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The Expanding Use of the Res Gestae Doctrine

by H. Patrick Furman and Ann England

This article provides a brief history of the doctrine of res gestae and an analysis of its current usage in both Colorado state and federal courts.

The doctrine of res gestae allows the introduction of evidence necessary to give context to a charged offense. The doctrine has been used extensively in Colorado in recent years to admit a wide variety of evidence. The federal courts treat the doctrine quite differently, despite a shared common law origin.

This article provides a brief history of the doctrine, describes the definitions that have been given to res gestae in Colorado decisions, discusses some of the cases in which the doctrine has been used, and addresses the interplay between res gestae and the rules relating to relevance and "other acts" evidence. The article then addresses the treatment of the doctrine in the Tenth Circuit, noting some important but perhaps dissolving differences between the state and federal approaches.

The History of Res Gestae

"Res gestae" is translated as "things done," and generally is used to describe the circumstances in which potentially inadmissible evidence might otherwise be admitted to give context to the charged crime. The doctrine has its roots in the common law and appears to have come into common usage in the early 1800s to explain the admission into evidence of statements that were made at the time an event occurred. The justifications were that witnesses needed to include such statements to complete the telling of the story of the event itself, and that the spontaneity of such statements rendered them reliable.

The first reference to the doctrine by the U.S. Supreme Court came in 1817, in a decision holding that an agent's admissions against his principal are admissible when they are part of the res gestae. In 1827, the Court held that the statements of a co-conspirator were admissible against a defendant because they were part of the res gestae. Of course, these two particular applications of the doctrine are now governed by hearsay provisions of the Federal Rules of Evidence (F.R.E.). Neither of the cases provided an explanation of the term.

In 1837, the Supreme Court ventured a definition of res gestae as synonymous with "surrounding circumstances." Using this definition, the Court approved the admission of a legislative committee report that dealt with both parties and the subject matter of the litigation. In the ensuing 100 years, the term was used to justify the admission of evidence that today is admitted as an exception to hearsay, including statements of then-existing state of mind, excited utterances, the rule of completeness, and statements made by a party opponent.

The Colorado history of res gestae begins in 1872 in a case that described it as an exception to the general ban on hearsay. Like the federal history just described, the initial Colorado history of res gestae is replete with cases that use the doctrine to address evidence in situations that would now be governed by the Colorado Rules of Evidence (C.R.E. or Rules). For example, the doctrine was used in 1873 to admit the statement of a co-conspirator; in 1875 to admit the statement of a declarant as to his state of mind; and in 1893 to bar the admission of statements that did not fall within the dying declarations exception.

This admittedly incomplete history suggests that res gestae should have been subsumed within the subsequently adopted rules of evidence. Support for this conclusion comes from a 1949 decision of the U.S. Supreme Court that quoted extensively from an evidence treatise by Wigmore. Wigmore's position was unambiguous: "The phrase 'res gestae' has long been not only entirely useless, but even positively harmful." It is "useless" in Wigmore's view because every application of the doctrine is actually part of, and explained by, "some other well-established principle." It is

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harmful in his view because "it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both." A similar, but more modern view, has been expressed by McCormick, who described res gestae as "a historical relic to be jettisoned from modern hearsay analysis." 20

The academic suggestion that the doctrine of res gestae ought to be jettisoned has not been accepted by the courts, at least not in Colorado. People v. Workman23 expressly rejected the argument that the doctrine was superseded by the adoption of the C.R.E., and subsequent cases make clear that the doctrine is still alive. In fact, the current use of res gestae in Colorado state courts appears to go far beyond even the limited historical use about which Wigmore and McCormick so strongly complained.

The Recent History of Res Gestae in Colorado

People v. Quintana22 includes a comprehensive discussion of res gestae by the Colorado Supreme Court. This 1994 opinion addressed the decision of the trial court to admit three statements made by a defendant charged with murder. The three statements involved threats to murder other people made by the defendant during or while driving away from the murder at issue. At trial, the parties analyzed the statements under C.R.E. 404(b). A four-justice majority of the Court held that the statements were admissible as res gestae.

