Franklin County Legal Journal
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Commonwealth v. Raiber

COMMONWEALTH OF PENNSYLVANIA
v. ALBERT VICTOR RAIBER, JR., Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania
Franklin County Branch
Criminal Action No. OTN # T 134871-2

Evidence: Tender-Years Hearsay

1. To be admissible, tender-years hearsay statements must contain sufficient indicia of reliability. 42 Pa. C.S. § 5985.1.

2. In determining whether a tender-years hearsay statement contains sufficient indicia of reliability, courts look to the spontaneity and consistent repetition of the statement(s), the mental state of the declarant, the use of terminology unexpected of a child of a similar age, and the lack of motive to fabricate. 42 Pa. C.S. § 5985.1.

3. Tender-years statements contained sufficient indicia of reliability where child made statements without any undue prompting or pressure, where child consistently alleged that defendant physically and sexually abused him, where there was no motive to fabricate, and where prosecutor provided corroborating physical evidence.

Evidence: Other-Acts Evidence: Common Scheme

1. Evidence of other crimes, wrongs or acts is not admissable to prove character or to show action in conformity therewith, but may be admissable for other purposes, including common scheme, plan, or identity. Pa R.E. 404(b).

2. Under the "common-scheme exception," evidence of other crimes, wrongs or acts is admissable if a defendant's scheme, plan, or design in committing two or more crimes is so related that proof of one tends to prove the other.

3. In prosecution for physical and sexual abuse of a minor, evidence of a prior conviction for similar conduct was admissable where, in both cases, victims were around 13 years old, defendant used his biological grandsons to attract the victims; abuse was sexual in nature; defendant beat the victims with his hands, belts, and a whip; defendant claimed beatings were for "discipline"; abuse allegedly occurred inside defendant's bedroom; and defendant told victims not to tell anyone about the incidents.

Evidence: Other Acts Evidence in Criminal Cases

1. In a criminal case, evidence of other crimes, wrongs, or acts is admissable only if its probative value outweighs the danger of unfair prejudice. Pa. R.E. 404(b)(3).

2. In balancing other-acts evidence's probative value against its prejudicial effect, courts look to the prosecutor's need for the evidence, the availability of other evidence, the strength of the evidence in supporting its purpose, the degree of similarity between the other act and the current offense, the time between the other act and the current offense, and the effect of cautionary jury instructions.

3. In prosecution for child sexual abuse, Commonwealth met the balancing test where its case rested primarily on the minor victim's testimony and where there was a high degree of similarity between the other act and the current charge.

APPEARANCES:

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Christopher L. Reibsome, Esq., *Counsel for Defendant*

Albert Victor Raiber, Jr., *Defendant*

Judge Carol L. Van Horn

OPINION

Walsh, J., July 23, 2012

Defendant Albert Victor Raiber, Jr., is awaiting a preliminary hearing in charges that he physically and sexually abused a child. Two motions are before this Court. First, the Commonwealth moves to admit hearsay statements under the tender-years statute. Second, the Commonwealth moves to admit evidence of similar prior acts that Raiber committed. The Commonwealth has established, and Raiber does not appear to contest, the admissability of the tender-years statements. The Commonwealth has also shown that Raiber's prior acts are admissable as evidence of a common scheme, plan, or design. For those reasons, which are more fully explained below, the Commonwealth's motions are granted.

On January 12, 2012, Raiber was charged with involuntary deviate sexual intercourse with a child, sexual assault, indecent assault, indecent exposure, corruption of minors, simple assault, and false imprisonment.[1] The Commonwealth alleges that Raiber spanked and beat his then-twelve-year-old neighbor, J.C.W., on the buttocks with his hands, a belt, a paddle, a whip, and a stick. The Commonwealth claims that Raiber also restrained J.C.W. with handcuffs and rope. The Commonwealth contends that Raiber then performed oral sex on J.C.W., fondled him, and exposed his penis to J.C.W. The alleged incidents occurred inside Raiber's home and inside a parked car sometime in December 2011.

