

COURT OF APPEALS OF VIRGINIA

Record No. 0498-25-1

JAMES RICHARD KING
v.
COMMONWEALTH OF VIRGINIA

Present: Judges O'Brien, Chaney and Raphael

Argued at Williamsburg, Virginia

Opinion Issued October 20, 2026

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

James Clayton Lewis,¹ Judge

Brett P. Blobaum, Senior Appellate Attorney (Virginia Indigent Defense Commission, on briefs),
for appellant.

Elizabeth Kiernan Fitzgerald, Assistant Attorney General (Jason S. Miyares,² Attorney General, on
brief), for appellee.

PUBLISHED OPINION BY JUDGE MARY GRACE O'BRIEN

Following a jury trial, the circuit court convicted James Richard King of first-degree murder and object sexual penetration. On appeal, King argues that the court erred in admitting evidence of his conviction for a 1986 murder. He contends that this prior conviction was inadmissible under Virginia Rule of Evidence 2:404. Finding no error, we affirm.

¹ Judge Lewis presided over the trial and sentencing hearing and entered the final order. Judge Steven C. Frucci ruled on the pretrial motion that is a subject of this appeal. Now a member of this Court, Judge Frucci took no part in this decision.

² Jay C. Jones succeeded Jason S. Miyares as Attorney General on January 17, 2026.

BACKGROUND

“We recite the facts in the light most favorable to the Commonwealth, the prevailing party below.” *McCumber v. Commonwealth*, 88 Va. App. 169, 173 (2026). “Doing so requires that we ‘discard’ the defendant’s evidence when it conflicts with the Commonwealth’s evidence, ‘regard as true all the credible evidence favorable to the Commonwealth,’ and read ‘all fair inferences’ in the Commonwealth’s favor.” *Id.* (quoting *Camann v. Commonwealth*, 79 Va. App. 427, 431 (2024) (en banc)).

1. The Murder of Lexie Walters

On September 15, 2020, King checked into a hotel room with Lexie Walters, a woman he had been dating “on and off” for “quite some time.” On the second day of their stay, September 16, they went to a bar and drank a significant amount of alcohol. When the bartender stopped serving them, King told her that Walters was “dying anyway” and said, “If you were dying, wouldn’t you want to drink as much alcohol as you can?”

King and Walters left the bar between 7:00 and 8:00 p.m. and returned to the hotel. King murdered Walters in the hotel room that night and turned himself in at a police station the next morning. King told the police that Walters’s body was lying on a couch in the hotel room and that he had covered her with a blanket. King said he had consumed so much alcohol the previous night that he could not recall the details of Walters’s death, but he wanted the police to “find her before anyone else did.” He said that he did not call 911 because he wanted to smoke and drink coffee “before coming in and going to jail.”

King explained that he thought he was responsible because he had “flipped out before.” He elaborated that he had been convicted of murder in Ohio and said, “I did the same thing that I am doing right now. When I found her, I just turned myself in.”

The police located Walters's body, covered with a blanket, on a couch in the hotel room, as King had reported. She was naked from the waist down, and her shirt and bra were "pulled up high on her chest" exposing her breasts. Walters's perineum and anus displayed "blunt force trauma," and she had suffered "[m]ultiple contusions and abrasions to the face, neck, torso, and extremities" and "blunt force injuries to the head, torso, and extremities." Her blood alcohol content was between .231 to .261 percent. The cause of Walters's death, however, was asphyxiation. King was arrested and indicted for first-degree murder, first-degree murder during object sexual penetration, and object sexual penetration.

2. Pretrial Motion to Admit Ohio Murder Conviction

Before trial, the Commonwealth moved under Rule 2:404(b)³ to admit evidence of King's prior conviction for a 1986 murder in Ohio, which he had referenced when reporting himself to police. The Commonwealth proffered that, in November 1986, King walked into an Ohio police station and reported that a woman's dead body was on a bed in his apartment and he wanted police to know before someone else found her. According to the proffer, King told the police that he had met the woman—Janis Kloschen—at a wedding reception and they subsequently went to his apartment. The woman's body was found on a bed in King's

³ Rule 2:404(b) provides exceptions to the general rule excluding "other crimes" evidence:

[E]vidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.

apartment; she was lying on her back, naked, with a pillow over her face, and a sheet covering her genitals.⁴

At a hearing on the motion, the Commonwealth entered several exhibits, including (1) the Ohio conviction order, showing that King pleaded guilty to the 1986 murder of Kloshen; (2) Kloshen's autopsy; (3) the autopsy of Walters, the victim in this case; and (4) photographs of both crime scenes. Kloshen's autopsy reported that she had suffered significant injuries to her anus, as well as hemorrhaging and bruising to her face, head, neck, and extremities. According to the report, Kloshen's cause of death was "asphyxia due to strangulation," and her blood alcohol concentration was between .13 and .16 percent when she died. The photographs depicted Kloshen naked, lying on a bed on her back, partially covered with a blanket.

The Commonwealth argued that, because King was charged with premeditated murder, the evidence was relevant to establish King's relationship to his victims, his modus operandi, and that Walters's killing "was not an accident or a mistake that happened during the course of intoxication beyond [King's] control."

The court granted the Commonwealth's motion, noting that the similarities between the Ohio murder and the instant case were "striking." Both murders began with a consensual relationship and involved alcohol. The victims had "injuries in similar locations," and both had died of asphyxiation. In both cases, King wanted police to find the bodies before anyone else did. Significantly, the court found the crime scene photographs "hauntingly similar" in "the way th[e] bodies were placed." The court ruled that the similarities between the two crimes were "sufficiently idiosyncratic . . . to establish the probability of a common perpetrator" and that King's prior conviction was relevant evidence of his modus operandi. Moreover, the factual

⁴ The Commonwealth also sought to admit evidence of King's 2018 conviction for assault. The court denied the Commonwealth's motion pertaining to the assault conviction.

similarities were so strong that the probative value outweighed the prejudicial harm, and the lapse of time between the crimes did not “dissipate” the probative value.

3. Trial

At trial, the Commonwealth introduced evidence of King’s prior murder conviction along with other evidence. Retired Ohio Police Detective Michael Belcik testified that in 1986, he executed a search warrant at King’s apartment in Ohio. Inside, he found a deceased woman—Kloshen—lying down, naked, with a pillow over her face, and a sheet covering her genitals. When the pillow was removed, he saw that Kloshen’s face was heavily bruised. She had abrasions on her wrists and ankles, as well as bite marks on her nipples. Detective Belcik observed a beer can, drinking glasses, and cigarettes on the nightstand.

The Commonwealth also introduced crime scene photographs of Kloshen, her possessions, her injuries, and how she was found in King’s apartment. The photographs depicted Kloshen lying naked on King’s bed with both arms at right angles above her head; her face was red and mottled, and she had markings on her neck. One photograph showed Kloshen with the pillow on her face before investigators removed it. Detective Belcik testified that, at the police station, King “refused to make a phone call” and instead said, “[W]hy would I want to call my mother and father and tell them I just murdered someone[?]” The parties stipulated that King had been found guilty of murdering Kloshen in November 1986.

After the Commonwealth rested, King renewed his objection to the evidence of his prior murder conviction. He pointed out that the Commonwealth did not introduce Kloshen’s autopsy report, as it had at the pretrial hearing, and that the trial evidence therefore did not establish her cause of death. King also argued that the trial evidence did not establish the nature of his relationship with Kloshen. The court declined to reconsider the prior ruling, made by a different judge, and overruled the renewed objection.

King's defense evidence consisted of a stipulation that King and Walters spent over three hours together at the bar before the killing, drinking alcohol and behaving affectionately.

Sergeant Bryan Smolin also testified that the police recovered many of Walters's personal items from the hotel room, including keys, a wallet, medicines, clothes, and cosmetics. King rested and unsuccessfully moved to strike the evidence.

The court instructed the jury that it could consider King's prior murder conviction "only for the purpose of showing [King's] motive, opportunity, preparation, plan, knowledge, identity, absence of mistake, accident, or if part of a common scheme or plan. You may not consider it for any other purpose."

During closing argument, King suggested that Walters's death was accidental. He addressed Walters's cause of death—asphyxiation—and asserted that "strangulation or smothering" is a "sort of behavior that's not unusual in sexual relations" but "[i]t's something that can go wrong."

The Commonwealth closed by summarizing the beating and extensive injuries that Walters suffered prior to being asphyxiated and addressed the incriminating statements King made to the bartender and the police. The Commonwealth argued that the similarities between Kloshen's murder and Walters's murder demonstrated King's modus operandi and that King "plan[ned]" Walters's death; it was "no accident" or "mistake." The jury convicted King of first-degree murder and object sexual penetration.⁵

⁵ The jury also convicted King of first-degree murder during object sexual penetration. The Commonwealth later moved to vacate the conviction for first-degree murder during object sexual penetration, which the court granted. *See Severance v. Commonwealth*, 295 Va. 564, 572 (2018) ("In the simultaneous-prosecution context, the prohibition against double jeopardy protects against 'multiple punishments for the same offense.'" (quoting *Commonwealth v. Gregg*, 295 Va. 293, 298 (2018))).

ANALYSIS

“The admissibility of evidence is within the broad discretion of the trial court, and a ruling will not be disturbed on appeal in the absence of an abuse of discretion.” *Cheripka v. Commonwealth*, 78 Va. App. 480, 494 (2023) (quoting *Warnick v. Commonwealth*, 72 Va. App. 251, 263 (2020)). “In evaluating whether a trial court abused its discretion, . . . we do not substitute our judgment for that of the trial court. Rather, we consider only whether the record fairly supports the trial court’s action.” *Kenner v. Commonwealth*, 299 Va. 414, 423 (2021) (quoting *Carter v. Commonwealth*, 293 Va. 537, 543 (2017)). We “can conclude that ‘an abuse of discretion has occurred’ only in cases in which ‘reasonable jurists could not differ’ about the correct result.” *Cheripka*, 78 Va. App. at 495 (quoting *Commonwealth v. Swann*, 290 Va. 194, 197 (2015)).

