TEXAS RULES OF CRIMINAL EVIDENCE

SIGNIFICANT DECISIONS

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Applicability of Rules

Jackson v. State, 861 S.W.2d 259, 261 (Tex. App. -- Dallas, no pet.)

> Legislature has right to create rules of evidence; it has granted limited power of delegation to S.Ct. & TCA to draft rules unless & until disapproved by the Legislature; citing **Tex. Const.** art. V, § 31 (admitting evidence of prior juvenile adjudications at punishment).

Boyle v. State, 820 S.W.2d 122, 144 (Tex. Crim. App. 1989)

> Procedural statutes changing rules of admissibility of evidence control litigation from their effective date. See also Medrano v. State, 768 S.W.2d 502, 504 (Tex. App. -- El Paso 1989, pet. ref'd) Tumlinson v. State, 757 S.W.2d 440, 443 (Tex. App. --Dallas 1988, pet. ref'd).

Interpretation of Rules

Bodin v. State, 807 S.W.2d 313, 317 (Tex. Crim. App. 1991)

> "Generally, the Texas Rules of Criminal Evidence were patterned after the Federal Rules of Evidence. Cases interpreting federal rules should be construed for guidance with regard to Texas Evidence Rules, unless the Texas rule clearly departs from its federal counterpart." See also Cole v. State, 839 S.W.2d 798, 801 (Tex. Crim. App. 1990)(lengthy discussion, numerous cites in noting that "cases interpreting federal rules should be consulted for guidance as to their scope and applicability unless the Texas rule clearly departs from its federal counterpart"); Campbell v. State, 718 S.W.2d 712, 716 (Tex. Crim. App. 1986).

Tex. R. Crim. Evid. 103(a) effect of erroneous ruling

Kirchner v. State, 739 S.W.2d 85, 87 (Tex. App. --San Antonio 1987, no pet.)

> Error may not be predicated upon a ruling that excludes evidence unless a substantial right of a party is affected. Here evidence contained in bill of exceptions as to impeachment with prior inconsistent statement so minute as to be harmless. Passing reference to rule 803(3). *See also McDuffie v. State*, 854 S.W.2d 195, 211, 211 n.6 (Tex. App. — Beaumont 1993, no pet.).

Tex. R. Crim. Evid. 103(a) specific & timely objections

Morales v. State, 951 S.W.2d 59, 62-63 (Tex. App. — Corpus Christi 1997, no pet.)

> "[A]n error may be predicated upon a timely objection so long as its specific ground is apparent from the context. (Citing Rule 103(a)). In this case, the request for the "Jackson v. Denno hearing," which immediately followed the officer's assertion that the statement was given voluntarily, was clearly a challenge to the voluntariness of the statement. In this regard, appellant did preserve the point for our consideration."

Hoyos v. State, 951 S.W.2d 503, 507 (Tex. App. — Houston [14th Dist.] 1997, no pet.)

In this case, the appellant's counsel objected to a denial of the right to confrontation by objecting "under the authority of *Van Ardsall* and *Davis*," two seminal confrontation cases. This, the court held, was sufficient to preserve error on the issue of confrontation. "To preserve error a party must simply 'let the trial judge know what he wants, why he things himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.'" (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Cr. App. 1992)).

Lankston v. State, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)

English, not legalese, is sufficient language to make a specific objection; "all a party has to do ... is to let the trial judge know what he wants, why he thinks himself entitled to it and to do so clearly enough for the judge to understand him at the time when the trial court is in a proper position to do something about it."

Hernandez v. State, 825 S.W.2d 765, 770 (Tex. App. -- El Paso 1992, no pet.)

Stating that since Civil Rule 103(a)(1) specifically states that objections and rulings made outside the presence of the jury need not be repeated in front of them while the criminal rule does not contain that additional language, any objections to the admissibility of evidence that were made outside the presence of the jury must be repeated in their presence in criminal proceedings. Appears to be incorrectly decided. See Ethington v. State, 819 S.W.2d 854 (Tex. Crim. App. 1991)(reiterating that objection made and ruled upon outside jury's presence preserves issue for appeal as long as opponent does not affirmatively state "No objection" when evidence offered to jury).

Imo v. State, 822 S.W.2d 635, 636 (Tex. Crim. App. 1991)

Sloppy, inartful, incomplete objections are sufficient to preserve error if the objection draws court's and opponent's attention to the specific error complained of.

Berry v. State, 813 S.W.2d 636, 638-40 (Tex. App. --Houston [14th Dist.] 1991, no pet.)

Refusing to address asserted error when defendant made "shotgun" general objections citing numerous constitutional and statutory bases. Reliance upon Tex. R. App. P. 52(a); no citation to rule 103 which would also apply. "A trial court cannot be forced to sift through dozens of general objections in an effort to determine which complaints, if any, have merit. To hold otherwise, would be to permit counsel to conceal valid objections in a sophistic fog and defeat the true purpose of Rule 52(a)."

Andrews v. State, 794 S.W.2d 46, 49 (Tex. App. -- Texarkana 1990, pet. ref'd)

Objection that "proper predicate" for admission of photographs of deceased was not laid is too general to preserve error. Objections must be timely & specific in pointing out precisely what is objectionable.

Sattiewhite v. State, 786 S.W.2d 271, 283 n. 4 (Tex. Crim. App. 1989), *cert. denied*, 111 S.Ct. 2891 (1991)

No reference to rule, but noting that a running objection will not preserve error whenever that matter is brought up again at trial. "An advocate who lodges a running objection should take pains to make sure it does not encompass too broad a time or over different witnesses." See also Ethington v. State, 819 S.W.2d 854 (Tex. Crim. App. 1991)(running objections are permissible and favored whenever a continuous stream of objections would be disruptive); Killibrew v. State, 746 S.W.2d 245, 247 (Tex. App. -- Texarkana 1987, pet. ref'd)(Beware of "running objections" that do not precisely specify the witness, the topic, the testimony, and the extent of the objection. Here defense attorney failed to make specific objection to inadmissible portions of 12 page document).

Tex. R. Crim. Evid. 103(b) offer of proof

Kipp v. State, 876 S.W.2d 330, 333 (Tex. Crim. App. 1994)

> Defendant has an absolute right to make offer of proof by question & answer even on a bill of exceptions and even when determining preliminary issues under Rule 104(a) during pre-trial hearings.

Dopico v. State, 752 S.W.2d 212, 215 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref'd)

> Defendant may demand question & answer format for his offer of proof. It is error for trial court to require bill of exceptions in affidavit form. Rule 103 is mandatory and gives either party right to decide how his offer of proof shall be made.

Tex. R. Crim. Evid. 103(c) hearing of jury

Nelson v. State, 765 S.W.2d 401, 403 (Tex. Crim. App. 1989)

> When defendant testified outside presence of jury on preliminary issue of admissibility of prior convictions during guilt stage, this testimony is inadmissible to impeach his testimony given before jury at punishment stage.

Tex. R. Crim. Evid. 104(a) preliminary questions

Harrell v. State, 884 S.W.2d 154, 157-59 (Tex. Crim. App. 1994)

> Major case. Proof beyond a reasonable doubt required for admission of extraneous offense evidence; TCA declines to follow Huddleston v. United States, 485 U.S. 681 (1988).

Johnson v. State, 803 S.W.2d 272, 284 & n. 10 (Tex. Crim. App. 1990), *cert. denied*, 111 S.Ct. 2914 (1991)

> Trial court not bound by rules of evidence, except those relating to privileges, in determining preliminary questions of admissibility. Nonetheless, such evidence should always be relevant and reliable. Lengthy discussion and citation to **C. Wright & K. Graham,** 21 **Federal Practice and Procedure** § 5055.

Casillas v. State, 733 S.W.2d 158, 168 (Tex. Crim. App. 1986), cert. denied, 108 S.Ct. 277 (1987)

> When judge determines that co-conspirator's statement is admissible under rule 104, he does not give a limiting charge on admissibility of co-conspirator's statement to jury; cites United States v. James, 590 F.2d 575 (5th Cir. 1979), and follows federal reasoning because Texas rule follows federal rule.

Tex. R. Crim. Evid. 104(b) conditional relevancy

Rosales v. State, 867 S.W.2d 70, 72 (Tex. App. -- El Paso 1993, no pet.)

> "Evidence should not be excluded merely because its relevance may depend upon the production of additional evidence at a later point in the trial or because its probative strength is alone insufficient to prove a significant fact."

Lookingbill v. State, 855 S.W.2d 66, 70 (Tex. App. -- Corpus Christi 1993, pet. ref'd)

> Opponent of evidence admitted as conditionally relevant has duty to object that proponent never did "connect up" evidence admitted under 104(b); trial court does not have independent duty to exclude.

Tex. R. Crim. Evid. 105 limited admissibility

Rankin v. State, ___ S.W.2d ___, 1996 WL 165014 at **5 (Tex. Cr. App. 1996)

> Limiting instructions should be given at the earliest opportunity — when the evidence comes in. The court should not wait until the jury charge to give a limiting instruction for the first time. Case remanded to the court of appeals for a harm analysis.

Wood v. State, 822 S.W.2d 213, 216 (Tex. App. -- Houston [1st Dist.] 1991), *remanded on other grounds*, 828 S.W.2d 13 (Tex. Crim. App. 1992)

> When party is objecting to a document that contains some inadmissible evidence (here hearsay), he must specify exactly which portions are inadmissible hearsay; if he fails, court does not err in admitting entirety.

Thompson v. State, 795 S.W.2d 177, 178 (Tex. Crim. App. 1990)(Miller, J., joined by Clinton & Teague, J.J., dissenting)

> Trial court must give oral limiting instruction at time evidence offered for limited purpose as well as in written jury instructions. [This dissent was adopted by majority of the court in Abdnor v. State, 808 S.W.2d 476, 477-78 (Tex. Crim. App. 1991)].

Richardson v. State, 786 S.W.2d 335, 337 (Tex. Crim. App. 1990)

> When defendant introduced plea papers of co-defendant who had pled guilty and signed "along with" stipulation, he could not request limiting instruction in jury charge that "along with" stipulation was offered by State solely for impeachment purposes of co-defendant who testified for defendant. Defendant had offered plea papers without limitation, thus jury could use "along with" stipulation as direct evidence of defendant's guilt.

Hernandez v. State, 750 S.W.2d 902, 905 (Tex. App. -- Corpus Christi 1988, no pet.)(Nye, C.J., dissenting)

> The party opposing an offer of evidence has the burden of requesting a correct limiting instruction where evidence is admissible for a limited purpose only and the court admits evidence without limitation.

Simon v. State, 743 S.W.2d 318, 324 (Tex. App. -- Houston [1st Dist.] 1987, pet. ref'd)

> When statements are admissible as a valid exception to hearsay rule against one co-defendant, but not other, court should clearly instruct jury that it may consider the testimony only against the defendant against whom the evidence was admissible. No citation to rule.

Tex. R. Crim. Evid. 106 contemporaneous admission of remainder

Reece v. State, 772 S.W.2d 198, 203 (Tex. App. -- Houston [14th Dist.] 1989, no pet.)

> Opponent can interrupt other's presentation of evidence to offer remainder of a writing under rule 106 or wait until his turn under rule 107. It's an either/or proposition. Prosecutor should not have edited defendant's confession from: "I want to say that I do believe that I did not kill Mr. Smith cause [sic] I did not do nothing [sic] but hit him three times with my hand" to "I did kill Mr. Smith" but not reversible error. Questionable ethics and poor strategy to edit words such as "not" out of a statement; court noted "flagrant abuse of long-accepted trial tactic."

Gilmore v. State, 744 S.W.2d 630, 631 (Tex. App. -- Dallas 1987, pet. ref'd)

> Contemporaneous admission permissive, not mandatory. Defendant failed to show harm when remainder of writing was introduced shortly after State introduced a portion, though not admitted contemporaneously.

Tex. R. Crim. Evid. 107 rule of optional completeness

Mitchell v. State, 948 S.W.2d 62, 66 (Tex. App. — Fort Worth 1997, no pet.)

> Where juvenile no-billed for a murder on certification, but ultimately found to have engaged in delinquent conduct for the same murder, the fact that he was no-billed is not relevant during the punishment stage of a subsequent case where the juvenile conviction is being used for punishment such that the no-bill is required to be admitted under the rule of optional completeness. The proponent of the evidence is required to show some relevance apart from Rule 107. Appellant failed to show that relevance here.

Credille v. State, 925 S.W.2d 112, 116-17 (Tex. App. — Houston [14th Dist.] 1996, pet. ref'd)

> When Def. inquired into content of videotaped conversation between officer and victim, State was entitled to offer any other evidence (the videotape itself) that was necessary to make the conversation fully understood.

Washington v. State, 856 S.W.2d 184, 186 (Tex. Crim. App. 1993)

> Taped interview between witness for State and defendant's investigator was protected from discovery under attorney work product doctrine. Defendant did not waive privilege by questioning witness about interview with investigator. Trial court had admitted tape recording into evidence under Rule 107. TCA holds that since defense did not introduce any part of the tape itself into evidence, questioning witness about the conversation she had with investigator did not open door to admission of tape. TCA cites **Cullen** for proposition that an attorney (defense or prosecution) preparing a witness for testifying (or, as in this case, impeachment) is not discoverable.

Lawson v. State, 854 S.W.2d 234, 238 (Tex. App. -- Austin 1993, pet. ref'd)

Rule only compels admission of evidence on "the same subject" as the previously admitted portion. It is not sufficient to show that it's simply in the same document or videotaped statement.

Reynolds v. State, 856 S.W.2d 547, 550 (Tex. App. -- Houston [1st Dist.] 1993, no pet)

Victim's hearsay statement concerning defendant's other acts with students at another high school not admissible under Rule 107 in public lewdness prosecution since single statement offered by defendant was not related to other statements offered by State. These other statements were not offered "on the same subject" as the one impeaching statement offered by defendant.

Sontag v. State, 841 S.W.2d 889, 892 (Tex. App. -- Corpus Christi 1992, pet ref'd)

Opponent may offer any relevant portion of evidence to correct a false impression; he need not offer the whole thing. Defendant should have been able to offer all of the video portion of a videotape, but omit the audio, which he did not want, when the State offered a portion of the videotape. State could then have offered the audio itself, also under Rules 106-107.

Lucas v. State, 791 S.W.2d 35, 53 (Tex. Crim. App. 1989)

Rule 107 is the same as former article 38.24. "The only addition under the new rule is to specifically include depositions as a written or recorded statement." State had originally offered part of edited confession, then defense offered more to show defendant wasn't too clear on confessed facts. This opened door for State to offer even more of confession to show why he had a problem creating a coherent narrative, namely the confusingly similar offenses he had committed.

Reece v. State, 772 S.W.2d 198, 203 (Tex. App. -- Houston [14th Dist.] 1989, no pet.)

Prosecutor offered distorted version of defendant's confession. Defendant had option of offering the remainder at time State offered a portion under Rule 106 or of waiting until his case in chief and offering the entirety under Rule 107. Defendant argued that he should have been able to correct only 1 altered sentence offered by prosecution--he could have but failed to object on this basis, thus error not preserved.

Martinez v. State, 749 S.W.2d 556, 559-60 (Tex. App. -- San Antonio 1988, no pet.)

Not error for State to introduce officer's hearsay statement regarding information he received indicating defendant was source of heroin supply since it clarified hearsay evidence elicited by defendant.

Pratt v. State, 748 S.W.2d 483, 486 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref'd)

Despite fact that defendant had questioned affiant about making of affidavit and had introduced into evidence victim's written statement that was basis for affidavit, rule 107 would not permit State to introduce arrest warrant affidavit since it was not part of same document defendant had introduced. Appears to be wrongly decided. Foster v. State, 779 S.W.2d 845 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 1505 (1990), holds the opposite on similar facts.

Smith v. State, 740 S.W.2d 503, 513 (Tex. App. -- Dallas 1987), aff'd on remand on other grounds, 764 S.W.2d 31 (Tex. App. -- Dallas 1989)

When defendant sponsored two psychiatrists to testify to his insanity, and, on cross-examination, they referred to Dr. Grigson's report, State was entitled to show, through those witnesses, that Grigson's report concluded that defendant was sane. Relied on rule 107 to admit otherwise inadmissible hearsay. Could also have used rule 705.

Ngoc Van Le v. State, 733 S.W.2d 280, 285 (Tex. App. -- Houston [14th Dist.] 1987), remanded on other grounds, 761 S.W.2d 14 (Tex. Crim. App. 1988)

Evidence offered under rule of optional completeness need not be ordinarily admissible.

White v. State, 732 S.W.2d 423, 424 (Tex. App.--Beaumont 1987, pet. ref'd)

Court did not err in excluding defendant's written statement when offered by defendant. It was not connected in time or subject matter to oral confession introduced by State.

Solano v. State, 728 S.W.2d 428, 429-31 (Tex. App.--San Antonio 1987, pet. ref'd)

When defendant had: 1) questioned sheriff about existence of witness' written statement; 2) elicited sheriff's acts based upon receipt of that statement; and 3) shown sheriff that statement, State was entitled to introduce the statement since jury might otherwise have been misled as to its contents.

Austin v. State, 712 S.W.2d 591, 594-95 (Tex. App.--Tyler 1986, no pet.)

Admission of second conversation between defendant and officer upheld because related to same subject as first conversation which defendant had asked about on cross-examination and was closely related in time. Court cited art. 38.24, now replaced by rule 107. Operative rule: Is statement necessary to full understanding of an act or statement previously introduced by the opposing party?

Tex. R. Crim. Evid. 201(b)(2) judicial notice: facts capable of accurate & ready determination

Lozada-Mendoza v. State, 951 S.W.2d 39, 44 (Tex. App. — Corpus Christi 1997, no pet.)

"A trial court is permitted to take judicial notice of prominent local geographical features as are generally known within its territorial jurisdiction and also capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Thus, the trial court in this case was free to take judicial notice of the fact that "El Toro" lies within Jackson County.

Anderson v. State, 880 S.W.2d 35, 38 (Tex. App. -- Tyler 1994, pet. ref'd)

Appellate court may take judicial notice that a Monte Carlo is a type of Chevrolet; that fact is both known generally in the jurisdiction & is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Ho v. State, 856 S.W.2d 495, 498-99 (Tex. App. -- Houston [1st Dist.] 1993, no pet.)

Appellate court would not take judicial notice of facts set out in defendant's brief which purported to demonstrate that the conduct contained in videos were "normal," not "abnormal" sex and thus not obscene. Court held that these "facts" were neither notorious nor verifiable.

Cobb v. State, 835 S.W.2d 771, 773 (Tex. App. -- Texarkana 1992), *rev'd*, 851 S.W.2d 871 (Tex. Crim. App. 1993)

Trial court may not silently take judicial notice of a fact unless he has given parties notice and an opportunity to dispute judicial notice. Reliance upon silent judicial notice would violate defendant's due process right to be heard and to know what evidence there is against him. TCA reversed because formal proof of terms of probation is not necessary in motion to revoke probation & therefore court did not need to take judicial notice of defendant's terms of probation.

Weeks v. State, 834 S.W.2d 559, 563, n.2 (Tex. App. -- Eastland 1992, pet. ref'd)

Court of Appeals would not take judicial notice of fact that AIDS cannot be transmitted through act of spitting; while most medical experts agree upon this fact, the issue "is not free from reasonable dispute."

Trujillo v. State, 809 S.W.2d 593, 595-96 (Tex. App. -- San Antonio 1991, no pet.)

Defendant had objected to witness' testimony that Edgewood High School was accredited by state education agency. Appellate court states that trial court could have taken judicial notice of this fact; however, nothing appeared in record to suggest that trial court did take judicial notice or that materials were submitted to trial court to support judicial notice of accreditation. Dubious reasoning.

Davenport v. State, 807 S.W.2d 635, 638 (Tex. App. -- Houston [14th Dist.] 1991, no pet.)

During final argument, defense counsel attempted to make time-distance calculations on blackboard. Prosecutor's objection that there was no evidence of figures to support calculations upheld. Court notes distinction between fact that trial court could take judicial notice of basic units of measurement and fact that it was not requested to do so or provided with necessary information.

Penix v. State, 748 S.W.2d 629, 630 (Tex. App. -- Fort Worth 1988, no pet.)

Appellate court may not take judicial notice of court orders that are attached to appellate brief but were not introduced into evidence at trial.

Stowe v. State, 745 S.W.2d 568, 570 (Tex. App. -- Houston [1st Dist.] 1988, no pet.)

Trial judge may not take judicial notice of jurors' comments that were made "off the record" though in the presence of the judge since they may be subject to varying interpretations.

McCulloch v. State, 740 S.W.2d 74, 75-76 (Tex. App. -- Fort Worth 1987, pet. ref'd)

Either appellate or trial court may take notice of explosive nature of gasoline. Rule not cited.

Bender v. State, 739 S.W.2d 409, 412-13 (Tex. App. -- Houston [14th Dist.] 1987), *aff'd per curiam*, 761 S.W.2d 378 (Tex. Crim. App. 1988)

Appellate court could take notice of fact "2100 West Loop South" was located: 1) in Houston; 2) Houston is in Harris County, Texas; and 3) there is an MBank building located there, "by resort to obtainable, accurate reference materials." Implication is that courts can, by themselves, go to key maps, telephone books, addresses, etc.

Turner v. State, 733 S.W.2d 218, 222 (Tex. Crim. App. 1987)

Court may take judicial notice of its own records in same or related proceedings involving same or nearly same parties. Here, lower appellate court had improperly considered fact that it had affirmed the defendant's conviction in another case in holding that trial court had sufficient information to cumulate defendant's sentence with case that had been tried in a different court. Had both of defendant's convictions been obtained in same trial court, the problem would not have arisen.

Gonzalez v. State, 723 S.W.2d 746, 751 (Tex. Crim. App. 1987)

Court of Criminal Appeals judicially noticed fact of San Antonio's incorporation; therefore, State did not need to allege that fact in indictment or prove it at trial. Courts may take judicial notice of special acts, session laws, papers on file with Secretary of State, city charters, etc. If a fact is susceptible to judicial notice, it need not be pled in indictment under Tex. Code Crim. Proc. art. 21.18. TCA did not address fact that trial court was never requested to take judicial notice nor was it provided with necessary information. In this case, probably unnecessary since incorporation was neither pled nor proven and apparently was never an issue at trial.

Tex. R. Crim. Evid. 202 judicial notice of laws of other states

Ex parte Zetty, 765 S.W.2d 908, 909 (Tex. App. -- Austin 1989, no pet.)

Appellate court may take judicial notice of laws of other states to determine if supporting instruments for extradition of defendant to other state has "substantially the same effect" as those required under Texas demand for extradition law.

Jones v. State, 758 S.W.2d 356, 356-57 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Appellate court may take judicial notice of law of sister state to show validity of prior commitment papers for enhancement paragraph.

Jenkins v. State, 734 S.W.2d 197, 198 (Tex. App. -- Houston [1st Dist.] 1987, no pet.)

Appellate court may take judicial notice of the statutes and rules of every other state. Iowa rule of criminal procedure judicially noticed to uphold admission of pen packet which showed that an appeal bond had been set. Under Iowa rules, an appeal bond is set in every conviction.

Nubine v. State, 721 S.W.2d 430, 434 (Tex. App.--Houston [1st. Dist.] 1986, pet. ref'd)

Courts, both trial and appellate, may now take judicial notice of laws of another state "from reasonably available and easily accessible source," e.g., statute books which need not be introduced into evidence.

Tex. R. Crim. Evid. 204 municipal ordinances

Houston v. Southwest Concrete Const., 835 S.W.2d 728 (Tex. App. -- Houston [14th Dist.] 1992, writ denied)

> Interpreting analogous civil rule: "To be part of the record before an appellate court, municipal ordinances must be submitted in verified form." See also Metro Fuels, Inc. v. City of Austin, 827 S.W.2d 531, 532(Tex. App. -- Austin 1992, no writ)(declining to take judicial notice on appeal of municipal ordinance when no showing that certified version provided to trial court); Hollingsworth v. King, 810 S.W.2d 772, 774 (Tex. App. -- Amarillo), *writ denied per curiam*, 816 S.W.2d 340 (Tex. 1991).

Dedonato v. State, 789 S.W.2d 321, 326 (Tex. App. -- Houston [1st Dist.] 1990)(O'Connor, J., dissenting), *aff'd*, 819 S.W.2d 164 (Tex. Crim. App. 1991)

> Dissent argues that there is a procedural difference between rules 202 & 204. Latter rule does not have a provision for trial judge to take notice on his own, therefore, he must be given materials sufficient to prove noticed fact. Here, neither side produced municipal ordinance re Sexually Oriented Business for trial court. [rule 204 also does not explicitly state that judicial notice may be taken at any stage of the proceeding; query whether this is intended or a glitch].

Tex. R. Crim. Evid. 401-403 general relevancy & balancing

Williams v. State, ___ S.W.2d ___, 1997 WL 631981 at **8 (Tex. Cr. App. 1997)

> "Once a Rule 403 objection as to prejudice versus probative value is invoked, the trial judge has no discretion as to whether or not to engage in the balancing test required by the rule. However, a trial judge is not required to *sua sponte* place any findings he makes or conclusions he draws when engaging in this test into the record, nor did appellant request such to be affirmatively shown. Rather, a judge is presumed to engage in the required balancing test once Rule 403 is invoked and we refuse to hold that the silence of the record implies otherwise."

Nevels v. State, ___ S.W.2d ___, 1997 WL 603888 at **1 (Tex. App. – Waco 1997)

> No abuse of discretion to limit cross-examination (and therefore confrontation) of complainant under Rule 403 where 403 analysis is otherwise sound. In this, a sexual assault case, appellant was not allowed to develop through cross-examination that complainant worked as a stripper.

Smith v. State, ___ S.W.2d ___, 1997 WL 195290 at **7 (Tex. App. – Waco 1997)

> "Confusion of the issues occurs where introduction of the contested evidence raises 'the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues."

Fields v. State, 932 S.W.2d 97, 107-08 (Tex. App. – Tyler 1996, pet. ref'd)

> Expert testimony on drug trafficker patterns & characteristics relevant in narcotics prosecution. Witness gave wholesale & street value of drugs & outlined characteristics of people who travel with large amounts of drugs. Interesting. Compare Cabrales v. State, 932 S.W.2d 653, 658-09 (Tex. App. – Houston [14th Dist.] 1996,

n.p.h.)(reversible error to elicit testimony on techniques of manufacturing crack cocaine and its street value when D. was prosecuted for possessing powdered cocaine).

Munoz v. State, 932 S.W.2d 242, 244 (Tex. App. — Texarkana 1996, n.p.h.)

In close cases, courts should favor admission of evidence. Presumption is that probative value of relevant evidence outweighs its prejudicial effect.

Richards v. State, 932 S.W.2d 213, 215 (Tex. App. — El Paso 1996, n.p.h.)

"Negative victim impact" evidence offered by defendant that deceased was not a model citizen, not relevant in punishment phase of murder trial.

Sonnier V. State, 913 S.W.2d 511, 519 (Tex. Crim. App. 1995)

Gruesome photographs are generally probative & admissible. "The photographs are powerful visual evidence, probative of various aspects of the State's theory of the offense including the brutality and heinousness of the offense ... when the power of the visible evidence emanates from nothing more than what the Def. has himself done, we cannot hold that the trial court abused its discretion merely because it admitted the evidence."

Mason v. State, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995)

Evidence of gang membership (Aryan Brotherhood) admissible in cap. murder; relevant to show future dangerousness. State must prove: 1) Def. is a member; 2) group's violent & illegal activities. State not required to prove Def. committed/participated in those specific activities.

Menchaca v. State, 901 S.W.2d 640, 649 (Tex. App. -- El Paso 1995)

Trial judge not required to articulate 403 balancing on record; appeals court will assume he did unless record shows he refused to conduct test.

Etheridge v. State, 903 S.W.2d 1, 14 (Tex. Cr. App. 1994)

"Evidence of the extent of the victim's injuries is relevant if it is probative of an element which the Stae must prove in establishing the charged offense. On the other hand, testimony regarding the victim's future hardship is generally irrelevant at guilt/innocence because it does not tend to make more or less probable the existence of any fact of consequence at guilt/innocence. ... Dr. Duke did not testify as to any future hardship or treatment that the surviving victim would incur; his statement that she required reconstructive surgery went to the nature and extent of her injuries. Dr. Duke's testimony concerning the nature and extent of the surviving victim's injuries was relevant to prove that appellant cause bodily injury to the surviving civtim or placed her in fear of imminent bodily injury or death."

McKnight v. State, 874 S.W.2d 745, 746 (Tex. App. -- Fort Worth 1994, no pet.)

Implicating Rule 607. Evidence implying that Def. & Def.'s witness were affiliated with gang was admissible to show bias by witness.

Moreno v. State, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993)

General discussion of Rules 401-404. Admonishes that lawyers and judges should not use old term "res gestae" when speaking of relevancy. There is no such term in the Rules.

Lewis v. State, 856 S.W.2d 271, 275 (Tex. App. -- Texarkana 1993, no pet.)

Photocopies of money used in drug transaction admissible to show that defendant intended to make drug purchase and to show absence of mistake.

McIntosh v. State, 855 S.W.2d 753, 769 (Tex. App. -- Dallas 1993, pet. ref'd)

Evidence showing defendant's prior infidelity admissible in murder trial for killing his wife to show motive since defendant denied marital difficulties. Evidence not excludable even though victim-wife did not know of infidelities.

Rogers v. State, 853 S.W.2d 29 (Tex. Crim. App. 1993)

Lengthy discussion of "same transaction" and "other offenses" evidence. Discussion of "background" evidence and standards for its admission. Implies that background evidence should not be admissible unless trial judge determines that it is "necessary" to give full and accurate picture to jury. Normal standard is "helpful," not essential. Narrow construction of rules.

Fletcher v. State, 852 S.W.2d 271, 276 (Tex. App. -- Dallas 1993, pet. ref'd)

Testimony that defendant assumed "fighting position" when first approached by officers was relevant to show his state of mind near time of offense. Resistance to officers showed his then present aggressive state of mind consistent with earlier actions in Injury to a Child prosecution.

Cohn v. State, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993)

Testimony in child sexual assault case by psychologist that children who have been abused frequently demonstrate some anxiety and that these children did display anxiety was relevant and admissible. "Bolstering" objection is not valid under rules when it complains that evidence merely enhances one sides' version of the events. Only when testimony is offered solely to enhance the credibility of a witness, rather than the evidence, is "bolstering" a valid objection.

Malone v. State, 849 S.W.2d 414, 418 (Tex. App. -- Beaumont 1993, no pet.)

Evidence that officer found pistol under driver's seat relevant in methamphetamine case as "res gestae" or "same transaction" evidence. Events do not occur in a vacuum. Reasons that officer had a right to protect himself by searching car. Result may be right, but reasoning is faulty under Rogers, supra.

Fuller v. State, 829 S.W.2d 191, 198-99 (Tex. Cr. App. 1992)

"[A] trial judge cannot err in most cases by overruling a relevancy objection so long as the challenged evidence might be 'connected up' before the end of trial. In the instant case, the trial court's ruling was correct when made and only became challengeable when a connection by the close of the case had not been made. And it is not the judge's duty to notice whether the evidence is eventually 'connected up' in fact. Instead, the objecting party must reurge his relevancy complaint after all the proof is in, ask that the offending evidence be stricken, and request that the jury be instructed to disregard it. Otherwise, his objection will be deemed forfeited on appeal."

Houston v. State, 832 S.W.2d 180, 186 (Tex. App. -- Waco, 1992), *pet. dism'd*, 846 S.W.2d 848 (Tex. Crim. App. 1993)(Vance, J., dissenting)

> Outline of balancing factors under *Montgomery* (see below): 1) inherent probative value of evidence; 2) similarity of conduct with offense on trial; 3) strength of evidence of extraneous conduct; 4) nature of extraneous and potential for impressing jury in irrational but indelible ways; 5) State's "need" for evidence, including availability of alternate evidence, strength of other evidence and whether purpose served by the admission of the extraneous conduct relates to an issue in dispute.

Massey v. State, 826 S.W.2d 655, 659 (Tex. App. -- Waco 1992), *cert. denied*, 112 U.S. 3042 (1992)

> Outlining objector's duty under Rule 403; objector must point out nature and degree of prejudice that would result from admission of evidence; no formal burden of proof under 403; court should ask proponent to explain probative value and balance that against opponent's claim of prejudice.

Mayes v. State, 816 S.W.2d 79, 84 (Tex. Cr. App. 1991)

> "Rule 401 makes no demand that facts or issues be contested before judicially regarded as 'relevant.'" Under the pre-Code common-law rule, there was a requirement that a fact be "contested." "Having discarded the dispute requirement, Rule 401 deems 'relevant' any evidence which influences consequential facts, i.e., fact which have something to do with the ultimate determination os guilt or innocence in a particular case."

Long v. State, 823 S.W.2d 259, 270-73 (Tex. Crim. App. 1991), *cert. denied*, 112 S.Ct. 3042 (1992)

> Lengthy discussion concerning admissibility of "gruesome photos." Uses relevancy rules 401-403 to balance probative value vs. unfair prejudicial effect. Holds harmless error in admitting post-autopsy photos. Rule of thumb: probative value of non-cumulative photos of scene and victim as either existed at time of offense or immediate aftermath is not substantially outweighed by unfair prejudice; when the scene or victim's body has been radically altered by other events (e.g. autopsy), probative value diminishes. Following **Long**, are **McFarland v. State**, 845 S.W.2d 824, 841 (Tex. Crim. App. 1992) & **Green v. State**, 840 S.W.2d 394, 410 (Tex. Crim. App. 1992).

Renfro v. State, 822 S.W.2d 757, 758-59 (Tex. App. -- Houston [14th Dist.] 1992, pet. ref'd)

> Evidence that defendant had been victim of misidentification in 2 strikingly similar, contemporaneous cases of indecent exposure was relevant & admissible. Sauce for goose is sauce for gander rationale under 404(b). If witnesses had positively I.D. defendant in these prior incidents, that evidence would be admissible, so reverse is true also.

