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Evidence: Prior Crimes and Prior Bad Acts Evidence

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EVIDENCE: PRIOR CRIMES AND PRIOR BAD ACTS EVIDENCE

Two recent New Mexico cases, *State v. Marquez*[1] and *State v. Ortiz*,[2] illustrate a misunderstanding by the New Mexico Court of Appeals of the evidentiary rules controlling admissibility of prior crimes, prior bad acts and character evidence.

In *State v. Marquez* the defendant was convicted of second-degree murder and aggravated battery. During the State's cross examination of the defendant, evidence was admitted of an incident which occurred two nights before the murder and battery for which the defendant was tried. While at a carnival the defendant became angry at some carnival workers and fired six shots into the ground near one of them, using the same gun later used in the acts for which he was tried. On appeal the defendant argued that the trial judge improperly allowed the prosecution to question him about this incident.

The Court of Appeals, through Judge Sutin, properly ruled that evidence of the carnival shooting was not admissible to impeach the credibility of the defendant as a witness under Rules 607 and 608 of the New Mexico Rules of Evidence,[3] because the carnival shooting evidence was not probative of truthfulness or untruthfulness.[4] But

1. 87 N.M. 57, 529 P.2d 283 (Ct. App. 1974), *cert. denied*, 87 N.M. 47, 529 P.2d 273 (1974).
2. 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).
3. Rule 607. [N.M. Stat. Ann. § 20-4-607 (Supp. 1975)] WHO MAY IMPEACH: The credibility of a witness may be attacked by any party, including the party calling him.

   Rule 608. [N.M. Stat. Ann. § 20-4-608 (Supp. 1975)] EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS: (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations:

   (1) the evidence may refer only to character for truthfulness or untruthfulness, and, (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

   (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may however, if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness.
4. Rule 608. [N.M. Stat. Ann. § 20-4-608 (Supp. 1975).]

the Court held that evidence of the carnival shooting was admissible under Rule 404(b)[5] to prove intent. The Court of Appeals' misunderstanding of prior acts evidence under Rules 404(a) and (b) is evident from its holding in *Marquez:*

> The issue to decide is whether the carnival shooting incident two days before the crimes in question bears upon the intent of the defendant when he shot the decedent. . . . We believe it does. It shows the state of mind of the defendant, his *characteristic conduct* in the use of a gun. It was relevant on the question of intent. (Emphasis added.)[6]

Marquez raises important questions concerning the proper relationship between Rules 404(a) and (b)[7] and the relevancy of evidence to the issue of intent. Rule 404(a) establishes a general rule of exclusion for character evidence: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." The time-honored policy underlying the general rule of exclusion is that while a person's propensity to act in a particular manner may be highly probative of whether, in a given instance, that person acted consistently with that propensity, its tendency to prejudice and distract juries and unfairly to surprise opponents is thought to outweigh its probative value.[8]

Dean McCormick says that "[t]his danger is at its highest when character is shown by other criminal acts. . . ."[9] This policy is em-

5. Rule 404(b). [N.M. Stat. Ann. § 20-4-404(b) (Supp. 1975)]: Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

6. 87 N.M. 57 at 62, 529 P.2d 283 at 288 (Ct. App. 1974).

7. Rule 404(a). [N.M. Stat. Ann. § 20-4-404(a) (Supp. 1975)] Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of the accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

Rule 404(b), [N.M. Stat. Ann. § 20-4-404(b) (Supp. 1975)] *supra* note 5.

8. E. Cleary, McCormick on Evidence 446 (2d Ed. 1972), hereinafter "McCormick."

9. *Id.* at 447.

bodied in Rule 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."[10] The use to which prior bad acts evidence should be put was nicely articulated in the often-quoted *People v. Molineux* case,[11] which Dean McCormick summarizes as follows:

> [T]he prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is *substantially relevant* for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character. (Emphasis added.)[12]

Evidence of prior criminal acts, if offered not to show criminal propensity but to establish some other element in the party's case is admissible. Rule 404(b) lists examples of such non-propensity purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[13] However, the commentary to Rule 404(b) cautions that such non-propensity use of prior bad acts evidence is limited if "the danger of undue prejudice outweighs the probative value of the evidence. . . ."[14]

The New Mexico Court of Appeals commented on the danger concomitant with the admission of prior acts evidence in *State v. Mason.*[15] In *State v. Velarde*[16] the Court refused to allow the admis-

10. *Supra* note 5.