The allegations came to light on December 11, 2011. On that date, J.C.W. went shopping with his family. To his mother, Trisha W. this was unusual, because J.C.W. did not usually accompany his family on shopping trips. When she asked why, he said that he was tired of being babysat by Raiber because Raiber beat him. Trisha W. examined J.C.W., and found bruises on his thigh and buttocks. J.C.W. told his mother that Raiber had been sexually abusing him, too. Trisha W. wanted to be sure about the allegations, so she asked what happened. J.C.W. told her that Raiber had given him a "blow job." Trisha W. stopped asking questions. J.C.W.'s father, Terry W., took pictures of the bruises, and the family called the State Police to report the allegations.

Kimberly Duffy, of the Adams County Children's Advocacy Center, interviewed J.C.W. on January 9, 2012. He claimed that Raiber beat him with a belt, paddle, stick, and whip. The beatings occurred both with J.C.W.'s pants on and off. J.C.W. said that Raiber had showed him the various implements, and that they were in case he got out of line. J.C.W. also said that Raiber "showed him what a blow job was" and told him not to tell anyone. J.C.W. told Duffy that he rides the same bus as Raiber's grandson. Apparently, Raiber met J.C.W. through the grandson. J.C.W. further said that Raiber smacked him on the buttocks while the two were in a parked car outside of a GameStop store. He described the belt Raiber used to beat him in detail, and said that it hurt him and bruised his legs.

State Police charged and arrested Raiber. They executed a warrant to search his house. From his bedroom, they seized rope, handcuffs, a leather belt, and a whip with a pink heart tip.[2]

This case is not the first time that Raiber has been accused of sexual abuse. On December 22, 2005, the State Police filed a complaint against Raiber charging him with abusing his thirteen-year-old grandson, S.F.C. and S.F.C.'s friend, T.P.W.[3] There are insinuations of an earlier incident in the 1980s, though the Commonwealth currently has no competent supporting evidence.

Trooper Nathaniel Liebrum interviewed Raiber regarding the 2005 incident. While testifying at the hearing on the Commonwealth's motions, he said that he very clearly remembers Raiber, even though almost seven years have passed since the interview. Trooper Liebrum recalled Raiber because he looked like an older version of Elvis Presley, and because he recalled Raiber as a sexual predator. On September 15, 2005, he and Trooper Walter Brunner were dispatched to Raiber's residence. At the time, Trooper Liebrum thought he was responding to a domestic dispute. Trooper Liebrum interviewed Raiber, who said that his wife and daughter were mad at him because he was hitting his grandson on the bare buttocks with his hands and a belt. Raiber continued, and stated that he was "kind of naked" at the time because he had "kind of disrobed." Trooper Liebrum stopped Raiber and administered Miranda[4] warnings to him. The PSP Incident Report (Com.'s Ex. 2) typed by Trooper Brunner details further allegations: that Raiber had been spanking both S.F.C. and T.P.W., that he forced the two victims to spank him and that he laid in a bed naked with S.F.C. Raiber's then-wife also told Trooper Brunner that Raiber had been in trouble for similar behavior in 1985.[5] The victims alleged that the abuse happened six times.

Police charged Raiber with two counts of simple assault, and one count of corruption of minors and indecent exposure.[6] Raiber pleaded guilty to corruption of minors. Fulton County Probation Officer Daniel Miller (he is now the Chief) interviewed Raiber to prepare a Presentence Investigation Report.[7] Like Trooper Liebrum, Miller recalls his interview of Raiber, which was seven years ago. Miller said that Raiber admitted to striking his two victims with a belt, to undressing in their presence, and to making them undress. When asked why, Raiber said that the spankings were disciplinary in nature. He also said that he had a rough upbringing, and that a therapist told him he was reliving his childhood through his actions. Raiber denied having "sex or anything" with the children. Chief Miller's report was entered as Commonwealth's Exhibit 3. The Court sentenced Raiber to 6 - 23 months in jail, and the Commonwealth nolle prossed the remaining charges.

1 18 Pa. C.S. § § 3123(b); 3124.1; 3126(a)(7); 3127(a); 6301(a)(1)(ii); 2701(a)(1); and 2903(a).
2 The Commonwealth entered a photograph of these items into evidence at Raiber's first bail hearing on January 27, 2012.
3 T.P.W. and J.C.W. do not share a surname, and do not appear to be related.
4 Miranda v. Arizona, 384 U.S. 436 (1966).
5 The Commonwealth could not locate the victims from the 1985 incident, which occurred in Baltimore. As a result, it has withdrawn its other-acts motion as it pertains to that incident.
6 The charges were docketed in this Court at Criminal Action No. 90 of 2006.
7 The Franklin County Adult Probation Officer referred the case to Fulton County due to a conflict of interest.

