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Criminal Law - New Mexico Rejects the Lewd and Lascivious Exception to Rule 404(B): State v. Lucero

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CRIMINAL LAW—New Mexico Rejects the "Lewd and Lascivious" Exception to Rule 404(B): *State v. Lucero*

I. INTRODUCTION

In *State v. Lucero*[1] the New Mexico Court of Appeals held that evidence of prior sexual conduct of the defendant is not admissible under Rule 404(B), where the proponent of the evidence does not provide an adequate basis for the court to conclude that the evidence is relevant.[2] The court further held that New Mexico does not accept the "lewd and lascivious" exception to Rule 404(B).[3] In *Lucero*, the court of appeals attempted to clarify New Mexico law concerning the admissibility of prior acts in sexual misconduct cases. This Note discusses the "lewd and lascivious" exception to Rule 404(B), explores the rationale of *Lucero*, and examines the policy implications of refusing to apply the exception in New Mexico courts.

II. STATEMENT OF THE CASE

The state convicted Lucero of attempted criminal sexual penetration of a minor, criminal sexual penetration of a minor, criminal sexual contact of a minor and kidnapping.[4] Lucero allegedly asked the victim, then seven years old, to his house and then proceeded to take off her clothes, as well as his own. The victim testified that Lucero attempted to "put his penis into her vagina, inserted his fingers into her vagina, and put his penis into her mouth."

At trial, the State called Lucero's ex-girlfriend, Diane. On direct examination, the prosecution attempted to elicit information concerning Lucero's prior sexual acts with Diane. The court sustained an objection by Lucero and rejected the State's argument that the evidence was "extremely important to prove motive, intent and lack of mistake." However, on cross-examination of Lucero, the State asked Lucero to agree that he and Diane had argued concerning her refusal to perform anal and oral sex. Lucero disagreed. Subsequently, the State recalled Diane and the court allowed her to testify that she and Lucero had argued a number of times about her refusal to engage in anal and oral sex.[5]

Lucero appealed his convictions citing a number of errors. The court of appeals reversed and remanded on the grounds that admitting Diane's testimony concerning the couple's sexual acts was prejudicial error.[6] The State did not proffer any specific exception under Rule 404(B), nor did

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1. 114 N.M. 489, 840 P.2d 1255 (Ct. App.), *cert. denied*, 114 N.M. 413, 839 P.2d 623 (1992).
2. *Id.* Judge Black wrote the opinion for the court with Judges Minzner and Apodaca concurring.
3. *Id.*
4. *Id.* at 491, 840 P.2d at 1257.
5. *Id.*
6. *Id.* at 492, 840 P.2d at 1258.

it request the application of the "lewd and lascivious" exception in order to have Diane's testimony admitted. Nevertheless, the court of appeals discussed the exception and engaged in a lengthy colloquy on whether to apply the exception to 404(B).[7] The court ultimately held that the "lewd and lascivious disposition" exception is not applicable in New Mexico.[8]

III. HISTORICAL AND CONTEXTUAL BACKGROUND

Rule 404(B) renders evidence of prior acts for the purpose of establishing the defendant's character inadmissible, unless the proponent of the evidence has established the relevance of the evidence for a purpose falling under an exception to 404(B).[9] The "lewd and lascivious" exception is not listed in the Federal Rules of Evidence. However, because the list of exceptions is not exhaustive, both federal and state courts have permitted prior acts to be introduced under Rule 404(B) where the proponent of the evidence establishes a relevant basis of admission for a permissible purpose.[10] The following is an analysis of how courts of other jurisdictions, as well as New Mexico, have dealt with a sexual misconduct exception to Rule 404(B).

