to refute appellant's assertion that the victim's death was an accident inadvertently caused during the struggle for the knife." In *Commonwealth v. Hicks*, 156 A.3d 1114, 1128-1129 (Pa. 2017), the plurality upheld admitting Hicks' prior violent attacks on other female victims to rebut his claim that his current victim died from an accidental overdose.[6]

---

[6] *Hicks* is properly understood as a majority ruling when it comes to admitting other crimes evidence to rebut a defense. While Chief Justice Saylor did not join the lead opinion of three Justices, the lead opinion was focused on the question of whether the other crimes evidence amounted to a "signature crime"—a requirement that makes sense only when the identity of the perpetrator is in issue. 156 A.3d at 1130-1131. The Chief Justice explained that the issue of admissibility to rebut a defense was easier to resolve, and more directly supported the trial court's ruling:

> The sole defense was a claim to the possibility of what the defense dubbed as "drug dumping," i.e., that Appellant may have panicked when the victim purportedly died of an accidental drug overdose, and that he therefore decided to covertly dispose of her body. Id. Consequently, a main focus at trial was whether various injuries to the victim were pre-mortem or post-mortem (i.e., intentionally inflicted while Deanna Null was alive or incurred incident to the dismemberment and disposal of her body).
>
> Given this critical aspect of the case, the central relevance at trial of the evidence of Appellant's other assaults upon women went toward negating his defense that the death was an accident. […] This focus clearly enhanced the Commonwealth's claims of relevancy of and necessity for the evidence. Significantly, moreover, the logical relevance of other-bad-acts evidence—so employed to demonstrate lack of accident—does not depend on as great a degree of similarity, as between the charged and uncharged misconduct, as is the case under the modus operandi theory.

Numerous cases confirm that other crimes may be admitted to rebut a defense. *E.g.*, *Commonwealth v. Bracey*, 662 A.2d 1062, 1069-1070 (Pa. 1995) (other crimes relevant to rebut claim that Bracey shot police officer out of fear); *Commonwealth v. Ragan*, 645 A.2d 811, 820 (Pa. 1994) (other crimes relevant to show alibi witness was biased because she harbored Ragan despite knowing he was a fugitive); *Commonwealth v. Gelber*, 594 A.2d 672, 680 (Pa. Super. 1991) (other crimes relevant to rebut self-defense by showing motive for shooting was to get cocaine); *Commonwealth v. Rozanski*, 433 A.2d 1382, 1387–1388 (Pa. Super. 1981) (evidence that Rozanski had threatened to blow up a church for purposes of extortion admissible to rebut his claim that he was merely asking the current victim for a handout).[7] For this reason alone, the trial court did not abuse its discretion in admitting the disputed evidence.

---

156 A.3d at 1131-1132, citations and footnotes omitted.

Reading the lead opinion together with Chief Justice Saylor's concurrence, therefore, *Hicks* represents a four-Justice majority reaffirmation of the rule that other crimes may be admitted to rebut a defense.

[7] *Commonwealth v. Weiss*, 81 A.3d 767, 799 (Pa. 2013) (comment by witness that her prior inconsistent statement resulted because appellant "had just beaten up her mother and her" was "a proper response" to defense attempt to undermine her credibility); *Commonwealth v. Boczkowski*, 846 A.2d 75, 89 (Pa. 2004) ("the defendant does not have to actually forward a formal defense of accident, or even present an argument along those lines, before the Commonwealth may have a practical need" to use other crimes evidence "to exclude the theory of accidental death"); *Commonwealth v. Sparks*, 492 A.2d 720, 722 (Pa. Super. 1985) ("the

2. The evidence established a relevant criminal pattern.

Other crimes that establish a distinct pattern may be relevant to prove "motive, intent, or plan." *Commonwealth v. Arrington*, 86 A.3d 831, 842 (Pa. 2014); *see Commonwealth v. O'Brien*, 836 A.2d 966, 970 (Pa. Super. 2003) (in cases where "signature" level of similarity was required "the relevance of that evidence was to be used to identify the perpetrator, while here the admission of the evidence of the prior crimes was relevant to establish a common scheme, plan or design and, thus, bolster the victim's credibility").

