OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 46 WINTER 2021 NUMBER 1

COMMENT

IT TAKES TWO TO TANGO BUT IN *HAMMICK V. STATE* THREE WAS A TANGLE: UNTANGLING OKLA. STAT. TIT. 12, § 2403, OKLA. STAT. TIT. 12, § 2404(B), AND THE NEBULOUS DOCTRINE OF RES GESTAE

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INTRODUCTION

It is a fundamental principle in criminal jurisprudence that, when one is put on trial for a crime, one is to be found guilty, if at all, by evidence that tends to establish guilt for that crime and that crime only.[1] It logically follows that evidence revealing a defendant has engaged in criminal

* Juris Doctor candidate, Oklahoma City University School of Law, May 2022. This article is dedicated to my wife, whose patience and adoration were a sweet savor for me during this article's production. I appreciate the members and editors of the Law Review as well for their efforts in preparing this article for publication. Finally, I would like to thank my family and friends for their endless love and support, and for taking an interest in all that I do.

1. Blackwell v. State, 1983 OK CR 51, 663 P.2d 12, 15 (stating that "[a]s a general rule . . . an accused put on trial for an offense is to be convicted, if at all, by evidence which proves him guilty of that offense alone.").

misconduct on *other occasions* is forbidden from going into the hands of the jury if that evidence only permits the jury to infer that, because the defendant has committed crimes in the past, he must have committed the crime he is on trial for.[2] Though technically bearing some relevance, such evidence is, as a matter of law, too susceptible to inviting the jury to convict the defendant merely because it perceives him to be a habitual offender.[3]

But as with any equitable principle, the conferred right must at times be balanced against competing interests. In the evidentiary context, the prosecution has a right of its own to use evidence against a defendant that establishes a coherent narrative which leads the jurors to an honest verdict, even if the evidence "strik[es] hard" and shows "much at once."[4] And perhaps counterintuitively, that right extends at times to evidence that shows the defendant has committed crimes on other occasions.[5] But, as with all evidence, before the prosecution can put evidence of the defendant's other criminal misconduct into the hands of the jury, one hurdle must first be cleared: the evidence must pass muster under Section 2403 of the Oklahoma Evidence Code.[6] That is, to be eligible to be considered by the jury, the evidence of the defendant's other crime must *more so* tend to logically establish guilt for the particular crime charged than it tends to carry a risk of unfairly prejudicing the defendant as just one who is predisposed to engage in criminal misconduct.[7] The principle is sound in theory, but in practice, the upshot of judges balancing the logical relevance of a defendant's other crimes against its risk of causing unfair prejudice is not always beyond reproach, because the introduction

2. *See* OKLA. STAT. tit. 12, § 2404(B) (1981, Supp. 1991).

3. Old Chief v. United States, 519 U.S. 172, 181 (1997) ("[T]he risk that a jury will convict for crimes other than those charged– or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment– creates a prejudicial effect that outweighs ordinary relevance.") (quoted authority omitted); *See generally* Edward J. Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence,* 1 CRIM. Just. 6, 8 (1986) (explaining that empirical data indicates that general character is a poor predictor of conduct).

4. *Old Chief*, 519 U.S. at 186-87 (expounding upon the "standard rule that the prosecution is entitled to prove its case by evidence of its own choice . . . .").

5. *Cf.* Driver v. State, 1981 OK CR 117, 634 P.2d 760, 762 (stating that "[e]ven if the evidence [of the defendant's other crimes is admissible] . . . its admissibility is still dependent on a finding that its probative value outweighs the prejudice to the accused.").

6. OKLA. STAT. tit. 12, § 2403 (2001, Supp. 2003).

7. *See Driver*, 634 P.2d at 762.

of evidence is left to the trial courts' sound discretion, in which an element of subjectivity naturally inheres.[8]

The judicial task of calibrating the balancing test pursuant to Section 2403 to yield an accurate admissibility-reading entails both gauging the other crime's risk of causing unfair prejudice and gauging its probative value—that is, its relevance to a material issue.[9] The latter task is facilitated by Section 2404(B) of the Oklahoma Evidence Code which explicitly provides examples of what the defendant's other crimes may legitimately be used to prove (e.g., a defendant's other crime may be admissible if it tends to establish he had a motive to commit the crime he is on trial for). It also instructs that evidence of other crimes are categorically forbidden from being used to establish a defendant is simply predisposed to breaking the law. This is perhaps superfluous because Section 2403 already operates to exclude evidence that could prejudice a defendant in such a way.[10] Given defendants' weighty interest in not being unfairly prejudiced in the eyes of the jury, there is a substantial need to accurately appraise the probative value of defendants' other crimes and their attendant risk of causing unfair prejudice before putting it into the hands of the jury.[11] So viewed, when the prosecution offers such information into evidence as relevant to one or more example-purposes pursuant to Section 2404(B), like motive, it is necessary for a court to closely scrutinize on balance whether the other crimes, if admitted into evidence, would *more so* logically prove the defendant's motive for

8. *See e.g.,* Harney v. State, 2011 OK CR 10, ¶ 17, 256 P.3d 1002, 1006 (stating that the "trial court abused its discretion in the admission of [evidence] that reflected other crimes and bad acts."); *See also* Stouffer v. State, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263 (stating that "[t]he introduction of evidence is left to the sound discretion of the trial court; the decision will not be disturbed absent an abuse of that discretion.").

9. *See* Martinez v. State, 2016 OK CR 3, ¶ 37, 371 P.3d 1100, 1111 (stating that "[r]elevant evidence is evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," and that "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . ").

10. *See* OKLA. STAT. tit. 12, § 2404(B) (1981, Supp. 1991); *See generally* OKLA. STAT. tit. 12, § 2403 (2001, Supp. 2003).

11. *See* Hardin v. State, 1969 OK CR 309, 462 P.2d 357, 360 ("[E]xceptions to the general rule are to be used with the utmost caution."); *See also* President v. State, 1979 OK CR 114, 602 P.2d 222, 225 (explaining that jury decisions made on the basis of an "emotional" rather than a "rational" judgment serves to deprive criminal defendants of their constitutional right to an impartial jury).

committing the crime he is on trial for or if it would more so prejudice the defendant as simply being predisposed to breaking the law.[12]

What is peculiar then is that in *Hammick v. State*[13] the Rogers County District Court of Oklahoma admitted evidence of the Defendant's other crime as relevant to proving his motive, intent, preparation, and common scheme or plan, which are other explicitly named Section 2404(B) example-purposes. But, the trial court circumvented performing an individualized analysis of the other crime's relevance to each example by simply analyzing whether the other crime was part of the res gestae. Res gestae is the name of a vexing legal doctrine which, for reasons explained herein, should only be used in very limited circumstances. Some of these reasons include its limited utility, wide breadth, and tendency to mire the already difficult task of accurately evaluating evidence pursuant to Section 2403.

Hammick v. State presents both an opportunity to argue for a refinement of res gestae and an opportunity to argue the purposes codified by Section 2404(B) should be interpreted in accordance with their respective commonsense meanings. This Comment begins with an exploration of the relationship between Sections 2404(B) and 2403. Within that topic, it looks first at the way in which the two work in tandem to exclude evidence of a defendant's other crimes that only serve to prove a defendant's bad character; it then provides an illustration of their operation to that effect. It looks second at the fact that evidence of a defendant's other crimes may still come into the hands of the jury, if it bears enough logical relevance (to an example-purpose named by Section 2404(B)) to justify its admission pursuant to Section 2403, and also provides an illustration to that effect. This Comment explains next why it is imprudent for courts to adopt interpretations of the example-purposes that go beyond their commonsense meanings, especially in light of how difficult it can be to overturn a court's Section 2403 evidentiary rulings.[14]

The Comment then explores the relationship between Section 2404(B) and res gestae. It first takes a deep dive into the background and mechanics of res gestae's slippery operation. It second debunks the notion that res gestae is doctrinally separate and distinct from Section 2404(B), ultimately

12. *See infra* text accompanying notes 107-14.

13. Hammick v. State, 2019 OK CR 21, 449 P.3d 1272.

14. *See generally* Stouffer v. State, 2006 OK CR 46, ¶ 60, 147 P.3d 245, 263 (stating that "[t]he introduction of evidence is left to the sound discretion of the trial court; the decision will not be disturbed absent an abuse of that discretion.").

establishing res gestae as technically redundant. It then concludes that res gestae, though redundant in theory, still bears some practical utility that justifies its continued existence.

Following the discussion of res gestae, this Comment describes the facts and decision of the trial court in *Hammick v. State*. This Comment pays special attention to the way in which res gestae was used to certify the Defendant's other crime as relevant to proving the Defendant's motive, intent, preparation, and common scheme or plan for the charged crime. The Comment then analyzes how the approval of that application by the Court of Criminal Appeals of Oklahoma effectively authorizes prosecutors to forgo articulating coherent theories of relevancy for each example-purpose codified by Section 2404(B) if they simply resort to citing res gestae as their theory of admissibility. Finally, this Comment offers a more prudent approach to evaluating the admissibility of a defendant's other crimes for purposes codified by Section 2404(B) and illustrates its efficacy by applying it to the facts of *Hammick*.

