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EVIDENCE II: EVIDENCE OF OTHER CRIMES AS PROOF OF INTENT

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Few issues trouble courts as sorely and often as does the admissibility of prior crimes evidence. *State v. Carr*,[1] decided during the Survey year by the New Mexico Court of Appeals, illustrates both the difficulty such cases produce and the reasons for the difficulty. *Carr* involved a common enough situation. The prosecution introduced evidence of other crimes to show the defendant's intent to commit the crime for which he was on trial. The court of appeals came to the same result most courts would reach; namely, that the evidence was introducible to show intent. The relevance of the evidence in this case, however, and in many other cases reaching a like result, seems to depend upon an inference about the defendant's propensity for crime, which is ordinarily thought to be a prohibited use of such evidence. This article will review the problems raised in *Carr* in order to show that determining whether evidence of other crimes or wrongs should be admitted requires the most painstaking analysis of the relevance of that evidence.

Evidence of wrongs other than the crime charged may be relevant for a number of purposes. In some cases, the evidence may support only an inference that the defendant acted in conformity with a character trait on a particular occasion. Rules 404(a) and 405[2] specifically exclude this use of evidence of other wrongs. The former Rule makes inadmissible, with certain exceptions, evidence relevant on the following theory: Defendant committed a wrong in the past; defendant therefore has a propensity or a character trait for committing wrongful acts; therefore defendant is more

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1. 95 N.M. 755, 626 P.2d 292 (Ct. App.), *cert. denied*, 95 N.M. 669, 625 P.2d 1186, *cert. denied*, ___ U.S. ___, 102 S.Ct. 298 (1981).

2. N.M. R. Evid. 404(a) provides: "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. . . ."

N.M. R. Evid. 405 provides:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross examination, inquiry is allowable into relevant specific instances of conduct. (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

likely to have engaged in the act for which he is on trial than is someone not known to have this character trait.[3] Rule 405 provides that even when a character trait is admissible circumstantial evidence, it may be established only by proof of reputation or opinion and not by proof of specific acts.

These rules exclude evidence of other wrongs to prove character as a matter of policy, not because it is irrelevant.[4] Use of character evidence creates two related dangers. First, the jury may conclude that the defendant is such an odious person that he ought to be punished regardless of the merits of the particular case before the court.[5] Second, the jury may rely too heavily on a weak inference of conforming behavior in reaching its verdict.[6] Accordingly, Rule 404 specifically prohibits the introduction of character evidence to prove that the defendant acted in conformity with his character on a particular occasion, unless the accused first injects his character into the case.

In other instances, however, the inference drawn from evidence of other wrongs does not relate to the defendant's character. A prior crime may supply the defendant's motive for committing the charged crime, may show the defendant's preparation for this crime, or may demonstrate that the defendant's act was not merely an accident or a mistake. When used for these purposes, evidence of previous crimes or wrong acts would be admissible, subject only to the balancing of probative value against prejudicial effect required by Rule 403,[7] because the relevance of the evidence does not depend upon an inference about the defendant's character.

The most common permissible uses of evidence of other wrongs are

3. Although evidence of character would be relevant to the issue of whether the defendant committed the charged crime, it is unlikely to be sufficient by itself, even if it were admissible, to support a conviction. For a thorough discussion of the inferential process as applied to circumstantial evidence, see J. Maguire, J. Weinstein, J. Chadbourn, & J. Mansfield, Evidence Cases and Materials 867–69 (6th ed. 1973).

4. Michelson v. United States, 335 U.S. 469, 475–76 (1948).

5. "Character evidence is of slight probative value and may be very prejudicial. . . . It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." Advisory Committee Note, Rule 404, *reprinted in* S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 133 (1977) [hereinafter cited as Saltzburg & Redden]. 2 D. Louisell & C. Mueller, Federal Evidence § 136 (1979 & Supp. 1982) [hereinafter cited as Louisell & Mueller], collect the cases illustrating this point in the margin notes.