Quintana offered several definitions of res gestae. These definitions included:

1) "[e]vidence of other offenses or acts that is not extrinsic to the offense charged, but rather is part of the criminal episode or transaction with which the defendant is charged . . . to provide the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred";23

2) evidence that "is generally linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury;"24

3) "the circumstances, facts and declarations which arise from the main event and serve to illustrate its character";25 and

4) "evidence that is closely related in both time and nature to the charged offense."26

Later in the opinion, while distinguishing res gestae from other acts evidence, the Court cited with approval an Eleventh Circuit holding describing res gestae as evidence that is "inextricably intertwined with evidence regarding the charged offense."27

Whichever definition is controlling, the statements at issue in Quintana fit. The statements were linked in time with the charged murder because they occurred either during or immediately subsequent to the murder. The statements "are all linked in time to a single criminal episode, and indeed, form a natural part of the criminal episode as a whole."28 Quintana claimed that he was intoxicated and incapable of forming the requisite intent; the statements were inextricably linked to this claim to prove that Quintana "was conscious that his actions amounted to killing, was conscious of the meaning of the word 'kill' and could verbalize his desire to engage in the same action again."29 Thus, under even the narrowest of the definitions in Quintana, these statements were admissible as res gestae.

The majority's view was rejected by three justices. They argued that the statements should be analyzed under Rule 404(b) because the prosecution did not use the statements simply to refute Quintana's state of mind, but also used the statements to show that he intended to eliminate witnesses—that is, that he had a bad character. The justices found that the evidence had no other probative value. The fact that the statements were made in close temporal proximity to the murder did not automatically make them relevant. According to the minority, the statements should not have been admitted because they "fail to provide an understanding of the context in which the crime occurred or set a background for the events leading up to the victim's murder."30 Ultimately, the minority concurred in the result. They concluded admission of the statements was harmless in light of the other overwhelming evidence of guilt.

The first time the Colorado Supreme Court addressed res gestae after Quintana, it reversed convictions for sexual assault on a child because the trial court erroneously admitted, as res gestae, evidence of three other sexual assaults, allegedly committed by the same defendant against the same victim. People v. Rollins31 held that the uncharged incidents "were neither contemporaneous with nor provided a background for the offense charged."32 The charged offense occurred between June 1 and June 6, 1989, and the three uncharged offenses all occurred between March and June of that same year. The findings that this uncharged conduct did not help explain the charged conduct, and that the other incidents were not contemporaneous with the charged offense, are quite different from the findings reached in most of the subsequent opinions described in the next section.

Subsequent Applications of Res Gestae in Colorado

The doctrine has been employed in a wide variety of factual settings since Quintana and Rollins. The following discussion of cases is merely illustrative and is not intended to be exhaustive.

In People v. Fears,33 the court of appeals affirmed the convictions of the defendant in connection with the murder of a witness to an armed robbery. The court held that the robbery was the motive for the killing, and thus was res gestae. The robbery was, in the court's view, "impossible to separate" from the murder.34 The court of appeals also held that the trial court did not need to make an independent determination whether the defendant committed the robbery as it would have to do with other crimes evidence.

People v. Young35 also involved a strong tie between the other criminal activity and the charged criminal activity. Young was charged with the murder of a man with whom he had purchased marijuana that the two men had intended to resell. The two were en route from the place of purchase to the place of sale, and the marijuana may have been the source of a falling out between the two, thus leading to the murder. This tie between other criminal activity and the charged criminal activity helped the jury understand the context of the charged activity.

The defendant in People v. Lovato36 was charged with the robbery of an at-risk adult. The trial court permitted the introduction, as res gestae, of evidence that the defendant committed another robbery shortly after the robbery at issue, and that he was thereafter apprehended after getting stuck in traffic. The court of appeals held that the trial court did not abuse its discretion by admitting evidence of the second robbery. The second robbery was part of a single criminal episode, and was logically relevant to prove Lovato's identity as the perpetrator of the charged robbery. The court
held that the evidence of the second robbery was not so inflammatory that it should have been excluded under C.R.E. 403.

