Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

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

For purposes of relevance analysis, "fact in consequence" includes either elemental fact or evidentiary fact from which elemental fact can be inferred. Rankin v. State (Cr.App. 1996) 974 S.W.2d 707, opinion withdrawn in part on reconsideration, on remand 995 S.W.2d 210, petition for discretionary review refused.

Evidentiary fact that stands wholly unconnected to elemental fact is not "fact of consequence" for purposes of relevancy analysis. Rankin v. State (Cr.App. 1996) 974 S.W.2d 707, opinion withdrawn in part on reconsideration, on remand 995 S.W.2d 210, petition for discretionary review refused.

Party may introduce evidence where it logically serves to make more probable or less probable elemental fact; where it serves to make more probable or less probable evidentiary fact that inferentially leads to elemental fact; or where it serves to make more probable or less probable defensive evidence that undermines elemental fact. Rankin v. State (Cr.App. 1996) 974 S.W.2d 707, opinion withdrawn in part on reconsideration, on remand 995 S.W.2d 210, petition for discretionary review refused.

Decision whether to admit evidence rests within discretion of trial court. E.I. du Pont de Nemours and Co., Inc. v. Robinson (Sup. 1995) 923 S.W.2d 549, rehearing overruled.

Trial court commits error in admission and exclusion of evidence only if it acts in unreasonable or arbitrary manner, or acts without reference to any guiding principles. Fredericksburg Industries, Inc. v. Franklin Intern., Inc. (App. 4 Dist. 1995) 911 S.W.2d 518, rehearing denied, writ denied, rehearing of writ of error overruled.

Trial court in employee's negligence suit against employer erred in not instructing jury panel to disregard statement of plaintiff's counsel during voir dire which informed jury panel that employer had decided not to elect coverage under the workers' compensation law, as statement was not relevant to any issue in the action. FFP Operating Partners, L.P. v. Love (App. 6 Dist. 1994) 884 S.W.2d 898.

After proper objection has been raised to evidence of extraneous act, trial court must determine whether proffered evidence is relevant; if relevant, evidence is admissible unless opponent shows that it should be excluded for some other reason. McLellan v. Benson (App. 1 Dist. 1994) 877 S.W.2d 454.
Trial court errs in excluding relevant evidence unless some rule or principle requires its exclusion. Durbin v. Dal-Briar Corp. (App. 8 Dist. 1994) 871 S.W.2d 263, rehearing overruled, application for writ of error filed, writ denied.

Rule excluding relevant evidence must be supported by good cause and solid policy reasons. Durbin v. Dal-Briar Corp. (App. 8 Dist. 1994) 871 S.W.2d 263, rehearing overruled, application for writ of error filed, writ denied.

All relevant evidence is admissible unless its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. Jones v. Red Arrow Heavy Hauling, Inc. (App. 9 Dist. 1991) 816 S.W.2d 134, writ denied, rehearing of writ of error overruled.

Letter written by patient's attorney to patient's family physician relating to physician's alleged negligence in treating patient for condition that gave rise to her medical malpractice action against hospital and another physician was relevant and admissible in that action. Eoff v. Hal and Charlie Peterson Foundation (App. 4 Dist. 1991) 811 S.W.2d 187.

In action alleging conspiracy to cause buyer to pay for oil which was not delivered, exclusion of defendants' expert testimony as to condition of inside of "drop meter" used to measure amount of oil delivered was improper, even if expert's knowledge of inside of meter was improperly acquired, and did not constitute harmless error, where buyer's case relied greatly on evidence that meter showed failure to deliver promised oil, the expert testimony was not cumulative and dealt with rebuttal of the most convincing portion of buyer's case, defendants denied under oath any wrongdoing, and defendants had explanations for all the circumstantial evidence indicating wrongdoing. Sims v. Cosden Oil & Chemical Co. (App. 11 Dist. 1983) 663 S.W.2d 70, ref. n.r.e.

1.3. Motive

Court did not abuse its discretion in admitting evidence of details of defendant's tax debt to Internal Revenue Service where state, in an effort to show intent and motive for defendant's theft, showed use of the money which he allegedly stole, including its use to pay taxes even though defendant claimed that fact that there were tax liens was immaterial. Skillern v. State (App. 3

Dist. 1994) 890 S.W.2d 849, rehearing overruled, petition for discretionary review refused.

Motive is circumstance indicating guilt, and that defendant stood to receive financial gain from the offense is evidence of motive. Haddad v. State (App. 5 Dist. 1993) 860 S.W.2d 947, petition for discretionary review refused.

Evidence showing defendant's prior misconduct of infidelity was admissible in prosecution for murder of defendant's wife to show motive and was relevant to issue of motive since defendant denied that he was having marital troubles. McIntosh v. State (App. 5 Dist. 1993) 855 S.W.2d 753, petition for discretionary review refused.

Statements of witnesses in prosecution of defendant for murder of his wife concerning defendant's infidelity were evidence on substantive issues, relating to motive, and were not used solely for impeachment purposes despite contention that there was no evidence that defendant's wife knew about acts of infidelity, as jury could infer knowledge from evidence that defendant and wife began having uncharacteristic arguments during a period of a few weeks before the murder and that wife began spending time reviewing her husband's personal books at his office. McIntosh v. State (App. 5 Dist. 1993) 855 S.W.2d 753, petition for discretionary review refused.

Testimony of murder victim's spouse regarding status and contents of community estate was admissible, in prosecution of defendant for soliciting third parties to murder victim, as relevant to motive behind defendant's solicitations, i.e., his expectation of receiving portion of community estate. McDuffie v. State (App. 9 Dist. 1993) 854 S.W.2d 195, petition for discretionary review refused.

Motive for commission of offense is relevant as circumstance tending to prove commission of offense; however, to be admissible as proof of motive, proposed testimony must fairly tend to raise inference in favor of existence of motive on part of accused to commit alleged offense for which he is on trial. Young v. State (App. 7 Dist. 1992) 837 S.W.2d 185, rehearing denied, review granted, reversed 843 S.W.2d 570.

Evidence which demonstrates presence of motive on part of accused is admissible if it is relevant as circumstance tending to prove commission of offense. Gosch v. State (Cr.App. 1991) 829 S.W.2d 775, rehearing denied, certiorari denied 113 S.Ct. 3035, 509 U.S. 922, 125 L.Ed.2d 722, habeas corpus denied.

Efforts of accused to avoid future incarceration are admissible to

show motive for committing seemingly senseless murder. Gosch v. State (Cr.App. 1991) 829 S.W.2d 775, rehearing denied, certiorari denied 113 S.Ct. 3035, 509 U.S. 922, 125 L.Ed.2d 722, habeas corpus denied.

Accused may not generally bring in evidence that third person may have had motive to commit crime with which accused is charged unless third person can be linked to crime. Jones v. State (App. 2 Dist. 1992) 825 S.W.2d 529, petition for discretionary review refused.

Evidence of street value of marijuana seized from defendant was relevant to show defendant's motive for growing marijuana as well as his control and management over it and was admissible in trial on charge of possession of marijuana. Martin v. State (App. 10 Dist. 1992) 823 S.W.2d 726, petition for discretionary review refused.

Evidence that two men with defendant had machine guns was relevant to show defendant's control over marijuana and his knowledge that it was marijuana so as to be admissible in trial on charges of unlawful possession of marijuana. Martin v. State (App. 10 Dist. 1992) 823 S.W.2d 726, petition for discretionary review refused.

Evidence of settlement of widow's claim for death benefits with workers' compensation carrier prior to bringing action against employer for breach of contract with decedent by withholding sums from paychecks for purpose of obtaining workers' compensation coverage, and then failing to obtain coverage, was not relevant and was inadmissible, and erroneous admission of the evidence was so prejudicial as to cause rendition of improper judgment. Jones v. Red Arrow Heavy Hauling, Inc. (App. 9 Dist. 1991) 816 S.W.2d 134, writ denied, rehearing of writ of error overruled.

All relevant evidence is admissible unless its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. Jones v. Red Arrow Heavy Hauling, Inc. (App. 9 Dist. 1991) 816 S.W.2d 134, writ denied, rehearing of writ of error overruled.

Evidence of motive is always admissible as circumstance indicating guilt. Miranda v. State (App. 4 Dist. 1991) 813 S.W.2d 724, petition for discretionary review refused.

In prosecution for murder of defendant's husband, proof via paternity test results that husband was not natural father of defendant's child was probative value of motive, as defendant was made aware that results of test would be available about two weeks before murder, and results could have seriously affected defendant's remaining beneficiary on husband's life insurance

policy and share she might receive from husband's personal injury settlement; further, as defendant did not sustain her burden of showing that probative value of evidence was substantially outweighed by danger of unfair prejudice, it was properly admitted. Miranda v. State (App. 4 Dist. 1991) 813 S.W.2d 724, petition for discretionary review refused.

Letter written by patient's attorney to patient's family physician relating to physician's alleged negligence in treating patient for condition that gave rise to her medical malpractice action against hospital and another physician was relevant and admissible in that action. Eoff v. Hal and Charlie Peterson Foundation (App. 4 Dist. 1991) 811 S.W.2d 187.

Evidence of defendant's alleged sexual assault of rebuttal witness was inadmissible to rebut defendant's theory on cross-examination that rebuttal witness falsely accused defendant in order to divert suspicion from himself; defensive theory was collateral matter. Celeste v. State (App. 12 Dist. 1991) 805 S.W.2d 579.

Testimony establishing motive for someone other than defendant to commit murders was not admissible in murder prosecution, absent evidence tending to link the other person to the murders. Spence v. State (Cr.App. 1990) 795 S.W.2d 743, rehearing denied, certiorari denied 111 S.Ct. 1339, 499 U.S. 932, 113 L.Ed.2d 271, denial of habeas corpus affirmed 80 F.3d 989, certiorari denied 117 S.Ct. 519, 519 U.S. 1012, 136 L.Ed.2d 407.

Murder victim's diary, which detailed victim's affair with defendant, her desire to have his baby, and her frustration with his failure to leave his wife and come to her, was relevant to motive in murder trial despite facts that recording dates were more than one year prior to victim's death, where defendant denied having an affair with victim. Dowler v. State (App. 8 Dist. 1989) 777 S.W.2d 444, petition for discretionary review refused, rehearing on petition for discretionary review denied.

Evidence that defendant was on federal parole and knew that he had outstanding warrant for parole violations was admissible in guilt/innocence phase of capital murder prosecution to show that defendant had motive for shooting police officer with officer's service revolver in order to avoid apprehension. Valdez v. State (Cr.App. 1989) 776 S.W.2d 162, rehearing denied, rehearing dismissed, certiorari denied 110 S.Ct. 2575, 495 U.S. 963, 109 L.Ed.2d 757, habeas corpus granted 93 F.Supp.2d 769.

Testimony by waitress that defendant had made callous, joking postmortem references to his deceased wife and expressed desire to divest himself of sons was relevant evidence of motive and state of mind in prosecution for murder of eight-and one-half-month pregnant

wife. Huffman v. State (App. 8 Dist. 1989) 775 S.W.2d 653, petition for discretionary review refused.

In prosecution which resulted in conviction of attempted capital murder, testimony that defendant told acquaintance he did what he had to do, because he didn't want to go back to jail, was admissible to establish motive and provide jury with explanation for otherwise meaningless shooting. Smith v. State (App. 14 Dist. 1989) 774 S.W.2d 280.

Evidence of murder victim's wife's marital infidelities offered by defendant to show wife's motive to murder victim was inadmissible as it was highly speculative that marital infidelity, standing alone, created homicidal motive. Casterline v. State (App. 13 Dist. 1987) 736 S.W.2d 207, petition for discretionary review refused.

Testimony of mother, who was subject of alleged conspiracy to commit capital murder for which son was charged, relating to character and extraneous act of defendant's having sent Halloween card to mother implying that she was a bitch was relevant to issue of hostility and ill will which son felt toward parents, and of specific hatred for mother, and thus was admissible to show son's motive in arranging for mother's murder. Mehaffey v. State (App. 6 Dist. 1987) 723 S.W.2d 798, petition for discretionary review refused.