King argues that the court erred in admitting evidence of his prior conviction for the 1986 murder of Kloschen. He claims that the evidence “did not tend to prove any relevant fact pertaining to the charged offenses.” He emphasizes factual differences between the two crimes and argues that any “generalized similarities . . . are not sufficiently idiosyncratic as to justify their admission.” King also asserts that the prior conviction amounts to propensity evidence and the court abused its discretion in finding that the probative value exceeded the incidental prejudice under Rule 2:404(b). Finally, King argues that the court erred in declining to reconsider the pretrial ruling to allow evidence of the prior conviction.

“[E]vidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith.” Va. R. Evid. 2:404(b). “The law is clear that evidence ‘tend[ing] to show that the accused is guilty of other crimes and offenses at other times’ is not admissible if ‘offered *merely* to show [the accused’s] propensity to commit’ the charged crime.” *Cheripka*, 78 Va. App. at 495 (alterations

in original) (quoting *Harvey v. Commonwealth*, 76 Va. App. 436, 475 (2023)). Yet, Virginia courts take an “inclusionary approach” to the admissibility of other-crimes evidence, provided it is “relevant[] for any purpose *other than* to show a mere propensity.” *Harvey*, 76 Va. App. at 476 (alteration in original) (quoting *Castillo v. Commonwealth*, 70 Va. App. 394, 415 (2019)). “As an exception to the general rule of exclusion,” evidence of other crimes is admissible when “it tends to prove any relevant fact pertaining to the offense charged, such as . . . motive, opportunity, intent, preparation, plan, knowledge, identity, *absence of mistake [or] accident*, or if they are part of a common scheme or plan.” *Vera v. Commonwealth*, 77 Va. App. 271, 281 (2023) (emphasis added) (first quoting *Shifflett v. Commonwealth*, 29 Va. App. 521, 529 (1999); and then quoting Va. R. Evid. 2:404(b)). “In addition to being relevant and material, other crimes evidence ‘is subject to the further requirement that the legitimate probative value of the evidence must exceed its incidental prejudice to the defendant.’” *Kenner*, 299 Va. at 427 (quoting *Rose v. Commonwealth*, 270 Va. 3, 11 (2005)); *accord* Va. R. Evid. 2:404(b).

As a preliminary matter, in determining whether the court erred under Rule 2:404(b), we consider only the evidence presented at trial. Although the trial judge declined to “reconsider” the pretrial ruling by a different judge, he was in fact presented with a new question: whether King’s 1986 murder of Kloshen remained admissible even though the Commonwealth introduced less extensive evidence of Kloshen’s murder at trial. Specifically, at trial, the Commonwealth did not introduce Kloshen’s autopsy, evidence that Kloshen and King’s relationship began consensually, or that King wanted the police to find Kloshen’s body before anyone else did—information that was before the judge at the pretrial hearing.

But the evidence the Commonwealth did introduce at trial nevertheless established substantial similarities between the 1986 murder and the instant case. That trial evidence included testimony from the Ohio detective who investigated the 1986 murder and saw

Kloshen's dead body in King's apartment. Numerous crime scene photographs showed Kloshen's body in a position similar to Walters's body: both women were found naked, on their backs, with their arms overhead. The photographs showed that both women were beaten. Kloshen had bruising on her neck and was found with a pillow on her face, permitting the reasonable inference that King smothered her, similar to how he asphyxiated Walters. The fact that Kloshen was on King's bed permits a reasonable inference that she and King had been sexually involved prior to her murder, like Walters and King. And, although Kloshen's BAC was not admitted into evidence at trial, photographs showed alcohol on the nightstand at the 1986 crime scene; similarly, the police found beer bottles on a table in the hotel room where Walters died, indicating that both incidents involved alcohol.

The trial evidence also included the fact that, after each murder, King turned himself in to the police and made incriminating statements. Specifically, the Ohio detective testified that King refused to make any phone calls and instead said, "[W]hy would I want to call my mother and father and tell them I just murdered someone[?]" Similarly, here, King turned himself in, telling police that he had smoked and drank coffee "before coming in and going to jail." King even referenced his Ohio murder conviction, telling police that he had "flipped out before" and "I did the same thing that I am doing right now. When I found her, I just turned myself in."

The evidence before the trial judge—although not as extensive as the evidence presented at the pretrial hearing—was still admissible under Rule 2:404(b). King was charged with first-degree murder, requiring the Commonwealth to prove that Walters's homicide was "willful, deliberate, and premeditated." Code § 18.2-32. Evidence that King had previously murdered another sexual partner, after brutally beating her, was relevant to the issue of King's intent in this case and to negate the possibility that Walters's death was a mistake or accident. *See* Va. R. Evid. 2:404(b) (allowing evidence of other crimes if relevant to show absence of mistake or

accident); *see also Kirkpatrick v. Commonwealth*, 211 Va. 269, 272 (1970) (stating that “other crimes” evidence is “permissible in cases where the motive, intent[,] or knowledge of the accused is involved”); *Jennings v. Commonwealth*, 20 Va. App. 9, 15, *aff’d on reh’g en banc*, 21 Va. App. 328 (1995) (stating that “evidence of other crimes may be admitted to prove knowledge, or to refute a claim of mistake”). The evidence was relevant to refute King’s suggestion that his actions merely amounted to “rough sex” that went too far. *See, e.g., Williams v. Commonwealth*, No. 1786-23-1, 2025 Va. App. LEXIS 115, at *30-31 (Feb. 25, 2025) (“To the extent appellant attempted to excuse some of his behavior as an accident or mistake, the evidence of other similar and intentional incidents rebuts that defense.”).⁶

We also find no abuse of discretion in the court’s conclusion that the probative value of King’s prior conviction outweighed the incidental prejudice. “Rule 2:404(b) permits the introduction of otherwise admissible prior-bad-act evidence only ‘if the legitimate probative value of such proof outweighs its incidental prejudice.’” *Williams v. Commonwealth*, 85 Va. App. 718, 734 (2025) (quoting Va. R. Evid. 2:404(b)). The Rule 2:404(b) standard is “marginally stricter than the balancing test for prejudice used to evaluate the admission of relevant evidence generally.” *Id.* at 737 (quoting *Drexel v. Commonwealth*, 80 Va. App. 720, 741 n.6 (2024)). “The responsibility for balancing the two considerations rests in the trial court’s discretion[,] and we will not disturb the trial court’s determination in the absence of a clear abuse of discretion.” *Kenner*, 299 Va. at 427.

The Commonwealth had to prove that Walters’s murder was premeditated. Thus, any evidence that was probative of King’s intent, plan, modus operandi, relationship to the victim, and absence of mistake or accident was relevant. *See* Va. R. Evid. 2:404(b); *see also* Va. R.

⁶ “Unpublished opinions of this Court, while having no precedential value, are nevertheless persuasive authority.” *Otey v. Commonwealth*, 71 Va. App. 792, 799 n.3 (2020) (quoting *Samartino v. Fairfax Cnty. Fire and Rescue*, 64 Va. App. 499, 508 n.2 (2015)).

Evid. 2:401 (“Relevant evidence” is “evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence”). As stated above, based on our review of the trial record, the evidence of Kloshen’s murder was relevant to show that Walters’s death was not a mistake or accident and to show King’s criminal intent. The trial record also supports a finding that the probative value of King’s prior conviction outweighed its incidental prejudice. The evidence of Kloshen’s murder helped establish King’s intentional method for abusing and killing Walters. The Commonwealth must “prove every element of its case” and “is entitled to do so by presenting relevant evidence in support of the offense charged.” *Kenner*, 299 Va. at 426. It is settled law in Virginia that “the perpetrator has no right to have the evidence ‘sanitized’ so as to deny the jury knowledge of all but the immediate crime.” *Id.* (quoting *Scott v. Commonwealth*, 228 Va. 519, 526 (1984)). “Given that all incriminating evidence ‘is prejudicial to an accused,’ the fact that prejudice results does not ‘justify automatic exclusion.’” *Williams*, 85 Va. App. at 739 (quoting *Jordan v. Commonwealth*, 84 Va. App. 446, 469 (2025)). Rather, the rule is concerned with unfair prejudice. *See id.*

“[T]he danger of unfair prejudice can . . . be mitigated by an instruction to the jury that limits their consideration of other crimes evidence to its proper purposes and application to each offense charged.” *Id.* (second alteration in original) (quoting *Brooks v. Commonwealth*, 73 Va. App. 133, 148 (2021)). Here, the court instructed the jury that it could consider King’s prior conviction only to assess “motive, opportunity, preparation, plan, knowledge, identity, absence of mistake, accident, or if part of a common scheme or plan” and “not . . . for any other purpose.” “We presume that juries heed such instructions.” *Williams*, 85 Va. App. at 739-40.

We also note that although nearly 34 years had passed between the homicides, King was incarcerated for the majority of that time.⁷ *See Turner v. Commonwealth*, 259 Va. 645, 652-53

⁷ King pleaded guilty to the Ohio murder in 1990 and served a 20-year sentence.

(2000) (holding that the court properly considered whether the defendant was incarcerated in weighing the probative value of crimes committed years apart). Although evidence of a prior crime may be too remote in time where it shows “no causal relationship or logical connection between” the first incident and the second, *Quinones v. Commonwealth*, 35 Va. App. 634, 642 (2001), once factual relevancy has been established, the court “should not withhold such evidence solely on the basis of remoteness unless the expanse of time has truly obliterated all probative value,” which is a “determination . . . committed to the sound discretion of the trial court,” *Lafon v. Commonwealth*, 17 Va. App. 411, 419 (1993). Here, considering the clear logical connection between the two offenses and King’s intervening incarceration, the passage of time did not obliterate the probative value of the prior bad act nor render it inadmissible.

Because the court’s evidentiary ruling was supported by the record, we find no abuse of discretion. *Kenner*, 299 Va. at 423; *Lafon*, 17 Va. App. at 419.⁸

CONCLUSION

For these reasons, we affirm the court’s judgment.

Affirmed.