Commonwealth needed to introduce the [other crimes] evidence to rebut the [defense] assertion of lack of knowledge or intent"); *Commonwealth v. Travaglia*, 467 A.2d 288, 297 (Pa. 1983) (other crimes evidence admissible to rebut "the theory that the shooting of Officer Miller was an accident, that Travaglia's finger had slipped from the gun's hammer," which would otherwise "be hard to refute"); *Commonwealth v. Wright*, 454 A.2d 122, 125 (Pa. Super. 1982) (other crimes evidence "properly admitted on rebuttal" because "material to the resolution of the apparent conflict" between Wright's alibi testimony and that of prosecution witness identifying him); *Commonwealth v. Styles*, 431 A.2d 978, 980 (Pa. 1981) (other crimes evidence admissible "to rebut [appellant's] claim that the shotgun discharged accidentally"). In *Commonwealth v. Roots*, 306 A.2d 873 (Pa. 1973), Roots claimed she stabbed the victim in self-defense. As she told it, he attacked her because she was a witness to his robbery of a hotel and had tried to help the clerk. The Commonwealth, however, introduced evidence that Roots was the lookout in that robbery, which was not committed by the murder victim, but by someone else who was Roots' accomplice. The Supreme Court held that Roots' claim in her statement "that she killed in self-defense when the decedent threatened to kill her for reporting his involvement in a robbery" made it "entirely appropriate" to allow evidence of her other offense "to show that the decedent was not a robber and that appellant was not a good Samaritan." 306 A.2d at 875-876.

Where there is more than one basis for admitting evidence, the effect is synergistic: a pattern of distinctive criminal conduct adds weight to the rebuttal value of the evidence. In *Commonwealth v. Rozanski*, this Court reasoned that the other crimes evidence, admitted to rebut Rozanski's claim that his extortion demand was really just a request for charity, had greater weight "given the similarity in appellant's methods." 433 A.2d at 1388 ("the tape recording showed appellant threatening to 'blow your church right up;' Segal testified that appellant threatened to 'blow your home up with you in it'") (citation omitted, internal quotation marks modified). Similarly, in *Commonwealth v. Gordon*, 673 A.2d 866 (Pa. 1996), an attorney was charged with indecent assault of a client, and the Commonwealth sought to introduce similar assaults. The pattern included that each victim was alone with Gordon, emotionally vulnerable, and afraid to report the sexual misconduct due to his ability as counsel to do harm to her case. The Supreme Court concluded that that this evidence established a common scheme, and also served to rebut Gordon's claim that the victim was fabricating the assault. 673 A.2d at 870.

A distinct pattern does not require outlandish or bizarre criminal conduct, nor does it demand proof that the conduct was part of a greater master plan. Rather, what is essential is that the similarities "are not confined to insignificant details that would likely be common elements regardless of who had committed the crimes." *Commonwealth v. Hughes*, 555 A.2d 1264, 1283 (Pa. 1989). A criminal "plan" may

be analogized to a script or playbook of criminal tactics that worked for the offender when committing past crimes. [8]

[8] The dissent in *Hicks* argued that appellate decisions of this Court and the Supreme Court over the last 65 years are collectively wrong, and that other crimes should never be admitted to prove a "plan" unless each individual crime was specifically "contemplated by the [accused] as parts of one plan in his mind." 156 A.3d at 1144 (dissenting opinion). That, however, was the view of only two of seven Justices, and it notably relied on cases dating from 1872 through 1955. The modern approach recognizes that a "plan" should include an offender's opportunistic resort to criminal techniques that succeeded in the past:

> The concept "plan," and its frequent companion "common scheme," sometimes refers to 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. The defendant never pictures all the crimes at once, but rather plans a crime thinking, "It worked before, I'll try the same plan again." Some commentators have criticized courts for admitting such "spurious plan" evidence. In a California acquaintance rape case, for example, the court described "common scheme or plan" as merely an unacceptable euphemism for "disposition."
>
> Yet this concept of "plan" is a textually plausible interpretation of the rule against character reasoning. One could construe the concept of "character" as referring only to traits manifesting a general propensity, such as a propensity toward violence or dishonesty. Under this interpretation, a situationally specific propensity, such as a propensity to 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. The probative value of the evidence is, of course, enhanced by the situational similarity.

David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529, 546–48 (1994) (footnotes omitted).

On point is a rape case decided by this Court *en banc*, *Commonwealth v. Tyson*, 119 A.3d 353 (Pa. Super. 2015) (*en banc*). There, as here, "the key issue for the factfinder" was "whether [the vitctim] consented." This Court noted that the current crime followed a pattern or plan established by Tyson's other offenses. Among other factors, he "was aware that each victim was in a weakened or compromised state," each victim "ultimately lost consciousness," and while thus incapacitated was unable to resist or consent to the sexual assault. Such evidence was probative because it tended "to increase the probability that Appellee knowingly had non-consensual sex with [the victim] in the present case." In addition to being relevant to rebut the consent defense, the similarity between the offenses was sufficient to show that they were not merely "of the same general class," or that Tyson merely "sexually assaulted two different women or that [his] actions are generically common to many sexual assault cases." *Tyson*, 119 A.3d at 357-360.

Here the evidence is stronger than in *Tyson*. Defendant's plan was to exploit the victims' trust in his mentor or celebrity status in order to drug them, inducing a state of helplessness that enabled the older defendant to sexually assault a much younger woman.

