

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

**STATE OF NEW MEXICO,
Plaintiff,**

No. D-101-CR-2024-0013

vs.

Judge Mary Marlowe Sommer

**ALEXANDER RAE BALDWIN,
Defendant.**

**STATE'S NOTICE OF INTENT TO INTRODUCE OTHER ACTS EVIDENCE AS
INTRINSIC EVIDENCE OR IN THE ALTERNATIVE PURSUANT TO RULE 11-404(B)**

COMES NOW the State of New Mexico by its Special Prosecutors Kari T. Morrisey and Erlinda O. Johnson, and hereby submits the following notice of its intent to introduce evidence of crimes, wrongs or other acts as intrinsic evidence or in the alternative pursuant to Rule 11-404(B) NMRA, and in support thereof the State submits the following.

INTRODUCTION

Sometime prior to October 2021, the defendant collaborated with Director Joel Souza in the writing and production of the screenplay "Rust" which eventually began filming in New Mexico on October 6, 2021. The defendant was one of the film's producers. According to evidence, the defendant arrived in Santa Fe, New Mexico sometime before October 12, 2021, to begin acting as the leading actor in the film. Prior to the filming, the defendant had asked to be assigned the "biggest" gun available. He was assigned an 1873 replica revolver manufactured sometime in 2017 by Pietta Firearms.

Between October 12, 2021 and October 21, 2021, the defendant was involved in various scenes wherein the defendant, 1) used his gun as a pointer directing crew members; 2) discharged

the revolver after the filming was over and “cut” was called, in violation of rules governing the safe handling of firearms on set; 3) the defendant shot several scenes wherein he placed his finger on the trigger of the revolver where the scene did not require any shooting of the firearm; 4) rushed the armorer to reload and crew members to work at a faster pace; 5) was inattentive during the firearms training conducted by Ms. Gutierrez and was distracted by texting/face timing family members and making videos for his family’s enjoyment (the evidence to support this is witness testimony and the video evidence in the last bulleted paragraph below); 6) engaged in horseplay with the revolver while making videos during his firearms training while using pull load blanks; 7) displayed erratic and aggressive behavior during the filming of Rust that created potential safety concerns; 8) displayed reckless behavior as it related to the use of a firearm, such as pointing it and firing a blank round at a crew member while using that crew member as a line of site as his perceived target; and 9) after October 21, 2021 was insistent that he not be required to follow safety recommendations made by film set safety experts on the continuation of the filming of Rust in Montana. Specifically, the State notifies the defendant that it may use the following pieces of evidence to prove the above enumerated conduct:

- On October 21, 2021, minutes before the 911 call was made reporting the shooting of Mr. Souza and Ms. Hutchins, Mr. Baldwin was photographed by Karen Keuhn manipulating his prop gun. He appears to have his finger inside the trigger guard and his thumb on the hammer. Upon information and belief, Ms. Gutierrez was not present to supervise his handling of the gun.
- On October 21, 2021, prior to lunch Mamie Mitchell took a cell phone video of Mr. Baldwin wherein he appears to cock the gun and possibly pull the trigger.

- In video # 118B-02-CAM A-2CEA926, on October 21, 2021, prior to lunch there is a set video wherein Mr. Baldwin is asked to look at the camera and pull his gun and point his gun in the direction of “camera left.” Mr. Baldwin is not instructed to cock the gun, but he cocks the gun despite not being asked to cock the gun. There is some evidence that he also pulls the trigger of the gun.
- In video 123D T_03 CAM_B_350E03E, Mr. Baldwin can be seen exercising complete control over the crew and screaming at the crew to be quiet.
- In video 123E T_05 CAM_B 9A19A716D, Mr. Baldwin exercised complete control over the set by stopping the acting sequence during the filming of a scene with the minor child actor after his gun appears to have become caught on his microphone wire. Mr. Baldwin can be heard cussing loudly while glaring at the crew.
- In video SC_107E T_01 CAM_B_8F6A8B0, Mr. Baldwin can be seen using his gun as a pointer during a time that there is no acting sequence. He is pointing his gun at crew members while speaking to them and fires his gun after “cut” was called and the scene was to stop.
- In video SC_107FT_03 CAM_A_EA666B5, Mr. Baldwin can be seen shooting blank rounds in very close proximity to a camera operator.
- In video SC_107FT_03 CAM_B_1A65DB6, Mr. Baldwin exercises complete control over the set and stops the acting sequence due to his own perceived error. Mr. Baldwin can be heard rushing the armorer to reload the gun and rushing other crew members to hurry. This video also provides another view of the close distance between Mr. Baldwin and the camera operator he shoots toward in the video mentioned above ending in 666B5.