⁸ We need not decide whether King’s prior conviction was admissible as evidence of modus operandi—the exception on which the court relied below—because the record amply demonstrates that it was admissible to show an absence of mistake or accident and King’s criminal intent. “Under the ‘right-result-different-reason principle,’ we may sustain a trial court’s judgment ‘where the correct conclusion has been reached but [a different] reason [is] given.’” *Reed v. Commonwealth*, 85 Va. App. 196, 211 n.6 (2025) (alterations in original) (quoting *Vandyke v. Commonwealth*, 71 Va. App. 723, 731 (2020)). “Further, the doctrine of judicial restraint obligates us to decide cases ‘on the best and narrowest grounds.’” *Id.* (quoting *Butcher v. Commonwealth*, 298 Va. 392, 396 (2020)).

Raphael, J., concurring.

I join the majority opinion in full. I agree that the trial court properly admitted the evidence that James King killed Janis Kloshen 34 years before he killed Lexie Walters under unusually similar circumstances. King claimed that he did not intend to kill Walters and that her death was accidental. Kloshen's killing was not admitted "to prove the character trait of [King] in order to show that [he] acted in conformity therewith." Va. R. Evid. 2:404(b). The prosecution's theory was not, "once a murderer, always a murderer." Rather, King's prior bad act tended to show that Walters did not die by "accident," *id.*, because it was highly improbable that two women could die by accident in King's presence under such exceptionally similar circumstances. I also agree that the probative value of the prior-bad-act evidence outweighed the risk of unfair prejudice.

I write separately to show that the relevance of the prior-bad-act evidence here derives from what Dean Wigmore called the "doctrine of chances," the early name for what we now call probability theory.

I. The common-law precursors to Virginia Rule of Evidence 2:404

The Virginia Rules of Evidence, promulgated in 2012,⁹ were "adopted to implement established principles under the common law and not to change any established case law rendered prior to the adoption of the Rules." Va. R. Evid. 2:102. Rule 2:404(b) provides (with exceptions not applicable here) that "evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith."

Such propensity evidence is excluded not because it is irrelevant but because of the significant risk it poses of "unfair prejudice." *Rodriguez v. Commonwealth*, 85 Va. App. 664,

⁹ See Order (Va. July 1, 2012) (Rule 2:102), <https://perma.cc/8AGV-QWTR>.

684 (2025). “Evidence that a defendant has committed similar offenses in the past ‘might logically be persuasive that [the defendant] is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much.’” *Id.* at 684-85 (alteration in original) (quoting *Old Chief v. United States*, 519 U.S. 172, 181 (1997)). “Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of his guilt.” *Old Chief*, 519 U.S. at 181 (quoting *Michelson v. United States*, 335 U.S. 469, 475 (1948)). “The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.” *Michelson*, 335 U.S. at 476.

But that rule of exclusion does not apply to prior bad acts that are relevant for a *proper* purpose:

[I]f the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.

Va. R. Evid. 2:404(b). That sentence uses *such as*, making clear that the list of permissible uses of prior-bad-act evidence “is neither exhaustive nor definitive.” *Lafon v. Commonwealth*, 17 Va. App. 411, 417 (1993); *see also Stambler v. Commonwealth*, 88 Va. App. 198, 211 (2026) (same); *Lambert v. Commonwealth*, 70 Va. App. 740, 750 (2019) (same). In other words, Virginia “follows an ‘inclusionary approach’ to the uncharged misconduct doctrine by admitting such evidence ‘if relevant, for any purpose *other than* to show a mere propensity or disposition on the part of the defendant to commit the crime.’” *Thomas v. Commonwealth*, 44 Va. App. 741, 757 n.8 (quoting Kent Sinclair, Joseph C. Kearfott, Paul F. Sheridan, & Edward J. Imwinkelried,

Virginia Evidentiary Foundations § 6.4[A], at 165 (1998)), *aff'd upon reh'g en banc*, 45 Va. App. 811 (2005).

Our courts have usually described the rule against propensity evidence as the “general rule” and the use of prior-bad-act evidence for other, relevant purposes as the “exception.” *E.g.*, *Ortiz v. Commonwealth*, 276 Va. 705, 714 (2008). The title of the rule itself tracks that approach. *See* Va. R. Evid. 2:404 (“Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes”). Still, we have recognized that “there are so many exceptions to the rule that it is difficult to determine which is more extensive—the rule or its acknowledged exceptions.” *Cullen v. Commonwealth*, 13 Va. App. 182, 185 (1991) (quoting *Ferrell v. Commonwealth*, 11 Va. App. 380, 388 (1990)).

The general rule and its exceptions are “deeply rooted in Virginia common law.” *Tucker v. Commonwealth*, 17 Va. App. 520, 522 (1993). In *Finn v. Commonwealth*, 26 Va. (5 Rand.) 701 (1827), a prosecution for passing counterfeit notes, the Court ruled that the prosecution’s witness properly testified that the defendant had asked him “two or three” times before to procure counterfeit money. *Id.* at 709. The Court explained that passing a counterfeit note could be “a perfectly innocent transaction; the guilt consists in passing it, knowing it to be counterfeit.” *Id.* at 710. The defendant’s prior bad act was admissible “so that from his conduct on one occasion, the jury may infer his knowledge on another.” *Id.* The Court cited *Rex v. Whiley*, 2 Leach. 983, 168 Eng. Rep. 589 (K.B. 1804). *See Finn*, 26 Va. at 710. As Chief Justice Lord Ellenborough wrote in *Whiley*, “[c]ircumstances of this kind may produce such strong evidence as to leave no doubt as to the prisoner’s knowledge that these notes are forged.” 2 Leach at 986, 168 Eng. Rep. at 590. “It was from cases such as *Whiley*, along with comments of legal commentators, that the modern ‘other crimes, wrongs, or acts’ rule emerged.” David P. Leonard,

In Defense of the Character Evidence Prohibition: Foundations of the Rule against Trial by Character, 73 Ind. L.J. 1161, 1175 (1998).¹⁰

Two years after *Finn*, the Court applied the general rule against propensity evidence in *Walker v. Commonwealth*, 28 Va. (1 Leigh) 574 (1829). *Walker* held that it was inadmissible in a prosecution for stealing a watch that the defendant on another occasion had stolen a cloak. *Id.* at 579-80. The Court distinguished *Finn* as a case where it was “impossible . . . to become acquainted with the secret knowledge of another, without referring to his conduct or his acts on other occasions.” 28 Va. at 578. *Walker* became known as “the leading case” in Virginia for the rule against propensity evidence. See *Guill v. Commonwealth*, 255 Va. 134, 139 (1998) (citing *Kirkpatrick v. Commonwealth*, 211 Va. 269, 273 (1970)). Propensity evidence is inadmissible because it “confuses one offense with the other, unfairly surprises the defendant with a charge he is unprepared to meet, and, by showing that the accused has a criminal propensity, tends to reverse his presumption of innocence of the crime on trial.” *Lewis v. Commonwealth*, 225 Va. 497, 502 (1983).

II. The doctrine of chances

Dean Wigmore was the first legal scholar to describe the use of probability theory—what was then called “the doctrine of chances”—to warrant the admission of prior-bad-act evidence for purposes other than showing the defendant’s poor character or propensity to offend. 1 John

¹⁰ Unlike certain other common-law rules of evidence, the rules surrounding prior-bad-act evidence were not clearly established under English common law before American independence. Cf. *Curry v. Commonwealth*, 84 Va. App. 339, 361-62 & n.2 (2025) (Raphael, J., concurring) (noting that the rule of completeness under English common law can be traced to “the 1600s”). The rule against using “character evidence to prove a person’s conduct” was not “well settled” in England until at least 1810. Leonard, 73 Ind. L.J. at 1170 & nn.41-43 (discussing the unreported case of *Rex v. Cole*). “The rule which is said to be fundamental in English criminal justice was apparently not sufficiently well known even as late as 1824 to merit treatment in the textbooks on criminal law.” Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv. L. Rev. 954, 959 (1933) (footnote omitted).

Henry Wigmore, *Treatise on the System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States* § 302, at 390 (1904).

The doctrine of chances can be traced to the first treatise on probability theory, published in 1718. See Abraham de Moivre, *The Doctrine of Chances* 1 (1718) (“THE Probability of an Event is greater, or less, according to the number of Chances by which it may Happen, compar’d with the number of all the Chances, by which it may either Happen or Fail.”). The “doctrine of chances” was also the name used by the father of Bayesian probability theory. See Thomas Bayes, *An Essay Towards Solving a Problem in the Doctrine of Chances*, 53 Phil. Trans. R. Soc. 370, 370-71 (1763).¹¹

Wigmore explained that relevance, based on the doctrine of chances, involves “instinctive recognition.” Wigmore, *supra*, at 390. “[T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal event likely to be the true explanation of them.” *Id.* Wigmore used the example of a hunter, A, who hears a bullet fired by B whiz past his head. A “is willing to accept B’s bad aim or B’s accidental tripping as a conceivable explanation.” *Id.* “[B]ut if shortly afterwards the same thing happens again, and if on a third occasion A receives B’s bullet in his body, the immediate inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately” *Id.* For “the chances of an inadvertent shooting on three successive similar occasions are extremely small.” *Id.*

“Most jurisdictions now approve of the doctrine [of chances].” Edward J. Imwinkelried & Tamara Rice Lave, *Uncharged Misconduct Evidence* § 5:6 (2024) [“*Uncharged Misconduct*

¹¹ A Lexis search reveals 50 uses of *doctrine of chances* in American caselaw before the first edition of Wigmore’s treatise in 1904.

Evidence”]. The doctrine “has been used to determine the admissibility of evidence of extrinsic acts to prove intent, knowledge, or absence of mistake or accident in homicide, sexual crimes, and other crimes against the person.” Marjorie A. Shields, *Application of “Doctrine of Chances” in Homicide, Sexual Crimes, and Other Offenses Against the Person*, 11 A.L.R. 7th Art. 1, § 1 (2015).