11. 168 N.Y. 264, 61 N.E. 286 (Ct. App. 1901).

12. McCormick at 447.

13. McCormick stresses that the enumeration of specific exceptions to the general rule of exclusion of character evidence such as found in Rule 404(b), leads to a danger that proponents of evidence will seek to "pigeon hole" it into one of the specific categories of exceptions. Instead, it is suggested that the proper analysis is not to try to force evidence to fit within a particular exception, but instead to carefully analyze the purpose for which it is offered. If that purpose is clearly other than to show propensity, the evidence should be admitted for that purpose—even if not enumerated in Rule 404(b). The merit of this approach is that rather than conditioning admissibility on how persuasively a proponent of evidence can characterize it in terms of a 404(b) exception, admissibility is conditioned on a careful inquiry showing that the purpose of the evidence is non-propensity. *See* McCormick at 447-448.

14. Fed. R. Ev. 404(b), Advisory Committee's Note (b) (1975).

15. 79 N.M. 663, 667, 448 P.2d 175. 179 (Ct. App. 1968), *cert. denied* 79 N.M. 688, 448 P.2d 489 (1968).

> [W]e believe the language of the Court in Morgan v. United States, 355 F.2d 43 (10th Cir. 1966), cautioning against the unwarranted admissibility of evidence of other crimes is particularly appropriate. . . . The Court there stated: "Evidence of other crimes than the one charged must, however, have a real probative value, and not just a possible worth on issues of intent, motive, absence of mistake or accident, or to establish a scheme or plan. . . . They cannot become an occasion or excuse or device for offering evidence of other crimes which have little or no real probative value or which is cumulative. . . .

sion of evidence of prior crimes, ostensibly offered by the State to show 404(b)-type exceptions, because "[i]t . . . could serve no purpose other than to show a disposition on the part of the appellants to commit the crime with which they were charged."[17]

In *Marquez* the Court of Appeals concluded that evidence of the carnival shooting was admissible under Rule 404(b) to show the state of mind or intent of the defendant[18] because it established the defendant's "characteristic conduct in the use of a gun."[19] But this is precisely what Rule 404(a) forbids—use of a character trait of the accused tending to show that on the day of the shooting for which he was tried, he acted in conformity with that trait. Moreover, no explanation appears by which the carnival shooting could legitimately show intent except by showing propensity.

In testing whether or not evidence of the carnival shooting should have been admitted to show intent, three considerations must be kept in mind: (a) McCormick's statement that prior bad acts evidence should have substantial relevancy before it is admitted for some nonpropensity purpose; (b) the position of the commentary to Rule 404(b) that the probative value of prior acts evidence should be balanced carefully against its probable prejudicial effect; and (c) the cautionary approach articulated by the New Mexico Court of Appeals in the *Mason* and *Velarde* cases.

"Intent" can mean many things, depending on the context of its use. As the word is relevant to *Marquez,* it may be defined usefully as "the attitude of mind in which the doer of an act adverts to a consequence of the act and desires it to follow."[20] Implicit in this definition is the requirement that intent be purposive or involve some desired result. Thus, for the carnival shooting in *Marquez* to be probative of the defendant's intent to shoot two individuals two days later, there would have to be some logical nexus between the two shootings. For example, suppose that *A* is known to dislike *B* intensely and to quarrel with him often. Following an argument with *B* on Monday, *A* breaks into a pawn shop and steals a gun. On Wednesday *A* shoots *B*. Under these facts there is a logical nexus between *A*'s crime of stealing the gun on Monday and the shooting of *B* on

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The risk and danger is great, and this must be recognized when considering the probative value of such evidence of specific acts offered to prove the crime charged."

16. 67 N.M. 224, 354 P.2d 522 (1960).
17. *Id.* at 227, 354.
18. 87 N.M. 57 at 62, 529 P.2d 283 at 288 (Ct. App. 1974).
19. *Id.* at 62, 529 P.2d at 288.
20. R. Perkins, Perkins on Criminal Law 746 (1969), quoting Markby, Elements of Law § 220 (4th ed. 1889).