In *Commonwealth v. Arrington*, decided by the Supreme Court the year before *Tyson*, murder charges were properly supported by prior violent assaults by the appellant against three former girlfriends when they tried to break off their romantic

relationship. The Supreme Court held that the evidence was sufficient to establish a "distinct behavioral pattern" where Arrington: "(1) monitored his girlfriend's daily activities; (2) resorted to violence when his partner wanted to end a relationship or interacted with other men; (3) inflicted head or neck injuries with his fist, a handgun, or an edged weapon; and (4) harmed or threatened to harm members of his girlfriend's family or male acquaintances that he viewed as romantic rivals." 86 A.3d at 844 (footnote omitted). The Supreme Court cited with approval this Court's decision in *Commonwealth v. Einhorn*, 911 A.2d 960 (Pa. Super. 2006) (attacks on former girlfriends admissible where each was choked or attacked with a blunt object when she refused to continue a relationship with appellant), as well as *Commonwealth v. Miller*, 664 A.2d 1310 (Pa. 1995) ("logical connection" between current rape-murder and two prior rapes established by similar manner of commission), and *Commonwealth v. May*, 656 A.2d 1335, 1341 (Pa. 1995) (prior victims physically similar, attacks were of similar nature, and body of current victim was found close to where May left other assault victims).

Here the other crimes evidence was especially admissible because defendant's pattern of prior crimes lent greater weight to their ability to refute his consent claim. This mutually-reinforcing combination of common plan and rebuttal theories is not uncommon, and confirms the validity of the trial court's ruling. *E.g.*, *People v. Jones,* 311 P.3d 274, 279 (Co. 2013) (other crimes relevant to show "common plan, scheme,

or design, and to rebut [Jones's] defense of consent"); *Casey v. State*, 215 S.W.3d 870, 881 (Tex. Crim. App. 2007) (prior crimes where offender drugged and photographed victims relevant to rebut defense theory that victim initiated the sexual activity and consented to being photographed); *Williams v. State*, 621 So. 2d 413, 417 (Fla. 1993) (where accused claimed victim consented to sex to obtain drugs, evidence of his other similar crimes admissible because they "tended to rebut the defense by showing a common plan or scheme to seek out and isolate victims likely not to complain or to complain unsuccessfully because of the circumstances surrounding the assaults"); *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988) ("Although identity is not at issue here, we think that Plaster's modus operandi also tends to rebut his consent defense"); *State v. DeBaere*, 356 N.W.2d 301, 305 (Minn. 1984) (other crimes evidence "showed a pattern of similar aggressive sexual behavior by defendant against other women in the community" and so was "highly relevant to the issue of consent"); *Youngblood v. Sullivan*, 628 P.2d 400, 402 (Or. 1981) ("Even though modus operandi is usually used to establish identity … we conclude the evidence is admissible here to show a modus operandi which rebuts the defense of consent") (citation omitted).

In this case, the trial court found that defendant's prior crimes established a distinct pattern or plan of criminal conduct. In particular, defendant targeted victims in connection with their employment, often posing as a mentor. He induced them to

ingest drugs and/or other intoxicants of his selection. This rendered them helpless while they were in an isolated location in his control. They experienced severe memory loss, intermittent loss of consciousness, and were deprived the ability to cry out or physically resist the sexual assaults. They often did not confront defendant or report the attacks for fear of professional harm. The court held that this evidence was relevant and admissible to rebut the claim that the instant victim, whom defendant sexually assaulted using the same pattern of conduct, consented. That was a proper exercise of discretion.[9]

[9] Finally, the evidence was admissible under the concept Chief Justice Saylor referenced in his concurring opinion in *Hicks* as the "doctrine of chances." *See also Commonwealth v. Donahue*, 549 A.2d 121, 125-127 (Pa. 1988) (opinion announcing the judgment of the court) (discussing same doctrine). Because this topic is addressed by the parties it will not be discussed here, except to note that its only novelty is its title. The "doctrine of chances" is an aspect of relevance. Other crimes evidence that "has any tendency to make a fact"—a common plan, for example—"more … probable," Pa.R.E. 401, is admissible if the "fact" is "something other than a defendant's propensity to commit crimes." *Commonwealth v. Dean*, 693 A.2d at 1366. The "doctrine of chances" merely acknowledges the common-sense conclusion that multiple offenses committed by the same offender with similar methods imply a common, conscious design. This is an expression of already-well-established principles.

3. The trial court avoided improper prejudice.

Admitting other crimes requires that "the probative value of the evidence outweighs its potential for unfair prejudice." Pa.R.E. 404(b)(2). The key word is "unfair." As the Supreme Court emphasized in *Gordon*, "Without doubt, the other crimes evidence would be prejudicial to Gordon. That is what it is designed to be." 673 A.2d at 870.