A. Federal Jurisdictions' Positions on the Exception to Rule 404(B)

Federal jurisdictions are divided on the definitive limits of admissibility of other acts in sexual misconduct cases. No circuit has gone so far as to accept and apply the "lewd and lascivious" exception. At least one circuit[11] represents a more liberal medium between the two extremes. But the majority of the circuits have held that the Federal Rules of Evidence should not be overridden, even when circumstances may pose unique problems.[12]

However, the Ninth Circuit has taken a middle position with respect to the question of creating an exception to Rule 404(B) in sexual misconduct cases.[13] In *United States v. Hadley* the court allowed evidence of defendant's prior acts of sexual abuse where the acts were similar to the offenses charged and were used to exhibit intent of the defendant in the case at bar.[14] The defendant in *Hadley* was charged with eleven counts of sexual abuse of minors.[15] Although the court in *Hadley* de-

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7. N.M. R. EVID. 11-404(B).

8. *Lucero*, 114 N.M. 484, 840 P.2d 1255.

9. FED. R. EVID. 404(B). In 1973, New Mexico adopted the federal rules. *See* N.M. R. EVID. 11-404(B).

10. *See, e.g.*, State v. Lara, 109 N.M. 294, 296, 784 P.2d 1037, 1039 (Ct. App. 1989).

11. *See* United States v. Hadley, 918 F.2d 848 (9th Cir. 1990), *cert. granted*, 112 S. Ct. 1261 (1992), *and cert. dismissed*, 113 S. Ct. 486 (1992).

12. *See* Government of Virgin Islands v. Archibald, 987 F.2d 180 (3d Cir. 1993); *see also* United States v. Fawbush, 900 F.2d 150 (8th Cir. 1990) (Admissible evidence is that which operates within the rules and should be allowed only for a relevant, established permissible purpose.).

13. *Hadley*, 918 F.2d 848.

14. *Id.*

15. *Id.* at 850.

termined that prior bad acts must fall under an accepted exception to 404(B), it admitted evidence of prior acts with someone other than the prosecuting victim.[16] Thus, while avoiding any express exception to 404(B) in the case of sexual misconduct, the court found that the prior acts were indicative of the defendant seeking out activities "of a sexually gratifying nature," which the court found to be relevant to the defendant's intent.[17] Apart from determining that the evidence was offered for the relevant, material issue of specific intent,[18] the court also noted that it would allow the prior acts evidence because it found that the acts "have to do with alleged activities of [the defendant], of a sexually gratifying nature."[19] One might conclude that while jurisdictions such as the Ninth Circuit do not intend to create or codify a special exception for sexual misconduct cases, courts may use their discretion to consider admission of prior acts in a more liberal manner in order to deal with evidentiary difficulties[20] and public policy concerns.

Before New Mexico adopted the Federal Rules of Evidence in 1973, the Tenth Circuit, in *United States v. Burkhart*, held prior acts inadmissable on the basis of a "similar offense theory."[21] The court placed the emphasis on keeping character evidence out, because "too often we lose sight of the fact that the [federal] rule is primarily a rule of exclusion of evidence and not one of admission . . . ."[22] Although *Burkhart* did not involve an issue of sexual misconduct, the court's thorough analysis is helpful in attempting to sort out the admissibility of evidence of prior acts and the consequences of admitting such evidence. Such evidence could conceivably prejudice the jury by interjecting the prior acts with those alleged in the case at bar, resulting in confusion and possible conviction, not for the crime charged in the instant case, but for retribution for the prior acts.[23] The constant concern of unfair prejudice against the

16. *Id.* at 851.

17. *Id.* The court looked to the following three factors in concluding that the evidence was probative of the defendant's intent: a) Could the jury reasonably conclude that the prior acts occurred and that defendant was the actor? b) Was the event in question too remote in time? c) Was the prior act introduced to prove a material element of the case? *Id.*

18. *See id.* On appeal, the defendant in *Hadley* unsuccessfully attempted to argue that intent was not a material issue. *Id.* It should be noted, however, that the law of Arizona includes specific intent as an element of criminal sexual contact of a minor and criminal sexual penetration of a minor, while New Mexico does not require the prosecution to prove the specific intent of the defendant. *See* State v. Osborne, 111 N.M. 654, 656, 808 P.2d 624, 626 (1991).