Wednesday. Because *A* was known to have disliked *B* and to have quarreled with him recently, it can be inferred from his theft of a gun on Monday that he *intended* to shoot *B* on Wednesday. In terms of the definition of intent offered above, *A*'s act of stealing the gun shows that he adverted to and desired one consequence of this act—the shooting of *B*. At the trial of *A* for shooting *B* the prosecution could, under Rule 404(b), justifiably offer into evidence *A*'s prior bad act of stealing the gun on Monday to show that he intended to shoot *B* on Wednesday.

However, turning again to *Marquez,* the logical nexus between the carnival shooting and the acts two days later which would make the carnival shooting probative of intent is entirely lacking. The evidence at trial showed that the victim of the shooting for which Marquez was charged was not involved in the earlier carnival shooting. The only connections between the carnival shooting and the subsequent shooting were that Marquez shot the gun both times, the same gun was used both times, and Marquez's use of the gun both times followed his involvement in an argument or disagreement. From these facts the only statement of intent which could be formulated would be that Marquez intended to use a gun at the slightest provocation—which is indistinguishable from saying that Marquez had a character trait or propensity to shoot at people when angry. The Court of Appeal's statement that the carnival shooting showed "characteristic conduct" of the defendant to use firearms supports the conclusion that this shooting showed not intent but propensity and is therefore inadmissible under Rule 404(a).[21]

State v. Ortiz[22] also allowed admission of prior bad acts evidence under circumstances in which the appropriateness of admission was questionable. Ortiz was found guilty of manslaughter and aggravated battery, both of which were committed with a firearm. The trial judge admitted testimony by a government witness which referred to a prior crime of the defendant. The substance of the testimony[23]

21. Even if the evidence were relevant to intent, the three warnings articulated above would militate against admitting the evidence. It is doubtful that the probative value of the evidence would outweigh the great prejudice which would flow from introduction of the carnival shooting evidence.

22. 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).

23. The exchange between prosecution and its witnesses went as follows:

Witness: "While we were cooking he was sitting in the chair, and we were cooking, and he was laughing and saying that he had gotten away with an armed robbery before, or something."

Question: "Now, after you cooked up the macaroni, what did you do? What did Mike do?"

Witness: "Then we just ate and he was telling us about the trouble he had gotten in before with armed robbery?"

was that the witness had heard the defendant boast that he "had gotten away with an armed robbery before." The defendant argued on appeal that the testimony was inadmissible under Rule 404(b), because the testimony tended to prove a criminal character trait. The Court of Appeals held that the evidence was admissible under two theories: (a) the testimony contained an admission by the defendant that he had just participated in an armed robbery, and (b) the defendant's words were a statement of his then existing mental condition, and were thus admissible under Rule 803(3)[24] to show the defendant's state of mind at the time of the shooting.

The Court of Appeals said that the defendant's statement that he had "gotten away with an armed robbery before" was more than an admission of a prior crime, it was an admission by the defendant that he had just participated in an armed robbery. The Court pointed out that while technically the defendant was tried for murder and aggravated battery, he was tried under N.M. Stat. Ann. § 40A-29-3.1(19), the firearm enhancement statute, which requires imposition of more severe penalties on defendants who commit crimes using firearms. Thus, the defendant's admission that he had just participated in an armed robbery supported the inference that he had used a firearm earlier in the evening which was relevant to his murder and battery trial because of the gun enhancement statute.

The New Mexico and federal rules require that where an admission also involves disclosure of a prior bad act by the defendant, its technical relevancy must be balanced against the prejudicial effect it is likely to have.[25] Prior crimes evidence should not be admitted unless substantially relevant to a material question and unless its probative value outweighs its prejudicial effect.[26] In *Ortiz* at least two eyewitnesses to the defendant's crime testified that he used a firearm. Therefore, the defendant's "admission" does not seem *substantially* relevant to whether or not he had used a gun. It was at best cumulative.

Question: "Okay, what other things did Mike Ortiz say to you at the time while you were sitting down eating."

Witness: "Just that he had friends and for us not to say anything, and that he had gotten away with it before."

