Tulsa Law Review

Volume 33
Issue 1 *Dedicated to the U.S. Supreme Court*

Fall 1997

Let's Say Good-Bye to Res Gestae

Chris Blair

LET'S SAY GOOD-BYE TO RES GESTAE

Chris Blair†

INTRODUCTION

The phrase res gestae has long since outlived any usefulness it ever had. Although the phrase may have played some beneficial role in the development of the law of hearsay and uncharged misconduct evidence, it has been widely criticized for being useless and harmful. It is useless because the concepts included within res gestae can all be explained by reference to other more refined principles of evidence law. It is harmful because it causes confusion of evidentiary principles and acts as a deterrence to principled analysis of evidentiary concepts. The concepts once analyzed as res gestae have now been more precisely codified in the Oklahoma Evidence Code without the use of the words res gestae. As a result, the time has come to finally abandon the use of the term in favor of the analysis envisioned by the Code.

HISTORY OF RES GESTAE

Res gestae is a Latin phrase which means "things done"[1] and generally refers to words and/or actions that "occur so close in time and substance" to each other that they are considered part of the same happening, event or transaction.[2] Although the phrase first appeared as early as 1637,[3] it was not in common use until the early nineteenth century.[4]

The phrase initially developed as an exception to the hearsay rule for state-

† Associate Professor of Law, University of Tulsa College of Law.

1. BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

2. *Id.*

3. JOHN WIGMORE, 6 WIGMORE ON EVIDENCE § 1767 n.1 (Chadbourn rev. ed. 1976) (citing Ship Money Case, 3 How.St.Tr. 825, 988 (1637)).

4. WIGMORE, *supra* note 3, § 1767, citing a lengthy passage from Professor James B. Thayer, *Bedingfield's Case-Declarations as a Part of the Res Gestae*, 15 AM. L. REV. 1, 5-10 (1881) which stated that although the term "res gestae" did not appear in Peake's "Law of Evidence," published in 1801, the term did appear in a treatise titled Evans Appendix to Pothier on Obligations, printed in 1806. Thayer determined that the phrase first appeared in a Massachusetts case in 1808, in Bartlett v. Delprat, 4 Mass. 702. The term first appeared in an American treatise, "Swift's Digest of the Law of Evidence in Civil and Criminal Cases" in 1810.

ments which were associated with the happening of the principal litigated event, such as a murder, a collision, or a trespass.[5] Eventually, though, the term "seemed to embody the notion that evidence of any concededly relevant act or condition might also bring in the words which accompanied it."[6] Thus, the conduct and the accompanying words were all part of the same transaction or the "things done," and if the conduct was admissible, so were the words.

As the hearsay doctrine was refined over the years, the concept of res gestae evolved into the hearsay exceptions that we now recognize as present sense impressions,[7] excited utterances,[8] and statements of then existing mental, emotional, or physical condition.[9] The term has also been used to explain the admissibility of words that we now would refer to as verbal acts or verbal parts of acts.[10]

Although the phrase initially developed as a hearsay concept, res gestae has also been used to explain the admissibility of evidence of uncharged misconduct[11] committed in conjunction with the crime for which the defendant is being prosecuted.[12] Although the uncharged misconduct evidence would not be admissible to prove that the defendant acted in conformity with his character,[13] it was said to be admissible because the uncharged misconduct was a part of a

---

5. *See* CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 268 (4th ed. 1992).

6. *Id.*

7. *See id. See also* FED. R. EVID. 803(1) and OKLA. STAT. tit.12, § 2803(1) (1991), which provide that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter[.]"

8. *See id. See also* FED. R. EVID. 803(2) and OKLA. STAT. tit 12, §2803(2) which provide that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition[.]"

9. *See id. See also* FED. R. EVID. 803(3) and OKLA. STAT. tit 12, § 2803(3) (1991) which provides:

> A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation or identification or terms of declarant's will[.]