19. *Hadley*, 918 F.2d 848.

20. *See, e.g.*, State v. Lucero, 114 N.M. 489, 492-93, 840 P.2d 1255, 1258-59 (1992) (noting that possible problems with prosecuting child sexual abuse cases include the need to bolster the victim's credibility and the belief that sex crimes are more likely to follow a specific psychological profile).

21. 458 F.2d 201, 205 (10th Cir. 1972) (Defendant was prejudiced by prior convictions admitted at trial which were not connected with instant prosecution for transporting vehicles over state lines, and were not offered for the purpose of establishing a common plan, scheme, design or intent.).

22. *Id.* at 204; *see also* Morgan v. United States, 355 F.2d 43 (10th Cir. 1966). The *Morgan* majority was explicit in its view of the exclusionary nature of the rule of character evidence, stating: "The [words] must be and will be realistically and closely defined and limited." *Id.* at 45.

23. *Burkhart*, 458 F.2d at 205 (citing Paris v. United States, 260 F. 529, 531 (8th Cir. 1919)) ("Such evidence tends to draw the atttention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial.").

defendant may be one of the major reasons why despite differing interpretations of Rule 404(B), the circuits have refused to stretch the rule to the extent of creating a "lewd and lascivious" exception.

B. Other States' Treatment of the "Lewd and Lascivious" Exception

Considering the complexity of Rule 404(B), it is not surprising that state courts also have diverse views on the creation of an exception explicitly for sexual abuse cases. The states appear to illustrate three positions concerning the admission of prior acts evidence in sexual misconduct cases. Some states maintain the Federal Rules of Evidence are the final word on admission; others do not provide for an exception, such as the "lewd and lascivious" exception, but do allow quite a bit of judicial discretion as to admission of prior acts, and some states have adopted the "lewd and lascivious" exception in cases involving sexual misconduct.

At one end of the spectrum are states like New Mexico[24] which base their decisions on the admissibility of evidence on their adopted versions of the Federal Rules of Evidence and maintain that any prior acts evidence must definitively fall within an exception to Rule 404(B). In *State v. Courter*,[25] the Missouri Court of Appeals indicated that it would not extend Rule 404(B) exceptions to create a specific exception for "sexual aberrations," unless the evidence was offered to establish proof of one of the established categories of exceptions, i.e., motive, intent, identity, common scheme or plan.[26] Because the court held that evidence of prior acts was admissible only where it fit into an existing category of exceptions, the existence of a sexual aberration exception or "lewd and lascivious" exception became moot. The court pointed out that the sexual aberration exception would allow the prosecution to establish that the defendant has depraved sexual instincts, and determined that this was essentially inadmissible propensity evidence.[27]

States which have taken the middle ground have allowed wider discretion with regard to admission of prior acts, while avoiding the creation of an exception specifically for sexual misconduct cases. The Wisconsin Court of Appeals has declared that cases dealing with sex crimes, "especially those dealing with incest and indecent liberties with a child," merit a "greater latitude of proof" as to other like occurrences.[28] Wisconsin, among other states, has turned to a relaxation of Rule 404(B) to circumvent the evidentiary problems of a young victim challenging the credibility of the adult defendant.[29] Despite the belief that these cases

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24. *But see infra* section V. (Analysis and Implications) (discussing recent cases indicating a trend toward the middle ground).

25. *See* State v. Courter, 793 S.W.2d 386 (Mo. App. 1990).

26. *Id.* at 389.