BACKGROUND: EVIDENCE THAT A CRIMINAL DEFENDANT HAS COMMITTED CRIMES OTHER THAN THE CHARGED CRIME MAY BE ADMISSIBLE, BUT THE RULES FOR DISCERNING WHEN ARE TANGLY

In Oklahoma, prosecutors are strictly barred by Section 2404(B) of the Oklahoma Evidence Code from using evidence of a defendant's "other crimes, wrongs, or acts" as a part of their narrative of a defendant's guilt if the thrust of such evidence primarily serves to portray the defendant as one who is simply predisposed to breaking the law.[15] Specifically, Section 2404(B) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[16] However, the problem with such evidence is not that it is irrelevant.[17] In fact, technically speaking, evidence of other crimes, wrongs, or acts ("other crimes") *does* bear some probative value, and so long as evidence bears some degree of probative value to "any fact that is of consequence to the determination" of the defendant's guilt, a jury

15. *See* OKLA. STAT. tit. 12, § 2404(B) (1981, Supp. 1991).

16. *See id.* § 2404(B).

17. Michelson v. United States, 335 U.S. 469, 475-76-(1948) (explaining that evidence of a defendant's other crimes as relevant to criminal propensity is not "irrelevant, on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

may consider the evidence; it need not conclusively, or even directly, establish the defendant's guilt.[18] Rather, the problem with using evidence of one's other crimes to prove the defendant is prone to breaking the law is that the probative value of that information is substantially outweighed by its risk of inviting a jury to convict simply because it believes the defendant to be of poor character and deserving of punishment generally.[19] As one commentator has pointed out, "once the jurors learn of the [defendant's other crimes], they tend to use an entirely 'different . . . calculus of probabilities' in deciding whether to convict."[20]

To visualize how Sections 2404(B) and 2403 work in tandem to exclude evidence that could yield a conviction based primarily on bad character, consider this illustration: if *A* is indicted for burglary, the prosecution is barred from introducing evidence that *A* perpetrated the theft of a pistol in the past in order to prove that *A* has a general propensity to engage in criminal misconduct and is thus the likely culprit of the burglary too.[21] Though the prior theft technically has a slight tendency to indirectly establish *A* as the culprit, the probative value of *A*'s earlier criminal misconduct is low relative to its attendant risk of causing unfair prejudice.[22] Specifically, the jury may overestimate the probative worth of the defendant's other crime when evaluating the defendant's culpability.[23] Or, even if the jury does not overestimate its probative worth, it may nevertheless consciously or subconsciously feel comfortable (if not resolved in) convicting the defendant merely because it perceives the defendant to be a lawbreaker who will commit more crimes if acquitted.[24] Evidence that tends to invite convictions on such grounds is the very kind of evidence that Section 2403 endeavors to thwart and Section 2404(B) codifies as inadmissible.[25]

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18. *Id.*; *See* OKLA. STAT. tit. 12 § 2401 (1978) ("'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").

19. *See supra* text accompanying note 3.

20. Edward J. Imwinkelried, *Uncharged Misconduct: One of the Most Misunderstood Issues in Criminal Evidence,* 1 CRIM. CRIM. Just. 6, 8 (1986).

21. *See* § 2404(B).

22. *See Old Chief*, 519 U.S. at 181 (1997).

23. *See* EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 901, at 311 (3rd ed. 1998).

24. *See Old Chief*, 519 U.S. at 181 (1997).

25. *See generally* OKLA. STAT. tit. 12, § 2403 (2001, Supp. 2003); § 2404(B); *See* President v. State, 1979 OK CR 114, 602 P.2d 222.

Even though the above illustration perhaps sufficiently explains the thrust of Section 2403, it only delves into the meaning of the first sentence of Section 2404(B).[26] There is also a second, final sentence to Section 2404(B) that clarifies that evidence of a defendant's other crimes *may be admissible* if it is offered for a purpose *unrelated* to showing the defendant has a general propensity to commit crimes.[27] Specifically, the second sentence of Section 2404(B) clarifies the thrust of the first sentence by stating that "[other crimes] may, however, be admissible for other purposes, such as [to prove the defendant's] motive, opportunity, intent, preparation, plan, knowledge, identity or [the] absence of mistake or accident."[28] However, to be admissible, the evidence must still pass Section 2403's balancing test, even if offered for a legitimate purpose codified by Section 2404(B).[29] This Comment has, up to this point, referred to these purposes as "example-purposes," but will hereafter use the term "facts of consequence." Recall the burglary hypothetical for an illustration of identity evidence that would also (likely) pass Section 2403's balancing test: suppose *A* is indicted for the theft of a .44 magnum pistol that was stolen from a sporting goods store at 3:30 a.m., and suppose also that before the thief escaped, he painted his zodiac sign on the wall with blue paint. If there was evidence that *A* perpetrated an identical theft at a different sporting goods store in the past, that evidence would likely be admissible under an identity theory. It would likely be admissible because *A*, whose modus operandi—that is, *A*'s highly peculiar method of operation, or M.O.—of vandalizing sporting goods stores with blue paint after robbing them at 3:30 a.m., is compelling evidence of *A*'s identity as the culprit of the theft *A* is currently on trial for.[30] Although such evidence *does* prejudice *A* to an extent as one having a general criminal propensity, it is *more so* logically probative of *A's* guilt than it is prejudicial when viewed through a Section 2403 lens.[31] However, because the facts of

26. *See generally* § 2404(B) (stating in its first sentence that evidence of a defendant's other crimes is inadmissible to prove "conformity therewith").

27. *See generally* § 2404(B).

28. *See* § 2404(B).

29. *See* Bryan v. State, 1997 OK CR 15, 935 P.2d 338, 357, *as corrected* (Mar. 24th, 1997) ("Other crimes should not be admitted where it is so prejudicial [that] it denies a defendant his right to be tried only for the offense charged.").

30. *See* Williams v. State, 2008 OK CR 19, ¶ 37, 188 P.3d 208, 219 ("[W]hen [a] peculiar method of operation is so unusual and distinctive as to be like a signature . . . [i]dentity is the . . . appropriate label . . . because distinctive methods of operation are indicative of who perpetrated the crime.").

31. *See generally* OKLA. STAT. tit. 12, § 2403 (2001, Supp. 2003); § 2404(B).

consequence codified by Section 2404(B) lack statutory definitions, applying Section 2404(B) with Section 2403 is not always so straightforward.

Because the facts of consequence codified by Section 2404(B) lack statutory definitions, courts have at times interpreted them in ways that exceed their commonsense meanings.[32] For example, the aforementioned theory of identity (a highly peculiar method of operation) has been conflated by the Court of Criminal Appeals of Oklahoma to be a permissible interpretation of common scheme or plan.[33] In *Cook v. State* the trial court admitted four independent instances of embezzlement committed by the Defendant simply because there were "similarities" between all the instances of embezzlement that pointed toward "a common scheme of embezzlement."[34] Though this approach may seem justified at first blush, broadly interpreting the codified facts of consequence pursuant to Section 2404(B) is imprudent. This is because a defendant's weighty constitutional right to an impartial jury is naturally jeopardized by evidence of his prior criminal misconduct going into the hands of the jurors.[35] It is also because, as one commentator has pointed out, alleged errors in admitting evidence of a defendant's other crimes has been "the most common ground for appeal" "in many jurisdictions."[36] Because Oklahoma trial courts' evidentiary rulings generally will not be overturned absent an abuse of discretion, the need to adopt commonsense interpretations of the codified facts of consequence is vital given that

32. *See* § 2404(B).

33. *See* Cook v. State, 1982 OK CR 131, 650 P.2d 863, 868; *accord* Roubideaux v. State, 1985 OK CR 105, 707 P.2d 35, 37 (responding to appellants contention that the "exception of common scheme or plan cannot be applied unless the commission of one crime facilitated the other," stating that "this Court has not so narrowly construed this permitted departure from the other crimes evidence rule . . . .[T]his connection may be established by evidence of a method of operation so distinctive as to demonstrate a plan common to both crimes.").

34. *Cook*, 650 P.2d at 868.

35. *See supra* text accompanying note 20. *See generally* President v. State, 1979 OK CR 114, 602 P.2d 222, 225 (explaining that jury decisions made on an improper basis serves to deprive criminal defendants of their constitutional right to an impartial jury).

36. *See* IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 901, at 243 (2d ed. 1993) (stating that "[t]his doctrine [of 404(b) (which is the virtually identical, federal counterpart to § 2404(B))] is of tremendous importance . . . [because] in many jurisdictions alleged errors in the admission of uncharged misconduct are the most common ground for appeal; in a significant minority of states, errors in admitting this species of evidence are the most frequent basis for reversal in criminal cases.").

mistakes are apparently believed to be frequent while the ability to remedy them is exceedingly difficult.

Fortunately, there is precedent from within the jurisdiction of the Tenth Circuit that interprets the codified facts of consequence in accordance with their commonsense meanings. This precedent is available to the Oklahoma Court of Criminal Appeals, including precedent for the "common scheme or plan" fact of consequence that can be cited to justify commonsense interpretations. For example, concerning the breadth of the "common scheme or plan" fact of consequence, the Court in *Williams v. State* believed that "when the peculiar method of operation is so unusual and distinctive as to be like a signature . . . [i]dentity is the more appropriate label . . . because distinctive methods of operation are indicative of who perpetrated the crime."[37] Additionally, the Supreme Court of New Mexico (also in the Tenth Circuit with a statute that is virtually identical to Section 2404(B)) has implicitly condemned the Oklahoma Court of Criminal Appeals's approach to the "common scheme or plan" fact of consequence by declaring that, when "identity" is not at issue, evidence that the defendant used the same plan repeatedly to commit separate crimes that are "strikingly similar . . . is propensity evidence pure and simple."[38] The Supreme Court of New Mexico clarified that, to be admissible under a "common scheme or plan" theory, "[t]here must be some overall scheme of which each of the crimes is but a part."[39] In accord with that holding, one commentator has clarified that there are, in reality, only two types of common schemes or plans: a "sequential plan" and a "chain plan." The commentator describes each as follows:

> In a sequential plan, there is a natural sequence or order to the crimes. For instance, the criminal initially breaks into the bank president's residence to steal a key to an entrance to the bank and later uses the key to break into the bank. The other type is a "chain" plan. In this type of plan, although the crimes do not have to be committed in any particular order, there is a grand design or an overall objective requiring the commission of several crimes.