1.5. Intent

Hand-written letter found in glove compartment of car that defendant was driving was relevant evidence in trial for possession of more than five but less than 50 pounds of marijuana, where primary dispute was whether defendant knowingly or intentionally possessed contraband found in car, defendant claimed to be on his way to meet person named Ramon when he was apprehended, letter indicated that "Ramon" would wait with author for addressee's arrival, and inspector testified that defendant seemed to anticipate letter's wording and corrected inspector's reading of it. Menchaca v. State (App. 8 Dist. 1995) 901 S.W.2d 640, petition for discretionary review refused.

Where state alleged that defendant possessed controlled substance with intent to deliver, state had burden of proving, as element of offense, specific intent to distribute narcotics; all evidence relevant to that issue was admissible. Puente v. State (App. 4 Dist. 1994) 888 S.W.2d 521.

Evidence that defendant was present at premises that was in possession of known drug dealer, who was married to defendant's sister, was relevant to issue of whether defendant merely possessed

narcotics found on premises or instead possessed them with particular intent required for possession with intent to deliver. Puente v. State (App. 4 Dist. 1994) 888 S.W.2d 521.

Affidavit signed by depositor and two witnesses, stating that depositor had stated to witnesses that she wished money she received from sale of certain minerals to be placed in joint account with rights of survivorship, did not tend to make existence of any material fact more or less probable, in action to determine whether bank account was a survivorship account, and, thus, should have been excluded as irrelevant evidence. McCarty v. First State Bank & Trust Co. (App. 6 Dist. 1987) 723 S.W.2d 792, reversed 730 S.W.2d 656.

2. Preexisting relationship

Evidence that shooting victim had abused his son was not relevant to establish prior relationship between victim and defendant, the son's uncle, who claimed self-defense; evidence did not suggest that prior fights between victim and defendant had anything to do with victim's abuse of his son. Buhl v. State (App. 10 Dist. 1998) 960 S.W.2d 927, petition for discretionary review refused, certiorari denied 119 S.Ct. 623, 525 U.S. 1057, 142 L.Ed.2d 561.

Evidence that victim's companion had reported defendant to Crime Stoppers was relevant in murder prosecution as reflecting prior relationship of parties after victim apparently took some of defendant's cocaine. Craig v. State (App. 8 Dist. 1989) 783 S.W.2d 620, petition for discretionary review granted, remanded 825 S.W.2d 128, on remand 847 S.W.2d 434.

Testimony of prison warden that defendant and another inmate were members of prison gang was admissible to show preexisting relationship between defendant and the other inmate, who also had a prominent role in kidnapping of corrections officer. Langley v. State (App. 12 Dist. 1987) 723 S.W.2d 813, petition for discretionary review refused, habeas corpus granted 833 S.W.2d 141.

3. Victim impact

Negative victim impact evidence that murder defendant sought to introduce during punishment phase of trial, suggesting victim's death was not such a loss to society as widow might claim and that victim was not model citizen, was irrelevant to issue of defendant's personal responsibility and moral guilt, and thus was properly excluded. Richards v. State (App. 8 Dist. 1996) 932 S.W.2d 213, petition for discretionary review refused.

Admissibility of "victim impact" evidence, or "reciprocal victim impact" evidence, is governed by state law. Goff v. State (Cr.App.

1996) 931 S.W.2d 537, rehearing denied, certiorari denied 117 S.Ct. 1438, 520 U.S. 1171, 137 L.Ed.2d 545.

Evidence of extent of victim's injuries is relevant if it is probative of element which state must prove in establishing charged offense, but testimony regarding victim's future hardship is generally irrelevant at the guilt/innocence phase. Etheridge v. State (Cr.App. 1994) 903 S.W.2d 1, rehearing denied, certiorari denied 116 S.Ct. 314, 516 U.S. 920, 133 L.Ed.2d 217, habeas corpus dismissed 49 F.Supp.2d 963, dismissed 209 F.3d 718.

In prosecution for capital murder in which state had to prove, in connection with underlying felony of robbery, that defendant intentionally, knowingly or recklessly caused bodily injury to a surviving victim or knowingly threatened her or placed her in fear or imminent bodily injury or death, testimony of physician concerning nature and extent of surviving victim's injuries was relevant and was not improper evidence of hardship and course of treatment. Etheridge v. State (Cr.App. 1994) 903 S.W.2d 1, rehearing denied, certiorari denied 116 S.Ct. 314, 516 U.S. 920, 133 L.Ed.2d 217, habeas corpus dismissed 49 F.Supp.2d 963, dismissed 209 F.3d 718.

Victim impact evidence is generally admissible if it pertains to accused's personal responsibility and moral guilt. Ortiz v. State (App. 8 Dist. 1992) 825 S.W.2d 537.

Testimony of victim's mother about adverse effects of sexual assault upon victim bore sufficient relationship to defendant's personal responsibility and moral guilt in abducting victim and locking her in house for hours while defendant and others raped her repeatedly, as to be admissible. Ortiz v. State (App. 8 Dist. 1992) 825 S.W.2d 537.

Testimony relating to mental trauma experienced by nine-year-old parishioner, upon whom priest was discovered performing fellatio, and upon parishioner's mother had bearing on priest's personal responsibility and his moral guilt, and was therefore admissible in assessing punishment following priest's plea of guilty to aggravated sexual assault; priest knew parishioner and mother well and preyed upon their vulnerabilities as single parent and child and could easily have anticipated impact his betrayal of trust would have on them. Stavinoha v. State (Cr.App. 1991) 808 S.W.2d 76.

Evidence of victim's emotional difficulties following rape, including two suicide attempts, weight gain, and job loss, was irrelevant and inadmissible; defendant simply asserted that he had not raped victim or had sexual intercourse with her at all, and presented alibi witness who testified that witness was with victim

when rape occurred. Brown v. State (Cr.App. 1988) 757 S.W.2d 739.

Assault victim's testimony relating to nature and circumstances of crime and its effect on her was admissible in defendant's prosecution. Killebrew v. State (App. 6 Dist. 1987) 746 S.W.2d 245, petition for discretionary review refused.

4. Circumstances surrounding arrest

Photographic evidence depicting circumstances surrounding defendant's eventual apprehension by police officers investigating bank robbery was admissible as relevant to question of defendant's guilt. Adanandus v. State (Cr.App. 1993) 866 S.W.2d 210, rehearing denied, certiorari denied 114 S.Ct. 1338, 510 U.S. 1215, 127 L.Ed.2d 686, habeas corpus denied 947 F.Supp. 1021, affirmed 114 F.3d 1181.

Generally, state is entitled to admit evidence of circumstances surrounding accused's arrest. Mock v. State (App. 8 Dist. 1992) 848 S.W.2d 215, petition for discretionary review refused.

Knives found on front seat of getaway vehicle were admissible in prosecution for attempted capital murder, even though handgun was used in assault, as evidence of circumstances surrounding defendant's eventual arrest. Mock v. State (App. 8 Dist. 1992) 848 S.W.2d 215, petition for discretionary review refused.

State is generally entitled to show circumstances surrounding arrest. Johnson v. State (App. 14 Dist. 1992) 846 S.W.2d 373, rehearing denied, review granted in part, cause remanded 853 S.W.2d 574, on remand 857 S.W.2d 812, petition for discretionary review granted.

Admission of state's evidence showing circumstances surrounding arrest is reviewed under abuse of discretion standard. Johnson v. State (App. 14 Dist. 1992) 846 S.W.2d 373, rehearing denied, review granted in part, cause remanded 853 S.W.2d 574, on remand 857 S.W.2d 812, petition for discretionary review granted.

State is entitled to put on evidence of what occurred immediately before and after commission of offense, if that evidence is relevant to something at issue in case, and is not inherently prejudicial. Christopher v. State (Cr.App. 1992) 833 S.W.2d 526, on remand 851 S.W.2d 318, petition for discretionary review refused.

Police officer's testimony concerning number of police calls at house and area where defendant was arrested was relevant in narcotics prosecution to show why officers needed a number of patrol cars to investigate possible stripping of stolen car.

Taylor v. State (App. 14 Dist. 1991) 820 S.W.2d 392.

Although defendant should not be punished for collateral crime or simply for being a "criminal," facts and circumstances surrounding commission of offense can be considered by jury. Blackwell v. State (App. 10 Dist. 1991) 818 S.W.2d 134, petition for discretionary review refused.

Evidence that there was warrant for defendant's arrest and that gun used by defendant against peace officer could hold more shells than permitted by law was admissible to show what prompted defendant to flee from officer and to show context of aggravated assault. Blackwell v. State (App. 10 Dist. 1991) 818 S.W.2d 134, petition for discretionary review refused.

Testimony concerning officer's injuries sustained as result of automobile collision which occurred in effecting defendant's arrest was admissible in prosecution for aggravated assault on peace officer to show context of offense; actions occurring between traffic stop and arrest involved continuous transaction with interrelated facts and circumstances. Blackwell v. State (App. 10 Dist. 1991) 818 S.W.2d 134, petition for discretionary review refused.

Gun and newspaper found in automobile which defendant was driving when he was arrested for robbery were admissible and were not so prejudicial as to cause rendition of improper verdict; State was entitled to introduce gun as part of circumstances surrounding defendant's arrest, and whether newspaper was relevant to any issue in case was within trial court's discretion. Paz v. State (App. 13 Dist. 1988) 749 S.W.2d 626, petition for discretionary review refused, rehearing on petition for discretionary review denied.

4.5. Entrapment

While other crimes, wrongs or acts are not admissible to extent they are tendered only for their value as character conformity evidence, they may be admissible either to establish or rebut defense of entrapment to extent they can be said to relevant to issues of "inducement" and/or "persuasion." England v. State (Cr.App. 1994) 887 S.W.2d 902, rehearing on petition for discretionary review denied.

Any evidence tending to make either "inducement" or "persuasion," within meaning of Penal Code section providing for defense of entrapment, more or less likely than it would be without that evidence is admissible under rule rendering relevant evidence generally admissible in criminal prosecution. England v. State (Cr.App. 1994) 887 S.W.2d 902, rehearing on petition for discretionary review denied.

5. Self-defense

Specific acts of violence murder victim may have committed in abusing his son were not admissible to suggest victim was aggressor, absent any other evidence suggesting he was aggressor. Buhl v. State (App. 10 Dist. 1998) 960 S.W.2d 927, petition for discretionary review refused, certiorari denied 119 S.Ct. 623, 525 U.S. 1057, 142 L.Ed.2d 561.

Even if victim had been known to carry weapon, that was not per se violent or aggressive act admissible on self-defense issue in homicide prosecution. Cadoree v. State (App. 14 Dist. 1991) 810 S.W.2d 786, petition for discretionary review refused.

Excluding proffered testimony from police officer, that man killed by gunshot wound to the back associated with reputed drug dealers and was drug runner, that drug dealers in the area were armed, that citizens had warned police to be careful and bring more than one unit in response to calls, and that officer had heard other officers had found weapons at store near which shooting took place, was not abuse of discretion in murder prosecution in which self-defense was argued, despite claim that officer's excluded testimony was relevant to reasonableness of actions in shooting victim in the back. Cadoree v. State (App. 14 Dist. 1991) 810 S.W.2d 786, petition for discretionary review refused.

Defendant's personal perception of severity of aggression against her by her husband was probative of her apprehension of fear of death at time that she shot her husband and was admissible on self-defense issue. Fielder v. State (Cr.App. 1988) 756 S.W.2d 309.

6. Hypnotically enhanced testimony

Procedures utilized by trial court in admitting hypnotically enhanced testimony in murder prosecution conformed substantially to those required by decision indicating that trial court may admit hypnotically recalled testimony if, after consideration of totality of the circumstances, clear and convincing evidence exists that hypnosis did not render witness' posthypnotic memory untrustworthy or substantially impair the ability of the opponent to fairly test witness' recall by cross-examination; after hearing all of the testimony and, presumably, taking dangers of hypnosis into account, trial court overruled defendant's motion to exclude the hypnotically enhanced testimony. Spence v. State (Cr.App. 1990) 795 S.W.2d 743, rehearing denied, certiorari denied 111 S.Ct. 1339, 499 U.S. 932, 113 L.Ed.2d 271, denial of habeas corpus affirmed 80 F.3d 989, certiorari denied 117 S.Ct. 519, 519 U.S. 1012, 136 L.Ed.2d 407.

