CONCURRING OPINION BY NAKAYAMA, J.

I respectfully concur in the result. Because the legislature intended that the Hawai'i Rules of Evidence ("HRE") serve as "a singular and primary source" for evidentiary rules, I agree that the ICA gravely erred by acknowledging the res gestae doctrine, inasmuch as the HRE supersedes the common law res gestae doctrine. See majority at 53-59. However, I write separately to emphasize the value and potential viability of res gestae evidence, as numerous federal courts that continue to rely on this doctrine have demonstrated.

A. The Continuing Importance of the Res Gestae Doctrine

As the majority explained, the res gestae doctrine historically admitted "otherwise inadmissible evidence" "to permit each witness to tell his or her story in a natural way . . . [and in] recognition of spontaneity as the source of special trustworthiness." Majority at 20 (quoting 2 Kenneth S. Broun, McCormick on Evidence § 268 at 245-46 (6th ed. 2006)). Allowing the development of the full story is critical at trial:

> It may be quite impossible to prove the case without revealing other crimes. The court cannot 'fragmentize the event under inquiry.' If an understanding of the event in question, or if a description of the immediate circumstances reveals other crimes than those charged, exclusion will lead to a highly artificial situation at the trial making understandable testimony unlikely.

United States v. Krezdorn, 639 F.2d 1327, 1332 (5th Cir. 1981) (footnotes and citation omitted)). After all, "[t]here is no reason to treat events minutes before the accident as part of a separate occurrence from the accident." Moody ex rel. Moody v. Ford Motor Co., No. 03-CV-0784-CVE-PJC, 2006 WL 3325425, at *4

(N.D. Okla. Nov. 14, 2006) (holding that evidence of a driver's speed prior to the accident is admissible because driver's "conduct during the time leading up to the accident is part of one event"). Moreover, background evidence

> has a causal, temporal or spatial connection with the charged offense. Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense.

United States v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000) (citing Jennifer Y. Schuster, Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence, 42 U. Miami Law Review 947 (March/May 1998).

Bad acts are admissible as res gestae evidence "to show the context of the crime when the bad acts are 'so intimately connected with and explanatory of the crime charged against the defendant and [are] so much a part of the setting of the case and its environment that [their] proof is appropriate in order to complete the story of the crime on trial.'" United States v. Powers, 59 F.3d 1460, 1466 (4th Cir. 1995)(holding that evidence of defendant's prior acts of physical acts against the victim is admissible in the trial of his charge of sexual abuse of a minor to show the defendant's control and victim's "inability to resist or report his violent acts"). See Robinson v. Whitley, 2 F.3d 562, 567 (5th Cir. 1993) (citing State v. Edwards, 406 So.2d 1331, 1351 (1981)) (holding that detailed evidence of defendant's criminal activity on the night of the alleged murder (stealing wine from a grocery store and attempting to steal the victim's car) is admissible in defendant's trial for murder because the

murder "did not occur in a vacuum").

Accordingly, this court has supported the admission of the defendant's prior bad act as res gestae evidence. See majority at 22-23 ("Territory v. Warren, 35 Haw. 232, 238-39 (1939) (in prosecuting for killing of a police officer, evidence that the defendant was operating house of prostitution admissible as res gestae); Territory v. Wilson, 26 Haw. 360, 361 (1922) (evidence of similar crime committed at the same time and same place admissible as res gestae"; Republic v. Tsunikichi, 11 Haw. 341 (1898)). In Tsunikichi, we affirmed the trial court's admission of evidence that the defendant killed his child before killing his wife under the res gestae doctrine. Tsunikichi, 11 Haw. at 344. We explained that this evidence "was a fact connected with the [charge] and forms part of one transaction and illustrates its character and by reason and upon authority it could not be properly excluded." Id. Under the same rationale and laws, in the instant case, the evidence regarding defendant's confrontation in the apartment may have been admissible under the res gestae doctrine.[1]

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[1] In the present case, the events that occurred immediately prior to the incident in question consisted as part of a larger occurrence and was therefore res gestae evidence. As the ICA opined,

> In total, Fetelee was agitated when he arrived home to find his parking stall blocked and his agitation, coupled with his intoxication, continued throughout the course of the early morning. The incident in Lopez's apartment, the exchange with Lincoln, and the unprovoked assault on the two Micronesian men were reasonably contemporaneous with one another. . . .
>
> These actions are not wholly independent or irrelevant to Fetelee's subsequent unprovoked assault on the two Micronesian men. It is evidence that was necessary to complete the story for the jury.

