

An Overview of the Texas Rules of Criminal Evidence

Article I. General Provisions

Rule 105. Limited Admissibility

Rankin v. State, 904 S.W.2d 707 (Tex. Crim. App. 1996)

Defendant was convicted of aggravated sexual assault. At trial Defendant objected, pursuant to Rule 404(b) and Rule 403, that the testimony of the two witnesses amounted to inadmissible extraneous offense evidence. The trial judge overruled the objection, and Defendant then requested that the judge deliver a limiting instruction as to the extraneous offense evidence. The trial judge refused to give the limiting instruction at that time but did give a limiting instruction at the time of the final jury charge. The Court granted discretionary review to determine whether or not Rule 105(a) requires that a limiting instruction be given when the evidence is admitted rather than at the time of the final jury charge.

The Court stated that an instruction given for the first time during the jury charge necessarily leaves a window of time in which the jury can contemplate the evidence in an improper manner. Thus, since it allows for the possibility that evidence will be used improperly in clear contravention of the rule, limiting instructions given for the first time during a jury charge do not constitute an efficacious application of Rule 105(a). Consistent with these observations, the Court held that Rule 105(a) requires a limiting instruction, upon proper request, when evidence is admitted.

Rule 107. Rule of Optional Completeness

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

Defendant was convicted of capital murder. On appeal Defendant asserted that the Court of Appeals erred in holding that the State was allowed to examine a taped interview between a witness for the State and an investigator for the defense. The Court granted discretionary review to determine whether or not the Court of Appeals had erred. During cross examination of the State's witness, the Defendant asked about various statements made during the interview but did not, at any point, attempt to introduce the tape into evidence. The State requested that the trial court order Defendant to produce the tape recording. Over Defendant's objections the tape was admitted into evidence and played for the jury. On review the Court stated that although the contents of the tape are subject to Rule 107, the Rule is not implicated until such time as a party attempts to have a portion of it given into evidence. Because Defendant never attempted to have a portion of the tape given into evidence, Rule 107 was never implicated, and the tape was improperly admitted.

Article IV. Relevancy and Its Limitations

Rule 401. Definition of "Relevant Evidence"

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

Rule 403. Exclusion of Relevant Evidence on Special Grounds

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

Montgomery v. State, 810 S.W.2d 372 (Tex. Crim. App. 1990).

Defendant was convicted of indecency with a child. The Court granted discretionary review to address the application of Rules 401, 402, 403, and 404. At

issue was whether or not the trial judge abused her discretion by admitting evidence that Defendant frequently appeared nude with an erection in front of his daughters. The Court stated that the trial court must perform a two step analysis. First, the trial court must determine whether or not the evidence is relevant. Next, if the trial court determines that the evidence is relevant pursuant to Rule 401, then under Rule 402 the evidence will be admissible, unless the opponent of the evidence demonstrates that the evidence should be excluded because of some other statutory, constitutional, or evidentiary provision.

In the present case, Defendant lodged an objection under Rule 404(b) claiming that testimony describing him walking nude in front of his daughters with an erection amounted to extraneous offense evidence. The Court stated that when a party attempts to introduce evidence of other crimes, wrongs, or acts, the opposing party should object under Rule 404(b). At this point the proponent of the evidence must demonstrate that the evidence has relevance wholly separate from its tendency to prove the character of a person to show that he acted in conformity therewith. If the trial court determines that the evidence is only relevant to show character conformity, the evidence is absolutely inadmissible.

However, if the trial court determines that the evidence has relevance apart from character conformity, the opponent may make a Rule 403 objection. Under Rule 403 there is a presumption that relevant evidence will be more probative than prejudicial. Thus, the opponent of the evidence must demonstrate that the danger of unfair prejudice substantially outweighs the probative value of the evidence. Moreover, once Rule 403 has been invoked, the trial court has no discretion and must engage in a

balancing of probativeness versus prejudice. Applying the rules to the facts of this case, the Court held that the trial judge abused her discretion by admitting the challenged evidence.