37. Williams v. State, 2008 OK CR 19, ¶¶37-38, 188 P.3d 208, 219 (quoting Welch v. State, 2000 OK CR 8, ¶ 11, 2 P.3d 356, 366) (clarifying that common scheme or plan "deals primarily with . . . other crimes evidence to show the commission of one crime facilitated another.").

38. State v. Gallegos, 2007-NMSC-007, ¶ 31, 141 N.M. 185, 194, 152 P.3d 828, 837.

39. *Id.* ¶ 32, 152 P.3d at 838 (quoted authority omitted).

> For example, suppose that there are four heirs to Greenacre and that heir #4 can take Greenacre only if the other three heirs predecease him. If heir #4 decides to kill the other three to acquire Greenacre, the three killings would be parts of a chain plan; heir #4 does not have to kill the other three in any particular sequence, but his overall goal necessitates the perpetration of all three murders.[40]

Although the Court of Criminal Appeals of Oklahoma has adopted a broad interpretation of "common scheme or plan," it has nevertheless agreed that "all [the] crimes must come under one plan or scheme . . . or [be] merely part of a greater overall plan," and therefore not precluded from refining its broad interpretation of that fact of consequence.[41] This is also the case for the other facts of consequence codified by Section 2404(B), which will be discussed later.

But in addition to Section 2404(B), there is an inauspicious, topsy-turvy evidentiary institution that is *also* used to justify the admissibility of a defendant's other crimes: res gestae. American courts have for centuries recognized the common law doctrine of res gestae, which is Latin for "things done."[42] But to be more precise about its use, prosecutors may offer evidence of a defendant's other crimes by theorizing that the other crimes are "part of the 'res gestae.'"[43] In the evidentiary context, the phrase has, at least by the Court of Criminal Appeals of Oklahoma, been used in part to certify the relevance of a defendant's other crimes if the other crimes are "a) . . . so closely connected to the charged offense as to form part of the entire transaction; b) . . . [are] necessary to give the jury a complete understanding of the [charged] crime; or c) . . . [are] central to the chain of events."[44] However, it is a misnomer to call the aforementioned test the definition of res gestae.[45] Rather, because its wide

40. IMWINKELRIED ET AL., *supra* note 36, § 907, at 251.

41. *See* Atnip v. State, 1977 OK CR 187, 564 P.2d 660, 663.

42. IRVING J. KLEIN, LAW OF EVIDENCE FOR CRIMINAL JUSTICE PROFESSIONALS 253 (International Thomson Publishing Company, 4th ed. 1997); *See generally* Chris Blair, *Let's Say Good-Bye to Res Gestae*, 33 TULSA L. REV. 349, 349 (1997) (discussing the history and meaning of res gestae and its first appearance in American jurisprudence).

43. *See* Reyes v. State, 1988 OK CR 50, 751 P.2d 1081, 1083 (referring to other crimes admissible under a theory of res gestae as "constituting part of the 'res gestae'").

44. *See* Eizember v. State, 2007 OK CR 29, ¶ 77, 164 P.3d 208, 230.

45. *See* Mason v. State, 1994 OK CR 2, 868 P.2d 724, 725-26 (reciting one of the court's common law tests for res gestae: "Other crimes constitute res gestae if they are "so connected with other offenses as to form a part of an 'entire transaction' . . . ;" have a

breadth and lack of any substantive underpinning, the doctrine of res gestae is understood to be incapable of possessing a "comprehensive definition."[46] Nevertheless, res gestae still appears to endure as the unofficial adjunct to Section 2404(B)'s clarificatory second sentence.[47] Even so, res gestae's overbreadth and awkward entanglement with the rules of evidence has left it subject to intense criticism, and has led even prominent names like Judge Learned Hand to condemn it as "accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."[48] Others implicitly agree, stating that, "[res gestae] breeds admission of evidence without analysis, discouraging the court from examining the evidence for its potential value and dangers. It should not be used as a means of circumventing the [other crimes] doctrine."[49] One federal circuit court has affirmatively invalidated res gestae's hypothesis of admissibility by stating that "there is no general 'complete the story' or 'explain the circumstances' exception . . . ."[50] But perhaps more significantly, the trend among the states in the Tenth Circuit is to abolish res gestae entirely.[51]

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logical or visible connection to the offense charged; "tend[ ] to prove a material fact in issue . . . ."; "show [defendant's] conduct as an occurrence forming an integral part of the transaction, . . . which completed the picture of the offense charged"; or are "relevant to prove the essential elements of the offense charged as matters incidental to the main fact and explanatory of it.").

46. *See* KLEIN, *supra* note 42; *See also* Stephens v. Miller, 13 F.3d 998, 1003 (7th Cir. 1994) (noting that "[o]ther federal courts have described the phrase res gestae as . . . almost inescapable of a definition.").

47. *See, e.g.*, Hammick v. State, 2019 OK CR 21, ¶ 16, 449 P.3d 1272, 1277; *Eizember*, ¶ 77, 164 P.3d at 230; Neill v. State, 1994 OK CR 69, ¶ 36, 896 P.2d 537, 550-51; Vanderpool v. State, 2018 OK CR 39, ¶ 24, 434 P.3d 318, 324; Baird v. State, 2017 OK CR 16, ¶ 37, 400 P.3d 875, 885.

48. United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944); *Accord* State v. Long, 173 N.J. 138, 801 A.2d 221, 239-40 (2002) (Stein, J., concurring in part and dissenting in part) (listing federal and state cases, and scholarly works that have condemned the endurance of res gestae).

49. DAVID P. LEONARD, THE NEW WIGMORE A TREATISES ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS 324 (Aspen Publishers, 2009).

50. United States v. Bowie, 232 F.3d 932, 928-29 (D.C. Cir. 2000) (referring specifically to both the "inextricably intertwined" doctrine and the "res gestae" doctrine given their synonymity as used by the trial court).

51. Horton v. State, 764 P.2d 674, 677 (Wyo. 1988) ("While the concepts that traditionally were labeled as 'res gestae' are still present in the law of evidence, the phrase itself no longer is present under the Wyoming Rules of Evidence. . . . [I]t probably is more helpful for courts and counsel to address evidentiary issues in the language of those

Regarding the mechanics of res gestae's operation, its scope is "indefinite, and needs further definition and translation before either its reason [or] scope can be understood."[52] To visualize the accuracy of this observation, consider once again the standard articulated by the Court of Criminal Appeals of Oklahoma for when other crimes constitute part of the res gestae:

> [E]vidence is admissible under the res gestae exception when "a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events."[53]

Moreover, what is commonly discernable in all of res gestae's tests is that they entail multiple facets that *loosely describe* unparticularized idiosyncrasies that, if congruent with the particular idiosyncrasies inhering in the defendant's other crime, will certify the other crime as relevant under the res gestae theory.[54] But because res gestae lacks any substantive underpinning, there is theoretically no limit as to what may be congruent, and thus relevant, under a res gestae theory—hence the description, "indefinite."[55]

What is interesting though is that, in the second sentence of Section 2404(B), the semantics of "such as" where it immediately precedes the codified facts of consequence plainly implies that its scope is *also* indefinite in terms of what it contemplates.[56] So although the codified facts

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rules."); State v. Gunby, 282 Kan. 39, 63, 144 P.3d 647, 663 (2006) ("This case provides an opportunity to end this particular confusion of thought, and we hereby do so. The concept of res gestae is dead . . . ."); People v. Rojas, 2020 COA 61, ¶¶ 74-75, *cert. granted,* No. 20SC399, 2020 WL 5997143 (Colo. Oct. 6th, 2020) (petition for Writ of Certiorari granted as to the issue of whether the court "should abolish the res gestae doctrine").

52. *Rojas*, 2020 COA 61, ¶ 74 (Furman, J. dissenting) (quoting 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 218, at 721 (1904)). Quoted language is only in paragraph 74.

53. *Hammick*, ¶ 16, 449 P.3d at 1277.

54. *See infra* text accompanying notes 69-73.

55. *See Rojas*, 2020 COA 61, ¶ 74 (Furman, J. dissenting).

56. *See* Rhodes v. State, 1985 OK CR 16, ¶ 9, 695 P.2d 861, 863 (describing OKLA. STAT. tit. 12 § 2404(B), stating that the "provision authorizes the use of other acts or crimes for 'other purposes' other than proof of character, 'such as' those enumerated; it clearly was not intended to be exhaustive or exclusive"); State v. Gallegos, 2007-NMSC-007, ¶ 22, 141 N.M. 185, 192, 152 P.3d 828, 835 ("The list of allowable purposes . . . is not

of consequence have mostly been referred to as "exceptions" to the rule articulated in the first sentence of Section 2404(B) (the bar against proving criminal propensity) it is perhaps more appropriate to conceptualize the codified facts of consequence in the second sentence as just *some* of an indefinite number of legitimate evidentiary purposes. This could be because the *raison d'etre* of Section 2404(B) is limited to simply forbidding a defendant's other crimes from being used for *one* evidentiary purpose: proving the defendant has a general propensity to commit crimes.[57] So viewed, because the full thrust of res gestae is already exerted by the second sentence of Section 2404(B), it can be deduced that res gestae is technically rendered *redundant* by statutes like Section 2404(B), which *already* implicitly exert the same thrust by way of the implication that derives from their *raison d'etre*.[58] Simply put, both res gestae and the second sentence of Section 2404(B) theoretically function to do the exact same thing: contemplate a defendant's other crimes, wrongs, or acts as admissible for any purpose *other than* to prove a defendant's propensity to commit crimes.[59] This reveals their doctrinal distinctiveness as a mirage.[60] Their respective procedural implications (such as the degree to which the defendant's other crime must be proven to have in fact occurred) is all that makes them distinguishable.[61]

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exclusive, but is illustrative."); *See generally* § 2404(B) (1981 & Supp. 1991) (stating that other crimes "may, however, be admissible for other purposes, such as [to prove the defendant's] motive, opportunity, intent . . . ").