27. *Id.*

28. State v. Friedrich, 398 N.W.2d 763, 771 (Wis. 1987).

29. *See* Hendrickson v. State, 212 N.W.2d 481, 483 (Wis. 1973); *see also* People v. Covert, 57 Cal. Rptr. 220, 224 (Cal. App. 1967); State v. Jackson, 81 N.E.2d 546 (Ohio App. 1948).

should represent an exception to the rule, these courts have been reluctant to codify the exception. Nevertheless, by allowing evidence to be manipulated so as to fit an existing exception to Rule 404(B), these courts are indicating that a certain amount of discretion is due sexual misconduct cases.[30]

Finally, some states have created an exception to Rule 404(B) specifically for sexual misconduct cases.[31] In Ohio, the courts decided as early as 1948 that admitting the prior acts of the defendant in a sexual molestation case was indicative of the defendant's possession of a "degeneracy," which was probative of whether the defendant likely had the "same emotion or [degeneracy] at the time in question."[32] The court in *State v. Jackson*, acknowledging that evidence of a defendant's propensity to commit an act is generally inadmissable, distinguished the evidence of "degeneracy" by suggesting that it is the specific type of character or personality of sexual abusers which sets them apart from other violators of the law.[33]

Another rationale for creating an exception to Rule 404(B) in sexual offense cases includes the practical problem of corroborating the victim's testimony. In *Gezzi v. State*,[34] the Supreme Court of Wyoming stated that "the victim's credibility or apparent lack thereof may be determinative," thus corroborative evidence is of high probative value.[35] This policy consideration, as well as others involving concerns for protecting children, have led some states[36] to consider exceptions and to grant greater discretion with respect to other acts evidence in sexual misconduct cases. However, with *Lucero*, the New Mexico Court of Appeals clearly expressed its intent not to join these states, but to remain well within the limits of Rule 404(B).

C. *New Mexico's Position on Prior Acts Evidence Before Lucero*

In sexual misconduct cases, New Mexico courts have consistently accepted evidence of the defendant's past conduct with the prosecuting

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30. *See, e.g., Jackson*, 81 N.E.2d 546.

Of course, there are jurisdictions which seem to be mired in the complexities inherent in Rule 404(B) and have thus far produced largely confusing opinions with respect to prior acts evidence in sexual misconduct cases. *See* People v. Engelman, 453 N.W.2d 656, 661 (Mich. 1990) (using heightened evidentiary standards "designed to protect against the misuse of other acts evidence" but noting that Rule 404 is intended to be an inclusionary rule rather than an exclusionary one).

31. *See* Bowden v. State, 538 So. 2d 1226 (Ala. 1988); *see also* Soper v. State, 731 P.2d 587 (Alaska Ct. App. 1987); State v. Weatherbee, 762 P.2d 590 (Ariz. Ct. App. 1988).

32. *Jackson*, 81 N.E.2d at 548.

33. *Id.*

34. 780 P.2d 972 (Wyo. 1989).

35. *Id.* at 977 (quoting Robert N. Block, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. REV. 261, 286 (1977). In addition to admitting such evidence to buttress the credibility of the victim, the court noted that if the accused has a predilection to "deviant sexual practices," it would not be unreasonable for the trier of fact to find him/her guilty in the instant case. *Gezzi*, 780 P.2d at 977.

36. *See supra* note 29.

witness.[37] In fact, the lewd disposition exception was first introduced in New Mexico in the context of prior acts of a defendant with a prosecuting witness.[38] The exception continued to be cited as support for admitting testimony of prior acts involving the prosecuting witness, even after the adoption of the rules of evidence.[39]

However, prior acts which did not involve the victim raise a different standard of admissibility. Although courts in New Mexico have not defined the limits of the exclusion of evidence of prior sexual acts with someone other than the prosecuting witness, they have long excluded such evidence from admission at trial.[40] Before *Lucero*, New Mexico courts had not yet considered whether the "lewd and lascivious" exception would apply to a defendant's acts with someone other than the prosecuting witness.

Prior to the adoption of the rules of evidence in New Mexico, the common law test of admissibility of prior acts was one of relevance.[41] Courts recognized early on that admitting evidence of prior sexual acts involved a great deal of risk and danger.[42] Consequently, the test became a balancing act between the possible relevance to the current proceedings and the possible adverse effect the evidence might have on the jury.[43]

The common law relevancy requirement survived the adoption of the rules of evidence in 1973. In *State v. Ross*,[44] the court of appeals considered the threshold issue of relevancy and gave a cursory glance to

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37. State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct. App.), *cert. denied*, 80 N.M. 234, 453 P.2d 597 (1969).