10. *See* WIGMORE, *supra* note 4, § 1767; *see also* MCCORMICK, *supra* note 5, § 249. Such words, e.g. the words of offer and acceptance to prove the formation of a contract, are not hearsay because they are not being offered in evidence to prove the truth of the matter asserted, but rather to prove only that the words were spoken or written.

11. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE §6:20 (Callaghan 1984). The Federal Rules of Evidence and the Oklahoma Evidence Code refer to such evidence as "other crimes, acts or wrongs." *See also* FED. R. EVID. 404(b) and OKLA. STAT. tit. 12, § 2404(b) (1991) which provide:

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

The same concept is sometimes referred to as "prior bad acts." *See, e.g.*, William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPPERDINE L. REV. 297 (1982), or simply "other crimes" evidence. *See, e.g.*, Ralph C. Thomas, *Looking Logically at Evidence of Other Crimes in Oklahoma*, 15 OKLA. L. REV. 431 (1962) . Since the concept involves conduct that is not necessarily a crime, the term "other crimes" is somewhat misleading, although the vast majority of such evidence does in fact involve "other crimes" and not just "wrongs" or "acts."

12. *See* IMWINKELRIED, *supra* note 11, § 6:22. Even though the text refers to the use of uncharged misconduct evidence in a criminal case, there is nothing in FRE 404(b) that prohibits the introduction of such evidence in a civil case. Moreover, courts have applied the res gestae theory to permit the introduction of such evidence in civil cases, although with much less frequency and with more restraint than in criminal cases. *See* IMWINKELRIED, *supra* note 11, § 7:19.

13. *See* FED. R. EVID. 404(b) and OKLA. STAT. tit. 12, § 2804(b) (1991).

single criminal episode and that the jurors could not adequately evaluate the charged crime without the contextual evidence provided by the uncharged misconduct.[14] By way of example, it has been held that in a prosecution for the charged crime of drunk driving, it was permissible for the prosecution to introduce evidence that the defendant was carrying a pistol at the time of his arrest, which was conduct for which the defendant had not been charged.[15] Since the drunk driving and the possession of the pistol occurred simultaneously, they were considered part of the same transaction or "things done" and were thus all admissible.

The Court of Criminal Appeals of Oklahoma has also used the res gestae doctrine to explain the admission of uncharged misconduct evidence. In *Mason v. State*,[16] the Court explained that other crimes constitute res gestae if they are "so connected with other offenses as to form a part of an 'entire transaction' . . . ;[17] have a logical or visible connection to the offense charged, tend to prove a material fact in issue . . . ;[18] show [defendant's] conduct as an occurrence forming an integral part of the transaction . . . which completed the picture of the offense charged;[19] or, are relevant to prove the essential elements of the offense charged as matters incidental to the main fact and explanatory of it."[20]

CRITICISM OF RES GESTAE

Even when the development of the term res gestae was in its infancy, Thayer reported that "there were signs that it was not altogether regarded with favor."[21] He wrote that the res gestae doctrine became popular because of its "convenient obscurity."[22] During a time when the law of hearsay was unsettled, it was easier and more convenient to use this vague term to provide "relief in a pinch" rather than to "stop to analyze" the hearsay issue involved.[23] Although this very vagueness has been credited with allowing the development of the hearsay doctrine by permitting the admissibility of hearsay statements in

14. *See* IMWINKELRIED, *supra* note 11, § 6:22.

15. *See id.*, citing Ross v. State, 334 S.W.2d 174 (Tex. Crim.App. 1960). Other examples cited include Dickson v. State, 642 S.W.2d 185 (Tex. Crim. App. 1982) (in a prosecution for unauthorized use of a motor vehicle, it was permissible to show that there were stolen ice bags in the vehicle) and Kolbert v. State, 644 S.W.2d 150 (Tex. Crim. App. 1982) (in a robbery prosecution, evidence that the defendant had pill bottles and narcotics was admissible).

16. 868 P.2d 724 (Okla. Crim. App. 1994).

17. Bruner v. State, 612 P.2d 1375, 1377 (Okla. Crim. App. 1980).

18. *Id.*

19. Cooper v. State, 765 P.2d 1211, 1214 (Okla. Crim. App. 1988), *overruled in part on other grounds*, and Williams v. State, 794 P.2d 759, 763 (Okla. Crim. App. 1990).

