

District Court, City and County of Denver, Colorado Lindsey-Flanigan Courthouse, Room 135 520 W. Colfax Ave Denver, CO 80204	▲ COURT USE ONLY ▲
Plaintiff: The People of the State of Colorado v. Defendant: Jason Groshart	
McKenna Elizabeth Burke, Reg. No. 49550 Deputy District Attorney Cold Case Unit Dawn M. Weber, Reg. No. 23433 Senior Chief Deputy District Attorney Cold Case Unit For: Beth McCann, Reg No. 5834 District Attorney 201 W. Colfax Ave. Dept. 801 Denver, CO 80202 Phone Number: (720) 913-9000 Fax Number: (720) 913-9035	Case Number: D0162006CR006594 Div: Criminal Ctrm: 5B
PEOPLE'S MOTION TO ADMIT EVIDENCE OF ANOTHER ACT OF THE DEFENDANT PURSUANT TO C.R.E. 404(b)	

I. Charges & Procedural Posture of the Case

This Defendant currently faces charges of Sexual Assault (F2), Kidnapping (F2), Burglary (F3) and two crime-of-violence sentencing enhancers. The date of offense in this case is March 30, 2004.

On June 30, 2023, the defendant entered a not guilty plea and agreed to a tolling of speedy trial until the next court date. At the next court date on July 19, 2023, the defendant agreed to continue tolling speedy trial through November 2, 2023. According to the People's calculation, the speedy trial deadline in this case is May 2, 2024.

The matter is currently set for disposition hearing on November 2, 2023, and motions on November 17, 2023.

II. Facts of the Charged Case

On March 30, 2004, a masked, armed rapist entered the home of victim A.R. Victim A.R. lived alone with her beagle, Sophie, in a single-family residence located at [REDACTED] in Denver's West Highland neighborhood.

Below is a photo of A.R.'s home taken by Crime Scene Detectives on March 30, 2004:

On the morning of March 30, 2004, A.R. went to work as usual. Around 10:30 a.m., she left work and went home due to a migraine headache. Once A.R. arrived home, she slept a bit and worked a bit. Around 4:30/4:45 p.m., A.R. went upstairs to her bedroom to take a nap; her dog accompanied her, and her bedroom television was on. She was wearing a pink bathrobe.

Around 5:55 p.m., A.R. woke to her dog barking, growling and gritting her teeth. She then saw a man walk into her bedroom. The intruder was dressed in all black including a black wool ski mask and black rubber surgical-type gloves. Not one inch of his skin was exposed; his mouth, nose, eyes, neck and ears were covered. He was wearing a black long-sleeved shirt or jacket with some sort of center divider, possibly a zipper. He had a pair of black and silver handcuffs attached to his right hip, and a small black and silver semi-automatic handgun in his right hand (A.R. described the gun as "mostly black" with a silver stripe on each side of the barrel).

The intruder initially pointed the gun at the dog and told A.R. to "shut [her] dog up." Once the barking stopped, he approached the bed and pointed the gun at A.R.

A.R. offered the intruder jewelry and money and told him he needed to leave. He put the gun to A.R.'s face and instructed her to roll over. A.R. did as instructed. He removed her robe and told her to put her arms behind her back. At this point, A.R. was completely nude and lying on her stomach on the bed. He placed handcuffs on her wrists. He shoved A.R.'s face into a pillow for a moment before placing a black mask onto her head. He instructed A.R. not to turn around and not to look at him. She could not see out of the mask; it had no eye holes.

The intruder placed her dog into a closet. A.R. tried to reach for the phone in her bedroom but the handcuffs immobilized her.

The intruder began caressing A.R. She was trying to keep her legs locked and her arms close to her body. The intruder removed his clothing, turned A.R. over and spread her legs. A.R. resisted and kicked him several times. The intruder was touching A.R.'s neck, chest, stomach and breasts in an effort to arouse himself. A.R. believed the intruder was now bare-handed and was no longer wearing gloves. He was using one hand to masturbate. This went on for a period of time and the intruder grew frustrated and said, "this isn't working for me, we are going to do something else." The gun was on the bed beside A.R. during all of this.

The intruder then forcefully pulled her legs apart and digitally penetrated A.R.'s vagina. The intruder then took the gun, placed it under A.R.'s chin and said, "is this really worth dying for?" In fear for her life, A.R. submitted to the intruder's demands. Ultimately, the intruder inserted his penis into A.R.'s vagina. A.R. did not believe he was wearing a condom and believed he ejaculated but was not certain.