38. *Id.* The court in *Minns* relied on State v. Dodson, 67 N.M. 146, 353 P.2d 364 (1960), and State v. Whitener, 25 N.M. 20, 175 P. 870 (1918), for the admissibility of prior acts to show the disposition of the defendant. However, these cases held that the evidence was admissible to show the "relation and familiarity of the parties" and to corroborate the victim's testimony. *Dodson*, 67 N.M. at 148, 353 P.2d at 366.

39. *See* State v. Mankiller, 104 N.M. 461, 469, 722 P.2d 1183, 1191 (Ct. App. 1986) (court admitted pornographic photographs of one of the victims found in the defendant's motel room); *see also* State v. Scott, 113 N.M. 525, 528, 828 P.2d 958, 961 (1991) (Defendant's previous sexual misconduct involving prosecuting witness was similar in nature to misconduct alleged at trial, and thus was admitted as "illustrative of a lewd and lascivious disposition of defendant toward the victim.").

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

41. *See id.*, at 666, 448 P.2d at 178. The court deemed a prior act of sexual misconduct not involving the victim to be a "collateral offense" and "wholly irrelevant" to the instant case.

42. *Id.* at 667, 448 P.2d at 179. The *Mason* court noted the importance of balancing the probative value of the evidence versus the possible prejudicial effect which is now codified in N.M. R. EVID. 11-403.

43. *See Mason*, 79 N.M. at 667, 448 P.2d at 179.

44. State v. Ross, 88 N.M. 1, 3, 536 P.2d 265, 267 (Ct. App. 1975) (Evidence of a collateral matter is irrelevant to the case at bar and is generally inadmissible.). A considerable amount of confusion has surrounded the question of what actually is relevant to the charges of Criminal Sexual Contact of a Minor (CSCM) and Criminal Sexual Penetration of a Minor (CSPM). Current law seems to indicate that CSCM does not require proof of specific intent on the part of the defendant. However, the supreme court has held a jury instruction on general intent to be insufficient. State v. Osborne, 111 N.M. 654, 660, 808 P.2d 624, 630. The court suggested an instruction requiring the jury to find that the defendant acted in a "manner calculated to arouse or gratify sexual desire, or which otherwise intruded upon the child's bodily integrity or personal safety." *Id.* at 660, 808 P.2d at 630; *see also* State v. Pierce, 110 N.M. 76, 83, 792 P.2d 408, 415 (1990) (Conviction for CSCM or CSPM does necessitate proving that the defendant acted unlawfully and intentionally.).

the exceptions under the newly adopted Rule 404(B). Even at that early stage, New Mexico courts appeared reticent to construe 404(B) outside the limited categories of exceptions which the state had acquired from the federal rules.[45]

With the adoption of the rules of evidence, prosecutors were given a higher standard to meet when attempting to introduce prior acts evidence.[46] The federal rules had established a list of exceptions which had to be considered.[47] Thus, prior acts evidence had to be relevant to a material issue in the case and fall within an exception to 404(B).[48] Comfortable with the existing exceptions, New Mexico case law indicates a conservative tendency concerning the rules of evidence. Indeed, the court of appeals may have been waiting for a case such as *Lucero*, in which it felt justified to strike down the "lewd and lascivious" exception in an attempt to clarify Rule 404(B).