6. Saltzburg & Redden, *supra* note 5, at 133.

7. N.M. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

set forth in Rule 404(b).[8] Most of them cause no character evidence problems because the inferences to be drawn are plainly not dependent upon the defendant's propensity to act in a certain way. For example, if the defendant is on trial for the murder of two FBI agents, evidence that the defendant had jumped bond while charged with attempted murder on a past occasion is not admissible to show that the defendant has a propensity to commit murder and that he therefore probably committed this murder. The evidence is admissible, however, to show that the defendant had a motive for reacting with deadly force when followed by the FBI agents and that he therefore probably did so.[9] The only inference that need be drawn to establish the relevance of the evidence is that a person with a motive to commit a particular crime is more likely to commit that crime than is a person about whom nothing is known. This inference can be drawn even if the defendant is a person of generally peaceful character.

In general, cases and commentators assume that when other crimes evidence is genuinely relevant on intent, its use will not offend the rule against character evidence. Rules 404(a) and 404(b) are understood as mutually exclusive categories; because proof of other crimes to prove intent is permitted under 404(b), it cannot be forbidden by 404(a). However, intent has more than one meaning and different meanings of intent require different analyses of relevance. When intent refers to the defendant's knowledge or plan, or when it establishes absence of mistake, evidence relevant to intent does not involve an inference about the defendant's character and is therefore admissible. Wigmore offers this example:

> Thus, if A while hunting with B hears the bullet from B's gun

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8. N.M. R. Evid. 404(b) provides:

> (b) 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Prior offense evidence is admissible for reasons so numerous that one commentator has suggested redrafting Rule 404 to read:

> Prior offense evidence may be received in criminal cases on any issue as to which it may be relevant, unless its probative value is substantially outweighed by the risk of unfair prejudice, except that it may not be received if its only relevance is to show a propensity on the part of the accused.

2 Louisell & Mueller, *supra* note 5, § 140, at 114. Another writer would eliminate the term "character evidence" and draft a rule requiring only that all evidence of specific instances of conduct be subject to the balancing of probative value against prejudicial effect. Under this rule, the absolute prohibition against character evidence used to show that a person acted in accordance with some known propensity would disappear. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777 (1981).

9. United States v. Peltier, 585 F.2d 314, 320–21 (1978), *cert. denied*, 440 U.S. 921 (1979).

> whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the 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; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e., discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.[10]

The inference that B deliberately shot at A can be drawn without any reference to B's character; it derives rather from the low probability that this series of events occurred accidentally.

Evidence of other similar wrongs is relevant to show knowledge when the defendant contends that he was unaware that his behavior was criminal, because it is unlikely "that repeated instances of behavior, even if originally innocent, will not have resulted in defendant's having the requisite state of knowledge by the time of the charged crime."[11] Where the charged crime is the manufacture and possession for sale of PCP ("angel dust"), and where the defendant claims to be an innocent bystander unfamiliar with PCP and therefore ignorant that it was being manufactured on her patio, evidence that during the three months immediately preceding the charged offense she had twice been present or in control of premises used for the manufacture of the chemical is admissible to rebut her claim of ignorance.[12] The inference that a person repeatedly found in certain circumstances probably knows what is going on there can be made without an inference about the person's character. For example, it is not necessary in the case just described to infer that the defendant is a drug abuser or

10. 2 J. Wigmore, Evidence in Trials at Common Law § 302, at 241 (1979).
11. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[13], at 404–73 (1981).
12. People v. Goodall, 131 Cal. App. 3d 107, 182 Cal. Rptr. 243 (1982).

a drug seller to reach the conclusion that she knew that the substance produced on her patio was PCP.[13]

In other cases, however, it is impossible to distinguish between evidence offered to prove intent and its use as character evidence. A good example of the tenuousness of the distinction between inadmissible propensity evidence and admissible evidence of intent is *State v. Carr*.[14] This case reveals that evidence of intent based on prior bad acts is sometimes relevant to the charged crime only through an inference about the defendant's character. The resulting problem is whether a court should exclude such evidence under Rule 404(a) or admit the evidence under Rule 404(b).