At some point during the sexual assault, A.R. heard her home phone ring and go to her answering machine. She could hear the caller, whom she believed was her boyfriend, leaving a voicemail on her machine.

After the sexual assault was complete, the intruder told A.R. that they were going to shower. He led her out of the bedroom and down the hallway toward the bathroom. A.R. still had the mask on and remained handcuffed.

Once in the bathroom, the intruder placed A.R. into the shower before getting in with her. He rubbed soap all over A.R.'s chest and neck. As he was washing her body, A.R. could feel that the intruder was again wearing gloves; she described them as feeling and smelling like latex gloves. A.R. did not know where the intruder would have gotten those gloves; she did not keep gloves like that in her bathroom.

After showering, the intruder used a towel to dry himself and A.R. After returning to the bedroom, he sat A.R. down on the bed and began to engage in conversation. A.R. was still completely nude, masked and restrained in handcuffs. The intruder asked for a trash bag and A.R. told him there was one in the bathroom wastebasket. He retrieved the trash bag and upon returning to the bedroom told A.R. to "get up" and that he was "taking the evidence." He then proceeded to collect A.R.'s bedding and towels. He narrated his actions as he collected the items, saying "I am taking the sheets, taking your towels, taking the evidence."

A.R. asked the intruder if this was the first time he had done this? He told her no, that he had done this before.

He then pushed A.R. down the hallway and told her he was going to put her into the closet with her dog. A.R. was still completely nude. The intruder stated he would remove the mask and handcuffs (and he did so) and, before he left, he instructed her to remain in the closet for five minutes. A.R. waited for approximately one minute before she ran downstairs. She reached for her cordless phone to call 911 but found it had been unplugged (she recalled hearing

her home phone ring and go to voicemail during the assault, so she knew it was plugged in prior to her assailant's departure).

Once her assailant left, A.R. put her bathrobe back on. She observed some vaginal drainage which she collected on a plastic saucer and provided to police when they arrived. A.R.'s pink bathrobe contained additional fluid/staining and was likewise collected as evidence.

Below is a photo of A.R. in her pink bathrobe on March 30, 2004:

The below photo depicts redness on A.R.'s wrists from the handcuffs her attacker used to restrain her:

A.R. described her attacker as a short (5'4" – 5'6") white male with a slight build (130-160 pounds) who was approximately 18 to 25 years of age. A.R. stated that he did not appear drunk or high during the sexual assault.

A.R. submitted to a Sexual Assault Nurse Examination (SANE) at Denver Health Medical Center. During the examination, Dr. Maria Moreira collected evidence from A.R.'s body, including vaginal swabs.

Sexual Assault Detective Anthony Parisi was assigned to the investigation. The vaginal drainage collected by A.R. was tested for biological material and was determined to contain semen and/or seminal fluid. From that semen/seminal fluid, a DNA profile was generated and uploaded into the Combined DNA Index System ("CODIS") database. No matches were produced. Additionally, a familial search conducted in the state of Colorado's state-level database ("SDIS") produced negative results.

Detective Parisi conducted a thorough investigation. He reviewed reports of other burglaries in the area around the date of offense; he looked into all registered sex offenders residing the area surrounding A.R.'s home; and he hosted a community meeting in hopes of locating any information to move the investigation forward. Multiple suspects were ultimately eliminated by way of DNA analysis excluding them from the DNA profile developed from the evidence in A.R.'s case.

A. Investigative Lead Developed by Forensic Investigative Genetic Genealogy

Despite a dogged investigation by the Denver Police Department, the case remained unsolved for 18 years, from 2004 until 2022, when law enforcement utilized a technique called Forensic Investigative Genetic Genealogy ("FIGG"). FIGG was applied to this particular case under federal grant funding awarded specifically for the purpose of using FIGG to solve and prosecute violent crime cold cases.

The goal of a FIGG investigation is to identify individuals who may be related to the suspect; once identified, law enforcement uses traditional police investigative techniques and resources to build family trees that may lead law enforcement to the perpetrator.