- In video 118A-02-CAM A-468B23D, Mr. Baldwin can be seen engaging in horseplay with his gun and pulling his gun when the scene did not call for the pulling of his gun. When he pulls his gun the muzzle of the gun is pointed directly at another actor.
- In video 123E T_02 CAM_B_BD51445, Mr. Baldwin exercises complete control over the set and stops the acting sequence during the filming of the scene. Without the scene calling for any action, Mr. Baldwin cocks and de-cocks his gun immediately after he has stopped the acting sequence.
- In video 125H T_01 CAM_B_0838B64, the camera operator was running video and asked to see the gun in front of the camera so he could adjust the focus. There was no acting sequence occurring, “action” had not been called and Mr. Baldwin had his finger on the trigger.
- In video 125H T_03 CAM_B_EFA6276, Mr. Baldwin presented the gun to the camera/camera operator before “action” had been called and asked, “Is that good for you there?”, presumably speaking to the camera operator and/or director. Again, Mr. Baldwin had his finger on the trigger unnecessarily.
- In 127B-02-CAM B-96F3A40GDF, Mr. Baldwin can be seen screaming intermittently throughout the attempts at filming the scene. He exercises complete control over the set by stopping the acting sequence, cursing loudly and rushing the other cast and crew.
- Videos 125H T_02_CAM_B_1589923 and 125H T_02_CAM_B_766D2B3, may be used to demonstrate that Mr. Baldwin was cocking and de-cocking the gun in between scenes.
- The video taken by Sarah Zachry that was provided as a part of her phone download will be used to show that Mr. Baldwin was having videos taken during his firearms training (demonstrating his inattentiveness) and was shooting full-load blanks in the direction of

or in close proximity to others who also appear to be filming him. This is another example of Mr. Baldwin engaging in horseplay with his gun and firing his gun when a scene is not being filmed and for no other legitimate purpose.

- The foregoing acts are intrinsic to the offense charged as conduct which conformed to a reckless *mens rea*, intimately or blended with the factual circumstances of the charged offense. Even if found to be other bad acts evidence pursuant to Rule 11-404(B), the foregoing acts are admissible to prove lack of accident or mistake and their probative value is not outweighed by the danger of unfair prejudice.

ARGUMENT

I. Evidence of Defendant’s Conduct Between October 12-21, 2021, is Relevant Intrinsic Evidence of Criminal Negligence and Recklessness in the Commission of the Charged Offense

“Relevant evidence” means evidence having any tendency to make the existence of any *material* fact more or less probable than it would be without the evidence. Rule 11-401 NMRA 2024; *see also* *McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-022, ¶ 14, 182 P.3d 121. “Evidence that is not relevant is not admissible.” Rule 11-402 NMRA 2024. In order to determine whether evidence of other alleged incidents is relevant and admissible under Rule 11-402, the Court must carefully examine the circumstances of the other incidents to determine whether they are substantially similar to the incident in question. *See, e.g. State v. Aguayo*, 1992-NMCA-044, ¶¶ 18-19, 835 P.2d 840.

Evidence that is “directly connected to the factual circumstances of the crime and provides contextual or background information to the jury,” is referred to as intrinsic evidence. *United States v. Irving*, 665 F.3d 1184, 1212 (10th Cir. 2011). The evidence need not apply directly to an element of the offense to fulfill the definition. *Id.*; *see also State v. Loza*, 2016-

NMCA-088, ¶ 16, 382 P.3d 963, 966 (explaining that Rule 404(B) does not apply to intrinsic evidence (citing *United States v. Parker*, 553 F.3d 1309, 1314 (10th Cir. 2009)) (“Because Rule 404(b) only limits evidence of ‘other’ crimes—those extrinsic to the charged crime—evidence of acts or events that are part of the crime itself, or evidence essential to the context of the crime, does not fall under the other crimes limitations of Rule 404(b).”); *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010) (“If uncharged misconduct directly proves the charged offense, it is not evidence of some ‘other’ crime.”); and Black's Law Dictionary 899 (9th ed. 2009) (defining “intrinsic” as “[b]elonging to a thing by its very nature; not dependent on external circumstances; ... essential”). Indeed, “evidence of acts or events that are part of the crime itself, or evidence essential to the context of the crime, does not fall under the other crimes limitations of Rule 404(b)” and thus are admissible as intrinsic to the charged offense. *United States v. Parker*, 553 F.3d 1309, 1314-15 (10th Cir. 2009).

In this case, evidence of defendant’s conduct between October 12-21, 2021, outlined in the introductory section, as it relates to the firearm at issue in this matter and his handling thereof is relevant because it is part of the crime of involuntary manslaughter as it shows defendant’s recklessness or criminal negligence on October 21, 2021, when he shot and killed Halyna Hutchins. Defendant’s acts are intrinsic as they conform to a reckless *mens rea* present on October 21, 2021, when defendant shot Halyna Hutchins.