Gerson Carr, a physician, was convicted of 42 counts of drug trafficking.[15] He was prosecuted under the Controlled Substances Act,[16] which makes it illegal for a physician intentionally to distribute a controlled substance "not in the course of his professional medical practice."[17] The indictment charged Dr. Carr with trafficking in that "he gave Niki Jones, not in the course of his professional medical practice or research, a bottle

13. The court properly admitted the evidence of prior wrongs in this case to refute the defendant's testimony that, "[s]he would not recognize PCP if she saw it, she had never seen it being manufactured before, and she had only once been in the presence of a person who smoked it." *Id.* at ___, 182 Cal. Rptr. at 248. This evidence by itself is not conclusive on the issue of guilt of the charged crimes. It is, however, relevant to the element of intent to manufacture PCP thorugh a two-step analysis. The first inference relates to the defendant's knowledge that the substance being manufactured was PCP. PCP has a strong and characteristic odor. It is therefore likely that a person who was present on one occasion when PCP was being manufactured knows that the substance being manufactured on a subsequent occasion is also PCP. Once it is inferred that the defendant recognizes PCP, a second inference—that she intended that PCP be manufactured—arises, because it is likely that a person who knew the end result of a particular action probably intended that result when the action was undertaken.

14. 95 N.M. 755, 626 P.2d 292 (Ct. App.), *cert. denied*, 95 N.M. 669, 625 P.2d 1186, *cert. denied*, ___ U.S. ___, 102 S. Ct. 298 (1981).

15. 95 N.M. at 758, 626 P.2d at 295.

16. N.M. Stat. Ann. §§ 30-31-1 to -40 (Repl. Pamp. 1980 & Cum. Supp. 1982).

17. 95 N.M. at 762, 626 P.2d at 299. Some interpretation is necessary to reach the conclusion that a physician can be prosecuted under the Controlled Substances Act. Section 30-31-20 prohibits and defines trafficking: "A. As used in the Controlled Substance Act, 'traffic' means the: . . . 2. distribution, sale, barter or giving away any controlled substance. . . . B. Except as authorized by the Controlled Substances Act, it is unlawful for any person to intentionally traffic. . . ." Section 30-31-2(J) defines distribute: " '[D]istribute' means to deliver other than by administering or dispensing a controlled substance." Dr. Carr contended that a physician who prescribes a drug cannot be prosecuted under either of these sections, but the court held that "a physician is prescribing drugs only when he issues a prescription for a legitimate medical purpose and when acting in the usual course of his professional practice." 95 N.M. at 762, 626 P.2d at 299. The issue therefore became whether Dr. Carr intended to prescribe the drugs in question for a legitimate medical reason or whether he intended to prescribe drugs for a non-medical, and therefore criminal, purpose. A substantial portion of the opinion deals with the correctness of the application of the trafficking and dispensing statutes to a licensed physician, but this statutory and constitutional issue is not within the scope of an evidence survey article. For a discussion of *Carr* from this aspect, see Hollander, *Criminal Law, ante* at 323.

of pills which was a Schedule II narcotic drug."[18] Niki Jones was the state's principal witness at trial; Dr. Carr did not testify.[19]

The evidence presented at trial was voluminous; the trial lasted three weeks and the transcript fills both sides of thirty-five tapes.[20] Numerous evidentiary issues were raised on appeal, the most difficult of which concerned the admissibility of evidence of Dr. Carr's involvement with two women patients, Mary Gennari and Martha Hamilton. The prosecution characterized this testimony as evidence of uncharged crimes relevant to the material element of intent, and therefore admissible under Rule 404(b).[21] The defense contended that the testimony was irrelevant and therefore inadmissible under Rule 402, and that even if relevant, it was so highly prejudicial as to require exclusion under Rule 403.[22]

The disputed evidence concerning Mary and Martha was essentially the same. Witnesses who had been present during transactions between Dr. Carr and the two women testified that Dr. Carr administered drugs to Mary and Martha in exchange for sexual favors.[23] Although Dr. Carr had not been indicted for these offenses, the trial court allowed the prosecution to introduce this testimony on the theory that it tended to establish Dr. Carr's intent to prescribe drugs for Niki Jones not in the course of medical treatment.

