Core Evidence Rules II – Rules of Relevance

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Rule 401. Definition of "Relevant Evidence"

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

> All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

Definition of "Relevant Evidence"

This definition includes two main components. First, the evidence must be material, i.e., that the proposition for which the evidence is offered must be of consequence to the determination of the case. Second, the evidence must be probative, i.e., it must make the existence of the fact more probable or less probable than it would be without the evidence. Tennison v. State, 969 S.W.2d 578 (Tex. App. -- Texarkana 1998, no pet.).

Test For Relevancy

In determining relevancy, the appellate court looks at the purpose for offering the evidence and whether there is a direct or logical connection between the offered evidence and the proposition to be proved. If there is a reasonable logical nexus, the evidence passes the relevancy test. Fletcher v. State, 852 S.W.2d 271, 271-77 (Tex.App.--Dallas 1993, pet. ref'd). In reviewing a trial court's determination that evidence is relevant, the ruling will be upheld absent an abuse of discretion. Montgomery v. State, 810 S.W.2d 372, 390-91 (Tex.Crim.App.1990) (op. on reh'g). An appellate court should hold that a trial court has abused its discretion only in those instances where the court can say with confidence that by no reasonable perception of common experience could the trial court have concluded that the contested evidence had a tendency to make the existence of a fact or consequence more or less probable than it would have been without the evidence. Id. Relevance is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly provable in the case. Montgomery, 810 S.W.2d at 375. Moreover, the evidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence. Id. at 376.

Policy of Rules -- Presumption of Admissibility

The Texas Rules of Criminal Evidence (now "Texas Rules of Evidence")favor the admission of all logically relevant evidence. Hawkins v. State, 871 S.W.2d 539, 541 (Tex.App.--Fort Worth 1994, no pet.), citing Montgomery v. State, 810 S.W.2d 372, 375 (Tex.Crim.App.1990)

Same Transaction / Contextual Evidence

Facts and circumstances surrounding commission of an offense are relevant. Evidence of how the offense developed and progressed is necessary for jury to have complete picture of what occurred. Yates v. State, 941 S.W.2d 357 (Tex. App. -- Waco 1997, pet. ref'd).

Rule 403. Exclusion of Relevant Evidence on Special Grounds

> 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, or needless presentation of cumulative evidence.

Test For Admissibility of Extraneous Offense, Review

In order for evidence of an extraneous offense to be admissible, a two-part test must be met. First, the transaction must be relevant to a material issue in the case, and second, the relevancy value of the evidence must outweigh its inflammatory or prejudicial potential. Montgomery v. State, 810 S.W.2d 372, 390-91 (Tex.Crim.App.1990); Crank v. State, 761 S.W.2d 328, 342 (Tex.Crim.App.1988), cert. denied, 493 U.S. 874, 110 S.Ct. 209, 107 L.Ed.2d 162 (1989). We review the trial courts actions regarding the admissibility of such evidence under an abuse of discretion standard. Saenz v. State, 843 S.W.2d 24, 26 (Tex.Crim.App.1992). As long as the trial court's ruling was at least within the zone of reasonable disagreement, an appellate court will not intercede. Montgomery, 810 S.W.2d at 391. However, where an appellate court can say with confidence that by no reasonable perception of common experience can it be concluded that proffered evidence has a tendency to make the existence of a fact of consequences more or less probable than it would otherwise be, then it can be said that the trial court abused its discretion in admitting that evidence. Perry v. State, 933 S.W.2d 249, 253 (Tex. App. -- Corpus Christi 1996, pet. ref'd).

Preservation of Error

To properly preserve error with regard to inadmissible extraneous offense evidence, a party must first object under Rule 404(b) that the evidence is irrelevant. Once that objection is made, the

proponent of the evidence must then satisfy the trial court that the evidence has relevance apart from its tendency to prove character conformity. Once the trial court rules that the evidence is relevant apart from character conformity, the opponent must then object that the evidence, although relevant, should not be admitted because its probative value is substantially outweighed by the danger of unfair prejudice. The court then is required to conduct a balancing test to determine that question. Montgomery v. State, 812 S.W.2d 372, 388-90 (Tex. Crim. App. 1991)(on rehearing); Beasley v. State, 838 S.W.2d 695 (Tex.App.--Dallas 1992, no pet.).

Balancing Analysis

The relevant criteria in determining whether the prejudice of an extraneous offense outweighs its probative value include:

(1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable--a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense;

(2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way";

(3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense;

(4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute. Santellan v. State, 939 S.W.2d 155, 169 (Tex.Crim.App.1997)

The question of prejudice is not solely a function of whether the jury would likely convict appellant of the wrong offense, or for "general criminality." Evidence of "other crimes, wrongs, or acts" may also create "unfair prejudice" if under the circumstances a jury would be more likely to draw an impermissible character conformity inference than the permissible inference for which the evidence is relevant, or if it otherwise distracts the jury from "the specifically charged offense" and invites them to convict on a moral or emotional basis rather than as a reasoned response to the relevant evidence. Montgomery v. State, 810 S.W.2d 372, 395 (Tex. Crim. App. 1991)(on rehearing).