In People v. Asberry, a police officer stopped the defendant because he believed the defendant was violating an area restriction. On contact, the defendant was found to have an outstanding misdemeanor warrant. He then was found in possession of a controlled substance. The court of appeals affirmed the trial court's determination that the evidence about the area restriction was res gestae, "because it gave the jury an understanding of why defendant was stopped and thus, formed a natural and integral part of an account of the crime." Similarly, evidence of the outstanding warrant was relevant, because it "explained why he was taken into custody." The testimony was found to comport with the requirements of C.R.E. 403 because, although damaging, the testimony was not unfair, and no further testimony was adduced about the area restriction or the warrant.

In People v. Lehnert, the court of appeals held that the trial court erred in permitting the introduction, as res gestae, of evidence that a defendant, charged with attempted murder of a police officer, had held a party some years earlier to celebrate the murder of a police officer. The court of appeals held that, because the party was not contemporaneous with the murder and did not "illustrate its character," it was not admissible as res gestae. However, the court went on to find the error harmless.

In People v. Coney, a murder prosecution, the court of appeals held that the trial court did not abuse its discretion in admitting, as res gestae, evidence concerning defendant's pending drug cases and his concern about finding the snitch. The court found that the pending cases and the concern about finding the snitch were inextricably intertwined with the charged crimes. The evidence was relevant and probative of defendant's motive.

In People v. Gomez, an undercover detective who purchased drugs from the defendant was allowed to testify that "he had received information about an individual named Joshua Gomez who had been selling narcotics, including a description of Gomez's vehicle and its license plate number." The trial court admitted the evidence as part of the context of the drug buy and the court of appeals agreed, describing the evidence as res gestae, because it "explained to the jury why the police had set up the buy with Gomez." The court cited a 1998 case in which evidence of two prior marijuana transactions was admitted to set the stage for the charged offense.

Domestic Violence Cases
Cases involving domestic violence often involve claims that the defendant previously has engaged in similar behavior against the alleged victim. Generally, such evidence must be analyzed under C.R.E. 404(b) and CRS § 18-6-801.5; however, in certain situations, it may be considered under a res gestae analysis.

In People v. Jaramillo, the trial court allowed the introduction of testimony that the argument between the defendant and his alleged victim (his wife) "had been building" and that it was a result of his "extreme jealousy." The court of appeals found this to be res gestae.
Another domestic violence case, People v. Merklin,49 addressed the introduction of evidence in defendant's trial for violating a restraining order that defendant had called the victim on other occasions. A juror wanted to ask the victim why she had not called police earlier; the victim indicated, in camera, that she had some fear of the defendant due to the other calls. Ultimately, the trial court allowed the juror's questions for the purpose of showing the victim's state of mind. The court of appeals noted that the questions and answers also were appropriate in the context of res gestae.

**Limits on Res Gestae**

The problem with trying to establish limits on res gestae is illustrated by People v. Lucas,50 a 1999 decision of the court of appeals that approved the admission, at defendant's murder trial, of evidence that he had committed a burglary three days earlier. The defendant and his friends left Colorado Springs, traveling by foot and hitchhiking, burglarized a home in Walsenburg, and stole a computer, which they then sold to help finance the trip. The court reiterated the traditional language that res gestae evidence:

- provides the fact-finder with a full and complete understanding of the events surrounding the crime and the context in which the charged crime occurred, and includes events closely related in both time and nature to the charged offense.51
- The court then held that the evidence of the burglary demonstrated to the jury that the defendant and his friends left Colorado Springs on a long journey with no means of support and no vehicle. They began to commit crimes in order to support themselves.

It was in this context that defendant's group encountered, robbed and killed the victim.52 Such language seems perilously close to simply admitting evidence of bad character.

In a decision that, like Lucas, seems to touch the boundaries of res gestae, the court of appeals in People v. St. James53 upheld defendant's conviction for sexual exploitation of a child against a claim that unfairly prejudicial evidence was admitted as res gestae. The court of appeals deemed evidence of the defendant's possession of large amounts of money, and the alleged victim's drug dealing on his behalf, to be res gestae because it showed "aspects of the relationship demonstrating defendant's influence over [the victim], her desire to please him, and, ultimately, the power defendant had in this relationship."54 Neither the alleged source of the money nor the temporal proximity of the drug dealing are discussed.