Discussion

The Commonwealth filed a motion in limine on May 30, 2012 to admit J.C.W.'s statements to his parents and Duffy under the tender-years hearsay statute, 42 Pa. C.S. § 5985.1.[8] It also moved to admit the 2005 crime as other-crimes evidence of a "common scheme, plan or design," Pa. R.E. 404(b)(2). The Court took evidence at a hearing on June 14, 2012, and received post-hearing briefs from the Parties. The Commonwealth's two motions are ripe for discussion.

A. J.C.W.'s Statements are Admissable Under the Tender-Years Exception

Under the tender-years hearsay exception, children's out-of-court statements are admissable in certain circumstances. See 42 Pa. C.S. § 5985.1(a) (listing the circumstances). To be admissable, the statements must contain sufficient indicia of reliability. Id. Factors to consider in evaluating a statement's reliability include the spontaneity and repetition of the statements, the use of terminology unexpected of a child of a similar age, and the lack of motive to fabricate. Commonwealth v. Hunzer, 868 A.2d 498, 510 (Pa. Super. 2005) (quoting Commonwealth v. Hanawalt, 615 A.2d 432, 438 (Pa. Super. 1992)).

The Commonwealth rests on the evidence presented at the hearing. Raiber does not appear to contest the tender-years exception's applicability.

This is not a close call, as the Commonwealth has clearly established the necessary elements to admit tender-years hearsay. First, J.C.W. was 12 years old at the time he made the statements. Second, the statements describe assault, false imprisonment, and sexual offenses - all enumerated crimes.

Third, we find sufficient indicia of reliability. J.C.W.'s statements, though not completely spontaneous, were not made because of any undue prompting or pressure. J.C.W. consistently and repeatedly alleged that Raiber beat him with a belt, whip, and paddle; restrained him with handcuffs and ligatures; and performed oral sex on him. He used age-appropriate terminology, and he had a credible demeanor during the Adams County interview and while testifying in court. He has no motive to fabricate the allegations, and Raiber alleged none. Furthermore, the Commonwealth produced corroborating physical evidence: bruising on J.C.W., the ligatures allegedly used to restrain him, as well as the implements allegedly used to beat him.

The final element for tender-years hearsay is prospective. Because the Commonwealth withdrew its closed-circuit television motion, J.C.W. must either testify at the hearing, or be "unavailable" to testify, see 42 Pa. C.S. § 5985.1(a.1) (defining unavailability as it pertains to tender-years hearsay). The Court will therefore enter an order allowing the admission of J.C.W.'s statements at the preliminary hearing and trial, if any. We now turn to the admissability of Raiber's prior acts.

B. Other Crimes, Wrongs, or Acts Evidence

The Commonwealth moves to admit evidence of Raiber's 2005 abuse of his grandson and his grandson's friend. The Commonwealth argues that the 2005 incident evinces a common scheme and should be admitted for that purpose. Raiber responds and argues that the 2005 abuse is a collateral issue, that it is impermissible propensity evidence, and that is unfairly prejudicial value outweighs its probative effect.

1. Other Acts Evidence is Inadmissible to Prove Propensity to Commit a Crime

Evidence of a crime, wrong, or other act is not admissable 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). Evidence of prior crimes or bad acts is powerful, and the potential for unfair prejudice great. "It is not proper to raise a presumption of guilt, on the ground, that having committed one crime, the depravity it exhibits makes it likely he would commit another." Shaffner v. Commonwealth, 72 Pa. 60, 65 (1872). There is real danger that a jury will construe prior-crimes evidence as propensity evidence - that because the defendant committed the prior offense, he must be guilty of the current one.

2. Other Acts Evidence is Admissible for Other Purposes, Including "Common Scheme"

On the other hand, "[e]vidence of other crimes, wrongs, or acts is admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Pa R.E. 404(b)(2).

Rule 404(b)(2) is a codification of Pennsylvania's common law. The list of other purposes is non-exhaustive.

8 The Commonwealth withdrew its motion to allow J.C.W. to testify via closed-circuit television under 42 Pa. C.S. § 5985, because it could not produce evidence that he would suffer serious emotional distress that would substantially impair his ability to communicate.