New Mexico as well as federal courts have ruled intrinsic evidence admissible as part of the offense. Indeed, federal law recognizes evidence that is inextricably intertwined or preliminary to the crime charged as intrinsic evidence. See *United States v. Girod*, 646 F.3d 304, 319 (5th Cir. 2011). “Intrinsic evidence is admissible to complete the story of the crime by proving the immediate context of events in time and place and to evaluate all of the

circumstances under which the defendant acted.” *Id.* Importantly, “intrinsic evidence naturally “allow[s] the government to tell the whole story of a ... criminal episode.” *United States v. Rice*, 607 F.3d 133, 141 (5th Cir. 2010). As such, “[e]vidence that is inextricably intertwined with the evidence used to prove a crime charged is not extrinsic evidence under Rule 404(b).” *United States v. Royal*, 972 F.2d 643, 647 (5th Cir. 1992) (internal quotations omitted).

New Mexico courts have often looked to federal law for guidance on interpreting the New Mexico Rules of Evidence. *See generally Lopez v. Reddy*, 2005-NMCA-054, ¶ 14, 137 N.M. 554, 558 (court recognized that the New Mexico Rule and the Federal Rule were analogous and looked to federal case law for guidance). The Committee Commentary for the New Mexico Rules of Evidence indicates that the rules were amended in 2012 to be consistent with the restyling of the federal Rules of Evidence. As such, New Mexico courts look to the federal courts for guidance as to the proper application of the rules. *See State of New Mexico v. Loza*, 2016-NMCA-088, ¶ 12, 382 P.3d 963 (citing *Kipnis v. Jusbasche*, 2015-NMCA-071, ¶7, 352 P.3d 687).

Here, defendant’s acts of handling the firearm in a reckless manner and in violation of guidelines for handling firearms on a movie set, between October 12 and 21st, 2021, and his acts in rushing the crew during scenes, fit comfortably under the interpretation of intrinsic evidence as defined by federal jurisprudence and New Mexico law. Defendant’s acts are relevant to evaluate all of the circumstances and state of mind of the defendant on October 21, 2021.

It is important to note that the *mens rea* required for involuntary manslaughter is criminal negligence. *See State v. Yarborough*, 1996-NMSC-068, ¶ 20, 122 N.M. 596, 930 P.2d 131 (holding that involuntary manslaughter, whether premised upon a lawful or unlawful act, requires a showing of criminal negligence). Criminal negligence exists where the defendant “acts

with willful disregard of the rights or safety of others and in a manner which endangers any person or property.” *State v. Skippings*, 2011-NMSC-021, ¶ 18, 150 N.M. 216, 258 P.3d 1008 (alterations, internal quotation marks, and citation omitted). Therefore, the defendant’s acts preceding the shooting are probative to a jury’s determination of whether, in filming Rust and in handling the firearm in question, the defendant acted in a manner that endangered the safety of others. Accordingly, his acts between October 12 through 21, 2021, are relevant to his state of mind and thus intrinsic of the charged offense.

In *United States v. Riego*, 2022 WL 4295185 (D.N.M. September 16, 2022), the defendant was charged with four counts of involuntary manslaughter resulting from a collision of his commercial motor vehicle with other vehicles that were stopped in a construction zone on Interstate 40, west of Albuquerque. *Id.* at *1. The prosecution sought to admit evidence of the defendant’s prior commercial driver’s license exam as probative of the involuntary manslaughter charge that “Defendant drove while not physically qualified and that his conduct conformed to a reckless *mens rea*.” *See id.* at *2 (citing *United States v. Bryant*, 892 F.2d 1466, 1468 (10th Cir. 1989) (involuntary manslaughter requires a proof of defendant's recklessness)). In ruling to admit evidence of the defendant’s prior driver’s license record, the Court noted,

It is well settled that Rule 404(b) does not apply to other act evidence that is intrinsic to the crime charged. *United States v. O'Brien*, 131 F.3d 1428, 1432 (10th Cir. 1997). [I]ntrinsic evidence is directly connected to the factual circumstances of the crime and provides contextual or background information to the jury. Extrinsic evidence, on the other hand, is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense. *United States v. Parker*, 553 F.3d 1309, 1314 (10th Cir. 2009).

Id. at * 2 (quotations omitted).

In this case, the defendant is charged in the alternative with involuntary manslaughter committed without due caution and circumspection in that he committed an act with total disregard or indifference for the safety of others. His reckless or criminally negligent state of mind may be proven by his conduct in the days leading up to shooting of Ms. Hutchins on October 21, 2021. Notably, the defendant “may be convicted of involuntary manslaughter when a convergence of the proper act and state of mind requirements result in the death of an individual.” *State v. Henley*, 2010-NMSC-039, ¶ 14, 237 P.3d 103. Accordingly, the defendant’s acts preceding October 21, 2021, are admissible as evidence of his reckless state of mind.