Rule 404(b). Other crimes, wrongs, or acts.

Smith v. State, No. 996-98, 1999 WL 415336 (Tex. Crim. App. June 23, 1999).

Defendant was convicted of murder. The Court granted discretionary review to determine whether or not the Court of Appeals erred in holding Article 38.36(a), CCP, abrogates the trial court's duty to comply with Rules 404(b) and 403. The Court held that trial courts can congruously apply Article 38.36(a) and Rules 404(b) and 403.

The Court further stated that because grafting an exception into Article 38.36(a) contravenes its plain language, evidence admissible under Article 38.36(a) may nevertheless be inadmissible under Rules 404(b) and 403. The trial court must perform a two part analysis to determine whether or not the evidence is admissible. First, the trial court must find that the non-character conformity purpose for which it is proffered is relevant to a material issue. Second, if the evidence is relevant to a material issue, the trial court must determine whether or not it should be excluded because the Rule 403 factors substantially outweigh its probative value.

Buchanan v. State, 911 S.W.2d 11 (Tex. Crim. App. 1995).

Following the Defendant's conviction for aggravated sexual assault and aggravated kidnapping, the Court granted discretionary review to determine whether or not the State's "open file" policy prior to trial satisfies the Rule 404(b) requirement that the State provide notice in advance of its intent to use extraneous evidence of other crimes, wrongs, or acts in its case-in-chief. The Court stated that merely granting

Defendant access to a file containing the extraneous offense evidence does not satisfy the requirement of providing notice of intent to produce such evidence. Therefore, the Court held that the State's "open file" policy does not comply with the Rule 404(b) requirement that the State provide advance notice of its intent to introduce such extraneous evidence in its case-in-chief.

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

Defendant was convicted of aggravated sexual assault. The Court of Appeals reversed Defendant's conviction. The Court granted the State's petition to address the requirements that the State must meet to allow the admission of extraneous acts for the purpose of showing identity. As the Court stated, "the act sought to be admitted must be so similar to the offense charged that the accused's acts are marked as his handiwork." In other words, "his signature must be apparent from a comparison of circumstances in both cases." The Court further stated that the evidence sought to be admitted must demonstrate a much higher degree of similarity to the charged offense than extraneous acts offered for other purposes such as intent.

Dodgen v. State, 924 S.W.2d 216 (Tex. App.--Eastland 1996, pet. ref'd).

Defendant was convicted of aggravated sexual assault. On appeal Defendant argued that the trial court erred by admitting his three prior convictions. Because the State did not give Defendant notice of its intent to introduce evidence of the prior convictions pursuant to Art. 37.07, § 3(g), CCP, the trial court should not have admitted the evidence of the three prior convictions. The Court noted that Art. 37.07 specifically requires that notice of intent shall be given in the same manner required by Rule 404(b). Thus, merely furnishing a record of Defendant's criminal history was not a sufficient

statement of intent to introduce evidence of his prior convictions.

Article V. Privileges

Rule 508. Identity of Informer; (c)(2) Exceptions, Testimony on merits.

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

Defendant was convicted of possession of a controlled substance. The Court granted discretionary review to determine whether or not the trial court properly refused to order the State to disclose the name of the confidential informant. As the Court observed, citing Bernard v. State, 566 S.W.2d 575 (Tex. Crim. App. 1978), prior to the enactment of Rule 508, the identity of an informer was privileged and disclosure was not required unless 1) the informer participated in the offense, 2) the informer was present at the time of the offense or arrest, or 3) the informer was otherwise shown to be a material witness to the transaction or as to whether or not the defendant knowingly committed the offense charged.

Rule 508 still affords the State the privilege of not revealing the identity of a confidential informant. However, subsection (c) sets forth three exceptions to the privilege. The privilege does not apply if 1) the informant's identity has been voluntarily disclosed, 2) the informant may be able to give testimony necessary to a fair determination of the issues of guilt or innocence, or 3) a judge is not satisfied that information obtained from an informant is reasonably believed to be reliable.