In light of the usefulness of the res gestae doctrine, many Federal courts, including the Fifth, Sixth, and Ninth Circuit, continue to admit res gestae evidence, even after adopting FRE Rule 404(b) (the nearly identical counterpart of HRE Rule 404(b)) in 1975. See majority at 30-31 (citing Hardy, 228 F.3d at 748 (explaining that res gestae evidence "does not implicate Rule 404(b)"), United States v. Daly, 974 F.2d 1215, 1217 (9th Cir. 1992) ("[E]vidence concerning other acts that are inextricably intertwined with the charged acts may be admitted."), and United States v. McDaniel, 574 F.2d 1224, 1227 (5th Cir. 1978) ("Evidence of other crimes, closely related in time and nature to the crime charged, may be admitted to establish the res gestae, that is, the common scheme or history of the crime, of which the other crimes constitute a part.")). See also United States v. Gonzales, 110 F.3d 936, 942 (2d Cir. 1997) ("It is well established that "evidence of uncharged criminal activity is not considered 'other crimes' evidence under [FRE] 404(b) if it 'arose out of the same transaction or series of transactions as the charged offense, if it [is] inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime [on] trial.'" (citations omitted)). But see majority at 29-30 ("observing that, for purposes of [FRE], the use of the term res gestae 'is essentially obsolete'" (citing Stephens v. Miller, 13 F.3d 998, 1003 (7th Cir. 1994))). Further, "courts [including

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State v. Fetelee, 114 Hawai'i 151, 157, 159, 157 P.3d 590, 596, 598 (App. 2007).

the Fifth, Eighth, Tenth, and Eleventh Circuit,] that have not expressly recognized the res gestae doctrine implicitly acknowledged its continued viability via the application of its underlying concept." Majority at 31. See majority at 31-33 (citing United States v. Weeks, 716 F.2d 830, 832 (11th Cir. 1983), United States v. Green, 175 F.3d 822, 831 (10th Cir. 1999), United States v. Johnson, 463 F.3d 803, 808 (8th Cir. 2006), United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990), and Krezdorn, 639 F.2d at 1332). The federal reliance of the res gestae doctrine in spite of the adoption of the FRE highlights this doctrine's present-day usefulness and continuing support.

B. Rejection of the Res Gestae Criticism

The majority observes that res gestae doctrine has been criticized for being (1) vague inasmuch as courts have ignored the traditional limitations and broadened the usage of this doctrine, (2) "harmful because, by its ambiguity, it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both," and (3) "useless because every rule of evidence to which it has ever been applied exists as part of some other well-established principle and can be explained in the terms of that principle." Majority at 28-29 (citing 2 Broun, McCormick on Evidence, § 269 at 246; quoting 6 John Henry Wigmore, Evidence in Trials at Common Law § 1767 at 253 (Chadbourn rev. 1976)). However, I do not believe that these arguments are persuasive.

Res gestae evidence is not unlimited. Rather, the

doctrine admits background evidence which "consists of those other acts that are inextricably intertwined with the charged offense or those acts, the telling of which is necessary to complete the story of the charged offense." United States v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000). See United States v. Hinojosa, No. 1:06-cr-093, 2007 WL 3347878, at *2 (W.D. Mich. Nov. 7, 2007) ("The required connection between res gestae evidence and the charged offense imposes severe limitations on the admission of background evidence and, when properly analyzed, is not an open ended invitation to admit any evidence of a prior bad act."). See also majority at 24-25 (citing Territory of Hawai'i v. Lewis, 39 Haw. 635 (1953) (defining and limiting the application of res gestae)).