Blackburn v. State, 820 S.W.2d 824, 825-27 (Tex. App. -- Waco 1991, pet. ref'd)

> In possession of amphetamine trial, court erred in admitting photo found in defendant's home of woman sniffing a "rail" of cocaine. Irrelevant. State argued it was "res gestae" of arrest. No. Had live woman been there performing conduct that evidence would be "res gestae." Even if relevant, excludable under rule 403. Here defendant did not "seriously" contest his possession of contraband; "when a defendant admits the truth of a specific fact of consequence to the determination, that admission can enter into the balancing of the probative value vs. possible prejudicial effects." C.J. Thomas, dissenting, questions this logic at 829.

Callaway v. State, 818 S.W.2d 816, 826 (Tex. App. -- Amarillo 1991, pet. ref'd)

Background evidence is relevant. "Although it may not necessarily influence consequential facts, background evidence is relevant ... because it furnishes the context for a realistic comprehension and evaluation of the evidence of the offense by the factfinder."

Hernandez v. State, 817 S.W.2d 744, 746 (Tex. App. -- Houston [1st Dist.] 1991, no pet.)

"Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial." Here there was room for disagreement re whether an inference of requisite knowledge & intent could be drawn from misconduct evidence, thus trial court didn't err in allowing it into evidence,

Montgomery v. State, 810 S.W.2d 372 (Tex. Crim. App., 1991)(op. on reh'g)

Lengthy & excellent discussion of "inclusionary" rules of evidence; trial court's discretion in admitting all relevant evidence; trial court discretion in finding appropriate balance under rule 403; admissibility of extraneous offenses to show intent under rule 404(b). Clinton's opinion on rehearing changed result from original opinion upholding admission of extraneous offenses, but not basic analysis. Trial court's balance of probative vs. unfair prejudice will be upheld if his ruling "was within the zone of reasonable disagreement." Here, evidence that defendant walked around house nude and used unparental, lascivious language in front of daughters was not particularly probative of defendant's intent to arouse and gratify his own sexual desires but was very prejudicial. State had no need to shore up children's testimony or prove specific intent. Reasonable minds might differ. Conviction upheld on remand. 801 S.W.2d 314 (Tex. App. -- Texarkana 1992, pet. ref'd).

Fernandez v. State, 805 S.W.2d 451, 454 n.2 (Tex. Crim. App. 1991)

Useful discussion noting distinctions between direct & circumstantial evidence. "An inference from the assertion of a witness to the truth of the fact asserted is called direct evidence. On the other hand, evidence offered for a proposition based upon some inference other than that from the mere assertion of a witness, is termed circumstantial evidence." 2 **R. Ray, Texas Law of Evidence** § 1481, at 164-65 (1980).

Asaff v. State, 799 S.W.2d 329, 333 (Tex. App. -- Dallas 1990, pet. ref'd)

Relevant evidence is inadmissible only when its probative value is substantially outweighed by rule 403 counterfactors. Here, defendant offered evidence of survey dealing with community standards regarding sexually explicit material. Error to exclude.

Roberts v. State, 795 S.W.2d 842, 845 (Tex. App. -- Beaumont 1990, no pet.)

Letter from defendant to complaining witness was very prejudicial because he threatened her to drop charges or he would tattle on her re bigamy & tax evasion. It may be prejudicial, but it was very probative to prove consciousness of guilt; let it in.

Sallings v. State, 789 S.W.2d 408 (Tex. App. -- Dallas 1990, pet. ref'd)

Rape victim's real name not relevant when State pled "Jane Doe" in indictment and victim testified that Jane Doe was not her real name. Even if relevant, trial court had discretion to exclude under rule 403. Second issue: defense

witness who would have testified that this police officer made her falsely accuse "X"--a relative of Def's--in an unrelated case to show officer was "out to get" Def's family was irrelevant under rule 401.

Gass v. State, 785 S.W.2d 834, 837 (Tex. App. -- Beaumont 1990, no pet.)

"The plain language of Rule 403 shifts the focus somewhat from the test in *Williams v. State* ... and its progeny. The approach under the present Rule 403 is to admit relevant evidence unless the probative value is substantially outweighed by the danger of unfair prejudice to the defendant."

Bushnell v. Dean, 781 S.W.2d 652, 655-57 (Tex. App. -- Austin 1989), *rev'd,* 803 S.W.2d 711 (Tex. 1991)

In civil sexual harassment suit, plaintiff brought in expert witness to talk about the profile of a typical sexual harasser. Irrelevant under 401 and "profile" testimony substantially outweighed by unfair prejudicial effect & was inadmissible character evidence under 404(a). Same rule applies in criminal cases. Do not attempt to offer "profile" evidence that defendant fits profile of typical sexual abuser, wife batterer, drug dealer (except to show probable cause for temporary detention--issue here is not to prove def's conduct in conformity but reasonableness of officer's action), etc. Supreme Court reversed on preservation of error grounds.

Wilkerson v. State, 766 S.W.2d 795, 799 (Tex. App. -- Tyler 1987, pet. ref'd)

Defendant's expert psychologist who testified that defendant was remorseful, felt guilty about what he had done and who expressed expert opinion that defendant's alcohol/drug problem would be manageable over 10 year period of probation, was relevant to defendant's application for probation, relying on Allaben, 418 S.W.2d 517 (Tex. Crim. App. 1967). [Allaben was subsequently overruled by Murphy v. State, 777 S.W.2d 44 (Tex. Crim. App. 1988), but Art. 37.07, § 3(a) was modified by Legislature to permit admission of any evidence court deems relevant, thus Wilkerson may once again be good law.]

Dorsett v. State, 761 S.W.2d 432, 433 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Proper for trial court to exclude defense psychologist's expert opinion that defendant's personality profile indicated that he was not a child abuser under rule 403.

Gonzales v. State, 761 S.W.2d 809, 814-15 (Tex. App. -- Austin 1988, pet. ref'd)

Money found in defendant's safety deposit box admissible in prosecution for possession of cocaine with intent to deliver. Fact that State could not prove that money was, in fact, from cocaine dealing, went to weight, not admissibility, of evidence. [Court should have discussed rule 104(b): was there evidence sufficient to support a finding by some rational juror that money was, in fact, connected to cocaine; otherwise this evidence is not relevant].

Pike v. State, 758 S.W.2d 357, 361-62 (Tex. App. -- Waco 1988), *remanded on other grounds*, 772 S.W.2d 130 (Tex. Crim. App. 1989)

Testimony by two teen-age girls that defendant, charged with organized criminal activity under Penal Code section 71.02(a)(5), gave them methamphetamine in exchange for sex was relevant and not "substantially outweighed by unfair prejudice." These were not extraneous offenses because defendant delivered drugs during pendency of conspiracy, thus direct evidence of the offense itself.

Brown v. State, 757 S.W.2d 739, 740-41 (Tex. Crim. App. 1988)

Rape victim's anguish and testimony of counseling not relevant in sexual assault trial when defense was alibi. Concurrence by McCormick, P.J., stating that testimony regarding nature and extent of injuries (physical or psychological) are admissible to prove that rape had occurred.

Miskis v. State, 756 S.W.2d 350, 352 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Extraordinarily narrow interpretation & analysis of the admissibility and usefulness of demonstrative evidence. Here admission of "similar" ball peen hammer held to be erroneous, but harmless error. Compare Tatmon v. State, 767 S.W.2d 945 (Tex. App. -- Beaumont 1989, pet. ref'd)(weapon placed into evidence as demonstrative evidence was relevant "because it was of a type of evidence that had tendency to show" existence of a fact which was of consequence).

Rodda v. State, 745 S.W.2d 415, 417-20 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Admission of extraneous offense determined by general relevancy balancing test. Quotes Dean Blakely and Beechum re new rules are inclusionary, not exclusionary. Relevant question is whether probative value is substantially outweighed by danger of unfair prejudice. Excellent analysis.

Kimes v. State, 740 S.W.2d 903, 903 (Tex. App. -- Corpus Christi 1987, pet. ref'd)

When case depends on circumstantial evidence, rules of evidence regarding relevancy will not be applied stingily. While witness' testimony concerning co-defendant's unsuccessful attempts to purchase gun from her not independently relevant in capital murder case, it did provide background information and illuminate circumstances leading up to deceased's murder. "By being informed of all the circumstances leading up to the murder, the jury was more aptly prepared to evaluate the evidence." No citation to rule, but good analysis. Evidence was offered to prove co-defendant's intent to kill and the desired manner of death.

Cole v. State, 735 S.W.2d 686, 689-91 (Tex. App. -- Amarillo 1987, no pet.)

Relies upon federal decisions in analyzing whether trial court abused its discretion in excluding defendant's evidence on extraneous offenses to disprove identity; his fingerprints did not match those found on extraneous victim's car. Defendant offered evidence to show he was not guilty of this offense since rash of extraneouses was arguably committed by same person. Trial court's exclusion upheld because insufficient showing that fingerprints were those of assailant in extraneous.

Tex. R. Crim. Evid. 404(a)(1) character of accused

Garcia v. State, 819 S.W.2d 667, 668 (Tex. App. -- Corpus Christi 1991, no pet.)

Defendant may present evidence of his character during guilt-innocence phase, but only by reputation or opinion testimony, not by specific instances of conduct.

Dunn v. State, 804 S.W.2d 952, 953 (Tex. App. -- Eastland 1991, pet. ref'd)

Prosecution cannot put defendant's character in issue through its cross-examination & then bring in extraneous offense to disprove defendant's answer on cross. Here, police officer defendant on trial for vol. manslaughter of

wife. On cross, prosecutor asked testifying defendant what kind of temper he had; Def. said normal/moderate. State could not then bering in witnesses to show examples of quick temper. Bootstrapping.

Wade v. State, 803 S.W.2d 806, 808 (Tex. App. -- Fort Worth 1991, no pet.)

Defendant's character that he had never possessed drugs is a pertinent character trait in PCS case. Here trial court improperly granted State's motion in limine excluding defendant's character evidence, but harmless error.

Brewington v. State, 802 S.W.2d 691, 692 (Tex. Crim. App. 1991)

State cannot offer evidence that defendant is a "fixated pedophile"; that's forbidden character evidence under 404(a)(1).

Bushnell v. Dean, 781 S.W.2d 652, 655-57 (Tex. App. -- Austin 1989), *rev'd*, 803 S.W.2d 711 (Tex. 1991)

See discussion under rule 401-403.

Wiggins v. State, 778 S.W.2d 877 (Tex. App. -- Dallas 1989, pet. ref'd)

Lengthy discussion of distinctions between character trait for "honesty" and "truthfulness." Fact that defendant's mother inadvertently answered opinion question as to son's truthfulness with response that he was honest, did not open door to State's cross-examination with "have you heards" on instances of dishonest behavior. Court holds that State should have objected to her nonresponsive answer instead. Query if it is usually sponsoring witness who objects to "nonresponsiveness" of witness while opponent is entitled to rely on "open door" doctrine. However, error in admission of testimony harmless since State introduced same evidence through other reputation witnesses.

Townsend v. State, 776 S.W.2d 316 (Tex. App. -- Houston [1st Dist.] 1989, pet. ref'd)

Defendant's psychologist opened door to testimony by victims of two other prior extraneous offenses when he gave expert opinion that defendant's psychological profile was not typical of those who commit sexual crimes. Query if extrinsic evidence was admissible or whether cross-examination of expert with "did you know" would have been proper mode.

Preston v. State, 769 S.W.2d 375 (Tex. App. -- Fort Worth 1989, pet. ref'd)

Conviction reversed and remanded when trial court refused to allow defendant's former spouse to testify that defendant "does not have a propensity for violence and is the type of man for whom it would take some extreme provocation to cause him to resort to violence." Evidence of pertinent character that may be offered by defendant to prove that on the occasion in question he acted in conformity with that character.

Thomas v. State, 759 S.W.2d 449, 451-52 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

If defendant's witness, on cross-examination, volunteers his "opinion" of defendant, State may then cross-examine on "Did you knows?" When reputation is given, ask only, "Have you heard?"

Canto-Deport v. State, 751 S.W.2d 698, 700 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref'd)

Trial court should have permitted character witnesses to testify to defendant's reputation for "honesty and fair dealing" in price-tag switching prosecution because this is an offense involving moral turpitude (more accurately, deceit), but exclusion held harmless because testimony that defendant was "law-abiding citizen" was admitted.

Spector v. State, 746 S.W.2d 946, 950-51 (Tex. App. -- Austin 1988, pet. ref'd)

Defendant's character for truthfulness and honesty are not pertinent traits in drug prosecution. Even though defendant testified and State cross-examined, this was not an attack on her general reputation warranting admission of character testimony since State did not attack her general reputation for truthfulness or impeach her testimony with contrary statements. Very narrow interpretation of rule.

Tex. R. Crim. Evid. 404(a)(2) victim's character offered by defense

Matter of G.M.P., 909 S.W.2d 198, 208 (Tex. App. — Houston [14th Dist.} 1995, no pet.)

Defining "moral turpitude" for purposes of allowing Def. to offer reputation/character evidence of the victim. Crimes involving moral turpitude are those dealing with dishonesty, fraud, misrepresentation or deliberate violence (query the last item).

Fry v. State, 915 S.W.2d 554, 560-61 (Tex. App. — Houston [14th Dist.] 1995, no pet.)

Good discussion of distinctions between "communicated" and "uncommunicated" character of victim in self-defense situation, here a murder prosecution.

Campbell v. State, 885 S.W.2d 528, 531 (Tex. App. -- El Paso 1994, no pet.)

Before evidence of victim's character is admissible on issue of whether Def. was provoked & thus guilty only of voluntary manslaughter, Def. must offer evidence of some act of aggression by victim.

Gonzales v. State, 838 S.W.2d 848, 856-61 (Tex. App. -- Houston [1st Dist.] 1992, pet. dism'd)

Defendant can show prior specific instances of the deceased's aggressive conduct offered to show character when defendant asserts self-defense. Appears wrongly decided under rule 405; evidence normally limited to reputation and opinion when offered to show general character for violence; P.D.R. granted, then dismissed.

Effort v. State, 760 S.W.2d 374, 377 (Tex. App. -- Fort Worth 1988, pet. ref'd)

Trial court did not err in excluding opinion testimony that murder victim had a "character trait of making remarks that would provoke another person into anger," [is this a character trait?] and excluding evidence of a prior specific example of this conduct. Defendant was not aware of such a character trait and there was no evidence that victim was the first aggressor. Even if this evidence were relevant, trial judge did not abuse his discretion under rule 403 in excluding it.

Carrasquillo v. State, 742 S.W.2d 104, 110-11 (Tex. App. -- Fort Worth 1987, no pet.)

Defense argument that evidence of victim's homosexuality was relevant to prove his violent character & aggression was "weak"; court holds that, even assuming logical proposition true, trial court's exclusion of complained-of testimony not error because some such evidence already in record.

Tex. R. Crim. Evid. 404(b) extraneous offenses

Umoja v. State, ___ S.W.2d ___, 1997 WL 656627 at **2-3 (Tex. App. — Fort Worth 1997)

A murder case. As much a TEX. CODE CRIM. PRO. ANN. art. 38.36 case as it is a TEX. RULES CRIM. EVID. 404(b) case. The state gave notice under 404(b) on the day of trial, which it conceded was untimely. The extraneous offense for which the state sought and gained admission was relevant under art. 38.36(a). But the state argued that art. 38.36, which contains no notice requirement, is a statutory enactment (while 404(b) is a mere rule propounded by the Court of Criminal Appeals) and thus nullifies the notice requirement of 404(b) to the extent that the extraneous offense is relevant under art. 38.36. Using the rationale of *Werner v. State*, 711 S.W.2d 639 (Tex. Cr. App. 1986) that art. 38.36 does not expand the rules of evidence, the court held that it does not contract the rules of evidence, either. The notice requirement of 404(b) must be met. Harmless error here, however.

Sledge v. State, 953 S.W.2d 253, 256 (Tex. Cr. App. 1997)

Aggravated sexual assault of a child case where there were many allegations occurring during the statutory time limit (anytime prior to indictment but before the statute of limitations). There were alleged incidents set out in the indictment and the defendant was given notice of additional incidents in a 404(b) notice. The defendant argued that he was convicted on incidents that were listed in the 404(b) notice but not the indictment. The court said that just because the incidents are listed in the 404(b) does not make them "extraneous" for purposes of conviction. (This means the state does not make an election through its 404(b) notice).

Yates v. State, 941 S.W.2d 357, 365-66 (Tex. App. — Waco 1997, pet. ref'd)

An analysis of "same-transaction contextual evidence." Same transaction contextual evidence is not an "extraneous offense" for purposes of Rule 404(b) and it does not need to be shown to be relevant aside from character conformity. There are two bases for admission of such evidence: where the evidence is significantly intertwined with the evidence of the charged offense such that the jury must hear it to get an accurate picture of the charged offense; and where the extraneous evidence actually tends to prove the charged offense. The Court of Criminal Appeals said the same thing, although not quite as eloquently, this year in *Santellan v. State*, 939 S.W.2d 155, 168-69 (Tex. Cr. App. 1997), and this reasoning has been in existence at least as far back as *Camacho v. State*, 864 S.W.2d 524 (Tex. Cr. App. 1993), *cert. denied*, 510 U.S. 1215 (1994). Note that in *Santellan*, the court went on to further analyze the same transaction contextual evidence in terms of Rule 403. *See also Hodge v. State*, 940 S.W.2d 316, 319 (Tex. App. — Eastland 1997, pet. ref'd)(same transaction contextual evidence not subject to notice requirement of Rule 404(b)).

Pondexter v. State, 942 S.W.2d 577, 583-86 (Tex. Cr. App. 1996)

Gang affiliation not same transaction contextual evidence because it is not *relevant*. Discusses some of the limitations of such evidence, referencing *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." This is probably what the Court of Criminal Appeals was trying to say in *Mayes v. State*, 816 S.W.2d 79 (Tex. Cr. App. 1991), although in that case the court used a Rule 404(b) analysis that does not make much sense as a 404(b) analysis.

Booker v. State, 929 S.W.2d 57, 65 (Tex. App. — Beaumont 1996, n.p.h.)

State cannot offer evidence that Def. has "ever" pointed a gun at someone before in attempted capital murder prosecution. This did not show intent or absence of mistake. It's offered solely for character. He's done it before, he's done it again.

Williams v. State, 927 S.W.2d 752, 758 (Tex. App. — el Paso 1996, n.p.h.)

Extraneous offenses admissible in homicide prosecution to show Def.'s state of mind and rebut Def.'s theory that victim was aggressor. Collecting cases.

Turner v. State, 924 S.W.2d 180, 182 (Tex. App. — Eastland 1996, pet. ref'd)

Evidence of other sexual assaults by Def. upon child victim admissible to prove identity when defense was that abuser was child's biological father when Def. was adoptive father.

Lane v. State, 933 S.W.2d 504, 517-21 (Tex. Crim. App. 1996)

Excellent discussion of admissibility of extraneous kidnapping-murder offered to show identity, motive & rebuttal of various defenses. Footnote shows how to visually list similarity factors. Useful model.

Massey v. State, 933 S.W.2d 141, 153-54 (Tex. Crim. App. 1996)

Def. statements to others that he would like to kidnap, kill & mutilate women was admissible in capital murder trial. Testimony did not implicate Rule 404(b) because it pertained to Def.'s thoughts, not conduct.

Willis v. State, 932 S.W.2d 690, 695-97 (Tex. App. — Houston [14th Dist.] 1996, n.p.h.)

Admission of extraneous offenses in theft by a public servant prosecution upheld though they occurred two years after charged offense. Similar ways in which work records were falsified. Showed Def. had the opportunity and knowledge to commit offense & falsified records were not a mistake. Were necessary. "The greater the State's need to resort to extraneous offenses to prove a material issue in the case, the higher the probative value of the offense in relation to its potential for prejudice."

Johnson v. State, 932 S.W.2d 296, 300-04 (Tex. App. — Austin 1996, n.p.h.)

In capital murder prosecution, intent was disputed issue justifying admission of extraneous offense when Def., although he had confessed to killing, suggested that the killing was unintentional or accidental. Since both the primary and extraneous acts involved efforts to prevent an individual's escape, that was sufficient similarity. Good analysis by Judge Onion.

Hernandez v. State, 914 S.W.2d 226, 232-33 (Tex. App. -- Waco 1996, n.p.h.)

Good review of 404(b). Evidence that def. had hit victim in stomach before was admissible to disprove def.'s theory of accident--that he performed Heimlich maneuver to dislodge a piece of food in child's throat.Notice requirement error. Def. had requested notice in Dec. '93; State gave it in Oct. of '94--3 days before trial. Open-file policy doesn't count. Error but harmless here (State was lucky).

Buchanan v. State, 911 S.W.2d 11, 14-15 (Tex. Cr. App. 1995)

An "open file policy" will not suffice for Rule 404(b) notice.

Blakeney v. State, 911 S.W.2d 508, 513-15 (Tex. App. -- Austin 1995, no pet.)

Trial court had discretion to permit admission of evidence that Def. claimed child grabbed his penis, disrobed, etc. & that Def. had erection while telling this to police. Facts that Def. was bisexual and had been in prison before may have been relevant but inadmissible character evidence. Harmless here. Good discussion on 2 forms of background evidence: "same transaction contextual evidence" & "background contextual evidence."

Bisby v. State 907 S.W.2d 949, 958-59 (Tex. App. -- Fort Worth 1995, pet. ref'd)

Evidence of calls made by Def's wife (with Def. audible in background--essential that he is there & in agreement) threatening victim admissible to show Def's motive to kill, ill will & hostility in murder case.

Alba v. State, 905 S.W.2d 581, 586 (Tex. Crim. App. 1995)

Kidnapping of 2 teen-age boys admissible in cap. murder to show Def's flight from arrest 1 hour after murder when he abandoned his own car fleeing scene. See also **Smith v. State**, 838 S.W.2d 838, 842 (Tex. Crim. App. 1995)(evidence that cap. murderer had just committed robbery admissible to show Def's intent & motive to commit murder & steal victim's truck to make getaway from robbery scene).

Lum v. State, 903 S.W.2d 365, 372 (Tex. App. -- Texarkana 1995, pet. ref'd)

State could offer evidence that Def. had guns in his truck as background when Def. charged with murder & found guilty of involuntary for running deceased passenger & driver off road & causing their car to overturn & crash.

Pavlacka v. State, 892 S.W.2d 897, 902 (Tex. Crim. App. 1994)

Victim in child sexual assault trial who is impeached can't be rehabilitate by testifying to other acts of Def's sexual misconduct against him. See Campbell's dissent which formed the basis for new **Tex. Code Crim. P.** 38.37 which explicitly admits the type of evidence rejected by the majority in **Pavlacka**.

George v. State, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994)

Court holds that the burden of proof for admission of extraneous offenses is "beyond a reasonable doubt" under Rule 104. It rejects federal precedent in **Huddleston v. United States**, 485 U.S. 681 (1988) which had held preponderance of evidence is standard for admission of evidence. **Huddleston** is better reasoned.

Waddell v. State, 873 S.W.2d 130, 132-38 (Tex. App. -- Beaumont 1994, pet. ref'd)

Extraneous offense admissible in indecency with child trial when Def.'s theory was parents of child were engaged in scheme to discredit Def.'s reputation.

Rankin v. State, 872 S.W.2d 279, 282-83 (Tex. App. -- Houston [14th Dist.] 1994, pet. granted)

Two other instances of Def. picking up little girls & putting them on a horse, feeling them in process were admissible in indecency with child trial to show common scheme or plan. This was not merely the same result, but the same concurrence of common features.

Garcia v. State, 871 S.W.2d 769, 771-72 (Tex. App. -- Corpus Christi 1994, pet. ref'd)

Evidence of marihuana stuffed in back seat of patrol car along with cocaine inadmissible in trial for possession of cocaine. Crabbed interpretation.

Espinosa v. State, 853 S.W.2d 36, 39 (Tex. Cr. App. 1993)

Request for Rule 404(b) notice must be addressed to the state, not to the trial court. If request for notice is put in a motion for discovery, the request is not directed to the state (and therefore not effective to create a duty to give notice) until the motion for discovery is ruled on by the court.

Bishop v. State, 869 S.W.2d 342, 346 (Tex. Cr. App. 1993)

"The traditional rule in regard to the admission of extraneous acts for the purpose of showing identity is that the acts sought to be admitted must be so similar to the offense charged that the accused's acts are marked as his handiwork, that is, his 'signature' must be apparent from a comparison of circumstances in both cases. Evidence of an extraneous act which is sought to be admitted for the purpose of proving identity must demonstrate a much higher degree of similarity to the charged offense than extraneous acts offered for other purposes such as intent. This is because without such a high degree of similarity, the probative value of such evidence would be substantially outweighed by its prejudicial effect." In this case, a rape case in which identity was the sole issue, the state asked a witness (the defendant's ex-wife) if, during the course of their marriage, the defendant, "from time to time," liked to engage in anal intercourse, ask her to perform sex acts such as fondling herself, and was capable of performing sexually for an extended period of time without ejaculating. Reversed and remanded. This was not sufficient to be identity evidence.

Castillo v. State, 865 S.W.2d 89, 92-93 (Tex. App. -- Corpus Christi 1993, no pet.)

In robbery trial, State offered testimony that after robbing victim and running off, defendant robbed a bar patron while victim and police were looking for him; victim saw defendant coming out of second bar; appeals court holds that this evidence was not essential to any issue at trial; reversed, not harmless. Old rule suggesting that events that occur immediately before and after offense are automatically admissible is no longer valid. Compare to **Nelson** & **Camacho**, *infra.*

Nelson v. State, 864 S.W.2d 496, 498 (Tex. Crim. App. 1993)

Surviving capital murder victim could testify that defendant stabbed and raped her as well as deceased--they both occurred during the same transaction and same location. "The facts and circumstances of the charged offense would make little or no sense without also admitting the same transaction contextual evidence as it related to the second victim." See also **Camacho v. State**, 864 S.W.2d 524, 531 (Tex. Crim. App. 1993)(evidence of kidnapping and murder in Oklahoma 4 days after capital murder in Texas admissible as same transaction contextual evidence in capital murder trial--later victims were homeowner's wife and child kidnapped from home where 1st victim was killed).

Creekmore v. State, 860 S.W.2d 880, 883 (Tex. App. -- San Antonio 1993, pet. ref'd)

State permitted to offer, during rebuttal, testimony of 3 other victims who were near age of victim in Indecency with Child prosecution. Victim's testimony was challenged by suggesting that: 1) she was jealous; 2) she told lies;

3) her testimony was contradicted by defendant's witnesses; 4) her mother was a lesbian; 5) she and her mother watched X rated movies; 6) she and her mother touched each other in sexually suggestive ways. Good explanation of public policy.

Self v. State, 860 S.W.2d 261, 263 (Tex. App. -- Fort Worth 1993, pet ref'd)

When defense cross-examined State's witness (not the victim) implying that witness and victim contrived the offense and witness coaxed victim into telling story, the extraneouses are admissible to restore the victim's credibility. i.e., since defendant was indirectly attacking victim's credibility through another witness, the victim could testify to extraneous sexual offenses against her. Unusual situation but logical resolution.

Moreno v. State, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993)

Admission of capital murderer's confession in which he said he thought about kidnapping mayor's son and holding him for ransom is not a 404(b) issue because there was no act. Statement was relevant under 401 to show a general intent to kidnap & kill for money, but unfairly prejudicial under 403 because thoughts about bad acts are likely to be misused as character evidence. Harmless error here.

Fletcher v. State, 852 S.W.2d 271, 277 (Tex. App. -- Dallas 1993, pet. ref'd)

Good discussion concerning trial court's balance of probative value v. unfair prejudicial effect. Admitting evidence of defendant's aggressive conduct shortly after commission of offense of Injury to Child when confronted by officers.

Lockhart v. State, 847 S.W.2d 568, 571 (Tex. Crim. App. 1992)

Extraneous offenses indivisibly connected to charged offense & necessary to State's case may be admissible to explain context. Here, evidence that defendant attempted drug purchase and drove car with stolen license plates relevant to capital murder trial. Compare Christopher v. State, 833 S.W.2d 526, 529 (Tex. Crim. App. 19992)(extraneous offense that demonstrate probable cause to arrest not necessarily relevant to charged offense).

McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992)

General review. Presumption that evidence that passes 404(b) hurdle has probative value that is not substantially outweighed by unfair prejudice.

Stringer v. State, 845 S.W.2d 400, 402 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd)

2 other rapes 5 & 5 ½ years earlier at same apartment complex & with same m.o. admissible to prove identity; defendant had been released from TDC just 68 days before present rape; good discussion re not too remote because defendant was in TDC in interim.

Vernon v. State, 841 S.W.2d 407 (Tex. Crim. App. 1992)

Admissibility of prior sexual assaults of a child governed by same standard as other 404(b) evidence; no "lascivious nature" or "continuing offense" exception. [note: holding applies only to unimpeached witness in case in chief; compare Silva infra]

Murdock v. State, 840 S.W.2d 558, 567 (Tex. App. -- Texarkana 1992), *remanded on other grounds*, 845 S.W.2d 915 (Tex. Crim. App. 1993)

When defendant claimed that he was completely unaware of drug-related activities at time of his arrest for illegal investment, State could offer "mule's" testimony that defendant was a drug dealer and mule had worked for him as a runner; helped prove mule delivered money for defendant.

Logan v. State. 840 S.W.2d 490, 497 (Tex. App. -- Tyler 1992, pet. ref'd)

When defense to felony murder was accidental fire, State could show defendant's role in helping burn a relative's mobile home, also for insurance proceeds.

Bishop v. State, 837 S.W.2d 431, 433-34 (Tex. App. -- Beaumont 1992), aff'd, 869 S.W.2d 342 (Tex. Crim. App. 1994)

State couldn't cross-examine defendant's ex-wife on fact that defendant sometimes had anal intercourse, had witness fondle herself, and he could keep an erection for a long time without ejaculating when offered to prove identity as burglar-rapist who had done these things to victim. This is not so distinctive as to be a signature. Reasoning and result repeated by TCA.

Peterson v. State, 836 S.W.2d 760, 763 (Tex. App. -- El Paso 1992, pet. ref'd)

State offered evidence of threats defendant made to police officer 1 hour after arrest for agg. assault on p.o. that he would come back and kill first white officer he could. Offered to show defendant's intent/state of mind. Held to be improperly admitted because threats were made after arrest, therefore it was propensity evidence and prejudicial because it showed racial animosity, desire for killing police officers in general, and feelings of retribution & revenge toward police. Appears wrongly decided if defendant disputed commission of offense or intent.

Silva v. State, 831 S.W.2d 819, 822 (Tex. App. -- Corpus Christi 1992, no pet.)

Follows Boutwell reasoning in admitting evidence of defendant's prior sexual conduct with child victim in aggravated sexual assault of a child prosecution when defendant testified and 1) denied that event occurred; and 2) implied child was lying. Extraneous acts improperly admitted during State's case-in-chief but error cured when defendant testified.

Owens v. State, 827 S.W.2d 911, 917 (Tex. Crim. App. 1992)

Error to admit evidence of defendant's prior sexual conduct with his elder daughter at age 11 in prosecution for sexual assault of younger daughter at age 11 even though defendant testified and denied that event occurred and implied that he was a victim of "frame-up" by daughters who lied.

Dabney v. State, 816 S.W.2d 525, 528-29 (Tex. App. -- Houston [1st Dist.] 1991, pet. ref'd)

In theft trial, admission of 150 extraneous real estate transactions to show defendant never had intention to fulfill obligation to make mortgage payments upheld. State argued that these instances were relevant to show intent to

defraud when intent could not be established from one instance alone. See also Alarid v. State, 762 S.W.2d 659, 661-62 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)(71 extraneous real estate transactions admissible to show intent to defraud).

Bevers v. State, 811 S.W.2d 657, 660-64 (Tex. App. -- Fort Worth 1991, pet. ref'd)

Defendant's prior rape conviction of this victim admissible to show he raped her again 7 years later; proves identity and motive. Victim did not see attacker in charged incident, but he had previously raped her in same manner. Nor was it error to show that he was convicted for first rape, particularly when victim was questioned about variances between testimony at first trial. Further, fact of conviction and jail sentence was admissible to show defendant's motive for second rape since, during first rape, he had threatened to "punish" her if she went to police. Trial court also properly admitted evidence that defendant had made threatening calls to victim after second rape; evidence helped to establish rapist's identity

Gilbert v. State, 808 S.W.2d 467, 470-73 (Tex. Crim. App. 1991)

"[I]f extraneous offense evidence is not 'relevant' apart from supporting an inference of 'character conformity,' it is absolutely inadmissible under Rule 404(b)," and no need for balancing under rule 403. Evidence that defendant was indicted as getaway driver in one bank robbery was not relevant to show defendant was actual robber in this bank robbery trial. Trial court had admitted it under theory that defense cross-examination of police officer opened door by creating false impression that another person might have committed charged bank robbery. Keltner's dissenting opinion at court of appeals level appears to be correct. See Gilbert v. State, 781 S.W.2d 296, 301 (Tex. App. -- Fort Worth 1988)(Keltner, J., dissenting). Rule 404(b) permits admission of extraneous offenses to rebut defensive theory or testimony.

Sypniewski v. State, 799 S.W.2d 432, 434 (Tex. App. -- Texarkana 1990, pet. ref'd)

Extraneous offence admissible to show motive. Evidence of robbery committed 1 month before admissible to show why defendant robbed police officer who had pulled defendant & friend over for speeding. See also Stoker v. State, 788 S.W.2d 1, 12-13 (Tex. Crim. App. 1989)(in capital murder case, witness could testify that Def. told her he had gotten into debt "because he had 'fronted' too many drugs," needed some money & killed a man during robbery of grocery store; showed Def's motive during robbery & evidence that Def. was in debt was probative of his state of mind at time of robbery).

Owens v. State, 795 S.W.2d 822, 825 (Tex. App. -- Texarkana 1990) *rev'd*, 827 S.W.2d 911 (Tex. Crim. App. 1992)

5 years between charged sexual assault of child & extraneous not too remote when acts were similar and victims were at the same age--Def. only had 2 daughters, so he had to wait 5 years until 2nd became same age as 1st at time of assault. Good analysis. Court of Criminal Appeals reversed by applying mechanistic "pigeonholes" of 404(b).

Torres v. State, 794 S.W.2d 596, 598 (Tex. App. -- Austin 1990, no pet.)