On appeal Defendant argued that the trial court erred when it refused to order disclosure of the informant's identity pursuant to Rule 508(c)(2). The Court stated that Rule 508(c)(2) only requires that the testimony be necessary to a fair determination of

the issues of guilt or innocence. In other words, “the informer’s potential testimony must significantly aid the defendant and mere conjecture of supposition about possible relevancy is insufficient.” The defendant has the threshold burden of demonstrating that the State must disclose the informant’s identity, and the defendant may present evidence from any source to meet the required burden.

Applying 508(c)(2) to the facts of this case, the Court found that the trial court erred because it relied on the three exceptions in effect prior to the enactment of Rule 508. The Court concluded that the testimony of the informer was necessary to a fair determination of guilt or innocence and that the trial court erred in refusing to disclose the identity of the informant.

Anderson v. State, 817 S.W.2d 69 (Tex. Crim. App. 1991).

Defendant was convicted of delivery of methamphetamine. The Court granted discretionary review to determine whether or not Defendant was entitled to disclosure of informant’s identity pursuant to Rule 508(c)(2). The Court stated that whenever the defendant shows that an informant was an eyewitness to an alleged offense, that informant can give testimony necessary to a fair determination of the issues of guilt or innocence. Thus, the Court held that Defendant was entitled to disclosure of the identity of the informant who was present at the drug transaction and that the trial court’s failure to order disclosure necessitated reversal.

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

Defendant was convicted of possession of a controlled substance. On appeal Defendant asserted that the trial court’s refusal to order disclosure of the informant’s identity was error. The Court concluded that the trial court abused its discretion when it

failed to order disclosure of the informant's identity. The Court further concluded that when the informant was the only person who saw the drugs and gave the signal that provided the probable cause for the arrest, the trial court must order disclosure of the informant's identity.

Article VI. Witnesses

Rule 607. Who May Impeach

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

Defendant was convicted of aggravated robbery. On appeal Defendant raised the issue of whether or not the State may impeach its own witness knowing that he will provide little or no useful testimony. Citing United States v. Hogan, 763 F.2d 697 (5th Cir. 1985), the Court stated that the prosecution may not call a witness that it knows is hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony as a subterfuge to avoid the hearsay rule. Thus, the Court held that the right to impeach one's own witness by use of a prior inconsistent statement did not extend to employment of such impeachment as a mere subterfuge to get otherwise inadmissible hearsay evidence before a jury.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.

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

Defendant was convicted of possessing and delivering cocaine. The Court granted discretionary review to consider whether or not it was improper to admit Defendant's prior conviction for arson. The Court said that a conviction for arson is

admissible for impeachment purposes and may be admitted if its probative value outweighs its prejudicial effect. Any proponent seeking to introduce evidence of a witness' conviction for impeachment purposes has the burden of demonstrating that the probative value of the conviction outweighs its prejudicial effect.

The Court then listed five factors that the trial court must consider to determine whether or not the probative value of the conviction offered outweighs its prejudicial effect. The five factors are 1) impeachment value of the crime, 2) the temporal proximity of the crime to the charged offense and the witness' subsequent history, 3) the similarity between past crime and the offense being prosecuted, 4) the importance of the defendant's testimony, and 5) the importance of the credibility issue. The Court held that the arson conviction should not have been admitted for impeachment purposes because it had very little probative value concerning Defendant's credibility, and the trial judge failed to dispel the prejudicial effect when presented with the opportunity.

(c) Effect of pardon, annulment, or certificate of rehabilitation.

Ex Parte Menchaca, 854 S.W.2d 128 (Tex. Crim. App. 1993).