The list is also slightly different than those lists stated by the precodification cases. Compare Pa. R.E. 404(b)(2) ("motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident") with, e.g., Commonwealth v. Sam, 635 A.2d 603, 607 (Pa. 1993). ("motive; intent; absence of mistake or accident; a common scheme, plan or design; or the identity of a person charged with a crime"). The two leading treatises on Pennsylvania evidence discuss the differences, as well. See Packel & Poulin § 404-9(a) (3d ed. & supp. 2012); Ohlbaum on the Pennsylvania Rules of Evidence § 404.14 (2012-13 ed.).

Under the "common-scheme" exception to Rule 404(b)(1), evidence of a prior crime or act is admissible if a defendant's scheme, plan, or design in committing two or more crimes is so related that proof of one tends to prove the other. Commonwealth v. Elliott, 700 A.2d 1243, 1249 (Pa. 1997), abrogated on other grounds by Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003); Commonwealth v. O'Brien, 836 A.2d 966, 969 (Pa. Super. 2003).

There are numerous examples of common-scheme crimes,[9] and such evidence is usually used to establish the defendant's identity. Common-scheme evidence, however, can be admissible for any purpose other than to besmirch the defendant. Packel & Poulin § 404-9(a) (noting that Pennsylvania courts have used "common scheme" as an umbrella term). Common-scheme evidence can prove not only identity, but also motive, intent, plan, or preparation. Id.

The crux of the common-scheme exception is the similarity between the two (or more) offenses, wrongs, or acts. The court must examine the details and surrounding circumstances of each criminal incident to ensure that the conduct is so distinctive and so nearly identical as to become the signature of the same perpetrator. Commonwealth v. Smith, 635 A.2d 1086, 1089 (Pa. Super. 1993); see also Commonwealth v. Frank, 577 A.2d 609, 612 (Pa. Super. 1992) ("[T]o fit within [the common-scheme] exception, the crimes must embrace distinctive elements and be so nearly identical as to bear the 'signature' or be the 'handiwork' of the same person.") (internal quotation omitted). Factors to consider include the time between the crimes, the similarity of location, the similarity of the victims, the similarity of weapons, the similarity in the manner in which the crimes were committed, and the similarity of appearance and clothing. See Smith, 635 A.2d at 1089. Thus, the court is to look to both the acts performed by the perpetrator, as well as the "shared details" of each offense. O'Brien, 836 A.2d at 969. The evidence should be admitted if the crimes are so similar that they evince a defendant's modus operandi. Commonwealth v. Novasak, 606 A.2d 477, 484 (Pa. Super. 1992).

In Smith, the defendant was accused of molesting his two minor daughters when they were around five or six to twelve years old. Smith, 635 A.2d at 1088. The Commonwealth attempted to admit evidence that the defendant molested his third adult daughter when she was about the same age. Id. The trial court denied the Commonwealth's motion in limine, ruling that the alleged abuse of the third daughter happened too long ago, and that the Commonwealth had enough evidence through the testimony of the other two daughters. Id. at 1088-89. The Superior Court reversed. First, it held that the nearly identical nature of the crimes outweighed the temporal remoteness of the third daughter's alleged abuse. Id. at 1088-90. Second, the court found that the Commonwealth needed the testimony because the one victim failed to promptly report the abuse. As a result, the Commonwealth lacked corroborating physical evidence. Id. at 1090. Though Smith predates the codified Rules of Evidence, the court referred repeatedly to the defendant's "common *plan*" regarding the nature of abuse of his three daughters. See id. at 1089-90 (emphasis added); see also Commonwealth v. Gordon, 673 A.2d 866, 869 (Pa. 1996) (evidence of prior sexual assaults admissible where defendant used similar methods to molest victims); Frank, 577 A.2d at 616 (in child-sexual abuse case, evidence of six prior sexual assaults was properly admitted under the "common plan" exception); Commonwealth v. Hacker, 959 A.2d 380, 393 (Pa. Super. 2008) (holding trial court properly admitted evidence that defendant, who enticed two children to commit a sex act, showed another girl pornography because defendant's actions were proof of her common plan).