When using hypnotic recall for witnesses, videotape should be made of all interaction between hypnotist and individual being hypnotized, including not only the hypnosis session, but also prehypnosis interview and posthypnosis discussion, and only the hypnotist and subject should be present at any phase of the session to avoid inadvertent communication by observers to the subject in regards to their expectations, disappointments or surprises. Zani v. State (App. 6 Dist. 1989) 767 S.W.2d 825, petition for discretionary review refused.

In using hypnotically refreshed testimony of witness, free narrative recall procedure, which requires minimal direction from hypnotist, is the technique least likely to introduce inaccuracies and systematic bias, even though it does not totally eliminate risks of confabulation. Zani v. State (App. 6 Dist. 1989) 767 S.W.2d 825, petition for discretionary review refused.

To safeguard against hypnotist's influencing witness under hypnosis by suggestions toward description of specific suspect, hypnotist should have total lack of knowledge of suspect, as he is not in position to bias, unduly influence or contaminate hypnotized person's recollection to the extent hypnotist lacks information. Zani v. State (App. 6 Dist. 1989) 767 S.W.2d 825, petition for discretionary review refused.

Fact that hypnotized witness resisted temptation to fill gap in description of murder suspect by fabricating description of suspect's eyes, although not proving lack of confabulation about other matters, showed that witness was not in a state in which he was willing to supply every detail in order to please hypnotist and weighed in favor of admitting testimony and evidence. Zani v. State (App. 6 Dist. 1989) 767 S.W.2d 825, petition for discretionary review refused.

Hypnotically refreshed testimony, description of suspect, and identification of suspect were admissible in murder trial; hypnotist possessed sufficient expertise to perform hypnosis and used appropriate techniques for type of memory loss involved, there was no indication of overt or subtle cueing or suggestions of answers which would taint identification, and there was sufficient corroborating evidence that defendant was the person behind the counter seen by witness. Zani v. State (App. 6 Dist. 1989) 767 S.W.2d 825, petition for discretionary review refused.

In some instances, hypnotically enhanced testimony may be admissible. Zani v. State (Cr.App. 1988) 758 S.W.2d 233, 77 A.L.R.4th 897, on remand 767 S.W.2d 825, petition for discretionary review refused.

Proponent of hypnotically refreshed testimony must demonstrate to

satisfaction of trial court, outside jury's presence, by clear and convincing evidence, that such testimony is trustworthy. Zani v. State (Cr.App. 1988) 758 S.W.2d 233, 77 A.L.R.4th 897, on remand 767 S.W.2d 825, petition for discretionary review refused.

Factors involved in determining trustworthiness of hypnotic recall include level of training in clinical uses and forensic applications of hypnosis by person performing the hypnosis; hypnotist's independence from law enforcement investigators, prosecution and defense; existence of record of any information given or known by hypnotist concerning case prior to hypnosis session; existence of written or recorded account of facts as the subject remembers them prior to undergoing hypnosis; creation of recordings of all contacts between hypnotist and subject; presence of persons other than hypnotist and subject during any phase of the session, as well as location of session; appropriateness of induction and memory retrieval techniques used; appropriateness of using hypnosis for kind of memory loss involved; and existence of any evidence to corroborate hypnotically enhanced testimony. Zani v. State (Cr.App. 1988) 758 S.W.2d 233, 77 A.L.R.4th 897, on remand 767 S.W.2d 825, petition for discretionary review refused.

Testimony of defense expert should have been entertained by trial court in assessing admissibility of hypnotically enhanced testimony. Zani v. State (Cr.App. 1988) 758 S.W.2d 233, 77 A.L.R.4th 897, on remand 767 S.W.2d 825, petition for discretionary review refused.

If hypnotically enhanced testimony is admitted, opponent should be allowed to adduce expert testimony before jury pointing out both dangers of hypnosis in general, and any perceived defects in the particular hypnotic session. Zani v. State (Cr.App. 1988) 758 S.W.2d 233, 77 A.L.R.4th 897, on remand 767 S.W.2d 825, petition for discretionary review refused.

7. Psychiatric evidence

Defendant's conclusory testimony, that he repeatedly cut his wife's throat with pocket knife and wanted her dead because he felt frustrated, enraged, scared, and threatened, was insufficient direct evidence to raise triable issue of fact as to whether he was victim of family violence inflicted by his wife, and thus trial court properly refused to admit expert testimony that defendant reasonably believed that deadly force was necessary to protect himself from his wife because defendant suffered from dependent personality disorder. McDonald v. State (App. 4 Dist. 1995) 911 S.W.2d 798, rehearing overruled, petition for discretionary review dismissed.

Psychiatrist's rebuttal testimony at punishment phase of attempted

murder trial, in support of his conclusion that defendant was unsuitable or poor candidate for probation, was relevant to defendant's likely ability to follow the law in the future, and his testimony that defendant was not a victim of battered wife syndrome also had bearing on punishment to extent it may have deflated mitigating impact of psychotherapist's contrary testimony. Ortiz v. State (Cr.App. 1992) 834 S.W.2d 343, on remand 846 S.W.2d 165.

Physician's testimony that defendant's problem which caused charged sexual assault was alcohol and drug abuse and that problem would be manageable over ten-year period of probation was relevant to defendant's application for probation and should have been admitted, at punishment phase of trial. Wilkerson v. State (App. 12 Dist. 1987) 766 S.W.2d 795, petition for discretionary review refused, rehearing on petition for discretionary review denied.

Trial court's error in excluding physician's expert testimony that defendant's "problem" would be manageable over ten-year period of probation, offered at punishment phase of aggravated sexual assault prosecution, was not harmless beyond reasonable doubt. Wilkerson v. State (App. 12 Dist. 1987) 766 S.W.2d 795, petition for discretionary review refused, rehearing on petition for discretionary review denied.

In deciding whether evidence of mental illness or disturbance which occurred prior to event in question should be admitted into evidence, great deference should be given trial judge in its determination of which and to what extent collateral evidence on that issue should be admitted. Munoz v. State (App. 13 Dist. 1988) 763 S.W.2d 30, petition for discretionary review refused.

8. Identity

In-court identification of codefendant, in jury's presence, was not reversible error where defendant himself mentioned codefendant's presence when he was arrested and thus made the identification relevant and admissible, even though codefendant was brought into courtroom in shackles, dressed in jail clothes, and guarded by two deputy sheriffs. Garcia v. State (Cr.App. 1994) 919 S.W.2d 370, rehearing granted, on rehearing.

State did not act improperly in bolstering complainant's in-court identification of defendant as one of the robbers after complainant's identification of defendant was impeached; officer's testimony properly rehabilitated complainant's testimony after his powers of observation were impeached by the defense. Jones v. State (App. 14 Dist. 1992) 833 S.W.2d 634, petition for discretionary review refused.

Defendant put his identity in issue by presenting alibi defense to

charge of aggravated robbery; hence, evidence of extraneous offense was admissible to prove identity, where crimes shared unique, distinguishing, common characteristics. Poullard v. State (App. 1 Dist. 1992) 833 S.W.2d 273, petition for discretionary review refused.

Evidence that defendant had been victim of misidentification in two strikingly similar and contemporaneous cases of indecent exposure was relevant and admissible to support alibi defense of mistaken identity; extraneous incidents had sufficiently similar modus operandi to be admissible and evidence of prior positive identifications would have been admissible if State had offered it to rebut alibi defense. Renfro v. State (App. 14 Dist. 1992) 822 S.W.2d 757, rehearing denied, petition for discretionary review refused.

In-court identification is always admissible unless it is shown by clear and convincing evidence that it was tainted by improper pretrial identification procedures. Bethune v. State (App. 14 Dist. 1991) 821 S.W.2d 222, petition for discretionary review granted, affirmed 828 S.W.2d 14.

In-court identification is inadmissible if pretrial identification procedure is impermissibly suggestive and suggestive procedure gives rise to substantial likelihood of irreparable misidentification. Bethune v. State (App. 14 Dist. 1991) 821 S.W.2d 222, petition for discretionary review granted, affirmed 828 S.W.2d 14.

Photographic array from which defendant was identified by complainant was not impermissibly suggestive, and did not create substantial likelihood of misidentification; complainant did not notice several differences pointed out by defendant, array consisted of photographs of six black men of similar age and build, who were all wearing casual shirts or athletic type T-shirts, and complainant testified that her selection of defendant's photographs were based solely upon her memory of him from attack. Bethune v. State (App. 14 Dist. 1991) 821 S.W.2d 222, petition for discretionary review granted, affirmed 828 S.W.2d 14.

Although fact that previous robbery in which defendant was misidentified as perpetrator was located close to scene of robbery-murder of which defendant stood accused was relevant to issue of whether crimes were committed by one person, evidence of time it took to travel between two scenes was inadmissible, inasmuch as the two crimes took place a month apart. Pierce v. State (Cr.App. 1989) 777 S.W.2d 399, rehearing dismissed, certiorari denied 110 S.Ct. 2603, 496 U.S. 912, 110 L.Ed.2d 283.

Although fact that capital murder defendant had been misidentified

by victim of previous robbery as perpetrator of that robbery was relevant to issue of whether defendant was misidentified in present case, defendant was not entitled to have indictment for previous robbery admitted to show that State had mistakenly given eyewitness testimony enough credence to indict defendant in previous case, where defendant had victim testify in present case as to misidentification in previous case and State did not contend that victim's identification in previous case was correct. Pierce v. State (Cr.App. 1989) 777 S.W.2d 399, rehearing dismissed, certiorari denied 110 S.Ct. 2603, 496 U.S. 912, 110 L.Ed.2d 283.

Police description of male defendant in female attire was relevant on issue of identification in prosecution for delivery of cocaine; during all contacts with police, defendant held himself out to be woman and was referred to in police officer's testimony as a woman, but at trial defendant apparently dressed as male. Cruz v. State (App. 14 Dist. 1988) 762 S.W.2d 624.

9. Remoteness in time

Evidence concerning sexual incident involving child victim six years before charged offense was irrelevant in sexual assault prosecution. Jessup v. State (App. 2 Dist. 1993) 853 S.W.2d 141, rehearing denied, petition for discretionary review refused.

Bankruptcy petition filed by defendant's financing company was not so remote in time to be inadmissible in defendant's theft of money trial where petition was filed 40 days after defendant accepted last of 11 advance fee payments which provided basis for criminal charges; defendant accepted fee commitment payments after agreeing to provide financing to applicants but never made loans and often did not return all of the advance commitment fees. De La Garza v. State (App. 14 Dist. 1988) 762 S.W.2d 899, writ refused.

10. Demonstrative evidence

Testimony of police officer regarding results of horizontal gaze nystagmus (HGN) test which was performed on motorist at time of arrest was properly admitted in prosecution for driving while intoxicated (DWI); principal issue was whether or not motorist was intoxicated when he was arrested, officer testified that he was qualified expert in administering test and that motorist had failed test, and nothing in record indicated that danger of unfair prejudice, undue delay, or presentation of cumulative evidence existed. Lewis v. State (App. 13 Dist. 1996) 933 S.W.2d 172, petition for discretionary review refused.

In order to be admissible, experiment or demonstration must be conducted under conditions that are similar to event to be duplicated. Lewis v. State (App. 13 Dist. 1996) 933 S.W.2d 172,

petition for discretionary review refused.

Trial court has discretion to admit or exclude experiments or demonstrations, and appellate review is limited to whether trial court abused its discretion. Lewis v. State (App. 13 Dist. 1996) 933 S.W.2d 172, petition for discretionary review refused.

Defendant's proposed "sniff test," in which arresting officers would be tested in courtroom to determine whether the could detect difference in odor between cups of alcoholic and nonalcoholic beer, was not substantially similar to events on night of defendant's arrest for driving while intoxicated (DWI), on which police had contended that defendant had put alcoholic beer into nonalcoholic beer bottles, to be considered probative, and trial court properly refused to allow test, even though officers testified about test in which they poured alcoholic beer into nonalcoholic beer bottle; any demonstration would have been irrelevant and misleading, and defendant had already conducted thorough cross-examination of officers. Lewis v. State (App. 13 Dist. 1996) 933 S.W.2d 172, petition for discretionary review refused.