Testimony that defendant called child victim's mother from jail and threatened that if she testified against him, he would see she went to jail and lose his military benefits was admissible, despite being extraneous offense, when offered to prove "consciousness of guilt." Although rule 404(b) does not specifically mention "consciousness of guilt" such evidence is an "other purpose"; here, probative value was not substantially outweighed by unfair prejudice.

Couret v. State, 792 S.W.2d 106, 108 (Tex. Crim. App. 1990)

> Major case. Extraneous offenses as *res gestae* to offense. Def. was arrested for burglary & officer found hypodermic syringe in his pocket. Evidence of hypodermic syringe did not prove any material fact in burglary case & was not independently relevant. Error to admit it. [Test is whether extraneous offense sheds light on charged offense or is so entwined with charged offense that evidence of one cannot be logically separated from the other].

Janisse v. State, 789 S.W.2d 623, 626-27 (Tex. App. -- Beaumont 1990, pet. ref'd)

> Defendant committed sexual assaults on 2 young girls in same room on same 2 nights and made 2 separate confessions; events were intermixed, but not confessions. Let it all in as a continuous transaction so that jury not "hoodwinked." Probative value not substantially outweighed by unfair prejudice when offered to show absence of mistake or accident. Rule 403 acts to discourage "ad hoc" review of trial court's discretion.

Clarke v. State, 785 S.W.2d 860, 864-66 (Tex. App. -- Fort Worth 1990), *aff'd per curiam*, 811 S.W.2d 99 (Tex. Crim. App. 1991)

> When State's case re identity was circumstantial, proper to use extraneous offense in which identity evidence was also circumstantial; "Common element may be the mode of commission of the crimes, or the mode of dress of the perpetrator, or any other element which marks both crimes as having been committed by the same person." 11 month interval not too remote.

Wiggins v. State, 778 S.W.2d 877, 881-87 (Tex. App. -- Dallas 1989, pet. ref'd)

> Extraneous offense admissible to refute a defensive theory or strategy. Good discussion of Wigmore's "doctrine of chances." Helpful analysis.

Crank v. State, 761 S.W.2d 328, 342 (Tex. Crim. App. 1988), cert. denied, 110 S.Ct. 209 (1989)

> Admission of extraneous offenses governed by rule 403. If relevant, this evidence admissible unless its probative value is "substantially outweighed" by danger of unfair prejudice. Major Texas case; dramatic shift in balancing probative value v. prejudicial effect in the admission of other bad acts evidence. In accord with established federal precedent: see, e.g., United States v. Huddleston, 108 S.Ct. 1496 (1988).

Pleasant v. State, 755 S.W.2d 204, 205-06 (Tex. App. -- Houston [14th Dist.] 1988, no pet.)

> Extraneous offense was admissible to rebut alibi defense. Helpful analysis. Defendant had filed pretrial request for notice of extraneous offenses. When prosecutor approached bench before offering this evidence, held sufficient compliance with notice requirement [no issue of request for continuance which, if requested, presumably should be granted].

Yarbough v. State, 753 S.W.2d 489, 490 (Tex. App. -- Beaumont 1988, no pet.)

> When defendant claimed self-defense, he could be cross-examined on two extraneous knifings in which he was the aggressor and State could bring on witnesses to prove them up when defendant denied their commission.

Herring v. State, 752 S.W.2d 169, 172 (Tex. App. -- Houston [1st Dist.] 1988), remanded on other grounds, 758 S.W.2d 283 (Tex. Crim. App. 1988)

Prior notice of intention to use extraneous offenses must be given only for State's case-in-chief, not when used for rebuttal. Here extraneous offense became admissible only for impeachment of alibi witness. See also Yohey v. State, 801 S.W.2d 232 (Tex. App. -- San Antonio 1990, pet. ref'd).

Jones v. State, 751 S.W.2d 682, 683-87 (Tex. App. -- San Antonio 1988, no pet.)

Admission of evidence that disproportionate number of infant deaths occurred during defendant's nursing shift at hospital admissible under 404(b). Court has difficulty articulating rationale, finally suggests relevancy to prove identity and intent. Could have gone straight to Wigmore's "doctrine of chances." Hospital statistics could be offered to prove this baby died as a result of a criminal act, not natural causes because one death is a tragedy, two deaths is weird, and three deaths is murder. See E. Imwinkelried, **Uncharged Misconduct Evidence**, sec. 4.02 et. seq. (1984).

Dickerson v. State, 745 S.W.2d 401, 403 (Tex. App. -- Houston [14th Dist.] 1987, no pet.)

List of permissible purposes for introduction of extraneous offenses is exemplary, not exhaustive, citing McCormick & Black, Evidence, 18 **Tex. Tech. L. Rev.** 491, 514-19 (1987).

Wooten v. State, 735 S.W.2d 574, 578 (Tex. App. -- Texarkana 1987, pet. ref'd)

When entrapment was defense, extraneous offenses are admissible to show intent. Blanket statement; no analysis made.

Houston v. State, 735 S.W.2d 903, 905 (Tex. App. -- Houston [14th Dist.] 1987, no pet.)

Contra Wooten. No analysis; no citation to rules. Holds that since Texas has adopted "objective" test for entrapment, extraneous would show only propensity and thus is irrelevant. Query if both opinions are unsound. Extraneous offenses are sometimes admissible to directly rebut affirmative defense; in case-by-case analysis, a particular extraneous might be admissible.

Tex. R. Crim. Evid. 404(c) character relevant to punishment

Beasley v. State, 902 S.W.2d 452, 456 (Tex. Crim. App. 1995)
Anderson v. State, 901 S.W.2d 946 (Tex. Crim. App. 1995)

Evidence of gang membership admissible at punishment stage. State must prove: 1) Def. is a member; 2) group commits bad/illegal acts. State need not prove Def. is connected to their specific illegal acts.

Monroe v. State, 864 S.W.2d 140, 143-45 (Tex. App. -- Texarkana 1993, pet. ref'd)

Defendant pled guilty to agg. robbery at Stop N Rob. During punishment, State put on 7 convenience store clerks to testify that they had met defendant on X date, while employed, and in their opinion he was not law-abiding. Court says examiner cannot go into date & convenience store--too close to getting into extraneous offenses, but

harmless here. But see Bleil's dissent, noting foul tactic and blatant misuse of Rule 405 (he's right--violation of the spirit).

Grunsfeld v. State, 845 S.W.2d 521 (Tex. Crim. App. 1992)

Unadjudicated extraneous offenses not admissible under amended 37.07. According to majority, legislature did not intend to change statute when they amended it. Tortuous reasoning. Good dissents by McCormick, Campbell, Benavides, & White. Legislature once more amended 37.07 to admit other offenses.

Ybarra v. State, 775 S.W.2d 409 (Tex. App. -- Waco 1989, no pet.)

State's witness at punishment phase could give his opinion that defendant was a member of a TDC prison gang. "If gang membership gives the jury valuable information regarding the character of the defendant it should be allowed." Good reasoning and result.

Tex. R. Crim. Evid. 405 specific instances of character

Evans v. State, 876 S.W.2d 459, 464 (Tex. App. -- Texarkana 1994, no pet.)

Rule does not allow evidence of prior specific instances to prove victim's character. Def.'s theory was that instances showed victim's aggressive tendencies and therefore he was aggressor & Def. was acting in self-defense. Compare to Gonzales, supra under 404(a)(2).

Tex. R. Crim. Evid. 405(a) cross-examination of character witness with specific prior instances of conduct

Goff v. State, 931 S.W.2d 537, 552-53 (Tex. Crim. App. 1996)

Defendant not permitted to prove that deceased had been convicted of forgery and injury to a child to impeach fact witness' testimony that deceased was a "good worker." No connection between the two. Witness did not testify to deceased general good character.

Bratcher v. State, 771 S.W.2d 175 (Tex. App. -- San Antonio 1989, no pet.)

Quoting extensively from Goode, Wellborn, Sharlot Guide to the Texas Rules of Evidence: Civil and Criminal §405.2 (Texas Practice 1988) for proposition that character witness who gives his opinion of defendant's character traits may be cross-examined with "were you aware" or "did you know" questions since there was a good faith basis for question.

Quiroz v. State, 764 S.W.2d 395, 397-99 (Tex. App. -- Fort Worth 1989, pet. ref'd)

Before cross-examining character witness on prior specific instances of conduct, impeaching party should put on evidence, outside presence of jury, of factual basis for the acts inquired into.

Smith v. State, 763 S.W.2d 836, 840-43 (Tex. App. -- Dallas 1988, pet. ref'd)

Defense witness who gratuitously told prosecutor, on cross-exam, "I have never known [defendant] to be in any kind of trouble," did not open door to cross-examination with defendant's arrest record. Logically it should have since witness was leaving false impression with jury, but record was clear that defense attorney had warned witness not to say this and he had immediately objected to his own witness' testimony.

Turner v. State, 762 S.W.2d 705 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Reputation witness may be cross-examined on specific instances which have not resulted in a final conviction.

Lancaster v. State, 754 S.W.2d 493 (Tex. App. -- Dallas 1988, pet. ref'd)

When defense witness, at punishment stage, offered opinion that defendant was not violent or continuing danger, State could cross-examine with "Did you knows" of prior arrests for theft, robbery, etc., including very specific details of offenses. Court properly held hearing, outside presence of jury, on factual basis for these questions in which several victims testified.

Tex. R. Crim. Evid. 405(a) familiarity with reputation

Adanandus v. State, 866 S.W.2d 210, 225 (Tex. Crim. App. 1993)

Reputation witness may base testimony on discussion with other police officers. Rule does not require specific discussion of "reputation." Sufficient if testimony is based upon a "synthesis of observations and discussions which result in a conclusion as to the individual's reputation."

Lopez v. State, 860 S.W.2d 938, 944-45 (Tex. App. -- San Antonio 1993, no pet.)

Opposing party entitled to test qualifications of reputation witness outside presence of jury. Testimony must be based on discussions with others about defendant or on hearing others discuss that reputation. Reputation witness must have substantial familiarity with reputation, not specific acts. When State's witness admitted his opinion was based on statements of a single informant received 2-3 days before the offense, he was not substantially familiar with reputation. Not harmless because officer's testimony "clothed with authority of law enforcement." Compare Smith v. State, 857 S.W.2d 65, 70 (Tex. App. -- Tyler 1993, no pet.)(sufficient familiarity by police officer concerning defendant's reputation).

Davis v. State, 831 S.W.2d 839, 844 (Tex. App. -- Dallas 1992, pet. ref'd)

State cannot ask reputation witness questions based upon this offense. Rationale: "if the State uses the charge contained in the indictment as a basis for showing that a man's reputation as a law-abiding citizen is bad, then no man who is on trial could successfully show a good reputation as a law-abiding citizen."

Hernandez v. State, 800 S.W.2d 523, 524-25 (Tex. Crim. App. 1990)

Substantial familiarity with specific acts does not equal substantial familiarity with reputation. Witness must have discussed reputation itself with others prior to date of offense [under 1990 amendment to 405, presumably familiarity with "facts," i.e. specific acts, is sufficient basis for witness' personal opinion].

Willis v. State, 785 S.W.2d 378, 386 (Tex. Crim. App. 1989)

Reputation testimony can't be based solely upon knowledge surrounding offense for which Def. on trial; it must include a discussion of matters other than instant offense. Does not matter whether witness personally knows Def. or where Def. lived. Testimony by police officer is admissible when he has discussed reputation with fellow police officers and those who did live in Def.'s neighborhood. See also Fearance v. State, 771 S.W.2d 486, 511-12 (Tex. Crim. App. 1988), *cert. denied*, 109 S.Ct. 3266 (1989).

Hedicke v. State, 779 S.W.2d 837, 840-41 (Tex. Crim. App. 1989)

Historical analysis of rule. Relevant opinion and reputation evidence admissible character evidence at punishment phase. Trial court improperly excluded defense witnesses' opinion evidence, but harmless since they did testify to reputation.

Ross v. State, 763 S.W.2d 897 (Tex. App. -- Dallas 1988, pet. ref'd)

One police officer said that he knew defendant after offense, but had first heard about him one month before offense--testimony admissible. Second police officer only knew defendant after offense; error, but harmless.

Tex. R. Crim. Evid. 406 — Habit

Miller v. State, 882 S.W.2d 936, 938-39 (Tex. App. — Beaumont 1994, no pet.)

"Habit evidence is admissible whether corroborated or not and, even, regardless of the presence of eyewitnesses. Rule 406 mandates that evidence of habit is relevant to prove that the conduct of the person or accused on a particular occasion was in conformity with the habit." In this case, two witnesses testified that defendant frequently carried a pistol and smoked marijuana. The court held that this was habit evidence. (Wow!).

Waddell v. State, 873 S.W.2d 130, 138 (Tex. App. — Beaumont 1994, pet. ref'd)

Numerous extraneous sexual assaults against the same complainant named in the indictment were habit evidence when it was shown that they were committed in substantially the same manner each time over a period of five years. (Wow!). Of course, TEX. CRIM. PRO. ANN. art. 38.37 makes such evidence expressly admissible now.

Bishop v. State, 837 S.W.2d 431, 434-35 (Tex. App. — Beaumont 1992), aff'd, 837 S.W.2d 431 (Tex. Cr. App. 1993)

"Habit evidence is superior to character evidence because the uniformity of one's responses to habit is far greater than the consistency with which one's conduct conforms to character. Evidence of habit is not lightly established, however. To offer evidence of a habit, a party must at least demonstrate a 'regular practice of meeting a particular kind of situation with a specific type of conduct." In this case, the state attempted to prove that the defendant had a "habit" of engaging in anal sex with his wife, asking his wife to fondle herself, and having intercourse for an extended period of time without ejaculating. All that was established in the evidence was that the defendant did this "from time to time." Reversed and remanded.

Tex. R. Crim. Evid. 408 settlement negotiations

Smith v. State, 898 S.W.2d 838, 843 (Tex. Crim. App. 1995)

> Rule 408 does not bar evidence of capital murder Def.'s offer to plead guilty in return for life. Citing federal cases, court notes that a claim which is disputed as to either validity or amount generally does not refer to criminal plea bargains. Evidence properly excluded under Rule 403 instead.

Moss v. State, 860 S.W.2d 194, 196 (Tex. App. -- Texarkana 1993, no pet.)

> Rule 408 prohibits defendant from offering testimony about plea negotiations (410 only excludes evidence offered against defendant). Follows federal cases.

Tex. R. Crim. Evid. 410 plea negotiations

Dennis v. State, 925 S.W.2d 32, 41 (Tex. App. – Tyler 1995, pet. ref'd)

> Admission of statements made during federal plea session admissible because: 1) Def. didn't show that his plea had been withdrawn; and 2) jury only knew that the statements were made under oath, not the full context.

Childs v. State, 837 S.W.2d 822, 824 (Tex. App. -- San Antonio 1992, pet. ref'd)

> Defendant's prior guilty plea, which was appealed and conviction reversed for failure to admonish on entire range of punishment, was barred by Rule 410 in second trial before jury. Prior guilty plea was "withdrawn" by reversal on appeal.

Henson v. State, 794 S.W.2d 385, 399 (Tex. App. -- Dallas 1990, pet. ref'd)(Kinkeade, J., dissenting on motion for reh'g)

> Noting that statements protected by the rule must have been made for the purpose of obtaining a concession from the government; "[g]ratuitous remarks made without the intent to negotiate a plea are admissible."
> Ed. note: Rule 410 is interpreted narrowly in federal courts; it only bars evidence when Def. offers to plead guilty, not when he's looking for a dismissal. See **United States v. Porter**, 821 F.2d 968, 977 (4th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988); **United States v. Sebetich**, 776 F.2d 412, 421-22 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988).

Wayne v. State, 756 S.W.2d 724 (Tex. Crim. App. 1988)

> When defendant was in jail, he initiated attempt to make a "deal" with police as a "snitch." This was not a plea negotiation. Police officer did not initiate discussion & he had no authority to negotiate a plea bargain; must be "attorney for the prosecuting authority." Good general outline of area, but opinion does not cite rule.

Tex. R. Crim. Evid. 412 rape shield law

Marx v. State, 953 S.W.2d 321, 337 (Tex. App. — Austin 1997, pet. granted)

> Agg. sexual assault of a child case. In this case, the rape shield law was used to prevent defense-sponsored evidence that a child had been molested on a previous occasion by another person (other than defendant). Defendant sought admission of the evidence to show that physical injuries to the child's genitalia were inflicted at a time earlier than the incident alleged against defendant. The state's expert had testified that it could not be determined when the injuries occurred. The evidence sought to be admitted was not really relevant anyway, but the court of appeals did the analysis in terms of the rape shield law. This type of use of the statute could not have been what the legislature intended when it enacted the rape shield law, however such use is not unprecedented. *See Reynolds v. State*, 890 S.W.2d 156 (Tex. App. — Texarkana, no pet.).

Hood v. State, 944 S.W.2d 743, 745-47 (Tex. App. — Amarillo 1997, no pet.)

> Identical set of facts as *Marx*, but the medical evidence was relevant and fit within both the rape shield law and the defendant's theory. The court of appeals held that it was harmful error for the trial court to exclude it. Again, complete analysis under the rape shield law. The court held that if the rape shield law's requirements are otherwise met, the age of the child is irrelevant to the determination of whether the probative value is not outweighed by the danger of unfair prejudice.

Kesterson v. State, ___ S.W.2d ___, 1997 WL 189915 (Tex. App. — Dallas)

> Another aggravated sexual assault of a child case. Trial court conducted an *in camera* interview of the child and sealed the record. The court of appeals held that defendant's appellate lawyer is not entitled to see the record made *in camera*. The court made the following concession, however: "In conducting its review, this Court will be mindful of the fact that the briefing may be less specific than usual due to the appellant's inability to review the sealed portion of the record." Indeed. It will be interesting to see what the CCA will do with this.

Wofford v. State, 903 S.W.2d 796, 799-800 (Tex. App. -- Dallas 1995, pet. ref'd)

> Good general review of rule & rationale. When Def. denies that sex occurred, he can't bring in evidence that victim had sex with others for money offered to prove she got mad because Def. wouldn't buy her more drugs.

Cuyler v. State, 841 S.W.2d 933, 936 (Tex. App. -- Austin 1992, no pet.)

> Evidence of victim's subsequent sexual behavior (post-offense, pre-trial) banned by Rule 412; cites federal rule definition, Wright & Graham, & other states' cases; good reasoning and result.

Rankin v. State, 821 S.W.2d 230, 233-34 (Tex. App. -- Houston [14th Dist.] 1991, no pet.)

> Discussion of numerous 412 issues. Defendant in agg. sexual assault of child offered hearsay testimony that victim had told cousin she had oral sex in movies; evidence that victim "played doctor" at age 6 (!!) & engaged in "lesbian activity" at 11-12. All evidence excluded as hearsay, prohibited reputation, occurring after offense; or irrelevant for promiscuity defense which doesn't apply to aggravated sexual assault; single incident does not equal promiscuity.

Boyle v. State, 820 S.W.2d 122, 147-49 (Tex. Crim. App. 1989)(op. on reh'g)

"Texas courts have been reluctant to find prior sexual history evidence to be material." Evidence of sexual conduct with others not relevant to show consensual sex with defendant. Not relevant to show source of semen when other conduct occurred 2 weeks before charged rape-murder.

Chew v. State, 804 S.W.2d 633, 638-41 (Tex. App. -- San Antonio 1991, pet. ref'd)

"Cock fight" gang rape case. Def. claimed consent and wanted to prove victim was nymphomaniac. Offered expert testimony that female with "nymphomania" *could* be raped but "it's not probable," claiming this is a medical affliction that casts doubt on victim's denial of consent. Also offered to show victim's motive to deny consent because she was afraid of her jealous husband. Requires admission of post-offense sexual conduct as well. Conviction reversed. Majority opinion marks return to 19th century; well-reasoned dissent by Peeples.

Pinson v. State, 778 S.W.2d 91, 94 (Tex. Crim. App. 1989)

Def. failed to show that victim's prior sexual conduct with another person 48 hours earlier was relevant to alibi defense. Victim had testified that she thought Def. had ejaculated. Def. offered testimony of examining doctor that he had found non-motile sperm present to show that source of semen was another person. Insufficient foundation since Def. didn't offer any evidence that he was within "normal" group of those who ejaculate motile sperm & did not prove penetration/nonpenetration since Def. might have penetrated but not ejaculated.

Leger v. State, 774 S.W.2d 99, 101 (Tex. App. -- Beaumont 1989, pet. ref'd)

Trial court properly excluded evidence that victim had worked as a topless dancer, taken money for sex twice, and had lived with a man to whom she was not married. Offered 1) to impeach credibility; 2) show consent; 3) since State "opened door" to evidence. Appeals court rejects all arguments; only past behavior with Def. is relevant.

Golden v. State, 762 S.W.2d 630, 631-32 (Tex. App. -- Texarkana 1988, pet. ref'd)

Defendant is not entitled to present evidence of victim's prior promiscuity when he did not make prior request, out of jury's presence, regarding his intention to ask these questions.

Holloway v. State, 751 S.W.2d 866 (Tex. Crim. App. 1988)

Lengthy discussion of rationale of rape shield law. Defendant cannot introduce victim's reputation as prostitute in rape prosecution even when defense is consent. He cannot introduce evidence of prior specific acts of prostitution with others; it is not material. "This is as ridiculous as assuming that a philanthropist cannot be robbed because he has a past history of instances in which he gave away money and property to people he did not know."

Garza Barreda v. State, 739 S.W.2d 368, 369-70 (Tex. App. -- Corpus Christi 1987), pet. dism'd, 760 S.W.2d 1 (Tex. Crim. App. 1988)

Defendant could not introduce evidence of past sexual activities of complainant with defendant or anyone else when consent was not in issue. Used general relevancy balancing test; discusses impeachment on collateral matters and right of confrontation.

Tex. R. Crim. Evid. 501 No privileges except those set out in constitution, statute, or rules

Skinner v. State, ___ S.W.2d ___, 1997 WL 266188 (Tex. Cr. App. 1997)

The "work product privilege" is alive and well. This case gives a good review of the privilege citing back to *Washington v. State*, 856 S.W.2d 184 (Tex. Cr. App. 1993) and *United States v. Nobles*, 422 U.S. 225 (1975). The work product privilege may be waived through "testimonial use": the use of privileged materials before the jury. This is a "testimonial use" case. *See* especially **6 (headnote 9).

Coleman v. State, ___ S.W.2d ___, 1997 WL 209530 (Tex. Cr. App. 1997)

Affirmed court of appeals decision. There is no reporter's privilege. Good compulsory process analysis (to everyone except McCormack, Womack and Keller, who dissented). Denial of compulsory process not subject to harm review.

Coleman v. State, 915 S.W.2d 80, 83-84 (Tex. App. — Waco 1996, pet. granted)

There is no reporter's privilege in Texas. Trial court erred in granting their motion to quash subpoenas issued by Def. Conviction reversed.

Tex. R. Crim. Evid. 503(a)(3) & (a)(4): "lawyer" and "representative of lawyer"

(note: numerous Texas civil cases have addressed the same attorney-client privilege issues under civil rule; refer to them in West's Digest: Witnesses 198)

Richardson v. State, 744 S.W.2d 65, 74-76 (Tex. Crim. App. 1987), *vacated*, 492 U.S. 914 (1989)

Fellow prison inmate who gives legal advice is not a lawyer or representative of lawyer for purposes of privilege rule.

Tex. R. Crim. Evid. 503(a)(5) "confidential" communication

Austin v. State, 934 S.W.2d 672 (Tex. Cr. App. 1996)

Reversed court of appeals decision. Where the attorney is a "mere conduit" between the trial judge and the client, passing on a routine message (such as a trial setting), the information "does not involve the subject matter of the client's legal problems" and is thus not protected by the attorney-client privilege.

Austin v. State, 899 S.W.2d 834, 837-38 (Tex. App. -- Beaumont 1995, pet. granted)

Appeals court holds that attorney's letter to defendant informing him of trial date was a confidential communication because letters are private & client didn't agree to disclosure. Court appears wrong, probable reversal on PDR.

Lewis v. State, 709 S.W.2d 734, 736 (Tex. App.--San Antonio 1986, pet. ref'd, untimely filed)

Statement made by sexual assault victim's sister to attorney ad litem for victim was made in presence of victim and Dept. of Human Resources caseworker, thus not intended to be confidential when sister would have considered the audience adverse to her own interests at time statement made.

Tex. R. Crim. Evid. 503(b) attorney-client privilege

Carmona v. State, 941 S.W.2d 949 (Tex. Cr. App. 1997)

> In this case, the defendant's attorney turned a polygraph report over to the state in the hopes of getting a favorable result from the district attorney. Instead, the district attorney called the polygraph examiner as a witness at trial to testify to the incriminating statements that the defendant made that were *not* in the report. CCA held that it was error to hold that the attorney-client privilege was waived merely because the attorney made a partial disclosure without more. Good outline of the operation of both the attorney-client privilege and the work product privilege. An objection citing only the attorney-client privilege will not preserve error as to the work product privilege.

Manning v. State, 766 S.W.2d 551, 556-58 (Tex. App. -- Dallas), aff'd, 773 S.W.2d 568 (Tex. Crim. App. 1989)

> Defense attorney's testimony at competency hearing did not violate attorney-client privilege. Lengthy discussion and analysis. Attorney did not testify as to content of privileged communications. Defendant argued that attorney would not have been able to express an opinion regarding his competency if there had been no attorney-client relationship, thus the "fact" of his competency became known "by reason of the attorney-client relationship." Court rejected this since any person could have observed defendant's demeanor and ability to converse, thus fact was not a special attribute of attorney-client privilege

Tex. R. Crim. Evid. 503(b)(3) privilege covering "common interest"

Strong v. State, 773 S.W.2d 543 (Tex. Crim. App. 1989)

> Discussion regarding when two co-defendants have similar interests under rule. Thorough analysis. Here, defendant and co-defendant charged with capital murder; co-defendant turns State's witness and gives confession, then testifies against defendant at trial. Meanwhile, defendant had written co-defendant's attorney a letter stating that the two were "in this" together and would stick together. Defense attorneys had not cooperated, discussed common defense with each other or clients. Defendant's letter admissible at trial because no evidence that at time letter was written co-defendants had a common interest.

Tex. R. Crim. Evid. 503(c) who may claim attorney-client privilege

Smith v. State, 770 S.W.2d 70 (Tex. App. -- Texarkana 1989, no pet.)

> Trial court improperly allowed State to invoke attorney-client privilege on behalf of murder victim since prosecuting attorney was not one of persons enumerated in rule who may claim privilege. Here error harmless because excluded testimony went only to character trait testimony regarding victim's terroristic threat charge that attorney was appointed on and witness to that terroristic threat testified, thus attorney's testimony would have been merely cumulative.

Tex. R. Crim. Evid. 503 Comment (work product doctrine)

Washington v. State, 822 S.W.2d 110, 114-17 (Tex. App. -- Waco 1991), *rev'd* 856 S.W.2d 184 (Tex. Crim. App. 1993)(see rule 107)

> Defense investigator taped interview with State's witness & selectively cross-examined on contents of that interview. State entitled to introduce remainder under rule 107. Work product does not protect materials otherwise privileged when attorney affirmatively uses that material in court; doctrine of waiver by offensive use.

Tex. R. Crim. Evid. 504(1) marital communications privilege

Weaver v. State, 855 S.W.2d 116, 120-121 (Tex. App. -- Houston [14th Dist.] 1993, no pet.)

> Spousal privilege does not apply to threats made against spouse--threats are not intended to be kept private. Privilege does not apply to acts, only words.

Sterling v. State, 814 S.W.2d 261, 261-62 (Tex. App. -- Austin 1991, pet. ref'd)

> Marital communications privilege applies to utterances only, not to acts; wife could testify that husband struck her with his facts, a tape recorder, a brick, and a telephone.

Gibbons v. State, 794 S.W.2d 887, 892-93 (Tex. App. -- Tyler 1990, no pet.)

> Rule does not prevent State from introducing out-of-court statements by wife against Def. Here, taped conversations in which Def's wife gossips to 3rd party about Def's drug dealing was admissible.

Freeman v. State, 786 S.W.2d 56, 59 (Tex. App. -- Houston [1st Dist.] 1990, no pet.)

> Divorce terminates testimonial privilege, but it does not terminate privilege for confidential communications made during marriage. Divorced spouse may be compelled to testify against Def. spouse regarding acts or conduct of the other. Thus, State could require former wife to testify that Def. habitually carried handgun.

Zimmerman v. State, 750 S.W.2d 194, 198-201 (Tex. Crim. App. 1988)

> Pre-rules decision stating, in dicta, that court was adopting doctrine that "'where a written confidential communication between husband and wife falls into the hands of a third party inadvertently and without the consent or connivance of the addressee-spouse, the third party should be permitted to testify as to the communication'" Here letter written by murder Def. to his wife was discovered by Def's mother-in-law without wife's consent was admissible. Result under rule 504 would be that letter is privileged if Def. had taken reasonable care that it not be divulged.

Tex. R. Crim. Evid. 504(1)(d)(2) "minor child"

Ludwig v. State, 931 S.W.2d 239 (Tex. Cr. App. 1996)

Affirmed. CCA does a *Boykin* analysis. *See Boykin v. State*, 818 S.W.2d 782 (Tex. Cr. App. 1991).

Ludwig v. State, 872 S.W.2d 771, 773-75 (Tex. App. -- Waco 1994, pet. granted)

Minor child exception to marital communications privilege applies to any minor child, need not be child of either spouse. Here, spouse could be compelled to testify to marital communications when capital murder victim was Def.'s nephew by marriage. Good reasoning and result.

Tex. R. Crim. Evid. 504(2) spousal testimonial privilege

Welch v. State, 908 S.W.2d 258, 264-65 (Tex. App. -- El Paso 1995, pet. ref'd)

No privilege not to testify to events that occurred before marriage. Here Def. married witness 3 days before trial (wonder why?). Witness must testify unless Def. proves C.L. marriage by preponderance of evidence. Mere cohabiting does not equal C.L. marriage.

Tejeda v. State, 905 S.W.2d 313, 316-17 (Tex. App. -- San Antonio 1995, no pet.)

Spousal privilege not abridged by admission of spouse's excited utterances made to police when policeman testifies at trial. Also, requiring a spouse to stand and be identified is not testimonial, it's outside protection of rule.

Johnson v. State, 803 S.W.2d 272, 281 (Tex. Crim. App. 1990)

Review of spousal testimonial privilege under rule; witness must testify on behalf of spouse if Def. calls her. Error for State to cross-examine wife at pretrial hearing on irrelevant matters and introduce that testimony at trial when wife claims 5th at trial, but harmless here.

Willard v. State, 719 S.W.2d 595, 600-02 (Tex. Crim. App. 1986)

Wife may now testify against husband; privilege belongs to witness. This conviction reversed because trial occurred before new rules promulgated. Court noted that since retrial would occur after the rules were in effect, wife could now testify. Wife testified against defendant who had killed wife's daughter by a previous marriage. White's dissent sets out rationale for abolishing spousal incompetency. See also Boyle v. State, 820 S.W.2d 122, 145 (Tex. Crim. App. 1991)(spouse may testify over defendant spouse's objection).

Tex. R. Crim. Evid. 504(2)(b) privilege when spouse is victim

Fuentes v. State, 775 S.W.2d 64 (Tex. App. -- Houston [1st Dist.] 1989, no pet)

Defendant's wife who does not wish to testify against defendant cannot be compelled to do so even though she had testified against him in a prior hearing. State claimed that her voluntary testimony at prior hearing waived privilege but court found prior testimony was not voluntary.

Tex. R. Crim. Evid. 504(2)(a) definition of "spouse"

Weaver v. State, 855 S.W.2d 116, 120-121 (Tex. App. -- Houston [14th Dist.] 1993, no pet.)

> Spousal privilege does not apply to putative spouse (one thought to be a spouse, but there's a legal impediment--e.g. a former, undissolved marriage). Also, threats to putative spouse are not intended to be kept private. Also, testimony about acts rather than words is not privileged. Also, since Defendant signed confession, he waived any privilege; information disclosed to 3rd persons.

Riley v. State, 849 S.W.2d 901, 902 (Tex. App. -- Austin 1993, pet. ref'd)

> When spouse does not dissolve common law marriage within 1 year after relationship ends, spouse cannot claim spousal privilege. Also addresses "member of household" under Family Code. Victim was unrelated to defendant or spouse, but he lived in the house, thus was a member of household.

Tompkins v. State, 774 S.W.2d 195, 208-09 (Tex. Crim. App. 1987), *aff'd*, 109 S.Ct. 2180 (1989).

> "Secret" common law marriage does not exist. Discussion of elements of common law marriage & burden of proof on proponent of privilege b/f testimonial privilege will apply. Here, no evidence to prove that Def. & W. held themselves out to public as husband & wife.

Reece v. State, 772 S.W.2d 198 (Tex. App. -- Houston [14th Dist.] 1989, no pet)

> Enactment of Rule 504 did not affect prior case law under former art. 38.11 that existence of common law marriage is a question of fact subject to "close scrutiny" by court. Proof must meet all elements of Family Code §1.91(a)(2). When evidence on each element is conflicting, trial judge has discretion to find existence or nonexistence of marriage.

Tex. R. Crim. Evid. 505 priest-penitent privilege

Simpson v. Tennant, 871 S.W.2d 301 (Tex. App. -- Houston [14th Dist.] 1994, orig. proceeding)

> Major case. Lengthy discussion of history & rationale of evidentiary privileges. Priest-penitent privilege applies to identity of penitent as well as communication.

Easley v. State, 837 S.W.2d 854, 855-58 (Tex. App. -- Austin 1992, no pet.)

> Defendant's letters to pastor urging him to provide alibi or she would reveal truth about their relationship was not a privileged communication because not written to pastor in professional character as spiritual advisor. It was blackmail attempt.

Tex. R. Crim. Evid. 508(c)(2) & (3) confidential informant

Loving v. State, 882 S.W.2d 42, 44-45 (Tex. App. -- Houston [1st Dist.] 1994, no pet. reported)

Reversed when Def. made "plausible" showing that informer's testimony could be helpful to Def. Not harmless error. See also **Edmonds v. State**, 911 S.W.2d 487, 487-88 (Tex. App. -- Texarkana 1995, no pet.)("Rule 508(c)(2) requires only that there be a reasonable probability that the informer can give testimony necessary to a fair determination of the issue of guilt"; Def. must make only a "plausible showing" to get name).