The defendant in People v. Kyle55 was charged with sexual assault on a child—the daughter of his girlfriend—and testified that he cared about the victim and was like a father figure to her. A therapist testified to defendant's angry behavior during family counseling sessions, and a caseworker testified to defendant's anger on learning that the caseworker was recommending out-of-home placement for the victim. The defendant never objected to this testimony, and the court of appeals deemed it admissible as res gestae using a plain error analysis.

The pattern that emerges from these opinions is one of expanding the doctrine of res gestae. The time and subject matter limitations set forth in Quintana and Rollins have been significantly loosened by these opinions. Whether traditional notions of relevancy restrict this expansion of the doctrine is addressed in the next section.

**Res Gestae and Rule 403**

C.R.E. 403, like its federal counterpart, is one of the most basic rules of evidence. Given that the definition of relevancy in Rule 401 is quite broad, Rule 403 provides a check on the admissibility of otherwise relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice ...."56 This balancing test is applied in a wide variety of contexts.

Quintana made clear that res gestae evidence is still subject to the traditional relevancy analysis. "Res gestae evidence is admissible only if it is relevant ...."57 The trial court’s finding that the statements were logically relevant to refute Quintana’s claim that he did not form the requisite mens rea was within the discretion afforded trial courts on evidentiary decisions of this sort. Likewise, because the statements in Quintana were not given undue emphasis, no evidence was introduced that Quintana attempted to act out these statements, and the trial court gave a limiting instruction to the jury, the Rule 403 balance did not require exclusion. "Thus, taken in context, these statements were not unduly inflammatory nor likely to prevent the jury from making a rational decision."58

People v. Jaramillo59 also makes clear that res gestae evidence should be evaluated under the usual relevancy standards:

Regardless of whether evidence of other acts is admissible as res gestae or for a permissible purpose under C.R.E. 404(b), evidence of other acts may be excluded if it is irrelevant, C.R.E. 402, or its probative value is substantially outweighed by the danger of unfair prejudice.60

Presumably, a decision to admit evidence under a res gestae theory means that the trial court has determined that the evidence is relevant pursuant to Rule 401 and therefore not excludable pur-
suant to Rule 402. As a practical matter, Jaramillo seems to stand for the proposition that res gestae evidence can be excluded pursuant to Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other concerns. The trial court has substantial discretion in conducting this balancing test.61

When an appellate court is reviewing the relevance balance struck by a trial court, the appellate court must assume the maximum probative value of the evidence and the minimum unfair prejudice.62 People v. Auldridge63 is apparently the only Colorado case since the adoption of the C.R.E. to hold that the trial court abused its discretion in this regard. Auldridge was charged with an assault involving a weapon and claimed self-defense. The prosecutor was allowed to cross-examine Auldridge about his knowledge that carrying a weapon was illegal. The court of appeals held that the probative value of this evidence, in light of the other evidence of defendant's state of mind, was substantially outweighed by the danger of unfair prejudice. Finally, appellate courts assume that jurors followed any limiting instruction given in connection with res gestae evidence.64

Res Gestae and Rule 404

Evidence of other acts generally is controlled by C.R.E. 404(b). That rule begins by providing that evidence of other crimes, wrongs, or acts is not admissible to prove a person's character and that the person acted in conformity with that character. The rule then creates the exception that such evidence may be admissible for other purposes. The rule sets out a nonexhaustive list of such other purposes.

An extensive body of appellate court decisions relating to Rule 404(b) has developed in Colorado. The seminal cases in this body of law are People v. Garner,65 People v. Spoto,66 People v. Honey,67 and Stull v. People.68 These cases establish a four-part test to evaluate the admissibility of evidence of other crimes, wrongs, or acts.

Quintana makes clear that res gestae evidence is distinguished from other acts evidence because other acts evidence generally relates to events occurring "at different times and under different circumstances from the charged offense."69 By its very nature, res gestae is intrinsic to the charged offense, not extrinsic to it. In fact, the Court described res gestae evidence as "the antithesis of C.R.E. 404(b) evidence."70

The Quintana Court referred to the seminal other acts case of People v. Spoto71 for illustration. Spoto, like Quintana, was charged with murder. The prosecution sought to rebut his claim of self-defense by introducing evidence that he had brandished a weapon a few weeks earlier. The Spoto Court held that this evidence was properly characterized as other acts evidence, because it involved a separate and distinct episode wholly independent from the offense charged. Quintana, on the other hand, involved acts (the three statements) that occurred contemporaneously or immediately after the murder, as part of that criminal episode.

