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3314 EDA 2018

IN THE SUPERIOR COURT OF PENNSYLVANIA
FOR THE EASTERN DISTRICT

NO. 3314 EDA 2018

COMMONWEALTH OF PENNSYLVANIA,
Appellee

VS.

WILLIAM H. COSBY, JR.,
Appellant

REPLY OF APPELLANT

Appeal of William H. Cosby, Jr., from the denial of Post-Sentence Motions on October 23, 2018, by the Honorable Steven T. O'Neill, Judge, Court of Common Pleas, Montgomery County

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REPLY TO COMMONWEALTH'S AND AMICI'S ARGUMENTS

A. COSBY IS ENTITLED TO A NEW TRIAL WHERE THE TRIAL COURT ABUSED ITS DISCRETION IN ERRONEOUSLY ADMITTING THE TESTIMONY OF FIVE WOMEN (AND A DE FACTO SIXTH WOMAN VIA DEPOSITION) WHOSE TESTIMONY LACKED ANY STRIKING SIMILARITIES OR CLOSE FACTUAL NEXUS AS REQUIRED UNDER PA.R.EVID. 404(b)[1].

1. INTRODUCTION

At trial, the lower court permitted the Commonwealth to introduce the testimony of six women entirely foreign to this action, with the sole purpose of negatively coloring the jury's perception of Cosby. The Commonwealth endorses the lower court's error, alleging that the five 404(b) witnesses who testified at trial, and the testimony relating to a sixth 404(b) witness, were relevant and admissible as a common scheme, plan, or design and to demonstrate an absence of mistake. The Commonwealth is wrong. The five 404(b) witnesses were

[1] This reply brief will address the Commonwealth's arguments regarding the admission of the 404(b) witnesses (App. Br. Issue A). Cosby stands by his Primary Brief for all remaining issues

inconsistent in their allegations, remote in time, and used solely as a mechanism to promote hysteria.

Furthermore, the lower court's decision to admit the witnesses' testimony lacked such support in fact and in law as to ostensibly compel Amici to step in and voice their opinions. Despite the number of briefs that may be written in support of the lower court's decision, the lower court's decision cannot withstand scrutiny.

2. THE STANDARD OF REVIEW DOES NOT COMPEL AFFIRMANCE.

The Commonwealth mischaracterizes Cosby's stated standard of review regarding the admission of the 404(b) witnesses [See, App. Br. Issue A], inaccurately asserting that Cosby relied upon a "clearly erroneously" standard. [See, Comm Br. p. 76, fn 18]. As clearly set forth in the Primary Brief, the applicable standard of review for this issue is whether the lower court abused its discretion. [See App. Br. p. 7]. Cosby recognizes that this standard places "a heavy burden [on the

appellant] to show that this discretion has been abused." ***Commonwealth v. Norton***, 201 A.3d 112, 120 (Pa. 2019). The lower court's decision, however, must be made in accordance with the law and must be supported by the facts of Record. As the ***Norton*** Court commented, an abuse of discretion "exists where the [trial] court has reached a conclusion which overrides or misapplies the law . . ." ***Id.*** at 120.

Here, the lower court, at a minimum, misapplied, or more egregiously, overrode, the law in its decision regarding the 404(b) witnesses. As fully demonstrated in Cosby's Primary Brief, the lower court's decision on this issue is not supported by either the law or the facts of Record.

3. THE COMMONWEALTH'S AND AMICI'S BRIEFS IGNORE THE LAW.

The Commonwealth and Amici repeatedly assert that the remote allegations of uncharged misconduct are "strikingly similar" to the facts surrounding the offenses for which Cosby was on trial. The Commonwealth goes as far as to characterize it as a

"unique" scheme. [See Comm. Br. p. 42]. The Commonwealth and Amici assert this "unique" scheme derives from the allegations that: (1) the women were younger than Cosby; (2) the women were alone with Cosby during the alleged incidents; (3) the women were given intoxicants; and (4) the women were sexually assaulted. This series of alleged conduct does not create a signature.

As the Supreme Court has repeatedly cautioned, the mere repeated commission of crimes of the same class does not establish a signature "*so nearly identical in method*" to be admissible for common scheme. ***See Commonwealth v. Rush***, 646 A.2d 557, 560-561 (Pa. 1994)(quoting ***McCormick on Evidence***, § 190 at 449 (2d. Ed. 1972)(emphasis added)). As the ***Rush*** Court observed, "The device used must be so unusual and distinctive as to be like a signature." ***Id***. The facts involving the crime for which the accused is on trial and the "other acts evidence" must "share a method so distinctive and circumstances so nearly identical as to constitute the virtual signature of the

defendant." ***Commonwealth v. Weakley***, 972 A.2d 1182, 1189 (Pa.Super. 2009)(citations omitted).