"[U]nfair prejudice is defined as a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." *Commonwealth v. Jemison*, 98 A.3d 1254, 1262 (Pa. 2014) (internal quotation marks omitted). Evidence is "not unduly prejudicial merely because it [is] damaging to [the defendant's] case." *Commonwealth v. Fisher*, 769 A.2d 1116, 1128 (Pa. 2001). Further, "[w]hether relevant evidence is unduly prejudicial is a function in part of the degree to which it is necessary to prove the case of the opposing party." *Gordon, id*. In that case the Supreme Court held that the other crimes evidence was proper because the victim's "uncorroborated testimony … might reasonably lead a jury to determine that there was a reasonable doubt," making the evidence "necessary for the prosecution of the case." *Id*.

The reasoning of *Gordon* is clearly applicable here. Since the victim's otherwise-uncorroborated credibility was pitted against that of a defendant who was

a popular, internationally-known celebrity entertainer, evidence of his relevant pattern of prior criminal conduct to rebut his consent claim was not a prosecutorial convenience, but a necessity. The cases make clear that the potential for improper prejudice is outweighed where the disputed evidence has a proper purpose. *Commonwealth v. Dillon*, 925 A.2d 131, 141 (Pa. 2007) (even where "extremely grotesque and highly prejudicial," other crimes evidence admissible when relevant to a proper purpose); *Commonwealth v. McCutchen*, 454 A.2d 547, 549 (Pa. 1982) ("the value of this evidence ... fully compensates for any likelihood that [it] may inflame the passions of the jury"); *Commonealth v. Weakley*, 972 A.2d 1182, 1191 (Pa. Super. 2009) (potential for improper prejudice "is mitigated where, as here, the focal point of the evidence is the precise criminal method used").

The sequence of other crimes admitted here ended in 1989, while the present offense occurred in January 2004, a gap of 15 years. But "remoteness in time" is only one "factor to be considered." *Commonwealth v. Tyson*, 119 A.3d at 359; *see Commonwealth v. Aikens*, 990 A.2d 1181, 1185 (Pa. Super. 2010) (15 year old prior sexual assault not too remote); *Commonwealth v. Smith*, 635 A.2d 1086, 1189-1190 (Pa. 1993) (prior crimes up to 20 years old admissible); *Commonwealth v. Luktisch*, 680 A.2d 877, 878 (Pa. Super. 1996) (14 year old offense); *Commonwealth v. Odum*, 584 A.2d 953 (Pa. Super. 1990) (10 years); *Commonwealth v. Patskin*, 93 A.2d 704 (Pa. 1953) (17 years). In the discretion of the trial court, even a large time lapse may

be considered "minimal" where, as here, the offenses are highly similar, and amount to "a recurring sequence of acts … over a continuous span of time, as opposed to random and remote acts." *Smith*, 635 A.2d at 1090. Here, where the defendant was executing a highly consistent plan he had practiced for many years, the age of the prior offenses did not impede their admission.

Finally, it is notable that Judge O'Neill repeatedly instructed the jurors, throughout the trial, that the other crimes evidence could be considered only for the limited purpose defined by the court, and could not be regarded as proving criminal tendencies or bad character. "Any possibility of unfair prejudice is greatly mitigated by the use of proper cautionary instructions to the jury[.]" *Commonwealth v. Jemison*, 98 A.3d at 1262. The presumption that jurors follow such instructions is "[a] pillar of our system of trial by jury." *Commonwealth v. Means*, 773 A.2d 143, 157 (Pa. 2001).

In short, the defendant's "heavy burden," *Commonwealth v. Gill*, 206 A.3d at 466-467, has not been surmounted. There was no abuse of discretion.

CONCLUSION

For these reasons, this Court should affirm the judgment of sentence.

Respectfully submitted,

/s/ Hugh Burns

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
MICHELLE A. HENRY
First Deputy Attorney General
JENNIFER C. SELBER
Executive Deputy Attorney General
Criminal Law Division
JAMES BARKER
Chief Deputy Attorney General
Appeals & Legal Services Section
HUGH J. BURNS JR.
Senior Appellate Counsel

Office of Attorney General
1600 Arch Street
Philadelphia, PA 19103
(484) 390-5143
hburns@attorneygeneral.gov

CERTIFICATE OF COMPLIANCE WITH RULE 531

This amicus brief complies with Pa. R. App. P. 531(b)(3), as it contains fewer than 7,000 words.

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*, which require that confidential information and documents be filed differently than non-confidential information and documents.

HUGH J. BURNS JR.
Senior Appellate Counsel

Office of Attorney General
1600 Arch Street
Philadelphia, Pennsylvania 191013
(484) 390-5143
hburns@attorneygeneral.gov