IV. RATIONALE OF THE COURT IN *LUCERO*

The court in *Lucero* found that defendant's prior conduct with his ex-girlfriend was inadmissible based on a two-step test using Rules 404(B) and 403.[49] The threshold question the court asked was whether the proffered evidence was relevant for any admissible purpose.[50] Then, assuming the proponent of the evidence had adequately established its relevance to the proceedings for an admissible purpose under Rule 404(B), the court considered whether the probative value of the evidence was "substantially outweighed" by other considerations.[51]

The court of appeals found that Rule 404(B) "requires counsel to identify the consequential fact to which the proffered evidence of other acts is directed."[52] The State did not offer Defendant's prior sexual activities with his ex-girlfriend for any purpose other than to show his

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45. *See Ross*, 88 N.M. at 3, 536 P.2d at 267 (court limited admission of evidence to the language of the new state rules of evidence in all areas of the law); *see also* State v. Bazan, 90 N.M. 209, 561 P.2d 482 (Ct. App.), *cert. quashed*, 90 N.M. 254, 561 P.2d 1347 (1977) (in prosecution of assault charges, state was not allowed to introduce evidence of prior acts because they were not being introduced to prove an element of the crime charged, or to establish any factor within the exceptions to Rule 404(B)).

46. *See* State v. Dodson, 67 N.M. 146, 148, 353 P.2d 364, 366 (1960) ("Whenever the proof of another act or crime tends to prove the guilt of the person on trial, it is admissible, notwithstanding the consequences to the defendant.") (quoting State v. Bassett, 26 N.M. 476, 478, 194 P. 867, 869 (1921)).

47. *See Ross*, 88 N.M. at 3, 536 P.2d at 267.

48. State v. Beachum, 96 N.M. 566, 568, 632 P.2d 1204, 1206 (Ct. App. 1981).

49. *Lucero*, 114 N.M at 494, 840 P.2d at 1260; N.M. R. EVID. 11-403 and 404(B).

50. *Lucero*, 114 N.M. at 492, 840 P.2d at 1258. As previously noted, Rule 404(B) does not allow the admission of evidence in an attempt to show the character of the defendant or his/her propensity to commit the crime alleged.

51. *Id.* "Other considerations" include the possible prejudicial consequences of allowing the evidence before the jury, such that the "guilty verdict is a foregone conclusion." United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972); *see also* Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1470 (1985).

52. *Lucero*, 114 N.M. at 492, 840 P.2d at 1258 (citing State v. Aguayo, 114 N.M. 124, 835 P.2d 840 (Ct. App.), *cert. denied*, 113 N.M. 744, 832 P.2d 1223 (1992)).

desire to engage in such activities.[53] Because propensity is clearly inadmissable according to Rule 404(B), the court considered possible exceptions which might allow the admission of such evidence.[54]

Looking to the decisions of a number of other jurisdictions, the court raised the proposition of applying the "lewd and lascivious" exception to Rule 404(B).[55] In its discussion the court noted that other states have allowed more discretion in the admissibility of evidence of prior acts with respect to sexual misconduct.[56] However, relying on a number of authorities criticizing this exception,[57] the court deemed the lewd disposition exception "nothing more than a euphemism for the character evidence which Federal Rule of Evidence 404(B) and its state counterparts are designed to exclude."[58]

The court acknowledged the possibility that a charge of sexual misconduct involving children could present evidentiary problems meriting an exception to Rule 404(B).[59] Prior acts appear to arise more often in cases of child sexual abuse due to "the need to bolster the victim's credibility" and "the belief that sex crimes alone are more likely to follow a pattern based on the unique psychological profile of a likely perpetrator."[60] However, the court refused to bypass the rule as a solution to possible complications in prosecuting such crimes.[61] Finally, the court rejected the evidence on relevance grounds.[62]

Even though the sexual acts with Lucero's ex-girlfriend were not illegal, the court considered the effect such testimony might have on jurors.[63] Some jurors might be offended by the nature of the acts; therefore, the

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53. *Lucero*, 114 N.M. at 492, 840 P.2d at 1258.