20. *Id.*

21. WIGMORE, *supra* note 4. Thayer reported that Phillipps' excellent treatise on evidence, published in 1814, referred to hearsay being admitted as part of the res gestae. Phillipps then removed the phrase from his next four editions and did not use the phrase again until his eighth edition, published in 1838.

22. *Id.* at 255.

23. *Id.*

new situations,[24] Thayer wrote, as early as 1881, that "this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."[25]

Wigmore has also been highly critical of the use of the phrase res gestae. He has written that it is "not only entirely useless, but even positively harmful."[26] The phrase is useless because "every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle."[27] The phrase is harmful because "by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both."[28] Thus, Wigmore concluded that the "shibboleth," res gestae, "should never be mentioned."[29]

As indicated previously, the concept of res gestae has evolved into the hearsay exceptions that we now recognize as present sense impressions,[30] excited utterances,[31] and statements of then existing mental, emotional, or physical condition.[32] Thus, as Wigmore concluded, res gestae is a "part of some other well-established principle and can be explained in the terms of that principle."[33] As a result, any analysis of the admissibility of spontaneous statements should proceed under the more precise hearsay exceptions now recognized rather than under the imprecise phrase res gestae.

Although most of the criticism leveled at the phrase res gestae has concerned the use of the phrase in relation to the hearsay rule, the criticism applies equally to the use of the phrase in relation to the admissibility of evidence of uncharged misconduct. With respect to this application of the res gestae doctrine, Wigmore wrote that it is "most frequently used as a cover for loose ideas and ignorance of principles."[34] Since the rules of evidence[35] currently permit evidence of contemporaneously committed uncharged misconduct evidence for a purpose other than to prove character, such as intent, motive, or design "let legal discussion sedulously avoid this much-abused and wholly unmanageable Latin phrase."[36]

24. *See* MCCORMICK, *supra* note 5.
25. WIGMORE, *supra* note 4.
26. WIGMORE, *supra* note 3, at § 1767.
27. *Id.*
28. *Id.*
29. *Id.*
30. *See supra* note 7.
31. *See supra* note 8.
32. *See supra* note 9.
33. WIGMORE, *supra* note 3, § 1767.
34. JOHN WIGMORE, 1A WIGMORE ON EVIDENCE §218 (Tillers rev. ed. 1983).
35. *See* FED. R. EVID. 404(B) and OKLA. STAT. tit 12, § 2404(B) (1991).
36. WIGMORE, *supra* note 8.

USE OF RES GESTAE BY OKLAHOMA COURTS

Prior to the adoption of the Oklahoma Evidence Code on October 1, 1978, the phrase res gestae was widely used by the Oklahoma courts to explain the admissibility of certain hearsay statements and uncharged misconduct evidence. A Westlaw search indicates that the phrase appeared in approximately 187 cases from 1945 to 1978. Since the phrase res gestae does not appear in the Oklahoma Evidence Code, it might have been expected that the use of the phrase would have appeared much less frequently after the adoption of the Code. However, the phrase has appeared in another 100 cases decided between 1978 and 1997.[37]

Most of the pre-code decisions that utilized the phrase res gestae to explain the admissibility of hearsay evidence applied the phrase to spontaneous statements that would now be classified as present sense impressions,[38] excited utterances,[39] or statements of then existing mental, emotional, or physical condition.[40] For example, in *Sands Springs Ry. Co. et al. v. Piggee*,[41] the Oklahoma Supreme Court, in a case involving an accident between a bus and an interurban car, held that a statement about the cause of the accident, made at the scene of the accident "at a time when tension and excitement due to the accident was still high,"[42] was admissible as part of the res gestae. The same statement would now be classified as an excited utterance.[43] And in *Lee v. Volkswagen of America, Inc.*,[44] the same court held that the plaintiff's statement made after an accident, that he felt like committing suicide, could be admitted under the res gestae exception. Such a statement would qualify as a statement of a then existing mental or emotional condition under the Oklahoma Evidence Code.[45]