As defined by one of the applicable regulations,[24] the requisite criminal intent depended on whether Dr. Carr prescribed a controlled substance for Niki Jones for reasons other than a "legitimate medical purpose."[25] Accordingly, the prosecution argued that evidence that Dr. Carr prescribed drugs for Mary and Martha in exchange for sexual favors led to the inference that he also provided controlled substances for Niki Jones for a similar non-medical purpose—in this case, for a share of the money she would receive for selling the drugs on the street.

The court of appeals accepted this rationale and held that the evidence of other wrongs was admissible, stating, "[t]his evidence all related to the circumstances under which the defendant prescribed drugs to Gennari

18. 95 N.M. at 762, 626 P.2d at 299.

19. Telephone conversation with Ann Steinmetz, Esq., defense attorney (July 15, 1982).

20. Motion for Leave to Exceed the Length of the Brief, at 1, filed June 12, 1980, by attorney Steven G. Farber, Esq., *State v. Carr* (a partial record is on file at the University of New Mexico Law Library).

21. Plaintiff-Appellee's Response Brief at 32, *State v. Carr.*

22. 95 N.M. at 766–67, 626 P.2d at 303–304.

23. Plaintiff-Appellee's Response Brief at 37–38, *State v. Carr;* 95 N.M. at 771, 626 P.2d at 308.

24. New Mexico Drug Laws and Bd. of Pharmacy Regulations, no. 20, §913(A) (1980), reads in pertinent part: "A prescription for a controlled substance may be issued only for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. . . ."

25. *Id.*

and Hamilton, and the jury was instructed to consider the evidence only in determining defendant's intent to act outside the course of his professional practice. The testimony was clearly relevant for that purpose."[26] The court of appeals failed to consider, however, that the kind of inference necessary to link evidence of Dr. Carr's intent regarding Mary and Martha with his intent regarding Niki Jones is indistinguishable from inadmissible propensity evidence. Dr. Carr's intent to administer drugs to Mary and Martha outside the scope of his professional medical practice is relevant to the doctor's intent to act similarly toward Niki Jones solely on the assumption that the transactions with Mary and Martha show that Dr. Carr is the kind of person who harbors the intent to dispense drugs for non-medical purposes.[27] That is, the evidence is relevant to intent only through an inference as to the doctor's propensity to prescribe drugs for non-medical purposes.

The court of appeals ended its analysis of the admissibility of the evidence of Dr. Carr's prior conduct by holding that evidence relevant to the issue of intent. Although it is accurate so to characterize the evidence, it is also true that in this case the other wrongs prove intent only through an inference of character or propensity of exactly the kind that is prohibited when such evidence is offered to show conforming behavior.

The New Mexico Court of Appeals is not the only court to have reached this result without noticing that relevance may depend entirely on some inferred propensity for crime. The Fifth Circuit, for example, faced with this issue, reached the same conclusion in what is something of a leading case, *United States v. Beechum*.[28] A federal letter carrier was convicted of unlawful possession of a silver dollar that he knew to be stolen from the mails. In fact, postal inspectors who suspected the carrier of rifling the mail had planted the coin in a mailbox on the carrier's route.[29] The primary issue in the case was whether the carrier intended to keep the coin unlawfully or whether, as he claimed, he intended to turn the coin over to his superiors at the post office.[30] To establish the requisite criminal intent, the court allowed the prosecution to introduce into evidence two unsigned credit cards that had been found in the carrier's possession. The cards had not been issued to the carrier and had been mailed some months

26. 95 N.M. at 767, 626 P.2d at 304.

27. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.M. R. Evid. 401. Without an inference that one who has committed a past act is likely to repeat it, there would be no nexus, and thus no relevance, between the past and the present act.

28. 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979).

29. 582 F.2d at 903.