There is nothing unique or "signature-like" about the facts relied upon by the Commonwealth and Amici. The news is littered with cases of allegations against older men having an inappropriate sexual relationship with a younger woman with whom they work with or met through work. Regrettably, the facts relied upon by the Commonwealth involve a scenario that is all too common.

The Commonwealth dismisses as "inconsequential distinctions" the substantial factual differences that exist between the allegations lodged by Complainant and that of the 404(b) witnesses. [See Comm Br. p. 50]. What the Commonwealth labels "inconsequential" is the difference between a multi-year affectionate friendship that Cosby shared with Complainant versus the alleged one-night stands that occurred with the 404(b) witnesses. This distinction is significant. Equally significant is the distinction between an allegation of digital penetration made by

Complainant and the conduct alleged by the 404(b) witnesses, which ranged from no sexual contact to anal rape, as well as the multitude of other significant differences that are addressed by Cosby in his Primary Brief. [See App. Br. pp. 41-91].

The Commonwealth is correct in noting that "A 'signature' is not based solely on the perpetrator's actions, but rather on the totality of the factual similarities.'" [Comm. Br. p. 51; citing ***Commonwealth v. Newman***, 598 A.2d 275, 278 (Pa. 1991)]. As Cosby indicated in his Primary Brief, consistent with applicable law, this Court should consider: "(1) the manner in which the crimes were committed; (2) weapons used; (3) ostensible purpose of the crime; (4) location; and (5) type of victims. Remoteness in time between the crimes is also factored . . . ." ***Weakley*** at 1189. In this case, the factual similarities involve nothing more than age, gender and an allegation of contact ranging from no sex to a varying degree of sexual acts[2]. These

[2] Please refer to Cosby's primary brief for extensive argument on the differences that existed between Complainant's allegation and the 404(b) witnesses' testimony. [App. Br. p. 41-91].

purported similarities are generalities only; they are not so unique as to constitute a "signature like" quality between the uncharged allegations and the charges for which Cosby was actually on trial.

In a desperate attempt to give support to the lower court's decision, the Commonwealth recharacterizes the testimony of Lublin to suggest that she was sexually assaulted, when, in fact, Lublin made no claim that there was any sexual contact between she and Cosby, nor that she was sexually assaulted. [See App. Br. p. 56; R 5867a]. Lublin woke up in her own bed and never testified to any indication of sexual assault. [See App. Br. p. 55-56; R. 5866a-5867a]. The fact the lower court approved Lublin as a 404(b) witness when she was not sexually assaulted underscores the fact the decision was not only an abuse of discretion but possibly was nothing more than an affirmation of the Commonwealth's request, without the exercise of any discretion.

The Commonwealth and Amici seemingly ignore the fact that Courts have acknowledged that "[e]vidence of prior crimes is generally inadmissible due to the prejudicial effect such evidence has on a jury." ***Rush*** at 560 (citations omitted). Pa.R.E. 404(b) is an exception to the inadmissibility of this propensity evidence, which is why the law requires the incidents be "so nearly identical in method" ***Rush*** at 560 (citations omitted) and "share a method so distinctive and circumstances so nearly identical" before this type of prejudicial and inflammatory evidence might be allowed to be presented to a jury. ***Weakley*** at 1189.

If the Commonwealth's and Amici's arguments are accepted, and prior bad acts testimony admitted at trial regardless of how great the differences between the uncharged allegations and the conduct for which the defendant is on trial, Rule 404(b) and its prohibition on the admission of propensity evidence will be rendered hollow.

4. THE COMMONWEALTH'S ARGUMENT THAT THE DECADES OLD ALLEGATIONS FROM THE 404(b) WITNESSES WERE NOT REMOTE IS NOT SUPPORTED IN LAW.

The Commonwealth cites several cases as purportedly holding that prior bad acts may be presented to a jury despite a "long delay" between the incident for which the accused is on trial and the alleged other bad acts. [See Comm. Br. p. 53]. The Commonwealth argues that ***Commonwealth v. Patskin***, 93 A.2d 704 (Pa. 1953) allowed the admission of a 17-year-old prior assault. [See Comm. Br. p. 53]. ***Patskin*** was decided in 1953, 15 years before the Pennsylvania Rules of Evidence went into effect, and therefore is not determinative.