In O'Brien, which postdates adoption of the Rules, the Superior Court reversed a trial court that had excluded other acts evidence. The defendant was accused of showing pornography to a ten-year-old boy and attempting to anally rape him. O'Brien, 836 A.2d at 968. He was friends with the boy's parents. Id. The Commonwealth attempted to introduce two prior convictions for similar crimes. Id. In the two prior cases, the defendant had been friends with the boys' parents, he showed pornography to one of the victims, and attempted to engage in deviate sexual intercourse with them. Id. at 968-69. In reversing the trial court, the Superior Court noted that the evidence was proof of a common scheme, plan, or design, and would bolster the credibility of the victim, who had waited five years to reveal the abuse. Id. at 970. It also held that the trial court had failed to fully consider the factual similarities of the three incidents. Id. at 970-71.

9 Consider, for example, the serial killer who strangles homeless men and leaves a distinctive red ribbon tied around the victim's wrist, the bank robbers who wear Richard Nixon masks, or burglars who ransack vacant suburban houses and turn on the kitchen sink faucet before leaving.

In contrast, the common-scheme exception clearly does not allow the Commonwealth to prove its case based solely on the depravity of the defendant or his prior offenses. In Commonwealth v. Boulin, 116 A.2d 867 (Pa. Super. 1955) (en banc), an older case that Raiber cites, the defendant was charged with corruption of the morals of a minor for molesting two girls at an auto-repair garage. The Commonwealth introduced evidence of a prior, uncharged instance where another girl claimed that the defendant molested her in the same manner in the same garage. Id. at 869. The Superior Court reversed the defendant's conviction, stating that "[t]he only purpose of the [other] girl's testimony was to show depravity or propensity, and *for this* purpose it was not admissible." Id. at 348 (emphasis added).

Also, where the crimes are insufficiently similar, the common-scheme exception is inapplicable. In Commonwealth v. Hawkins, 626 A.2d 550 (Pa. 1993) (Hawkins I), the defendant, a convicted murderer, was charged with a second murder. Id. at 551 (plurality opinion). In 1989, the defendant sexually assaulted his 14-year-old niece, stabbed her, and strangled her to death with telephone wire.[10] The Commonwealth introduced into evidence the defendant's 1981 murder conviction (also a strangling of a minor girl), producing 18 similar factors between the two crimes. Id. at 552. The Supreme Court, however, rejected those arguments and reversed the defendant's conviction. In a split decision, it ruled that the two murders were only coincidentally linked. Id. at 553. The court also noted that the crimes were different in several key factors. First, the 1981 victim was strangled with the defendant's hands, while the defendant's niece was strangled with ligatures. Second, the 1981 victim's murder was non-intentional third-degree murder, while the niece's clearly was intentional. Third, the 1981 victim had puncture wounds because the defendant claimed that he tried to revive her by performing a tracheotomy with a paint scraper, while the niece was stabbed in the back. Id. The plurality characterized the two murders as different and distinct crimes. Id.

Based on the various cases applying the common-scheme exception is intensely fact-specific.[11] The prior crime must be so similar to the current crime as to show that the defendant has a common modus operandi and that the crimes are signature crimes. Remoteness in time counsels against a common scheme, but is inversely proportional to the degree of similarity. The court must look not only to the defendant's conduct during the prior offense and the current alleged offense, but also to the circumstances surrounding that conduct.

3. In Criminal Cases, the Prior Acts' Probative Value Must Outweigh the Danger of Unfair Prejudice

In a criminal case, the Commonwealth must show that the probative value of the other-acts evidence outweighs its potential for prejudice. Pa. R.E. 404(b)(3); see also Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976). The balancing test involves a number of factors: (1) the Commonwealth's need for the evidence; (2) other evidence available to the Commonwealth; (3) the strength of the evidence in supporting its purpose, (4) the degree of similarity between the other act and the present offense, (5) the span of time between the prior crime and the present offense; and (6) the effect of cautionary instructions to the jury. Ohlbaum § 404.27[2]; Packel & Poulin § 404.9(b); 1 McCormick on Evidence § 190 (6th ed. 2010).

4. The Parties' Agreements

The Commonwealth argues that evidence of the 2005 assaults should be admitted because of the "strikingly similar" nature of the incidents. It points to the common scheme, plan, or design of Raiber's conduct. In 2005, Raiber assaulted his grandson and a friend he met through his grandson. In this case, Raiber is accused of assaulting another grandson's friend. In both cases, it claims he used his grandsons as "bait." The circumstances of the abuse are analogous. The Commonwealth argues that the allegations of escalation in this case (restraining and performing oral sex) indicate Raiber's sexually deviate intent. The Commonwealth notes that the abuse in both cases occurred inside Raiber's house and inside his bedroom. Finally, the Commonwealth argues that similarity between the incidents vitiates the remoteness in time between them.