In People v. Greenlee,72 the Colorado Supreme Court granted certiorari to determine whether the court of appeals erred in holding that evidence of a defendant's plan to shoot a woman and then hide her body—made two months before he shot a woman and hid her body—was inadmissible as res gestae evidence at his murder trial. The Court eventually ruled that the evidence was admissible under either a 404(b) or a res gestae analysis, so that any possible error in admitting the evidence under a res gestae theory was harmless.

The distinction between res gestae evidence and other acts evidence is critical. If the evidence truly is "linked in time" to and "forms a natural part of" the offense, as described in Quintana, the evidence is res gestae. If it is not so linked, it is necessarily other acts evidence subject to the admissibility requirements of C.R.E. 404(b). The federal treatment of res gestae, discussed in more detail below, also serves to illustrate this distinction.

Other Issues Relating to Res Gestae

A defendant may open the door to res gestae evidence, at least in the sense that the defense or testimony proffered by the defendant may alter the relevancy balance and open wider the door that already was open to res gestae evidence. For example, the defendant in People v. Cooper73 was charged with burglarizing his mother's home, and testified that she had invited him inside. The trial court allowed the prosecution to cross-examine him about an incident,
three days earlier, when his mother had called the police to have him removed from the house.

The court of appeals affirmed, noting that the prior incident became part of the res gestae when the defendant opened the door by offering his explanation of why he was inside. Similarly, in People v. Ornelas, the court of appeals approved the trial court’s findings that defendant’s statements about the importation of drugs by other people were res gestae in his trial for drug distribution, because defendant asserted that the drugs that were found were for his personal use.

Res gestae evidence need not involve the defendant. In People v. Bernabei, the court of appeals held that it was within the trial court’s discretion to admit evidence of two prior drug transactions that did not involve the defendant in the defendant’s trial for selling counterfeit controlled substances. The two other transactions involved defendant’s son and occurred at a home where defendant’s sale also occurred. The prosecution theory was that the evidence was needed to explain to the jury how the undercover officer came to be at the home. The jury was properly advised that neither transaction involved the defendant.

Res gestae evidence also does not have to involve the alleged victim of the charged offense. In People v. Agado, the defendant argued with his girlfriend one evening and moved out the next morning, but returned the next night with a gun and found a babysitter there. He raised the gun, it discharged, and the babysitter was killed. The trial court allowed the admission of evidence of the argument with the girlfriend as res gestae.

In People v. Skyfian, the Colorado Supreme Court addressed the question whether the introduction of res gestae evidence against a defendant might impermissibly chill his right to testify by making him subject to cross-examination on the uncharged conduct. The trial court allowed the introduction of evidence relating to another case against the defendant, and defendant argued that he should be allowed to assert his Fifth Amendment right to silence if he was cross-examined about that other case. The court of appeals agreed with the defendant’s position.

The Supreme Court noted that the decision of a defendant whether to testify is fundamental and must be made “freely and without coercive influence.” However, the Court noted that this decision is a tactical choice like many others that a defendant and counsel must make during trial. The fact that the prosecution introduced evidence that made it more difficult and problematic for defendant to testify did not implicate his constitutional right to silence. This is particularly true when, as here, the trial court ruled that the scope of cross-examination would depend on the questions asked and answers given during direct examination. The Court took this ruling to mean that it was the defendant’s own testimony, not evidence offered independently by the prosecution, that would control the extent to which the defendant was forced to testify about the uncharged misconduct.

In People v. Lovato, the court of appeals held that res gestae evidence need not be accompanied by a limiting instruction. The fact that a limiting instruction was in fact given inures to the benefit of the defendant. The court did not explain its reasoning, but simply cited Quintana.

The Tenth Circuit View of Res Gestae

A discussion of the treatment of res gestae evidence by the federal courts is important to federal practitioners. It also is important to state court practitioners, because federal court interpretations of evidence rules that are identical to the Colorado rule—although not binding on state appellate courts—are persuasive.