Trial court did not abuse discretion, at defendant's trial for possessing liquor with intent to sell without a proper permit and for permitting consumption of alcohol at a prohibited time, in denying defendant's request to allow jury members to smell or taste concoctions he had prepared as demonstrative evidence to show that the liquids seized by Alcoholic Beverage Commission agent were in fact nonalcoholic; trial court allowed jury to see what the containers looked like, and thus they were properly used as demonstrative evidence. Kaldis v. State (App. 1 Dist. 1996) 926 S.W.2d 771, petition for discretionary review refused.

When demonstrative evidence is admitted, jury should be instructed that the object is not the object used in the commission of the crime and is to be considered solely as evidence that demonstrates or illustrates what the object used in the offenses looked like. Kaldis v. State (App. 1 Dist. 1996) 926 S.W.2d 771, petition for discretionary review refused.

When key issue in case is whether knife was used in deadly manner, knife substantially like one allegedly used in attack is admissible as demonstrative evidence. Johnson v. State (App. 2 Dist. 1996) 919 S.W.2d 473, rehearing overruled, petition for discretionary review refused.

Demonstrative knife with blade of length and size similar to knife defendant was charged with using was admissible, in prosecution for aggravated robbery with deadly weapon; key issue was whether knife used in robbery was used in deadly manner, original knife would have been admissible if available, and victim testified that

demonstrative knife's blade was substantially same as one allegedly used by his assailant. Johnson v. State (App. 2 Dist. 1996) 919 S.W.2d 473, rehearing overruled, petition for discretionary review refused.

It is within trial court's discretion to admit into evidence similar type weapon or instrument used in commission of offense as demonstrative evidence to jury in understanding oral testimony adduced at trial. Fletcher v. State (App. 1 Dist. 1995) 902 S.W.2d 165, petition for discretionary review refused.

In prosecution for aggravated robbery, picture of firearm which complainant testified looked similar to gun defendant used, was admissible for demonstrative purposes only. Fletcher v. State (App. 1 Dist. 1995) 902 S.W.2d 165, petition for discretionary review refused.

Defendant in prosecution for driving while intoxicated was not denied his rights of due process or due access to the courts through exclusion of in-court demonstrations as to which no predicate was laid to test reliability. Baker v. State (App. 14 Dist. 1994) 879 S.W.2d 218, petition for discretionary review refused.

Admission of demonstrative evidence rests with the sound discretion of the trial court, and court's discretion in deciding whether proper predicate has been laid for admission of the evidence is very broad. Baker v. State (App. 14 Dist. 1994) 879 S.W.2d 218, petition for discretionary review refused.

Demonstrative evidence must be properly identified and authenticated in order to be admissible, and the proffered evidence must be relevant to the issues at hand. Baker v. State (App. 14 Dist. 1994) 879 S.W.2d 218, petition for discretionary review refused.

In prosecution for driving while intoxicated, defendant's demonstrations involving reading paragraph in newspaper, and performing one-leg stand and other coordination exercises, proffered so that judge could compare how defendant did them with what was seen on videotape, were inadmissible, as no predicate had been laid to test reliability of the demonstrations, and demonstrations were not evidence in that they had no probative value, where there was no showing that demonstrations were done in manner in which defendant normally performed such tests. Baker v. State (App. 14 Dist. 1994) 879 S.W.2d 218, petition for discretionary review refused.

Pistol identical except for barrel length with murder weapon, which had not been found, could be admitted as demonstration

evidence in homicide case; defendant had claimed that murder weapon discharged accidentally, and amount of effort required to pull trigger was important issue in case. Lynn v. State (App. 13 Dist. 1993) 860 S.W.2d 599, petition for discretionary review refused.

In prosecution for driving while intoxicated, where state had placed defendant's lack of control of his movements in issue, evidence of his scars and injury to his left foot and leg should have been allowed before jury. Sorensen v. State (App. 9 Dist. 1993) 856 S.W.2d 792.

Visual, real, demonstrative evidence has evidentiary, probative value and is admissible at trial of criminal case if it tends to resolve some issue in case and is relevant. Sorensen v. State (App. 9 Dist. 1993) 856 S.W.2d 792.

Discretion to admit or not admit demonstrative evidence must rest in trial judge; error does not occur unless court abuses that discretion. Vollbaum v. State (App. 10 Dist. 1992) 833 S.W.2d 652, petition for discretionary review refused.

Styrofoam model of a woman's head was admissible in homicide prosecution arising from fatal shooting of defendant's wife; trial court could determine that model would assist jury in understanding testimony of medical examiner relating to positions of gun and victim when gun was fired. Vollbaum v. State (App. 10 Dist. 1992) 833 S.W.2d 652, petition for discretionary review refused.

Trial court did not abuse its discretion in permitting State to make physical demonstration, before jury in capital murder prosecution, of techniques used to disarm police officers to show how defendant might have been able to obtain officer's weapon and use it to shoot officer; there was already sufficient evidence to infer possibility that, during struggle, defendant had been able to disarm officer and use his weapon to kill him. Valdez v. State (Cr.App. 1989) 776 S.W.2d 162, rehearing denied, rehearing dismissed, certiorari denied 110 S.Ct. 2575, 495 U.S. 963, 109 L.Ed.2d 757, habeas corpus granted 93 F.Supp.2d 769.

Pistol alleged to be "same or similar" weapon used in robbery of liquor store was admissible in defendant's prosecution for intentionally and knowingly, while in course of committing theft of property, threatening and placing complainant in fear of eminent bodily injury and death by using and exhibiting deadly weapon. Jackson v. State (App. 9 Dist. 1989) 772 S.W.2d 459.

Firearm placed in evidence only for demonstration purposes was relevant to case against defendant charged with aggravated robbery involving use of firearm. Tatmon v. State (App. 9 Dist. 1989) 767 S.W.2d 945, petition for discretionary review refused.

10.6. Cross examination

Determination of admissibility of evidence elicited by questions on cross- examination is determination of relevancy of evidence. Draheim v. State (App. 4 Dist. 1996) 916 S.W.2d 593, petition for discretionary review refused.

11. Impeachment

Trial court erred in excluding defendant's proffer of witness' testimony that arresting officers returned to location of arrest and searched it, where trial court was aware that evidence was offered for purpose of impeaching officers, upon whose testimony conviction rested; evidence was clearly in context of allegations against defendant because it took place at same location as arrest and within close proximity after arrest. Wells v. State (App. 6 Dist. 1994) 880 S.W.2d 185, petition for discretionary review refused.

Evidence showing bias on part of witness is relevant and admissible unless it is excluded by Constitution, statute, or rule, or its probative value is substantially outweighed by its prejudicial effect. McKnight v. State (App. 2 Dist. 1994) 874 S.W.2d 745.

Trial court has considerable discretion as to how bias on part of witness is proven and as to what collateral evidence can be introduced for that purpose. McKnight v. State (App. 2 Dist. 1994) 874 S.W.2d 745.

Generally, all facts tending to show bias, interest, prejudice, or any other motive, or mental state of witness, which fairly considered and construed might even remotely tend to affect his credibility, should be admitted. Green v. State (App. 13 Dist. 1992) 831 S.W.2d 89, rehearing overruled.

Defendant's sister's having come to his defense in the past was insufficient to show any improper scheme or plan by sister which might have indicated a friendship or leaning toward any party or issue in aggravated assault prosecution; therefore, it was improper for trial court to permit state to cross-examine sister regarding her coming to defendant's aid when he had been in trouble in the past. Green v. State (App. 13 Dist. 1992) 831 S.W.2d 89, rehearing overruled.

Defendant's testimony from his prior trial was relevant to show that defendant had given untrue explanations for events surrounding his wife's death. Bryan v. State (App. 11 Dist. 1991) 804 S.W.2d 648, petition for discretionary review granted, affirmed 837 S.W.2d

637, rehearing on petition for discretionary review denied.

Evidence of assumed name certificates executed by defendant was admissible to impeach his claim that he did not have any knowledge about the real estate business and did not realize that one cannot borrow on one's homestead when he entered into allegedly fraudulent transaction with another. Villanueva v. State (App. 4 Dist. 1989) 768 S.W.2d 900, petition for discretionary review refused.

12. Drawing or photograph

Evidence that drawing of defendant holding bloody knife was found in his cell provided sufficient connection between drawing and defendant to render drawing relevant and permit state to make argument that it was defendant's drawing, in penalty phase of capital murder trial. Soria v. State (Cr.App. 1996) 933 S.W.2d 46, rehearing denied, certiorari denied 117 S.Ct. 2414, 520 U.S. 1253, 138 L.Ed.2d 179, rehearing denied 118 S.Ct. 5, 521 U.S. 1137, 138 L.Ed.2d 1039.

Any error in excluding photographs of defendant's bed sores, allegedly pertaining to length of appropriate incarceration and future dangerousness, when assessing punishment alternatives for aggravated sexual assault of child and indecency with child, was harmless given that defendant testified at length concerning his bed sores and physical condition. Rodda v. State (App. 2 Dist. 1996) 926 S.W.2d 375, petition for discretionary review refused.

Defendant waived objection to admission of photograph of defendant wearing long dark coat, since, without objection, substantially same evidence was introduced in form of testimony of arresting officer that defendant was taken into custody in long dark coat, coat itself, and defendant's testimony that he was photographed wearing long dark coat and that admitted coat was similar in appearance to his. Ford v. State (Cr.App. 1996) 919 S.W.2d 107, rehearing denied.

In defendant's prosecution for child sexual assault, evidence in form of defendant's statements that child had previously grabbed his penis and had disrobed, and was being forward and was at fault, as well as police officer's testimony regarding defendant's apparent erection while being questioned about child, was relevant to elements of charged offense. Blakeney v. State (App. 3 Dist. 1995) 911 S.W.2d 508.

Photographs of murder victim were not cumulative of other evidence admitted before jury where only two photographs depicted injuries to victim's body, one of which was only of victim's head and upper torso and appeared to have been taken at hospital as victim had various tubes and hospital equipment attached to her. Phipps v.

State (App. 9 Dist. 1995) 904 S.W.2d 955.

Photographs are generally admissible where verbal testimony about the same matter is admissible. Phipps v. State (App. 9 Dist. 1995) 904 S.W.2d 955.

If verbal description of scene would have been admissible, photograph depicting scene is admissible. Garcia v. State (App. 14 Dist. 1995) 901 S.W.2d 724, petition for discretionary review refused.

Decision on admissibility of a photograph is within discretion of trial court. Garcia v. State (App. 14 Dist. 1995) 901 S.W.2d 724, petition for discretionary review refused.

Photographs of victims were probative of relevant issues in murder prosecution and provided jury with information concerning manner of death and identity of killer, and did not lead to cruel and unusual punishment in form of life sentence. Morales v. State (App. 13 Dist. 1995) 897 S.W.2d 424, petition for discretionary review refused.

Photographs of the deceased which are limited in number and reflect the manner of the deceased's death and defendant's mental state are relevant and more probative than prejudicial. Laca v. State (App. 8 Dist. 1995) 893 S.W.2d 171, petition for discretionary review refused.

In murder prosecution, four crime scene photographs of victim were more probative than prejudicial where photographs showed that victim was murdered by multiple blows to the head from variety of weapons including rocks, bats, and pipe, notwithstanding amount of blood shown in some photographs. Laca v. State (App. 8 Dist. 1995) 893 S.W.2d 171, petition for discretionary review refused.

In murder prosecution, six autopsy photographs of victim's head wounds were relevant in connection with doctor's testimony and defendant's confession as to victim's manner of death and, although perhaps duplicative, did not rise to the level of cumulation found impermissible. Laca v. State (App. 8 Dist. 1995) 893 S.W.2d 171, petition for discretionary review refused.

Determination as to admissibility of photographic evidence rests largely in discretion of trial judge. Staley v. State (App. 12 Dist. 1994) 888 S.W.2d 45.