Rodriguez v. State, 834 S.W.2d 592, 595-96 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd)

Filing of motion and affidavit insufficient to raise right to informer's identity when affidavit not offered into evidence, no testimony, and no stipulation.

Bodin v. State, 807 S.W.2d 313, 317 (Tex. Crim. App. 1991)

Def. is only required to make "plausible showing" of how informer's identity may be important to defense before disclosure required. Def. arrested for PCS; he wanted to know if person whom he knew as "James" was informer because validation of "James" as informer would be material evidence of a possible entrapment defense. Relying upon federal precedent and noting that rule 508 is based on Roviaro v. United States, 353 U.S. 53 (1957), but holding that rule "is broader than that applicable under the prior law... and the Court of Appeals erred by restricting application of the exception to the three categories relevant before Rule 508 was adopted." See also Lopez v. State, 824 S.W.2d 298, 300 (Tex. App. -- Houston [1st Dist.] 1992, no pet.)(following *Bodin* re "plausible showing"; failure to disclose identity of informer who was present during drug delivery was harmful error).

Bailey v. State, 804 S.W.2d 226, 230 (Tex. App.--Amarillo 1991, no pet.)

Def. must make sufficient preliminary showing of materiality of informer's testimony by putting on evidence. Since Def. did not put on such evidence, no error in denying to disclose identity.

Ashorn v. State, 802 S.W.2d 888, 892 (Tex. App. -- Fort Worth 1991, no pet.)

In motion to suppress, relevant issue regarding disclosure is whether officer did or did not believe informer, not whether informer himself did tell truth. It is the reasonableness of officer's reliance that is in issue. 2nd issue: State does not have burden of producing informer in court at trial, only of disclosing his identity and last known location.

Martinez v. State, 782 S.W.2d 262, 263 (Tex. App. -- Houston [14th Dist.] 1989, no pet.)

Disclosure of informant not required when evidence goes to an extraneous offense rather than charged offense.

Smith v. State, 781 S.W.2d 418, 421 (Tex. App. -- Houston [1st Dist.] 1989, no pet.)

In camera hearing necessary only when defendant makes showing that there is an informant who may be able to give testimony necessary to fair determination of defendant's guilt or innocence.

Hall v. State, 778 S.W.2d 473 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Trial judge has discretion on whether or not to require disclosure of informant's name or in camera hearing when truthfulness of warrant affidavit is disputed. If judge is satisfied that the information upon which the search warrant was based was received from an informer reasonably believed to be credible or reliable, court need not require in camera hearing at all.

Crawford v. State, 772 S.W.2d 493, 495-96 (Tex. App. -- Houston [14th Dist.] 1989, no pet.)

No cite to rule. Here informant translated between Def. & undercover officer during preliminary negotiations for drug buy. Although informer not present during actual offense, was a material witness to transaction as a whole.

Lopez v. State, 760 S.W.2d 770, 773-74 (Tex. App. -- Corpus Christi 1988, pet. ref'd)

Trial court did not abuse discretion in refusing to require informant's identity at motion to suppress hearing since there was evidence to support a finding that information given by informant was not false.

Thompson v. State, 741 S.W.2d 229, 230-31 (Tex. App. -- Fort Worth 1987), *pet. ref'd per curiam*, 763 S.W.2d 430 (Tex. Crim. App. 1989)

Carries Roviaro rule through to 503. Defense has burden of showing informant: 1) participated in offense; 2) was present during offense; or 3) was otherwise a material witness, before disclosure required "for fair determination of a material issue" under subsection (2). Regarding subsection (3), record failed to establish officers did not believe informant at time they wrote search warrant affidavit. Query if it is officers' subjective belief that is determinative? Better rule would be that judge focuses upon the reasonableness of the officers' belief, i.e., would reasonable officer have relied upon this informant?

Tex. R. Crim. Evid. 509 – Physician-Patient Privilege

State v. Hardy, ___ S.W.2d ___, 1997 WL 716775 (Tex. Cr. App. 1997)

Tells us what we suspected all along – there is no physician-patient privilege in criminal proceedings. Period. This case dealt specifically with medical records of a blood test in a DWI case.

Tex. R. Crim. Evid. 510 communications for drug or alcohol abuse treatment

McAllister v. State, 933 S.W.2d 763, 768 (Tex. App. – Houston [14th Dist.] 1996, n.p.h.)

Statements made to Def.'s "sponsor" for 12 step program of AA not covered by rule. Court takes very narrow approach & since Sponsor was not affiliated with a licensed facility under chap. 464 of the Health & Safety Code, his counseling did not qualify as part of "treatment." Further, statements did not relate to drug or alcohol abuse, instead dealt with his desire to commit murder of victim (this is better rationale).

Johnson v. State, 938 S.W.2d 65 (Tex. Cr. App. 1997)

Reversed court of appeals decision. Did not address Rule 510 argument, but reversed and remanded because the court of appeals did not properly conduct a harm analysis.

Johnson v. State, 926 S.W.2d 334, 337 (Tex. App. — Fort Worth 1996, reversed on other grounds)

Def.'s statements to wife admitting sexual abuse of their child held privileged under rule because statements made during counseling session for drug abuse. Dubious reasoning. Statements had nothing to do with drug or alcohol abuse; made to wife, not provider of drug treatment. Does not fit rationale of rule. See also the dissent: Family Code § 34.04 states that no privileges except attorney-client apply in child abuse cases.

Tatum v. State, 919 S.W.2d 910, 913 (Tex. App. — Fort Worth 1996, n.p.h.)

Statements made by Def. to sex offender therapist not covered by rule. Def. not being treated for alcohol or drug abuse (although he claimed such a problem) and statements did not relate to drug or alcohol problems.

Tex. R. Crim. Evid. 511 waiver of privilege

Skinner v. State, ___ S.W.2d ___, 1997 WL 266188 (Tex. Cr. App. 1997)

The work product privilege may be waived through "testimonial use": the use of privileged materials before the jury. This is a "testimonial use" case. *See* especially **6 (headnote 9).

Carmona v. State, 941 S.W.2d 949 (Tex. Cr. App. 1997)

In this case, the defendant's attorney turned a polygraph report over to the state in the hopes of getting a favorable result from the district attorney. Instead, the district attorney called the polygraph examiner as a witness at trial to testify to the incriminating statements that the defendant made that were *not* in the report. CCA held that it was error to hold that the attorney-client privilege was waived merely because the attorney made a partial disclosure without more. Good outline of the operation of both the attorney-client privilege and the work product privilege. An objection citing only the attorney-client privilege will not preserve error as to the work product privilege.

Fuller v. State, 835 S.W.2d 768, 769-71 (Tex. App. -- Eastland 1992, pet. ref'd)

While atty-client privilege belongs to client, not atty, when clients implicitly consent to atty talking to sheriff's officers about how and why defendants shot victim in self-defense, privilege is waived; defendants were present and disclosure was part of defense strategy.

Tex. R. Crim. Evid. 513 comment upon claim of privilege

Tinney v. State, 773 S.W.2d 364 (Tex. App. -- Fort Worth 1989, pet. ref'd)

Trial court did not err in refusing to permit defendant to elicit testimony from witness that witness had invoked privilege against self-incrimination at a prior hearing, not the present one.

Tex. R. Crim. Evid. 601(a)(2) competency of child witness

Berotte v. State, ___ S.W.2d ___, 1997 WL 543042 at **4-5 (Tex. App. — Houston [1st Dist.] 1997)

Good exposition of law surrounding competency of a child witness. In this case, the trial judge would not have abused his discretion if he had ruled the child incompetent (although he ruled the child competent – also not an abuse of discretion). Interesting case.

Dufrene v. State, 853 S.W.2d 86, 88-89 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd)

4 year old competent to testify. Good review of law and foundation requirements. Good example of qualifying questions and how to talk to a small child. See also **Holliger v. State**, 911 S.W.2d 35, 38-39 (Tex. App. -- Tyler 1995, pet. ref'd)(4 year old, who was 3 at time of agg. sexual assault, was competent to testify; didn't have to take oath).

Kipp v. State, 802 S.W.2d 804, 807 (Tex. App. -- Texarkana 1990) *rev'd* 876 S.W.2d 330 (Tex. Crim. App. 1994)

Trial court determines competency of child under rule 104(a); thus, is not bound by rules of evidence in making determination. Def. doesn't have absolute right to question & answer offer of proof re psychiatrist's proposed testimony that child not competent. TCA reversed because Defendant was not allowed to make an offer of proof.

Reyna v. State, 797 S.W.2d 189, 191 (Tex. App. -- Corpus Christi 1990, no pet.)

Rule creates a presumption that a person is competent to testify; court considers 3 elements: 1) competence to observe events at time; 2) capacity to recollect; 3) capacity to narrate. Exclude witness' testimony only when trial court convinced that witness does not possess sufficient intellect to relate transaction.

Rodriguez v. State, 772 S.W.2d 167 (Tex. App. -- Houston [14th Dist.] 1989, pet. ref'd)

Although complaining witness was elderly, had had nervous breakdown and suffered from Alzheimer's disease, Defendant did not carry burden in showing trial court abused discretion in permitting her to testify.

Long v. State, 770 S.W.2d 27 (Tex. App. -- Houston 1989), *rev'd on other grounds*, 800 S.W.2d 545 (Tex. Crim. App. 1990)

While testimony of 4 ½ year old child showed some conflict and confusion on cross-examination, remainder showed she was sufficiently mature and accurate in recollections to testify competently. "In addition, her testimony demonstrated that she understood the difference between truth and falsehood, a factor which, although not required under Rule 601(a)(2), might have aided the court in concluding she possessed "sufficient intellect" to describe the criminal episode.

Kirchner v. State, 739 S.W.2d 85, 88 (Tex. App. -- San Antonio 1987, no pet.)

No error in finding four-year-old competent. Conflicting and sometimes confusing answers do not necessarily make witness incompetent.

Tex. R. Crim. Evid. 602 lack of personal knowledge

Middlebrook v. State, 803 S.W.2d 355, 358-59 (Tex. App. -- Fort Worth 1990, pet. ref'd)

Police officer testified that Def. said "something like ... I can't give you an exact quote..." Inability to recall exact wording of another's statement not fatal. Certainty of perception or recollection not required as long as witness is not making complete guess of testifying to sheer speculation.

Skruck v. State, 740 S.W.2d 819, 821 (Tex. App. -- Houston [1st Dist.] 1987, pet. ref'd)

Witness may assert existence of fact if knowledge gained through personal observation and reasonable inferences therefrom. Officer could testify that person in bar was "X" based upon examining "X's" T.D.L. and comparing that picture with "X" standing in front of him. Second, "X" identified himself as "X." Testimony by a declarant regarding the name by which a person is known is an exception to the hearsay rule. No citation to either rule.

Tex. R. Crim. Evid. 605 testimony by trial judge

Hensarling v. State, 829 S.W.2d 168, 170 (Tex. Crim. App. 1992)

Rule does not bar judge's testimony in contested retrospective competency hearing presided over by another judge. "The phrase 'the judge presiding at the trial may not testify in that trial' means that the judge who is presiding may not 'step down from the bench and become a witness in the very same proceeding over which he is currently presiding." *See also*, *Janecka v. State*, 937 S.W.2d 456, 472-73 (Tex. Cr. App. 1996)(same).

Tex. R. Crim. Evid. 606(b) competency of jurors as witness

Lewis v. State, 911 S.W.2d 1, 10 (Tex. Crim. App. 1995)

Trial court has broad discretion in deciding what is relevant to validity of the verdict. Determined on case-by-case basis, taking into account court's experiences & observations. Court didn't abuse discretion in excluding juror's testimony.

Speer v. State, 890 S.W.2d 87, 90-91 (Tex. App. -- Houston [1st Dist.] 1994, no pet.)

Juror affidavits re their understanding of the evidence at trial not admissible to attack sufficiency of the evidence.

Buentello v. State, 826 S.W.2d 610, 613 (Tex. Crim. App. 1992)

Rule 606(b) intended to permit "impeachment of the verdict through all relevant evidence as to both internal and external influences" upon a juror. The trial judge is granted broad discretion in determining whether the testimony sought to be admitted at a motion for new trial hearing is relevant to the validity of the verdict. What is "relevant" will be determined on a case-by-case basis, taking into account: the trial judge's experiences and observations; b) the grounds set forth for the motion for new trial under Tex. R. App. P. 30(b); and c) the case law developed prior to the promulgation of the Rule. Defendant was entitled to call jurors at his motion for new trial hearing to prove that the jurors discussed the workings of the parole system and, as a consequence, assessed a greater punishment, citing Sneed v. State, 670 S.W.2d 262 (Tex. Crim. App. 1984). See also Dunkins v. State, 838 S.W.2d 898 (Tex. App. -- Texarkana 1992, pet. ref'd)(criticizing both wording of rule & *Buentello* for destroying protection of jurors' decision-making process; good reasoning); Rasbury v. State, 832 S.W.2d 398 (Tex. App. -- Fort Worth 1992, pet. ref'd)(following *Buentello* and holding that discussion of law of self-defense which was incorrect in its substance was the receipt of "other evidence" for purposes of Rule 606(b)).

[N.B.: reasoning and result in *Buentello* suggests that Rule 606(b) should be amended to bring it in line with Texas common law, or civil or federal rules]

Brown v. State, 804 S.W.2d 566, 569 (Tex. App. -- Houston [14th Dist.] 1991, pet. ref'd)

Jurors may testify to matters relevant to validity of verdict. "A matter is relevant to the validity of the verdict if it concerns an overt act which constitutes jury misconduct under Tex. R. App. P. 30(b) & its predecessor Tex. Code Crim. Proc. art. 40.03." Juror's "feeling" that other jurors were using Def's failure to take stand against him was not an overt act.

Goldstein v. State, 803 S.W.2d 777, 798 (Tex. App. -- Dallas 1991, pet. ref'd)

Jurors incompetent to impeach their verdict by affidavit or testimony about mental processes during deliberation except where relevant to overt act of jury misconduct.

Leach v. State, 770 S.W.2d 903 (Tex. App. -- Corpus Christi 1989, pet. ref'd)

At motion for new trial hearing, rule 606(b) prohibited jury foreman from testifying as to whether he was "pushing for a conviction" during jury deliberations.

Rose v. State, 752 S.W.2d 529, 536 (Tex. Crim. App. 1987)

"It is now the rule that jurors may not testify to any matter or statement occurring during the course of deliberations or to the effect of anything upon their minds or emotions influencing them or concerning their mental processes." Overruled (?) by **Buentello**, supra.

Baldonado v. State, 745 S.W.2d 491, 495 (Tex. App. -- Corpus Christi 1988, pet. ref'd)

Testimony that personal knowledge influenced juror's verdict is impermissible attempt to impeach verdict. Dicta that testimony regarding conversations with unauthorized persons during deliberations is still admissible.

Tex. R. Crim. Evid. 607 impeachment of one's own witness

Bridgewater v. State, 905 S.W.2d 349, 353 (Tex. App. -- Fort Worth 1995, no pet.)

Permissible for State to impeach its own witness who refused to testify at trial with his membership in the "Black Villain Assassins" gang offered to show witness' bias because gang members don't snitch.

Miranda v. State, 813 S.W.2d 724, 734-38 (Tex. App. -- San Antonio 1991, pet. ref'd)

Rule 607 does not require that a party be surprised or prejudiced before he may impeach his own witness, but impeachment is limited by rule 403 which requires that "impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible. Neither defendant nor State may use rule 607 as a "straw-man" ploy to get impeachment evidence before jury as substantive evidence. Here, no error in permitting State to impeach witness with her prior statement to police

officer when she denied that defendant has asked her if she knew anyone willing to kill defendant's husband. Compare to Pruitt, infra which was held to be a straw-man ploy.

Celeste v. State, 805 S.W.2d 579, 581 (Tex. App. -- Tyler 1991, no pet.)

State may not cross-examine a Def. to raise a defense & then bring in an extraneous offense to disprove the defense State's questioning raised. Collateral bootstrapping.

Russeau v. State, 785 S.W.2d 387, 390 (Tex. Crim. App. 1990)

Rule 607 abrogates the voucher rule; Palafox rule is no longer a part of Texas law. See also Gale v. State, 747 S.W.2d 564, 566 (Tex. App. -- Fort Worth 1988, no pet.); Guerra v. State, 760 S.W.2d 681 (Tex. App. -- Corpus Christi 1988, pet. ref'd); Green v. State, 761 S.W.2d 824, 827 (Tex. App. -- Dallas 1988, no pet.); Downing v. State, 761 S.W.2d 881, 883 (Tex. App. -- Fort Worth 1988, pet. ref'd); Stills v. State, 728 S.W.2d 422, 424-28 (Tex. App.--Eastland 1987, no pet.)(best historical discussion & analysis)

Pruitt v. State, 770 S.W.2d 909 (Tex. App. -- Fort Worth 1989, pet. ref'd)

State may not impeach its own witness with prior inconsistent statement when it called the witness knowing he would provide little or no testimony useful to State. Neither side may call a witness as a "straw man." Here, defendant's stepfather had given written statement to officer that he had driven defendant and brother to shopping center where robbery occurred on that day, but at first trial witness said he drove 2 unknown black males, not his stepsons, to shopping center. Improper for State to call witness at second trial solely to introduce his earlier, otherwise inadmissible, hearsay statement to officer, but error harmless. See also Zule v. State, 802 S.W.2d 28, 34 (Tex. App. -- Corpus Christi 1990, no pet. reported)("rules do not permit a party to call a witness primarily for the purpose of impeaching the proposed witness with evidence that would be otherwise inadmissible").

Medina v. State, 743 S.W.2d 950, 955 (Tex. App. -- Fort Worth 1988, pet. ref'd)

Dicta that party could call a witness solely for impeachment purposes. Here, court properly prevented defense from calling co-defendant to question him about his relatively minor charge and sentence so jury might take that into account in assessing defendant's punishment. Not relevant under rules 401-402.

Tex. R. Crim. Evid. 608 impeachment of witness' credibility

Dixon v. State, ___ S.W.2d ___, 1997 WL 703409 (Tex. App. – Fort Worth 1997)

Even though a person cannot be impeached with a offense that is not a conviction (608(b)), he may nonetheless be impeached with a charge that is a pending indictment under Rule 612(b) because the pending indictment may give the witness a bias or motive to testify untruthfully (because the witness is mad at the state for indicting him). Chief Justice Cayce writes that the "plain language" of Rule 612(b) supports this proposition. He cites to a 1994 court of appeals opinion, *Staley v. State*, 888 S.W.2d 45, 50 (Tex. App. -- Tyler 1994, no pet.) (Cayce then goes on to say that because the defendant *did not object under Rule 612(b)*, he waived error!) This opinion is a joke.

Shelby v. State, 819 S.W.2d 544, 549-51 (Tex. Crim. App. 1991)

Trial court's refusal to allow defendant to cross-examine complainant's mother in agg. sexual assault case on fact she had filed civil lawsuit against apartment complex where complainant assaulted was harmful error. Evidence showed possible bias by a "star" witness.

Ramirez v. State, 802 S.W.2d 674, 676-77 (Tex. Crim. App. 1990)

State can't impeach child victim's mother who was testifying for Def. about her prior use of heroin when Def. charged with agg. sexual assault of child. This is collateral. Prior specific instances of conduct theoretically offered to show untruthfulness (it doesn't anyway), but Texas rule does not allow prior specific instances of conduct under rule 608.

West v. State, 790 S.W.2d 3, 4 (Tex. App. -- San Antonio 1989, pet. ref'd)

Can't impeach witness with specific instances of prior bad conduct; error to ask Def. in manufacture of controlled substance trial if he wasn't the Grand Dragon of Ku Klux Klan in Texas during 70's, but no specific objection so conviction affirmed. Since Def. 1st time offender was sentenced to 99 years, dissent noted that error was harmful and even "I object" was sufficient under circumstances.

Wiggins v. State, 778 S.W.2d 877, 892 (Tex. App. -- Dallas 1989, pet. ref'd)

Def's mother was asked, on direct, if Def. was a "truth teller." Mother responded that he is an "honest" person. State should have objected to nonresponsive or improper answer; this answer did not open door for State to impeach witness with "have you heard" questions re trait of honesty. Harmless error.

Ray v. State, 764 S.W.2d 406, 413 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Trial court did not err in excluding evidence of prior specific violent acts by State's witness which were not relevant to credibility. Witness had not falsely portrayed himself as a nonviolent person.

Munoz v. State, 763 S.W.2d 30, 32-33 (Tex. App. -- Corpus Christi 1988, pet. ref'd)

No reference to rule in holding that trial court did not abuse discretion in refusing to permit Def. to impeach State's murder witness with her prior psychiatric history and evidence of drug use. No evidence that witness had used drugs or alcohol at time of murder itself.

Pyles v. State, 755 S.W.2d 98, 115 (Tex. Crim. App. 1988)

When capital murder defendant's testimony on direct created false impression that he was a non-violent person interested only in committing property crimes, State may rebut by offering writings defendant made on his cell wall of "Kill, kill, Judge, D.A." Rule 608 not cited; rule 612 was. Evidence was collateral, but issue was crucial.

Villarreal v. State, 750 S.W.2d 314, 318-19 (Tex. App. -- Dallas, 1988, pet. ref'd)

Trial court had discretion to prevent defense rebuttal witness from testifying to numerous prior acts of misconduct of State's rebuttal witness to impeach that witness' credibility; wandering far afield from issues in trial.

Tex. R. Crim. Evid. 608(b) impeachment with prior specific instances

Lagrone v. State, 942 S.W.2d 602, 612-13 (Tex. Cr. App. 1997)

> Defense counsel sought to impeach a state's witness' "ability to perceive, recall, and relate the details of the crime with evidence of her alleged drug use and subsequent 'withdrawal symptoms." The trial court refused to allow this line of cross. The CCA affirmed. "Although long term alcohol or drug use may produce some minimal effects on witness' perceptual capacity, this Court has consistently classified inchoate alcohol and drug usage as specific instances of conduct which are immune from impeachment. ... Accordingly, we have held that a witness' credibility is only subject to attack on cross-examination when their perceptual capacity is physically impaired by the intoxicating effects of alcohol or drugs during their observation of pertinent events." The defense in this case did not demonstrate that the witness had an "actual drug-based mental impairment during the witness' observation of the crime."

House v. State, 909 S.W.2d 214, 216-17 (Tex. App. -- Houston [14th Dist.] 1995, pet. granted)

> "What a good boy am I" exception to general prohibition under rule. State could cross-examine Def. on "real" reason Y would want to burn down Def's business (Def. later shot Z who was hired by Y to burn business) that Def. & Z were in cocaine distribution business. Def. had gratuitously testified that he didn't know why Y would want to destroy his business. See Lee's concurrence that this is carrying "What a good boy" exception too far.

Hernandez v. State, 897 S.W.2d 488, 494 (Tex. App. -- Tyler 1995, no pet.)

> "Have you ever had any other type of problems with the law?" by defense counsel & Def's answer of "No" opened door to fact Def. was wanted for murder in Mexico. Blanket statement about his prior conduct opened door.

Lape v. State, 893 S.W.2d 949, 958 (Tex. App. -- Houston [14th Dist.] 1994, pet. ref'd)

> Def. should have been allowed to cross-examine victim's mother about her prior conviction for making a false report about child sexual abuse allegations against this Def. for offense against this victim. This does more than general impeachment of credibility; it shows bias and motive in this case.

Ex parte Kimes, 872 S.W.2d 700, 704 (Tex. Crim. App. 1994)(Maloney, J., dissenting)

> Arguing (correctly) that Rule 608 only bars evidence of specific acts offered to infer that a person who does such acts is not generally credible. Rule does not bar evidence of specific acts offered to show witness has made a misrepresentation on direct exam. Party is entitled to correct a false impression made by the witness, subject to collateral-non-collateral rule.

Cunningham v. State, 815 S.W.2d 313, 319 (Tex. App. -- Dallas 1991, no pet.)

> Generally witness may not be impeached with specific instances of conduct that are not final convictions, however, when witness gratuitously testifies about some collateral matter, opponent may impeach him by showing that he is lying or in error regarding that matter under theory of *falso in uno, falsus in omnibus*. Here, when defendant denied that he had previously sold drugs to undercover officer, officer could be recalled to offer evidence that defendant had sold him drugs. Dubious.

Tex. R. Crim. Evid. 609 impeachment with prior convictions

Moreno v. State, 944 S.W.2d 685, 690 (Tex. App. — Houston [1st Dist.] 1997, pet. granted)

> "A deferred adjudication is not a conviction and cannot be used to impeach a witness under rule 609(a). ... A witness for the defense or prosecution may be impeached by evidence of a pending deferred adjudication if a showing is made that the witness has testified as a result of bias, motive or ill will emanating from his status of deferred adjudication."

Royal v. State, 944 S.W.2d 33, 36 (Tex. App. — Texarkana 1997, pet. ref'd)

> "To be admissible under Rule 609(a), a conviction must be final. ... But an exception to Rule 609 applies when a witness makes statements concerning his past conduct suggesting that he has never been arrested, charged, or convicted of any offense. Where the witness creates a false impression of law abiding behavior, he opens the door on his otherwise irrelevant past criminal history, and opposing counsel may expose the falsehood. This exception is not limited to final convictions."

Lape v. State, 893 S.W.2d 949, 958 (Tex. App. -- Houston [14th Dist.] 1994, pet. ref'd)

> See discussion under Rule 608.

Butler v. State, 890 S.W.2d 951, 954-55 (Tex. App. -- Waco 1995, pet. ref'd)

> Use of remote prior reversible. Def. was impeached with prior sexual assault of a child that was more than 10 years old. State bears burden of showing release brings conviction within 10 year rule. Since this conviction was of same type as Def. on trial for, it was very prejudicial.

Matter of Thacker, 881 S.W.2d 307, 311-12 (Tex. 1994)

> "Anything done knowingly contrary to justice, honesty, principle or good morals" constitutes moral turpitude.

Matter of Humphreys, 880 S.W.2d 402, 407-08 (Tex. 1994)

> Income tax evasion = moral turpitude.

Brown v. State, 880 S.W.2d 249, 252-53 (Tex. App. -- El Paso 1994, no pet. reported)

> If requested notice not given to Def. mandatory exclusion of prior, but not preserved here; admission of Def.'s 15 year old rape conviction reversible error when Def. on trial for sexual assault of child; crimes similar & rape is not particularly probative of credibility.

McKnight v. State, 874 S.W.2d 745, 747-48 (Tex. App. -- Fort Worth 1994, no pet.)

> Def. witness could be impeached with pending charges & conviction on appeal because witness was prosecuted by same prosecutor as in Def.'s trial; prosecutor acknowledged that he intended to prosecute witness fully; offered to show animosity & fact that witness would want to retaliate against State.

Hardeman v. State, 868 S.W.2d 404, 405 (Tex. App. -- Austin 1993, pet. granted)

"Moral turpitude." Prior misdemeanor assault by man against woman was admissible. Dubious these days. Opinion lists various crimes involving moral turpitude. Cites definition: "The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita." Not an appropriate definition for purposes of rule which is concerned with truth-telling.

Polk v. State, 865 S.W.2d 627, 630 (Tex. App. -- Ft. Worth 1993, pet. ref'd)

"Moral turpitude has been defined to include acts which are base, vile or depraved." Upholds admission of misdemeanor conviction for indecent exposure. Dubious. Defendant's prior conviction for murder without malice admissible though he had been granted probation because of intervening agg. robbery conviction with 75 year sentence (D. released in 1982, but parole revoked, then reparoled in 1986, trial in 1992).

Delk v. State, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993)

Regardless of Rule 609, when witness creates false impression of law-abiding behavior, he opens door to impeachment with prior criminal history not otherwise admissible under Rule 609.

Ex parte Menchaca, 854 S.W.2d 128, 130-31 (Tex. Crim. App. 1993)

Expiration of probationary terms equals "satisfactory conclusion of probation" under rule. Prior probation not admissible to impeach unless there has been an intervening conviction.

Theus v. State, 845 S.W.2d 874 (Tex. Crim. App. 1992)

Lengthy discussion and analysis of 609 probative value factors. Defendant's prior arson conviction could not be used to impeach. Major case on Rule 609. Cases following Theus include: Simpson v. State, 886 S.W.2d 449, 452-53 (Tex. App. -- Houston [1st Dist.] 1994, no pet. reported)(admitting priors for robbery & agg. robbery, tacking a remote to more recent prior); Edwards v. State, 883 S.W.2d 692, 694 (Tex. App. -- Texarkana 1994, pet. ref'd)(if prior offenses involve deception & are recent, admissibility is favored; similarity between prior & present charge militates against admission; good discussion);

Wunneburger v. State, 844 S.W.2d 864, 866-67 (Tex. App. -- Amarillo 1992, pet. ref'd)

Probation conviction that has been successfully completed and no later convictions is not admissible. Here, MRP had been filed during probation period, but no evidence to show probation was actually revoked. Witness testified that her probation was not revoked.

Hutson v. State, 843 S.W.2d 106, 107 (Tex. App. -- Texarkana 1992, no pet.)

Criminal trespass is not a crime of moral turpitude. "Generally, moral turpitude means something that is inherently immoral or dishonest."

Baker v. State, 841 S.W.2d 542, 543 (Tex. App. -- Houston [1st Dist.] 1992, no pet.)

"Tacking" back with conviction more than 10 years old is permissible when there is "evidence of a lack of reformation or an intervening conviction for a felony offense [or one for moral turpitude]."

Jones v. State, No. 69,894 (Tex. Crim. App., delivered Sept. 23, 1992)

Deferred adjudication is not a prior conviction for purposes of Rule 609.

Richardson v. State, 832 S.W.2d 168, 172 (Tex. App. -- Waco 1992, pet. ref'd)

Trial court not required to make pre-trial determination of admissibility of defendant's prior convictions; no issue presented for appeal if defendant does not testify and therefore is not impeached by questionable prior convictions.

Buffington v. State, 801 S.W.2d 151, 153-54 (Tex. App. -- San Antonio 1990, pet. ref'd)

Remoteness counts from time of present trial. Here, Def. wanted to impeach State's witness with conviction for which witness had been released from prison in 1970 that had been admitted at Def's first trial in 1978 which was later reversed for trial error. At second trial, Def. argued that he should be permitted to impeach with conviction that was now remote because otherwise State could profit from its error in first trial. Court rejects argument and holds that trial court did not abuse its discretion in excluding remote prior conviction. Discussion of factors trial court should use in balancing probative value of remote convictions against prejudicial effect.

Sinegal v. State, 789 S.W.2d 383, 387 (Tex. App. -- Houston [1st Dist.] 1990, pet. ref'd)

Prior conviction older than 10 years is presumptively inadmissible under rule. Here, trial court said that because credibility was essential issue in swearing match between Def. & officers, proper to allow impeachment with prior conviction. 10 year rule not touchstone to admissibility. Factors include: 1) youthfulness of Def. at time of prior; 2) subsequent conduct showing lack of reformation; 3) nature of accusation & facts & circumstances of alleged offense; 4) length & severity of penalty assessed. When determining remoteness, look to evidence of lack of reformation or intervening conviction. Here, no evidence of lack of reformation so error to admit. Conviction reversed.

Husting v. State, 790 S.W.2d 121, 125-26 (Tex. App. -- San Antonio 1990, no pet.)

"Revitalization" doctrine alive & well. 1975 conviction for prostitution admissible because of intervening 1980 federal conviction in which witness released less than 5 years before trial. [Query if prostitution conviction is really crime of moral turpitude relating to credibility?]

Hinojosa v. State, 780 S.W.2d 299 (Tex. App. -- Beaumont 1989, pet. ref'd)

When prosecutor asked his own witness on direct if he had ever been convicted of a felony and witness responded "No," this created a false impression that witness had never been convicted at all of an offense when, in fact, he had successfully completed a federal felony probation. While this conviction was not admissible under rule 609 to impeach, sponsoring side created impression that witness had no prior problems with law. Harmless error for guilt stage but not for punishment.

Prescott v. State, 744 S.W.2d 128, 131 (Tex. Crim. App. 1988)

Defendant cannot be impeached with a prior felony conviction that is not yet final unless he has left a false impression with jury regarding his prior "troubles" with police. Here, defendant's direct examination response that

"this is my first time of going through this," held insufficient to "open door" to impeachment with conviction still pending on appeal. Questionable.

Tex. R. Crim. Evid. 609(f) notice of prior convictions used to impeach

Harper v. State, 930 S.W.2d 625, 631 (Tex. App. — Houston [1st Dist.] 1996, no pet.)

> The fact that the defendant already knows about the prior convictions is irrelevant to the question of whether the state must provide notice upon request. Rule 609(f) "does not exist for the state to provide notice only when it intends to impeach a witness or defendant-witness with a prior conviction of which he is aware. Rather, the rule exists to provide, upon request, the witness or defendant-witness *notice* that the state intends to impeach with the prior convictions. Any other interpretation would render rule 609(f) meaningless."

Johnson v. State, 885 S.W.2d 578, 581 (Tex. App. -- Dallas 1994, no pet.)

> Def. filed request for advance notice more than 2 months before trial on use of priors in impeach defense witnesses; State responded on day of trial but since Def.'s witnesses did not testify for 2 more days. This was "fair opportunity" to contest their use.

Vela v. State, 771 S.W.2d 659, 662 (Tex. App. -- Corpus Christi 1989, pet. ref'd).

> Notice requirement of Rule 609(f) does not apply to admissibility of prior convictions during punishment phase to prove defendant's prior criminal record.

Cream v. State, 768 S.W.2d 323 (Tex. App. -- Houston [14th Dist.] 1989, no pet.)

> When Defendant requested notice of State's intent to use prior convictions for impeachment, State responded that it had no knowledge of any. At trial State nonetheless permitted to inquire of defendant whether he had any such priors and he did. Appellate court held that clear intent of 609(f) is to prevent an ambush upon adverse party's witness when the other side had not had a fair opportunity to contest use of priors. Here the only convictions that defendant had to consider before taking the witness stand were those already known to him.

