FILED
10:30 O'Clock A M
FEB 03 2011
JEANNE HICKS, Clerk
BY Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NUMBER: V1300CR201080049

Date: February 3, 2011

TITLE:	COUNSEL:
STATE OF ARIZONA	Sheila Sullivan Polk Yavapai County Attorney Bill Hughes, Esq. Steven Sisneros, Esq. Deputy Yavapai County Attorneys
(Plaintiff)	(For Plaintiff)
vs.	
JAMES ARTHUR RAY	Thomas K. Kelly, Esq. 425 E. Gurley Prescott, AZ 86301 Luis Li, Esq. Brad Brian, Esq. Truc Do, Attorney at Law Miriam Seifter, Attorney at Law MUNGER TOLLES & OLSON LLP 355 S. Grand Avenue, 35th Fl. Los Angeles, CA 90071
(Defendant)	(For Defendant)

UNDER ADVISEMENT RULING ON DEFENDANT'S MOTION IN LIMINE (NO. 1) TO EXCLUDE INADMISSIBLE EVIDENCE OF PRIOR BAD ACTS PURSUANT TO ARIZ.R.EVID. 404(b) and 403

The Court has considered the Defendant's Motion, the Response, the Reply, the Defendant's Supplemental Brief Regarding Motion in Limine (No.1), the State's Memorandum Re: 404(b) Acts, and the evidence admitted at the 3-day hearing on this motion including, along with the other extensive material provided to this Court, the State's Offer of Proof and Exhibits in Support Thereof.

In an attempt to focus the issues presented, the Court has relied largely on the Defendant's Supplemental Brief Regarding Motion in Limine (No.1) and the State's Memorandum Re: 404(b) Acts, copies of which were received by this division on December 7, 2010. The summary contained in the State's Memorandum indicates that the State seeks to introduce evidence relating to sweat lodge ceremonies for the four consecutive years (2005-2008) preceding the October 2009 ceremony. It appears to this Court that this

proffered evidence falls into two, related categories: (1) alleged signs and symptoms of illness or "medical distress" in some participants; and (2) alleged similarity in the manner in which the sweat lodge ceremonies of 2005 through 2008 and the sweat lodge ceremony of 2009 were conducted.

(A) Alleged signs of illness or "medical distress" in some sweat lodge participants.

The Court concludes that the State has shown by clear and convincing evidence that some participants in some of the sweat lodge ceremonies conducted prior to 2009 exhibited various signs or indications that a reasonable person with no specialized medical training and experience would associate with unusual or abnormal physical or mental conditions. Specifically, these signs or indications are as follows: vomiting, problems with balance, disorientation or incoherence, unresponsiveness, shaking violently or convulsions, and apparent loss of consciousness. The State has also presented evidence that a person experienced headache and other symptoms in the 2008 ceremony. As the Defendant argues, however, the State has not proved by clear and convincing evidence that any of the persons who exhibited these indications of "distress" were at risk of dying. Thus, under Rule 404(b) analysis, the question becomes whether this type of evidence would be admissible pursuant to Rules 404(b) and 403 despite the dissimilarity between the types of harm allegedly suffered by participants in the pre-2009 events and the deaths associated with the 2009 sweat lodge.

(1) Purpose for the evidence of alleged "medical distress."

The State argues that the evidence of alleged physical and mental problems of participants is not offered to prove that the Defendant was acting in conformity with a trait of character; rather, the State argues that the evidence is offered for the proper purpose under Rule 404(b) of showing that the Defendant had knowledge of the medical consequences of his sweat lodge ceremonies. The Court concludes, however, that without medical testimony connecting the observations of physical and mental distress exhibited by the pre-2009 sweat lodge participants with a risk of death and without evidence of the Defendant's knowledge of the actual type of risk, the proffered evidence is not relevant to the stated purpose.

This Court recognizes that evidence of an "other act" may be admissible even though the harm caused by the other act is in some ways dissimilar to the harm caused by the conduct for which a defendant is being tried. However, other than the medical records relating to Mr. Daniel P, a participant in the 2005 sweat lodge, there is no evidence that any other participant in a pre-2009 sweat lodge ceremony ever sought or was administered actual, professional medical care of any kind as a result of that activity. And, as noted by the defense, the evidence does not suggest that Daniel P was suffering a life-threatening condition. Without medical testimony or other substantial medical evidence to the contrary, evidence of the alleged disturbing physical and mental manifestations exhibited by pre-2009 sweat lodge participants is not sufficiently similar to the medical conditions associated with deaths in 2009 to show relevance to the issue of knowledge (conscious disregard of a substantial and unjustifiable risk) in a manslaughter case.