As to the rule 404(b)(3) balancing test, the Commonwealth claims a great need for the prior-acts evidence. Its case hinges on the testimony of one child-victim. There are no eyewitnesses. The Commonwealth concedes that it has physical evidence, but notes that it lacks DNA evidence. It says that it needs the evidence more than in the Smith case. There, the prosecution had two victims and the prior-acts evidence concerned a third. Here, there is only

10 In Hawkins I, the court reversed the defendant's conviction and death sentence because it held that the Commonwealth improperly brought up the prior murder. Hawkins I, 626 A.2d at 554 (plurality opinion). After retrial, the defendant was again convicted and again sentenced to death. Commonwealth v. Hawkins, 701 A.2d 492 (Pa. 1997) (Hawkins II).

11 Whether the rule for common-scheme evidence is different in sex crimes is an open question. In an old case, the Supreme Court held that other-acts evidence was easier to admit in such cases. Commonwealth v. Kline, 65 A.2d 348 (Pa. 1949). "[T]he law is more liberal in admitting as proof of his guilt evidence of similar sexual offences committed by him than it is in admitting evidence of similar offences when a defendant is charged with the commission of non-sexual crimes." Id. at 352. Kline was charged with the statutory rape of his daughter, and the court approved the admission of evidence that he had exposed himself to a neighbor. Id. at 348-49.

In Commonwealth v. Shively, 424 A.2d 1257 (Pa. 1981), the court purported to overrule Kline, stating that sexual and non-sexual crimes must be treated alike in deciding the admissibility of other-acts evidence. Id. at 1259-60 (plurality opinion). But Shively represents the opinion of only two justices, and it has never been adopted by a majority of the court. Indeed, the court has never subsequently cited Shively for the above proposition, and the Superior Court has treated Shively as non-binding. See Commonwealth v. Powers, 577 A.2d 194, 197 n.1 (Pa. Super. 1990).

one victim. The Commonwealth points to the strong probative value of Raiber's statements to Trooper Liebrum and Chief Miller that evince a sexual deviancy. Finally, it argues that any undue prejudice can be cured by a limiting instruction.

In opposition, Raiber argues that the 2005 incident and the current one are not at all similar. He notes that the prior case involved only spanking, and no sexual intercourse. This case allegedly involves both. He also argues that the time - over six years - between the incidents counsels against any common scheme or plan. Raiber contends that introduction of the prior incident involves a collateral issue, will divert the jury's attention, and will force him to explain his prior conduct.

Raiber strongly argues that the danger of undue prejudice outweighs the probative value of the 2005 incident. A cautionary instruction will be a paper tiger, because other-crimes evidence "is probably only equaled by a confession in its prejudicial impact upon a jury." Def.'s Post-Hr'g Br. ¶ 6 (quoting Commonwealth v. Spruill, 391 A.2d 1048, 1050 (Pa. 1978)). He contends that the Commonwealth does not need the prior act to prosecute the current case: the victim is available, and the Commonwealth has strong evidence. Finally, Raiber claims that the evidence at issue does not fit into any of the enumerated "other purposes" in Rule 404(b)(2). Conceding that the list is non-exhaustive, he nevertheless argues that the common-scheme exception's non-inclusion means that it should be applied cautiously and sparingly. **5. Raiber's 2005 Acts Are Admissible Under the Common-Scheme Exception**

The Court holds that Raiber's 2005 acts are admissible under Rule 404(b)(2). We find that the 2005 incident is admissible as proof of a common scheme, plan, and motive. The incidents are extremely similar, and the similarities overcome the time in between.

Here are the similarities and differences that the Court finds significant:

- **Use of grandson as "bait"**: In the 2005 incident, Raiber met the second victim, T.P.W., through his grandson, S.F.C. The Commonwealth alleges that he met his current alleged victim, J.C.W., through his other grandson, "Nick." In the 2005 incident, Raiber's grandson was a victim, while here, the grandson is not.