30. *Id.* at 905.

previously to addresses on routes that he had worked.[31] In upholding the introduction of this evidence, the Fifth Circuit, sitting *en banc*, stated:

> If Beechum [the letter carrier] wrongfully possessed these cards, the plausibility of his story about the coin is appreciably diminished. Therefore, assuming that it could be established that the cards were wrongfully possessed by Beechum, they were relevant to the issue of Beechum's intent to commit the crime for which he was charged.[32]

The court further explained how the cards were relevant to the charge of intent to possess the coin:

> Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that *because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense.*[33]

In the italicized sentence above, the court omitted a critical step in the analysis. Evidence of unlawful intent in a prior offense is relevant to unlawful intent in the present offense only on the assumption that people are likely to repeat past behavior because of a character trait or a propensity to act in a certain way.[34] The *Beechum* court did suggest that

> the touchstone of the trial judge's analysis in this context should be whether the Government has proved the extrinsic offense sufficiently to allow the jury to determine that the defendant possessed the *same state of mind* at the time he committed the extrinsic offense as he allegedly possessed when he committed the charged offense.[35]

There is no reason to think, however, that the "state of mind" of the defendant was a continuing mental condition. Apparently, therefore, the defendant's state of mind at the time of the present offense was proved by showing a state of mind on a previous occasion and positing that such a state of mind probably continued over time and across separate transactions. A state of mind that continues over time and governs otherwise unconnected acts is generally called a person's character trait or propensity. It is difficult to understand how the evidence of other wrongs in *Beechum* and *Carr* was relevant on any theory other than to show that the two defendants acted in conformity with their characters, as demonstrated by the prior crimes, when they committed the crimes for which

31. *Id.* at 904.
32. *Id.* at 907.
33. *Id.* at 911 (emphasis added).
34. *See supra* note 27.
35. 582 F.2d at 914 (emphasis added).

they were indicted. This use of character evidence seemingly is just what Rule 404 specifically prohibits.

It might, perhaps, be argued in defense of *Beechum* and *Carr* that Rule 404(a) only prohibits evidence of a character trait when offered to prove that a person "acted in conformity therewith on a particular occasion" and thus only limits character evidence offered to prove that a defendant committed the *actus reus*. Because the evidence in *Carr* and *Beechum* was offered to establish a state of mind rather than conduct, its introduction would not offend Rule 404(a). This reading of the character evidence rule might even seem to reflect the relative difficulty of proving a subjective mental element and would assure the mutual exclusivity of Rules 404(a) and 404(b).

Several flaws in this interpretation come readily to mind. The first is that, even if Rule 404(a) prohibits character evidence only when offered to prove the *actus reus*, Rule 405 prohibits use of specific acts to prove character except when a character trait is itself an element of some claim or defense. Plainly, character is not an element in any of the cases we have considered and, therefore, only reputation or opinion evidence would have been admissible to establish the propensity from which criminal intent was inferred.

A second answer to the *actus reus* interpretation is that such a reading is strained and improbable. Simply as a matter of language, to act in conformity with a character trait seems to reach intent as well as conduct. To say that a person has a propensity for theft does not mean merely that he or she has an inclination to take things but to take things with the intent to keep them. To say that another person has a propensity or character for lying does not simply imply that he or she says things that are false but that he or she knows they are false and intends to mislead others by their utterance. Indeed, most character traits about which we are concerned include some mental element that is essential to their definition.

Finally, an *actus reus* interpretation of Rule 404(a) would practically emasculate the Rule itself. One instance could stand for many. Suppose that a defendant is charged with robbing a convenience store. There is evidence that, on two previous occasions, the defendant has robbed other stores (although not in any distinctive fashion). Under an *actus reus* reading of Rule 404(a) or, for that matter, under the *Beechum* court's analysis of state of mind, the prosecution could offer the prior crimes not to prove that the defendant took the victim's money but to establish that the defendant intended to keep the money rather than return it the next day. Only the general balancing requirement of Rule 403 might justify exclusion of the evidence. Because intent to keep property taken from another is an element of all theft offenses, which the prosecution is both

required and entitled to prove, the *actus reus* theory would routinely allow evidence of other thefts by the accused regardless of any particular resemblance to the crime charged.[36] This reading of Rule 404(b) would so fundamentally weaken the traditional prohibition of prior crimes evidence as to be inconsistent with the policy bases of Rule 404(a).