The Commonwealth argues that ***Commonwealth v. Luktisch***, 680 A.2d 877 (Pa.Super. 1996) allowed the admission of testimony regarding a 14-year-old sexual assault. [See Comm. Br. p. 53]. In ***Luktisch***, the victim reported she was molested from 1982 to 1990, while the prior bad act evidence occurred from 1971 to 1976 for a six-year break between instances, not 14

years. The Commonwealth argues that ***Commonwealth v. Aikens***, 990 A.2d 1181 (Pa.Super. 2010) permitted a 15-year-old sexual assault. [See Comm. Br. p. 53]. In ***Aikens***, the incident occurred in 2001 while the prior bad acts occurred from 1986 until approximately 1990; a "ten-to eleven-year" window. Id. at 1186. The ***Aikens*** Court deemed the testimony admissible only because the "abuse was perpetrated in an *identical* manner on victims with *identical* characteristics and in an identical setting." ***Id.*** (emphasis added). Those identical characteristics included the following: (1) the victim was 14 years old and the 404(b) witness was 15 years old; (2) the victim and the 404(b) witness were both the appellant's biological daughters; and (3) contact was initiated in the exact same place (appellant's apartment) and in the exact same way (by watching pornography). No such similarities existed in this case to justify the trial court's erroneous decision. [See, supra, Part A.3].

The Commonwealth argues that ***Commonwealth v. Odum***, 584 A.2d 953 (Pa.Super. 1990) permitted a 10-year-old sexual

assault, against the same victim. [See Comm. Br. p. 53]. In ***Odum***, the crime occurred in 1988. The prior bad acts evidence included an attempted homicide against the same victim in 1975; an attempted homicide against a trooper who was responding to an assault upon the same victim in 1978; an assault against the same victim in 1985; and an assault against the victim sometime between 1978 and 1988. ***Id.*** Because these attacks against the same victim were sequential, the court determined that it could not view the first, 10-year-old assault as being overly prejudicial. Id. at 955.

Finally, the Commonwealth argues that ***Commonwealth v. Smith***, 635 A.2d 1086 (Pa.Super. 1993) permitted a sexual assault from 10 to 20-years prior to the incident for which the accused was on trial. [See Comm. Br. p. 53]. In ***Smith***, the trial court found the approximate 10 to 20 year gap was "too remote to have probative value". ***Id.*** at 1089. The Superior Court initially agreed: "At first glance, we are inclined to agree with that conclusion[]"; however, the issue of remoteness requires an

analysis of the facts supporting each allegation. ***Id.*** In ***Smith***, again there were striking similarities, specifically: (1) the victim and 404(b) witness were both the appellee's daughters; (2) both reported being abused on a daily basis; and (3) both reported being abused at a very young age. More critically, there was no gap between the alleged conduct. As the court in Smith explained: "Certainly, the record reveals that at the time appellee ended his sexual activity with Mona [the 404(b) witness], appellee began his sexual offenses against Erin [the complainant]." ***Id***. at 1090.

In sum, the cases cited by the Commonwealth do not support the admission of testimony from the five 404(b) witnesses (plus the sixth de facto witness). The witnesses differ in age, occupation, location and alleged conduct – both as compared to one another and as compared to Complainant. There is nothing strikingly similar about the 404(b) witnesses' allegations that could cure the nearly 15 to 20-year time gap between the alleged prior incidents, and the allegations on which

Cosby was being tried. The 404(b) witnesses' allegations are too remote in time and the trial court abused its discretion in admitting their testimony.

5. THE COMMONWEALTH AND AMICI'S ARGUMENT CONCERNING THE "DOCTRINE OF CHANCES" UNDERSCORES THE FACT THAT THIS DOCTRINE PERMITS PRIOR BAD ACTS EVIDENCE IN ORDER TO SHOW PROPENSITY.

The introduction of the 404(b) witnesses' testimony under the legal theory of Doctrine of Chances is no more than an attempt by the Commonwealth to introduce propensity evidence by another name. The Commonwealth argues that, "[b]ecause of the number of prior incidents in this case, the likelihood that defendant's conduct was unintentional has plummeted[]" [Comm. Br. p. 70] and "defendant's repeated history of providing intoxicants to women and then sexually assaulting them once they were incapacitated 'reduced the probability that . . . there is an innocent explanation' for his conduct with Ms. Constand." [Comm. Br. pp. 70-71].