In the present case, the Denver Crime Lab, working in concert with a genetic genealogy investigator ("GGI"), used the above-described FIGG process to produce an investigative lead identifying defendant Jason Groshart as a possible suspect. Ultimately, law enforcement agents surreptitiously collected the defendant's DNA (by collecting a straw and eating utensils used by the defendant while dining out at a restaurant). Using that DNA profile, a **direct DNA comparison** confirmed the defendant as the suspect in the 2004 attack on A.R. More specifically, with regards to the testing comparing the male DNA on the surreptitiously collected straw with that from A.R.'s rape kit, the Denver Crime Lab reported that the rape kit DNA is

consistent with one male contributor and matches the DNA profile obtained from the surreptitiously collected straw. The lab further reported that the male DNA profile from the rape kit is estimated to be at **least 30 octillion (30E27) times more likely** if the sample originated from the donor of the male DNA obtained from the straw than if it originated from one unknown, unrelated person. *Based on this data, and in the absence of identical twins, the probability is greater than 99.9% that the male DNA obtained from these items can be attributed to the same source, the defendant Jason Groshart.*

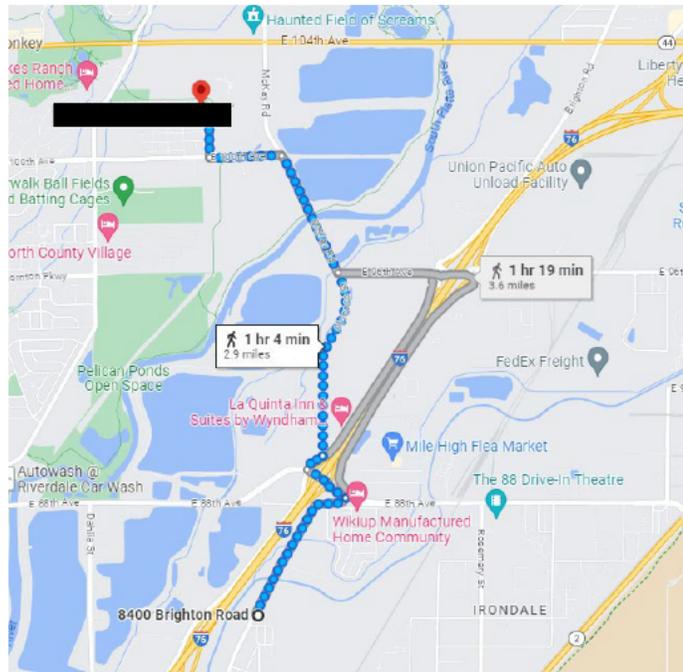
When the defendant was arrested in the present case he was residing in Sedalia, Missouri. He was working as a Counselor with the Reigning Grace Counseling Center.

III. Facts of the Proposed Other Act

On October 7, 2007, at 2:42 a.m., Adams County Sheriff's Officer Mitchell Temple contacted the defendant, Jason Groshart walking north on the 8400 block of Brighton Road. The defendant was wearing dark clothing - grey sweatpants and a zipped-up black jacket with a hood. He was wearing a fanny pack around his waist.

The area where Officer Temple contacted the defendant was, at the time in 2007, a mix of businesses and residential homes. According to Officer Temple, it was extremely unusual to see foot traffic in this area during overnight hours.

Officer Temple initiated contact with the defendant who reported that he was walking to his house at [REDACTED] Street in Thornton from the bar. A google search reveals that the distance between the Hudson Street address provided by the defendant and the 8400 block of Brighton Road is between 3 and 3.5 miles depending on the route taken (see below image taken from google maps).



Though he reported that he was walking home from the bar, the defendant stated that he last drank alcohol around noon on October 6, 2007 (more than 12 hours earlier). A portable breath test later administered to the defendant at the police station resulted in a reading of triple zero. During this contact, Officer Temple documented the following items as being on the defendant's person:

Items located inside the fanny pack the defendant was wearing around his waist:

- 1) **A black Hi-Point CF380 handgun with seven rounds in the magazine and one in the chamber.** The below image is the first result of a google image search for "black Hi-Point CF380" (the actual gun collected from the defendant in 2007 no longer exists):



- 2) One black half face mask; and
- 3) One pair of black cloth gloves

Items located inside of the defendant’s jacket, in between an inside and outside liner:

- 4) One pair of black Smith & Wesson handcuffs;
- 5) Four yellow latex gloves;
- 6) A ball gag;
- 7) Four zip ties; and
- 8) One camouflaged ski mask

By way of explanation, a ball gag is a ball that is placed into the mouth and secured by straps that tie at the back of the head. Ball gags are designed to restrict movement of the mouth, preventing speaking or shouting. Officer Temple’s report notes that the defendant informed him that “he and his wife role-play.” The defendant also stated that he “always carried a gun for protection” but did not have a concealed weapons permit.