57. *See* CHRISTOPHER B. MUELLER ET AL., EVIDENCE 210-11(Aspen Publishers, 4th ed. 2009) (stating that "[i]n addition to the purposes expressly listed in FRE 404(b) [(the virtually identical federal counterpart to § 2404(B))] . . . there are other proper uses for evidence of prior crimes, wrongs, or acts," and that "[e]vidence necessary for a full understanding or to bridge a chronological gap in the government's proof is properly admissible under FRE 404(b)").

58. *See* State v. Clark, 261 Kan. 460, 471, 931 P.2d 664, 674 (1997) ("Res gestae evidence is . . . analogous to the admission of K.S.A. 60-455 evidence [(a virtually identical statute to § 2404(B))] of other crimes and civil wrongs").

59. *Id.*

60. *Id.*

61. *See* Eizember v. State, 2007 OK CR 29, ¶ 92, 164 P.3d 208, 233, n. 18, *as corrected* (Aug. 10, 2007) (acknowledging that witness testimony was admissible "as a § 2404 exception or as res gestae" but specifies in footnote 18 that "[a]s relevant to showing [the] [a]ppellant's intent, motive, and absence of mistake, [the Witness's] testimony was sufficient to establish by clear and convincing evidence that Appellant [committed the "other crime"] . . . . [But] [i]f admitted as part of the res gestae . . . the evidence [is] not subject to the clear and convincing requirement."). *But cf.* State v. Gunby, 282 Kan. 39, 62-63, 144 P.3d 647, 662-63 (2006) (admonishing the lower court for using res gestae as "a basis for circumventing K.S.A. 60-455 [(a virtually identical statute to § 2404(B))],"

This has led one commentator to insist that the Oklahoma Court of Criminal Appeals "abandon the use of the phrase res gestae."[62] Specifically, in *Let's Say Good-Bye to Res Gestae*, Chris Blair posits that "[s]ince the Oklahoma Evidence Code requires that the admission of evidence be analyzed under §§ 2404(B) and 2403, there is nothing to be gained by calling the evidence res gestae."[63] In fact, according to Blair, its use comes at the cost of a "principled analysis of evidentiary concepts" given that "the concepts included within res gestae can all be explained by reference to other more refined principles of evidence law," namely those codified in the Oklahoma Evidence Code.[64]

Although Blair argues res gestae can be explained by reference other, more refined principles of evidence law, those "more refined" principles, namely Section 2404(B), do not provide an exhaustive list of every permissible use of defendants' other crimes. And while it is unnecessary that Section 2404(B) do so, the practical effect of the judiciary invalidating res gestae, although it is substantively indistinguishable from Section 2404(B), would conceivably serve to simultaneously, albeit mistakenly, invalidate otherwise valid theories of admissibility that are *rooted in* and used *synonymously* with res gestae, particularly the "inextricably intertwined" theory of admissibility.[65] Threatening the legitimacy of the inextricably intertwined theory would be mistaken because the theory's premise for admissibility is sound.[66] It hypothesizes that a defendant's other crimes may be admissible where the other crime and the crime the defendant is indicted for cannot be disconnected without unduly

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and stating that doing such made it "apparent that the doctrine, as recognized by the court, was identical in form to the statute").

62. Chris Blair, *Let's Say Good-Bye to Res Gestae*, 33 TULSA L. REV. 349, 349 (1997).

63. *Id.* at 357.

64. *Id.* at 349.

65. *See* Newman v. State, 2020 OK CR 14, ¶ 19, 466 P.3d 574, 582 (applying the inextricably intertwined doctrine and using it synonymously with res gestae, stating that, "no error, plain or otherwise," in the trial court's admission of "evidence that Newman was carrying a fake gun at the time he cased the Rush Peterbilt Truck Center while obviously looking for something to steal" as res gestae. The Oklahoma Court of Criminal Appeals reasoned that the other crime was "central to the chain of events and inextricably intertwined with the evidence that formed the basis of the crime of larceny of an automobile. It was connected to the factual circumstances of th[e] crime and provided contextual information to the jury.").

66. Imwinkelried, *supra* note 3, at 45-46 (stating that "[i]n exceptional cases when the evidence about the two crimes is inextricably intertwined, it is defensible to admit the uncharged misconduct evidence" under the res gestae principle given the simultaneity of the two crimes).

deteriorating the prosecution's narrative of guilt for the indicted crime.[67] To visualize the utility of the doctrine, consider Christopher B. Mueller's illustration in *Evidence*:

> Sometimes several crimes are "inextricably intertwined" so that one simply cannot be proven without proof of the other. For example . . . proof that a defendant murdered a man in an apartment might require proof that he was burglarizing the place when the man returned and was killed. The murder might make no sense without any indication of the burglary, and practically speaking the prosecutor must allude to the burglary in proving the murder.[68]

Or consider *People v. Young*, in which evidence of the defendant's other crime was admitted to provide context that was, similar to the above illustration, critical to the prosecution's narrative: in *Young*, the defendant and his victim had purchased marijuana and subsequently traveled together to meet a buyer.[69] At trial, the defendant was charged with the murder of his passenger, and evidence that he and the victim had purchased marijuana and subsequently traveled with it to meet a buyer was admitted as res gestae to give the jury an "understanding of why [the] defendant and the victim were traveling together and why they may have had a falling out that ended violently."[70] The trial court reasoned that "without the evidence of the marijuana [delivery], there would be *no context* for the jury to consider the other evidence" (emphasis added).[71] The appellate court agreed, stating that "[t]he evidence concerning the marijuana [delivery] was inextricably interwoven with the facts of the murder. . . ."[72] In *Young*, the evidence of the marijuana delivery was not considered to be probative of any codified facts of consequence, such as the defendant's motive or identity, but instead was deemed to be evidence that was part and parcel with the event that predicated the murder; without

67. *See* People v. Gee, 2015 COA 151, ¶ 33, 371 P.3d 714, 721 (stating that "an act 'somewhat remote in time' from the charged crime nevertheless is res gestae if the two are 'inextricably intertwined' such that the former 'forms' an integral and natural part of an account of the crime.").

68. MUELLER & KIRKPATRICK, *supra* note 57, at 211.

69. People v.Young, 987 P.2d 889, 892 (Colo. App. 1999).

70. *Id.* at 893-94.

71. *Id.*

72. *Id.*

the evidence of the marijuana delivery, the prosecution's narrative that the marijuana transaction was the likely cause of the fall out would have been unduly deteriorated and would have left the jury without enough context to understand the circumstances surrounding the victim's murder. Or as Mueller would put it, the murder might have made "no sense" without any indication that a marijuana transaction was in progress and conceivably went awry.[73]

Young illustrates that the existence of res gestae is justified because the continued legitimacy of the valid concepts within it, namely the inextricably intertwined concept, conceivably depend upon the continued legitimacy of res gestae. Invalidating res gestae would likely serve to, mistakenly, invalidate the "inextricably intertwined" theory given its synonymity with, and roots in, res gestae.[74] So perhaps the fountainhead for the confusion that abounds from res gestae's existence is the fact that res gestae is technically redundant, arguably necessary, and indefinite in scope.

Even so, there will always be a dilemma presented by both the prosecution's need for evidence of a defendant's other crimes and the general rule that juries must be precluded from making decisions based upon their beliefs about a defendant's criminal propensity.[75] And because alleged errors in admitting such evidence has been "the most common ground for appeal" "in many jurisdictions," and because there is an exceedingly high hurdle that must be cleared to overturn mistakes in admitting evidence, what is ultimately in order is for the judiciary to employ commonsense interpretations of the facts of consequence codified by Section 2404(B). Courts should also require the prosecution to articulate a specific theory of admissibility for each individual fact of consequence the jury will consider the other crime probative of, especially in light of res gestae's limited utility as an adjunct to Section 2404(B).[76]

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73. *See* MUELLER & KIRKPATRICK, *supra* note 57.

74. *See generally* Newman v. State, 2020 OK CR 14, ¶ 19, 466 P.3d 574, 582.

75. *See* IMWINKELRIED, *supra* note 36, § 908, at 254.