Tex. R. Crim. Evid. 610(a) control by court

Morrison v. State, 845 S.W.2d 882, 883-89 (Tex. Crim. App. 1992)

> Jurors may not submit questions to judge that they would like to have asked. Procedure outlined for review of questions, mode of questioning, and follow-up questions by attorneys. The jury is a passive body and it must rely upon the adversary questioning by the attorneys. "Party responsibility for the production of evidence insulates the jury, to the greatest extent possible, from the contest." Dissents by Campbell & Benavides, McCormick joining. Citing Fifth Circuit precedent holding that it makes good common sense for jurors to be allowed to ask questions; "Trials exist to develop the truth." **Allen v. State**, 845 S.W.2d 907 (Tex. Crim. App. 1993)(this error not subject to 81(b)(2) harm analysis).

Newsome v. State, 829 S.W.2d 260, 269-70 (Tex. App. -- Dallas 1992, no pet.)

Use of leading questions on direct examination was upheld under trial judge's discretion. Abuse of discretion when question has effect of supplying witness with a "false memory." Lengthy discussion of what are and are not leading questions.

Tex. R. Crim. Evid 610(b) scope of cross-examination

Fagbemi v. State, 778 S.W.2d 119, 121 (Tex. App. -- Texarkana 1989, pet. ref'd)

Def. properly prevented from cross-examining complaining witness about her income tax returns in aggravated assault prosecution. Not relevant.

Johnson v. State, 773 S.W.2d 721, 727-28 (Tex. App. -- Houston [1st Dist.] 1989, pet. ref'd)

Trial court erred in refusing to permit Def. to recall police officer to question him about offense report after another officer had testified, but since Def. made no offer of proof, no harm shown.

Ogier v. State, 730 S.W.2d 189, 191 (Tex. App.--Dallas 1987, no pet.)

Not error to disallow cross-examination of State's witness that co-defendant had beaten deceased on prior occasions. Not relevant under rule 401 to issue of whether defendant committed charged murder.

Gonzalez v. State, 730 S.W.2d 196, 198 (Tex. App.--San Antonio 1987, no pet.)

Not error to limit cross-examination of State's witness, owner of bar where deceased was killed, regarding suspension of alcoholic beverages license. Irrelevant under rule 401 to any issue in murder trial.

Tex. R. Crim. Evid. 611 production and use of prior statements

De La Rosa v. State, ___ S.W.2d ___, 1997 WL 619599 (Tex. App. — San Antonio 1997)

Documents used to refresh memory. Defendant allowed to see document used to refresh the witness' memory, but court did not allow defendant to introduce relevant portions of the document into evidence. Court of appeals held this is not "constitutional error" for purposes of the new rules of appellate procedure. TEX. R. APP. PRO. 44.2(a) & (b).

Yates v. State, 941 S.W.2d 357, 362-63 (Tex. App. — Waco 1997, pet. ref'd)

"If the party sponsoring the witness claims that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. In camera review of the entire writing at issue is mandatory." In this case, an officer testified that he reviewed his entire file to refresh his memory as to dates and times. It was error for the trial court to not review the entire file in camera and provide the defense with the relevant portions.

Robertson v. State, 871 S.W.2d 701, 708 (Tex. Crim. App. 1993)

Rule providing for admission of writings used to refresh witness' memory is broader than prior C.L. rule. Here State called Def.'s probation officer as witness in capital murder punishment stage. When witness testified he had read Def.'s psych.

evaluation, Def. should have been able to introduce entire report because: 1) used to refresh witness' memory, and 2) no claim that any portion were not related to witness' testimony. Harmless error here.

State v. Williams, 846 S.W.2d 408, 411 (Tex. App. -- Houston [14th Dist.] 1992, pet. ref'd)

Rule applies when party calls adverse witness who cannot recall information without reference to prior statement; here, trial court properly ordered State to give defense attorney copy of offense report that officer (called by defense) needed to refresh recollection.

Sills v. State, 846 S.W.2d 392, 396 (Tex. App. -- Houston [14th Dist.] 1992, pet. ref'd)

Cannot use a prior inconsistent statement to impeach a witness who now refuses to answer questions; that out-of-court statement is hearsay and jury might misuse it as substantive evidence when the opponent can't cross-examine on either the content or making of the prior statement.

Young v. State, 830 S.W.2d 122 (Tex. Crim. App. 1992)

Defendant did not need to preserve and make available to appellate court the missing records that a State's witness used to refresh his memory before testifying he wished to use during cross-examination when trial court denied his request to examine them in camera. [Always provide these materials as a sealed exhibit to the record.]

Salazar v. State, 795 S.W.2d 187, 193 (Tex. Crim. App. 1990)

When prosecutor used jury information sheets to refresh memory during *Batson* hearing, Def. entitled to inspect them on cross-examination and offer them into evidence. Compare Guilder v. State, 794 S.W.2d 765, 767 (Tex. App. -- Dallas 1990, no pet.)(prosecutor's voir dire notes are not prior statements under rule 614 & thus need not be produced in *Batson* hearing; these are not a "verbatim" transcription & not signed or otherwise adopted). Difference seemingly depends upon whether notes taken at time of voir dire were used to refresh memory for testimony at *Batson* hearing or not.

Marsh v. State, 749 S.W.2d 646, 648 (Tex. App. -- Amarillo 1988, pet. ref'd)

Opposing party allowed to inspect and use on cross-examination any writing, without regard for authorship, that was used by witness to refresh his memory.

Tex. R. Crim. Evid. 612 evidence of bias

Gonzales v. State, 929 S.W.2d 546, 549-51 (Tex. App. — Austin 1996, n.p.h.)

Def. wanted to introduce evidence that: 1) Complainant police officer had kicked the Def. in a prior arrest; 2) he told the Def. that blacks and Mexicans need to go back to where they came from (excluded under 403); and 3) he told his Sgt. in that incident, "You didn't see that" referring to the kick. All of this barred by specific prohibitions of Rule 608.

Tex. R. Crim. Evid. 612(a) foundation for impeachment with prior inconsistent statement

Broden v. State, 923 S.W.2d 183, 188-89 (Tex. App. — Amarillo 1996, n.p.h.)

Applying Queen Caroline's Rule. Def. was told the contents of the oral statement that he made to arresting officer. Foundation laid and he did not admit making the statement, so it was permissible for State to call the officer to testify to it.

Enos v. State, 909 S.W.2d 293, 295-96 (Tex. App. -- Fort Worth 1995, no pet.)

Def. entitled to see victim impact statement once victim has testified, at least to the extent this statement is relevant to testimony at guilt stage. Harmless error here.

Davis v. State, 894 S.W.2d 471, 472-73 (Tex. App. -- Fort Worth 1995, pet. ref'd)

Def. cannot offer extrinsic evidence to show witness' bias unless he has cross-examined witness about the alleged bias first.

Staley v. State, 888 S.W.2d 45, 49 (Tex. App. -- Tyler 1994, no pet.)

If witness only qualifiedly or partially admits to making prior inconsistent statement, that statement may be introduced or used to impeach.

Garcia v. State, 871 S.W.2d 279, 284 (Tex. App. -- El Paso 1994, no pet.)

Rule admitting prior inconsistent statements should be liberally construed & trial court should have discretion to receive any evidence which gives promise of exposing falsehood.

Gannaway v. State, 823 S.W.2d 675, 677-78 (Tex. App. -- Dallas 1991, pet. ref'd)

State called defendant's cohort; she gives preliminary testimony, admits giving written statement to police, then invokes 5th; she's offered immunity but continues to refuse to testify. State offers content of her prior statement through a summary question which she refuses to answer. Next State calls officer and introduces parts of written statement. Reversed because defendant did not get full opportunity to cross-examine witness or her statement; this was a "back-door" way for State to get facts into evidence which witness refused to testify about at trial.

Alvarez-Mason v. State, 801 S.W.2d 592, 595 (Tex. App. -- Corpus Christi 1990, no pet.)

When impeaching with prior inconsistent statement, cross-examiner must tell witness the contents of the inconsistent statement & afford witness an opportunity to explain or deny the statements. Must also direct witness to whom, when, and in what context prior statement was made. Prior statement must be truly inconsistent.

Andrews v. State, 794 S.W.2d 46, 49 (Tex. App. -- Texarkana 1990, pet. ref'd)

If witness admits making the prior inconsistent statement, extrinsic evidence of that statement not admissible.

Allen v. State, 788 S.W.2d 637, 639-40 (Tex. App. -- Houston [14th Dist.] 1990, pet. ref'd)

Must lay "Queen Caroline's" foundation before impeaching witness with prior inconsistent statement. This case good example of how not to use prior inconsistent statements.

Sandow v. State, 787 S.W.2d 588, 593 (Tex. App. -- Austin 1990, pet. ref'd)

Witness need not be specifically directed to "time, place, and to whom" prior statement was made before bringing in extrinsic evidence of prior statement if it is clear that witness recalls that event. Here, State could offer proof of 5 year old witness' prior statement to social worker that child had told her his baby brother fell off couch when witness had, on cross-examination by Def. testified that he did not remember saying that during videotape talk with social worker. [Note that Defense laid the foundation for the State's evidence.]

McGary v. State, 750 S.W.2d 782, 786-87 (Tex. Crim. App. 1988)

Lengthy analysis. When witness unqualifiedly admits having made prior inconsistent statement, impeachment is complete; impeaching party may not introduce the statement into evidence. Only those specific portions that witness denies having made should be introduced. Since State offered entire statement, conviction reversed.

Colston v. State, 727 S.W.2d 683, 686 (Tex. App.--Houston [1st Dist.] 1987, no pet.)

No error in denying defense attorney's request to testify to purported telephone conversation he had with State's witness when proper foundation had not been laid and when there was no offer of proof as to the content of the conversation. Court implied that witness must deny the statement before extrinsic evidence is admissible. Rule 612(a) states, however, that "if the witness unequivocally admits having made the statement, extrinsic evidence of same shall not be admitted."

Tex. R. Crim. Evid. 613 exclusion of witnesses

Marx v. State, 953 S.W.2d 321, 338-39 (Tex. App. — Austin 1997, pet. granted)

Trial court is held to an "abuse of discretion" standard in regard to its decision whether or not to allow a witness to testify once the rule has been violated. To determine whether the court abused its discretion, the court of appeals will consider: (1) whether the witness actually heard the testimony or conferred with another witness without court permission; and (2) whether the witness's testimony contradicted the testimony of a witness he actually heard from the opposing side or corroborated the testimony of a witness he actually heard from the same side on an issue of fact bearing upon the issue of guilt or innocence. In this case, four witnesses violated the rule but all were allowed to testify. The court of appeals held that none of the witnesses testified about an issue relevant to guilt or innocence. One testified about the condition of a door lock in response to defense impeachment evidence. Three were reputation witnesses used during punishment.

Bath v. State, 951 S.W.2d 11, 23 (Tex. App. — Corpus Christi 1997, no pet.)

A party seeking an exception under rule 613 has the burden of showing that one of the enumerated sections is met. If the prosecution claims that the witness's presence is essential to the presentation of its cause, a "showing" is required, not a conclusory explanation. A mere conclusory statement by the prosecutor that it would be 'necessary and essential' for him to have the witnesses present does not meet the burden for exemption from the Rule. In this case, an exception was appropriate for a detective who was involved in the investigation of the case from the beginning, was the lead investigator for the prosecution, helped coordinate all the law enforcement agencies, assisted the state in preparing its case for trial, and that his assistance and experience were needed with items of evidence during trial.

Tell v. State, 908 S.W.2d 535, 542-43 (Tex. App. -- Fort Worth 1995, no pet.)

Def. investigator was not subject to The Rule because at time it was invoked Def. didn't know he would need to put him on stand to counter witness' line-up I.D.

Moore v. State, 882 S.W.2d 844, 848 (Tex. Crim. App. 1994)

"Expediency" is not an exception to The Rule. Harmless here because expert's presence during others' testimony could have been called essential to presentation of case.

Davis v. State, 872 S.W.2d 743, 745-46 (Tex. Crim. App. 1994)

Generally a defense witness's testimony cannot be excluded solely on ground he violated The Rule, though particular circumstances may permit it. Here Def. attorney didn't know Def.'s mother was in courtroom and when he found out, he asked her to leave. Her testimony was crucial to case. Not excludable.

Addy v. State, 849 S.W.2d 425 (Tex. App. -- Houston [1st Dist.] 1993, no pet.)

Rule does not permit State to identify any spectator as witness and have that person removed from courtroom.

Cooks v. State, 844 S.W.2d 697, 733 (Tex. Crim. App. 1992)

Not error to exempt murder victim's widow from Rule when she was the first witness to testify; she could not have previously heard testimony of another witness.

Coots v. State, 826 S.W.2d 955, 961 (Tex. App. -- Houston [1st Dist.] 1992, no pet.)

Abuse of discretion to permit court's bailiff to testify in rebuttal that defendant could have easily removed electronic bracelet (and thus his alibi was invalid) and to impeach alibi witnesses concerning what they had told bailiff. State always knew that electronic bracelet was an issue; should have requested an exemption if this particular witness was "essential" to presentation of evidence (but no showing that he would have been).

Kelley v. State, 817 S.W.2d 168, 171-72 (Tex. App. -- Austin 1991, pet. ref'd)

Prosecutor testified that chief investigator of murder case had assisted her in preparation of case & his presence was "essential" in trial. Party claiming exemption bears burden of proving "essential"; trial court did not abuse discretion in exempting investigator under particular circumstances of case. Even assuming error, harmless.

Hernandez v. State, 791 S.W.2d 301, 306 (Tex. App. -- Corpus Christi 1990, pet. ref'd)

Exemptions from Rule when witness is "essential." Here State merely said that one of its primary witnesses, a deputy, was "necessary and essential" to confer with D.A. This is not sufficient showing under rule 613--must give specific reasons. Harmless here because his testimony did not coincide with any of witnesses who testified before him.

Sallings v. State, 789 S.W.2d 408, 416 (Tex. App. -- Dallas 1990, pet. ref'd)

Not error to permit witness who had heard others' testimony to testify when it was not anticipated that this person would be a witness. State could not know that witness could contradict Def's testimony until after Def. testified.

Valdez v. State, 776 S.W.2d 162 (Tex. Crim. App. 1989)

Trial court did not abuse discretion in permitting State's witness who had been in courtroom and heard other witnesses testify to take stand because State was unaware of person's potential as a witness "but rather became a necessary witness due to events during trial."

Rodriguez v. State, 772 S.W.2d 167 (Tex. App. -- Houston [14th Dist.] 1989, pet. ref'd)

Trial court did not abuse discretion in permitting two police officers who had discussion with prosecutor together after "the rule" invoked to testify. Testimony of each did not corroborate that of other; they testified regarding completely different aspects of case. "In order to violate the rule, it is necessary that two (or more) witnesses confer on an issue bearing on the guilt or innocence of the accused and about which they later testify." (emphasis in original).

Guerra v. State, 771 S.W.2d 453, 474-76 (Tex. Crim. App. 1988)

General review of prior law regarding "the Rule." If there is a violation of the rule, Def. must show harm: 1) did witness actually hear testimony of other witnesses or confer with them? and 2) did witness' testimony contradict or coincide with testimony of other witnesses?

Webb v. State, 766 S.W.2d 236 (Tex. Crim. App. 1989)

Accidental violation of "the rule" by defense witness without the knowledge or consent of defendant or his attorney cannot be used to prevent the defense witness from testifying. Such would be a violation of defendant's 6th amendment right to present a defense.

Coons v. State, 758 S.W.2d 330, 335-36 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Trial court did not abuse discretion in excluding defense witness' testimony when witness had violated rule and evidence was not crucial. See also Davis v. State, 814 S.W.2d 159, 161 (Tex. App. -- Houston [14th Dist.] 1991)(trial court did not abuse discretion by excluding defendant's mother's testimony when she had been in courtroom and heard State's witness' testimony and defendant knew he would be calling her; testimony was hearsay in any event); Chavez v. State, 794 S.W.2d 910, 914-15 (Tex. App. -- Houston [1st Dist.] 1990, pet. ref'd)(trial court did not abuse discretion in excluding defense witnesses' testimony; defense attorney was, at least, negligent in permitting witnesses to remain in courtroom during trial).

Parrack v. State, 753 S.W.2d 467, 468 (Tex. App. -- Eastland 1988, pet. ref'd)

Bailiff's testimony, identifying picture of defendant who had left in middle of trial, was not violation of rule because testimony of other witnesses could not have affected his perfunctory testimony.

Madrigal-Rodriguez, 749 S.W.2d 576, 579 (Tex. App. -- Corpus Christi 1988, pet. ref'd)

Rule does not specifically authorize trial court to disqualify witness who has talked about the case with another witness, but court has power to do so under prior decisions.

Aguilar v. State, 739 S.W.2d 357, 358-59 (Tex. Crim. App. 1987)

Error to exempt rape victim from "the rule" when no showing that she was needed to advise and confer with prosecutor during trial or that she did so. First, exclude all witnesses, then request exemptions and specify rationale. Judge's decision will be upheld absent abuse of discretion. See also Barnhill v. State, 779 S.W.2d 890 (Tex. App. -- Corpus Christi 1989, no pet.)(applying Aguilar). [Rule 613 was amended in 1990 to exempt victim from the Rule unless victim is to testify and trial court determines that victim's testimony would be materially affected if victim hears other testimony; presumably Aguilar is no longer controlling]

Tex. R. Crim. Evid. 614(a) Production of witness statement

Williams v. State, 940 S.W.2d 802, 806-07 (Tex. App. — Fort Worth 1997, pet. ref'd)

It was not error for the trial court to refuse to make the prosecutor turn over his notes memorializing his meetings with the witnesses, even where the witnesses testified that they reviewed the notes for accuracy. In order for Rule 614 to require production of a witness statement, the statement must have been made by the witness.

Jenkins v. State, 912 S.W.2d 793, 818-19 (Tex. Crim. App. 1993)(op. on reh'g)

Rule requires only production of statements in prosecutor's possession. Here, prison narcotics investigator testified about availability of drugs in prison. Def. wanted all reports he'd ever written. Aff'd on reh'g because prosecutor need produce only those statements "possessed by the prosecutorial arm of the government."

Brooks v. State, 901 S.W.2d 742, 745-46 (Tex. App. -- Fort Worth 1995, pet. ref'd)

Def. not entitled to written transcript of witness' testimony in co-Def.'s trial under **Gaskin**/614 when requested after W's direct testimony since written transcript had not been made.

Jordan v. State, 897 S.W.2d 909, 915-17 (Tex. App. -- Fort Worth 1995, no pet.)

Trial court reviewed tape recorded interview between D.A. & witness, holding it's work product, no exculpatory evidence, need not be produced under 614. Work product doctrine does not trump Rule 614 if the recording was a "statement" of witness and relates to his testimony. Harmless error here.

Cross v. State, 877 S.W.2d 25, 27 (Tex. App. -- Houston [1st Dist.] 1994, pet. ref'd)

Officer's car inventory form was a statement under Rule. Though not signed, it was adopted by him. However, these forms were routinely destroyed & since it did not exist at time of trial, State could not be required to produce it; State did not "elect" noncompliance with production.

Newsome v. State, 829 S.W.2d 260, 263 (Tex. App. -- Dallas 1992, no pet.)

Prosecutor's notes not a "statement of the witness" that must be produced at Batson hearing; they were for private use prior to testifying; query if they were not used to refresh memory of prosecutor and therefore subject to production under Rule 611.

Davis v. State, 780 S.W.2d 945, 949 (Tex. App. -- Fort Worth 1989, pet. ref'd)

Police officer's offense report not discoverable prior to trial, but it is on cross-examination once he testifies. Failure to comply may result in mistrial

Mayfield v. State, 758 S.W.2d 371, 375 (Tex. App. -- Amarillo 1988, no pet.)

Court avoided issue of whether witness' prior statement which was in possession of city attorney, not prosecutor, must be produced for defendant's use for cross-examination. Instead, any error harmless since sealed record shows prior statement was consistent with trial testimony.

Tex. R. Crim. Evid. 701 lay opinions

Turro v. State, 950 S.W.2d 390, 401-03 (Tex. App. — Fort Worth 1997, pet. ref'd)

Witness could give lay opinion regarding "emotional tenor" of a conversation between two people that she personally knew based upon the inflections in their voices.

Fairow v. State, 943 S.W.2d 895, 895-902 (Tex. Cr. App. 1997)

A lay witness may give an opinion as to a person's culpable mental state so long as that opinion satisfies Rule 701 (personal knowledge and opinion rationally based on perception) and is "helpful to the jury." Does not matter that the opinion "embraces an ultimate issue." Keller wrote this opinion, which is a good exposition of the law surrounding lay witness opinion and should be read. Her reasoning breaks down at the end where she is describing why the defendant loses. Defendant wanted to introduce hearsay as lay opinion (the hearsay could have come in as an excited utterance). Keller identifies this as hearsay and inadmissible, *see McMillan v. State*, 754 S.W.2d 422, 425 (Tex. App. — Eastland 1988, pet. ref'd), but goes on to create some goofy exception to the lay witness opinion rule "where the jury is in a position to form its own opinion, thus rendering [the statement] inadmissible."

Fairow v. State, 920 S.W.2d 357, 360-61 (Tex. App. — Houston [1st Dist.] 1996, pet. granted)

Trial court did not err in excluding Def. witness' opinion that Def. did not intentionally cause victim's death. This was speculation. "Mere conjecture does not assist the jury." Intent can be inferred from "the acts, words and conduct of the defendant." Narrow interpretation of rule; if a jury can infer that intent, why can't a witness who was there and saw it?

McCray v. State, 873 S.W.2d 126, 128 (Tex. App. -- Beaumont 1994, no pet.)

Officer could testify under either 701 or 702 that blood splatters showed victim had been "trapped."

Sabedra v. State, 838 S.W.2d 761, 763 (Tex. App. -- Corpus Christi 1992, pet. ref'd)

Officer could testify under rule that victim's injuries were "serious and permanent" even though he was not a medical expert. He did have experience is viewing and investigating slash wounds.

Austin v. State, 794 S.W.2d 408, 410 (Tex. App. -- Austin 1990, pet. ref'd)

Police officer could testify that, based on his experience, words "Swedish Deep Muscle Rub" are often key words for prostitution.

Hughes v. State, 787 S.W.2d 193, 196 (Tex. App. -- Corpus Christi 1990, pet. ref'd)

Robbery victim's opinion as to proper punishment for defendant not relevant. He had no more expertise for suggesting proper punishment than any member of the jury.

Thomas v. State, 774 S.W.2d 26, 28-29 (Tex. App. -- Beaumont 1989, no pet.)

Police officer could give his opinion interpreting significance of defendant's actions in "stalking" him. See also Anguiano v. State, 774 S.W.2d 344, 346-47 (Tex. App. -- Houston [14th Dist.] 1989, no pet.)(police officer could give opinion of defendant's demeanor that she was offering or agreeing to engage in sex)

Howard v. State, 744 S.W.2d 640, 641 (Tex. App. -- Houston [14th Dist.] 1987, no pet.)

In DWI trial, officer may testify to HGN test for qualitative, not quantitative, purposes; admissible as a general sobriety field test; officer may not extrapolate b.a.c. level. See also Emerson v. State, 880 S.W.2d 759, 768 (Tex. Crim. App. 1994); Lewis v. State, 933 S.W.2d 172, 181 (Tex. App. -- Corpus Christi 1996, n.p.h.).

Roberts v. State, 743 S.W.2d 708, 711 (Tex. App. -- Houston [14th Dist.] 1987, pet. ref'd)

Trial court properly excluded defense witness' opinion that police were "harassing" defendant. Witness did testify to base facts, therefore her opinion and conclusions unnecessary. No citation to rule. Probability that trial court also would have been upheld had it admitted statement, great discretion here.

Gross v. State, 730 S.W.2d 104, 105-06 (Tex. App.--Texarkana 1987, no pet.)

Court properly excluded victim's opinion, offered during punishment phase, that defendant should have be given lenient sentence. Rule 701 would not allow opinion because the witness was in no better position to form an opinion than the jury; such evidence is merely an appeal to sympathy or prejudice.

Tex. R. Crim. Evid. 702 (401 & 403 implicated) testimony of experts

Hartman v. State, 946 S.W.2d 60 (Tex. Cr. App. 1997)

The requirements of *Kelly v. State*, 824 S.W.2d 568 (Tex. Cr. App. 1992) apply to *all* scientific evidence.

Fowler v. State, ___ S.W.2d ___, 1997 WL 686088 (Tex. App. — Waco 1997)

State argued that the requirements of *Kelly v. State*, 824 S.W.2d 568 (Tex. Cr. App. 1992) should not apply to the "soft sciences" (e.g., psychological or behavioral testimony) because such expertise is "specialized knowledge" rather than "scientific knowledge" and that the elements of *Kelly* are more difficult to satisfy with this type of testimony than with

testimony from the "hard sciences" (e.g., DNA). Court of appeals held that *Kelly* applies to "soft sciences." *See also Nations v. State*, 944 S.W.2d 795, 799-802 (Tex. App. — Austin 1997, pet. ref'd)(on remand)(court indicates that whether or not *Kelly*'s "reliability" prong applies to "soft sciences" is an open question).

Avila v. State, ___ S.W.2d ___, 1997 WL 539388 (Tex. App. — El Paso 1997)

Not error to exclude expert testimony offered by the defense addressing defendant's mental state at the time of the offense.

Durham v. State, ___ S.W.2d ___, 1997 WL 87354 (Tex. App. — Tyler 1997)

County toxicologist could testify about level of impairment from marijuana based upon the level of THC in defendant's blood. Passed *Kelly* test.

Jordan v. State, 950 S.W.2d 210 (Tex. App. — Fort Worth 1997, no pet.)(on remand)

Trial court did not commit error by excluding testimony from the defense pertaining to the reliability of eyewitness identification. Defense did not satisfy *Kelly*.

Nations v. State, 944 S.W.2d 795 (Tex. App. — Austin 1997, pet. ref'd)(on remand)

Another eyewitness identification case — defendant did satisfy *Kelly* — harmful error for trial court to exclude the evidence.

Turro v. State, 950 S.W.2d 390, 399-400 (Tex. App. — Fort Worth 1997, pet. ref'd)

Not error for medical examiner to go through defendant's statement and testify that certain assertions were "not consistent" with his autopsy findings (and therefore allegedly not true). This is not a "direct" comment on the credibility of the defendant, which is disallowed, *see Yount*, below, but an "indirect" comment, which is.

Scugoza v. State, 949 S.W.2d 360, 363 (Tex. App. — San Antonio 1997, no pet.)

Expert testimony regarding the "battered spouse syndrome" o.k. This case is nearly identical to *Duckett*, but deals with battered spouses rather than abused children. The way in which the state used the testimony was the same.

S.V. v. R.V., 933 S.W.2d 1, 26-27 (Tex. 1996)(Gonzalez, concurring)

Discussion, in civil case, on admissibility of expert testimony on memory repression in child abuse situation. Concludes it is "junk science."

Jordan v. State, 928 S.W.2d 550 (Tex. Crim. App. 1996)

Expert need not testify about every issue or fact that might affect the reliability of eyewitness identification before his testimony is relevant. Remanded for determination of reliability of the area of expertise.

Thomas v. State, 915 S.W.2d 597, 601 (Tex. App. — Houston [14th Dist.] 1996, pet. ref'd)

State's expert witness could testify on "pigeon drops" and how they're performed. He explained how one con man assists the primary actor by pretending to be another gullible fool. Fun.

Thomas v. State, 886 S.W.2d 388, 391 (Tex. App. -- Houston [1st Dist.] 1994, no pet.)

Since there is no defense that Def. is unable to form an intent to commit a proscribed act except for the insanity defense, expert's testimony on Def.'s state of mind negating intent not admissible because not relevant when he did not plead insanity.

Emerson v. State, 880 S.W.2d 759, 763-69 (Tex. Crim. App. 1994)

Court takes judicial notice of wide variety of materials in concluding that theory and general results of HGN test is admissible under Rule 702. Technique is reliable, but not as basis for a specific BAC.

Yount v. State, 872 S.W.2d 706, 709-12 (Tex. Crim. App. 1993)

Expert testimony that a particular witness is truthful is inadmissible under Rule 702. Expert testimony that child victims of sexual abuse, as a class, are generally very truthful in their accounts is inadmissible.

Rousseau v. State, 855 S.W.2d 666, 686 (Tex. Crim. App. 1993)

Not error to exclude expert testimony on unreliability of eyewitness identification when witness did not examine eyewitnesses in case and failed to "fit" expert's testimony to evidence in specific case.

McIntosh v. State, 855 S.W.2d 753, 767 (Tex. App. -- Dallas 1993, pet. ref'd)

Doctor who performed autopsy could testify that death was crime of passion, victim was killed by acquaintance, and facts were consistent with defendant being killer. Relevant in determining identity.

Nolte v. State, 854 S.W.2d 304, 309 (Tex. App. -- Austin 1993, pet. ref'd)

Defense expert on pedophilia did not have to obtain knowledge of facts concerning defendant before date of offense under Rule 405 because his testimony was not character evidence, it was expert opinion under Rule 702. However, exclusion of evidence was harmless.

Wunneburger v. State, 844 S.W.2d 864, 868-69 (Tex. App. -- Amarillo 1992, pet. ref'd)

No error in refusing to appoint expert for indigent to testify that most crimes are committed by males under 29 and that long prison terms have little, if any, effect on deterring others. Court notes that an expert may testify at punishment re a particular defendant's propensity to commit violence, but this type of expertise comes close to recommending a particular punishment. Collects cases. [Appears to be an overly narrow reading of rule 702, but trial judge has much discretion here.]

Sosa v. State, 841 S.W.2d 912, 916 (Tex. App. -- Houston [1st Dist.] 1992, no pet.)

Trial court's rejection of defense expert on graphoanalysis upheld. Expert was mother of defense attorneys. Defense failed to demonstrate by "clear and convincing evidence" that this is reliable technique. Factors: only scientific board or organization to recognize graphoanalysis is International Graphoanalysis Society [insiders]; expert took a mail course; didn't testify to any scientific literature on the subject; no evidence on potential rate of error; nothing in record about availability/existence of other experts in field.

Goodson v. State, 840 S.W.2d 469, 473-74 (Tex. App. -- Tyler 1991, no pet.)

Police officer could explain to jury the normal use of cocaine and how much a consumer would use offered to show defendant was a wholesale dealer, not a retail user. Officer was an expert who had 5 years experience in narcotics; it may be inferred that he was familiar with the normal limits of cocaine use.

Moore v. State, 836 S.W.2d 255, 258-59 (Tex. App. -- Texarkana, 1992, pet. ref'd)

Exclusion of defense expert testimony that defendant might appear to be intoxicated but was, instead, having a "panic attack" was harmful error. Witness was qualified, could testify hypothetically, and testimony was relevant.

Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992)

In upholding admission of DNA evidence, Texas rejects *Frye* test of "general scientific acceptance" and adopts more liberal McCormick "general relevancy" approach to admissibility of novel expert evidence. Sets forth factors to consider in determining reliability of particular theory/procedure/test result. Adds a novel twist by requiring "clear and convincing" evidence of reliability. But see Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993)(Supreme Court interprets same rule and adopts more flexible standard of validity of technique; reliability of specific result goes to weight, not admissibility; standard is preponderance of evidence).

McHenry v. State, 823 S.W.2d 667, 672-73 (Tex. App. -- Dallas 1991), *remanded on other grounds*, 829 S.W.2d 803 (Tex. Crim. App. 1992)

Police officer may testify as expert in punishment phase re importation, packaging, sale of cocaine, magnitude of sale in this case, and correlation between sale and use of cocaine & property crimes. "The ultimate effect on the community is relevant to a jury's determination of what punishment to assess when the State alleges an aggravated charge."

Sparks v. State, 820 S.W.2d 924, 927 (Tex. App. -- Austin 1991, no pet.)

Polygraph evidence always inadmissible, even testimony that a witness is willing to take a polygraph. Court discusses inherent unreliability and tendency to be unduly persuasive, but fails to discuss second problem that this constitutes expert testimony on a person's credibility.

Ramirez v. State, 815 S.W.2d 636, 651 (Tex. Crim. App. 1991)

"Expert's opinion could be predicated solely on inadmissible hearsay if of a type reasonably relied upon by experts in that field of expertise." Expert can give opinion without disclosing underlying facts/data, but here prosecutor cross-examined defense psychiatrist in capital murder about results of a Rand study that expert had neither read nor used; improper because it directly revealed the results of an unknown study. Numerous cites to pre-rules cases in which expert had to recognize impeaching material or treatise as authoritative; this is no longer necessary as long as some witness will validate the material as authoritative.

Kipp v. State, 802 S.W.2d 804, 808-09 (Tex. App. -- Texarkana 1990, pet. dism'd)

Expert testimony that matches general or class behavior characteristics of child sexual abuse victims with alleged victim's specific behavior patterns but does not directly comment on credibility is admissible.

Perryman v. State, 798 S.W.2d 326, 329-30 (Tex. App. -- Dallas 1990, no pet.)

Officer who had practical experience in dealing with sexual assaults, specific training in psychological profiling & previous experience in using profile technique is competent as expert under rule. Testimony that sexual assault Def. fits profile of "power reassurance rapist" not admissible; did not go to disputed issues of who committed crime/what crime committed & was testimony on assailant's subjective state of mind. [was character evidence forbidden by 404(a)].

Duckett v. State, 797 S.W.2d 906, 909-20 (Tex. Crim. App. 1990)

Expert testimony regarding child sexual abuse syndrome admissible on rebuttal under rule 702. Lengthy discussion of expert testimony and rule. Good analysis. Compare Rodriguez v. State, 815 S.W.2d 717, 718-24 (Tex. Crim. App. 1991)(Overstreet, J., dissenting to dismissal of P.D.R.)(arguing that this type of evidence is a "backdoor" opinion on complainant's credibility; makes much of fact State introduced this evidence in its case in chief but after complainant's credibility was attacked).

Reyna v. State, 797 S.W.2d 189, 193 (Tex. App. -- Corpus Christi 1990, no pet.)

Frye test does not apply to anatomically correct dolls used to demonstrate in child sexually abuse prosecution.