The confiscated items were booked into evidence and documented in the below fashion:

Property					
Seq. # 1	Description 380 CALIBER HANDGUN			Serial Number P848947	Make/Model HI-POINT
Owner			License / State	Color BLACK	
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL		Quantity 1.00	Units of Measure	Value
Gun Type PISTOL.	Caliber .380	Finish BLACK	Grip BLACK POLYMER	Gun Stock	
Condition	Gun Test <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Test Type	Sight Test <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Sight Type	

Seq. # 2	Description MAGAZINE FOR HI_POINT			Serial Number	Make/Model
Owner			License / State	Color BLACK	
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL		Quantity 1.00	Units of Measure	Value

Seq. # 3	Description W.W 380 AUTO BULLETS			Serial Number	Make/Model
Owner			License / State	Color	
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL		Quantity 7.00	Units of Measure	Value

Seq. # 4	Description CAMOFLAGED SKI MASK	Serial Number	Make/Model RED HEAD
Owner		License / State	Color
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL	Quantity 1.00	Units of Measure Value

Seq. # 5	Description FANNY PACK	Serial Number	Make/Model EAST SPORT
Owner		License / State	Color BLUE
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL	Quantity 1.00	Units of Measure Value

Seq. # 6	Description CLOTH GLOVES	Serial Number RN#52469	Make/Model
Owner		License / State	Color BLACK
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL	Quantity 2.00	Units of Measure Value

Seq. # 7	Description LATEX GLOVES	Serial Number	Make/Model
Owner		License / State	Color YELLOW
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL	Quantity 4.00	Units of Measure Value

Seq. # 8	Description BLACK ZIP TIES	Serial Number	Make/Model
Owner		License / State	Color BLACK
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL	Quantity 4.00	Units of Measure Value

Seq. # 9	Description BLACK HAND CUFFS	Serial Number 043981	Make/Model SMITH & WE / M-100
Owner		License / State	Color BLACK
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL	Quantity 1.00	Units of Measure Value

Seq. # 10	Description HALF FACE MASK	Serial Number	Make/Model THE MARQUE
Owner		License / State	Color BLACK
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL	Quantity 1.00	Units of Measure Value

Seq. # 11	Description BALL GAG	Serial Number	Make/Model
Owner		License / State	Color BLACK / PINK
Status EVIDENCE	Status Officer (AC0435) TEMPLE, MITCHELL	Quantity 1.00	Units of Measure Value

Beyond the items that were recovered from the defendant's person, it is important to note Officer Temple's observations relative to items that were not located on his person. Such items include any form of identification, such as a driver's license, or a car key (it is noted that the defendant had a key fob on his person but not an actual car key). The defendant's identity was ultimately confirmed after his driver's license was recovered during a consensual search of his vehicle, which happened to be parked nearby.

Reports associated with this incident document the defendant's physical description as a white male, 5'05" tall, weighing 135 pounds with brown hair and blue eyes. Below is the booking photo associated with this arrest:



The defendant was issued a citation for Unlawfully Carrying a Concealed Weapon and released. On December 27, 2007, he entered a guilty plea to Disorderly Conduct (a petty offense) in Adams County case 07M4294.

IV. Analysis & Applicable Legal Standards

The Court must first determine whether the proposed other act evidence is intrinsic or extrinsic evidence pursuant to *Rojas v. People*, 504 P.3d 296 (Colo. 2022).

In evaluating whether uncharged misconduct evidence triggers Rule 404(b), a trial court must first determine if the evidence is intrinsic or extrinsic to the charged offense. Intrinsic acts are those (1) that directly prove the charged offense or (2) that occurred contemporaneously with the charged offense and facilitated the commission of it. *Id.* at 309. If extrinsic evidence suggests bad character (and thus a propensity to commit the charged offense), it is admissible only as provided by Rule 404(b) and after a *Spoto* analysis. *Id.*

Here the other act evidence does not directly prove the charged offense. Likewise, it did not occur contemporaneously with and/or facilitate the commission of the charged offense. Therefore, under *Rojas*, the other act evidence falls in the category of extrinsic evidence.

To complete the *Rojas* analysis, the proposed other act evidence is not only extrinsic, but also involves a criminal conviction and could therefore be suggestive of bad character. Accordingly, the Court must evaluate the admissibility of the other act evidence under Rule 404(b) and the four-prong test set forth in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990).