76. *See* MUELLER & KIRKPATRICK, *supra* note 57, at 211. (stating that "[R]elatively few 'other crimes' are inextricably intertwined with the charged offense . . . . Usually they are more loosely linked with the charged offense and are offered to provide background and a fuller picture of what really happened. Here, FRE 404(b) [(the virtually identical federal counterpart to § 2404(B))] applies, which means that the evidence merits a close look to see whether it really does tend to shed useful light on points such as intent, motive, or plan . . . ."); *See also* STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 404.02[9] (Matthew Bender & Company, Inc., 8th ed. 2002) (arguing that "Trial Judges should be wary when the proponent of bad act evidence cites a 'laundry list' of possible

THE CASE: *HAMMICK V. STATE*

Facts

On May 10, 2015, the defendant broke into a Claremore, Oklahoma residence and robbed the three individuals inside at gunpoint.[77] Following the stickup, the defendant fled the scene in a car belonging to one of the individuals.[78] However, because the defendant apparently knew the police would be looking for the stolen car, he abandoned it and subsequently broke into another car and attempted to steal it.[79] The attempt was unsuccessful, but before bowing out, the defendant managed to locate a nine-millimeter pistol inside a compartment and stole it.[80] The defendant was arrested the next day by an officer responding to a call about a suspicious man "hiding in some bushes" who turned out to be the defendant.[81] A month after the defendant's initial interview that followed his arrest, he made a full confession and directed law enforcement to the stolen pistol.[82]

Procedural History

The defendant was arrested and subsequently sentenced in the district court to thirty-eight years imprisonment for Robbery with a Dangerous Weapon (Count 1), to twenty years imprisonment for Burglary in the First Degree (Count 2), and to nine years imprisonment for Larceny of an Automobile (Count 3), and each count after former conviction of two or more felonies.[83] The defendant was sentenced by the judge "in accordance with the jury's verdict."[84]

On appeal, one of the issues raised by the defendant was whether the district court erred in admitting the evidence of the later pistol theft and images of the pistol, under the res gestae exception.[85] Specifically, to

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purposes, without being able to articulate how the evidence is probative of those purposes or even that those matters are in issue in the case").

77. Hammick v. State, 2019 OK CR 21, ¶ 3, 449 P.3d 1272, 1274.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* ¶ 1, 449 P.3d at 1274.
84. *Id.*
85. *Id.*

establish that he was denied a fair trial, the defendant argued the evidence of the pistol theft that occurred a day after the charged crimes was inadmissible as res gestae because "the charged acts and pistol theft were separated by time and location and were unconnected . . . . He also argue[d] that the stolen pistol evidence was more prejudicial than probative."[86] But from the district court's perspective, the pistol theft was "part of a continuing series of related events," and because of its "proximity to the robbery," the court found it to be admissible as part of the res gestae.[87] Even though the pistol theft evidence was found to be relevant under res gestae, the district court gave the jury an instruction to only consider the pistol theft in reference to the defendant's "motive, intent, preparation, [and] common scheme or plan."[88]

Opinion

In section three of its opinion, the Court of Criminal Appeals of Oklahoma analyzed the admissibility of the pistol theft and ultimately rejected the defendant's argument that it was inadmissible.[89] The Court prefaced its analysis by citing case law that commands that "evidentiary rulings preserved by objection [be reviewed] for an abuse of discretion."[90] From there, the Court cited its test for res gestae:

> This Court has held that evidence is admissible under the res gestae exception when "a) it is so closely connected to the charged offense as to form part of the entire transaction; b) it is necessary to give the jury a complete understanding of the crime; or c) when it is central to the chain of events."[91]

The Court also, in an apparent attempt to refine its test, cited *Neill v. State* as counseling that "evidence of other crimes is admissible as res gestae where the evidence forms part of 'an entire transaction' or where there is a 'logical connection' with charged offenses."[92]

86. *Id.* ¶ 14, 449 P.3d at 1276-77.
87. *Id.* ¶¶ 14,15, 449 P.3d at 1276-77.
88. *Id.* ¶ 19, 449 P.3d at 1277.
89. *Id.* (ruling that the Defendant failed to show "any error, plain or otherwise").
90. *Id.* ¶ 15, 449 P.3d at 1277.
91. *Id.* ¶ 16, 449 P.3d at 1277.
92. *Id.* (citing Neill v. State, 1994 OK CR 69, ¶36, 896 P.2d 537, 550-551).

In *Hammick v. State*, the crux of the defendant's argument regarding the res gestae evidence was that the crimes for which he was actually charged—the misconduct at the Claremore residence—and the later pistol theft were "separated" and "unconnected," and thus were not part of the res gestae and inadmissible.[93] However, the Court reasoned that the "[a]dmission of the pistol evidence gave the jury a more complete understanding of the crime and the chain of events," and held that the evidence's probative value was not substantially outweighed by prejudice because it "tended to prove he committed the charged crimes."[94] The Court came to this conclusion by both recounting that a limiting instruction was issued and by giving the evidence its "maximum reasonable probative force and its minimum reasonable prejudicial value."[95] The Court then affirmatively stated that the defendant could not show unfair prejudice "because of the overwhelming evidence of his guilt, namely his confession and the victims' [identification] testimony."[96] And even though the evidence was admitted as part of the res gestae, the Court also did not express any concern about the trial court instructing the jury to only consider the pistol theft in reference to the defendant's "motive, intent, preparation, [and] common scheme or plan."[97]

ANALYSIS: ALTHOUGH THE DEFENDANT'S CONVICTION WAS CORRECTLY UPHELD, THE COURT'S ANALYSIS OF THE DEFENDANT'S PISTOL THEFT LACKED THE RIGOR NECESSARY TO ACCURATELY GAUGE ITS RELEVANCE FOR BALANCING UNDER SECTION 2403

The Court correctly upheld the defendant's conviction because, even absent the admission of the pistol theft evidence, there was "overwhelming evidence of his guilt, namely his confession and the victims' testimony."[98] However, what is hazardous is the Court's established practice of both declining to adopt commonsense interpretations of each fact of consequence codified by Section 2404(B) and declining to require the prosecution to articulate a specific theory of relevance, other than res gestae, for each Section 2404(B) fact of consequence it seeks to prove.[99]

93. *Id.* ¶¶ 14-15, 449 P.3d at 1276-77.
94. *Id.* ¶¶ 17-18, 449 P.3d at 1277.
95. *Id.* ¶¶ 18-19, 449 P.3d at 1277.
96. *Id.* ¶ 19, 449 P.3d at 1277.
97. *Id.*
98. *See id.*
99. *See id.* ¶ 16, 449 P.3d at 1277; Cook v. State, 1982 OK CR 131, 650 P.2d 863, 868;

Hammick is but one of numerous cases that has been subject to the Court's practice of allowing res gestae to certify a defendant's other crimes as relevant to multiple facts of consequence and presents an opportunity to advocate for a refinement of res gestae and an alternative approach to analyzing a defendant's other crimes when offered for one or more codified facts of consequence.

While res gestae may have some utility, its lack of particularization leaves it underequipped to aid a court in gauging the relevance of other crimes to the codified facts of consequence with enough precision to properly calibrate Section 2403's balancing test to yield an accurate appraisal of the other crime's probative value and attendant prejudice.[100] Declining to take care in facilitating an accurate appraisal is imprudent because, as recognized by courts, academics, and the drafters of the Oklahoma Evidence Code, evidence of a defendant's other crimes is already inherently susceptible to being used by a jury as evidence of criminal propensity.[101]

Instead of permitting res gestae to perpetuate as a license to circumvent a close scrutiny of other crimes, res gestae should be confined to simply guiding a court in spying legitimate theories of relevance, such as the "inextricably intertwined" theory, that are not already codified as legitimate by Section 2404(B). Additionally, when a court assesses the admissibility of a defendant's other crimes as probative of facts of consequence codified by Section 2404(B), a court should adhere to the

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Neill v. State, 1994 OK CR 69, 896 P.2d 537, 551 (explaining that evidence of the defendant's other crimes was admissible because it was "so closely related" to the charged crimes, a theory of res gestae, but footnote 8 reveals the jury was instructed that the evidence was received "solely on the issues of the defendant's alleged motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident").

100. *See* cases cited *supra* note 51 and accompanying text; *Cf.* People v. Gee, 2015 COA 151, ¶ 34, 371 P.3d 714, 721 (stating "'where . . . evidence is admissible under general rules of relevancy,' there is no 'need to consider an alternative theory of relevance, such as res gestae'").

101. *See* OKLA. STAT. ANN. tit. 12, § 2404(B) (2020) (acknowledging that character evidence admissible under OKLA. STAT. tit. 12, § 2404(B) is "highly prejudicial" in nature and should be admitted with caution); Hardin v. State, 1969 OK CR 309, ¶ 4, 462 P.2d 357, 360 ("[E]xceptions to the general rule are to be used with the utmost caution . . . ."); IMWINKELRIED ET AL., *supra* note 36, § 901, at 243 (stating that "[t]his doctrine [of 404(b) (which is the virtually identical federal counterpart to § 2404(B))] is of tremendous importance . . . [because] in many jurisdictions alleged errors in the admission of uncharged misconduct are the most common ground for appeal; in a significant minority of states, errors in admitting this species of evidence are the most frequent basis for reversal in criminal cases").

counseling of *United States v. Kendall*, which supports the suggestion that a court should adopt commonsense interpretations of each codified fact of consequence and, of course, require the prosecution to articulate specific theories of relevance for each codified fact of consequence it seeks to prove.[102] A court should facilitate this by first looking to precedent that delineates the commonsense meaning or essence of the specific proffered fact of consequence. Then, based on the prosecution's articulation of relevance to that specific fact of consequence, a court should gauge the degree to which the proffered evidence is congruent with that meaning or essence. This approach, if adopted, may be more laborious, but it would also be more prudent because of the consistency it would inevitably foster in common law dealing with Section 2404(B) and res gestae. Specifically, adopting this approach would first alleviate confusion that would otherwise continue to arise from the indiscernible efficacy of permitting evidence to enter pursuant to a res gestae theory when the jury will ultimately be instructed to consider the evidence as probative of a fact of consequence codified by Section 2404(B).[103] And second, it would foster further development of each fact of consequence's scope, thereby improving courts' ability to discern when the prosecution's theory of relevance is out-of-bounds and should fail pursuant to Section 2403.[104] This approach, if adopted, not only has no inherent drawbacks, but it would also more readily protect defendants' right to not be convicted for being perceived to merely have a propensity to commit crimes.[105]

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102. *See* United States v. Kendall, 766 F.2d 1426, 1436-37 (10th Cir. 1985) (delineating the appropriate procedure for admitting evidence of a defendant's other crimes: "The Government must articulate precisely the evidentiary hypothesis by which a fact [in issue] may be inferred from the evidence of other [crimes]. In addition, . . . a broad statement merely invoking or restating Rule 404(b) [(the federal counterpart to § 2404(B))] will not suffice. A specific articulation of the relevant purpose . . . will enable the trial court to more accurately make an informed decision and weigh the probative value of such evidence against the risks of prejudice . . . . In addition, specific and clear reasoning and findings in the trial record will greatly aid an appellate court in its review of these evidentiary issues.").