One more difficulty with the *Carr* decision bears mention. Even when a court has determined that evidence of other wrongs is relevant to an issue such as intent or knowledge, that determination does not automatically mean that the evidence is admissible. Relevant evidence may be excluded for a variety of practical and policy considerations.[37] Dr. Carr advanced the chief reason for exclusion—that the probative value of the evidence was substantially outweighed by its prejudicial effect.[38]

Rule 403 does not articulate a uniform balancing procedure, but the following factors should be taken into consideration: 1) need for the evidence, 2) strength of the other crimes evidence, 3) persuasiveness or probative worth of the other crimes evidence, and 4) degree of risk of prejudice to the defendant.[39] In *Carr,* the court concluded that the evidence was necessary because "intent must usually be proved circumstantially."[40] The court did not address the strength of the proof of the other crimes. Where the prior crime has not resulted in a conviction, courts usually require that proof of its commission be "clear and convincing."[41] In this case, the evidence was in the form of testimony from friends and relatives of Mary and Martha, both of whom were dead by the time of the trial.[42] If the testifying witnesses believed that Mary and Martha had died as the result of a drug addiction fostered by Dr. Carr, the testimony may not have risen to the level of clear and convincing evidence because the witnesses could be expected to be biased.

Moreover, there is considerable ground for concern that the evidence

36. The same results could occur in a variety of non-theft crimes as well. For example, the prosecution might offer evidence of prior unrelated assaults or murders by the defendant on the theory that they proved, not that defendant committed the attack for which he is now on trial, but that the injury was intentionally inflicted. The inference is, of course, that defendant has a propensity for injuring others and, therefore, intended to inflict this injury. This interpretation does not seem different from the inferences in *Carr* and *Beechum;* if the interpretations are not different, the evidence would be admissible subject only to Rule 403.

37. N.M. R. Evid. 403, *supra* note 7.

38. 95 N.M. at 767, 626 P.2d at 304.

39. 2 Louisell & Mueller, *supra* note 5, § 140, at 116–122.

40. 95 N.M. at 767, 626 P.2d at 304. See also R. Lempert & S. Saltzburg, A Modern Approach to Evidence, 225–26 (2d ed. 1982) [hereinafter cited as Lempert & Saltzburg], on necessity as a specific reason for receiving other crimes evidence on the issue of intent.

41. 2 Louisell & Mueller, *supra* note 5, § 140, at 118. For a discussion of the effect of Fed. R. Evid. 404 on the proof necessary for introduction of prior crimes evidence, see Lempert & Saltzburg, *supra* note 40, at 221–24, and the majority and dissenting opinions in United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979).

42. Telephone conversation with Ann Steinmetz, Esq., defense attorney (July 15, 1982).

about Dr. Carr's personal involvement with Mary and Martha was highly prejudicial in the context of this trial. Because the risk of prejudice cannot be quantified, it will never be possible to state with accuracy when this risk outweighs probative value, although one court has stated that evidence should be excluded "where the minute peg of relevancy [is] entirely obscured by the dirty linen hung upon it."[43] Dr. Carr's trial lasted for three weeks, more than two weeks of which was devoted to testimony about his relationships with Mary and Martha. Niki Jones, the only witness to give direct testimony about the crimes charged in the indictment, testified only on the first and second days of the trial. If the effect of the prolonged testimony of other wrongs obscured the jury's view of the charged crimes and incited them to convict Dr. Carr because he was portrayed as "a sex maniac and drug dealer,"[44] then the prejudicial effect of the evidence would have outweighed its probative value. "Where most of trial time is spent on collateral matters rather than on the matters covered by the indictment, the emphasis at trial becomes distorted, resulting in unfair prejudice and misleading the jury."[45]

Reversal on the ground of unfair prejudice is, however, difficult to achieve. The issue before the appellate court is only whether the trial court abused its discretion by admitting the evidence.[46] Because the court of appeals found the testimony to be both proper and necessary, it held that there had been no abuse of discretion by the trial court. The frequency of such rulings makes apparent the importance of accurately analyzing other crimes evidence at the outset.

43. State v. Goebel, 36 Wash. 2d 367, 379, 218 P.2d 300, 306 (1950).
44. 95 N.M. at 772, 626 P.2d at 309 (Lopez, J., dissenting).
45. *Id.*
46. 95 N.M. at 767, 626 P.2d at 304.