A. Admission of Other Acts Evidence under C.R.E. 404(b) and §16-10-301

i. Legislative Declaration

Pursuant to C.R.E. 404(b) and §16-10-301, C.R.S., the People respectfully request that this Court admit evidence of the above other act committed by the defendant. §16-10-301 specifically applies to the prosecution for (among others) “any offense involving unlawful sexual behavior as described in §16-22-102(9)....” Mr. Groshart’s charges fall cleanly within those requirements—he is charged with Sexual Assault in violation of §18-4-402, C.R.S., and with

Kidnapping in violation of §18-3-302(3)(a), C.R.S. (both of which are enumerated crimes under §16-22-102(9)).

The importance of §16-10-301 cannot be overstated because within that statute, our General Assembly has “expressly noted that evidence of other sexual acts is particularly important and **will typically be admissible in the prosecution of sexual offenses.**” *Bondsteel v. People*, 439 P.3d 847 (Colo. 2019) (emphasis supplied). The legislature has further declared that in sexual offense prosecutions, “there is a greater need and propriety for consideration by the fact finder of evidence of other relevant acts of the accused, including any actions, crimes, wrongs, or transactions, whether isolated acts or ongoing actions and whether occurring prior to or after the charged offense...” §16-10-301, C.R.S.

The statute continues to say that “the general assembly finds that such evidence of other sexual acts is typically relevant and highly probative, and it is expected that normally the probative value of such evidence will outweigh any danger of unfair prejudice, even when incidents are remote from one another in time.” *See* C.R.S. 16-10-301(1). Given the specific concerns highlighted by the General Assembly, this Court should enforce “the legislature’s expressed preference for admitting such evidence in the prosecution of sex crimes.” *Bondsteel*, 439 P.3d at 855.

ii. Admissibility under §16-10-301

§16-10-301 allows the prosecution to introduce “other acts of the defendant to prove the commission of the offense as charged for any purpose other than propensity, including: refuting defenses, such as consent or recent fabrication; showing a common plan, scheme, design, or modus operandi, regardless of whether identity is at issue and regardless of whether the charged offense has a close nexus as part of a unified transaction to the other act; showing motive,

opportunity, intent, preparation, including grooming of a victim, knowledge, identity, or absence of mistake or accident; or for any other matter for which it is relevant. The prosecution may use such evidence either as proof in its case in chief or in rebuttal, including in response to evidence of the defendant's good character.” Section 16-10-301 was adopted to permit the introduction of evidence of other sexual transactions on the same basis as other acts evidence generally. The statute clearly reflects a “policy judgment that in sexual assault cases a need arises to make similar transactions evidence more readily available.” See *People v. Opson*, 632 P.2d 602 (Colo. App. 1981).

The People recognize that the other act evidence at issue here does not include a completed sexual assault (quite possibly due to Officer Temple’s intervening contact of the defendant and resulting arrest). However, the items in the defendant’s possession, when considered as a whole, are certainly indicative of deviant sexual behavior. Furthermore, the defendant’s possession of a ball gag and his statement that “he and his wife engage in role play” interjects a sexual context into the other act.

B. Admissibility under 404(b)

Rule 404(b) of the Colorado Rules of Evidence authorizes the admission of evidence of other crimes, wrongs, or acts for limited purposes. Under this rule, evidence of other acts or transactions is admissible to prove, inter alia, “motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or lack of accident”. C.R.E. 404(b).

This evidence is admissible if it: (1) relates to a material fact, (2) is logically relevant, (3) has logical relevance that is independent of the intermediate inference that the defendant has a bad character and acted in conformity therewith, and (4) has probative value that is not substantially outweighed by prejudicial effect. *People v. Spoto*, 765 P.2d 1314 (Colo. 1990).

The People seek admission of the proposed other act evidence for three permissible, non-propensity purposes: 1) to refute a defense of consent; 2) to establish Mr. Groshart's identity as the person who sexually assaulted A.R. in her home on March 30, 2004; and 3) to show a common plan, scheme, design or modus operandi.

i. Refuting a Defense of Consent

One of the potential defenses for Mr. Groshart to pursue at trial is consent. Mr. Groshart may try to explain the presence of his DNA on A.R.'s body by claiming he engaged in an innocent consensual sexual encounter with A.R. sometime prior to, and separate from, the home invasion sexual assault. He may also claim that A.R. fabricated the home invasion, gunpoint, kidnapping portions of the sexual encounter. Refuting a defense of consent is one of the specifically enumerated purposes of §16-10-301.