103. *Cf. Gee*, at ¶¶ 27-35, 371 P.3d at 720-21.

104. *See Kendall*, 766 F.2d at 1436-37 (stating that "[a] specific articulation of the relevant purpose . . . will enable the trial court to more accurately make an informed decision . . . .").

105. *See generally* Blackwell v. State, 1983 OK CR 51, 663 P.2d 12, 15 (stating that "[a]s a general rule . . . an accused put on trial for an offense is to be convicted, if at all, by evidence which proves him guilty of that offense alone").

It is Hazardous for the Court to Decline to Adopt a Commonsense Interpretation of Each Fact of Consequence Codified by Section 2404(B) and Decline to Require the Prosecution to Articulate a Specific Theory of Relevance for Each Section 2404(B) Fact of Consequence it Seeks to Prove

In *Hammick*, the Court of Criminal Appeals circumvented the necessity of analyzing the defendant's pistol theft to the issue of "motive" by doing little more than stating excerpts from res gestae's test in the form of conclusions.[106] The Court's endeavor to preserve the true meaning of "motive" under Section 2404(B) would fare better if, going forward, the Court would look to Oklahoma common law from the pre-Evidence Code era that delineates the meaning or essence of "motive" (as opposed to opting out of the particularized analysis with res gestae). In *Cole v. State*, the defendant was charged with murder.[107] At trial, the prosecution offered evidence that there was a pending prosecution against the defendant for other crimes he had committed that predated the charged crimes, and that the deceased was going to be testifying against him at those pending proceedings.[108] The prosecution offered evidence of the other crime for which the proceeding was pending under a "motive" theory, and the court admitted such, finding that "the motive for the taking of deceased's life was the desire on the part of the defendant to get rid of [the deceased] as a witness against him . . . ."[109] The *Cole* Court reasoned that, without the evidence of the pending prosecution and the deceased's status as an adverse witness, the jury could not have "clearly understood" why the defendant would murder the victim.[110]

In *Dumas v. State*, the defendant was charged with the arson of a warehouse that was owned by his employer.[111] At trial, the prosecution offered evidence that the defendant wrongfully removed some inventory from the warehouse and fabricated receipts to reflect phony transactions explaining the inventory's removal.[112] Evidence of those crimes was admitted under the theory that it "tended strongly to show a motive" to

106. *See* Hammick v. State, 2019 OK CR 21, ¶ 16-19, 449 P.3d 1272, 1277.
107. Cole v. State, 298 P. 892, 893 (Okla. Crim. App. 1931).
108. *Id.*
109. *Id.*
110. *Id.* at 894.
111. Dumas v. State, 201 P. 820, 822 (Okla. Crim. App. 1921).
112. *Id.* at 821.

burn the warehouse down and the evidence of those other crimes remaining therein.[113]

The evidentiary portrayals of motive in *Cole* and *Dumas* are distinguishable from that which was portrayed in *Hammick* by the pistol theft that occurred after the charged crimes were already committed.[114] The trial court admitted the pistol theft evidence as "part of a continuing series of related events" under res gestae, and the Court of Criminal Appeals of Oklahoma agreed that it "gave the jury a more complete understanding of the crime and the chain of events," reasoning that it "tended to prove [the defendant] committed the charged crimes."[115] But in light of the evidence that has traditionally, and commonsensically, been considered to be relevant to prove "motive," it was imprudent to instruct the jury that the pistol theft could be considered proof of such given the inexistence of a visual connection as to how the later pistol theft could be relevant to prove the defendant's motive to commit the charged crimes, which occurred the day before.[116] The commonsense scope of "motive" is perhaps sufficiently preserved in *Cole* and *Dumas*, but the evidence's use in *Hammick* impermissibly broadens the scope of "motive" to permit evidence of other crimes to be admitted where it does no more than invite a jury to infer that, because the defendant was motivated to commit a crime on a different occasion, he must have a general propensity to be motivated to commit crimes and therefore must have been motivated to commit the crimes he was charged with.[117] Such was categorically evidence of criminal propensity and creates precedent that permits a defendant's other crimes to be admitted into evidence to prove "motive" even where they utterly lack any visual connection to that fact of consequence.

In *Hammick*, evidence of the Defendant's pistol theft was also considered relevant to his "common scheme or plan."[118] There, the Court likewise circumvented performing an analysis of that codified fact of consequence by using res gestae to explain the relevance of the pistol

113. *Id.* at 824.

114. *See* Hammick v. State, 2019 OK CR 21, ¶ 3, 449 P.3d 1272, 1274.

115. *Id.* ¶¶ 15-17, 449 P.3d at 1277.

116. *See generally id.* ¶ 3, 449 P.3d at 1274.

117. *See generally id.* ¶ 3, 449 P.3d at 1274; People v. Rath, 44 P.3d 1033, 1042 (Colo. 2002) ("When evidence of other crimes is offered to show a defendant's motive for committing a charged offense . . . similarity of the crimes often has no significance whatsoever.").

118. *Hammick*, ¶ 19, 449 P.3d at 1277 (admitting the pistol theft into evidence to be considered for the issue of "common scheme or plan").

theft.[119] Even though considerations of common law for that fact of consequence were due, as it was for "motive," Oklahoma common law is unfortunately inadequate because much of it (though not all of it) apparently conflates the word "common" in "common scheme or plan" to mean that other crimes with mere *commonalities* to those charged can come within the purview of "common scheme or plan."[120] The Supreme Court of New Mexico condemned such an interpretation in *Gallegos* by declaring that crimes independent of those charged, bearing only commonalities, are relevant only to prove the *identity* of the defendant, and to admit such evidence when identity is *not* at issue is to admit "propensity evidence pure and simple."[121] So viewed, it would be more prudent for the Oklahoma Court of Criminal Appeals, going forward, to consider common law from within the jurisdiction of the Tenth Circuit that interprets "common scheme or plan" as either a "sequential [scheme] or plan" or a "chain [scheme] or plan."[122]

In *United States v. Lamb,* evidence that the appellants escaped prison and "commandeer[ed]" an apartment to establish a "safehouse" was admitted to show their "plan or scheme" to commit the robbery for which they were charged.[123] The court reasoned that the evidence was relevant to show the appellants had "very little money when they abducted the prison guard" in Florence, Arizona, and, in order to "finance movement through Arizona and New Mexico, they planned the bank robbery."[124] In *Lamb*, the crimes were clearly part of a "sequential" plan that entailed first escaping prison, then establishing a safehouse to plan the robbery, and finally committing the robbery to finance their flight from authorities—all to accomplish the overall goal of protecting their freedom.[125]

But in *Hammick,* the defendant had no "sequential" scheme or plan that entailed first robbing the Claremore residence, then stealing a car to escape, and finally stealing a pistol; and he had no "chain" scheme or plan that, as an element of achieving a desired end, necessitated stealing a

119. *Id.* ¶¶ 16-19, 449 P.3d at 1277.

120. *See, e.g.,* Cook v. State, 1982 OK CR 131, ¶ 23, 650 P.2d 863, 868; Lott v. State, 2004 OK CR 27, ¶ 42, 98 P.3d 318, 335; Owens v. State, 2010 OK CR 1, ¶ 16, 229 P.3d 1261, 1267.

121. State v. Gallegos, 2007-NMSC-007, ¶ 31, 141 N.M. 185, 194, 152 P.3d 828, 837.

122. *See generally supra* text accompanying notes 37-40.

123. United States v. Lamb, 575 F.2d 1310, 1315 (10th Cir. 1978).

124. *Id.*

125. *See id*; *See generally supra* text accompanying note 40.

pistol.[126] What is more though is that even if the prosecution had, instead of wielding a res gestae theory, offered the pistol theft into evidence under a "common scheme or plan" theory on account of it bearing commonalities to the charged crimes, the pistol theft would have likely been *inadmissible*. This is because *Hall v. State* instructs that the existence of a common scheme or plan is dependent upon the "relationship or connection [with] the crime charged . . . . Similarity between crimes, without more, is insufficient to permit admission."[127] So, interestingly, what is ultimately ironic is that res gestae was capable of justifying the pistol theft's relevance to prove "common scheme or plan" where even the Court's condemned (by other jurisdictions) practice of conflating "identity" into "common scheme or plan" would have detected deficiencies regarding the degree to which the pistol theft and the Claremore crimes were connected.[128] Certainly then, it was manifestly imprudent to accept a res gestae theory for evidence going to "common scheme or plan."