(2) Whether the State has shown that the Defendant had knowledge of the alleged physical and mental problems exhibited by participants.

The defense argues that even if the State has shown that participants suffered "medical distress" in pre-2009 sweat lodge events, "the State offered no evidence whatsoever that Mr. Ray knew participants had suffered" this "medical distress." Because the Court has determined that knowledge of such signs (or lay observations) as vomiting or convulsions would not constitute notice of a substantial risk of death for purposes of Rule 404(b) analysis, the question of whether the Defendant had knowledge of these alleged effects is irrelevant with regard to the manslaughter charges.

(B) Alleged similarity in the manner in which the sweat lodge ceremonies of 2005 through 2008 and the sweat lodge ceremony of 2009 were conducted.

The Court concludes that the State has shown by clear and convincing evidence that the sweat lodge ceremonies were conducted in a similar fashion for the years 2005 through 2009. There appears to be little dispute between the parties as to the sequence and timing of activities, the general construction of the lodges, and the general manner in which the ceremonies were conducted.

The evidence of alleged signs and symptoms of physical or mental distress in some participants is not, in itself, other-act evidence. The evidence of medical conditions only has meaning in the context of Rule 404(b) analysis as it relates to the manner in which the sweat lodge ceremony and other events were conducted. The State argues that the sweat lodge ceremonies conducted between 2003 and 2009 were "similar in many striking and irrefutable ways to the sweat lodge ceremony in 2009." Thus, according to the State, the evidence of similarity among the ceremonies is admissible for the purpose of showing that the Defendant had notice or knowledge that the manner in which he purposely conducted these sweat lodge ceremonies and other Spiritual Warrior activities such as the Vision Quest resulted in some sweat lodge participants suffering life-threatening medical conditions.

As noted above, the Court has concluded that the evidence presented in this 404(b) proceeding does not establish that the harm manifested by signs and symptoms associated with some pre-2009 sweat lodge participants was similar for purposes of Rule 404(b) analysis to the life-threatening and fatal conditions suffered by some participants in 2009. Assuming that the Defendant was aware of the various signs and symptoms associated with pre-2009 participants, this knowledge would not constitute notice that he allegedly was subjecting these participants to a substantial and unjustifiable risk of death. As noted above, despite the large number of participants, there is no substantial medical evidence that any of the persons attending the pre-2009 Spiritual Warrior events suffered a life-threatening condition. Therefore, with regard to manslaughter charges, evidence of the similarity of the way in which the sweat lodge and other ceremonies were conducted from year-to-year is not relevant and admissible on the issues of knowledge (i.e., conscious disregard of a known risk) and absence of mistake or accident.

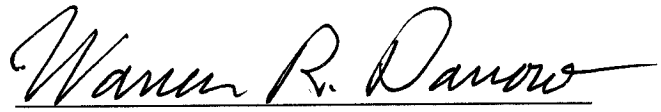
(C) Lesser-included offense.

Rule 13.2(c) of the Arizona Rules of Criminal Procedure (Notice of Necessarily Included Offenses) provides that "[s]pecification of an offense in an indictment, information, or complaint shall constitute a charge of that offense and all offenses necessarily included therein." Negligent homicide is a lesser-included offense of manslaughter. *State v. Parker*, 128 Ariz. 107, 109, 624 P.2d 304, 306 (App.1980), *vacated in part on other grounds* 128 Ariz. 97, 624 P.294 (1981). The possible admissibility of the other-act evidence in the

context of a lesser-included offense has not been directly presented to the Court and is not addressed in this ruling.

IT IS ORDERED that during the State's case-in-chief "other-act" evidence relating to the manner of conducting sweat lodge ceremonies and to the physical and mental effects observed in or experienced by participants is not admissible under Rule 404(b) with regard to the charges of manslaughter.

DATED this 3rd day of February, 2011.



Warren R. Darrow
Superior Court Judge

cc: Victim Services Division