As the Court is aware, sex assault victims are subject to intense and often unfair scrutiny. This point is particularly applicable in the present case – an offense which is the epitome of every woman's worst nightmare, and which is so horrible that it could be considered "unbelievable" (indeed, it is unbelievably violent). A.R.'s account will be further scrutinized by defense due to the 18-year delay in solving the case, and a lack of corroborating physical evidence (which is precisely why the defendant gathered and destroyed the evidence before departing A.R.'s home).

To place A.R.'s account of the facts in proper context, the jury must have the full context of the defendant's 2007 arrest and, with it, his possession of ***every single item*** A.R. described as being worn or used by her assailant in 2004 (plus a few additions to his rape supply kit including a ball gag and zip ties). Furthermore, the fact that the defendant was armed with a loaded handgun, in addition to the other items used to subdue a victim and prevent detection, is strong

evidence of non-consent. The defendant is clearly prepared to cause submission of his victim by force or violence. *See e.g. People v. Garcia*, 179 P.3d 250, 257 (Colo. App. 2007) (recognizing the admonition that use of force or violence negates consent); *People in the Interest of K.N.*, 977 P.2d 868, 873 (Colo. 1999) (citing a prior holding that “Consistent with this clear language, we have held that in cases involving sexual assault by force or violence, “an independent showing of the defendant's awareness of nonconsent by the [complainant] is unnecessary” in such prosecutions because use of force or violence negates consent.”)

a. Doctrine of Chances

Where a defendant claims that the victim consented, evidence that the defendant committed other sexual offenses may be admissible under “the doctrine of chances” as set forth in *People v. Everett*, 250 P.3d 649, 656 (Colo. App. 2010). “The doctrine of chances is based on the instinctive logical process that reasonably determines that unusual and abnormal events are unlikely to recur by chance.” *Id.* (citations omitted). As the Colorado Court of Appeals noted in *Everett*, “[t]he need for evidence based on the doctrine of chances can be particularly important in sexual assault cases:

Sex crimes, more than others, tend to be committed in private. Usually, the only witnesses are the complaining witness and the accused. Often the victim testifies that the defendant raped her, and the defendant testifies that she is lying. Often, there is no physical evidence, especially when, as here, the defendant admits the intercourse but claims consent. In that situation, who should be believed? This can present difficult credibility questions for the jury, especially if there is no evidence corroborating either version. It is therefore particularly important that when corroborating evidence does exist, the jury be allowed to consider it.

Id. at 656 (citations omitted).

Here, the defense may claim consent in order to explain/neutralize the presence of the defendant's DNA on A.R.'s body. Alternatively, the defendant may argue that A.R.'s version of events should not be believed because there is no physical evidence (i.e., no gun, no mask, no gloves, no handcuffs, no towels or sheets) to corroborate her version of events. This is particularly true in the present case, in which the defendant made every effort to destroy evidence, conceal his identity and evade detection, and in fact, was successful in doing so for 18 years. The jury should be permitted to consider all of the factual circumstances, including the significant corroborating evidence provided by the 2007 arrest.

ii. Identity

The other act evidence is being offered is to prove the defendant's identity as the perpetrator of the armed sexual assault, burglary and kidnapping in the present case. In the present case, the defendant is identified exclusively by DNA evidence linking him to the seminal fluid recovered from A.R.'s body following the assault and the vaginal swabs collected during the SANE examination. A.R. never identified the defendant in a photo array (indeed such an identification procedure was never attempted based on A.R.'s inability to observe her assailant's face), she was only able to offer a general physical description based on the attributes she was able observe (white male; 5'4" – 5'6"; slight build; 130-160 pounds; approximately 18 to 25 years of age). It is important to note that this description is consistent with the documented physical description of the defendant at the time of his arrest in 2007 (white male; 5'5"; 135 pounds; 34 years old).

Furthermore, the specific and unusual items the defendant chose to possess – and the manner in which they were stored and concealed on his person – while walking down the street

in the middle of the night in October 2007 are *nearly identical* to the items A.R. described her assailant possessing.