"Preparation" was also included in the *Hammick* jury instruction as a point to which the pistol theft was relevant.[129] However, accepting a res gestae theory for that fact of consequence was imprudent because that fact of consequence, like the other Section 2404(B) facts of consequence, is owed an analysis of its own.[130] Like "common scheme or plan," this task can be facilitated by looking to common law from within the Tenth Circuit. In *State v. Marquez*, a Kansas trial court found that evidence of the defendant's previous burglary was admissible in part because "the preparation for the incidents was very similar," and thus could be considered for the purpose of proving the defendant's preparation.[131] But the Supreme Court of Kansas disagreed and stated that the *similarity* of the previous burglary went to the issue of "identity," and that, according to Black's Law Dictionary 4th ed., "[p]reparation for an offense consists [of] devising or arranging means or measures necessary for its

126. Hammick v. State, 2019 OK CR 21, ¶ 3, 449 P.3d 1272, 1274.

127. Hall v. State, 1980 OK CR 64, ¶ 5, 615 P.2d 1020, 1022 (citation omitted).

128. *Id.*

129. *See Hammick*, ¶ 19, 449 P.3d at 1277 (admitting the pistol theft into evidence to be considered for the issue of "preparation").

130. *See* United States v. Kendall, 766 F.2d 1426, 1436-37 (10th Cir. 1985) (stating that "[a] specific articulation of the relevant purpose . . . will enable the trial court to more accurately make an informed decision . . . .").

131. State v. Marquez, 222 Kan. 441, 444, 565 P.2d 245, 249 (1977) (disapproved of by State v. Reid, 286 Kan. 494, 186 P.3d 713 to the extent that Marquez declines to uphold a correct trial court decision that was reached on faulty reasoning).

commission."[132] The Court expounded further that "a series of acts that . . . logically convinces [a] reasonable mind that the actor intended [for] prior activities [to] culminate in the happening of the crime in issue may have strong probative value in showing preparation."[133]

Additionally, in *State v. Allen*, the Utah Supreme Court approved of the trial court's evidentiary admission showing that the defendant fraudulently obtained credit cards to account for the "discretionary income" he was using to pay his hitman in advance.[134] The Supreme Court of Utah reasoned that the defendant's fraudulent activities were admissible under a "preparation" theory because the activities were part of the "preparation for the murder."[135] Or, as the *Marquez* Court would put it, the fraud was one of many acts intended to "culminate in the happening" of the murder.[136]

But in *Hammick*, it is inconceivable that the defendant intended for the pistol theft to culminate in the happening of the Claremore crimes because the Claremore crimes were committed the day before.[137] The only possible use of that evidence was to permit a jury to infer that, because the defendant presumably prepared in some shape or form for the independent pistol theft, the defendant must have a propensity to prepare for the crimes he commits and therefore must have prepared for the Claremore crimes prior to their commission.[138] In other words, the pistol theft entering evidence under a res gestae theory to prove "preparation" took the shape of nothing more than evidence of criminal propensity given that no reasonable juror could conclude that the crimes the defendant committed after-the-fact were done in preparation for what had *already been done*.[139]

Finally, in *Hammick*, it was imprudent to use res gestae to simultaneously analyze the relevance of the pistol theft to all three crimes' "intent" elements, especially in light of the differences between "general

132. *Id.* at 250; *Accord* People v. Rath, 44 P.3d 1033, 1042 (Colo. 2002) ("When evidence of other crimes is offered to show a defendant's . . . preparation . . . to commit a charged offense, similarity of the crimes often has no significance whatsoever.").

133. *Marquez*, at 250.

134. State v. Allen, 2005 UT 11, ¶ 13, 108 P.3d 730, 734.

135. *Id.* ¶ 20, 108 P.3d at 735.

136. *See Marquez*, 565 P.2d at 250.

137. *See generally* Hammick v. State, 2019 OK CR 21, ¶ 3, 449 P.3d 1272, 1274.

138. *Id.*

139. *See generally* OKLA. STAT. tit. 12, § 2404(B) (2011) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

intent" and "specific intent."[140] First, intent to commit a crime is not merely a fact of consequence codified by Section 2404(B)—it is an element of a crime that must be proven by the prosecution.[141] A defendant's other crimes can be used to prove intent, but the risk of it being outweighed by unfair prejudice under Section 2403 depends on whether the "intent" element refers to "general intent" or "specific intent."[142] A criminal statute is said to require "general intent" if, to be convicted under it, it only requires proof that the defendant committed the *actus reus*, i.e., the guilty act, of the crime with "purpose, knowledge, or recklessness."[143] In contrast, a criminal statute is said to require "specific intent" if, in addition to requiring proof of the *actus reus*, proof is required that the defendant had a *specific intention* when carrying out the *actus reus*—such specific intentions can only be shown by evidence of the defendant's *mens rea*, i.e., evidence of the defendant's guilty mind.[144]

But to make proving "intent" with a defendant's other crimes more slippery, using a defendant's other crimes to prove "specific intent" presents a paradox. As one commentator has pointed out, where evidence of a defendant's other crimes is admitted to prove his "specific intent," the *only way* a jury can deduce the defendant had the requisite *mens rea* in committing the crimes charged is to, based on the evidence of his other crimes, determine "whether the defendant has a propensity for forming a mens rea," i.e., a guilty mind.[145] In other words, evidence that serves no

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140. *Hammick*, ¶ 19, 449 P.3d at 1277 (admitting the pistol theft into evidence to be considered for the issue of "intent").

141. *Actus reus non facit reum nisi mens sit rea*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095349253 (last visited Oct. 29, 2021) (defining the Latin maxim *actus reus non facit reum nisi mens sit rea* as "an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offense").

142. *See infra* text accompanying notes 143-44.

143. United States v. Zunie, 444 F.3d 1230, 1235 (10th Cir. 2006) ("The Model Penal Code's approach accords with our formulation of 'general intent' crimes, [given that] a crime committed with purpose, knowledge, or recklessness amounts to an act 'done voluntarily and intentionally.'") (quoting United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995)). The court supported its approach to general intent by noting that its approach is also "taken by the Eighth and Ninth Circuits.".

144. United States v. Blair, 54 F.3d 639, 642 (10th Cir. 1995) ("[S]pecific intent requires 'a conscious purpose to do wrong . . . not only [with] knowledge of the thing done, but a determination to do it with bad intent . . . .'") (quoting Apodaca v. United States, 188 F.2d 932, 937 (10th Cir. 1951)).

145. IMWINKELRIED ET AL., *supra* note 36, § 907, at 252 (explaining the risk of a defendant being punished "for his or her uncharged misconduct" is present when "the jury

purpose other than to prove criminal propensity may legitimately be used to prove "specific intent." And to bolster the alarm caused by that fact, because "specific intent" cannot simply be inferred from the *actus reus*, like "general intent" can, the relevance of a defendant's other crimes may at times be heightened if inferences of the defendant's guilty mind while carrying out the *other crimes* are the "only means" of deducing the presence (or absence) of a guilty mind when allegedly carrying out the crime for which the defendant was charged.[146] So to mitigate the risk of enabling a jury to deliver a verdict based on *mere* criminal propensity in the instances it is allowed to consider propensity evidence, *United States v. Soundingsides* and *United States v. Tan* counsel that other crimes evidence should be excluded if intent can be inferred from evidence *other than* the defendant's other crimes, because the relevance of those other crimes is "greatly reduced" if other evidence is available.[147]

In *Hammick,* the defendant was charged with two "general intent" crimes and a "specific intent" crime.[148] He was charged with Robbery with a Dangerous Weapon (Count 1) and the Larceny of an Automobile (Count 3), which bear only "general intent" scienter requirements, and he was charged with Burglary in the First Degree (Count 2), which bears a "specific intent" scienter requirement.[149] In *Hammon v. State*, the defendant was charged with felony murder, a "general intent" crime that needed only proof that its *actus reus* was committed purposely, knowingly, or recklessly.[150] The *Hammon* Court ultimately found that the

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addresses the question of whether the defendant has a propensity for forming mens rea").

146. Huddleston v. United States, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.").

147. United States v. Tan, 254 F.3d 1204, 1210 (10th Cir. 2001) ("If malice could be inferred from evidence other than prior drunk driving convictions, then the probative value of those prior convictions was greatly reduced."); United States v. Soundingsides, 820 F.2d 1232, 1237 (10th Cir. 1987) ("If the Government has a strong case on the intent issue . . . the extrinsic offenses may add little and consequently will be excluded more readily . . . .").

148. Hammick v. State, 2019 OK CR 21, ¶ 1, 449 P.3d 1272, 1274.

149. *Id.*; *See generally* OKLA. STAT. tit. 21 § 801 (2011); § 1431 (2011); § 1720 (2011 & Supp. 2018).

150. Hammon v. State, 1995 OK CR 33, ¶ 71, 898 P.2d 1287, 1303 (referring to the defendant's First-Degree Murder charge as felony murder because his slaying fell within the meaning of OKLA. STAT. tit. 21, § 701.7(B), which states one "commits the crime of murder in the first degree, regardless of malice [(i.e., regardless of specific intent)], when that person . . . takes the life of a human being during . . . the commission [of] . . . robbery

defendant's mere confession to the felony was sufficient to satisfy the felony murder's "general intent" element, which is perhaps a logical conclusion.[151] Likewise, the defendant in *Hammick* was also charged with "general intent" crimes: Count 1 and 3.[152] And, as in *Hammon*, the *Hammick* defendant's full confession to Counts 1 and 3 should have also satisfied their "general intent" elements and taken them out of issue, and the jury therefore should not have been instructed to consider the later pistol theft in reference to the defendant's "intent" on Counts 1 and 3.[153]

Whenever a court is tasked with gauging the relevance of a defendant's other crimes to the issue of "intent," the counseling of *United States v. Soundingsides* makes clear what is prudent: if the prosecution has a "strong case on the intent issue," courts should exclude the evidence of other crimes if it only "add[s] little."[154] Or, "if the defendant's intent is not contested," the evidence should be excluded as only having "incremental probative value" that is "inconsequential when compared to its prejudice."[155] So, in *Hammick,* because there was "overwhelming evidence of [the defendant's] guilt, namely his confession and the victims' testimony," the pistol theft should have been excluded by Section 2403 for the issue of intent on Counts 1 and 3 because it either added little to that issue or because that issue was not genuinely in dispute.[156]

But even if "general intent" had genuinely been in dispute, it was nevertheless inappropriate to accept a res gestae theory of admissibility for the pistol theft when that evidence was offered to prove "intent"; evaluating a res gestae theory of admissibility for evidence of "intent" fails to invoke considerations of *Soundingsides* and *Tan*, which are helpful for facilitating a close scrutiny of such evidence's admissibility for proving "intent."[157] A more prudent approach to evaluating the admissibility of a defendant's other crimes to prove "general intent" would be to require the prosecution to articulate with specificity how the other crime tends to prove the defendant "purposely, knowingly, or recklessly" committed the

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with a dangerous weapon . . . .").