54. *Id.* at 493-93, 840 P.2d at 1258-59. Had the State chosen to proffer any accepted exception to Rule 404(B), the court might have at least considered the relevancy of the prior acts to the crimes alleged. Indeed, the issue of intent might have been well argued, as it is a commonly used exception to Rule 404(B). *See, e.g.*, United States v. Hadley, 918 F.2d 848, 851 (9th Cir. 1990), *cert. granted*, 112 S. Ct. 1261 (1992), *and cert. dismissed*, 113 S. Ct. 486 (1992).

55. *Lucero*, 114 N.M. at 492, 840 P.2d at 1258.

56. *Id.* (citing State v. Friedrich, 398 N.W.2d 763 (Wis. 1987)); *see also supra* note 34.

57. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 230 (2d ed. 1982); Brian E. Lam, Note, *The Admissibility of Prior Bad Acts in Sexual Assault Cases Under Alaska Rule of Evidence 404(b)—An Emerging Double Standard*, 5 ALASKA L. REV. 193, 206 (1988); Haydn Winston, Casenote, *Evidence—The Impotence of Wyoming Rule of Evidence 404 in Sex Crime Trials: Brown v. State, 736 P.2d 1110 (Wyo. 1987)*, 23 LAND & WATER L. REV. 267, 274 (1988).

58. *Lucero*, 114 N.M. at 492-93, 840 P.2d at 1258-59.

59. *Id.* at 493, 840 P.2d at 1259.

60. *Id.* at 494, 840 P.2d at 1260; *see* Chris Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. REV. 604 (1989) (Child sexual abuse cases do not seem to fit neatly into the existing exceptions to Rule 404(B) and the resulting action by some courts is simply a manipulation of the rules.).

61. *Lucero*, 114 N.M. at 494, 840 P.2d at 1260. The court stated that "[w]hile we recognize the potential difficulty in prosecuting such cases, then, we do not believe the appropriate solution is to wink at the dictates of Rule 404(B)." *Id.*

62. *Id.* The court found no reasonable basis for the testimony for an "identified and legitimate" purpose; consequently it held that the evidence had no probative value. *Id.*

63. *Id.* (trial court held that Defendant's requests to engage in anal and oral sex were "in today's society . . . not aberrant"). *But see* N.M. STAT. ANN. § 20-12-57 (Repl. Pamp. 1989) (prohibiting any "unnatural carnal copulation" under the New Mexico Military Code), *cited in Lucero*, 114 N.M. at 494, 840 P.2d at 1260.

court could not be sure that the evidence did not affect the result.[64] The court noted that the prejudicial effect of prior bad acts can be particularly powerful in child sexual abuse cases.[65] Thus, the court could not deem the admission of the rebuttal testimony of the defendant's ex-girlfriend harmless error.[66] By holding that the evidence of prior acts was irrelevant and prejudicial, the court also came to its conclusion to reject the "lewd and lascivious" exception.[67] In so doing, the court attempted to dispel some of the confusion surrounding Rule 404(B).

V. ANALYSIS AND IMPLICATIONS

The court in *Lucero* chose to consider and affirmatively dismiss the application of the lewd disposition exception in New Mexico, despite the fact that the prosecution did not argue the exception in its case. In so doing, the court attempted to accomplish a couple of goals. First, the court endeavored to clarify the ambiguity inherent in Rule 404(B)[68] by drawing a distinct line within the exceptions. It clearly established its intention to abide by the rules of evidence in a strict manner.[69] In addition, the court achieved its second goal of criticizing and rejecting the proposition that an exception should be created for admitting prior acts in a sexual misconduct case.

The success of the court's efforts in *Lucero* may be considered in light of subsequent cases involving the same issue. Despite a seemingly resolute decision in *Lucero*, the cases which followed it do not appear to illustrate such a strict adherence to the rules of evidence. The court held other acts admissible in *State v. Lamure*,[70] but cited *Lucero* in *State v. Landers*[71] for the proposition that evidence of prior acts of the defendant with someone other than the victim is inadmissible. It appears as though the court flatly rejected the label of "lewd and lascivious" in order to admit prior acts evidence with someone other than the prosecuting witness, but made little headway in its attempt to define the limits of prior acts which may be admitted through other exceptions.[72]

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64. *Lucero*, 114 N.M. at 494, 840 P.2d at 1260.