“The doctrine of chances rests on the objective improbability of coincidences.” Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances: Relying on the Concept of Relative Frequency to Admit Uncharged Misconduct Evidence*, 7 Crim. Just. 16, 18 (Fall 1992) [“Imwinkelried (1992)”]. Professor Imwinkelried offered *Rex v. Smith*, 84 L.J. 2153 (K.B. 1915), as an example. *Id.* at 19. Smith was charged with murdering his new wife. She had recently inherited some money from her father and drowned in the bathtub when Smith was the only other person at home. Smith had taken his wife to the doctor shortly before her death, asserting that she was unwell. Smith claimed that his wife had drowned accidentally. But the trial court allowed the prosecution to introduce evidence that Smith had married twice before, and both times the wives were “found drowned in their baths in houses where they were living with [Smith].” 84 L.J. at 2154. Both “women had insured their lives at the suggestion of [Smith]; in both [Smith] had been at some pains to ensure that a bath should be available; in both he had taken the woman just before her death to a doctor with a complaint concerning her state of health.” *Id.* The appellate court held that the earlier acts were properly admitted to show that the third wife’s death was not accidental. *Id.* at 2156.

As Imwinkelried explained in later works, “innocent persons sometimes find themselves enmeshed in suspicious circumstances; but common sense indicates that it is implausible that such involvement will occur repeatedly.” Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing*

Uncharged Misconduct Evidence to Prove Intent, 45 Hofstra L. Rev. 851, 855 (2017)

[“Imwinkelried (2017)”]. “In isolation, it might be plausible that the defendant acted accidentally or innocently However, in the context of other misdeeds, the defendant’s act takes on an entirely different light. The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed.” *Uncharged Misconduct Evidence, supra*, § 5:6 (footnotes omitted).

The Fourth Circuit’s decision in *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), is considered “[o]ne of the leading American cases” relying on the doctrine of chances, Imwinkelried (2017), *supra*, at 866, though *Woods* did not invoke the “doctrine of chances” by name. Woods was charged with first-degree murder in the death of her seven-month-old foster-care son. Over a two-week period, the infant “suffered instances of gasping for breath and turning blue from lack of oxygen”—cyanosis—while in Woods’s care. 484 F.2d at 129. On the last occasion, the infant lapsed into a coma and died. *Id.* The government’s forensic pathologist testified that he was 75% certain that the infant’s death was caused by smothering. His 25% doubt was based on the possibility that the infant “died naturally from a disease currently unknown to medical science.” *Id.*

The Fourth Circuit held that the government properly introduced evidence that 9 other children in Woods’s care had suffered at least 20 episodes of cyanosis and that 7 of them had died. *Id.* Woods argued “that cyanosis among infants is too common to constitute an unusual and distinctive device unerringly pointing to guilt.” *Id.* at 134. But the court of appeals held that the evidence was admissible to “prove that a crime had been committed because of the remoteness of the possibility that so many infants in the care and custody of defendant would suffer cyanotic episodes and respiratory difficulties if they were not induced by the defendant’s

wrongdoing.” *Id.* at 135. In other words, the “pattern overwhelmingly establishe[d] [Woods’s] guilt.” *Id.*

Our Supreme Court too has used probability theory to uphold the use of prior-bad-act evidence when relevant to an issue other than the defendant’s character. *E.g., Angel v. Commonwealth*, 281 Va. 248, 267 (2011) (“Evidence of other crimes is admissible in cases of disputed identity to prove the probability of a common perpetrator if the other crimes bear ‘sufficient marks of similarity to the crime charged.’” (quoting *Turner v. Commonwealth*, 259 Va. 645, 651 (2000))); *Chichester v. Commonwealth*, 248 Va. 311, 327 (2000) (finding “sufficient marks of similarity to the crime charged to establish that the defendant is probably the common perpetrator”); *Spencer v. Commonwealth*, 240 Va. 78, 89 (1990) (“[T]he evidence of other crimes so resembles the pattern of the offense charged as to raise the probability of a common perpetrator.”).

As those quotations reflect, “[t]he doctrine of chances does not come into play unless the incidents are similar.” *Uncharged Misconduct Evidence, supra*, § 5:6. The requirement to show “similarity is a logical necessity.” Imwinkelried (2017), *supra*, at 862. Our Court at first adopted a strict similarity requirement, insisting that “the device used to commit the [uncharged] crime, or the manner in which the [uncharged] crime was committed, must be so unusual and distinctive as to act as a signature.” *Sutphin v. Commonwealth*, 1 Va App. 241, 247 (1985), *overruled by Spencer v. Commonwealth*, 240 Va. 78 (1990).

But the Supreme Court relaxed that standard in *Spencer*. The Court said that the term *signature* was useful only if understood to mean “a distinctive *modus operandi*, such that the evidence of other crimes so resembles the pattern of the offense charged as to raise the probability of a common perpetrator.” 240 Va. at 89. The Court warned that our standard in *Sutphin* could have been “misunderstood to require . . . virtual carbon copies of the case on trial.”

Spencer, 240 Va. at 89-90. “[E]vidence of other crimes, to qualify for admission as proof of *modus operandi*, need not bear such an exact resemblance to the crime on trial as to constitute a ‘signature.’ Rather, it is sufficient if the other crimes bear ‘a singular strong resemblance to the pattern of the offense charged.’” *Id.* at 90 (quoting *United States v. Hudson*, 884 F.2d 1016, 1021 (7th Cir. 1989)). “That test is met where the other incidents are ‘sufficiently idiosyncratic to permit an inference of pattern for purposes of proof’” *Id.* (quoting *Hudson*, 884 F.2d at 1021); see generally Kent Sinclair, *The Law of Evidence in Virginia* § 8-4[c] at 473-74 (8th ed. 2018) (noting that *Spencer* “renders the ‘signature’ test (and the Court of Appeals cases which applied it) obsolete”). As we acknowledged more than 30 years ago, “[t]he signature theory, insofar as it requires that the crimes be ‘carbon copies’ of each other, was rejected by . . . *Spencer*.” *Ferrell*, 11 Va. App. at 387.

Another prerequisite for admitting prior-bad-act evidence under the doctrine of chances is that no step in the theory of relevance can depend on the defendant’s propensity to commit the crime. A propensity inference would defy the prohibition that “evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith.” Va. R. Evid. 2:404(b). By contrast, “[i]f the facts satisfy the requirements for invoking the doctrine of chances, the jury can draw the ultimate inference of intent without positing an intermediate assumption that the accused has a disposition or propensity for criminal or immoral conduct.” Imwinkelried (2017), *supra*, at 874.

A third requirement for applying the doctrine of chances is that the probative value of the prior-bad-act evidence must outweigh its incidental prejudice. Va. R. Evid. 2:404(b). This standard is more demanding than the general rule that relevant evidence is admissible unless its probative value is “substantially outweighed” by the danger of unfair prejudice. Va. R. Evid. 2:403(a)(i). As explained in *Williams v. Commonwealth*, 85 Va. App. 718 (2025), it is “easier for

a party to introduce relevant evidence generally than to introduce relevant prior-bad-act evidence. Prior-bad-act evidence that is otherwise admissible must be excluded whenever its probative value is merely outweighed by its incidental prejudice; the prejudice need not substantially outweigh the probative value.” *Id.* at 734.

To be sure, the balancing task is difficult because the probative value of prior-bad-act evidence cannot be measured in the same units as the danger of unfair prejudice to the defendant. The balancing task is akin to deciding “whether a particular line is longer than a particular rock is heavy.” *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U. S. 888, 897 (1988) (Scalia, J., concurring in judgment); *Uncharged Misconduct Evidence* § 8:27 (applying Justice Scalia’s metaphor). That is why “[t]he responsibility for balancing the two considerations rests in the trial court’s discretion and we will not disturb the trial court’s determination in the absence of a clear abuse of discretion.” *Kenner v. Commonwealth*, 299 Va. 414, 427 (2021).

Finally, a trial court that relies on the doctrine of chances to admit prior-bad-act evidence should generally give a limiting instruction, as the trial court did here. “[T]he distinction between verboten character reasoning and legitimate use of the doctrine [of chances] can be so thin that the trial judge ought to give the jury a limiting instruction sharply differentiating between character reasoning and the use of the evidence according to the doctrine.” Imwinkelried (2017), *supra*, at 857. “When evidence is admissible . . . for one purpose but not admissible as to . . . another purpose, the court upon motion must restrict such evidence to its proper scope and instruct the jury accordingly.” Va. R. Evid. 2:105. The court need not wait for a motion; it “may give such limiting instructions sua sponte, to which any party may object.” *Id.* A “limiting instruction may be the accused’s final and most important safeguard against the danger that the jury will misuse the testimony as evidence of the accused’s bad character.” Imwinkelried (2017), *supra*, at 878.

III. The doctrine of chances applied here

The doctrine of chances warranted the admission of the prior-bad-act evidence here despite that it was only one other act and despite the large gap in time between the two killings.

A. The prior bad act was admissible despite that it was the only other act of misconduct.

In Wigmore's hunter example, two shots missed the victim before the third one landed. In *Rex v. Smith*, two of the defendant's wives had drowned in the bathtub under similarly suspicious circumstances as the third wife. And in *Woods*, nine other children in the defendant's care suffered from cyanosis and seven died. Is the single instance in which Kloschen died under similar circumstances as Walters enough to invoke the doctrine of chances?

It is. "The question is not the absolute number of incidents. Rather, the question is whether the concurrence of the charged and uncharged incidents would amount to an extraordinary coincidence—exceeding the ordinary incidence of that type of event." Imwinkelried (2017), *supra*, at 863 (footnote omitted). "If an innocent person is likely to become involved in that type of event only once in his or her lifetime, proof of a single uncharged, similar incident suffices to trigger the doctrine." *Id.*

A good but "somber example" of how the occurrence of a single, highly unusual event influences the predictive probability of the same event recurring is "the September 11 attacks":

Most of us would have assigned almost no probability to terrorists crashing planes into buildings in Manhattan when we woke up that morning. But we recognized that a terror attack was an obvious possibility once the first plane hit the World Trade Center. And we had no doubt we were being attacked once the second tower was hit. Bayes's theorem can replicate this result.

. . . .

. . . One accident on a bright sunny day in New York was unlikely enough, but a second one was almost a literal impossibility, as we all horribly deduced.

Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail—but Some Don't*, 247-48 (2015).

What King claims was an accident here would surely be a once-in-a-lifetime event for any innocent person (if it even happened at all): waking up next to a dead naked woman whose face was battered and who died from asphyxiation (or apparent smothering) after a night of drinking; covering her naked body with a sheet or blanket; and reporting her death to the police while claiming he could not remember what happened. The facts surrounding Kloshen's killing bore "a singular strong resemblance to the pattern of the offense charged" and was "sufficiently idiosyncratic," *Spencer*, 240 Va. at 90 (quoting *Hudson*, 884 F.2d at 1021), to warrant its admission under Rule 2:404(b) to rebut King's claim of accident.

B. The prior bad act was admissible despite its age.

This case is also admittedly unusual because of the 34-year gap between the deaths of Kloshen and Walters. In our other appellate cases approving the admission of prior-bad-act evidence, the longest gap appears to have been 20 years. *Prieto v. Commonwealth*, 283 Va. 149, 174 (2012) ("20-year-old allegation"); *Bramblett v. Commonwealth*, 257 Va 263 (1999) ("two decades"); *George v. Commonwealth*, 242 Va. 264, 273 (1991) ("twenty years").

But just as the single prior instance involving Kloshen's killing was sufficiently idiosyncratic to warrant the inference that Walters did not die accidentally, the 34-year gap likewise does not negate its relevance. The rule is well-settled that "it is largely within the discretion of the trial court to determine '[w]hether evidence is so remote that it lacks probative value.'" *Collins v. Commonwealth*, 226 Va. 223, 230 (1983) (alteration in original) (quoting *Bunch v. Commonwealth*, 225 Va. 423, 439 (1983)). "Once factual relevance has been established, the trial court may consider remoteness as one of the factors in determining evidentiary relevance of prior bad act evidence, but it should not withhold such evidence solely on the basis of remoteness unless the expanse of time has truly obliterated all probative value."

Lafon, 17 Va. App. at 419. When the prior bad act is relevant, as it was here,¹² “the issue of remoteness concerns the weight of the evidence and the credibility of the witnesses, both of which are within the province of the jury.” *Barnes v. Commonwealth*, 214 Va. 24, 26 (1973).

* * *

This case is a particularly good example under Rule 2:404(b) of how the doctrine of chances can explain why an unusually similar prior bad act can be relevant to negate an accident defense. The Court properly affirms that the trial court here did not abuse its discretion by admitting the evidence surrounding Kloschen’s murder to show that Walters did not die accidentally.

¹² As the Court properly notes, King served a 20-year sentence for murdering Kloschen. “In determining whether a prior crime is too remote in time to be considered by the fact finder, the trial court may consider the length of time that a defendant has been incarcerated between the date of the prior crime and the date of the offense charged.” *Turner*, 259 Va. at 652-53.

Chaney, J., dissenting.

Since the trial court declined to decide whether evidence of King's 1986 murder remained admissible on the narrower showing the Commonwealth made at trial, and the majority resolves that question itself on appeal, I respectfully dissent from the affirmance of James Richard King's present conviction for the first-degree murder of Lexie Walters.¹³

Before trial, the motions judge ruled admissible evidence of King's 1990 Ohio conviction for the 1986 murder of Janis Kloshen, relying on the Commonwealth's pretrial showing that included Kloshen's autopsy findings and an account of how the encounter began. R. 380-82, 405-06, 898. At trial, however, the Commonwealth introduced neither. R. 874-98, 903, Maj. Op. at 8. When King identified the missing proof and renewed his objection, the trial court responded—" [W]hat you're asking me to do is reverse [the motions judge's] ruling and I'm not going to do that." R. 947. The majority acknowledges that the trial judge "was in fact presented with a new question," but resolves that question through its own assessment of the remaining evidence. Maj. Op. at 8-11.

Deference to a trial court's evidentiary judgment presupposes that the court exercised its discretion on the question presented. Here, the trial court failed to weigh the probative value of the Ohio evidence, as the Commonwealth presented it at trial, against its prejudice, as Rule 2:404(b) requires. The majority's alternative rationale does not supply that judgment. The error was also not harmless. The Commonwealth expressly used the Ohio murder to establish the mental state distinguishing premeditated murder from the lesser homicide offenses submitted to the jury. R. 747-49, 765-66. King's first-degree murder conviction should be reversed, and the case remanded for a new trial on that charge.

¹³ This dissent does not disagree with King's conviction of object sexual penetration. R. 353.

I. The trial court declined to reassess admissibility on the changed evidentiary showing.

Rule 2:404(b) generally excludes evidence of other crimes offered “to prove the character trait of a person in order to show that the person acted in conformity therewith.” Va. R. Evid. 2:404(b). The rule permits other-crimes evidence for a legitimate purpose, including intent or absence of mistake or accident, only “if the legitimate probative value of such proof outweighs its incidental prejudice.” *Id.* Those are separate requirements. Evidence offered to prove intent must actually bear a permissible connection to that intent, and its legitimate probative value must exceed its prejudice. *See Guill v. Commonwealth*, 255 Va. 134, 138-40 (1998); *Kenner v. Commonwealth*, 299 Va. 414, 424, 427 (2021).

The balance differs from the general rule governing relevant evidence. “Prior-bad-act evidence that is otherwise admissible must be excluded whenever its probative value is merely outweighed by its incidental prejudice; the prejudice need not substantially outweigh the probative value.” *Williams v. Commonwealth*, 85 Va. App. 718, 734 (2025). *Spencer v. Commonwealth*, 240 Va. 78, 90 (1990), similarly distinguishes relevance from admissibility. Even when similarities make other-crimes evidence relevant, “[t]he question remains, however, whether it is ‘otherwise admissible.’” *Id.* That determination “requires the trial court to weigh its probative value against its prejudicial effect.” *Id.* Thus, identifying some remaining relevance did not answer King’s renewed objection. The court still had to assess whether the legitimate probative value of the comparison—in light of the changed evidentiary showing King identified—justified the prejudice of admitting the prior murder. R. 944-47.

That assessment ordinarily warrants substantial deference. We “do not substitute our judgment for that of the trial court,” but ask “whether the record fairly supports the trial court’s action.” *Kenner*, 299 Va. at 423 (quoting *Carter v. Commonwealth*, 293 Va. 537, 543 (2017)). Yet the same standard requires review to ensure that the discretion “was not guided by erroneous

legal conclusions.” *Carter*, 293 Va. at 543-44 (quoting *Porter v. Commonwealth*, 276 Va. 203, 260 (2008)). As the Supreme Court explained in *Lucas v. Riverhill Poultry, Inc.*, 300 Va. 78, 92 (2021), discretion does not mean “that the court is free to simply act in any way it may deem desirable under the circumstances.” Rather, the court “has a range of choice, and . . . its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.” *Id.* at 93 (quoting *Landrum v. Cippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011)). As *Williams* explained, a trial court abuses its discretion by “(1) failing to consider a significant relevant factor, (2) giving significant weight to an irrelevant or improper factor, (3) committing a clear error of judgment in assigning weight to all proper factors, or (4) making a mistake of law.” 85 Va. App. at 733 (quoting *Citizens for Fauquier Cnty. v. Town of Warrenton*, 81 Va. App. 363, 385 (2024)). The legal error here concerns the court’s refusal to reassess admissibility after a material change in the evidentiary showing, not merely disagreement over the weight the evidence deserved.

The motions judge’s pretrial ruling identifies the basis for the original balance. He relied on a “consensual relationship,” “alcohol,” “injuries in similar locations,” “asphyxiation cause of death,” the placement of the bodies, and King’s concern about who would find them. R. 406. Describing the photographs as “hauntingly similar,” he found the circumstances sufficiently idiosyncratic to establish a *modus operandi*. R. 406. His assessment of probative value expressly depended on the similarities: “The probative value in this case I feel—because of the similarities I feel is strong,” and “factually[,] it’s so sufficiently strong that it outweighs the . . . prejudicial harm.” R. 406. The ruling, therefore, did not admit the Ohio murder simply because intent would be disputed. It depended on the asserted circumstances connecting that murder to Walters’s death.

The Commonwealth's trial presentation omitted substantial parts of that pretrial comparison. The Commonwealth expressly advised the court that it was "not seeking to introduce" Kloshen's autopsy report. R. 903. The jury consequently did not receive that report's findings concerning Kloshen's cause of death, alcohol level, or anal injuries, although the pretrial presentation had relied on those matters to establish a similar course of sexual violence ending in asphyxiation. R. 380-82, 390, 406. The majority also acknowledges that the Commonwealth did not introduce the pretrial information that Kloshen and King's encounter began consensually or that King wanted the police to discover her body before someone else did. Maj. Op. at 9. These omissions concerned the asserted connection between the two crimes, the very basis for the pretrial court's assessment of probative value.

The trial evidence supplied a narrower comparison. Detective Belcik agreed that Kloshen was found naked with "a pillow over her face" and a sheet covering her private area. R. 884. He observed "a Busch beer can, two drinking glasses with liquids in them" on the nightstand. R. 890. He also described "a lot of bruising on her face area, bruising on her neck," and "bite marks on her nipples." R. 892-93. His testimony identified abrasions on her wrists and stated that her ankles "had been tied up with rope." R. 893. The jury heard King's statement that he did not want to tell his parents he had "just murdered someone," and the parties stipulated to his murder conviction. R. 895, 898. The trial record contained evidence from which the Commonwealth could argue similarities. However, the evidence also disclosed different injuries and omitted the medical findings and account of the encounter that had supported the original assessment of probative value.