In addition, the trial court must determine whether the evidence conforms with HRE Rule 403, which excludes evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Thus, while the res gestae evidence may be prejudicial against the defendant, it will not be admitted if the unfair prejudice substantially outweighs the probative value of the evidence. Admittedly, these limitations give the trial court discretion regarding the admission of the evidence. However, the trial court is often required to make a "judgment call" when determining the

admissibility of evidence. See HRE Rule 403;[2] HRE Rule 404(b);[3] HRE Rule 803(24);[4] State v. Pulse, 83 Hawai'i 229, 246, 925 P.2d 797, 814 (1996) ("The traditional abuse of discretion standard should be applied in the case of those rules of evidence that require a "judgment call" on the part of the trial court"). In the same way, because the HRE cannot account for every situation, it is appropriate that the trial court has discretion to determine whether to admit res gestae evidence according to the facts of the case.

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[2] HRE Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[3] HRE Rule 404(b) provides:

> Other crimes, wrongs, or acts. 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 where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

See Hadley, 918 F.2d at 850 (explaining that the district judge has "wide discretion" when determining whether evidence is admissible under HRE Rule 404(b)).

[4] HRE Rule 803(24) provides in pertinent part:

> A statement not specifically covered by any of the exceptions in this paragraph (b) but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Accordingly, the res gestae doctrine alongside HRE Rule 404 would not create ambiguity or uncertainty. HRE Rule 404 excludes most types of character evidence because, as the legislature recognized, it is "of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion." State v. Pemberton, 71 Haw. 466, 471-72, 796 P.2d 80, 83 (1990) (quoting HRE Rule 404, Commentary (quoting [Federal Rules of Evidence ("FRE")] Rule 404 advisory committee's note)). HRE Rule 404(b), an "inclusionary rule," admits evidence "'only when it proves nothing but the defendant's criminal propensities,'" and conforms with Rule 403. United States v. Hadley, 918 F.2d 848, 850 (9th Cir. 1990) (citations omitted). However, because res gestae evidence must pass through the portals of HRE Rule 403, res gestae evidence would not be unfairly prejudicial in contradiction of the purpose or policy of HRE Rule 404(b).[5] See Krezdorn, 639 F.2d at 1332 ("It matters little whether the evidence is viewed as lying beyond the scope of Rule 404, or as satisfying the test of Rule 404(b) since it is being used to enhance the trier's understanding of the event, and not to prove propensity." (citation omitted) (emphasis added)).

C. Res Gestae Doctrine In the Wake of the HRE

Although I join the majority in its holding that the HRE supersedes the res gestae doctrine, I do not believe that the

[5] Although HRE Rule 404(b) is not implicated when evidence is admitted under res gestae, see United States v. Riebold, 135 F.3d 1226, 1229 (1998), because the application of the facts under HRE Rule 404(b) and the res gestae doctrine may produce two results, it is important that the result under one rule does not conflict with the purpose or policy of the other.

common law is antiquated. See United States v. Abel, 469 U.S. 45 (1984). In Abel, the United States Supreme Court discussed the role of common law in light of the enactment of the FRE, as follows:

> In principle, under the Federal Rules no common law of evidence remains. 'All relevant evidence is admissible, except as otherwise provided. . . .' In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.

Id. at 51 (quoting Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908, 915 (1978)). Thus, I believe that the res gestae doctrine remains valuable, but

> we are not at liberty to interpret a statutory provision to further a policy that is not articulated in either the language of the statute or the relevant legislative history, even if we believe that such an interpretation would produce a more beneficent result, for 'the Court's function in the application and interpretation of such laws must be carefully limited to avoid encroaching on the power of [the legislature] to determine policies and make laws to carry them out.'

Ross v. Stouffer Hotel Co., 76 Hawai'i 454, 467, 879 P.2d 1037, 1050 (1994) (Klein, J., concurring and dissenting) (quoting Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 256-57 (1970) (Black, J., dissenting)). For this reason, I write separately to emphasize the ongoing importance of the res gestae doctrine, but I must concur in the majority's result.

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