Numerous pre-code cases also utilized the phrase res gestae to explain the admissibility of uncharged misconduct evidence which would now likely be

---

37. Even though the Oklahoma Evidence Code became effective on October 1, 1978, some appellate decisions appearing after that date were in cases that had been tried under the law of evidence in effect before the Evidence Code. Thus, some of those 100 decisions were not using the phrase res gestae to refer to any evidence concepts contained in the Code, but rather to pre-Code terminology. For example, in *Lee v. Volkswagen*, 688 P2d 1283 (Okla. 1994), the Oklahoma Supreme Court specifically held that since the trial in the instant case was before the enactment of the Oklahoma Evidence Code, a statement could be classified as falling under the res gestae exception.

38. *See supra* note 7.

39. *See supra* note 8.

40. *See supra* note 9.

41. 163 P.2d 545 (Okla. 1945).

42. *Id.* at 547.

43. *See supra* note 8. Both the driver of the interurban car and his employer were the named defendants in the case. Since the driver was the declarant of the statement about the cause of the accident, and it was being offered by the plaintiff, the statement would now also be admissible as an admission of a party opponent under OKLA. STAT. tit. 12, § 2801(4)(b)(1) and(4).

44. 688 P.2d at 1291. Although the decision was rendered after the adoption of the Oklahoma Evidence Code, the opinion specifically stated that since the trial was held before the adoption of the code the statement would be classified as falling under the res gestae exception.

45. *See supra* note 9.

admissible, or at least analyzed, under §2404(B).[46] As the Court of Criminal Appeals has explained in an earlier definition, "[t]he term 'Res Gestae' means matters incidental to the main fact and explanatory to it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact might not be properly understood. . . ."[47] For example, in *Hall v. State*,[48] the Oklahoma Court of Criminal Appeals held, in a case charging reckless driving, that evidence of the driver's intoxication was admissible as part of the res gestae to help explain the cause of the reckless driving. And in *Dixon v. State*,[49] the same court held, in a case charging assault with intent to commit rape, that evidence that just before the assault the defendant urinated upon the dining room table was admissible as part of the res gestae because it was "contemporaneous with and a part of the physical assault upon the victim by the defendant."[50] Likewise, in a homicide prosecution, *Austin v. State*,[51] the court approved the admissibility of evidence that the defendant cut another person shortly before he stabbed the deceased as part of the res gestae, because it was explanatory of defendant's motive and it showed the actions, conduct and general demeanor of the defendant.[52]

The Evidence Subcommittee's Note to § 2803 of the Oklahoma Evidence Code states: "In no instance in these rules is the term 'res gestae' employed."[53] The Note further pointed out that the "vagueness and imprecision in the term 'res gestae' and the circumstances under which it should be employed to admit otherwise inadmissible hearsay evidence affords a convenient escape from the hearsay doctrine . . . ."[54] As a result, the Note then declared that "'res gestae' is specifically abandoned in these rules as an exception to the hearsay rule in favor of the more specific categories of exceptions recognized herein."[55] The courts of Oklahoma have followed the suggestion of the Subcommittee Note and have generally refrained from using the term res gestae as a hearsay exception. In the only Supreme Court opinion to use the phrase since the adoption of the Evidence Code, the Court in *Lee v. Volkswagen* specifically held that a