King specifically asked the court to evaluate that changed showing. R. 944. Before moving to strike the Commonwealth's evidence, King renewed his request to exclude the Ohio evidence "in light of the evidence" presented on the 1986 murder. R. 944. He explained: "We

don't have any evidence as to what the cause of [Kloshen's] death was. We don't have the autopsy confirming what the cause of death was. We don't know anything about the relationship between her and Mr. King out in Ohio." R. 944. He identified those matters as "key factors" in the asserted connection and continued: "With the limited evidence that's in, at this point, I don't think there's sufficient evidence to justify allowing it in over the prohibition against bringing a bad acts evidence to court." R. 944-45. King then made the scope of his request explicit: "Again, it's to all of the evidence from the 1986 murder coming into this case." R. 945. He also renewed his prejudice objection, telling the court, "I don't think we can have a fair trial with them hearing [the Ohio evidence]." R. 947. He made the request after the Commonwealth rested, the first opportunity to measure its full presentation against the pretrial proffer.

The Commonwealth argues that King "did not specifically alert the judge that the underlying factual record before it was different than the factual record considered by his colleague at the pretrial hearing." A'ee Br. at 32. However, the objection did precisely that: King identified the missing autopsy and prior relationship evidence, explained that they had been "key factors" connecting the crimes, and asked for exclusion "[w]ith the limited evidence that's in." R. 944. Earlier, the trial judge had recognized that the admissible testimony was to concern "those features of the '86 murder which bear a similarity on some level to the 2020 murder." R. 879-80. The Commonwealth answered the renewed objection on its merits, asserting that King's "actions were the same in both" and that the remaining similarities supported motive, identity, knowledge, and lack of mistake or accident. R. 945. The court was given both the particular problem and the competing grounds for resolving it. King's request to exclude all the Ohio evidence sought a ruling on admissibility; it was not merely a challenge to the sufficiency of the Commonwealth's proof of guilt.

The trial court instead responded—“I think, at the end of the day, Mr. Evans, what you’re asking me to do is reverse [the motions judge’s] ruling and I’m not going to do that. Your motion is denied.” R. 947. The court’s stated reason was its unwillingness to reverse the earlier ruling. King’s renewed objection, however, asked whether the materially different evidence actually presented remained legitimately probative to justify its admission. R. 944-47. The pretrial ruling had not resolved that question. As the majority recognizes, the trial judge “was in fact presented with a new question.” Maj. Op. at 8. Deference to the resolution of the pretrial question did not answer whether the materially different trial presentation remained admissible.

Commonwealth v. White, 293 Va. 411 (2017), explains why renewal of King’s objection matters. In reviewing a suppression ruling, our Supreme Court stated that an appellate court considering affirmance reviews “not only the evidence presented at the pretrial hearing but also the evidence later presented at trial.” *Id.* at 414. The Court then distinguished reliance on trial evidence as a ground for reversal: “evidence at trial becomes relevant only if the defendant renews his pretrial motion at trial.” *Id.* at 414 n.2. Renewal allows the trial court “to reconsider its pretrial ruling in light of the actual evidence presented,” rather than relying on “the charging documents, pretrial proffers of the parties, or cursory evidentiary presentations” available before trial. *Id.* The distinction protects the trial court’s opportunity to address the effect of the developed record before an appellate court reverses on that basis.

White does not hold that an appellate court must disregard all pretrial evidence in every evidentiary appeal. Nor did it decide the Rule 2:404(b) issue presented here. Its renewal analysis nevertheless answers the procedural objection: King returned to the trial court, identified the omitted proof, and requested a ruling on the evidence actually presented. R. 944-47. He gave the trial court the opportunity that *White* requires. Treating the pretrial ruling alone as a sufficient reason to decline that inquiry deprives renewal of its purpose.

Lucas similarly illustrates the importance of requesting a ruling in light of developments at trial. 300 Va. at 94. There, the circuit court excluded expert testimony without prejudice to reconsideration based on those developments. *Id.* Although the proponent proffered the testimony at trial, she did not request reconsideration. *Id.* The Supreme Court held that she thereby deprived the circuit court of an opportunity to make a final admissibility ruling in light of the trial evidence and declined to consider the challenged ruling as a basis for reversal. *Id.* King expressly requested that assessment here, identifying the omitted evidence and explaining its significance to the original ruling. R. 944-47.

Nor must every preliminary fact governing admissibility be established anew before the jury. *Rabeiro v. Commonwealth*, 10 Va. App. 61, 64 (1990), explains that “[t]he factual determinations which are necessary predicates to rulings on the admissibility of evidence and the purposes for which it is admitted are for the trial judge and not the jury.” That case concerned the foundation for coconspirator hearsay. *Id.* at 63-65. The question here is different: whether the Ohio evidence retained the legitimate probative value attributed to it when the jury did not hear much of the information that was supposed to connect the two crimes. The stipulation established the prior conviction; it did not convey the omitted medical findings or circumstances of the encounter. R. 898. *Rabeiro* identifies the judge’s responsibility to determine admissibility and does not dispense with that responsibility when the evidentiary presentation changes.

Commonwealth v. Holland, 304 Va. 34 (2025), requires an appellate court to presume, even without express factual findings, “that the trial court resolved all factual ambiguities or inconsistencies in the evidence in favor of the prevailing party and gave that party the benefit of all reasonably debatable inferences from the evidence.” *Id.* at 47 (quoting *Hill v. Commonwealth*, 297 Va. 804, 807 (2019)). Accordingly, the absence of express findings does not, by itself, establish that the court failed to exercise discretion. *Id.* However, *Holland* also

recognizes that the presumption that the law was correctly applied operates “[a]bsent clear evidence to the contrary in the record.” *Id.* at 47 n.4 (quoting *Yarborough v. Commonwealth*, 217 Va. 971, 978 (1977)).

The trial judge’s earlier limitation of Belcik’s testimony demonstrates that he exercised discretion concerning the Ohio evidence during trial. R. 879-80. That ruling preceded the Commonwealth’s decision not to introduce the autopsy and King’s renewed objection to the completed presentation at trial. R. 903, 944-47. In response to that objection, the court expressly stated that it would not reverse the motions judge’s ruling. R. 947.

Read in context, that explanation shows that the earlier ruling displaced consideration of the materially different question King presented. The error, therefore, rests on the court’s stated reason for declining reassessment, rather than an inference drawn merely from the absence of findings. Its refusal left a “significant relevant factor”—the materially reduced showing supporting admission—unconsidered. *See Williams*, 85 Va. App. at 733. The trial court, therefore, abused its discretion in refusing to undertake the reassessment.¹⁴

II. Invoking the right-result-different-reason doctrine does not sustain admission on this record.

The majority invokes the right-result-different-reason doctrine to affirm on intent and absence of mistake or accident, without deciding whether the Ohio evidence established the pattern on which the pretrial court relied. Maj. Op. at 12-13 n.8. Those purposes were argued below. The Commonwealth expressly invoked the absence of accident at the pretrial hearing and again when King renewed his objection. R. 401, 945. The defect is, therefore, not that the majority considered a label never mentioned in the trial court. It is that the alternative ground

¹⁴ This narrow ground of reversal does not require a holding that evidence of the Ohio murder could never be admitted on an adequately developed record.

depends on the significance of the materially changed evidentiary showing that the trial court declined to reassess.

Perry v. Commonwealth, 280 Va. 572 (2010), explains that alternative affirmance is unavailable “where, because the trial court has rejected the right reason or confined its decision to a specific ground, further factual resolution is needed before the right reason may be assigned to support the trial court’s decision.” *Id.* at 579 (quoting *Whitehead v. Commonwealth*, 278 Va. 105, 115 (2009)). The controlling question is whether the alternative ground requires further factual resolution; reliance on a particular ground below does not itself foreclose affirmance. *Id.* at 579-81. *Vandyke v. Commonwealth*, 71 Va. App. 723, 732 (2020), similarly requires “that all evidence necessary to that alternate ground was before the trial court.” The record must also show that the evidence was “undisputed,” or disclose “how the trial court resolved any dispute.” *Id.* Unlike the probable cause question in *Perry*, which was a legal conclusion drawn from a complete record, the balance of probative value against incidental prejudice is itself a discretionary determination.

The majority’s alternative rationale depends on its assessment of the factual connection established by the changed trial presentation. It infers from the pillow and neck bruising that King smothered Kloschen, from her presence on his bed that they had been sexually involved, and from alcohol at the scene that both incidents involved alcohol. Maj. Op. at 9. It then relies on the murder of “another sexual partner” to establish intent and rebut accident in Walters’s death. Maj. Op. at 10-11. King challenged the connection the remaining evidence established and its legitimate probative value in his renewed objection. R. 944-47. The court declined to reverse the earlier ruling. R. 947. The necessary assessment concerned both the strength of that disputed factual comparison and whether its legitimate probative value justified the prejudice of

admitting the prior murder. Substituting a permissible purpose for admission did not resolve those questions.

The Commonwealth is entitled to “the benefit of any reasonable inferences” from the evidence. *White*, 293 Va. at 413 (quoting *Evans v. Commonwealth*, 290 Va. 277, 280 (2015)). Circumstantial proof need not reproduce the form of the evidence presented before trial. However, the strength and limits of the proposed inferences matter to the balance. A beer can and two glasses support an inference that alcohol was present at the scene; they do not establish Kloshen’s alcohol level or the role of intoxication in the encounter. R. 890. Kloshen’s naked body on a bed may suggest sexual activity, but it does not establish that the encounter began consensually or that she and King had a relationship comparable to King and Walters. Belcik testified that King wanted the police “to find out who Jan was.” R. 896. That statement does not exclude sexual contact, but it provides no affirmative support for the consensual relationship on which the pretrial ruling relied. Counsel’s assertion that King “didn’t know her” was argument, not an additional fact established by testimony. R. 946.

The same distinction applies to cause of death. Even accepting that the pillow and visible injuries on Kloshen’s body support an inference of asphyxiation, the remaining evidence did not supply the autopsy findings on which the original comparison depended. R. 892-93, 903. Similarly, accepting the majority’s description that both bodies were found on their backs with their arms overhead does not establish that the encounters began or developed in the same way. Maj. Op. at 9. A shared position after death does not, without further analysis, establish the mental state accompanying the act that caused death. The issue is the legitimate force of the comparison, not whether the remaining circumstances support any inference at all.