Defendant was convicted of delivery of a controlled substance. Defendant was previously convicted of rape, and the term of his probation had expired by operation of law. In his post conviction application for writ of habeas corpus, Defendant asserted that because he had completed his term of probation, the prior offense was inadmissible pursuant to Rule 609(c). The Court held that there is no distinction between a probation period that has expired and one that is satisfactorily completed. Therefore, when the probationary term has expired, and the witness has not been

subsequently convicted of a felony or a crime involving moral turpitude, the prior conviction is not admissible for impeachment purposes.

(f) Notice.

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

Defendant was convicted of aggravated robbery. During trial the State introduced evidence of a prior conviction to impeach Defendant. The prior conviction was admitted even though the State failed to provide notice of intent to introduce such evidence following Defendant's request for such notice pursuant to Rule 609(f). The Court held that where the defendant files a request under 609(f) for notice of intent to use a prior conviction to impeach the defendant, and the State fails to comply, the prior conviction is not admissible against the defendant. Therefore, in the present case, because the State failed to file notice of its intent to use evidence of a prior conviction, the evidence is inadmissible against Defendant.

Article VII. Opinions and Expert Testimony

Rule 702. Testimony By Experts

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

In determining what the proper standard is for admitting expert scientific testimony in a federal trial, the Supreme Court concluded that the Federal Rules of Evidence supersede the Frye "general acceptance" test. Pursuant to Rule 702, the trial judge must ensure that 1) any and all scientific evidence admitted rests on a reliable foundation and 2) is relevant to the task at hand. The one who proffers the evidence has the burden to show that the expert's testimony pertains to "scientific knowledge."

To determine whether or not the testimony pertains to "scientific knowledge," the

trial judge may consider 1) whether or not the theory or technique that the expert offers has been or can be tested, 2) whether or not the theory has been subjected to peer review, 3) the known or potential rate of error, and 4) the general acceptance of the proffered evidence. To ensure that the evidence is relevant to the task at hand, the evidence or testimony must assist the trier of fact to understand the evidence or determine a fact issue.

United States v. Posado, 57 F.3d 428 (5th Cir. 1995).

Defendants appealed following their convictions of conspiracy to possess and possession with intent to distribute. The appeal concerned the admissibility of polygraph evidence pursuant to Rule 702. The Fifth Circuit has unequivocally held, with few exceptions, that polygraph evidence is inadmissible in federal court. However, in light of the United State Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the Court concluded that the rationale underlying the per se rule against admitting polygraph evidence is no longer valid. The Court did not hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact in this or any other individual case; however, the obstacle of the per se rule against admissibility has been removed.

Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Defendant was convicted of murder. The Court granted Defendant's petition for discretionary review to determine whether or not the Court of Appeals erred when it held that the trial court did not abuse its discretion by admitting DNA "fingerprint" evidence over Defendant's objection. When the Court considered the reliability of the novel scientific evidence, the Court stated that for evidence derived from scientific

theory to be reliable, it must satisfy three criteria. The three criteria are 1) that the underlying scientific theory must be valid, 2) that the technique applying the theory must be valid, and 3) that the technique must have been properly applied on the occasion in question. Before the evidence can be admitted, all three criteria must be proven by clear and convincing evidence.

The Court then provided an illustrative, though not exclusive, list of factors that trial courts should consider to determine the reliability of the evidence. Those factors include 1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such community can be ascertained, 2) the qualifications of the expert(s) testifying, 3) the existence of literature supporting or rejecting the underlying scientific theory and technique, 4) the potential rate of error of the technique, 5) the availability of other experts to test and evaluate the technique, 6) the clarity with which the underlying scientific theory and technique can be explained to the court, and 7) the experience and skill of the person(s) who applied the technique on the occasion in question. The overall effect of the Court's decision is that the Frye "general acceptance" test is no longer valid in Texas.

Jordan v. State, 928 S.W.2d 550 (Tex. Crim. App. 1996).