Sattiewhite v. State, 786 S.W.2d 271, 290-91 (Tex. Crim. App. 1989)

Psychologist not permitted to tell jury in capital murder case that life imprisonment would be most appropriate punishment for Def. No witness may recommend a particular punishment.

Wilkerson v. State, 766 S.W.2d 795, 799 (Tex. App. -- Tyler 1987, pet. ref'd)

Defense expert testimony regarding defendant's psychological problems and how they "would be manageable over ten year period of probation" was admissible under **Allaben** to show suitability for probation. Although family members testified to same effect, expert would have been helpful. Reversed on punishment.

Key v. State, 765 S.W.2d 848, 849-51 (Tex. App. -- Dallas 1989, pet. ref'd)

Expert witness, rape crisis counselor, could testify concerning the classifications of rapists and victims' responses to rapists. Admissible because many people are not familiar with the circumstances of "date rape." Case cites **Fielder** for proposition that expert testimony is admissible when average lay person has no basis for understanding this issue. Discusses balancing under 403 because defendant claimed testimony was too general to aid jury in resolving issue. Court finds the opposite: expert discusses general classification, jury then decides whether X person fits within that class. Expert's testimony did not discuss this victim, this defendant, or this event. Good analysis, helpful case.

Shaw v. State, 764 S.W.2d 815 (Tex. App. -- Fort Worth 1988, pet. ref'd)

Expert may testify to "power rapist" profile and that the "attacker" fit this profile. Highly questionable.

Zani v. State, 758 S.W.2d 223 (Tex. Crim. App. 1988)

Lengthy discussion of problems surrounding hypnotically refreshed memory. Despite Court's inclination to adopt per se rule of exclusion, felt mandated by **Rock v. Arkansas**, to permit State, as well as defense, to establish

reliability of specific procedure used on a case-by-case basis. When remanded, court of appeals upheld admission of this testimony. Zani v. State, 767 S.W.2d 825 (Tex. App. -- Texarkana 1989, pet. ref'd)

Pike v. State, 758 S.W.2d 357, 364 (Tex. App. -- Waco 1988), *remanded on other grounds*, 772 S.W.2d 130 (Tex. Crim. App. 1989), *op. on remand*, 788 S.W.2d 43 (Tex. App. -- Waco 1990, pet. ref'd)

Under 702, an expert may sponsor charts of methamphetamine prices, cost, distribution, etc. Although much of data was hearsay, it was reasonably relied upon by experts in the area, thus admissible in either testimonial or chart form under rule 705.

Morrow v. State, 757 S.W.2d 484, 487-88 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref'd)

Police expert on drugs may testify to quantity sold as a consumer good v. wholesale distribution, price, packaging, etc. to prove defendant possessed drugs with intent to deliver.

Agbogun v. State, 756 S.W.2d 1, 4 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref'd)

Whether witness, who is offered as an expert, has sufficient qualifications is a matter for the judge's discretion. Here, pharmacist could testify to procedures commonly followed in pharmacy profession regarding labeling.

Fielder v. State, 756 S.W.2d 309 (Tex. Crim. App. 1988)

Defense expert psychologist, in murder case, should have been allowed to testify as to why woman would endure abusive relationship. "Wife battering" testimony was relevant to defendant's state of mind and intent to commit offense. Distinguishes **Werner v. State**, 711 S.W.2d 639 (Tex. Crim. App. 1986)("holocaust defense" expert testimony was not relevant; no evidence that defendant, in fact, suffered any such syndrome).

Pope v. State, 756 S.W.2d 401 (Tex. App. -- Dallas 1988, pet. ref'd)

Any possible error in admission of "voiceprint" spectrographic analysis under either **Frye** or McCormick analysis was harmless. Dissenting opinion would adopt **Frye** analysis in Texas [no prior decision specifically on point], collecting numerous cases and authorities on scientific evidence & spectrographic analysis.

Parra Gonzalez v. State, 756 S.W.2d 413 (Tex. App. -- El Paso 1988, pet. ref'd)

Defendant cannot introduce his own private PSI done by expert psychologist. Not permitted under 37.07 or rules 402,403, 405. Lengthy discussion.

Thomas v. State, 748 S.W.2d 539, 540-41 (Tex. App. -- Houston [1st Dist.] 1988, no pet.)

Testimony of psychologist, an expert on unreliability of eyewitness testimony, properly excluded by trial court, citing numerous out-of-state decisions. This testimony goes solely to credibility of a lay witness and jury is sole judge of credibility.

Kirkpatrick v. State, 747 S.W.2d 833, 834-39 (Tex. App. -- Dallas 1988, pet. ref'd)

Expert's opinion admissible only when: 1) witness is competent and qualified; 2) testimony will assist jurors in understanding matters not within their common experience; and 3) probative value not substantially outweighed by

unfair prejudicial effect (403). Good review of out-of-state decisions relating to child abuse experts & areas in which they are competent to testify and which are helpful to jury. Conviction reversed because expert testified to her opinion as to credibility of child victim. No witness, lay or expert, should testify that another witness is telling the truth. Important opinion for child abuse prosecutions.

Jones v. State, 716 S.W.2d 142, 145-154 (Tex. App.--Austin 1986, pet. ref'd)

Extraordinarily lengthy and detailed analysis of Frye test and its counterpart Coppolino (dealing with the admissibility of expert testimony on "new" scientific theories and methods). Advocates that Texas should reject Frye in favor of general relevancy analysis when rules of evidence adopted. Excellent source for secondary material regarding admissibility of scientific evidence. Admission of gas chromatography mass spectrometry test results upheld under Frye despite court's dissatisfaction with that test. Excellent dissertation.

Tex. R. Crim. Evid. 703 inadmissible data upon which expert reasonably relies

Aguilar v. State, 887 S.W.2d 27, 28-30 (Tex. Crim. App. 1994)

Major case with lengthy analysis. Distinguishes Cole. A crime lab chemist may testify to his own expert opinion which was formed by reviewing reports of other crime lab workers. "Even if the expert relies in whole or part upon information of which he has no personal knowledge, communicated to him at or before the time he testifies, the admissibility of his opinion is not affected 'unless the court determines that he does not have a sufficient basis for his opinion.'" Good reasoning and result. See also Canida v. State, 823 S.W.2d 382, 383-84 (Tex. App. -- Texarkana 1992) *remanded*, 842 S.W.2d 293 (Tex. Crim. App. 1992); Henderson v. State, 822 S.W.2d 171, 173-74 (Tex. App. -- Houston [1st Dist.] 1991, no pet.)

Harkins v. State, 782 S.W.2d 20, 24 (Tex. App. -- Fort Worth 1989, no pet.)

Lab director could base his opinion that syringes Def. had possessed contained amphetamine even though his opinion may have been based upon inadmissible data since that data was reasonably relied upon by other experts in his field.

Moore v. Polish Powers, Inc., 720 S.W.2d 183, 191-92 (Tex. App.--Dallas 1986, writ ref'd n.r.e)

Products liability case. Court examines the sufficiency of the data, the expertise of the data, and the reasonableness of relying upon that data in permitting expert to testify as to his opinion based upon inadmissible data. Court holds expert's opinion was admissible. Useful analysis and citation to United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971)(en banc), cert. denied, 405 U.S. 954 (1972)

Tex. R. Crim. Evid. 703 hypothetical questions

Davis v. State, ___ S.W.2d ___, 1997 WL 531029 (Tex. App. — Fort Worth 1997)

Prosecutor asked the following hypothetical question: "Would there be any difference, Doctor, in a dentist using a drug like Versed in combination with two other central nervous system depressants on a patient in the doses we've been talking about without knowing, without taking the time to know, would there be any difference in that than taking a loaded .45, putting three bullets in it, spinning it and pointing it at the head of a child and pulling the trigger?" Objection sustained, instruction

to disregard given, request for mistrial denied. Court of appeals does not say whether this is an improper question or not, but only that the instruction to disregard cured the error, if any.

McBride v. State, 862 S.W.2d 600, 609 (Tex. Crim. App. 1993)

Facts on which hypothetical question is based must be introduced into evidence, but they need not be proven beyond a reasonable doubt. Defendant also complained that State's psychiatrist at capital murder punishment phase based his opinion on inadmissible documents, e.g. offense reports and witness statements. That's permissible since documents were never shown to or referenced explicitly by psych. *But compare*, *Held v. State*, 948 S.W.2d 45, 53 (Tex. App. — Houston [14th Dist.] 1997, pet. ref'd), where the court of appeals found that the state did in fact ask its expert to assume a fact not in evidence as part of his hypothetical. The court held this was *not even improper*, citing *Pyles v. State*, 755 S.W.2d 98, 118 (Tex. Cr. App. 1988). "When a hypothetical question is addressed to an expert witness, the assumptions on which the hypothetical is based are not necessarily limited to those assumptions which are supported by the evidence. Hypothetical questions may also include assumptions based on facts that are within the personal knowledge of the witness or that are assumed from common or judicial knowledge. Further, counsel may propound hypothetical questions which assume facts in accordance with his theory of the case."

Tex. R. Crim. Evid. 704 opinion on ultimate issue

Miller v. State, 874 S.W.2d 908, 914 (Tex. App. -- Houston [1st Dist.] 1994, pet. ref'd)

In gambling prosecution, expert could testify about rules of craps, whether there was an economic benefit other than personal winnings and whether risks of losing and chances of winning were the same for all participants. These were ultimate fact issues, but rule allows such testimony. Witness did not testify to his legal interpretation of statute.

Hernandez v. State, 772 S.W.2d 274, 275 (Tex. App. -- Corpus Christi 1989, no pet.)

An expert may testify on an ultimate issue of fact but may not state a legal conclusion. Medical examiner could testify that fatal knife wound was "deliberate cutting type of wound."

Tex. R. Crim. Evid. 705 Use of Underlying Data

Skinner v. State, ___ S.W.2d ___, 1997 WL 266188 at **7 (Tex. Cr. App. 1997)

A document made by an expert that reflects his mental thoughts and processes upon his initial review of the case is not "underlying facts and data upon which the expert opinion is based" such that it is discoverable under Rule 705(b).

Walck v. State, 943 S.W.2d 544 (Tex. App. — Eastland 1997, pet. ref'd)

Statements made by a defendant to a *forensic* expert are inadmissible hearsay if offered by the defendant. Therefore, they are not admissible for any other purpose but to support the expert's opinion and are thus excludible under Rule 705(d). Note that if the expert is a *treating* expert, the statements are made for the purpose of medical diagnosis.

Luxton v. State, 941 S.W.2d 339, 342-43 (Tex. App. — Fort Worth 1997, no pet.)

Rule 705(b) only applies to experts who are in court and testify. Thus, the defendant has not right to voir dire an expert who expresses his expert opinion in a medical record before that record is offered and admitted as a business record under Rule 803(6).

Love v. State, 909 S.W.2d 930, 948 (Tex. App. -- El Paso 1995, pet. ref'd)

Court could permit expert to testify to info. def.'s sister told him about def. which helped for basis of his opinion that def. had antisocial disorder but was not insane. These facts weighed heavily in his diagnosis & many were in evidence.

Alba v. State, 905 S.W.2d 581, 588 (Tex. Crim. App. 1995)

Error (harmless here) to deny Def. a hearing outside jury's presence on facts underlying expert's opinion when State asked expert hypothetical using facts already in evidence in cap. murder. Purpose of 705(b) is to prevent jury from hearing underlying facts & data which might ultimately be ruled inadmissible (unmentioned is further rationale that opinion may be excluded because expert is relying on rubbish or "junk science" in forming his opinion). See also **Jenkins v. State**, 912 S.W.2d 793, 814 (Tex. Crim. App. 1993)(op. on reh'g)(harmless error in denying hearing outside jury's presence since Def. already had a copy of psychologist witness' report setting out facts & data and expert didn't testify to damaging hearsay or other inadmissible material).

Boswell v. Brazos Elec. Power Co-Op., Inc., 910 S.W.2d 593, 602-03 (Tex. App. -- Fort Worth, n.h.w.)

Expert's testimony may be admissible while the underlying data supporting opinion is excluded; expert doesn't have an absolute right to disclose all of underlying facts & data, either on direct or cross. Here expert reasonably relied on report that included info. of undetermined reliability, hearsay, previously excluded testimony. Criminal rule is even more explicit on court's right to allow opinion & disallow data. See also **Beavers v. Northrop Worldwide Aircraft Serv., Inc.** 821 S.W.2d 669, 674 (Tex. App. -- Amarillo 1991, writ denied); **First Southwest Lloyds Ins. Co. v. MacDonald**, 769 S.W.2d 954, 957-58 (Tex. App. -- Texarkana 1989, writ denied).

Joiner v. State, 825 S.W.2d 701, 707 (Tex. Crim. App. 1992)

"The trial court will examine the basis for such expert opinion & determine whether the disclosure of such facts would be more prejudicial than probative to the jury's consideration."

Tex. R. Crim. Evid. 801(d) definition of hearsay

Morin v. State, ___ S.W.2d ___, 1997 WL 622766 at **5-6 (1997)

A case applying *Shaffer v. State*, 777 S.W.2d 111 (Tex. Cr. App. 1989)(discussed below). A police officer testified that another officer stated that the defendant was involved in the murder made the basis of this case. State said the statement was not hearsay, but elicited only to explain why the officer was investigating the defendant. The court of appeals correctly held

that this was hearsay. In this case, the police officer's actions were not questioned by the defendant and thus the state could not elicit hearsay from the police officer to explain his actions. *Shaffer* carves a narrow exception to the hearsay rule and the facts of this case went beyond it. Harmful error — reversal.

Chambers v. State, 905 S.W.2d 328, 330 (Tex. App. --Fort Worth 1995, no pet.)

Def.'s written statement to police that he was acting in self-defense was hearsay and inadmissible when offered by Def. rather than State.

Gaitan v. State, 905 S.W.2d 703, 709 (Tex. App. -- Houston [14th Dist.] 1995, pet. ref'd)

Offense reports admitted not to prove that those defs. were DWI but to show that 29 people who were arrested were not prosecuted was not hearsay. They were not offered for truth of matter contained within, but rather to show nonprosecution.

Rodriguez v. State, 903 S.W.2d 405, 411 (Tex. App. -- Texarkana 1995, pet. ref'd)

Failure to speak. State could offer evidence that mother of agg. sexual assault victim who was a friend of Def. did not tell police "You've got the wrong man." The failure to speak is not a statement under 801.

Benford v. State, 895 S.W.2d 716, 717-18 (Tex. App. -- Houston [14th Dist.] 1994, no pet.)

Statements by 3rd persons to officer not hearsay when offered to show probable cause; not offered for historical truth but for officer's reasonable belief & info. he had available; distinguishes **McVickers**, see Rule 1101, infra.

Oberg v. State, 890 S.W.2d 539, 542 (Tex. App. -- el Paso 1994, pet. ref'd)

Officer's statement that he had received info. that "Def. was going to sell some drugs up at the sun porch" was not hearsay when offered to show why Def. was searched after Def. challenged lawfulness of search. As in **Benford**, issue is not historical truth but rationale for challenged police behavior.

Jackson v. State, 889 S.W.2d 615, 616 (Tex. App. -- Houston [14th Dist.] 1994, pet. ref'd)

Testimony by sexual assault victim's father that victim told him she didn't tell him about assault at first because she was afraid that Def., who was hiding in closet where father stored his guns, might kill father. Not hearsay because not offered to prove Def. threatened to kill father but to explain why she didn't tell him about assault.

Stevenson v. State, 920 S.W.2d 342, 343 (Tex. App. — Dallas 1996, n.p.h.)
Smith v. State, 866 S.W.2d 731, 732 (Tex. App. -- Houston [14th Dist.] 1993, no pet.)

Intoxilyzer print-out slips are not hearsay because they're computer generated. See Burleson & Murray infra.See also **Ly v. State**, 908 S.W.2d 598, 600 (Tex. App. -- Houston [1st Dist.] 1995, no pet.)(printout generated by computer used for electronic monitoring by Harris County pretrial services not hearsay).

Drake v. State, 860 S.W.2d 182, 184 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd)

Witness could testify that he was in the hospital when he first learned defendant's name. That is not hearsay b/c not offered for truth of matter asserted, only to set time and place he heard a fact. Not hearsay that witness and another had a discussion when the contents of the discussion are not divulged.

Burleson v. State, 802 S.W.2d 429, 439 & n. 2 (Tex. App. -- Fort Worth 1991, pet. ref'd)

Witness' testimony re number of records missing from payroll file not hearsay because not a verbal/nonverbal out-of-court statement made by a *person*. It was tangible evidence generated by a computer; the computer equivalent of a snapshot. Good analysis. See also Murray v. State, 804 S.W.2d 279, 284 (Tex. App. -- Fort Worth 1991, no pet. reported)(printout of hotel door lock computer system not hearsay because not human generated "statement"; computer self-generated data, not computer stored data, i.e. not a reproduction of statements entered into device by a declarant).

Marsh v. State, 800 S.W.2d 607, 609 (Tex. App. -- Houston [14th Dist.] 1990, pet. ref'd)

Out of court statement that police officer learned there were two suspects admissible to indicate circumstances surrounding officer's arrest of suspect. Questionable: appears to be hearsay by implication.

Beverly v. State, 795 S.W.2d 846, 846-47 (Tex. App. -- Beaumont 1990, no pet.)

Officer could testify to his conversation with apartment manager that she had "trespass warned" Def. "The testimony was not concerned with whether the manager had, in fact, "trespass warned" Def. but concerned what caused the officer to check his list."

Cardenas v. State, 787 S.W.2d 160, 161-62 (Tex. App. -- Houston [1st Dist.] 1990, pet. ref'd)

Police officer testified that "I told [victim's wife] that her son had said that [Def.] had done the shooting" was inadmissible indirect hearsay.

Foster v. State, 779 S.W.2d 845, 861-63 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 1505 (1990)

Witness led officers out to a stockpond and she pointed out to pond--"she made a throwing motion"--then officers retrieved sawed-off shotgun from pond. Court says officer's testimony of witness' act was non-verbal, non-assertive, thus non-hearsay. "This was only an explanation of the circumstances which led to the recovery of the shotgun" not an assertion that witness or Def. put the shotgun in the pond. Questionable reasoning; witness' pointing was substitute for words "the shotgun is in the pond."

Schaffer v. State, 777 S.W.2d 111, 113-15 (Tex. Crim. App. 1989)

Hearsay by implication. Officer X testified that he arrested Def. Def. testified he was a police informer & worked for Officer Y. State recalled Officer X & asked if he had called Y after Def. testified. He did. "Without telling us what he told you, Officer X, would you at this time ask the State to drop charges against Def?" No, said X. No, said TCA--where there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside courtroom, one can't artfully circumvent the rule. Helpful discussion and comparison with other cases which would permit "based upon that information" questions. See also Coots v. State, 826 S.W.2d 955, 959 (Tex. App. -- Houston [1st Dist.] 1992, no pet. reported)(following *Schaffer* concerning "back door hearsay";

deputy testified that third person named defendant as possible suspect and had stated that defendant used same telephone number as robber).

Dubose v. State, 774 S.W.2d 328, 329 (Tex. App. -- Beaumont 1989, pet. ref'd)

State cannot turn hearsay into non-hearsay merely by stating that it is offering statement only to show that it was made. "Such an argument is pure sophistry." Proponent must show the relevance of the fact that statement was made.

Stewart v. State, 767 S.W.2d 455 (Tex. App. -- Dallas 1988, pet. ref'd)

Defendant's hearsay objection to former wife's testimony regarding fact that she had had conference with defendant's attorney who advised her that she did not have to testify against her husband properly overruled since testimony was offered to explain why former wife delayed in coming forward, not to prove truth of what attorney told wife.

King v. State, 765 S.W.2d 870, 871-72 (Tex. App. -- Houston [1st Dist.] 1989, no pet.)

Witness' statement that victim had told her, two weeks before his death, that defendant had pointed shotgun at him was hearsay and inadmissible even when offered to impeach defendant's testimony.

Lewis v. State, 759 S.W.2d 773, 774 (Tex. App. -- Beaumont 1988, no pet.)

Defendant's wife's testimony that she was told her husband's guns were illegal weapons not hearsay since not offered for truth but as an explanation for her conduct in bringing weapons to attention of police.

Martinez v. State, 749 S.W.2d 556, 559-60 (Tex. App. -- San Antonio 1988, no pet.)

"It is not error to admit hearsay evidence when it serves to clarify other hearsay evidence elicited by the opposition." Here, defense attorney had asked officer, "You didn't have any information regarding [the defendant] at the time you got the warrant, did you?" He did, and the prosecutor was entitled to ask him who talked with him and what that information was.

Carrasquillo v. State, 742 S.W.2d 104, 111 (Tex. App. --Fort Worth 1987, no pet.)

Error to admit doctor's hearsay testimony that he had just called office to verify that his records showed that victim's blood type was "B." It was the telephone call information that was hearsay, not the entry in the medical record. Harmless since doctor had already testified to his "recollection."

Ali v. State, 742 S.W.2d 749, 758 (Tex. App. -- Dallas 1987, pet. ref'd)

"X"'s statement to witness that defendant had gone "to pick up check" was inadmissible hearsay in theft by check prosecution, but harmless when jury instructed to disregard and other testimony clearly showed that defendant had gone to pick up check.

Fuller v. State, 737 S.W.2d 113, 115 (Tex. App. -- Tyler 1987, no pet.)

Resident trainer of home for mentally retarded could testify that none of mentally retarded victims were married to defendant and that none had sufficient mental capacity to consent to sexual intercourse. This was not hearsay. Court does not elaborate, but theory is that witness had personal knowledge of these facts, she was not reciting any "out of court statement."

Hendrick v. State, 731 S.W.2d 147, 148-49 (Tex. App.--Houston [1st Dist.] 1987, pet. ref'd)

Defendant's nonverbal assertion in handing his bank records to city secretary was an admission that records were his "true records of the narcotics operation." Therefore, the bank records themselves were admissible as admissions by a party opponent and were not hearsay.

Salazar v. State, 716 S.W.2d 733, 735 (Tex. App.--Corpus Christi 1986, pet. ref'd)

Officer could testify that, based upon a conversation with an informant, he placed defendant's photo in lineup; officer did not testify to contents of tip nor did he offer it for truth of matter asserted. It was offered for: 1) officer's motive; 2) reason for subsequent attempt to locate witness. Information upon which another acts is not hearsay. Does not cite rule.

Earls v. State, 715 S.W.2d 731, 733 (Tex. App.--San Antonio 1986, pet. ref'd)

"Acts or conduct of a person out of court is generally not subject to the hearsay objection unless the conduct amounts to an assertion." Distinguishes "hearsay by inference." Does not cite rule.

Howard v. State, 713 S.W.2d 414, 417 (Tex. App.--Fort Worth, 1986), *pet. ref'd per curiam*, 789 S.W.2d 280 (Tex. Crim. App. 1988)
Officer's testimony of what accomplice told him regarding how defendant was "ripped off" in prior drug sales admissible to show knowledge or intent when those issues are in dispute. Court states, incorrectly, that such evidence is an exception to hearsay rule (instead, it is outside the definition of hearsay under 801(d) which is not cited). Court cites to 1A R. Ray, Texas Law of Evidence $ 799 (3rd ed. 1980).

Tex. R. Crim. Evid. 801(e)(1)(A) prior inconsistent statements

Johnson v. State, 803 S.W.2d 272, 300 n.12 (Tex. Crim. App. 1990)
Grand jury testimony not admissible under Rule.

Davis v. State, 773 S.W.2d 592, 593 (Tex. App. -- Eastland 1989, pet. ref'd)

When co-Def. was called as witness but refused to testify at kidnapping trial, State offered his prior testimony given at his own trial. While W. was "unavailable" for rule 804 purposes, Def. did not have opportunity to cross-examine at that time, so testimony not admissible under 804, nor was it admissible under 801(e)91)(A) since prior testimony was not inconsistent with a refusal to speak at trial. Had W claimed a lack of memory or denied truthfulness of prior testimony, result would have been different.

Contreras v. State, 766 S.W.2d 891 (Tex. App. -- San Antonio 1989, no pet.)

Prior written statement that is sworn to before notary public does not qualify as non-hearsay under rule 801 since it was not given "at a trial, hearing, or other proceeding except a grand jury proceeding, or in a deposition." Such a prior inconsistent statement may be used to impeach the witness under rule 607 but is not substantive evidence.

Tex. R. Crim. Evid. 801(e)(1)(B) prior consistent statements

Kipp v. State, 876 S.W.2d 330, 337 (Tex. Crim. App. 1994)

Prior statement must relate to the same matter testified to by the witness at trial. Here, the prior statement related to a different incident, not the charged offense.

Mathes v. State, 765 S.W.2d 853 (Tex. App. -- Beaumont 1989, pet. ref'd)

State's witness who had been impeached with his prior typewritten statement to police which omitted certain facts that he testified to at trial created impression that witness' testimony in court was of recent fabrication, thus opening the door to rehabilitation with prior consistent handwritten statement, made 7 months before typewritten version, that was given to witness' attorney prior to entering a plea agreement on related charges. Defendant argued that witness had same motive to fabricate in his prior consistent statement as at trial, but court rejected argument since State was not made aware of statement's existence before plea agreement was made. Query if witness nonetheless had same motive since attorney testified that it was written in anticipation that prosecutor would want a written statement from witness.

Ray v. State, 764 S.W.2d 406, 411-12 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Trial court properly admitted surreptitious tape recording of co-defendant, turned State's witness, making prior consistent statement against penal interest to third party over defendant's claim that witness always had some motive, e.g. machismo, to lie. Court distinguished Campbell and held that motive to lie at trial and motive at time of prior statement must be the same. Numerous federal cites.

Tucker v. State, 751 S.W.2d 919, 923 (Tex. App. -- Fort Worth 1988, pet. ref'd)

State was entitled to offer two prior consistent statements made before any motive to exaggerate arose; in fact, the prior statements were against witness' penal interest.

Cartmill v. State, 748 S.W.2d 581, 582-83 (Tex. App. -- Dallas 1988, no pet.)

Child abuse victim's pretrial videotape admissible under rules when defendant cross-examined child on inconsistent statements. But see, Haughton v. State, 805 S.W.2d 405, 407-081 (Tex. Crim. App. 1990)(pretrial child videotape inadmissible under rule to rebut charge of improper influence and motive since alleged motive for fabrication arose prior to making of videotaped statement).

Beaver v. State, 736 S.W.2d 212, 215 (Tex. App. -- Corpus Christi 1987, no pet.)

Defendant's written statement giving her version of events, written shortly before trial, not admissible as a prior consistent statement since it was made after a motive to fabricate existed, i.e., after she had been charged with the crime.

Campbell v. State, 718 S.W.2d 712, 715 (Tex. Crim. App. 1986)

> "When the new Rules of Criminal Evidence were promulgated, a decision was made to adopt the wording of Fed. Rule 801(d)(1)(B), supra, for Tex. R. Cr. Evid. 801(d)(1)(B), supra. The intent was to adopt not only the wording of the Federal Rule but its interpretation as well." Uses federal citations. Prior consistent statement must be made prior to the time there was a motive to testify falsely even though that requirement not explicitly in rule.

Tex. R. Crim. Evid. 801(e)(1)(C) prior identifications

Smith v. State, 830 S.W.2d 328, 329 (Tex. App. -- Houston [14th Dist.] 1992, no pet)

> Third party witness may testify that victim made prior identification of defendant, as long as victim testifies at trial and is subject to cross-examination. Not hearsay. Not bolstering even when victim's identification testimony is unimpeached. See also Miller v. State, 843 S.W.2d 265 (Tex. App. -- Fort Worth 1992, no pet. reported).

Thomas v. State, 811 S.W.2d 201, 208 (Tex. App. -- Houston [1st Dist.] 1991, pet. ref'd)

> If witness has made a prior identification and has testified at trial and was subject to cross-examination, another witness who was present at time of prior I.D. may testify to first witness' identification; not hearsay and not bolstering.

Tex. R. Evid. 801(e)(2)(A) admission of party opponent

Jacobs v. State, 951 S.W.2d 900 (Tex. App. — Texarkana 1997, pet. ref'd)

> Letter written by defendant to his wife admitting the offense and asking her to fabricate an alibi was an admission under Rule 801(e)(2)(A) and was admissible as such. This case gives a good outline for handling documents containing admissions by a party opponent.

Nguyen v. State, 811 S.W.2d 165, 167-68 (Tex. App. -- Houston [1st Dist.] 1991, pet. ref'd)

> Bottle of wine with label on it saying "Thunderbird" and "alcohol content 18% by volume" that X purchased from defendant's store was admissible as admission when offered to prove defendant sold liquor at impermissible time. Court reasons that by selling products in public forum, defendant represents that all products are as they are labeled.

In the Matter of L.G., 728 S.W.2d 939, 942 (Tex. App.--Austin 1987, writ ref'd n.r.e.)

> An accomplice witness who testifies that defendant told her that the substance he had was cocaine is direct evidence of the defendant's possession of that substance. Witness is not testifying to her opinion, but to the truth of the matter asserted, i.e., the fact of cocaine. Rule 801 is not cited. It should have been.

Tex. R. Crim. Evid. 801(e)(2)(B) adoptive admissions

Fletcher v. State, ___ S.W.2d ___, 1997 WL 221843 at **3 (1997)

> "An adoptive admission of a party-opponent is not hearsay. It occurs when a statement is made in the defendant's presence, which he understood and which called for a reply, and the defendant remains silent although not under arrest." State has not proved up an adoptive admission where the testifying witness was unable on cross-examination to relate such basic information as the location of the individuals in the room and who was sitting next to her, and the record does not reflect where the defendant was in the room, his demeanor during the conversation, any comment he might have made and whether or not he was listening to the conversation. The record also did not support whether any remarks made in his presence called for a reply.

Wilkerson v. State, 933 S.W.2d 276, 278-79 (Tex. App. – Houston [1st Dist.] 1996, n.p.h.)

> Companion's statement to undercover officer: "I'm his partner. Give me the money. I'll take the $20" was admissible against Def. in drug prosecution. Defendant was present & manifested his adoption of belief in her statement by handing rock of cocaine to informant who handed it to officer.

Tucker v. State, 771 S.W.2d 523 (Tex. Crim. App. 1988), cert. denied, 109 S.Ct. 3230 (1989)

> 801(e)(2)(B) provides for admission by silence: "Where a statement or remark is made in defendant's presence, which he understood and which called for a reply, his silence or acquiescence may be shown as a confession where he was not under arrest." Surreptitiously recorded statements made by defendant and co-defendant in capital murder trial before their arrest were neither hearsay nor violation of Confrontation Clause.

Tex. R. Crim. Evid. 801(e)(2)(D) admission by agent of party-opponent

Rodela v. State, 829 S.W.2d 845, 849 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd)

> Holding that police officer may be an agent of the State for purposes of agent admissions. Very little analysis. Normally statements made by public employees are not considered agent admissions because: 1) these officials are theoretically neutral and not personally involved in the litigation and 2) traditional legal doctrine holds that public officers cannot bind the sovereign.

Morton v. State, 761 S.W.2d 876, 880 (Tex. App. -- Austin 1988, pet. ref'd)

> Court declined to decide whether sheriff's investigator is an "agent of the State" for purposes of rule since any error was harmless. No analysis of purpose of rule or logic of binding the State with out of court statements by members of law enforcement community.

Tex. R. Crim. Evid. 801(e)(2)(E) co-conspirator statements

Fletcher v. State, ___ S.W.2d ___, 1997 WL 221843 at **3 (Tex. App. – Tyler 1997)

> "A statement of a co-conspirator of a party is admissible if the statement was made during the course and in furtherance of the conspiracy. The proponent of the evidence must show that a conspiracy existed in which the defendant was a member or

later participated, that the declarant was a member of the conspiracy at the time the statements were made, and that the statement furthered the object and purpose of the conspiracy." (citing *Ward v. State*, 657 S.W.2d 133 (Tex. Cr. App. 1983).

Crum v. State, 946 S.W.2d 349, 363 (Tex. App. — Houston [14th Dist.] 1997, pet. ref'd)

"Statements that are made in furtherance of a conspiracy include those made (1) with intent to induce another to deal with co-conspirators or in any other way to cooperate with or assist co-conspirators; (2) with intent to induce another to join the conspiracy; (3) in formulating future strategies of concealment to benefit the conspiracy; (4) with intent to induce continued involvement in the conspiracy; or (5) for the purpose of identifying the role of one conspirator to another. Conversely, statements that are not in furtherance of a conspiracy, and thus remain hearsay, include those that are (1) casual admissions of culpability to someone the declarant had individually decided to trust; (2) mere narrative descriptions; (3) mere conversations between conspirators; or (4) "puffing" or "boasts" by co-conspirators."

Peoples v. State, 928 S.W.2d 112 (Tex. App. — Houston [1st Dist.] 1996, pet. ref'd)

Issue was whether there was one conspiracy or two. Friends X & Y both used Z as their intermediary to hire a hitman to kill their wives; it was a package deal with the hired killer (undercover D.A. investigator). The deal was kill one wife, get paid, then kill the other. One conspiracy. Did not matter that the conversation took place before one conspirator joined the conspiracy. To determine whether one conspiracy or two: 1) whether the conspirators shared a common goal or objective; 2) the degree of dependence inherent in the conspiracy; and 3) the overlap of participants.

Wilkerson v. State, 933 S.W.2d 276, 278-79 (Tex. App. — Houston [1st Dist.] 1996, n.p.h.)

Companion's statement to undercover officer: "I'm his partner. Give me the money. I'll take the $20" and her statement "Flush the dope, flush the dope" were admissible against Def. in drug prosecution as co-conspirator statements made during furtherance of conspiracy.

Rodriguez v. State, 896 S.W.2d 203, 205-06 (Tex. App. -- Corpus Christi 1994, no pet.)

Co-Def's statements to undercover officer were made several days before cocaine buy from Def. No evidence that co-Def. & Def. were conspiring together at that time. No evidence that co-Def. had any cohorts at that time. Harmless error in admitting statements.

Speer v. State, 890 S.W.2d 87, 94-95 (Tex. App. -- Houston [1st Dist.] 1994, no pet.)

Co-Def's statements about paying for murder were not made in furtherance of conspiracy; they're admissions or declarations between co-conspirators that is merely "chewing the fat." Admission harmless here.