The Commonwealth emphasizes that the motions judge adopted its arguments, including arguments concerning intent. A’ee Br. at 26-27. However, the ruling linked those arguments to

the asserted pattern: after referring to the Commonwealth's reasons, the motions judge found the similarities sufficiently idiosyncratic and ruled "in favor of the Commonwealth as it relates to modus operandi." R. 406. His balance then expressly relied on the strength of those similarities. R. 406. Even a reading that includes intent and absence of accident among the original purposes does not establish that he assessed the materially reduced trial presentation.

The majority announces that it considers only trial evidence, yet cites the motions judge's pretrial ruling to support its conclusions that the evidence showed intent and absence of accident and that probative value outweighed prejudice. Maj. Op. at 4, 11. Those portions of the record do not contain a determination of the legitimate probative value of the materially different evidence presented at trial. The alternative purpose and the changed factual showing required consideration together. The court never performed that task in response to King's renewed objection. The majority's alternative ground cannot inherit the probative value of facts the jury never received.

Spencer does not resolve the changed evidentiary showing here. There, the Supreme Court rejected a requirement that the other crimes be "virtual carbon copies of the case on trial," but retained the requirement of "a singular strong resemblance to the pattern of the offense charged." 240 Va. at 90 (quoting *United States v. Hudson*, 884 F.2d 1016, 1021 (7th Cir. 1989)). The comparison rested on evidence that all four victims had suffered forcible rape and sodomy and died by ligature strangulation; each had been found with her hands tied, and in three cases, the neck ligature was connected to those bindings. *Id.* at 88. The crimes occurred within 90 days, and serological and DNA evidence further connected the defendant to them. *Id.* at 88-89. Although the ligature materials and certain characteristics of the victims differed, the Court concluded that the demonstrated similarities and scientific evidence supported the trial court's balance. *Id.* at 91.

King's objection did not require two crimes to be identical. It required the court to assess the comparison that remained after the Commonwealth omitted evidence underlying the original ruling. R. 944-47. Differences within an established pattern and missing proof of the asserted pattern present different questions. The absence of Kloschen's autopsy did not foreclose every circumstantial inference concerning her death, but it left the court to determine whether the remaining evidence still established a sufficiently probative connection to Walters's killing. R. 892-93, 903. *Spencer's* rejection of exact correspondence did not answer that question.

Guill directly addresses why invoking intent does not resolve that difficulty. There, the disputed element was the defendant's intent in entering a dwelling. 255 Va. at 139. The Commonwealth offered evidence of an earlier burglary and attempted rape to prove an intent to rape in the charged burglary. *Id.* at 137-38. This Court affirmed admission for the "narrow purpose of proving, elucidating, or explaining [the defendant's] intent." *Id.* at 138 (alteration in original). The Supreme Court reversed. It required "a causal relation or logical and natural connection between the two acts," or acts forming parts of one transaction, and held that the prior offense was not probative of the charged intent. *Id.* at 140-41 (quoting *Barber v. Commonwealth*, 182 Va. 858, 868 (1944)). That an earlier offense demonstrated criminal intent on that occasion did not establish the necessary connection to the later offense.

The *Guill* Court then separately addressed the asserted similarities under *Spencer*. Assuming without deciding that the identity-based test applied when the perpetrator's identity was known, it held that the crimes lacked the necessary idiosyncratic characteristics. *Guill*, 255 Va. at 141. Both involved entry into a home and the bedroom of two girls, and both involved a threat. *Id.* Yet the earlier offense involved attempted rape and physical contact; the charged offense did not. *Id.* The threats also differed, and "conduct of this nature unfortunately is common, rather than idiosyncratic, in this type of crime." *Id.* The evidence, therefore, "lacked a

logical relationship to the offense charged” and “showed only the defendant’s propensity to commit the crime charged.” *Id. Guill* thus requires an explanation of how the earlier crime proves the disputed intent without relying on a disposition to commit such crimes. *Id.* at 140-41.

Turner v. Commonwealth, 259 Va. 645 (2000), similarly requires consideration of the demonstrated pattern of distinctive acts as a whole. The crimes need not constitute a “signature,” but must bear a “singular strong resemblance” and be “sufficiently idiosyncratic to permit an inference of pattern for purposes of proof.” *Id.* at 651 (quoting *Chichester v. Commonwealth*, 248 Va. 311, 326-27 (1994)). The shared circumstances there included approaching victims as they entered vehicles at shopping centers, handling their driver’s licenses, directing them not to look at the attacker, using their vehicles to take them elsewhere, raping them, requiring them to wait before leaving, and leaving their keys outside the vehicles. *Id.* at 652-53. The Supreme Court rejected reliance on isolated differences in the victims’ ages and races and the locations of the attacks because those facts had to be considered with the “entire record.” *Id.* at 653.

The same approach requires consideration of what the comparison here actually establishes. The missing autopsy findings and account of the encounter concern the asserted sexual assault and mechanism of death themselves. The rope restraints and bite marks described by Belcik also bear directly on the manner of attack. R. 892-93. King specifically contrasted those injuries with the charged offense and noted that Kloschen was found on a bed while Walters was found on a sofa. R. 946. Neither a difference in furniture nor any single dissimilarity independently decides admissibility. However, these circumstances cannot be dismissed as immaterial differences while the missing details of the earlier attack are supplied by assumption. At minimum, whether those remaining similarities established a comparably probative connection required the trial court’s assessment; it was not an undisputed premise that could be supplied for the first time on appeal.

Quinones v. Commonwealth, 35 Va. App. 634 (2001), which the majority invokes in its discussion of remoteness, directly addresses the use of an earlier offense to establish disputed intent. Maj. Op. at 12. There, the defendant admitted applying lotion to a child but denied acting with sexual intent. *Quinones*, 35 Va. App. at 638, 640. The Commonwealth introduced evidence of different sexual misconduct involving another child approximately 20 years earlier. *Id.* at 638, 641. Although both incidents involved sexual misconduct concerning a child, the earlier incident “did not negate good faith, mistake or accident” and instead tended to show a predisposition to commit such offenses. *Id.* at 641. Applying *Guill*, this Court held that the evidence established “no causal relationship or logical connection” to the charged crimes and was inadmissible to prove the disputed intent. *Id.* at 641-42.

Quinones did not establish a numerical limit on remoteness or require identical offenses. It required a permissible connection between the earlier conduct and the intent at issue in the charged offense. *Id.* Here, King asked the court to assess whether the trial presentation established that connection after the Commonwealth omitted medical findings and circumstances of the encounter underlying the original ruling. R. 380-82, 406, 903, 944-47. The existence of the Ohio murder conviction did not itself resolve that question. R. 898.

King’s own statements must also be considered. King told the police that he had “flipped out before” and referred to the Ohio murder. R. 130. The Ohio detective recounted his reference to having “just murdered someone.” R. 895. Those statements are incriminating. However, the comparison that the majority relies on must be read in context: “I did the same thing that I am doing right now. When I found her, I just turned myself in.” R. 131; Maj. Op. at 9-10. The second sentence identifies surrender as the conduct being compared. Even if the statement supports a broader inference that King associated the two incidents, it does not describe a shared method of attack, supply the missing Ohio medical findings, or identify premeditation. The fact

that he reported both deaths warrants consideration, but its bearing on the mental state preceding Walters's death must still be explained. It cannot substitute for the omitted circumstances of the earlier killing.

Lafon v. Commonwealth, 17 Va. App. 411, 419 (1993), similarly makes factual relevance the starting point—"Once factual relevance has been established, the trial court may consider remoteness as one of the factors [governing admissibility]." There, the prior conduct was probative because it supplied a "blueprint" for the charged crime, and the Commonwealth presented evidence that the plan had come to fruition. *Id.* at 418-19. Although remoteness alone should not exclude otherwise relevant evidence unless the passage of time has diminished its probative value, that principle presupposes an established factual connection. *Id.* at 419. It does not supply the connection itself.

The nearly 34-year interval does not create an automatic bar, but *Turner* does not remove its significance. *Turner* held that a trial court "may consider the length of time that a defendant has been incarcerated" between offenses. 259 Va. at 652-53. There, the prior crimes occurred "during the last four years that Turner was not incarcerated" before the charged offenses. *Id.* at 653. Here, the Commonwealth represented that King had received a sentence of 15 years to life and served 20 years. R. 377. The motions judge proceeded on the understanding that King "got out I guess in 2010-ish," leaving "roughly ten years" before the later killing. R. 407. Even accepting that understanding, the interval after release was appreciably longer than the period outside prison in *Turner*. More fundamentally, incarceration may explain a lapse in opportunities to offend but does not establish the missing factual connection between the offenses. *Turner* considered remoteness *after* identifying the distinctive pattern actually proved.

Kenner does not establish that a general resemblance between crimes suffices merely because the evidence is offered for a permissible purpose. It held that the pornography titles at

issue were relevant to the defendant's "conduct or attitude towards the victim, motive, method and intent." 299 Va. at 427. The victim testified that Kenner showed her adult pornography while sexually touching her, and the child pornography downloads occurred during the period she lived with him. *Id.* at 419-20. The Supreme Court explained that the assaults "mirrored or were closely akin to the titles" and that those titles bore on the required lascivious intent. *Id.* at 426-27. Thus, *Kenner* did not dispense with a factual connection to the charged conduct. It identified that connection in the evidence presented.

The handling of the evidence in *Kenner* is equally instructive. Although the pretrial ruling allowed images or evidence of child pornography, at trial, the court refused, over the Commonwealth's objection, to permit the jury to see the photographs and videos. *Id.* at 419-20. It allowed the titles. *Id.* at 420. In affirming, the Supreme Court stressed that "the trial court balanced the probative value of the evidence against its prejudicial effect and only allowed the titles" to be admitted. *Id.* at 427. The deference followed an actual assessment of the evidence admitted. Here, the trial court declined the requested reassessment after the Commonwealth's presentation materially changed.