65. *Id.* (citing Hutton, *supra* note 60, at 625-26) (evidence of prior bad acts in child sexual abuse cases is outcome-determinative in most cases); *see also* Calvin W. Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 NOTRE DAME L. REV. 556, 560 (1984).

66. *Lucero*, 114 N.M. at 495, 840 P.2d at 1261.

67. *Id.* at 493, 840 P.2d at 1259.

68. *See* 1A JOHN HENRY WIGMORE, EVIDENCE § 54.1 n.2 (Tillers rev. 1983).

69. *Lucero*, 114 N.M. at 494, 840 P.2d at 1260.

70. 115 N.M. 61, 846 P.2d 1070 (Ct. App. 1992), *cert. denied*, 114 N.M. 720, 845 P.2d 814 (1993) (in pathologist's trial for sexual misconduct against an adolescent, court found that prior sexual acts with one of the defendant's sons was probative of one of the established exceptions to Rule 404(B), in addition to the fact that defendant "opened the door" for prosecution on rebuttal by offering character trait). The majority's decision was the motivation for a lengthy concurrence by Judge Hartz, in which he suggested that the majority did not understand the established exceptions to Rule 404(B) and that the greater restrictions should exist on the admissibility of other acts.

71. 115 N.M. 514, 853 P.2d 1270 (Ct. App. 1993), *cert. quashed*, 115 N.M. 535, 854 P.2d 362 (1993).

72. Examples of such other exceptions to 404(B) include: intent, motive, plan and lack of mistake. N.M. R. EVID. 404(B).

The decision in *Lucero* and its discussion in later cases indicates the court's distaste for creating special exceptions, yet appears to encourage wide latitude for prosecutors who can wedge prior acts evidence into one of the established exceptions to Rule 404(B). While the court acknowledged the difficulties of prosecuting a sexual molestation case, it refused to help remedy the situation with a specific rule.[73] Despite this specific prohibition New Mexico courts may still allow a wide variety of circumstances to satisfy the established exceptions to Rule 404(B).[74] The courts' seeming refusal to support the adherence to the strictures of Rule 404(B) obscures the current limits of admissibility to an even greater extent. Additionally, the *Lucero* decision may result in inconsistent judgments; without a specific exception to rely upon, the trial courts must decide whether or not evidence is being permissibly or impermissibly manipulated into one of the established exceptions. The results could potentially be quite arbitrary, only adding to the quagmire that is Rule 404(B).

VI. CONCLUSION

The court in *Lucero* saw an opportunity to reject the Rule 404(B) "lewd and lascivious" exception, which would admit evidence of prior acts with someone other than the prosecuting witness. The defendant's ex-girlfriend's testimony as to intimate incidents between the two was found irrelevant for any purpose other than propensity. Accordingly, because the court struck down the "lewd and lascivious" exception, the testimony did not fall under any other exception and was deemed inadmissible and highly prejudicial.

Such a decision perpetuates the problems the state faces in attempting to prosecute sexual misconduct cases. How a court will decide on the admissibility of prior acts evidence still remains a mystery for practitioners, who retain only the established exceptions of Rule 404(B) and the balancing act of Rule 403 as reliable tools of the trade.

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73. The court might have considered creating a "lewd and lascivious" exception specifically in the case of child sexual molestation, where the practical problems of prosecution are the greatest. If such an exception were to exist, the defense would still have use of Rule 403 to avoid the admission of evidence where the probative value was not substantially outweighed by the prejudicial effect.

74. *See Lamure*, 115 N.M. at 65, 846 P.2d at 1074. The *Lamure* court ruled that the prior acts evidence was "relevant and came within one or more of the exceptions, such as motive, opportunity or intent." The court also noted that because propensity was not at issue in this case, the evidence could not have been offered for that purpose. *Id.*