Goodson v. State, 840 S.W.2d 469, 475 (Tex. App. -- Tyler 1991, pet. ref'd)

Witness' testimony that one co-conspirator told her that defendant owed him $13,000 and that another co-conspirator owed defendant money for cocaine was not admissible under the rule because there was no evidence from which it could be determined that the statement was made in furtherance of the conspiracy. [Paying the

business debts among the conspirators is part of the goals of conspiracy, but idle conversation about those debts to an uninvolved witness is not a conversation that furthers the conspiracy].

Bass v. State, 830 S.W.2d 142, 147 (Tex. App. -- Houston [14th Dist.] 1992, pet. ref'd)

Co-defendant's statements to police officer who had stopped both defendant and co-defendant admissible under Rule when statement was an explanation of why they were traveling and conspiracy was to transport marihuana across state. Conspiracy was not yet completed, but it wasn't yet thwarted either. Statement was in furtherance of conspiracy since it was intended to placate police.

Deeb v. State, 815 S.W.2d 692, 696-99 (Tex. Crim. App. 1991)

Co-conspirator statements are not admissible if made after the conspiracy has been terminated by success or failure; not admissible if not made "in furtherance of" conspiracy, distinguishing May v. State, 618 S.W.2d 333, 346 (Tex. Crim. App. 1981), which had stated that statement need only be related to conspiracy. See also Meader v. State, 812 S.W.2d 330 (Tex. Crim. App. 1991)(rule applies only to statements made "during the course" of conspiracy and "in furtherance").

Williams v. State, 815 S.W.2d 743, 745-47 (Tex. App. -- Waco 1991), *remanded*, 829 S.W.2d 216 (Tex. Crim. App. 1992)

Under common law, co-conspirator's statement did not need to be made "in furtherance of" conspiracy; under rule it must. Statements made in furtherance include those made: 1) with the intent to induce another to deal with the coconspirators or cooperate/assist; 2) with intent to induce another to join conspiracy; 3) to formulate future strategies of concealment for benefit of conspiracy; 4) with intent to induce continued involvement in conspiracy; 5) for purpose of identifying role of one conspirator to another. Statements not in furtherance include: 1) casual admissions of culpability to someone declarant had individually decided to trust; 2) mere narrative declarations; 3) mere conversation between conspirators; 4) "puffing" or boasting.

Anderson v. State, 742 S.W.2d 541, 544-45 (Tex. App. -- Waco 1987), *remanded on other grounds*, 760 S.W.2d 262 (Tex. Crim. App. 1988)

Evidence, properly heard outside presence of jury pursuant to rule 104, showed that defendant was acting with declarant in sale of cocaine to 3rd party, therefore co-conspirator's statements admissible and no need to show unavailability.

Figueroa v. State, 740 S.W.2d 887, 888-89 (Tex. App. -- Dallas 1987, no pet.)

Admission of co-conspirator statements do not violate confrontation clause, citing Bourjaily; see also Murdock v. State, 840 S.W.2d 558, 563-64 (Tex. App. -- Texarkana 1992, *remanded on other grounds*, 845 S.W.2d 915 (Tex. Crim. App. 1993)(noting that Bourjaily is part of Texas law; trial court may use the co-conspirator's statement as part of evidence to show existence of conspiracy; Texas constitution same as federal in this context).

Sherwood v. State, 732 S.W.2d 787, 796 (Tex. App.--Fort Worth 1987, no pet.)

Court did not err in admitting co-conspirator's statements that were made after the murder of victim, but during an attempt to conceal its commission by disposing of victim's truck, blood at scene, and murder weapon. Rule 801 is not cited. Court also stated that, "The fact of a conspiracy must be proven by evidence outside of and independent of the statements which tend to establish the joint act of the parties." This predicate should be reassessed in light of

Bourjaily v. United States, 107 S.Ct. 2775 (1987), employing rules 104 & 1101(d)(1), and holding that when judge determines whether there is an ongoing conspiracy, he may consider the conspirator statements themselves.

Tex. R. Crim. Evid. 802 unobjected-to hearsay

Fernandez v. State, 805 S.W.2d 451, 453-56 (Tex. Crim. App. 1991)

Unobjected-to hearsay is sufficient evidence to support a conviction even when declarant, on witness stand, denies truthfulness of that out-of-court statement. Investigating police officer testified that Def's wife told him at scene that Def. was working on stolen truck. At trial, she repudiated truth of that hearsay statement and explained that she only said that because she was angry with him. In court repudiation of out-of-court statement does not destroy probative value when the hearsay statement was not objected to. "The second sentence of Rule 802 was intended to discourage attorneys from deferring their objections to hearsay evidence because they were confident the evidence would be disavowed in an appellate sufficiency review." See also Chambers v. State, 805 S.W.2d 459 (Tex. Crim. App. 1991); Forrest v. State, 805 S.W.2d 462 (Tex. Crim. App. 1991).

Doyle v. State, 779 S.W.2d 492 (Tex. App. -- Houston [1st Dist.] 1989, no pet.)

In challenge of sufficiency of evidence, unobjected-to hearsay statement by anonymous informant to police was sufficient corroborating evidence to prove that defendant possessed marihuana. But see dissenting opinion by Justice Cohen arguing that when there is no nonhearsay evidence to support verdict, evidence is insufficient. This position rejected in *Fernandez, Chambers, & Forrest.*

Soto v. State, 736 S.W.2d 823, 828 (Tex. App. -- San Antonio 1987, pet. ref'd)

Child victim's mother testified to her daughter's outcry statements and interpretation thereof. Since defendant did not object to hearsay testimony, any purported noncompliance with article 38.072 not error.

Chambers v. State, 711 S.W.2d 240, 245-247 (Tex. Crim. App. 1986)

Inadmissible hearsay admitted without an objection is capable of sustaining a verdict. Court of Criminal Appeals deliberately jumped the gun on rules of evidence. Good historical analysis and use of secondary sources.

Tex. R. Crim. Evid. 803(1) present sense impression

Beauchamp v. State, 870 S.W.2d 649, 652 (Tex. App. -- El Paso 1994, pet. ref'd)

Police officer told defense witness during ride to jail that he did not think def. was intoxicated. Statement did not qualify under rule because: 1) statement of opinion about a condition , not a description of something observed; and 2) too long a time lapse to be reliable.

Kubin v. State, 868 S.W.2d 394, 396 (Tex. App. -- Houston [1st Dist.] 1993, pet. ref'd)

Statements by DWI accident witness to officer 4-6 minutes after accident concerning defendant's driving were made "immediately" after perceiving event; little opportunity for witness to make calculated misstatement.

Franklin v. State, 858 S.W.2d 537, 544 (Tex. App. -- Beaumont 1993, pet. ref'd)

Witness could testify to telephone conversation with murder victim immediately before her death as relating to her present state of mind as fear of husband-defendant.

Rabbani v. State, 847 S.W.2d 555, 559 (Tex. Crim. App. 1992)

Witness' statement that another person looked outside window and said "[Defendant] is outside" was admissible as a present sense impression made at the very time the other person was observing the event; it described the event or condition. Good explanation of rule.

Roberts v. State, 743 S.W.2d 708, 711 (Tex. App. -- Houston [14th Dist.] 1987, pet. ref'd)

Trial court properly excluded defense witness' testimony that defendant told police officers he did not have a gun. This was hearsay, not present sense impression or "res gestae."

Harris v. State, 736 S.W.2d 166, 167 (Tex. App. -- Houston [14th Dist.] 1987, no pet.)

When burglary occurred sometime after 9:30-10:00 p.m., and one witness testified to what "X" said when "X" knocked on door at 10:30 p.m., this statement was admissible since declarant's statement described and explained her perception of an event immediately after she perceived it. "Immediately" stretched to half hour interval. Questionable result; half an hour is more than ample time to reflect and fabricate.

Tex. R. Crim. Evid. 803(2) excited utterance

King v. State, 953 S.W.2d 266, 268 (Tex. Cr. App. 1997)

"In determining whether a statement is an excited utterance under rule 803(2), the pivotal inquiry is 'whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event.' The passage of time is but one factor to consider. Thus, even if the event had not 'just' occurred, Williams' statement may nevertheless be admissible if she was 'still dominated' by the emotions surrounding the body's discovery."

Bondurant v. State, ___ S.W.2d ___, 1997 WL 703788 (Tex. App. — Fort Worth 1997)

On this particular set of facts, statements by defendant's girlfriend that defendant had murdered victim and hidden her body were admissible as excited utterances even though two days had passed between event and statements. Excellent exposition of the law and analysis. Relies heavily on *McFarland v. State*, 845 S.W.2d 824 (Tex. Cr. App. 1992), *cert. denied*, 508 U.S. 963 (1992) and *Sellers v. State*, 588 S.W.2d 915 (Tex. Cr. App. [Panel Op.] 1979). The analysis of this case heavily favors admission of excited utterances.

Mosley v. State, ___ S.W.2d ___, 1997 WL 716587 at **3-4 (Tex. App. — Corpus Christi 1997)

"To admit evidence under the excited utterance exception to the hearsay rule, the offeror must show the declarant was 'in the grip of a shocking event so as to render the statement a spontaneous utterance.' Time and intervening circumstances

tend to attenuate the shock of an event, and reduce spontaneity. Consequently, one factor the trial court must consider on the issue of admissibility is the time elapsed between the statement and the shocking event. ... The 'excitement' experienced by the declarant must be continuous between the event itself and the statement describing it. ... The evidence shows a number of days passed between the time S.M. was molested and the time at which she made her statement. Also, in the intervening time, S.M. returned home to her step-grandmother. There is no evidence, nor even a suggestion by the state, that S.M. remained in the requisite state of agitation or shock from the time of her assault to the time she made her outcry statement as required by rule 803(2)."

Ochoa v. State, ___ S.W.2d ___, 1997 WL 602739 at **2 (1997)

Not error for the trial court to hold that statement was excited utterance where the witness spoke to the declarant (a child) on the day of one act of alleged penetration and the child seemed scared and was crying.

Snellen v. State, 923 S.W.2d 238, 243 (Tex. App. — Texarkana 1996, pet. ref'd)

Paramount factor is whether declarant is still dominated at the time by emotion triggered by the principal act or event. Here 12-13 hours was ok because "her eyes were sort of pink like she had been crying ... hands were trembling."

Wilkerson v. State, 933 S.W.2d 276, 278-79 (Tex. App. — Houston [1st Dist.] 1996, n.p.h.)

Companion's excited utterance of "Flush the dope, flush the dope" as officers entered home admissible against Def.

Hunt v. State, 904 S.W.2d 813, 815-16 (Tex. App. -- Fort Worth 1995, pet. ref'd)

The startling event that triggers the utterance need not be the crime. Here, child victim was watching TV program about child sexual abuse when she got agitated & upset that she might be pregnant & told her mother. Admissible.

Penry v. State, 903 S.W.2d 715, 750-51 (Tex. Crim. App. 1995)

Murder victim's dying statements made 45 minutes after stabbing to emergency room Dr. who asked questions about her attacker admissible under rule; not barred by right of confrontation.

Ross v. State, 879 S.W.2d 248, 249 (Tex. App. -- Houston [14th Dist.] 1994, pet. ref'd)

Statement by victim to friend & EMT that Def. was one who shot her made 30-45 minutes after shooting was admissible even though made in response to questioning. Victim still in state of excitement.

Gilbert v. State, 865 S.W.2d 601, 602-03 (Tex. App. -- El Paso 1993, no pet.)

Co-D's statement "I ain't got no radio" after being grabbed on street by victim of car burglary was admissible; startling event was being grabbed, not the original theft; sufficient evidence to show declarant was under emotional & physical stress.

Rodriguez v. State, 802 S.W.2d 716, 722 (Tex. App. -- San Antonio 1990), *aff'd on other grounds* 819 S.W.2d 871 (Tex. Crim. App. 1991)

> Court holds that excited utterance is not admissible unless there is independent evidence of the exciting event. This is wrong. See Blakely, *Summary of Changes*, Texas Rules of Evidence Handbook p. 625 at 649 (Hous. L. Rev. 1983).

Hawkins v. State, 792 S.W.2d 491, 495 (Tex. App. -- Houston [1st Dist.] 1990, no pet.)

> Deaf victim's husband testified that 1 ½ hours after sexual assault he arrived to find victim; she told him "X" had assaulted her through sign language. Def. argued this was too long a time lapse. Court rejects this, correctly noting that critical factor is whether declarant is still dominated by emotions arising from excited event. See also McFarland v. State, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992)(citing and following Hawkins).

Jones v. State, 772 S.W.2d 551 (Tex. App. -- Dallas 1989, pet. ref'd)

> Although witness to murder talked with officer 30-45 after event, she was still dominated "by emotions instigated by the happenings of the principal act or event," thus statements made to him were admissible as excited utterances.

Berry v. State, 759 S.W.2d 12, 13 (Tex. App. -- Texarkana 1988, no pet.)

> General review of foundation requirements. Trial court did not err in excluding this statement since there was no evidence regarding amount of time that had elapsed between event and making of statement or any showing of a lack of reflection.

Tex. R. Crim. Evid. 803(3) then existing mental, emotional, or physical condition

Williams v. State, 927 S.W.2d 752, 764 (Tex. App. — El Paso 1996, n.p.h.)

> Victim told witness that she was afraid that if witness told Def. that if he could not return to the residence, Def. would hurt her or take her child. Admissible under rule; not backward looking.

Pena v. State, 864 S.W.2d 147, 149 (Tex. App. -- Waco 1993, no pet.)

> Victim's friend permitted to testify that murder victim was planning to leave defendant in days before murder and "she was waiting for a $1200 income tax check that never came." Admissible to show her present state of mind--she wanted to leave but felt economically trapped. Query whether her state of mind was in issue absent a defense of suicide, accident, etc.

Navarro v. State, 863 S.W.2d 191, 197 (Tex. App. -- Austin 1993), *aff'd*, 891 S.W.2d 648 (Tex. Crim. App. 1995)

> Error to allow victim's mother to testify that daughter told her before murder that defendant "put a gun to her head and threatened to kill her." This was not expression of daughter's state of mind; it was only relevant to prove truth of statement. Harmless here.

Williams v. State, 798 S.W.2d 368, 371 (Tex. App. -- Beaumont 1990, no pet.)

Police officer testified that agg. sexual assault victim told him that Def. was going to "come back to the house, he is going to kill me. He is going to kill my kids because he told me that's what he was going to do." Court says this is a description of victim's emotional state. "The very disturbed emotional state was characterized by what the victim thought appellant would do to her to her children if the incident was reported to the authorities." Court is wrong; victim's statement does not describe her state of mind; it is a statement of memory. However, it might have been admissible as an excited utterance.

Norton v. State, 771 S.W.2d 160 (Tex. App. -- Texarkana 1989, pet. ref'd)

In murder trial, court properly permitted victim's widow to testify that, after receiving telephone call, he intended to go to defendant's shop since this was a state of mind statement looking into the future. Statement's reliability "springs from the natural and usual expressions inherent in our daily social and business lives. It is only normal to inform families of an impending trip." However, further statement that victim said he was going there because defendant had called and asked him to come clearly stated a fact remembered and did not fit under state of mind exception. Hillmon doctrine applied in Texas. See also Vann v. State, 853 S.W.2d 243, 250 (Tex. App. -- Corpus Christi 1993, pet. ref'd)(murder victim's statement: "I wouldn't be surprised if Cherie was waiting for me at home with a gun and shot me" not admissible under rule because it was a belief in the probability of a future event; questionable logic since statement looked forward, not backward)

Mathes v. State, 765 S.W.2d 853 (Tex. App. -- Beaumont 1989, pet. ref'd)

Murder victim's statement to fellow diner that he could pay for fellow diner's meal because he had "almost $42,000 on me" held exception to hearsay rule as explanation of victim's "actual present financial status and condition as he stated it to be at that time." Court did not explain whether or why victim's mental condition toward his financial status was relevant in murder trial--the truth of his financial status was relevant, but query whether his own attitude toward it was.

Tex. R. Crim. Evid. 803(4) statement made for purpose of medical diagnosis

Sneed v. State, ___ S.W.2d ___, 1997 WL 672282 at **3-4 (Tex. App. — Houston [14th Dist.] 1997)

Self-serving statements made to a doctor a week after the incident cannot come into evidence as statements made for the purpose of medical diagnosis. Rule 803(4) is not absolute and only statements that have "substitute guarantees of trustworthiness" will come in under the exception. Analysis was based on *Allridge v. State*, 762 S.W.2d 146, 152 (Tex. Cr. App. 1988), *cert. denied*, 489 U.S. 1040 (1989).

Walck v. State, 943 S.W.2d 544 (Tex. App. — Eastland 1997, pet. ref'd)

This case is an example of how Rule 803(4) applies to a forensic expert as opposed to a treating expert. The court found that the expert in this case, a psychologist, was hired to examine the defendant and determine his state of mind at the time of the offense (to testify about "sudden passion"). The court observed that the statements made by the defendant to the expert were not made for the purpose of medical diagnosis or treatment because the expert was not retained for the purposes of medical diagnosis or treatment. This reasoning is not terribly sound. The court also held that the statements were self-serving statements and thus not trustworthy enough to qualify under Rule 803(4), which is a much sounder rationale.

Castoreno v. State, 932 S.W.2d 597, 601-02 (Tex. App. — San Antonio 1996, pet. ref'd)

Fleming v. State, 819 S.W.2d 237, 247 (Tex. App. -- Austin 1991, pet. ref'd);
Tissier v. State, 792 S.W.2d 120, 125 (Tex. App. -- Houston [1st Dist.] 1990, pet. ref'd)

In injury to child case, child's statements identifying who committed offense made to medical personnel during treatment or diagnosis admissible if "reasonably pertinent to the treatment." Cites federal cases in support. Rationale is that responsible doctors have a duty to prevent children from being returned to abusive home environments. See also Macias v. State, 776 S.W.2d 255 (Tex. App. -- San Antonio 1989, pet. ref'd)(DHR investigation form concerning child sexual assault victim contained statement: "Mom states that child was a victim of abuse by stepfather for past two years" admissible because it goes to inception or general character of cause, citing federal precedent).

Tex. R. Crim. Evid. 803(5) past recollection recorded

Wigiert v. State, 948 S.W.2d 54, 58-59 (Tex. App. — Fort Worth 1997, no pet.)

Under common law, the document had to actually refresh the witness's memory before it was admissible as a past recollection recorded. Not so under the rules of evidence. Now, "it is only necessary that the prior statement be 'shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly." The witness does not have to remember the specific facts of his statement. The witness need only (1) remember making the statement; (2) testify that the events would have been fresh in his mind when he made the statement, and (3) state that the statement was accurate when made. In this case, the witness testified to (1) and (2), but did not testify that the statement was accurate when made (number (3)). The court of appeals held that (3) was nonetheless satisfied, because the witness did not recant any part of her statement at trial and she made the statement in the presence of a police officer (under circumstances that support its reliability"). Thus, it appears that at least the accuracy prong of the test may be inferred. Shaky. Analysis based on *Phea v. State*, below.

Kuczaj v. State, 848 S.W.2d 284, 288 (Tex. App. -- Ft. Worth 1993, no pet.)

General discussion on laying foundation under rule.

Phea v. State, 767 S.W.2d 263 (Tex. App. -- Amarillo 1988, pet. ref'd)

Major case on rule. Lengthy discussion on trustworthiness requirement; citation to Dean Blakely's article, Past Recollection Recorded: Restrictions on Use as Exhibit and Proposals for Change, 17 Hous. L. Rev. 411 (1980). Witness gave affidavit to police 2-3 weeks after witnessing involuntary manslaughter. Defendant argued that she had suffered a nervous breakdown at time, but officers did not notice any problem. Defendant argued statement was untrustworthy since it was not verbatim her words; court held that she adopted the final version.

Tex. R. Crim. Evid. 803(6) business records exception

Perry v. State, ___ S.W.2d ___, 1997 WL 703412 at **2 (Tex. App. — Texarkana 1997)

"If a public record is inadmissable against a defendant due to the limitations of Rule 803(8)(B) or (C), then the record may not alternatively be admitted under Rule 803(6) even though all the requirements are met. Otherwise, it would allow a party to circumvent the express exceptions listed in Rule 803(8)(B) and (C) by "back-dooring" the evidence via Rule 803(6)." Citing *Cole v. State*, below under Rule 803(8).

Garcia v. State, 901 S.W.2d 724, 728 (Tex. App. -- Houston [14th Dist.] 1995, pet. ref'd)

B.A.C. test on murder victim and atomic absorption test done on Def. admissible under rule when conducted by medical examiner's office. Any error harmless since Def. admitted shooting in self-defense.

Jefferson v. State, 900 S.W.2d 97, 101-02 (Tex. App. -- Houston [14th Dist.] 1995, no pet.)

Error to exclude offense report offered by Def. to offer modus operandi & officers' intent during arrest. Prohibition of 803(8)(B) is only directed against prosecution. Harmless here.

Philpot v. State, 897 S.W.2d 848, 851-52 (Tex. App. -- Dallas 1995, pet. ref'd)

Business records can be excluded if insufficient indicia of reliability. Here urine tests in Def's parole records not admissible because no showing tests were standard, who did them or any duty to report by lab.

Stapleton v. State, 868 S.W.2d 781, 784 (Tex. Crim. App. 1993)

Citizen call to police which is automatically recorded is not a business record because citizen has no duty to report & police have no personal knowledge.

Garcia v. State, 833 S.W.2d 564, 567-70 (Tex. App. -- Dallas 1992), *aff'd* 868 S.W.2d 337 (Tex. Crim. App. 1993).

Autopsy report admissible when another medical examiner did autopsy; refuses to follow *Cole* in this context [who can believe that medical examiners are "engaged in that competitive enterprise of ferreting out crime"?]. Good discussion of the issues. TCA agreed--these are objective, neutral factual reports by doctors who investigate all unknown deaths, not merely criminal investigations; see also Martinez v. State, 833 S.W.2d 188 (Tex. App. -- Dallas 1992, pet. ref'd)(without mentioning *Cole*, court holds that autopsy report comes in as a public record without testimony of medical examiner who conducted autopsy).

Cook v. State, 832 S.W.2d 62, 68 (Tex. App. -- Dallas 1992, no pet.)

Rejecting defendant's argument that parole officer is a law enforcement officer and thus *Cole* prohibited its admission as a public record, and holding that parole violation warrant admissible as a business record.

Ponce v. State, 828 S.W.2d 50, 51 (Tex. App. -- Houston [1st Dist.] 1991, pet. ref'd)

Report reflecting that intoxilyzer instrument is working properly is admissible as a business record. Not covered by *Cole* since it is not an observation by law enforcement at scene of crime or in course of investigating crime; not made for a specific prosecution and no subjective interpretation. These reports are routine, ministerial.

Shaw v. State, 826 S.W.2d 763, 765 (Tex. App. -- Fort Worth 1992, pet. ref'd)

Qualified witness for business records exception need not be creator of the records or even employee of the same company. He need not have personal knowledge of the content of the records, he need only have personal

knowledge of the mode of their preparation. Defendant's argument that records from ATM machine could never be admissible because no one had personal knowledge of the automatic transactions was rejected.

Bermen v. State, 798 S.W.2d 8, 10-11 (Tex. App. -- Houston [1st Dist.] 1990, pet. dismissed)

Business records exception cannot be used to escape requirements of 803(8)(B). State not permitted to introduce jail records with notations concerning Def's escape from jail even though these were business records of jail. These entries were not "merely made as a result of ministerial objective observations, but rather, had the features of statements made in an adversarial setting, since they resulted from the criminal investigation of the escape."

Crane v. State, 786 S.W.2d 338, 350-54 (Tex. Crim. App. 1990)

Dispatch police tapes admissible under business records exception. Also allowed in "double" hearsay since statements not offered for truth but to show: 1) circumstances surrounding and leading to shooting; 2) officer was acting in lawful discharge of duty; 3) res gestae. 2nd issue: Def.'s telephone calls from jail to family, recorded and monitored by police as part of their business, were hearsay, not covered by business records exception since Def. & family members had no duty to report, thus there is no trustworthiness.

Mitchell v. State, 750 S.W.2d 378, 379-80 (Tex. App. -- Fort Worth 1988, pet. ref'd)

In DWI trial, DPS blood test lab results admissible through supervisor of lab that took over operations of lab that performed test. Custodian of records need not have been creator of records or employed at time records were made, need not have any personal knowledge of contents of records, only of mode of preparation. See also, Armijo v. State, 751 S.W.2d 950, 952-53 (Tex. App. -- Amarillo 1988, no pet.); Hayden v. State, 753 S.W.2d 461, 463 (Tex. App. -- Beaumont 1988, no pet.)(sufficient indicia of reliability to comport with rights of confrontation and cross-examination).

Dunnington v. State, 740 S.W.2d 896, 897 (Tex. App. -- El Paso 1987, pet. ref'd)

Pre-rules decision. Medical records that contained allegations of prior sexual abuse of child victims were admissible insofar as they were relevant to the medical diagnosis and treatment. Here, prior instances of abuse were admissible, thus the records were also. There were some inadmissible hearsay statements regarding the context of the assaults but defendant failed to object on this basis.

Apple v. State, 744 S.W.2d 256, 257 (Tex. App. -- Texarkana 1987, no pet.)

Admission of canceled traveller's checks upheld under 803(6) despite fact that it was supermarket employee, not employee of business whose records offered, who created/sold document. Fact that checks contained refusal to honor stamp on them did not make checks so prejudicial as to render them inadmissible since those notations were made in the course of business activity.

Beltran v. State, 728 S.W.2d 382, 385-88 (Tex. Crim. App. 1987)

FBI rap sheet contained within business records of defendant's probation officer did not have sufficient indicia of reliability to satisfy defendant's rights of confrontation, cross-examination. Analyzed under 3731a & 3737e, not rules. Result would be the same under 803(6) which admits business records "unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Constitutional argument

unnecessary since probation officer was unqualified to testify to reliability of FBI methods of recording information. If FBI officer or records custodian had been on witness stand and explained how rap sheets are compiled, result might have been different.

Lucas v. State, 721 S.W.2d 315, 317-18 (Tex. Crim. App. 1986)

State failed to prove business records predicate when no testimony to show that any employee of the custodian of the business records business had personal knowledge of contents of document. Analyzed under 3737e rather than 803, but result would be the same. Under 3737e, the personal knowledge had to be held by an employee or representative of the business entity; under the new rules, the personal knowledge need not be by one connected with the business enterprise.

Baxter v. State, 718 S.W.2d 28, 32 (Tex. App.--Eastland 1986, pet. ref'd)

DEA business records admissible under art. 3737e (now 803(6)). Does not cite rule. DEA agent could introduce a chemical company's invoices with attached DEA "intelligence report" as DEA business records. Problematical. Witness was not in a position to vouch for record-keeping of chemical company. See Lucas, infra. Opinion does not reflect whether custodian for chemical company testified as well.

Tex. R. Evid. 803(8) public records and reports

Johnston v. State, ___ S.W.2d ___, 1997 WL 158245 at **10 (Tex. App. — Dallas 1997)

A jail nurse is not "law enforcement personnel" for purposes of Rule 803(8)(B).

Durham v. State, ___ S.W.2d ___, 1997 WL 87354 at **1-2 (Tex. App. — Tyler 1997)

Chemists working for county medical examiner not "law enforcement personnel" for purposes of Rule 803(8)(B).

Perry v. State, ___ S.W.2d ___, 1997 WL 703412 at **2 (Tex. App. — Texarkana 1997)

"If a public record is inadmissable against a defendant due to the limitations of Rule 803(8)(B) or (C), then the record may not alternatively be admitted under Rule 803(6) even though all the requirements are met. Otherwise, it would allow a party to circumvent the express exceptions listed in Rule 803(8)(B) and (C) by "back-dooring" the evidence via Rule 803(6)." Citing *Cole v. State*, below.

Dillard v. State, 931 S.W.2d 689, 698 (Tex. App. — Dallas 1996, no pet. reported)

Handwiping analysis performed on deceased's hands admissible as a public report when analysis was performed by the Southwest Institute of Forensic Sciences at request of medical examiner. Not an agent of police or other law enforcement. [If that institute was not a public agency, should be analyzed under 803(6)]

Smith v. State, 895 S.W.2d 449, 454-55 (Tex. App. -- Dallas 1995, pet. ref'd)

Certified copy of Def's drivers license history & list of convictions for traffic offenses admissible; ministerial, not prepared for litigation.

Abbring v. State, 882 S.W.2d 914, 916 (Tex. App. -- Fort Worth 1994, no pet.)

Def.'s DPS driving record not hearsay because it sets forth matters observed pursuant to a duty imposed by law.

Garcia v. State, 868 S.W.2d 337, 341-42 (Tex. Crim. App. 1993)

Medical examiners are not considered law enforcement personnel for purposes of rules; therefore, autopsy report written by non-testifying m.e. admissible. Good reasoning, good result.

Cowan v. State, 840 S.W.2d 435, 436-38 (Tex. Crim. App. 1992)

Requirements for admissibility under public records exception may be met by circumstantial evidence from face of document. Report of U.S. Marine Corps Medical Board re defendant's mental condition showed sufficient circumstantial evidence that report was made pursuant to authority granted by law. Sufficient that report is "authorized" by law, need not be "required" by law; need not be a record that is open for public inspection.

Cole v. State, 839 S.W.2d 798 (Tex. Crim. App. 1990)

Supervising chemist testified to results of lab analysis pursuant to business records. Report not admissible under 803(8) because DPS chemists are law enforcement personnel. "The reports were not prepared for purposes independent of specific litigation, nor were they ministerial, objective observations of an unambiguous nature." Declines to follow United States v. Quezada, 754 F.2d 1190, 1193-95 (5th Cir. 1985) and United States v. Baker, 855 F.2d 1353, 1359 (8th Cir. 1988)(in drug prosecution, police dept. lab reports identifying controlled substance were properly admitted as business records; "When made on a routine basis, laboratory analyses of controlled substances are admissible as business records under ... 803(6). Factors that courts should look at in deciding what are "matters observed" under rule include: 1) is public record a report of actual criminal activity; 2) is record one of unambiguous, objective factual matter or subjective personal impressions made in adversarial setting. Lab reports are made under scientific conditions by chemists, not police officers engaged in ferreting out crime. Are crime lab chemists so caught up in solving crime that they are likely to fabricate chemical analysis reports? See **Canida** & **Henderson** under rule 703 for a logical solution to the practical problems of the missing lab technician. For cases that have rejected **Cole** under the business records exception, see 803(6). Following *Cole* are: Nevarez v. State, 832 S.W.2d 82, 85 (Tex. App. -- Waco 1992, pet. ref'd)(error in admitting DPS lab report analysis of methamphetamine when chemist who performed test was unavailable on day of trial); Cruz v. State, 827 S.W.2d 83 (Tex. App. -- Corpus Christi, 1992, no pet.)(medical examiner's autopsy report inadmissible under *Cole*, but harmless error because eyewitness testified that victim was shot and killed; court holds that a medical examiner is a law enforcement agent because he has a duty to report unlawfully caused deaths to D.A.'s office; case exemplifies illogical lengths to which *Cole* could be taken).

Clement v. Texas Dept. of Public Safety, 726 S.W.2d 579, 581 (Tex. App.--Fort Worth 1986, no writ)

DPS packets are admissible under 803(8) and 902(4). No requirement that person making these reports have personal knowledge. DIC-23 form was admissible even though it was hearsay within hearsay because no evidence to indicate a lack of trustworthiness.

Porter v. Texas Dept. of Public Safety, 712 S.W.2d 263, 264-65 (Tex. App.--San Antonio 1986, no writ)

In suspension of driver's license hearing under Tex. Rev. Civ. Stat. art. 6701l-5, sec. 2(f), admission of arresting officer's affidavit of probable cause upheld under public records & reports hearsay exception. Predicate is: a) document is authentic; 2) contains one of three matters listed in 803(8). Neither "regularity" nor "contemporaneity" required under this exception, distinguishing business record exception. No due process/confrontation violation since no showing that appellant could not call officer.

Tex. R. Crim. Evid. 803(15) statement affecting interest in property

Madden v. State, 799 S.W.2d 683, 697-98 (Tex. Crim. App. 1990)

Handwritten list of murder victim's weapons found in victim's personal papers was admissible as statement affecting interest in property even though it wasn't a legally executed document. Court properly interprets exceptions to hearsay rule liberally, not mechanistically; admission of this particular item fit the rationale of adequate guarantees of trustworthiness.

Tex. R. Crim. Evid. 803(18) learned treatises

Loven v. State, 831 S.W.2d 387, 395 (Tex. App. -- Amarillo 1992, no pet.)

Learned treatises are not an "inferior substitute for live testimony," since it will frequently better communicate the basis of a particular subject than extemporaneous testimony and will be used only in conjunction with live expert testimony. Videotape produced by epilepsy foundation qualified as learned treatise. Lengthy discussion on rationale for this hearsay exception.

Mendoza v. State, 787 S.W.2d 502, 503 (Tex. App. -- Austin 1990, no pet.)

Witness may read into evidence parts of a treatise if W. is an expert in the relevant area and establishes that this publication is a reliable source in his field. Def's complaint that W. knew nothing about 1 of the authors and it wasn't established that author was a recognized authority rejected.

Zwack v. State, 757 S.W.2d 66, 68 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Discussion of history and development of rule by Judge Robertson. Treatises cannot be read directly into record; must have a sponsoring witness and use treatise through examination of expert witness.

Tex. R. Crim. Evid. 803(24) statement against interest

Zarychita v. State, ___ S.W.2d ___, 1997 WL 543045 at **3-5 (Tex. App. – Houston [1st Dist.] 1997)

Clark v. State, 947 S.W.2d 650, 653-54 (Tex. App. — Fort Worth 1997, pet. ref'd)

No new law. But these are two new cases analyzing statements in the context of Rule 803(24).

Howard v. State, 945 S.W.2d 303, 305-06 (Tex. App. — Amarillo 1997, no pet.)