If photographic evidence is relevant to issue on trial, it is not rendered inadmissible merely because it is gruesome or might tend to inflame minds of jury. Staley v. State (App. 12 Dist. 1994) 888 S.W.2d 45.

Photograph of elderly woman burned almost beyond recognition was relevant in murder prosecution to determination of victim's identification, and its probative value outweighed its prejudicial effect, even though nothing in record indicated that any participant in murder was responsible for fire; identification could not be made from body itself or from available records per se and, thus, photograph, identified by neighbor as that of victim, and by physician as person upon whose body he performed autopsy, satisfied state's burden to sufficiently establish identity of body. Rodriguez v. State (App. 7 Dist. 1994) 871 S.W.2d 312, rehearing denied.

Neither photographs of body of husband, with whose murder the defendant was not charged, nor testimony concerning husband's autopsy, was admissible in prosecution of defendant for murder of husband's wife, as that evidence had no logical relationship to consequential fact of defendant's intent to murder wife, sufficiency of which defendant did not challenge; however, error in admitting that evidence was harmless, as it was merely cumulative of testimony jury heard without objection. Rodriguez v. State (App. 7 Dist. 1994) 871 S.W.2d 312, rehearing denied.

Admissibility of photographs should be determined by considering circumstances unique to each case and other available means of proof. Montes v. State (App. 8 Dist. 1994) 870 S.W.2d 643.

If verbal description of injuries is admissible, then photos are admissible to depict that testimony unless probativeness is substantially outweighed by prejudicial effect. Montes v. State (App. 8 Dist. 1994) 870 S.W.2d 643.

Admission of enlarged pictures of murder victim's body and of victim's brain was appropriate as evidence was relevant and material; pictures helped jury to understand technical and difficult medical terminology used by pathologist and to understand different sections and layers of brain to explain type of injuries victim sustained and force it took to inflict them. Ladner v. State (App. 12 Dist. 1993) 868 S.W.2d 417, rehearing denied, petition for discretionary review refused.

Only identification or authentication required for photographs to be admissible is that offered evidence properly represent person, object, or scene in question; this may be testified to not only by photographer, but by any other witness who knows facts, even though witness did not take photograph himself or herself or see it taken. Quinonez-Saa v. State (App. 1 Dist. 1993) 860 S.W.2d 704, petition for discretionary review refused.

Before being admitted into evidence, photographs must ordinarily

be shown to be correct representation of subject at given time. Quinonez-Saa v. State (App. 1 Dist. 1993) 860 S.W.2d 704, petition for discretionary review refused.

Trial judge is to be accorded considerable discretion in ruling on admission or exclusion of photographic evidence. Quinonez-Saa v. State (App. 1 Dist. 1993) 860 S.W.2d 704, petition for discretionary review refused.

Test for admissibility of photos in criminal prosecution is whether there is testimony showing they accurately depict scene. Metoyer v. State (App. 2 Dist. 1993) 860 S.W.2d 673, petition for discretionary review refused.

Autopsy photographs were relevant to show stab wound and condition of upper torso and face of robbery victim and were relevant to establish wounds and abrasions to his body where there was conflicting evidence regarding precise wounds that robbery victim suffered. Sandles v. State (App. 1 Dist. 1993) 857 S.W.2d 932, petition for discretionary review refused.

Trial court did not abuse its discretion in refusing to admit photographs of underground storage tank of buyer of allegedly defective resin used in making dominos, as sponsoring witness said that excluded photographs did not show true condition of tank at time when damage was claimed to have occurred. Reichhold Chemicals, Inc. v. Puremco Mfg. Co. (App. 10 Dist. 1993) 854 S.W.2d 240, rehearing denied, writ denied, rehearing of writ of error overruled.

Admissibility of photograph is conditioned upon its identification by witness as accurate portrayal of facts and on verification by that witness or person with knowledge that photograph is correct representation of such facts. Reichhold Chemicals, Inc. v. Puremco Mfg. Co. (App. 10 Dist. 1993) 854 S.W.2d 240, rehearing denied, writ denied, rehearing of writ of error overruled.

If verbal description of item is admissible, then photograph depicting same is also admissible. Morris v. State (App. 14 Dist. 1992) 833 S.W.2d 624, rehearing denied, petition for discretionary review refused, certiorari denied 113 S.Ct. 1387, 507 U.S. 961, 122 L.Ed.2d 762.

Defendant's presence when photographs of child abuse victim's injury were taken was not required for their admissibility in prosecution for failure to report child abuse. Morris v. State (App. 14 Dist. 1992) 833 S.W.2d 624, rehearing denied, petition for discretionary review refused, certiorari denied 113 S.Ct. 1387, 507 U.S. 961, 122 L.Ed.2d 762.

Provided that a verbal description of body would be admissible, photograph depicting the same is admissible. Matter of D.S. (App. 13 Dist. 1992) 833 S.W.2d 250, rehearing overruled, writ denied.

Photographs of murder victim were admissible in juvenile court action alleging delinquent conduct of murderer, where they were used by pathologist in describing stab wound under victim's nipple, and in describing flesh-type wound behind shoulder. Matter of D.S. (App. 13 Dist. 1992) 833 S.W.2d 250, rehearing overruled, writ denied.

Photographs introduced as part of pathologist's testimony concerning injuries defendant had inflicted on prior victims were admissible to show injuries; photographs accurately depicted what they purported to show, verbal description of subject matter would have been admissible, and probative value was not outweighed by prejudicial effect. Hernandez v. State (Cr.App. 1991) 819 S.W.2d 806, rehearing denied, certiorari denied 112 S.Ct. 2944, 504 U.S. 974, 119 L.Ed.2d 568, denial of habeas corpus affirmed 108 F.3d 554, certiorari denied 118 S.Ct. 447, 522 U.S. 984, 139 L.Ed.2d 383.

Admissibility of photograph is within sound discretion of trial judge, who determines whether exhibit serves proper purpose in enlightenment of jury. Ramirez v. State (Cr.App. 1991) 815 S.W.2d 636, rehearing denied.

Photographs depicting deceased's body from side and in relation to one of alleged murder weapons found on floor, her upper torso and face, and wounds on her neck and body were admissible in prosecution of defendant for capital murder; photographs were probative of manner of deceased's death and of defendant's culpable mental state. Ramirez v. State (Cr.App. 1991) 815 S.W.2d 636, rehearing denied.

Photograph, if properly authenticated, is competent evidence in criminal trial on any subject of which witness' description is proper. Williams v. State (App. 14 Dist. 1991) 814 S.W.2d 163, petition for discretionary review granted, affirmed 893 S.W.2d 549.

Admitting photograph of victim and her three children during voluntary manslaughter prosecution was not error where testimony about victim's children was admitted without objection and photograph was properly authenticated. Williams v. State (App. 14 Dist. 1991) 814 S.W.2d 163, petition for discretionary review granted, affirmed 893 S.W.2d 549.

Photograph in defendant's "pen packet" was relevant to show identity when state introduced pen packet in punishment phase of aggravated robbery prosecution, even though State had already

introduced defendant's fingerprints and testimony showing that fingerprints included in pen packet matched defendant's prints. Mayfield v. State (App. 13 Dist. 1991) 803 S.W.2d 859.

Prejudicial effect of color photographs of victim's body did not greatly outweigh their probative value; only a limited number of photos were offered, those offered related directly to testimony of medical examiner on identification and cause of death, photographs were of normal size and showed decedent's body clothed, and examiner attempted to explain which damage had been caused by gunshot wounds and which damage was caused by animals and decomposition during the month prior to discovery. Goodwin v. State (Cr.App. 1990) 799 S.W.2d 719, rehearing denied, motion granted 111 S.Ct. 902, 498 U.S. 1301, 112 L.Ed.2d 1026, certiorari denied 111 S.Ct. 2913, 501 U.S. 1259, 115 L.Ed.2d 1076.

Photograph showing investigating officer carrying victim's mother over his shoulder failed to illustrate any fact which would tend to establish ill- feeling, bias, motive and animus on part of any witness testifying against defendant, as required for admission of the photograph. Hinojosa v. State (App. 13 Dist. 1990) 788 S.W.2d 594, petition for discretionary review refused.

"Mug shot" of defendant which was taken at time of his arrest for present offense was admissible to show defendant's appearance on or about day of offense, even though photograph showed defendant in custody of county sheriff's department and "inmate" number was held below his face. Davis v. State (App. 9 Dist. 1990) 786 S.W.2d 77, petition for discretionary review refused.

Admission of photograph of defendant taken at time of arrest and showing defendant in custody of sheriff's department with inmate number held below his face did not violate defendant's constitutional right to be presumed innocent. Davis v. State (App. 9 Dist. 1990) 786 S.W.2d 77, petition for discretionary review refused.

Once photograph of codefendant used in photographic lineup was introduced, other photographs used in lineup were relevant and should have been admitted to allow defense counsel opportunity to effectively cross-examine witness. Hill v. State (App. 6 Dist. 1989) 783 S.W.2d 257.

In capital murder prosecution, trial court did not abuse its discretion in refusing to admit architect's drawing of police lineup that was based on police description of heights and weights of people who appeared in lineup with defendant; there was no testimony that drawing accurately portrayed lineup and architect testified that he did not personally observe lineup. Pierce v. State (Cr.App. 1989) 777 S.W.2d 399, rehearing dismissed,

certiorari denied 110 S.Ct. 2603, 496 U.S. 912, 110 L.Ed.2d 283.

12.5. Other offenses

Evidence that defendant sexually molested two girls just before he molested complainant was not relevant in aggravated sexual assault prosecution merely on basis that it tended to show defendant's common scheme or plan, in light of failure to link such evidence to fact of consequence, such as intent. Rankin v. State (Cr.App. 1996) 974 S.W.2d 707, opinion withdrawn in part on reconsideration, on remand 995 S.W.2d 210, petition for discretionary review refused.

Testimony that defendant told witness she was moving because she was in trouble for killing a male with knife was relevant and admissible on charge of murder of child whom defendant had been babysitting, despite defendant's argument that testimony would necessarily have been viewed by jury as improper other crimes evidence; although defendant's alleged description of crime to witness varied from evidence about how child was murdered, jury could have interpreted difference as attempt by defendant to elicit sympathy rather than as reference to extraneous murder. Henderson v. State (Cr.App. 1997) 962 S.W.2d 544, rehearing denied, certiorari denied 119 S.Ct. 437, 525 U.S. 978, 142 L.Ed.2d 357.

In prosecution of cancer center employee for helping his wife to receive paychecks for work she did not perform, testimony of witness that he had performed personal work for defendant on state time while employed at center and falsely filled out time sheets at defendant's direction was relevant, even though witness' offenses occurred two years after offenses alleged in indictment. Willis v. State (App. 14 Dist. 1996) 932 S.W.2d 690.

In child sexual abuse cases, where defendant has denied act, other acts committed by defendant against complainant are generally admissible. Castoreno v. State (App. 4 Dist. 1996) 932 S.W.2d 597, rehearing overruled, petition for discretionary review refused.

In child sexual abuse case, evidence regarding extraneous sexual acts between defendant and third parties is generally inadmissible, although it may be admissible in certain circumstances, e.g., to rebut defense theory that defendant is being framed. Castoreno v. State (App. 4 Dist. 1996) 932 S.W.2d 597, rehearing overruled, petition for discretionary review refused.

In defendant's prosecution for child sexual abuse, in which defendant alleged that victim was confused and angry and was making up allegations against him, evidence pertaining to victim's reports of other abuse by defendant as well as third parties' reports of abuse by defendant would have been admissible over any objection regarding extraneous offenses. Castoreno v. State (App. 4 Dist.

1996) 932 S.W.2d 597, rehearing overruled, petition for discretionary review refused.

Defendant's admission of prior conviction for driving while intoxicated in particular county, which was one offense shown in driving record offered by state, along with defendant's name, age, and physical description in driving record, was sufficient to support finding that defendant was same person named in driving record, for purpose of admitting record in prosecution for driving while intoxicated. Wright v. State (App. 12 Dist. 1995) 932 S.W.2d 572.