Id. at , 540 P.2d at 856.

24. Rule 803(3). [N.M. Stat. Ann. § 20-4-803(3) (Supp. 1975)].
A statement of the declarants then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. (Hearsay exceptions).

25. Fed. R. Ev. 404(b), Advisory Committee's Note (b) (1975). *State v. Mason* 79 N.M. 663, 448 P.2d 175 (Ct. App. 1958); *State v. Velarde*, 67 N.M. 224, 354 P.2d 522 (1960).

26. *See* notes 14 and 15 *supra*, and accompanying text.

Alternatively, the Court of Appeals justified admission of the defendant's comments as showing the defendant's "then existing mental condition which is relevant to the defendant's state of mind at the time of the shooting a short time before."[27] Here, the Court of Appeals relied on *State v. Borrego*.[28] However, an examination of *Borrego* shows that it does not support admission of the defendant's comments in *Ortiz*.

In *Borrego* the defendant was convicted of involuntary manslaughter. Evidence at trial showed that the defendant and some companions drove away from a bar after having had some drinks. They accelerated and, as they passed a nearby filling station, struck the decedent who was standing near the edge of the service station property. The defendant drove on, stopped momentarily, and then, without returning to the site of the accident to render aid, drove away. Forty minutes to an hour later the defendant returned to the accident scene. At trial the defendant denied that he had driven too fast, that he had driven recklessly, and that he had driven under the influence of alcohol. During the state's case in chief the district attorney was allowed to prove that the defendant had driven eighty feet after hitting the decedent before stopping, and that he stopped only momentarily before leaving the scene of the accident.

On appeal, the defendant argued that the trial court had erred in allowing the state to prove that he had not stopped after hitting the decedent, claiming that it was an attempt by the state to "show a separate and distinct offense."[29] The Court rejected this argument, concluding that:

> We believe evidence which is competent, relevant and material cannot be excluded solely because it also tends to prove the person guilty of some other crime. . . . The movements, conduct and admissions of the defendant for more than one and a half hours after the accident were clearly admissible as characterizing his attitude of mind at the time of the killing, and were so connected with the events as to be part of the whole transaction.[30]

Borrego does not support the proposition that evidence of the defendant's statements in *Ortiz* was admissible. In *Borrego* several factors militated in favor of admitting the evidence of a prior bad act. At issue was whether or not the defendant had acted under the influence of alcohol and whether he had driven recklessly. From the defendant's acts of driving on after striking the decedent, stopping

27. *State v. Ortiz*, 88 N.M. 370, 540 P.2d 850 (Ct. App. 1975).
28. 52 N.M. 202, 195 P.2d 622 (1948).
29. *Id.* at 209, 195 P.2d at 626.
30. *Id.*

momentarily, and driving off without rendering aid it could be inferred that he was either operating the truck recklessly or under diminished mental capacity. The failure to stop and render aid was proximate to the acts alleged; in fact it was part of the same transaction as hitting the decedent. This nearness in time made the failure to stop relevant to a showing of the defendant's state of mind at the time of the accident. Evidence of the defendant's conduct in failing to stop was necessary to show what his state of mind was at the time. Borrego's state of mind at the time of the accident was clearly in issue because he denied driving recklessly and being under the influence of alcohol.

In comparison, in *Ortiz* the defendant's boast that he had "gotten away with an armed robbery before" shows only that he had a criminal character, was proud of that character, and was disposed to employ weapons in the exercise of that character trait. The only evidentiary value of the prior crimes testimony was to establish a character trait, a purpose clearly impermissible under Rule 403(b) and the *Velarde* case. Additionally, the defendant's remarks shed no light on when or how the crime was committed. Thus, admission of the testimony did not provide the court in *Ortiz* with the benefit of additional factual details which better described the defendant's conduct. It provided only a boast that he had successfully committed armed robbery at some undetermined time in the past.

No nexus appears between the defendant's admission and his state of mind at the time he committed the acts for which he was tried. Indeed, there is nothing in the Court of Appeals decision which indicates that the defendant's state of mind was in issue. Finally, assuming *arguendo* that the testimony had some probative value, its prejudicial impact should have tipped the balance toward excluding the evidence.

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