The majority's reliance on *Kenner*'s statement that a defendant has no right to "sanitized" evidence must be read in that context. Maj. Op. at 11. *Kenner* held that a defendant cannot bar relevant evidence simply by taking the position that the offense did not occur and intent is therefore not genuinely disputed. 299 Va. at 426. *Kenner* then quotes *Scott* concerning circumstances "[w]here a course of criminal conduct is continuous and interwoven, consisting of a series of related crimes." *Id.* at 426-27 (alteration in original) (quoting *Scott v. Commonwealth*, 228 Va. 519, 526 (1984)). That proposition does not itself establish the necessary connection here. Nor does it dispense with the required balance. *Kenner* immediately reaffirmed that "the

legitimate probative value of the evidence must exceed its incidental prejudice.” *Id.* at 427 (quoting *Rose v. Commonwealth*, 270 Va. 3, 11 (2005)).

The loss of evidence concerning the earlier encounter, cause of death, and particular sexual injuries materially diminished the legitimate probative value of the comparison without comparably diminishing the prejudice from presenting a prior murder to a jury deciding whether King committed premeditated murder. The conviction and account of the Ohio scene remained, while much of the evidence invoked to justify their admission did not. Rule 2:404(b) required assessment of that combination. The majority cannot defer to the pretrial balance as though its factual basis was unchanged, and alternative affirmance cannot supply the disputed premises and discretionary assessment the trial court declined to undertake.¹⁵

III. The error was not harmless.

Code § 8.01-678 precludes reversal “[w]hen it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached.” For nonconstitutional evidentiary error, the question is “whether the alleged error substantially influenced the jury.” *Haas v. Commonwealth*, 299 Va. 465, 467 (2021) (quoting *Clay v. Commonwealth*, 262 Va. 253, 259 (2001)). That inquiry considers the potential effect of the challenged evidence in light of all the evidence presented. *Id.* This Court

¹⁵ The concurrence’s doctrine-of-chances analysis rests on the similarities it identifies between the two deaths. However, in this case, Kloshen’s autopsy was not admitted, so the trial evidence did not establish her cause of death. R. 903, 944. Although the scene evidence permitted certain inferences from the pillow over Kloshen’s face and her visible injuries, an inference based on the improbability of repeated events necessarily depends on the evidentiary support for the circumstances being compared. R. 884, 892-93.

More fundamentally, the doctrine does not resolve the error identified here—the trial court’s failure to reassess admissibility based on the evidence actually presented at trial. King specifically asked the court to reassess the probative value and prejudice of the Ohio evidence in light of the materially different trial presentation. R. 944-47. The court instead relied on the motion judge’s earlier ruling without undertaking the requested assessment of the evidence actually presented. R. 947. The concurrence’s doctrine-of-chances rationale cannot substitute for that necessary assessment.

must be able to conclude with “fair assurance . . . that the judgment was not substantially swayed by the error.” *Carter*, 293 Va. at 546 (quoting *Adams v. Commonwealth*, 275 Va. 260, 277-78 (2008)).

The existence of sufficient evidence to convict does not answer that question. Since the trial court did not determine whether the evidence actually presented satisfied Rule 2:404(b), the Commonwealth cannot rely on a ruling that was never made to show that the jury weighed only properly admitted evidence. Whether the Ohio evidence could survive the Rule 2:404(b) balancing test is for the trial court to determine on retrial. The question here is whether evidence admitted without that determination substantially influenced the verdict.

The Commonwealth presented substantial evidence of a violent killing. Dr. Masian, the medical examiner, identified asphyxia as Walters’s cause of death and found evidence of both smothering and strangulation. R. 1177-78, 1191. Deep bruising near the esophagus indicated “a pretty strong amount of force.” R. 1163. She testified, “I think anybody would have died from being strangled and smothered,” and explained that a healthy, athletic person might have survived only a few seconds longer. R. 1188. The majority also recounts King’s statement that Walters was “dying anyway” and his decision to smoke and drink coffee before reporting her death. Maj. Op. at 2-3. Those circumstances support the jury’s verdict. Harmless error analysis nevertheless must address the disputed mental state for which the Ohio evidence was introduced.

The jury instructions make that distinction concrete. The jury could find second-degree murder if the Commonwealth proved a malicious killing but failed to prove that it was “willful, deliberate, and premeditated.” R. 747-48. It could find involuntary manslaughter if the killing was unintended but resulted from the criminal negligence described in the instruction. R. 748-49. The court also instructed that intoxication rendering King “incapable of deliberating or premeditating” precluded first-degree murder. R. 752. Defense counsel expressly argued that

the death was unplanned and that sexual activity could have gone wrong. R. 770-73. Counsel also invoked King's statement that he had "flipped out once before" to argue that the killing was unplanned. R. 774. The existence of lesser-offense instructions does not itself establish prejudice, but it identifies the decision on which the challenged evidence could operate even if the jury concluded that King caused Walters's death.

The medical testimony does not eliminate that concern. Dr. Masian stated, "I don't know whether it was smothering, strangulation or both and I can't tell what order they occurred in." R. 1190. She immediately clarified: "I saw evidence at autopsy that she was both smothered and strangled." R. 1191. Her uncertainty concerned which mechanism was ultimately dominant and the order in which they occurred; it did not suggest a natural death or establish that Walters's death was accidental. R. 1190-91. She also acknowledged that some injuries could have occurred during rough sexual play, answering, "Some of them perhaps." R. 1191. On further questioning, she explained that she had never encountered a death from such sexual activity involving a couple. R. 1192. The force and injuries could support an inference of premeditation, which need not exist for any particular length of time. R. 750. However, proof of fatal violence did not make the evidence offered to distinguish premeditated murder from the lesser offenses inconsequential.

The limiting instruction also did not remove that concern. At the close of evidence, the court told the jury it could consider the Ohio conviction to show "motive, opportunity, preparation, plan, knowledge, identity, absence of mistake, accident, or if part of a common scheme or plan." R. 752-53. It added, "You may not consider it for any other purpose." R. 753. The authorized purposes included plan and common scheme or plan, although the motions judge had specifically stated, "I don't see how they could argue it was a plan or a common plan," and explained that he was instead "focused . . . on modus operandi." R. 389, 392.

The presumption that jurors follow instructions addresses compliance with the instruction given; it does not establish that the uses the instruction authorizes are supported by the evidence.¹⁶ *Williams* relied on an instruction confined to identity, premeditation, and the “unique nature of the method of committing the crime charged.” 85 Va. App. at 732, 739-40. Here, a juror following the instruction could consider the Ohio murder as evidence of a plan, precisely the use the prosecutor urged in closing. R. 753, 765. The instruction, therefore, does not establish that the Ohio evidence lacked substantial influence on the jury’s choice of first-degree murder. Its breadth bears on the effect of the challenged evidence under Code § 8.01-678; it supplies no independent ground of instructional error for reversal.

The Commonwealth’s closing argument illustrates the problem. The prosecutor told the jury not to reason, “He committed murder before; therefore, he’s guilty of this murder.” R. 765. However, she then explained that the Ohio evidence established his *modus operandi* and continued: “This is his plan. This is what he does. This is no accident, and this is no mistake, what he’s done to these—both of these women.” R. 765. She identified similarities between the two scenes and urged a first-degree murder conviction. R. 765-66. The disclaimer does not eliminate the effect of an argument inviting the jury to resolve the disputed mental state by reference to what King “does.” Thus, the Commonwealth used the prior murder to establish planned and intentional conduct through the asserted pattern. Without the necessary connection,

¹⁶ In *McGowan v. Commonwealth*, 274 Va. 689, 693 (2007), the jury received a limiting instruction authorizing consideration of other-crime evidence only for intent, opportunity, or absence of mistake or accident. The Supreme Court nevertheless reversed, holding that evidence of the defendant’s subsequent cocaine possession had “little, if any, tendency” to establish her knowledge of cocaine at the time of the charged offense and was “unduly prejudicial.” *Id.* at 696. In rejecting the Commonwealth’s use of extrinsic evidence to contradict the defendant on a collateral matter, the Court described that evidence as “highly inflammatory and misleading to a jury” and “lacking in serious probative value.” *Id.*

the assertion “[t]his is what he does” invites the disposition-based inference Rule 2:404(b) prohibits.

The Commonwealth also relies on jury selection and the stipulation’s omission of King’s plea as safeguards. A’ee Br. at 36-37. Even accepting its account of those precautions, they do not establish that the Ohio evidence had no substantial influence. A juror could honor the presumption of innocence and still rely heavily on a comparison that the court’s instruction authorized and the prosecutor presented as proof of a plan. Similarly, the stipulation’s omission of the plea did not remove the fact that King had already been convicted of murdering another woman. R. 898. The relevant concern is the use of that evidence to decide this killing’s character and degree.

Nor do King’s references to Ohio make the additional evidence merely cumulative. Even treating his statements as independently admissible, the detective’s testimony, crime scene photographs, and stipulation supplied a detailed presentation beyond King’s brief references to having “flipped out” and turning himself in. R. 130-31, 884, 890, 892-98.¹⁷ The Commonwealth used those additional details to argue a pattern and returned to King’s comparison in rebuttal. R. 765-66, 781. His statements and conduct after Walters’s death were incriminating, but they did not expressly admit the premeditation required for a conviction of first-degree murder. The Ohio presentation supplied the asserted pattern from which the Commonwealth asked the jury to infer that mental state.

Given the Commonwealth’s reliance on that presentation to establish a plan and reject accident, I cannot conclude “with fair assurance” that the first-degree murder verdict “was not substantially swayed by the error.” *Carter*, 293 Va. at 546 (quoting *Adams*, 275 Va. at 277-78).

¹⁷ Exhibit 21, which contained those statements, was received without objection, though King had lodged a standing objection to “any of the evidence or mention or reference to the murder in 1986.” R. 866, 1019-20.

IV. CONCLUSION

The trial court declined to decide whether the Ohio evidence remained admissible after the Commonwealth's presentation materially changed. The majority cannot sustain that refusal by supplying the disputed factual premises and discretionary balance itself in the first instance. The challenged evidence was used to resolve the mental state distinguishing premeditated murder from the lesser offenses before the jury, and the breadth of the instruction did not eliminate the resulting prejudice. On this record, the error cannot be treated as harmless under Code § 8.01-678. King's first-degree murder conviction should be reversed, and the case remanded for a new trial on that charge.

For these reasons, I respectfully dissent.