Once a party objects to evidence under Rule 403, the trial court must engage in the balancing process. Montgomery, 810 S.W.2d at 389. The court should question the proponent of the evidence as to his need for the evidence, and the opponent as to the prejudicial effect the evidence will have. The trial court, however, is not required to make these inquiries, and a failure to do so will not necessarily constitute an abuse of discretion. See e.g., Houston v. State, 832 S.W.2d 180, 185 (Tex.App.--Waco 1992), pet. dism'd, improvidently granted, 846 S.W.2d 848 (Tex.Crim.App.1992). Further, a trial court is not required to affirmatively state on the record either that he has conducted a balancing test or his reasons for the ruling. Nolen v. State, 872 S.W.2d 807 (Tex.App.--Fort Worth 1994, pet. ref'd); Houston, 832 S.W.2d at 183-84.

In reviewing the trial court's determination of the probative and prejudicial value of evidence

under Rule 403, we do not make a de novo determination, but reverse only upon a clear abuse of discretion. Montgomery, 810 S.W.2d at 392. But, reviewing for abuse of discretion in this context requires more than deciding that the trial judge did in fact conduct the required balancing between probative and prejudicial values; the trial court's determination must be reasonable in view of all relevant facts. Id. at 392. Accordingly, if the record reveals criteria reasonably conducing to a risk that the probative value of the tendered evidence is substantially outweighed by unfair prejudice, then the trial court acted irrationally in admitting it and abused its discretion. Rachal v. State, 917 S.W.2d 799, 808 (Tex. Crim. App. 1996).

Presumption of Admissibility

Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. Montgomery v. State, 810 S.W.2d 372, 389 (Tex.Crim.App.1990).

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) Character of victim. In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608 and 609.

(b) 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 for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

Test For Relevance

When a party introduces evidence for a purpose other than character conformity under Rule 404(b) it must be relevant; that is, the other purpose for which the party proffers the evidence must "tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rankin v. State, 974 S.W.2d 707, 719-20 (Tex.Crim.App.1998) (op. on reh'g);
Mozon v. State, 991 s.w.2d 841, 846 (Tex. Crim. App. 1999). But, reading Rule 404(b) in light of Rule 401 and Rule 402, if evidence 1) is introduced for a purpose other than character conformity, 2) has relevance to a "fact of consequence" in the case and 3) remains free of any other constitutional or statutory prohibitions, it is admissible. Rankin v. State, 974 S.W.2d 707, 719-20 (Tex.Crim.App.1998) (op. on reh'g).

"Opening the Door"

The general rule is that if an accused creates what is purported to be a false impression about his nature as a law abiding citizen or his propensity for committing criminal acts, he has opened the door for his opponent to present rebuttal evidence. Delk v. State, 855 S.W.2d 700, 704 (Tex.Crim.App.1993). Nevertheless, a trial court must proceed cautiously when encountering the situation and subsequently permitting the State to proceed with rebuttal evidence. The trial court must be assured of two things before granting the State permission to continue. The first is that the accused indeed opened the door, and second, that the door was opened far enough to allow the State to use the evidence it intends to use. Rodriguez v. State, 974 S.W.2d 364, 368 (Tex.App.--Amarillo 1998, pet. ref'd). As to the former, it is clear that only the accused has the authority to open the door; the State cannot do so via its examination of a witness or the defendant. Hammett v. State, 713 S.W.2d 102, 105 n.4 (Tex.Crim.App.1986); Shipman v. State, 604 S.W.2d 182, 184-85 (Tex.Crim.App.1980). As to the latter, it is similarly clear that while the door may be opened, it is not necessarily opened for everything to pass through. In effect, the rebuttal evidence cannot exceed the scope of 1) the question posed by appellant, and 2) the answer given to it. Delk, 855 S.W.2d at 703-05; Hammett, 713 S.W.2d at 105-07. Furthermore, the "open the door" exception to the general rule of inadmissibility of extraneous offenses or bad acts is not broadly construed. Rather, it is generally limited to those instances in which a witness makes assertions about his past which are either patently untrue, or clearly misleading. See Orozco v. State, 164 Tex.Crim.App. 630, 301 S.W.2d 634 (1957); Lewis v. State, 933 S.W.2d 172, 179 (Tex.App.--Corpus Christi 1996, pet. ref'd).

Standard For Admissibility of Extraneous Offenses

The standard of admissibility for extraneous offense evidence is also proof beyond a reasonable doubt. Harrell v. State, 884 S.W.2d 154, 159 (Tex. Crim. App. 1994).