Defendant was convicted of robbery. The Court granted discretionary review to determine when expert testimony is admissible. During trial, by calling an expert to testify about the reliability of eyewitness testimony, Defendant attempted to show that he had been misidentified as the robber. The trial court held the testimony inadmissible. The Court examined Rule 702 and stated that for expert evidence to be admissible, it must be sufficiently reliable and relevant to help the jury reach accurate

results.

Duckett v. State, 797 S.W.2d 906 (Tex. Crim. App. 1990).

Defendant was convicted of indecency with a child. On appeal the court remanded for a new trial, and the State filed a petition for discretionary review. The Court granted discretionary review to determine whether or not expert testimony concerning child sexual abuse syndrome and the elements of the syndrome as applied to the facts of the case were admissible. The Court stated that the test for admissibility of expert testimony is 1) whether or not the testimony, if believed, will assist an untrained layman trier of fact in understanding evidence or determining the fact issue, and 2) whether or not the testimony is otherwise admissible under general rules of relevant admissibility. The Court was careful to note that expert testimony is admissible to aid the jury in its decision not to supplant the decision. The Court held that in the present case the expert testimony was admissible.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

(b) Voir dire.

Goss v. State, 826 S.W.2d 162 (Tex. Crim. App. 1992).

Defendant was convicted of capital murder. On appeal Defendant asserts that the trial judge erred in overruling Defendant's motion to conduct voir dire examination of the State's expert witness pursuant to Rule 705(b). The Court stated, "under Rule 705(b), the defendant in a criminal trial is undeniably entitled, upon timely request, to conduct voir dire examination directed to the underlying facts or data upon which the opinion is based." The Court further stated that the trial court must allow the examination to be conducted prior to the expert giving his opinion and out of the hearing

of the jury. Because of the mandatory nature of Rule 705(b), the trial judge's denial of a timely and proper motion for such hearing constitutes error.

(c) Admissibility of opinion.

Aguilar v. State, 887 S.W.2d 27 (Tex. Crim. App. 1994)

Defendant was convicted of delivery of heroin and cocaine. The Court granted discretionary review to determine whether or not the lack of an expert's personal knowledge affected his testimony. The trial judge allowed the State to identify the controlled substances alleged in the indictments by relying on the testimony of a toxicologist who had not performed any of the chemical analyses himself. The Court held that the admissibility of the expert's testimony was not affected by lack of personal knowledge of test results when there was an absence of evidence that the expert did not have a sufficient basis for his opinion.

Ex Parte Ake Motion

Williams v. State, 958 S.W.2d 186 (Tex. Crim. App. 1997).

Defendant was convicted of capital murder and sentenced to death. On appeal Defendant asserts that because the trial court refused to allow his *Ake* hearing to proceed ex parte, he had to reveal a portion of his defense at the hearing. The Court held that an indigent defendant is entitled, upon proper request, to make his *Ake* motion ex parte.

Article VIII. Hearsay

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

(6) Records of regularly conducted activity.

Jefferson v. State, 900 S.W.2d 97 (Tex. App.--Houston [14th Dist.] 1995, no pet. h.).

Defendant was convicted of possession of less than twenty-eight grams of cocaine. On appeal Defendant asserted that by refusing his attempts to offer the offense report into evidence under the business record exception to the hearsay rule, the trial judge erred. The Court noted that since the Texas rule is worded almost identically to the federal rule, reliance on federal decisions that interpret the Federal Rules of Evidence is justified. Citing United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975), the Court held that police reports are admissible under the business records exception to the hearsay rule.

(8) Public records and reports.

Cole v. Texas, 839 S.W.2d 798 (Tex. Crim. App. 1990).

Defendant was convicted of aggravated sexual assault. The Court granted discretionary review to determine whether or not forensic chemists of the Department of Public Safety (DPS) are law enforcement personnel within the meaning of Rule 803(8)(B). The Court concluded that full-time chemists of the DPS are law enforcement personnel for purposes of Rule 803(8)(B). The Court held that the absent chemist's reports were matters observed by law enforcement personnel and were inadmissible as an exception to the hearsay rule. Additionally, the Court held that the report of the chemist cannot be admitted under the business records exception pursuant to Rule 803(6).