Evidence that defendant had agreed to sell LSD to undercover officer on two occasions in months prior to charged offense of delivery of LSD was relevant to entrapment defense and admissible; evidence of prior sales tended to make it more probable that defendant's agreement to make instant sale was not because of persuasive aspect of informant's conduct and was thus relevant to rebut actual inducement element of entrapment defense, and therefore served evidentiary function other than character conformity; abrogating -Houston, 735 S.W.2d 903. England v. State (Cr.App. 1994) 887 S.W.2d 902, rehearing on petition for discretionary review denied.

If evidence of uncharged misconduct is relevant, court must decide if it has relevance apart from its tendency to prove character of person in order to show that he acted in conformity therewith; if it is relevant solely because it supports inference of character conformity, evidence is inadmissible. Harrell v. State (App. 12 Dist. 1992) 885 S.W.2d 433, petition for discretionary review granted, reversed 884 S.W.2d 154.

Evidence of uncharged misconduct may be admissible if trial judge is persuaded that evidence of extraneous offenses tends to establish some elemental fact such as identity or intent, some evidentiary fact such as motive, opportunity or preparation, or if it tends to rebut defensive theory. Harrell v. State (App. 12 Dist. 1992) 885 S.W.2d 433, petition for discretionary review granted, reversed 884 S.W.2d 154.

If opponent of offer of evidence of uncharged misconduct has objected only upon ground that proffered evidence is an extraneous offense or has no relevance beyond character conformity, trial judge should admit evidence if it has relevance apart from character conformity. Harrell v. State (App. 12 Dist. 1992) 885 S.W.2d 433, petition for discretionary review granted, reversed 884 S.W.2d 154.

Evidence of uncharged cocaine sales, offered in prosecution for engaging in organized crime, was relevant to prove intent apart

from its tendency to prove character conformity. Harrell v. State (App. 12 Dist. 1992) 885 S.W.2d 433, petition for discretionary review granted, reversed 884 S.W.2d 154.

Evidence of other wrongful acts is generally admissible if proponent of evidence can convince trial court that admission of such evidence is relevant, apart from tendency to prove conforming character, to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Miller v. State (App. 9 Dist. 1994) 882 S.W.2d 936.

Evidence that defendant attempted to buy .25 caliber ammunition seven to ten days before date of offense, in which bullets of that caliber were used, was relevant and, thus, admissible in felony-murder prosecution. Burks v. State (Cr.App. 1994) 876 S.W.2d 877, rehearing denied, certiorari denied 115 S.Ct. 909, 513 U.S. 1114, 130 L.Ed.2d 791.

Witness' testimony that defendant solicited help in robbery a month prior to date of charged felony-murder, and that witness had overheard incriminating conversation between defendant and alleged accomplices on day prior to date of offense, were admissible as proof of defendant's plans and preparations, and as proof of actions within same transaction as instant offense; testimony did not involve proof of "generic extraneous offenses," as claimed by defendant. Burks v. State (Cr.App. 1994) 876 S.W.2d 877, rehearing denied, certiorari denied 115 S.Ct. 909, 513 U.S. 1114, 130 L.Ed.2d 791.

Admission of evidence of marijuana possession was reversible error in prosecution for cocaine despite other testimony showing defendant's guilt, as result of inherently prejudicial nature of extraneous offense evidence. Garcia v. State (App. 13 Dist. 1994) 871 S.W.2d 769, rehearing overruled, petition for discretionary review refused.

While evidence that defendant had marijuana on his person was arguably related to showing guilty knowledge in prosecution for possession of cocaine, it was not admissible as it truly related only to character conformity. Garcia v. State (App. 13 Dist. 1994) 871 S.W.2d 769, rehearing overruled, petition for discretionary review refused.

Court determines if extraneous offense had any relevance beyond its tendency to prove character of person and to prove that he acted in conformity therewith; if evidence has no relevance other than to show character conformity, it is inadmissible. Garcia v. State (App. 13 Dist. 1994) 871 S.W.2d 769, rehearing overruled, petition for discretionary review refused.

In general, accused may not be tried for collateral crime for being criminal generally, although evidence of other crimes may be admissible if it has relevance apart from its tendency to prove character of person to show that he acted in conformity therewith. Garcia v. State (App. 13 Dist. 1994) 871 S.W.2d 769, rehearing overruled, petition for discretionary review refused.

Defendant charged with murdering customer who had attempted to thwart his robbery of bank was not entitled to introduce evidence of settlement of wrongful death action brought by customer's family against bank, as question of bank teller's alleged contributory negligence in connection with shooting had no bearing on whether defendant acted intentionally in shooting customer. Adanandus v. State (Cr.App. 1993) 866 S.W.2d 210, rehearing denied, certiorari denied 114 S.Ct. 1338, 510 U.S. 1215, 127 L.Ed.2d 686, habeas corpus denied 947 F.Supp. 1021, affirmed 114 F.3d 1181.

When defendant specifically denied committing charged offense or that he would sexually abuse a child, both his parents testified and denied that defendant would ever sexually abuse children, and defendant vigorously maintained he was the victim of a conspiracy engineered by complainant and her mother, rebuttal testimony of defendant's daughter and two nieces as to extraneous offenses committed against them when they were children was admissible. Creekmore v. State (App. 4 Dist. 1993) 860 S.W.2d 880, rehearing overruled, petition for discretionary review refused.

State adequately proved extraneous offenses referred to by undercover officer in rebuttal to defendant's testimony on cross-examination concerning extraneous matters; officer's testimony that Preludin is an "illegal drug" was sufficient to prove extraneous act of selling Preludin to officer for purposes of rebuttal; state was not required to present evidence upon which a conviction could be based such as testimony from chemist who analyzed the pills. Mills v. State (App. 11 Dist. 1993) 847 S.W.2d 453, petition for discretionary review refused.

Evidence that defendant's nickname was "Shanker" was not extraneous offense evidence in murder prosecution arising from stabbing incident. Saenz v. State (App. 8 Dist. 1992) 840 S.W.2d 96, petition for discretionary review refused.

Evidence that defendant used proceeds of burglary to buy cocaine was not so interwoven with and directly connected to burglary to be admissible. Young v. State (App. 7 Dist. 1992) 837 S.W.2d 185, rehearing denied, review granted, reversed 843 S.W.2d 570.

Evidence of other crimes, wrongs, or acts may be admissible if it has relevance apart from its tendency to prove character of person in order to show that he acted in conformity therewith. Young v.

State (App. 7 Dist. 1992) 837 S.W.2d 185, rehearing denied, review granted, reversed 843 S.W.2d 570.

For extraneous conduct to be admissible evidence as part of case on trial, or blended or closely interwoven therewith, conduct must be directly connected with, contemporaneous to and inseparable from offense charged, and relationship must exist between evidence of extraneous transaction and evidence necessary to prove that accused committed crime for which he stands charged. Young v. State (App. 7 Dist. 1992) 837 S.W.2d 185, rehearing denied, review granted, reversed 843 S.W.2d 570.

Testimony of other sexual advances made by defendant against victim was admissible in prosecution for sexual assault of a child to explain the context in which the charged offenses arose and to show a common scheme or plan to sexually assault the victim. O'Hara v. State (App. 3 Dist. 1992) 837 S.W.2d 139, rehearing overruled, petition for discretionary review refused.

Analysis of whether evidence of extraneous offense should be admitted is for trial court in first instance and, absent clear abuse of discretion, the court's decision will not be disturbed on appeal. Poullard v. State (App. 1 Dist. 1992) 833 S.W.2d 273, petition for discretionary review refused.

Rebuttal testimony of trooper that defendant's sister who was witness had been uncooperative in his investigation of defendant for separate hit-and-run felony accident was improper means of introducing extraneous offense in prosecution for aggravated assault with knife and with motor vehicle. Green v. State (App. 13 Dist. 1992) 831 S.W.2d 89, rehearing overruled.

Trial court's error in allowing State to impeach defendant in prosecution for aggravated sexual assault of child with evidence of murder which was committed by person with same name as defendant but which was not committed by defendant was harmful; State significantly impugned defendant's credibility, given his denial of murder conviction and in face of documentary evidence to the contrary, and as a result it was likely jury placed substantial weight upon error and ignored or disbelieved defendant's denial of charged offense. Moore v. State (App. 14 Dist. 1992) 826 S.W.2d 775, petition for discretionary review refused.

Evidence of unadjudicated extraneous offense was admissible at punishment phase of theft trial, where evidence had relevance to rebut defenses of mistake or accident, since defense had attempted to show that defendant was "good samaritan" who was only attempting to help store by pushing cigarette cases out the door. Rasmussen v. State (App. 2 Dist. 1991) 822 S.W.2d 707, rehearing denied, petition for discretionary review refused.

In prosecution for burglary of a habitation, testimony that defendant came to witness' home on evening of burglary and attempted to sell her a television did not relate to extraneous offense, so as to require proper foundation, but, rather, was admissible as evidence of chain of events that led to arrest of defendant near witness' residence. Alvarado v. State (App. 4 Dist. 1991) 818 S.W.2d 100.

Evidence of extraneous sexual assault was relevant to defendant's claim of consent as, standing alone, either the charged offense or the extraneous offense could conceivably have been unintentional, but it strained credibility to assert that two such unintentional incidents occurred. Wiggins v. State (App. 5 Dist. 1989) 778 S.W.2d 877, petition for discretionary review refused.

13. Tape recordings

It is not necessary for admission into evidence of tape recording made by paid informant during purchase of rock cocaine that voices extraneous to transaction itself be identified. Sterns v. State (App. 12 Dist. 1993) 862 S.W.2d 687.

Admission of sound recording is discretionary with trial court. Allen v. State (App. 1 Dist. 1993) 849 S.W.2d 838, rehearing denied, petition for discretionary review refused.

To introduce audio tape recording, state must prove recording device was capable of taking testimony, operator of device was competent to record material, recording is authentic and correct, there were no changes, additions, or deletions made to recording, recording was preserved in proper manner, all speakers were identified, and recorded statements were elicited voluntarily and without inducement. Allen v. State (App. 1 Dist. 1993) 849 S.W.2d 838, rehearing denied, petition for discretionary review refused.

Tape recording of conversation defendant had with undercover law enforcement agent was properly admitted, even though state did not identify all speakers on tape; unidentifiable voices were part of background noise inside hair salon in which conversation and associated crime occurred, and were not related to defendant's prosecution. Allen v. State (App. 1 Dist. 1993) 849 S.W.2d 838, rehearing denied, petition for discretionary review refused.

Tape recording of argument between defendant and wife, made by their daughter, which ended with sound of defendant shooting wife, was properly admitted despite claim that prosecution had not laid a foundation by showing that tape had been in custody of police since being received from daughter; although foundation was not established at time recording was played, foundation was supplied

afterwards by testimony of officers. Prosper v. State (App. 14 Dist. 1990) 788 S.W.2d 625, petition for discretionary review refused.

13.5. Summaries and charts

Admission of timeline produced by plaintiff's expert witness in products liability action against tire manufacturer which clarified sequence of events regarding history of problems created by mismatch of 16-inch tires on 16.5-inch wheels, instance of which had resulted in explosion in which plaintiff was injured, was not abuse of discretion. Uniroyal Goodrich Tire Co. v. Martinez (App. 4 Dist. 1995) 928 S.W.2d 64, rehearing overruled, writ granted, motion overruled, affirmed 977 S.W.2d 328, certiorari denied 119 S.Ct. 1336, 526 U.S. 1040, 143 L.Ed.2d 500.

Trial courts have discretion, in order to aid jury's understanding, to allow use of charts that summarize or even emphasize testimony of witness. Uniroyal Goodrich Tire Co. v. Martinez (App. 4 Dist. 1995) 928 S.W.2d 64, rehearing overruled, writ granted, motion overruled, affirmed 977 S.W.2d 328, certiorari denied 119 S.Ct. 1336, 526 U.S. 1040, 143 L.Ed.2d 500.

14. Weapons

"Similar type weapons" are generally relevant and admissible for comparison at trial. Luckette v. State (App. 7 Dist. 1995) 906 S.W.2d 663, rehearing overruled, petition for discretionary review refused, certiorari denied 117 S.Ct. 118, 519 U.S. 840, 136 L.Ed.2d 69.