If the defendant so requests at the guilt/innocence phase of trial, the trial court must instruct the jury not to consider extraneous offense evidence admitted for a limited purpose unless it believes beyond a reasonable doubt that the defendant committed the extraneous offense. George v. State, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994).

Same Transaction / Contextual Evidence

Where several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony ... of any one of them cannot be given without showing the others, this evidence is evidence of same transaction contextual evidence which is an exception to Rule 404(b) and is thus admissible. However, in addressing this issue, it is important that we also take into consideration the fact that this Court has held that "same transaction contextual evidence," is admissible under Rule 404(b) "only to the extent that it is necessary to the jury's understanding of the offense." England v. State, 887 S.W.2d 902, 915 (Tex.Cr.App.1994). Such evidence is admissible only "when the offense would make little or no sense without also bringing in the same transaction evidence." Pondexter v. State, 942 S.W.2d 577, 584 (Tex. Crim. App. 1996).

"First Aggressor" and "Defendant's State of Mind" in Self Defense

Under the evidentiary rules evidence of other crimes, wrongs, or acts are inadmissible to prove character conformity. Tex.R.Crim. Evid. 404(a). As an exception to this general ban on character evidence, however, a defendant may offer evidence of a victim's character or pertinent character trait. Tex.R.Crim.Evid. 404(a)(2). Consequently, evidence of a victim's character for violence remains admissible to show the victim was the first aggressor. Mozon v. State, 991 s.w.2d 841, 845-46 (Tex. Crim. App. 1999).

A victim's extraneous acts of violence also remain admissible to show the defendant's state of mind. Tex.R.Crim.Evid. 404(b). Though Rule 404(a) prohibits the use of extraneous acts to prove character conformity, such evidence may be admissible for purposes other than proving character assuming the purpose for which the evidence is proffered is relevant. Mozon v. State, 991 s.w.2d 841, 846 (Tex. Crim. App. 1999).

Rule 405. Methods of Proving Character

(a) Reputation or Opinion. In all cases in which evidence of a person's character or

character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify at the guilt stage of trial concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which a person's character or character trait is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct.

"Do You Know" and "Have Your Heard" Questions:
Cross-Examination Under Rule 405(a)

"Do you know" questions are permissible under Tex.R.Crim.Evid. 405(a) and 404(a)(1). Rule 404(a)(1) now allows an accused to offer general reputation or opinion testimony to prove character. Thomas v. State, 759 S.W.2d 449, 452 (Tex.App.-- Houston [14th Dist.] 1988, pet. ref'd). However, the old general limits on cross-examination still apply. Specifically, while reputation witnesses are asked "have you heard" questions, opinion witnesses are asked "do you know" questions. Id. The exception to this rule is where a witness "converts himself from a reputation witness to an opinion witness and vice versa." Id. The rationale is that reputation witnesses may be asked "have you heard" questions in order to test the weight of their testimony. Id. Opinion witnesses are asked "do you know" questions to test the basis of their personal opinions. Id.

Tex.R.Crim.Evid. 405(a) also allows "do you know" questions to be asked of opinion witnesses. Rule 405(a) states that "[i]n all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct." See Lancaster v. State, 754 S.W.2d 493, 495 (Tex.Civ.App.--Dallas 1988, pet. ref'd). However, the "right to cross-examine a character witness on specific instances of a defendant's conduct is subject to two limitations: first, there must be some factual basis for the incidents inquired about; and second, those incidents must be relevant to character traits at issue in the trial." Id. at 496. The foundation for inquiring into the specific instances of conduct must be laid outside the jury's presence. Reynolds v. State, 848 S.W.2d 785, 788 (Tex. App. -- Houston [14th Dist.] 1993, pet.ref'd).

What is an "Essential Element?"

A victim's character is not an essential element of a claim of self-defense. "Character per se is almost never an element of a charge or defense in criminal cases." Goode, Wellborn, & Sharlot, Guide to the Texas Rules of Evidence: Civil and Criminal § 405.2 (2nd ed.1993). See Gilbert v. State, 808 S.W.2d 467, 473 (Tex.Crim.App.1991); Purtell v. State, 761 S.W.2d 360, 370

(Tex.Crim.App.1988), cert. denied, 490 U.S. 1059, 109 S.Ct. 1972, 104 L.Ed.2d 441 (1989) (the victim's character is not an essential element of the offense of capital murder, nor is it an essential element of a defense to capital murder); U.S. v. Keiser, 57 F.3d 847 (9th Cir.1995). But compare U.S. v. Thomas, 134 F.3d 975, 980 (9th Cir.1998), in which it was held that predisposition is in fact an essential element of the defensive theory of entrapment and evidence of predisposition is admissible under Rule 405(b). Tate v. State, 981 S.W.2d 189, 193 (Tex.Crim.App. 1998).

For self-defense (first aggressor & defendant's state of mind), use Rule 404(a). The character of the victim is not one of the elements under Tex. Penal Code 9.31, thus Rule 405(b) does not apply.