In order to be a statement against interest, "the statement must (1) expose the declarant to criminal liability and (2) find corroboration through other evidence. One satisfies the first prong by showing that the utterance was truly self-inculpatory and not made for the purpose of shifting blame or currying favor. The second prong is satisfied if the corroborating circumstances 'clearly indicate trustworthiness.' There is no definitive test for determining when this standard is met. Nevertheless, the trial court must consider both circumstances which support as well as those which undermine the reliability of the declarant. Furthermore, such indicia as (1) whether the guilt of the declarant is inconsistent with the guilt of the accused, (2) whether the declarant was so situated that he might have committed the crime, (3) the timing of the declaration and its spontaneity, (4) the relationship between the declarant and the party to whom the declaration was made, and (5) the existence of independent corroborating facts are quite influential. Also probative is evidence suggesting that the statement was against the declarant's interest to an unusual or devastating degree, that the declarant repeated the story to others without contradiction, and that he had no motive to falsify. Finally, upon meeting both prongs, one may utilize the hearsay in several ways. For instance, it may be used in a defensive manner to illustrate that the declarant rather than the party on trial is actually guilty of the crime in question. Or, the state may proffer it offensively as evidence not only inculpating the declarant but also establishing the guilt of the party on trial. But, again, it must be stressed that much depends upon the presence of factors illustrating the hearsay to be true as opposed to a fabrication."

Miles v. State, 918 S.W.2d 511, 515 (Tex. Crim. App. 1996)

Deceased's statement implicating Def. in murder not admissible at punishment stage of capital murder when declarant said he was not a participant in murder; he was just present. He was not subjecting himself to criminal liability by his statement. This is not self-inculpatory. Follows **U.S. v. Williamson**, 114 S.Ct. 2431, 2435 (1994). Also was not a statement against social interest (State had claimed that a person accusing another of a crime would be an object of hatred and retaliation, but this would be true of any accusatory statement).

Jefferson v. State, 909 S.W.2d 247, 251-52 (Tex. App. -- Texarkana 1995, pet. ref'd)

A statement which is somewhat against interest but exculpatory as to the degree of bad conduct (Def. is charged with agg. robbery but admits to simple assault) does not qualify under rule.

Fonseca v. State, 908 S.W.2d 519, 521-22 (Tex. App. -- San Antonio 1995, no pet.)

Def. should have been allowed to introduce evidence by witnesses that X had admitted to them he and Y killed murder victim. There were sufficient "corroborating circumstances": against interest at time made 1 day after murder; independent that X & Y were together right after murder & close to victim's house; statements were made to a friend. Repetition of statement of others, albeit further hearsay, can be corroborating circumstance.

Drone v. State, 906 s.W.2d 608, 612 (Tex. App. -- Austin 1995, pet. ref'd)

Def.'s girlfriend's statement that she felt like she "killed the old woman" herself when washing victim's bloody clothes for Def. admissible as statement against her penal interest; relying on **Williamson v. United States**, 114 S.Ct. 2431 (1994).

Cofield v. State, 891 S.W.2d 952, 955-57 (Tex. Crim. App. 1994)

Co-Def's statements that inculpate Def. as well as speaker unlikely to be trustworthy since co-Def. is likely to curry favor with State & shade statements to shift blame. Follows **Williamson** rationale.

Fuentes v. State, 880 S.W.2d 857, 861-62 (Tex. App. -- Amarillo 1994, pet. ref'd)

Def.'s wife's statement to police chief inculpating both her and Def. was admissible under Rule when she was indicted and took 5th amendment at trial. Her grand jury testimony was not admissible under this rule because it was required to fit under former testimony rule (query this reasoning), but harmless error.

Cunningham v. State, 877 S.W.2d 310, 312 (Tex. Crim. App. 1994)

Trial court may consider evidence which undermines reliability of statement against interest as well as evidence corroborating its trustworthiness. Review of factors to consider in determining corroboration.

Davis v. State, 872 S.W.2d 743, 746-49 (Tex. Crim. App. 1994)

Major case. Discussion of "corroborating circumstances" factors: timing, spontaneity, relationship between declarant & party to whom statement was made, existence of independent corroborating circumstances. Federal cites. See also Navert v. State, 838 S.W.2d 328, 330 (Tex. App. -- Austin 1992, pet. ref'd)(statement against penal interest must be corroborated; "Allowing proof of innocence by the self-assumed blame of one beyond the reach of the law would soon disorganize criminal procedure").

Michael v. State, 864 S.W.2d 104, 108-10 (Tex. App. -- Dallas 1993, no pet.)

Court holds that witness who testified to co-Def's 2 statements, one against both Def. & co-Def. and other solely against co-Def. not admissible because Def. was not the declarant. This is wrong; if Def. were the declarant, it would automatically come in as admission by party opponent. The issue under this rule is whether the statement is against the declarant's interest whoever the declarant is. Harmless error.

Cofield v. State, 857 S.W.2d 798, 805 (Tex. App. -- Corpus Christi 1993), *aff'd*, 891 S.W.2d 952 (Tex. Crim. App. 1994)

Statement meets this exception if it is against the speaker's interest only; it cannot be considered reliable (or admissible) when it inculpates another person as well (e.g. the defendant). This ruling may paint **Williamson** too broadly, but reaches correct result since declarant was under arrest at time and clearly had a motive to curry favor & shift blame.

Lewis v. State, 856 S.W.2d 271, 274 (Tex. App. -- Texarkana 1993, no pet.)

Defendant's wife's statement to undercover officer that "they was [sic] needing to purchase this cocaine so they can put it out on the street to make money" admissible under Rule. Corroborated because wife was present during negotiations which took place in her house, and defendant had stated that he bought house and truck with drug money.

Crutchfield v. State, 842 S.W.2d 304 (Tex. App. -- Tyler 1992, pet. ref'd)

Last sentence of rule requiring corroboration "was obviously included so that the exception for admissibility would meet the standard of reliability required by the Confrontation Clause of the sixth amendment."

Green v. State, 840 S.W.2d 394, 411-12 (Tex. Crim. App. 1992)

TCA analyzes admissibility of defendant's statements to his cellmate as admission against interest which requires corroborating circumstances of trustworthiness. Finding sufficient corroboration here, but incorrect analysis; these are admissions of a party opponent exemptions to hearsay definition and never need corroboration.

Williams v. State, 800 S.W.2d 364, 367 (Tex. App. -- Fort Worth 1990) *pet. ref'd*, 805 S.W.2d 474 (Tex. Crim. App. 1991).

Trial court properly excludes statement when proponent fails to demonstrate corroborating circumstances clearly indicating trustworthiness of statement.

Davis v. State, 772 S.W.2d 563 (Tex. App. -- Waco 1989, no pet.), *overruled in* Williams v. State, 815 S.W.2d 743 (Tex. App. -- Waco 1991), *rev'd on other grounds*, 829 S.W.2d 216 (Tex. Crim. App. 1992).

Court incorrectly holds that Confrontation Clause automatically bars admission of statement against interest unless third party declarant is unavailable. Court misconstrues Ohio v. Roberts as holding that constitution prohibits admission of any hearsay unless declarant unavailable. Supreme Court specifically rejected such an interpretation in Inadi v. United States, 106 S.Ct. 1121 (1986).

Nix v. State, 750 S.W.2d 348, 353 (Tex. App. -- Beaumont 1988, no pet.)

Rule has no applicability when witness/declarant actually testifies in court. Opponent can not exclude live testimony by claiming that it is not trustworthy nor corroborated.

Jennings v. State, 748 S.W.2d 606, 608 (Tex. App. -- Fort Worth 1988, pet. ref'd)

Defendant's cellmate could not testify that he overheard co-defendant on telephone saying that "defendant didn't want to do it, but ..." because no corroborating circumstances to demonstrate trustworthiness of statement.

Spivey v. State, 748 S.W.2d 18, 19-20 (Tex. App. -- Houston [1st Dist.] 1988, no pet.)

Rule does not permit defendant to introduce his own out-of-court statement.

Reynolds v. State, 744 S.W.2d 156, 160-61 (Tex. App. -- Amarillo 1987, pet. ref'd)

D.W.I. defendant argued that there were not sufficient corroborating circumstances to prove trustworthiness of his out-of-court statement to officer that he had been driving and almost had an accident. Appellate court found sufficient evidence by analyzing under standard relating to corroboration of accomplice witness testimony. Very curious holding: why not simply hold statement was admission by party-opponent under rule 801?

Tex. R. Crim. Evid. 804(a) unavailability of witness

Dennis v. State, ___ S.W.2d ___, 1997 WL 281355 at **1-2 (Tex. App. — Houston [1st Dist.] 1997)

> Defendant could not claim his Fifth Amendment privilege, thereby making himself "unavailable" for purposes of Rule 804(a)(1) so that he could introduce his own statement given previously.

Ward v. State, 910 S.W.2d 1, 2-4 (Tex. App. — Tyler 1995, pet. ref'd)

> Child sexual assault victim who clammed up on witness stand and said she couldn't remember and then refused to talk was "unavailable" under the rule. Her testimony at a prior bond revocation hearing was admissible. Def. had opportunity and similar motive to cross-examine in that proceeding. No constitutional bar because this is a firmly rooted exception.

Reyes v. State, 845 S.W.2d 328, 331 (Tex. App. -- El Paso 1992, no pet.)

> State did not show "due diligence" in attempting to locate missing witness when it merely asked witness' grandmother to find him in Mexico 3 days before trial, did not contact Mexican authorities, and did not attempt any formal proceedings to being witness back. Analogizes to attempts to retrieve witness for continuance.

Marable v. State, 840 S.W.2d 88, 92-93 (Tex. App. -- Texarkana 1992, pet. ref'd)

> When State's witness simply couldn't remember the contents of his jailhouse conversation with defendant, permissible to introduce his testimony from the first trial. Here, there were two other defendants on trial with this defendant at first trial, but this witness' testimony didn't relate to them; same motive of this defendant to cross-examine witness in both trials.

Otero-Miranda v. State, 746 S.W.2d 352, 354-55 (Tex. App. -- Amarillo 1988, pet. ref'd, untimely filed)

> Proof that a witness is not subject to subpoena power is not sufficient, by itself, to establish unavailability. Noting that, under federal cases, a witness is not unavailable unless proponent has made a good faith effort to obtain his presence.

Tex. R. Crim. Evid. 804(b)(1) former testimony

Castro v. State, 914 S.W.2d 159, 163 (Tex. App. -- San Antonio 1995, no pet.)

> Def. can't introduce his own former testimony from mistrial when he invoked 5th in second trial because his exemption is "due to the procurement of the proponent" under 804(a)(1).

State v. Roberts, 909 S.W.2d 110, 111-12 (Tex. App. -- Houston [14th Dist.] 1995, pet. granted)

> State can't use a civil deposition in a criminal proceeding under this rule.

Coffin v. State, 850 S.W.2d 608, 610 (Tex. App. -- El Paso 1993), *aff'd*, 885 S.W.2d 140 (Tex. Crim. App. 1994)

Psychologist's testimony from juvenile certification hearing admissible at trial on merits over defendant's contention that his motive to cross-examine witness at 1st hearing not similar to motive at trial.

Jones v. State, 843 S.W.2d 487 (Tex. Crim. App. 1992)

Grand jury testimony of witness who invoked right against self-incrimination at trial was admissible as former testimony. Court holds that State had same interest and motive to develop her testimony before grand jury as at trial (this rule would not permit State to offer that testimony since defendant had no opportunity to cross-examine). Harmless error here, however, since defendant offered entire transcript of testimony, much of which was itself hearsay; witness recited what defendant had told her. Under Rule 105, defendant was required to sort out the nonhearsay observations of the witness from the hearsay and offer only the former.

Rodela v. State, 829 S.W.2d 845, 849 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd)

Testimony from pretrial motion to suppress hearing admissible as former testimony when witness did not respond to trial subpoena and judge refused to issue attachment (missing witness was a sitting judge who was on vacation). State had same motive to cross-examine witness at pretrial motion as at trial.

Wilkins v. State, 818 S.W.2d 844 (Tex. App. -- Houston [1st Dist.] 1991, pet. ref'd)

Examining trial testimony of burn victim, taken in hospital, admissible at trial after she died. Defendant complained because she was in next room and testimony shown by videotape, but rationale was on record and defendant failed to show harm.

Urbano v. State, 808 S.W.2d 519, 522 (Tex. App. -- Houston [14th Dist.] 1991, no pet.)

State offered complainant's (convenience store clerk whom defendant robbed at gunpoint) former testimony from 1st trial when it couldn't locate her; evidence from investigator that State had used due diligence in hunting for her--TDL check, utilities, went to last known address, asked neighbors & employers; "Rule 804(a)(5) does not require a proponent to butt his head against a wall just to see how much it hurts."

Davis v. State, 773 S.W.2d 592, 593 (Tex. App. -- Eastland 1989, pet. ref'd)

Co-defendant who had already been convicted of offense was called to testify by State, but refused. Prosecution could not use the testimony he had given at his own trial as former testimony under rule since this defendant had not had opportunity at that time to cross-examine him. Further, such testimony was not admissible as prior inconsistent statement under 801(e)(1)(A) or 612(a) since witness "has not falsified a lack of memory nor has he denied the truthfulness of his testimony at his trial."

Tex. R. Crim. Evid. 804(b)(2) dying declaration

Charles v. State, ___ S.W.2d ___, 1997 WL 621414 at **2-3 (Tex. App. – San Antonio 1997)

Court held that declarant had made a dying declaration even though she died thirty days later, where the declarant was burned over most of her body with third- and second-degree burns, had a thirty percent chance of survival at the time she was burned, could not walk without assistance and constantly asked the police officer getting the statement if she was going to die.

Pritchett v. State, 874 S.W.2d 168, 177 (Tex. App. -- Houston [14th Dist.] 1994, pet. ref'd)

Admissible statements not limited to one identifying person who injured dying person; it may be an explanation of circumstances surrounding event.

Green v. State, 840 S.W.2d 394, 411 (Tex. Crim. App. 1992)

Statement must be made when declarant believes that his death was imminent. Here, victim told E.M.T. "I'm dying." That's enough, even though E.M.T. kept trying to reassure victim that he would live and alleviate fears of dying.

Johnson v. State, 770 S.W.2d 72 (Tex. App. -- Texarkana 1989), *aff'd on other grounds*, 815 S.W.2d 707 (Tex. Crim. App. 1991)

Medical opinion that declarant is dying not necessary, only that she believes she is dying. Here, nurse permitted to testify to murder victim's statement concerning cause of her injuries since she had told nurse she thought she was going to die and had asked nurse several times if she were dying.

Contreras v. State, 745 S.W.2d 59, 62-63 (Tex. App. -- San Antonio 1987, no pet.)

When witness testified that dying declarant was "fully conscious and coherent," statement was admissible over defendant's claim that deceased did not possess sufficient mental capacity due to loss of blood. Defendant has burden of proving incompetency of witness under rule. Internal inconsistencies of statement go to weight, not admissibility. Trial judge should not give instruction regarding testimonial competency of dying declarant.

Hayes v. State, 740 S.W.2d 887, 888-89 (Tex. App. -- Dallas 1987, no pet.)

Since conversation took place five minutes after shooting, victim was in pain and under stress, it was reasonable to infer that victim believed his death was imminent because of severity of wound. Victim need not explicitly state belief in impending death. Statement may be made in response to questions so long as they are not designed to elicit a certain response.

Tex. R. Crim. Evid. 806 attacking credibility of hearsay declarant

Davis v. State, 791 S.W.2d 308, 309-10 (Tex. App. -- Corpus Christi 1990, pet. ref'd)

Letter from co-Def. to Def. stating that co-Def. told D.A. that Def. had nothing to do with charged offense of receiving stolen property was not admissible as prior inconsistent statement to attack co-Def's credibility on tapes surreptitiously recorded by undercover officer. Letter was hearsay description of a separate hearsay declaration, thus, as double hearsay, could not be used under 806. Evidence usable under rule 806 must be such that it could have been used to impeach or rehabilitate witness on witness stand.

Hall v. State, 764 S.W.2d 19 (Tex. App. -- Amarillo 1988, no pet.)

Defendant should have been allowed to introduce child videotape of nontestifying complainant for impeachment of State's witness who had testified to complainant's excited utterance. [query whether it is the witness who did testify or the hearsay declarant who is the subject of the impeachment].

Tex. R. Crim. Evid. 901(a) authentication sufficiency of foundation

Leos v. State, 883 S.W.2d 209, 211-12 (Tex. Cr. App. 1994)

The predicate set out in *Edwards v. State* for audiotape recordings no longer applies. Only Rule 901(a)'s requirements need be met. *See also Schneider v. State*, 951 S.W.2d 856, 862-63 (Tex. App. — Texarkana 1997)(same).

Kephart v. State, 875 S.W.2d 319, 321-23 (Tex. Crim. App. 1994)

C.L. Edwards rule still applies to admission of video/audio tapes. Here officer seized a video found in motel room that witness said was taken at Def.'s home & showed a "crack" party. No one could testify to when or by whom video was made. No personal knowledge of circumstances. Not admissible.

Stapleton v. State, 852 S.W.2d 632, 634 (Tex. App. -- Houston [14th Dist.] 1993), *rev'd on other grounds*, 868 S.W.2d 781 (Tex. Crim. App. 1993).

Identification of telephone call. Even when testifying witness denies making call to police, tape recording of call may be admissible; caller identified herself on tape, provided information about address, and marihuana ultimately found in house where caller said it was; further, judge could compare witness' voice in court with that on tape.

Garner v. State, 848 S.W.2d 799, 803 (Tex. App. -- Corpus Christi 1993, no pet.)

State failed to prove adequate chain of custody on syringe when it bore no identification marks or tags, no testimony that syringe chemist tested was same one found on defendant, and no testimony as to syringe's whereabouts from time officer mailed it to DPS lab until time he received an unidentified syringe in return.

Leos v. State, 847 S.W.2d 665, 667 (Tex. App. -- Texarkana 1993), *rev'd*, 883 S.W.2d 209 (Tex. Crim. App. 1994)

Unidentified voices on audio tape made tape inadmissible because "statements made by the unidentified voice of the informer" was pertinent to State's case and other unidentified voices suggest that they understood they were participating in purchase of marihuana, but error harmless.

Coleman v. State, 833 S.W.2d 286, 289 (Tex. App. -- Houston [14th Dist.] 1992, pet. ref'd)

"As long as the trial court believed that a reasonable juror could find the evidence has been authenticated or identified, the court should admit the evidence." DNA chain of custody and authentication testimony through internal patterns of distinctive characteristics upheld.

Brooks v. State, 833 S.W.2d 302, 305 (Tex. App. -- Fort Worth 1992, pet. ref'd)

Discussing *Edwards* predicate and compliance therewith; 911 call could be authenticated by dispatcher even though she did not operate the master recorder

Hall v. State, 829 S.W.2d 407, 408 (Tex. App. -- Waco 1992, no pet.)

Good discussion of predicate for admissibility of on-the-scene tape recording of a drug transaction. Rule 901 carries forward 7 prong *Edwards* predicate, but some prongs (e.g. device capable of recording and operator competent) pedigreed by existence and content of tape recording.

Haley v. State, 816 S.W.2d 789, 791 (Tex. App. -- Houston [14th Dist.] 1991, pet. ref'd)

Chain of custody sufficient; any perceived conflict between testimony of witness that "I bought these pills" and "my understanding" is that some pills came from a different source went to weight, not admissibility.

Ordonez v. State, 806 S.W.2d 895, 898 (Tex. App. -- Corpus Christi 1991, pet. ref'd)

State laid a proper predicate for admission of club & photographs through its witness; witness then left stand and State later offered exhibits into evidence; this is acceptable procedure if complete predicate was laid.

Stoker v. State, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989)

Tagging item of evidence at time of seizure and then identifying item at trial based upon tag is sufficient for admission barring any showing by Def. of tampering or alteration.

Wallace v. State, 782 S.W.2d 854, 856-58 (Tex. Crim. App. 1989)

Foundation for admissibility of tape recordings may be shown by circumstantial evidence under rule 901. Court notes that foundation is complete when proponent offers proof "sufficient to support a finding." This is a low, prima facie showing, threshold.

Wallace v. State, 770 S.W.2d 874, 877 (Tex. App. -- Dallas 1989, pet. ref'd)

Breaks/problems with chain of custody generally go to weight of evidence not admissibility. Here, confidential informer put drugs in refrigerator overnight--no break in chain; police officer misdated drug envelope--affects weight, not admissibility; officer misweighed drugs--weight; confidential informer used some of drugs at scene--weight; drugs themselves weren't introduced--they weren't required to be introduced.

Tex. R. Crim. Evid. 901(b) illustrations

Mutz v. State, 862 S.W.2d 24, 29 (Tex. App. -- Beaumont 1993, pet. ref'd)

Modes listed under 901(b) "are by no means exclusive of the methods to proof sufficient to authenticate or identify the types of evidence to which they refer. They are illustrations only, and not limitations."

Tex. R. Crim. Evid. 901(b)(2) authentication by nonexpert witness on handwriting

Acosta v. State, 752 S.W.2d 706, 709 (Tex. App. -- Corpus Christi 1988, no pet.)

State's witness could testify that she had frequently seen judge sign his name in her presence and that judge did sign pertinent original search warrant, which was, by the time of trial, lost. Copy was properly introduced.

Tex. R. Crim. Evid. 901(b)(3) authentication by comparison by trier of fact

Strong v. State, 805 S.W.2d 478, 486 (Tex. App. -- Tyler 1990, no pet.)

Expert witness identified some of Def.'s handwriting but could not make definite determination of other samples. Trial court let all samples in because jury could compare uncertain samples with those identified by expert.

Tex. R. Crim. Evid. 901(b)(6) authentication of telephone calls

Amis v. State, 910 S.W.2d 511, 516 (Tex. App. -- Tyler 1995, pet. ref'd)

Court properly excluded testimony that a person called witness saying he was defendant and left a message & phone number. When witness called back, person said he was defendant. Witness couldn't conclusively I.D. def.'s voice & no one proved up that this was def.'s phone number.

Sorce v. State, 736 S.W.2d 851, 859 (Tex. App. -- Houston [14th Dist.] 1987, pet. ref'd)

Identity of speaker established for business telephone when call is made to a known business number and person who answers represents he is the person called and is authorized to speak for business. Identity also established when speaker discusses facts that only speaker would be likely to know. No reference to rule.

Tex. R. Crim. Evid. 901(b)(7), 902(2) & (4) & 1005 authentication of penitentiary packets

Gonzales v. State, 831 S.W.2d 491, 493 (Tex. App. -- Houston [14th Dist.] 1992, pet. ref'd)

Pen packet that contained copies of copies admissible under Rule.

Reed v. State, 811 S.W.2d 582 (Tex. Crim. App. 1991)

Dingler rejected as being inconsistent with rules 901 & 902. TDC pen packet admissible although judgment & sentence not certified by clerk of convicting court. TDCJID record clerk's certification of pen packet "sufficient to support a finding" that judgment is authentic. TDCJID is authorized to keep these records and relies on them. "The probabilities are relatively low that the TDCJID records would be false or fraudulent even though they do originate from another source, the convicting court." See also Handspur v. State, 792 S.W.2d 239, 241-49 (Tex. App. -- Dallas 1990)(Onion, j., dissenting)(excellent discussion regarding authentication requirements for pen packets; criticizing Dingler, advocating proper use of rule 902), *aff'd* 816 S.W.2d 749 (Tex. Crim. App. 1991).

Carpenter v. State, 781 S.W.2d 707 (Tex. App. -- Dallas 1989, pet. ref'd)

Pen packet which contained neither the signature of the clerk of the county court nor a court seal was not properly authenticated under rule 902. Reversible error to permit introduction during punishment phase.

Davis v. State, 772 S.W.2d 563 (Tex. App. -- Waco 1989, no pet.)

Defendant argued that since pen packet copy of judgment and sentence were not themselves certified by convicting court, T.D.C. records were not admissible. Court held that since judgment and sentences are authorized by law to be recorded or filed at T.D.C., evidence that pen packet came from this public office was sufficient predicate to admissibility. Adds caveat that original judgment and sentence from convicting court "is the most appropriate enhancement evidence." Query if this is unnecessary dicta which sets up nonstatutory "rule of preference" for types of evidence which generally goes to weight not admissibility.

Redd v. State, 768 S.W.2d 439 (Tex. App. -- Houston [1st Dist.] 1989, pet. ref'd)

Pen packets accompanied by certificate by T.D.C. custodian of records attesting to authenticity of copies of original papers filed with T.D.C. properly authenticated when accompanied by official seal and signature of records clerk, judge, and clerk of court. Court notes that document need not be authenticated pursuant to both 901 and 902.

Barber v. State, 757 S.W.2d 83, 87 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd)

Self-authentication of penitentiary packets under rules.

Tex. R. Crim. Evid. 902(4) certified copies of public records

Jordan-Maier v. State, 792 S.W.2d 188, 191 (Tex. App. -- Houston [1st Dist.] 1990, pet. ref'd)

Authentication of foreign judgment & sentence. Good review of authentication requirements. Witness who spoke German translated documents & testified that official seal was like that of Justice Dept. of U.S. Witness testified regarding German custodian. Def.'s fingerprints on documents.

Rodasti v. State, 749 S.W.2d 161, 162-63 (Tex. App. -- Houston [1st Dist.] 1988), *aff'd*, 815 S.W.2d 591 (Tex. Crim. App. 1991)

Utilizing rules 901 & 902 in analysis of authentication rules. Copy of judgment in pen packet need not be certified by convicting court. Not error to admit document when evidence "sufficient to support a finding" is introduced as to authenticity of that document.

Gutierrez v. State, 745 S.W.2d 529, 530 (Tex. App. -- Corpus Christi 1988, pet. ref'd)

Federal judgment that bears seal of federal district clerk's office, attestation that document is a true copy of original, plus signature is sufficient to show authentication.

Tex. R. Crim. Evid. 902(10) business records affidavit

Harris v. State, 799 S.W.2d 348, 350-51 (Tex. App. -- Houston [14th Dist.] 1990, no pet.)

Don't need affidavit when business records are introduced through testimony of live witness. Here, State filed affidavit & records in original cause number & then reindicted. This would have been sufficient also.

Lee v. State, 779 S.W.2d 913, 917 (Tex. App. -- Houston [1st Dist.] 1989, pet. ref'd)

Outline of self-authentication requirements under business affidavit rule. If foundation requirements not met, bring in a custodian or "other qualified witness" to lay predicate for documents.

Yarbough v. State, 732 S.W.2d 86, 91 (Tex. App.--Dallas 1987), remanded on other grounds, 761 S.W.2d 17 (Tex. Crim. App. 1988)

Pen packet admissible as properly authenticated under 902(10) despite obvious clerical error on attestation date.

Tex. R. Crim. Evid. 902(10)(a) filing of affidavit 14 days before trial

Lee v. State, 779 S.W.2d 913 (Tex. App. -- Houston [1st Dist.] 1989, pet. ref'd)

Unnecessary to follow notice requirements of 902(10) if a witness sponsors the business records. Rule 902 applies only to self-authenticating records without a witness.

Cook v. State, 720 S.W.2d 867, 868-69 (Tex. App.--Beaumont 1986, no pet.)

Not error to admit business records under 3737e when no 14 day notice (which was not explicitly required under 3737e). Notes that 902(10)(a) "mandates" 14 day filing. Opaque opinion. Query: Can Granviel continue to be used for proposition that "admission or exclusion of hospital records is not reversible error in absence of a showing of harm to the complaining party" and obviate 14 day notice if opposing party is not unfairly surprised?

Tex. R. Crim. Evid. 1001(1) "writings" include tape recordings

Burdine v. State, 719 S.W.2d 309, 318, n. 5 (Tex. Crim. App. 1986)

Best evidence rule applies to tape recordings. However, best evidence rule does not apply to contents of conversation which happens to be tape recorded. The question was framed, "What was the conversation?" not "What was the conversation as it was duplicated on the tape recording?"

Tex. R. Crim. Evid. 1001(3) original of computer output

Burleson v. State, 802 S.W.2d 429, 441 (Tex. App. -- Fort Worth 1991, pet. ref'd)

Witness may testify to computer "display"; it is original under best evidence rule because "it was output other than a printout, was readable by sight, and was shown to be an accurate reflection of the data."

Tex. R. Crim. Evid. 1001(4) admissibility of duplicates

Englund v. State, 907 S.W.2d 937 (Tex. App. -- Houston [1st Dist.] 1995, pet. granted)(en banc)

> A FAX is a duplicate under Rule 1003. Here, Faxed copy of J & S was admissible although faxed version did not contain an original seal. This holding is very helpful. But see Taft's dissent. PDR granted.

Johnson v. State, 846 S.W.2d 373, 376 (Tex. App. -- Houston [14th Dist.] 1992), *aff'd on remand* 857 S.W.2d 812 (Tex. App. -- Houston [14th Dist.] 1993).

> Photocopy of $10 used to make narcotics buy not barred by best evidence rule when original bill was reused until lost or returned to city. [query whether best evidence rule applicable since this was "inscribed chattel" and trial court has discretion to decide whether witness likely to be mistaken on relevant contents of the document--i.e. $10 vs. 1, 5, 20, 50, etc.]

Jubert v. State, 753 S.W.2d 458, 460 (Tex. App. -- Texarkana 1988, no pet.)

> Under best evidence rule, a copy of a videotape is admissible unless there is an issue of the authenticity of the original or a substantiated complaint that this is not an accurate copy.

Tex. R. Evid. 1002-1004 Best Evidence Rule

Vitiello v. State, 848 S.W.2d 885, 887 (Tex. App. -- Houston [14th dist.] 1993, pet. ref'd)

> When evidence showed that original of check was in Penn., State did not have to produce original, duplicate sufficed.

Narvaiz v. State, 840 S.W.2d 415, 431 (Tex. Crim. App. 1992)

> Under Rule 1003 a duplicate is admissible to same extent as original unless opponent raises genuine question as to the authenticity of original. Here, defendant did not claim that original 911 tape recording was not authentic or that this was an inaccurate reproduction.

Cook v. State, 832 S.W.2d 62, 66 (Tex. App. -- Dallas 1992, no pet.)

> Best evidence rule does not apply when item not admitted into evidence to prove its contents. Here copy of parole violation warrant was offered to prove there was an outstanding warrant, not for truth of its contents. Even if rule had applied, duplicate is admissible unless there is a question of the authenticity of the original or circumstances should it would be unfair to admit the duplicate instead of original.

Richardson v. State, 821 S.W.2d 304, 308 (Tex. App. -- Amarillo 1991), *aff'd on remand*, 831 S.W.2d 78 (Tex. App. -- Amarillo 1992)

> Rule not violated when prosecution provides a transcript of tape recording to use as an aid while jurors listen to tape itself. Transcript not introduced into evidence and was not a substitute for tape recording.

Coleman v. State, 760 S.W.2d 356, 360 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref'd)

Trial court's admission of lineup photo over "best evidence" objection not error despite photo's lack of clarity when original photo "misplaced." [query if "best evidence" rule was applicable at all since issue was suggestibility of line-up itself, not suggestibility of contents of the photo taken of the lineup]

Keaton v. State, 755 S.W.2d 209, 210 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref'd)

To prove defendant was driving within incorporated city limits of Houston, police officer's testimony was sufficient, no need to offer city ordinance since contents thereof were not in issue.

Acosta v. State, 752 S.W.2d 706, 709 (Tex. App. -- Corpus Christi 1988, pet. ref'd)

Copy of search warrant properly admitted because defendant did not question authenticity of the original.

Persons v. State, 714 S.W.2d 475, 478 (Tex. App.--Fort Worth 1986, no pet.)

"Best evidence" rule did not make a copy of autopsy report inadmissible under Tex. R. Evid. 1002 & 1004 when no question of the authenticity of the copy raised. Court rejected use of civil rules, but could have invoked rule 1003 instead of art. 3731c.

Tex. R. Crim. Evid. 1006 summaries

Wheatfall v. State, 882 S.W.2d 829, 839 (Tex. Crim. App. 1994)

Rule does not permit prosecution to summarize its case--here Def.'s violent criminal history--on a blackboard and submit it as "evidence" to jury. Query whether same blackboard notations could be used as demonstrative aide during summation. Here harmless error. Rule of thumb: summaries/diagrams made by lawyers are not admitted as evidence, though they may be demonstrative aides.

Barnes v. State, 797 S.W.2d 353, 357 (Tex. App. -- Tyler 1990, no pet.)

State could use charts that were summaries of what witnesses had testified to. "If the evidence which the charts summarize is admissible, the admission of summary charts into evidence and their use before the jury is within the discretion of the trial court."

Tex. R. Crim. Evid. 1101(c) inapplicability of rules

Matter of J.P.O., 904 S.W.2d 695, 699 (Tex. App. -- Corpus Christi 1995, writ ref'd)

Although Rules of Evidence apply to juvenile proceedings, no strict adherence at transfer hearing. Court can consider evidence that would be inadmissible at trial.

Ex parte Mitchell, 859 S.W.2d 83, 84 (Tex. App. -- San Antonio 1993, no pet.)

Rules do not apply at extradition hearing. Photo of detainee accompanying warrant need not be authenticated under Rules.

Garcia v. State, 775 S.W.2d 879 (Tex. App. -- San Antonio 1989, no pet.)

Hearsay oral recitation of offense report by prosecutor was admissible at bail reduction hearing since this was not a hearing to "deny, revoke or increase bail." However, defendant ordered released because appellate court found no admissible evidence to support a finding of probable cause that a crime had been committed. Holding appears incorrect since this was a bail hearing not an examining trial which does require adherence to rules of evidence.

Tex. R. Crim. Evid. 1101(d)(4) applicability of rules at motions to suppress

McVickers v. State, 838 S.W.2d 651, 654-55 (Tex. App. -- Corpus Christi 1992), *aff'd*, 874 S.W.2d 662 (Tex. Crim. App. 1993)

Good discussion of rule. Rules apply at motion to suppress hearing. Hearsay admissible to show probable cause to arrest by testifying witness, but not to permit one witness to testify to what other officers had said about why they stopped defendant. That is double hearsay. Affirmed by TCA. Compare **Benford v. State**, 895 S.W.2d 716, 717-18 (Tex. App. -- Houston [14th Dist.] 1994, no pet.)(statements by 3rd persons to officer not inadmissible hearsay when offered to show probable cause; not offered for historical truth but for officer's reasonable belief & info. he had available; distinguishes **McVickers**).