On rehearing the Court attempted to clarify its original opinion. The Court stated that its opinion is not to be construed to hold that all law enforcement reports are

inadmissible as an 803(8)(B) hearsay exception. The Court also noted that the subjective nature of the testing process is not the only consideration in determining the admissibility of a report under Rule 803(8)(B). Because reports prepared in contemplation of litigation are inherently unreliable due to the maker's bias, the trial court must give consideration to the adversarial context in which the relevant tests were conducted.

(24) Statement against interest.

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

Defendant was convicted of delivering cocaine. The Court granted discretionary review to consider whether or not the Court of Appeals applied an incorrect standard when it determined that statements against penal interest were sufficiently corroborated to allow admission pursuant Rule 803(24). The Court stated that the first inquiry is whether or not the statement tended to expose the declarant to criminal liability. The Court further stated that while no definitive test exists to gauge the existence of corroborating circumstances for purposes of Rule 803(24), several factors may provide guidance in the inquiry. These factors include 1) whether or not the guilt of the declarant is inconsistent with the guilt of the accused, 2) whether or not the declarant was so situated that he might have committed the crime, 3) the timing of the declaration and its spontaneity, and 4) the existence of independent corroborating facts.

Moreover, the trial court may consider the evidence which undermines the reliability of the statement as well as evidence corroborating its trustworthiness as long as the trial court is careful not to engage in weighing the credibility of the in court witness. The burden lies with the party seeking to admit the statement. Because the

evidence of corroborating circumstances must clearly indicate trustworthiness, the test is not an easy one.

Schaffer v. State, 775 S.W.2d 111 (Tex. Crim. App. 1989).

Defendant was found guilty of possession of a controlled substance. The Court of Appeals reversed the conviction. The Court granted discretionary review to determine whether or not the trial court improperly admitted hearsay evidence before the jury. At trial Defendant stated that he worked with an Officer Seals to determine whether or not Defendant was being truthful. Then, upon an Officer Segovia taking the witness stand, the prosecutor asked him whether or not had an opportunity to speak with Officer Seals. Officer Segovia stated that he had. The prosecutor then asked, “without telling us what he told you, Officer Segovia, would you, at this time, ask the State to drop charges against Mr. Schaffer?” Officer Segovia said that he would not.

The Court affirmed the reversal of Defendant’s conviction. The Court stated that where there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom, a party may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly. The word, *statement*, as defined in Rule 801(a), necessarily includes proof of the statement whether the proof is direct or indirect.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(b)(1) Former testimony.

Jones v. State, 843 S.W.2d 487 (Tex. Crim. App. 1992).

Defendant was convicted of capital murder. The Court considered whether or not a witness’ grand jury testimony may be admitted when proffered by the defendant

under Rule 804(b)(1). The Defendant alleged that the trial court committed reversible error by refusing to admit the grand jury testimony of a witness who, when called by Defendant at trial, asserted her Fifth Amendment privilege against self-incrimination and refused to testify. Defendant contended that the testimony was hearsay; however, because the witness was unavailable to him as a witness, and her testimony was given at a former grand jury hearing, it was an exception to the hearsay rule.

The Court stated that under Rule 804 a witness is rendered unavailable when the witness invokes the Fifth Amendment privilege. Moreover, grand jury proceedings are hearings on the allegation brought against a defendant and satisfy the requirement that the testimony be given at another hearing of the same or a different proceeding. Therefore, grand jury testimony of a witness who asserted the Fifth Amendment privilege should have been admitted under the former testimony exception to the hearsay rule.

The Court further noted that Defendant's out-of-court statements to the witness were hearsay, and it was not abuse of discretion for the trial court to exclude the entire transcript of the witness' grand jury testimony where the Defendant did not specify which portion he sought to admit. Inadmissible hearsay testimony does not become admissible because it is contained within an admissible document or transcript.