Lack of positive identification of weapon or instrumentality used during commission of crime affects its weight rather than its admissibility. Fletcher v. State (App. 1 Dist. 1995) 902 S.W.2d 165, petition for discretionary review refused.

Trial court properly admitted sawed-off shotgun which police recovered from stock tank in murder prosecution; witness who was present with defendant when shooting took place led police to stock tank after murder where shotgun was recovered. Foster v. State (Cr.App. 1989) 779 S.W.2d 845, rehearing denied, certiorari denied 110 S.Ct. 1505, 494 U.S. 1039, 108 L.Ed.2d 639.

15. Prior accusations

Attorney's testimony as to meaning of term "no bill," offered after jury heard evidence that defendant was initially no billed by grand jury, was relevant in prosecution for indecency with a child by contact; defendant did not attempt to show that she should be found not guilty because of prior no bill, but instead tried to

show that there had been attempt by her former husband to improperly intervene in judicial process to have case against her reopened so that he could obtain sole custody of couple's minor children. L.M.W. v. State (App. 2 Dist. 1994) 891 S.W.2d 754, rehearing overruled, petition for discretionary review filed.

Evidence that defendant's former husband had offered to influence criminal proceeding favorably for defendant in return for concessions in divorce proceedings was relevant in prosecution for indecency with a child by contact to show former husband was biased against defendant and that charges could have been fabricated. L.M.W. v. State (App. 2 Dist. 1994) 891 S.W.2d 754, rehearing overruled, petition for discretionary review filed.

Evidence that police officer who took defendant's confession had caused witness to falsely accuse her grandfather of sexually assaulting her in unrelated case was irrelevant in sexual assault prosecution. Sallings v. State (App. 5 Dist. 1990) 789 S.W.2d 408, petition for discretionary review refused.

16. Destruction of evidence

Evidence that defendant destroyed document which would have been helpful in determining whether defendant had sold stolen property to auto parts store was probative of defendant's guilt in prosecution for theft. Lily v. State (App. 14 Dist. 1990) 789 S.W.2d 433.

17. Discipline of arresting officer

Trial court did not abuse its discretion in refusing to allow, on relevancy grounds, defendant charged with driving while intoxicated (DWI) to show that arresting officer had been demoted for improper conduct in issuing traffic citations and arrests; officer was demoted some time after incident in question and there was no showing that demotion had anything to do with case or other DWI arrest. Vasquez Garza v. State (App. 13 Dist. 1990) 794 S.W.2d 530, petition for discretionary review refused.

18. Videotapes

Video portion of videotape of defendant's sobriety tests is not testimonial in nature and its admission does not violate federal or state right against self- incrimination. Burke v. State (App. 14 Dist. 1996) 930 S.W.2d 230, petition for discretionary review refused.

Visual portion of videotape is admissible if predicate for introduction of a photograph is met. Burke v. State (App. 14 Dist. 1996) 930 S.W.2d 230, petition for discretionary review refused.

In prosecution for voluntary manslaughter, trial court did not abuse discretion in admitting videotape of crime scene despite fact that it repeated earlier evidence, because videotape was relevant evidence. Garcia v. State (App. 14 Dist. 1995) 901 S.W.2d 724, petition for discretionary review refused.

Usual predicate for admission of videotape is not applicable for videotape that was not made by law enforcement personnel; there is no reason to believe that videotape taken by defendant, without litigation in mind, would not accurately portray events it depicts. Kephart v. State (App. 4 Dist. 1993) 888 S.W.2d 825, reversed 875 S.W.2d 319, rehearing on petition for discretionary review denied.

Because videotape provides visual image with sound, it conveys greater indicia of reliability than either film or audiotapes standing alone, supporting relaxation of requirements for admission. Kephart v. State (App. 4 Dist. 1993) 888 S.W.2d 825, reversed 875 S.W.2d 319, rehearing on petition for discretionary review denied.

Ordinarily, party seeking to introduce videotape must show that recording device was capable of taking testimony, that operator of device was competent, that recording was authentic and correct, and that no changes, additions, or deletions were made, and party must show manner of preservation of recording, identity of speakers, and that testimony elicited was voluntarily made without any kind of inducement. Kephart v. State (App. 4 Dist. 1993) 888 S.W.2d 825, reversed 875 S.W.2d 319, rehearing on petition for discretionary review denied.

Trial court did not abuse its discretion by admitting videotape indicating presence of narcotics in defendant's home, where videotape was made by accomplices, and defendant did not assert that events were portrayed inaccurately or that she appeared involuntarily. Kephart v. State (App. 4 Dist. 1993) 888 S.W.2d 825, reversed 875 S.W.2d 319, rehearing on petition for discretionary review denied.

Trial court has broad discretion in admitting video recordings and her action will not be disturbed absent abuse of that discretion. Kephart v. State (App. 4 Dist. 1993) 888 S.W.2d 825, reversed 875 S.W.2d 319, rehearing on petition for discretionary review denied.

Videotape of victim's condition while in rehabilitation center was relevant in attempted murder trial to show nature and extent of injuries sustained, and was not outweighed by any prejudicial effect; tape of victim during recovery period did not heighten passion of jury after extensive witness testimony describing victim's condition. Staley v. State (App. 12 Dist. 1994) 888

S.W.2d 45.

Exclusion of videotaped exhibit offered by automobile purchasers was proper, in action by purchasers against dealership which alleged fraud and violation of Deceptive Trade Practices-Consumer Protection Act (DTPA), where exhibit showed expert pointing out observations regarding damages and repair work to automobile; exhibit was cumulative in light of expert's testimony and exhibit would have been of little use to jury since damage and conditions described by expert were not recognizable on tape. Padgett v. Bert Ogden Motor's, Inc. (App. 13 Dist. 1993) 869 S.W.2d 532, rehearing overruled, writ denied.

Jury was entitled to view during deliberations videotape taken by police of defendants committing offense in question. Reed v. State (App. 14 Dist. 1990) 794 S.W.2d 806, petition for discretionary review refused, certiorari denied 111 S.Ct. 2018, 500 U.S. 918, 114 L.Ed.2d 104.

Videotape taken of defendant at time of his arrest for driving while intoxicated was admissible in wrongful death suit arising out of automobile accident which gave rise to defendant's arrest, where defendant denied being intoxicated on date in question, and thus videotape was an aid to jury's understanding of defendant's condition. Cedillo v. Paloff (App. 2 Dist. 1990) 792 S.W.2d 830, writ denied, rehearing of writ of error overruled.

19. Chain of custody

Absent evidence of tampering, objection that the state has failed to establish proper chain of custody goes to the weight of the evidence rather than to its admissibility. Simmons v. State (App. 12 Dist. 1996) 944 S.W.2d 11, petition for discretionary review refused.

Where proof of chain of custody is necessary, the state must adduce such proof to establish that the evidence is what the state says it is. Simmons v. State (App. 12 Dist. 1996) 944 S.W.2d 11, petition for discretionary review refused.

Finding that cocaine introduced into evidence at trial was that taken from defendant was supported by officer's testimony that she seized the rocks from defendant and placed them in evidence envelope, that she placed identification mark on envelope and placed it in property room, and that envelope was same one produced at trial, by deputy's testimony that he transported envelope from property room to crime lab, and by crime lab supervisor's testimony that he tested envelope's contents and found them to contain cocaine, even though neither officer nor deputy actually identified the rocks and officer hesitated in her testimony about whether she

had wrapped rocks in piece of paper. Simmons v. State (App. 12 Dist. 1996) 944 S.W.2d 11, petition for discretionary review refused.

Tagging item of physical evidence at time of its seizure and then identifying it at trial based upon tag is sufficient showing of chain of custody for admission, barring any showing by defendant of tampering or alteration. S.D.G. v. State (App. 14 Dist. 1996) 936 S.W.2d 371, rehearing overruled, writ denied.

Chain of custody is conclusively proven if officer is able to identify that he or she seized item of physical evidence, put identification mark on it, placed in it property room, and then retrieved item being offered on day of trial. S.D.G. v. State (App. 14 Dist. 1996) 936 S.W.2d 371, rehearing overruled, writ denied.

Absent any evidence of tampering, objection that state failed to establish chain of custody goes to weight of evidence, rather than its admissibility. S.D.G. v. State (App. 14 Dist. 1996) 936 S.W.2d 371, rehearing overruled, writ denied.

Proper chain of custody was established for shotgun wadding and six metal fragments discovered at crime scene, in juvenile delinquency proceeding; officer identified bag in which she placed evidence, testified that prior to trial she went to firearms lab and retrieved bag, and further testified that exhibits appeared to be in same condition they were in when she retrieved them from scene. S.D.G. v. State (App. 14 Dist. 1996) 936 S.W.2d 371, rehearing overruled, writ denied.

Proper chain of custody was established for admission of shotgun shell casing, fragments, shotgun shell and shotgun wadding in juvenile delinquency proceeding; physician from county morgue testified that large caliber bullet, shotgun wadding, shell fragments, and shot pellets were recovered from victim, he identified exhibit as photograph of those items, and officer testified that he recovered those items from morgue, placed them into evidence envelope which he sealed and submitted to lab, and that he retrieved those items on day he testified. S.D.G. v. State (App. 14 Dist. 1996) 936 S.W.2d 371, rehearing overruled, writ denied.

Generally, tagging item of physical evidence at time of seizure and then identifying that item at trial based upon the tag is sufficient for admission barring any showing by defendant of tampering or alteration. Menefee v. State (App. 12 Dist. 1996) 928 S.W.2d 274.

If substance is properly identified, most questions concerning care and custody go to weight given evidence and not its

admissibility, absent showing that substance was tampered with or changed. Menefee v. State (App. 12 Dist. 1996) 928 S.W.2d 274.

Once testimony establishes substance's chain of custody into laboratory, any further objection goes to weight of evidence, rather than its admissibility. Menefee v. State (App. 12 Dist. 1996) 928 S.W.2d 274.

It is permissible for one officer to retrieve evidence from defendant, hand evidence to second officer, and for both officers to testify as to chain of custody. Menefee v. State (App. 12 Dist. 1996) 928 S.W.2d 274.

Neither fact that more than one officer handled cocaine before it was transferred to laboratory for identification nor officers' testimony that cocaine was more broken up at trial than when it was seized established that cocaine was tampered with, such that state could not establish proper chain of custody into laboratory, in light of officers' testimony regarding seizure, one officer's testimony regarding tagging of cocaine and its deposit in evidence locker, both officers' identification of cocaine at trial, deputy's testimony that she removed cocaine from evidence locker and transported it to laboratory, and chemist's testimony that she received cocaine from deputy. Menefee v. State (App. 12 Dist. 1996) 928 S.W.2d 274.

Generally, tagging item of physical evidence at time of its seizure and then identifying it at trial based upon tag is sufficient for admission barring any showing by defendant of tampering or alteration. Sneed v. State (App. 2 Dist. 1994) 875 S.W.2d 792.

Testimony of one officer that cocaine was dropped by defendant and that he recovered it and handed it to second officer, and testimony of second officer that he received cocaine capsule from first officer just moments after arrest, placed it in envelope and initialed it, and that evidence at trial was same as that seized from defendant, was sufficient to establish chain of custody. Sneed v. State (App. 2 Dist. 1994) 875 S.W.2d 792.

Absent evidence of tampering, objection that state has failed to establish proper chain of custody goes to weight of evidence, rather than admissibility. Murray v. State (App. 6 Dist. 1993) 864 S.W.2d 111, rehearing denied, petition for discretionary review refused.

Where state shows beginning and end of chain of custody, any gaps affect weight and not admissibility of evidence. Murray v. State (App. 6 Dist. 1993) 864 S.W.2d 111, rehearing denied, petition for discretionary review refused.

Sufficient chain of custody was established for admission of crack cocaine, even though intermediary in chain did not testify; state proved beginning and end of chain of custody, evidence showed that envelope was mailed and received by lab and return receipt card was received by police, and there was no evidence of tampering or deficiency in chain. Murray v. State (App. 6 Dist. 1993) 864 S.W.2d 111, rehearing denied, petition for discretionary review refused.