II. Even if Found to be Extrinsic, Evidence of Defendant’s Acts Between October 12-21, 2021, are Admissible Pursuant to Rule 11-404(B)

Rule 11-404(B)(1) NMRA 2024, states that evidence of another crime, wrong or act "is not admissible to prove a person's character" to show that "the person acted in accordance with the character." But under Rule 11-404(B)(2) NMRA 2024, evidence of another crime, wrong or act may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Thus, "evidence of other acts is admissible under Rule 11-404(B) if relevant to a material issue other than the Defendant's character or propensity to commit a crime." *State v. Kerby*, 2007-NMSC-014, ¶ 25, 141 N.M. 413; *see also State v. McGhee*, 1985-NMSC-047, ¶¶ 24-26, 703 P.2d 877, 881 (holding that evidence of prior bad acts is admissible “if it is probative of a material element at issue”); *State v. Niewiadowski*, 1995-NMCA-083, ¶ 10-14, 901 P.2d 779 (holding that “evidence of Defendant's other bad acts can be admissible if it bears on a matter in issue, such as intent, in a way that does not merely show propensity”).

Moreover, “[w]henver the proof of another act or crime tends to prove the guilt of the person on trial, it is admissible, notwithstanding the consequences to the defendant. The State

has the right to show the guilt of the defendant by any relevant fact.” *State v. Allen*, 1978-NMCA-054, ¶¶ 2-3, 581 P.2d 22 (citations omitted). “Such evidence may * * * properly be received if it is relevant to, and its probative force is sufficiently great upon, some material element of the crime charged which is in issue...” *Id.* (quoting *State v. Mason*, 79 N.M. 663, 448 P.2d 175 (Ct.App.1968)); see also *State v. Schifani*, 1978-NMCA-080, 584 P.2d 174 (Persons other than victims, in the counts being tried, were allowed to testify to dealings with defendant similar in nature to victims' dealings with defendant in order to show defendant's intent and common scheme or plan); *State v. McCallum*, , 1975-NMCA-030, 535 P.2d 1085 (In a case of fraud, related incidents of accused's acts are relevant and admissible to establish motive, absence of mistake or accident, common scheme or plan.). Courts have uniformly held that in cases where there is an issue as to a material element of the offense charged, evidence of other acts tending to establish said material element is generally admissible. See *United States v. Johnson*, 934 F.2d 936 (8th Cir. 1991). In particular, "evidence of another crime that tends to undermine defendant's innocent explanation for his or her act will usually be admitted." 2 WEINSTEIN'S FEDERAL EVIDENCE, § 404.22[1][a] at 404-100-02 (2d ed. 2015) (WEINSTEIN) (footnote omitted).

As the New Mexico Court of Appeals recognized, under Rule 11-404(B), "the admissibility of evidence of other acts does not depend on whether the evidence is potentially illegitimate evidence of character, but, instead, on whether there is a permissible purpose." *State v. Bailey*, 2015-NMCA-102, ¶18, 357 P.3d 423. The Court cited *Old Chief v. United States*, 519 U.S. 172, 184 (1997), where the U.S. Supreme Court held that, when evidence "has the dual nature of legitimate evidence of an element [of a charge] and illegitimate evidence of character," it satisfies Federal Rule of

Evidence 404(b) and admissibility is determined under Federal Rule of Evidence 403.

The Supreme Court “has often recognized that proof of similar acts is admissible to show intent or the absence of mistake.” *Andresen v. Maryland*, 427 U.S. 463, 483 (1976). This is particularly true when the main issue of contention is a defendant’s intent. *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973). Even egregious conduct can be relevant to establish an absence of mistake. See *United States v. Ciesiolka*, 614 F.3d 347, 359 (7th Cir. 2010); *United States v. Gonyer*, 761 F.3d 157, 163 (1st Cir. 2014).

In this case, evidence of acts committed by the defendant between October 12 and 21, 2021, such as, *inter alia*, using the firearm to point at people on set, putting his finger on the trigger when handling the firearm, pressuring crew members to get things done quickly are admissible to show lack of accident or mistake.

Wherefore, based on the foregoing reasons, the State of New Mexico hereby notifies the defendant of its intent to introduce evidence of acts by the defendant between October 12-21, 2021, and during the filming of Rust in Montana as detailed in the introduction section herein.

Respectfully Submitted,

/s/Erlinda O. Johnson

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I hereby certify that a true and accurate copy of the foregoing was provided to counsel for the defendant via e-mail this 17th day of June 2024.

/s/Erlinda O. Johnson
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