Propensity is "an often intense natural inclination or preference". www.merriam-webster.com/dictionary/propensity. The Commonwealth's argument is the very definition of propensity. Justice Donohue noted, "Rule 404(b) was adopted to codify our common law prohibition on the admission of propensity evidence while also providing, as at common law, that bad acts may be admissible, under special circumstances, to prove " "'motive, opportunity, intention, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.'" ***Hicks*** at 1142-1143 (Dissenting Opinion by Justice Donohue)(footnote omitted)(See Pa.R.E. 404(b)). Introducing evidence pursuant to Pa.R.E. 404(b) is an exception to the rule and should not be used to eliminate the Commonwealth's burden to prove their case beyond a reasonable doubt. ***See Hicks*** (Dissenting Opinion by Justice Donohue; ***See Shaffner v. Commonwealth***, 72 Pa. 60, (1872).

The Doctrine of Chances uses propensity evidence to assert a defendant is guilty of the present offense merely because he

has been accused of prior offenses. This evidence is prejudicial, unlawful and unconstitutional. The trial court abused its discretion in allowing the introduction of the five 404(b) witnesses (and de facto sixth witnesses) under this theory.

6. THE COMMONWEALTH FAILS TO DEMONSTRATE A "NEED" FOR THE ADMISSION OF THE 404(b) WITNESSES' TESTIMONY THAT WOULD OUTWEIGH ITS HIGHLY PREJUDICIAL EFFECT.

The Commonwealth erroneously that the probative value of the prior bad act evidence outweighs any potential for unfair prejudice, in part, because the Commonwealth had a substantial "need" for the evidence. Just because the Commonwealth believes that it has a "need" for propensity evidence does not justify stripping a criminal defendant of his presumption of innocence and allowing the jury to hear this type of inflammatory and highly prejudicial evidence. Indeed, in a drug prosecution, the Commonwealth has a "need" for the seized drugs; however, if they are seized illegally that evidence is suppressed. The

Commonwealth's "need" for such evidence does not override an individual's constitutional rights.

Regardless, the Commonwealth did not "need" the testimony of the prior bad act witnesses. Instead, the Commonwealth wanted the testimony of the alleged prior bad act witnesses because they did not want to "rely on uncorroborated testimony of the victim about the lack of consent." [Comm. Br. p. 82]. The Commonwealth argues that there was no physical or forensic evidence to corroborate Complainant, but that is not sufficient to override a criminal defendant's constitutional protections. [Comm. Br. p. 88-89]. Moreover, in the majority of sexual assault prosecutions, there is no physical or forensic evidence, which is why the Legislature enacted 18 Pa.C.S.A. § 3104[3]. Moreover, juries are given an instruction, that:

> The testimony of [name of victim] standing alone, if believed by you, is

[3] "The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant's testimony in any other way than that in which all complainant's testimony is viewed." 18 Pa.C.S.A. § 3104

> sufficient proof upon which to find the defendant guilty in this case.
> The testimony of the victim in a case such as this need not be supported by other evidence to sustain a conviction.
> Thus you may find the defendant guilty if the testimony of [name of victim] convinces you beyond a reasonable doubt that the defendant is guilty.

Pa.SSJI (CRIM) 4.13B [See R. 5736a-5737a].

Furthermore, the Commonwealth was allowed to present testimony from an expert witness, Dr. Barbara Ziv, as an expert in "victimology and sexual assault" and "in understanding the dynamics of sexual violence, victim responses to sexual violence and the impact of sexual violence on victims during and after being assaulted." [App. Br. p. 86; R. 3037a]. The Commonwealth had testimony beyond that of the Complainant in support of its prosecution and it did not "need" the 404(b) witnesses to testify.

The admission of the 404(b) witnesses (and de facto sixth witness) was prejudicial and no manufactured need by the Commonwealth can outweigh the prejudice caused to Cosby. The

witnesses' testimony was prejudicial and inflammatory, and the trial court abused its discretion in allowing its admission at trial.

CONCLUSION

For the reasons set forth in his Primary Brief and set forth above, the Appellant, William H. Cosby, Jr., respectfully requests that this Honorable Court reverse and arrest judgment. Alternatively, it is requested that this Court reverse and award Cosby a new trial.

Respectfully submitted,

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CERTIFICATION

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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Certification of Service

I hereby certify that I am this day serving the foregoing document upon the person(s) and in the manner indicated below which service satisfies the requirements of Pa. R.A.P. 121:

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