- **Type of instruments used**: In 2005, Raiber admitted beating his victims with his hands and a belt on the buttocks. J.C.W. claims that Raiber spanked him with his hands, a belt, a whip, and a switch on the buttocks.

- **Reason for the beatings**: In 2005, Raiber initially claimed to Trooper Liebrum that he hit T.P.W. and S.F.C. to "discipline" them. J.C.W. told the Adams County Children's Advocacy Center that Raiber told him that the belts and whips were disciplinary in nature.

- **Sexual nature of the incidents**: In 2005, Raiber admitted that he disrobed and exposed himself to the two victims. He further admitted that he made the victims disrobe and spank him, and that he lay in a bed with and hugged T.P.W. while naked. J.C.W. says that Raiber made him take off his pants, and that Raiber exposed himself to J.C.W. Finally, J.C.W. claims that Raiber tied him down and performed oral sex on him. The 2005 victims made no allegations of physical restraint or sexual intercourse.

- **Age and gender of the victims**: Both incidents involved prepubescent, white males. In fact, the 2005 victims and J.C.W. were just under the age of 13 at the time of the conduct.

- **Alleged intimidation**: In 2005, Raiber told his victims not to tell anyone or "they would get it harder." J.C.W. claims that Raiber told him not to tell anyone about the beatings or the sex.

- **Location of the abuse**: The 2005 abuse and the current alleged abuse took place inside Raiber's home and, more specifically, inside his bedroom (though, in 2011, Raiber lived in a different house). The 2005 abuse was confined to Raiber's house, while J.C.W. alleges at least one incident of abuse outside the home, in a car.

In all, the similarities between the incidents, however far, far outweigh the differences, and the crime committed in 2005 and the current allegations, if proven, are signature crimes. There is an eerie, alarming concurrence between what happened in 2005 and what allegedly happened in 2011. The lack of sexual intercourse in 2005 is not significant. Rather, the allegation of oral sex in 2011 is proof of Raiber's underlying sexual motive for the physical abuse. In both 2005 and 2011, Raiber allegedly started with criminal, albeit non-sexual spankings and escalated into deviant, sexual behavior.

Indeed, the similarities between the two incidents are greater than in any of the cases cited by either party. In Smith, the only similarities were the manner of abuse and that the victims were all daughters of the defendant. Smith, 635 A.2d at 1088. In O'Brien, the only things similar were the age of the victims, the defendant's relationship to them, and that he showed pornography to two of the three before assaulting them. O'Brien, 836 A.2d at 968-69. Raiber points to Boulden, but that case is too old to be useful. Hawkins is an outlier and (as a plurality opinion) is

non-binding, to boot.

The Court further finds that the Commonwealth meets the balancing test of Rule 404(b)(3). The Commonwealth has demonstrated a strong need for the prior-acts evidence. Its case rests on the testimony of a 12-year-old boy. Because the Commonwealth withdrew its closed-circuit television motion, J.C.W. probably must testify in open court. The Commonwealth does have physical evidence, but, like many child-sexual-abuse cases, it has no eyewitnesses, and no DNA evidence. The strength of the 2005 crime and its similarity to the current allegations add strong probative value to the evidence. The time between the crimes (a little over six years) is canceled out by the strong similarities. Finally, we will not consider the effects a cautionary jury instruction at this stage. It is premature, and, if the charges are bound over, another judge will preside at trial. We do not mean to minimize the prejudicial effect of the 2005 crime. According to the above factors, however, its probative value outweighs the danger of prejudice. We find that Raiber's 2005 acts are admissible.

Conclusion

The Court finds that the Commonwealth may admit tender-years hearsay, because it has met the requirements of the statute. The Commonwealth may also admit evidence that Raiber was convicted of a sexual-abuse crime in 2005. The Court's finding applies to the preliminary hearing and, if the charges are bound over, the trial. The haunting similarities between the 2005 incident and the current allegations point to a common scheme - a signature crime. The Commonwealth's motions are granted.

An Order is attached.

ORDER OF THE COURT

July 23, 2012, upon consideration of the Commonwealth's Tender Years Motion and Motion to Admit Other Acts Evidence,

It is ordered that the motions are granted. As to the Tender Years Motion, it is noted that the alleged victim just either testify, or be unavailable to testify within the meaning of the tender-years statute. The Clerk shall serve a copy of this order on Judge Van Horn. IN RE: ESTATE OF CONSUELLA B. WALLACE