46. *See supra* note 11.
47. Hathcox v. State, 230 P.2d 927, 935 (Okla. Crim. App. 1951).
48. 159 P.2d 283, 287 (Okla. Crim. App. 1945).
49. 560 P.2d 204 (Okla. Crim. App. 1977).
50. *Id.* at 206.
51. 228 P. 1113, 1114-15 (Okla. Crim. App. 1924).
52. For other examples of pre-Code res gestae cases, see Wallace A. McLean, Note, *Evidence: Admissibility of Other Offenses in Oklahoma*, 13 OKLA. L. REV. 68, 70-71 (1960).
53. OKLA. STAT. ANN. tit.12, § 2803 Evidence Subcommittee's Note. The Oklahoma Bar Association appointed the "Subcommittee on Evidence" to develop an evidence code for Oklahoma. The Subcommittee, after working for 4 years produced an evidence code that closely followed the FED. R. EVID. . Although the Oklahoma Legislature did not immediately act on the Subcommittee's draft, a committee established pursuant to the May 3, 1976 Senate Concurrent Resolution No. 69 endorsed the Subcommittee's draft as its own. That draft passed in the spring of 1978 and became effective on October 1, 1978. The Evidence Subcommittee's Notes were published in the Oklahoma Statutes Annotated. *See* FRANK T. READ, OKLAHOMA EVIDENCE HANDBOOK: A PRACTITIONER'S GUIDE TO THE OKLAHOMA EVIDENCE CODE AND TO THE FEDERAL RULES OF EVIDENCE xv-xviii (Oklahoma Bar Review 1979).
54. Title 12, § 2803 Evidence Subcommittee's Note.
55. *Id.*

statement could be classified as falling under the res gestae exception only because the trial in the case had occurred prior to the adoption of the Oklahoma Evidence Code.[56] The Court of Criminal Appeals has also acknowledged that the res gestae exception was eliminated in the context of hearsay[57] and has suggested that the hearsay concept was "formerly referred to as res gestae."[58] Thus, both the Oklahoma Supreme Court and the Court of Criminal Appeals have essentially eliminated the use of the phrase res gestae in relation to hearsay.

The same cannot be said, however, with respect to use of the phrase in the context of the admissibility of uncharged misconduct evidence. Almost all of the approximately 100 uses of the phrase res gestae since the adoption of the Evidence Code have been in reference to uncharged misconduct evidence. Despite the fact that the phrase res gestae does also not appear in § 2404(B) of the Oklahoma Evidence Code, the Court of Criminal Appeals continues to use the phrase with reference to the admission of uncharged misconduct evidence, which should otherwise be regulated by that section. As the Court stated as recently as 1994, "[o]ur post-Evidence Code cases leave no doubt as to the continuing vitality of the res gestae exception in the context of other crimes evidence."[59] Although in the same opinion the court ackowledged that "confusion exists as to the scope of the res gestae exception."[60]

At least part of the explanation for this seeming discrepancy between the abandonment of the phrase with respect to hearsay and its persistent use in the context of uncharged misconduct evidence lies in the Evidence Subcommittee's Notes. As noted above,[61] the Subcommittee's Note accompanying § 2803, concerning hearsay exceptions, specifically abandoned the use of the phrase with respect to hearsay exceptions. However, the Note accompanying § 2404(B),[62] after stating that all of the other purposes mentioned in the rule were previously recognized in Oklahoma, went on to question whether the previously recognized res gestae exception would be recognized under the new rule. The Court has acknowledged that this statement "expressed doubt" about the continuing vitality of the phrase res gestae in the context of other crimes evidence.[63] Since the Note was not as specific about abandoning the phrase in this context as it was in the hearsay context, however, the Court has persisted in the use of the phrase in the context of uncharged misconduct evidence. Of course, the Note statement that the term res gestae does not appear anywhere in the Evidence Code is as true of § 2404(B) as it is of § 2803.

Another misconception apparently accounts for the continued use of the

56. 688 P.2d at 1291.
57. Lalli v. State, 870 P.2d 175, 177 (Okla. Crim. App. 1994).
58. Gore v. State, 735 P.2d 576, 578 (Okla. Crim. App. 1987).
59. *Lalli*, 870 P.2d at 177.
60. *Id.*
61. *See* text accompanying note 54.
62. *See* OKLA. STAT. ANN. tit 12, §2404 Evidence Subcommittee's Note.
63. *Lalli*, 870 P.2d at 177.