It is not commonplace to have a fanny pack, two masks, black cloth gloves, latex gloves, zip ties, handcuffs, a ball gag and a handgun all readily accessible on one's person. Perhaps in isolation, some of these items may seem innocuous, but when considered together it is clear that the defendant was walking down Brighton Road in the middle of the night armed with not just a gun, but an entire supply of items to carry out a sexual assault. It is the defendant's possession of this specific list of items (which are designed to threaten and subdue a victim and evade detection), and their striking similarity to the items used in the charged offense, that makes this evidence highly probative of the defendant's identity as the perpetrator in the charged offense.

iii. Common Plan, Scheme or Design

The proposed other act evidence is relevant to establish a common plan, scheme or design. The items A.R.'s assailant used to sexually assault her in 2004 and the items in the defendant's possession when contacted on October 7, 2007, are nearly identical. The similarity is undeniable right down to the physical description of the gun having a silver stripe down each side of the barrel.

Prior courts have held that similarities in the plans executed by a sexual assault defendant are admissible as evidence of a common scheme or plan. The Court in *Delgado* allowed evidence of a prior sexual assault where the defendant's pattern had multiple similarities. *See People v. Delgado*, 890 P.2d 141, 144 (Colo. App. 1994). The Court held that the similarities between the cases demonstrated how the defendant "put these multiple steps together into a common plan of action, again without regard to the defendant's general character or the moral connotation of any one or more of the individual steps in the plan." *Id.* Similarly, in *Jones*, our

Supreme Court upheld the trial court’s ruling because the record “tended to show that Jones had a common plan to have sex with women without their consent.” *People v. Jones*, 311 P.3d 274, 279 (Colo. 2013).

This chart lays out the similarities between the charged offense and the other act:

Item Description	Charged Offense: March 30, 2004 Sexual Assault of A.R.	Other Act Evidence: Recovered From Defendant’s Person During October 7, 2007 Arrest
Handgun	<p style="text-align: center;">YES</p> <p>(A.R. described gun as mostly black with a silver stripe down each side of the barrel)</p>	<p style="text-align: center;">YES</p> 
Face mask (at least one)	<p style="text-align: center;">YES</p> <p>(possibly two masks; the mask defendant was wearing when he entered A.R.’s bedroom, and/or the mask he placed over A.R.’s head during the assault)</p>	<p style="text-align: center;">YES</p> <p>(one black half face mask and one camouflaged ski mask)</p>
Black gloves	<p style="text-align: center;">YES</p> <p>(black surgical-type gloves)</p>	<p style="text-align: center;">YES</p> <p>(black cloth gloves)</p>
Handcuffs	<p style="text-align: center;">YES</p>	<p style="text-align: center;">YES</p>
Latex gloves	<p style="text-align: center;">YES</p> <p>(A.R. reports defendant wearing a different pair of gloves (“smelled and felt like latex”) while washing A.R.’s body in shower after sexual assault)</p>	<p style="text-align: center;">YES</p> <p>(Four yellow latex gloves)</p>
Ball gag	<p style="text-align: center;">NO</p> <p>(or unknown; could have been on his person but not used)</p>	<p style="text-align: center;">YES</p>
Zip ties	<p style="text-align: center;">NO</p> <p>(or unknown; could have been on his person but not used)</p>	<p style="text-align: center;">YES</p>

The possession of this specific set of items, and the intentional manner in which the defendant placed the items on his person (in his fanny pack or concealed in between the liners of his black, hooded jacket) speak to the defendant's common plan, scheme or design to perpetrate a forcible sexual assault, threaten and/or restrain his victim if necessary, and conceal his identity (via mask and gloves) in order to avoid apprehension.

C. Admissibility under *Spoto*

The four-part test established in *Spoto* requires that the proposed other act evidence: 1) relates to a material fact; 2) is logically relevant; 3) operates on an inference other than a propensity for criminal behavior; and 4) the probative value of the evidence must not be outweighed by the danger of unfair prejudice. *People v. Spoto*, 765 P.2d 1314 (Colo. 1990). Without belaboring the above points, the People would offer a brief summary as to why the prior acts evidence meets the *Spoto* standard.

i. Relation to a Material Fact

Identity of the defendant and lack of consent by the victim are ultimate facts and elements that the People must prove. Likewise, the People must prove the defendant was armed with a deadly weapon and used it to cause the submission of the victim. Similarly, “plan, scheme, design, modus operandi, and motive, while not usually elements or ultimate facts themselves, are among, or closely related to, those examples of permissible reasons enumerated in the rule and are well-accepted methods of proving the ultimate facts necessary to establish the commission of a crime.” *People v. Rath*, 44 P.3d 1033, 1040 (Colo. 2002). Lack of consent and doctrine of chances also relate to the material fact of intent because “intent is ‘the other side of the coin’ of consent and/or fabrication.” *People v. Martinez*, 36 P.3d 154, 159 (Colo. App. 2001)