151. *Hammon*, ¶ 101, 898 P.2d at 1308-09.

152. *See supra* text accompanying note 149.

153. *Hammick*, ¶¶ 18-19, 449 P.3d at 1277 (acknowledging that there was "overwhelming evidence of [the Defendant's] guilt, namely his confession and the victims' testimony.").

154. United States v. Soundingsides, 820 F.2d 1232, 1237 (10th Cir. 1987).

155. *Id.*

156. *See Hammick*, ¶¶ 18-19, 449 P.3d at 1277.

157. *See supra* text accompanying notes 154-55.

actus reus of the crime—and to streamline the Section 2403 balancing test, a court should consider precedent particular to "general intent." This approach is implicitly endorsed in part by *United States v. Zunie*, in which the court lent credence to its approach to evaluating evidence offered to prove "intent" by citing a sister circuit case that "looked to the common law" to discern if sufficient evidence was available to prove the "general intent" element of battery.[158] *Zunie* also supports the proposition that it would likewise be prudent to look to the common law to appraise the particular evidentiary needs for the issue of "general intent," and whether evidence other than the defendant's other crimes can meet that need.

Moreover, the defendant in *Hammick* was also charged with Burglary in the First Degree (Count 2), which bears a "specific intent" scienter requirement.[159] Specifically, to be convicted under Okla. Stat. tit. 21, § 1431, an actor must have possessed an "intent to commit some crime" (the *mens rea* element) in the home in which the defendant broke into and entered while someone was therein (the *actus reus* element).[160] In *Patton v. State*, the defendant, like the *Hammick* defendant, was charged with First Degree Burglary.[161] There, the Court found that the defendant's confession in conjunction with "evidence of a scuffle" at the home's entryway was sufficient to prove that the appellant "broke into the victim's home with the [specific] intent to commit a crime therein."[162] This is distinguishable from the discretion the trial court exercised in *Hammick*, where the pistol theft was admitted under res gestae and given to the jury as proof that the defendant had a propensity to form the requisite *mens rea* for Count 2 ("intent to commit some crime").[163]

Even though *Huddleston v. United States* declares that such a propensity *can* be admitted for the issue of "specific intent," *Tan* and *Soundingsides* support the notion that it is more prudent for evidence of other crimes to be inadmissible to prove "intent" if such can be inferred from other evidence.[164] In *Hammick*, the Court perhaps could have found

158. United States v. Zunie, 444 F.3d 1230, 1235 (10th Cir. 2006).

159. *Hammick*, ¶ 1, 449 P.3d at 1274; *See generally* OKLA. STAT. tit. 12, § 1431 (2011).

160. OKLA. STAT. tit. 12, § 1431 (2011).

161. Patton v. United States, 1998 OK CR 66, ¶ 40, 973 P.2d 270, 286.

162. *Id.* ¶ 43, 973 P.2d at 287.

163. *Hammick*, ¶¶ 17-18, 449 P.3d at 1277 (admitting the pistol theft into evidence to be considered for the issue of "intent").

164. United States v. Tan, 254 F.3d 1204, 1210 (10th Cir. 2001) ("If malice could be inferred from evidence other than prior drunk driving convictions, then the probative value of those prior convictions was greatly reduced."); United States v. Soundingsides, 820 F.2d

the "specific intent" element was satisfied with evidence of the defendant's confession in conjunction with other available evidence of guilt that, in total, was described as "overwhelming."[165] But if not, the evidence of other crimes nevertheless should have been confined to the "specific intent" element of Count 2, given the "general intent" elements to Counts 1 and 3 were likely not genuinely in dispute.[166] Going forward, evidence of a defendant's other crimes to prove intent may need to be excluded wholly from the jury's consideration as to some of the crimes charged but may remain considerable as to others. And because res gestae is apparently capable of skewing the accuracy of the balancing test under Section 2403 and putting it into the jury's hands for all issues of "intent," it is certainly imprudent to continue to use res gestae, or any other unfocused analysis, to gauge the relevance of a defendant's other crimes to that fact of consequence or any other fact of consequence codified by Section 2404(B).[167]

CONCLUSION

The precedent within *Hammick* is hazardous to the extent that the Oklahoma Court of Criminal Appeals implicitly pronounces that the prosecution may, by simply theorizing that a defendant's other crime was part of the res gestae, offer the defendant's other crime into evidence as proof of a fact of consequence codified by Section 2404(B)—whether it be motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake/accident. This is hazardous because declining to require an articulation as to how the other crime is probative of each fact of consequence the jury will ultimately be instructed to consider it probative of shifts the burden to the judge to formulate the rationale, when balancing under Section 2403, of how the other crime is probative to each individual fact of consequence (provided they do it all).

1232, 1237 (10th Cir. 1987) ("If the Government has a strong case on the intent issue . . . the extrinsic offenses may add little and consequently will be excluded more readily . . . .").

165. *See generally Hammick*, ¶¶ 18-19, 449 P.3d at 1277 (acknowledging that there was "overwhelming evidence of [the Defendant's] guilt, namely his confession and the victims' testimony").

166. *See supra* text accompanying notes 153-56.

167. *See generally Hammick*, ¶ 19, 449 P.3d at 1277 (admitting the pistol theft into evidence to be considered for the issue of "intent").

This ultimately results in a lax scrutiny of whether the jury will refrain from yielding to propensity reasoning.

Even though res gestae's theories of relevance are not necessarily doomed to skew the accuracy of a Section 2403 balancing assessment, its susceptibility to doing so is great because it accommodates theories of relevance that are termed *loosely* and are subject to being misunderstood, which is precisely what has sparked a trend among Tenth Circuit states to abolish it outright.[168] Unfortunately, *Hammick* perhaps illustrates the very evidentiary woes that the states among the trend have sought to evade; although the *Hammick* Court was correct in upholding the conviction, it was error to find the pistol theft to be relevant to proving the defendant's motive, intent, preparation, and common scheme or plan given the degree to which the theft failed to prove any of those issues.[169] Considering the erroneous Section 2403 balancing results that can flow from permitting res gestae to be used as a vacuum—to certify evidence of other crimes as relevant to any and all facts of consequence codified by Section 2404(B)—res gestae should be confined to merely guiding courts in spying legitimate theories of relevance, such as the "inextricably intertwined" theory, that are not already codified as legitimate by Section 2404(B). Allowing it to be used in a similar fashion to that which was exhibited in *Hammick* is to show indifference to the cautioning of courts, academics, and the drafters of the Oklahoma Evidence Code, who implore punctiliousness when evaluating the admissibility of a defendant's other crimes.[170]

Instead, it would be more sensible for the Court of Criminal Appeals, when assessing the admissibility of other crimes, to adopt a commonsense interpretation of each fact of consequence codified by Section 2404(B) and, of course, require the prosecution to articulate a specific theory of relevance for each codified fact of consequence it seeks to prove. Adopting this approach would not only naturally retire res gestae as a pretext for prosecutors to offensively use the doctrine as a vacuum, but intuitively it would also lead to the development of commonsense scopes for each codified fact of consequence, which is a critical precursor to the production of consistency in the common law dealing with Section 2404(B).

With requirements of specific articulations of relevance for each codified fact of consequence, the development of their commonsense

168. *See supra* text accompanying notes 48-55.
169. *See generally Hammick*, ¶ 16-19, 449 P.3d at 1277.
170. *See generally supra* note 101.

scopes, and the fostering of consistency in precedent, the Court of Criminal Appeals would enable itself and the trial courts to more accurately, efficiently, and uniformly balance defendants' other crimes pursuant to Section 2403.[171] But perhaps more significantly, adopting the approach would attest to the Court's continued commitment to protecting each defendant's fundamental right to be convicted, if at all, by evidence that proves him guilty of the offense he is charged with and "that offense alone."[172] Declining to adopt a commonsense interpretation of each fact of consequence codified by Section 2404(B) and declining to require the prosecution to articulate specific theories of relevance for each fact of consequence it wishes to prove impermissibly jeopardizes that right.[173]

171. *See supra* note 102.

172. *See* Blackwell v. State, 1983 OK CR 51, 663 P.2d 12, 15 ("As a general rule . . . an accused put on trial for an offense is to be convicted, if at all, by evidence which proves him guilty of that offense alone.").

173. *See generally* Michelson v. United States, 335 U.S. 469, 475-76 (1948) (explaining that evidence of a defendant's other crimes, when probative of criminal propensity, may lead a jury to "prejudge one with a bad general record and deny him a fair opportunity to defend against [the] particular charge.").