phrase res gestae in the context of uncharged misconduct evidence. The Court occasionally seems to suggest that admission of evidence of res gestae is not the same as admission of other crimes evidence. For example, in *Rogers v. State*,[64] the Court agreed that certain evidence had been admitted "as part of the res gestae, *rather than as other crimes evidence.*"[65] The evidence involved in *Rogers* concerned the purchase and use of crack cocaine, admitted in a robbery prosecution. That is clearly evidence of "other crimes" and calling it res gestae does not remove it from § 2404(B). That section is concerned with the admission of evidence of other crimes, wrongs or acts that might tend to prove character to prove an act in conformity. The section prohibits that use, but then suggests that some other purpose might be permissible. Whether that purpose is one of those specifically mentioned in the rule or one of the purposes cited for the use of res gestae evidence, it is still "other crimes" evidence. Unfortunately, the Court's attempt to characterize res gestae as something other than "other crimes" evidence regulated by § 2404(B) seems to perpetuate the use of res gestae as a concept separate from and unregulated by the Evidence Code.[66]

USE OF "RES GESTAE" SHOULD BE ABANDONED

The Court of Criminal Appeals should abandon the use of the phrase res gestae and simply analyze any contemporaneously committed conduct the same as evidence of any other crime, wrong or act. The Court already utilizes the proper method of analysis envisioned by the Evidence Code. As indicated in *Knighton v. State*,[67] in order for evidence of uncharged misconduct to be admissible, it must be probative of some purpose other than character.[68] Once some other probative purpose has been identified, the court must then weigh that probative value against the danger of unfair prejudice (which will usually be the danger that the jurors will in fact use it for the prohibited character purpose) as provided in § 2403 of the Evidence Code.[69] Unless the danger of unfair prejudice substantially outweighs the probative value, the evidence of the uncharged misconduct should be admitted. Thus, instead of calling the evidence res gestae the court should examine one of the probative purposes for which res gestae evidence is supposedly admissible. For example, the Court often says that res gestae evidence is admissible because it puts the charged crime in perspective and helps the jurors better understand the case.[70] If that is true then

64. 890 P.2d 959 (Okla. Crim. App. 1995).
65. *Id.* at 971 (emphasis added).
66. This is not to suggest that the Court always does this. Sometimes the Court quite properly analyzes alleged res gestae evidence under §§ 2404(B) and 2403 just as it does any other "other crimes" evidence. *See, e.g.*, Knighton v. State, 912 P.2d 878 (Okla. Crim. App. 1996).
67. 912 P.2d 878 (Okla. Crim. App. 1996).
68. *See id.*
69. OKLA. STAT. tit 12 § 2403 (1991) provides that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise."
70. *See supra* note 20.

the evidence has permissible probative value which should then be weighed against the danger of unfair prejudice. Calling such evidence res gestae just evades the appropriate analysis.

Replacing res gestae with the above suggested analysis does not necessarily mean that the cases will be decided any differently. In *Mason v. State*,[71] the defendant was charged with first-degree manslaughter by virtue of having killed someone while driving under the influence. The Court of Criminal Appeals approved the admission of evidence that prior to the accident, the defendant had been driving through stop signs with her lights off and with an open container in the car. In concluding that such evidence was admissible as part of the res gestae of the charged offense, the court analyzed the evidence under the definition of res gestae.[72] The Court pointed out that the evidence of the open container tended to prove that she was driving under the influence which was a "material fact in issue."[73] The evidence that the defendant had been driving through stop signs with her headlights off was "relevant to prove the essential elements of the offense charged."[74]

The same analysis would apply under § 2404(B). The court would need to identify a permissible probative purpose other than character, which would be exactly the same ones identified by the court in *Mason*. The court would then need to weigh the probative value against the danger of unfair prejudice to determine ultimate admissibility. The case would most certainly come out the same way under both the res gestae and probative value-prejudicial effect analyses.

Since 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. What would be gained by dropping the phrase, however, would be clarity of analysis. Thus, the phrase res gestae should be eliminated from any future discussion of the admissibility of uncharged misconduct evidence, just as it has been eliminated in the hearsay context.

71. 868 P.2d at 725.
72. *See id.* at 725-26.
73. *Id.*
74. *Id.*