As mentioned above, the U.S. Supreme Court has not addressed the issues surrounding res gestae evidence since the adoption of the F.R.E. in 1975. In fact, in a 2007 slip opinion in a habeas case, the Tenth Circuit noted that the defendant cited no Supreme Court or other federal case that casts doubt on Quintana, and that the court was not aware of any Supreme Court case defining the constitutional parameters of the admissibility of res gestae evidence. Whether the disappearance of the doctrine from Supreme Court jurisprudence is due to a belief that the F.R.E. superseded the doctrine, or to the fact that the issue simply has not yet made its way to that Court, is not clear.

History of Res Gestae and 404(b) Evidence

Historically, the Tenth Circuit did not make a distinction between 404(b) evidence and res gestae—the two kinds of evidence that Colorado state courts have labeled as being the “antithesis” of each other, in the Tenth Circuit were considered varieties of the same species. For example, in developing its analysis, the Tenth Circuit relied heavily on the Fourth Circuit decision in United States v. Masters, which held that the bases for admissibility listed in F.R.E. 404(b) are not “exhaustive” but instead are “illustrative.” One of the accepted bases for admissibility of other crimes is when the evidence:

1) “furnishes part of the context of the crime”;
2) is necessary to a “full presentation of the case”; or
3) is so “intimately connected with and explanatory of the crime charges against the defendant that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context.”

In other words, res gestae evidence falls within the reach of the exceptions to Rule 404(b).

The Tenth Circuit followed this same analysis in United States v. Cook. Cook was indicted for making false representations in a financial document. The Tenth Circuit held that the evidence was admissible under F.R.E. 404(b), noting that the Rule governs the admissibility of other acts evidence:

when such evidence provides part of the “context” of the crime charged or is necessary to fully present the case; when the evidence is so much a part of the “environment” of the case that it is necessary to “complete the story of the crime” and when the evidence of the other acts is so linked together in “point of time and circumstances” with the crime charged with it is part of the “res gestae” of the crime charged.

Res Gestae and 404(b) Evidence After 1980

Things started to change in the early 1980s. First, the Tenth Circuit began developing a more restrictive test for determining the admissibility of evidence pursuant to F.R.E. 404(b). In United States v. Ceb, the court enumerated more than ten factors trial courts had to consider in determining the admissibility of 404(b) evidence. These new restrictive tests encouraged courts to admit evidence pursuant to F.R.E. 404(b) only if it fit into an category specifically listed by F.R.E. 404(b). This meant that res gestae evidence that was admitted because it was part and parcel of the crime or needed to complete the story would no longer fit into a 404(b) analysis.
At the same time, the Tenth Circuit began distinguishing between evidence that should be analyzed under Rule 404(b) and evidence that was part and parcel of the charged offense. In *United States v. Orr*, the defendant was charged with filing false income tax statements. Orr had set up several false identities for which he and others on his behalf received Internal Revenue Service refund checks. The prosecution presented two witnesses who testified that they previously had been involved in a similar tax refund scheme with Orr and that they had discussed starting another scheme with Orr. The prosecution argued this new scheme was the crime charged. The trial court held that all of the evidence was admissible pursuant to 404(b).

The Tenth Circuit held that the discussions regarding a new tax refund scheme was not 404(b) evidence, but rather direct evidence that went to the elements of the charge:

Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. An uncharged act may not be extrinsic if it was part of the scheme for which a defendant is being prosecuted. Although the court did not identify the evidence as *res gestae*, this language later becomes a part of the test for the admissibility of *res gestae*.

This change seems consistent with developments in 404(b) jurisprudence in the U.S. Supreme Court. In 1988, in *Huddleston v. United States*, the Court created a four-part test to determine the admissibility of 404(b) evidence. Although *Huddleston* did not address *res gestae* evidence, in *United States v. Record*, the Tenth Circuit case incorporating the 404(b) *Huddleston* test, the Court stated, in a footnote:

Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. . . . An uncharged act may not be extrinsic if it was part of the scheme for which a defendant is being prosecuted . . . or it was "inextricably intertwined" with the charged crime such as a witness testimony would have been confusing and incomplete without mention of the prior act.

In 1992, the Tenth Circuit made this same distinction in *United States v. Pace*. There, the court held that the actions of a co-conspirator, during the course of the conspiracy, were admissible against the defendant as evidence of the conspiracy and need not be analyzed under Rule 404(b).