(finding that the 404b evidence presented in a sexual assault case to refute a consent defense was appropriate under *Spoto*).

ii. Logical Relevance

The other act evidence is logically relevant because it makes it more likely than not that Mr. Groshart broke into A.R.'s home masked, gloved, and armed with a handgun which he used to force A.R.'s submission. This evidence makes it more likely than not that Mr. Groshart had and used handcuffs to restrain A.R during the commission of the charged offense, that he placed a mask over A.R.'s face prior to raping her and that he came prepared with latex gloves that he later would wear when forcing A.R. to shower and washing her body following the assault.

The other act evidence is logically relevant in that it corroborates nearly every detail of the sexual assault as reported by A.R. in 2004. This evidence also is logically relevant to link up the identification of the defendant 18 years after commission of the offense; it provides a physical description from a snapshot in time closer to the date of offense in the charged case (only three years after the charged offense, as opposed to 18 years).

iii. Inference Other than Propensity

The proposed other act evidence here is offered for a proper purpose, and not for the prohibited inference that the defendant committed the sexual assault in this case because he has a bad character. The Supreme Court has recognized that “almost any evidence of other crimes will suggest that the defendant has a bad character and acted consistently with that character.” *Everett*, 250 P.3d at 656. However, “[t]he key to understanding the third *Spoto* step is that it does not demand the absence of the inference but merely requires that the proffered evidence be logically relevant independent of that inference.” *Id.*

The People have advanced three distinct purposes for which this evidence may be offered, each of which is proper and independent of a propensity inference. First, evidence of the proposed other act is offered to refute the defense of consent. Second, evidence of the other act is offered to prove identity. Third, evidence of the other act is offered to show a common plan, scheme or design based upon the highly similar circumstances of the defendant's conduct, "without regard to the defendant's general character or the moral connotation of any one or more of the individual steps in the plan." *People v. Delgado*, 890 P.2d 141, 144 (Colo. App. 1994). These are all purposes other than propensity and are thus appropriate for admission.

iv. C.R.E. 403

Finally, C.R.E. 403 requires that the probative value of the proposed other act evidence is not substantially outweighed by the danger of unfair prejudice. In determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, the challenged evidence is afforded "the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected." *Bondsteel*, 439 P.3d at 855.

While the People recognize that this evidence, like all evidence against a defendant, is prejudicial, it is not unduly so. Unfair prejudice within the meaning of C.R.E. 403 refers to "an undue tendency on the part of admissible evidence to suggest a decision made on an improper basis." *See Rath* at 1043. Prejudice that results from "the legitimate probative force of the evidence" is not unfair prejudice. *Id.* Thus, the probative value of the proposed other act evidence here is not substantially outweighed by the danger of undue prejudice.

V. Burden of Proof and Submission by Offer of Proof

The standard for admission of a prior act or transaction evidence is "preponderance of the evidence." *See People v. Garner*, 806 P.2d 366, 373 (Colo. 1991). In *Garner*, the Colorado

Supreme Court held that “the trial court, on the basis of all the evidence before it, must be satisfied by the preponderance of the evidence that the other crime occurred and that the defendant committed the crime.” *Id.* Similarly, *Groves* also approved of the use of an offer of proof for determination of other act evidence. *People v. Groves*, 854 P.2d 1310, 1313 (Colo. App. 1992). The People’s offer of proof in this case greatly exceeds the preponderance of evidence standard and therefore, the People respectfully request that this Court determine the admissibility of the evidence discussed above by review of this offer of proof.

WHEREFORE, the People respectfully request that this Honorable Court grant the PEOPLE'S MOTION TO ADMIT EVIDENCE OF ANOTHER ACT OF THE DEFENDANT PURSUANT TO C.R.E. 404(B).

Dated: September 29, 2023

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2023, a true and correct copy of the foregoing was:

- E-served through CCE to party of record listed below
- Placed in the United States mail to party of record listed below
- Filed with Denver County Court and emailed to party of record listed below
- Filed with Denver County Court and will be provided upon request for discovery

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By: /s/ MCKENNA BURKE