In 1993, the Tenth Circuit was still working to define the boundaries between extrinsic and intrinsic evidence. In *United States v. Lambert*, the defendant was charged with bank robbery. Lambert’s co-defendant testified regarding a conversation occurring five days earlier, during which the two men were discussing the merits of several potential targets, including the bank eventually robbed. Lambert argued that this conversation was inadmissible under F.R.E. 404(b). The court held that the conversation was intrinsic to the crime. It went on to hold:

[o]ther act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.

It went on to state, "[s]uch intrinsic 'other act' evidence, although not excluded by 404(b), is still subject to the requirement of Fed. R. Evid. 403." In *United States v. Kimball*, the court finally linked the tests found in *Lambert* and its predecessors to the term "*res gestae*." Kimball was convicted of bank robbery. The trial court permitted evidence that he had recently been released from prison and had re-
fickling by the defendant in a case where he was charged with, inter alia, possession of a firearm in relation to a drug trafficking felony. This evidence was deemed admissible as res gestae even though the defendant was not independently charged with felony drug trafficking. The court held that the evidence was inextricably intertwined with the charged crimes.

These tests are still being refined. In 2007, the Tenth Circuit held that the prosecution was permitted to present evidence that a shotgun the defendant was accused of possessing was stolen, even though the defendant was not charged with possession of a stolen firearm but, instead, with possession of a firearm by a felon. The court listed all of the tests cited in the above cases. However, the court based its approval of the admission of this evidence on the theory that evidence the gun was stolen was:

a necessary preliminary to the crime charged . . . or in other words, was necessary to provide a full presentation of the case and completion of the story or was so linked together in point of time and circumstances with the crime charged it was part of the "res gestae.""  

In sum, the Tenth Circuit has moved from an analysis that views res gestae evidence as a part of 404(b) to a separate analysis. This separate analysis focuses on whether the evidence is intrinsic or extrinsic to the commission of the crime. Although the definition of "intrinsic" has no single meaning, the court seems to require that the evidence be either an integral part of the crime charged or "intrinsic to the commission of the crime. Although the definition of "separate analysis focuses on whether the evidence is intrinsic or extrinsic to the commission of the crime. Although the definition of "intrinsic" has no single meaning, the court seems to require that the evidence be either an integral part of the crime charged or necessary for the jury to understand the evidence. The difficulty with this federal analysis is the large span and scope of many federal indicents. It is rare that a federal criminal case has to do with just one event. However, even if the court finds that the evidence is intrinsic to the crime, it still must analyze the admissibility of the evidence using a F.R.E. 403 analysis.

Conclusion

The doctrine of res gestae has changed dramatically, perhaps even fundamentally, since its common law origin. Initially, the doctrine was used to address evidence that now is generally addressed by the state and federal rules of evidence. The initial application of the doctrine by the Colorado Supreme Court after the adoption of the C.R.E. was very restrictive. In the past fifteen years, the Colorado appellate courts have significantly broadened the applicability of the doctrine. The Tenth Circuit, using different language, seems to have followed the same general path as the Colorado courts, although, as a doctrine, res gestae is rarely used or rarely appealed and, as a result, there are very few Tenth Circuit cases addressing its admissibility.

In large part, this evolution mirrors how both sets of courts have analyzed the relationship between res gestae and Rule 404(b). Although there is an argument that the doctrine of res gestae was largely supplanted by the adoption of the federal and Colorado rules of evidence, this argument has not been adopted by either the Colorado Supreme Court or the Tenth Circuit. However, because the U.S. Supreme Court has not weighed in on the issue since the passage of the F.R.E., there still is an argument that the ever-broadening doctrine of res gestae will be eliminated or at least severely limited by the U.S. Supreme Court, when and if it finally does take up the issue. Even under current law, there is sufficient play in the res gestae doctrine in both state and federal courts that all practitioners can make some headway in either resisting or advancing the introduction of critical evidence in criminal cases.

Notes

1. Black's Law Dictionary (7th ed., 1999). The proper pronunciation of the term is in dispute. Black's holds that the first word should be pronounced "rays" and that the second word may be pronounced either "jes-ti" (accent on first syllable). Webster's holds that the first word also may be pronounced "race."


3. Id.