Minor theoretical breaks in chain of custody of controlled substance do not break chain. Murray v. State (App. 6 Dist. 1993) 864 S.W.2d 111, rehearing denied, petition for discretionary review refused.

Only upon showing that controlled substance evidence was tampered with or changed will care and custody question affect its admissibility. Irvine v. State (App. 1 Dist. 1993) 857 S.W.2d 920, petition for discretionary review refused, certiorari denied 114 S.Ct. 2683, 512 U.S. 1208, 129 L.Ed.2d 816.

Trial court could admit cocaine found in baggies carried by defendant over defendant's objection based on incomplete and uncertain chain of custody; there was no evidence that cocaine was tampered with or changed, and, therefore, trial court properly considered care and custody discrepancies as going to weight of evidence, rather than admissibility. Irvine v. State (App. 1 Dist. 1993) 857 S.W.2d 920, petition for discretionary review refused, certiorari denied 114 S.Ct. 2683, 512 U.S. 1208, 129 L.Ed.2d 816.

If substance is properly identified, most questions concerning care and custody go to weight given evidence and not to its admissibility, absent showing that substance was tampered with or changed. Alvarez v. State (App. 13 Dist. 1993) 857 S.W.2d 143, petition for discretionary review refused.

Chain of custody is conclusively proven if an officer is able to identify that he or she seized item of physical evidence, put an identification mark on it, placed it in property room, and then retrieved item being offered on day of trial. Alvarez v. State (App. 13 Dist. 1993) 857 S.W.2d 143, petition for discretionary review refused.

When state shows beginning and end of chain of custody, any gaps in between go to weight rather than admissibility, particularly when chain goes inside laboratory. Alvarez v. State (App. 13 Dist. 1993) 857 S.W.2d 143, petition for discretionary review refused.

State established proper chain of custody of tissue that contained .47 milligrams of cocaine, even though three days had passed

between time officer allegedly received tissue from defendant and time tissue was placed in sealed envelope and tested in laboratory, and two officers failed to mark exhibit, where first officer testified that it looked like tissue which was used to get sample from defendant's nose, where second officer recognized exhibit as tissue which first officer gave him, where chemist received exhibit from second officer and kept in sealed envelope, except for times he weighed and analyzed it, and where there was no evidence that exhibit was tampered with or changed. Alvarez v. State (App. 13 Dist. 1993) 857 S.W.2d 143, petition for discretionary review refused.

When beginning and ending of chain of custody is established and no evidence shows tampering, any gaps in the chain go to the weight rather than the admissibility of the evidence, especially when the chain is inside the laboratory. Juhasz v. State (App. 13 Dist. 1992) 827 S.W.2d 397, petition for discretionary review refused, rehearing on petition for discretionary review denied.

Despite contention that baggie of cocaine received by investigator from defendant could have been confused with others received and held by investigator, chain of custody was sufficiently established to justify admission of the exhibit; evidence did not affirmatively reflect either a similarity in appearance or actual commingling of substances, and there was testimony that envelope seal created prior to delivery to commander was still intact at time of receipt by chemist. Stone v. State (App. 8 Dist. 1990) 794 S.W.2d 868.

20. Res gestae

Evidence of the context of the offense is almost always admissible so that jury may have the offense placed in its proper setting, so that all evidence may be realistically evaluated. Skillern v. State (App. 3 Dist. 1994) 890 S.W.2d 849, rehearing overruled, petition for discretionary review refused.

Admissibility of evidence is no longer determined by whether it is "res gestae" of offense. Dams v. State (App. 9 Dist. 1994) 872 S.W.2d 325.

Evidence of context of offense is almost always admissible in order that jury may have offense placed in its proper setting so that all evidence may be realistically evaluated. Rodriguez v. State (App. 7 Dist. 1994) 871 S.W.2d 312, rehearing denied.

Kidnapping victim's testimony that defendant put his hands over tattoos on his arms because he saw his old probation officer was admissible as res gestae of offense in capital murder prosecution, despite defendant's contention that testimony was improper

reference to extraneous offense. Teague v. State (Cr.App. 1993) 864 S.W.2d 505, rehearing denied.

Testimony by client's codefendant in Internal Revenue Service (IRS) collection action on responsible person tax regarding circumstances of meeting with attorney and circumstances of client's filling out forms IRS official gave her at meeting was part of res gestae and not hearsay, and was admissible, in malpractice suit brought against attorney. Rhodes v. Batilla (App. 14 Dist. 1993) 848 S.W.2d 833, rehearing denied, writ granted, writ withdrawn, writ denied, rehearing of writ of error overruled.

In prosecution for possession of amphetamine, photograph of woman holding large cardboard tube to her nose, pointed toward mirror on which rested a "rail" of a white powdery substance, was not relevant, despite contention that photograph was part of a res gestae of defendant's arrest, in case in which sponsoring witness did not know who the woman was, when or where the picture was taken, or what the white powdery substance was, and, in any event, photograph should have been excluded on ground that its probative value was substantially outweighed by the danger of unfair prejudice, in case in which defendant did not seriously contest his possession of the controlled substance. Blackburn v. State (App. 10 Dist. 1991) 820 S.W.2d 824, petition for discretionary review refused.

Prejudicial nature of res gestae evidence will rarely render it inadmissible, so long as it truly sets stage for jury's comprehension of whole criminal transaction. Moore v. State (App. 5 Dist. 1990) 802 S.W.2d 367, petition for discretionary review refused.

Defendant's statements to security guards after he was apprehended, to effect that he had started to bring his gun, he wished he had brought his gun and that he would kill them, were admissible as res gestae to establish context of offense and to prove that defendant acted intentionally and knowingly in committing the offense of aggravated robbery. Moore v. State (App. 5 Dist. 1990) 802 S.W.2d 367, petition for discretionary review refused.

In order to qualify as res gestae, evidence of extraneous offense must be so closely interwoven with offense on trial that it shows context in which primary offense occurred. Moore v. State (App. 5 Dist. 1990) 802 S.W.2d 367, petition for discretionary review refused.

Where one offense or transaction is one continuous episode or where another offense or transaction is so closely interwoven as to be part of case on trial, proof of all facts is proper. Moore v.

State (App. 5 Dist. 1990) 802 S.W.2d 367, petition for discretionary review refused.

21. Computer data

State did not have to establish that operator of electronic monitoring system understood scientific theory of machine as foundation for admission in appeal bond revocation hearing of computer printout showing that defendant violated home curfew condition. Ly v. State (App. 1 Dist. 1995) 908 S.W.2d 598.

State adequately proved reliability of computer printout from electronic monitoring system for printout to be admissible in appeal bond revocation hearing to show that defendant violated home curfew conditions, where system operator testified to reliability and accuracy of system, she testified that vendor and manufacturer of electronic monitoring equipment verified that equipment was operating properly when printout was generated, and defendant offered no controverting evidence. Ly v. State (App. 1 Dist. 1995) 908 S.W.2d 598.

Proper analysis for introduction of computer generated evidence is balancing test as to whether such evidence, though relevant, had probative value which was not substantially outweighed by danger of unfair prejudice, confusion of issues, misleading jury, or considerations of undue delay or needless presentation of cumulative evidence. Ly v. State (App. 1 Dist. 1995) 908 S.W.2d 598.

Computer-generated printouts showing date and time of various transactions in defendant's employer's computer system were admissible in prosecution for harmful access to a computer. Burleson v. State (App. 2 Dist. 1991) 802 S.W.2d 429, petition for discretionary review refused.

21.5. Open door admissibility

Defendant, by presenting testimony from family and friends of their ability to help him abide by conditions for community supervision, opened door during sentencing phase of murder trial to state's inquiry into, among other things, opinions held by family members and friends regarding criminal justice system in general, and circumstances surrounding defendant's trial. Bell v. State (App. 9 Dist. 1997) 948 S.W.2d 535.

Admission of evidence that robbery defendant had gambled through "bookies" was not error; although prosecution elicited testimony from co-worker that defendant had gambling debts, the only questions about possible "illegal" gambling through bookies were those asked by defense counsel in cross- examination of co-worker,

and once defendant "opened the door" on subject of illegal gambling, it became proper matter for jury's consideration even though the evidence might not otherwise have been admissible. Cox v. State (App. 2 Dist. 1996) 931 S.W.2d 349, petition for discretionary review granted, petition for discretionary review dismissed 951 S.W.2d 5.

Defendant may not successfully challenge evidence that he introduced at trial. Cox v. State (App. 2 Dist. 1996) 931 S.W.2d 349, petition for discretionary review granted, petition for discretionary review dismissed 951 S.W.2d 5.

Defendant opened the door to cross-examination on his prior drug trafficking relationship with arsonist, who allegedly conspired with defendant to burn down his business, which in turn, resulted in involuntary manslaughter charge, where defendant testified gratuitously on direct examination that he did not know why arsonist would want to destroy defendant's business. House v. State (App. 14 Dist. 1995) 909 S.W.2d 214, petition for discretionary review granted, affirmed 947 S.W.2d 251.

When attorney testifying for the defense as an expert in the field of insurance regulatory law testified that he had offered his opinion on the validity of particular insurance premium financing plan to the courts, thus implying that his opinion was legally acceptable, state had right to cross- examine him concerning the fact that the courts rejected his opinion. Skillern v. State (App. 3 Dist. 1994) 890 S.W.2d 849, rehearing overruled, petition for discretionary review refused.

Impeachment on collateral issue is generally not permissible but an exception exists when the witness opens the door by raising a collateral matter on direct examination; in that case, impeachment is permissible. Skillern v. State (App. 3 Dist. 1994) 890 S.W.2d 849, rehearing overruled, petition for discretionary review refused.

When door is opened on direct examination by defense, prosecution has right to inquire, under exception to general rule excluding extraneous offense evidence, about relevant extraneous offenses. Creekmore v. State (App. 4 Dist. 1993) 860 S.W.2d 880, rehearing overruled, petition for discretionary review refused.

Party may open door to evidence of probation "suitability" by proffering evidence that broaches the subject, and opponent, at his option, may either object, in which case the proffered evidence should be excluded, or present evidence in rebuttal. Ortiz v. State (Cr.App. 1992) 834 S.W.2d 343, on remand 846 S.W.2d 165.

23. Punishment phase

Error occurring during punishment phase of murder trial when prosecutor cross- examined defendant's mother about whether she had heard someone refer to jury or prosecutor as "prejudiced" or "redneck" or comment that verdict was unfair because defendant was black and jury was entirely white without first connecting comments to defendant's family and friends was not harmless; defendant qualified for probation but was assessed 30 year sentence, self-defense was hotly contested issue by parties during guilt/innocence phase, and State had refused to recognize even possibility of trial court error. Bell v. State (App. 9 Dist. 1997) 948 S.W.2d 535.

Evidence that defendant's mother may have heard jury or prosecutor referred to as "prejudiced" or "redneck" or that she heard someone comment that verdict was unfair because defendant was black and jury was entirely white was irrelevant as to any issue regarding defendant during punishment phase of murder trial and was not proper subject of cross-examination after mother testified regarding defendant's suitability for community supervision, where source of comments was not first connected to defendant's family or friends. Bell v. State (App. 9 Dist. 1997) 948 S.W.2d 535.

Victim impact evidence is admissible at punishment phase if it has some tendency to demonstrate defendant's personal responsibility and moral guilt, and evidence regarding offense or defendant, tending to reduce defendant's moral blameworthiness, may be received as mitigating evidence; admissibility of evidence at punishment is function of policy rather than relevancy. Draheim v. State (App. 4 Dist. 1996) 916 S.W.2d 593, petition for discretionary review refused.

Trial court did not abuse its discretion by excluding from punishment phase proffered testimony that 11-year-old victim had been sexually abused by persons other than defendant, which did not relate to circumstances of defendant's charged abuse of victim or to defendant himself; evidence could have perniciously suggested to jury that defendant's conduct could not have caused psychological and behavior problems exhibited by victim after defendant's assault. Draheim v. State (App. 4 Dist. 1996) 916 S.W.2d 593, petition for discretionary review refused.

Admissibility of evidence during punishment phase of noncapital felony offense is not question of logical relevance but that of policy because there are not discrete factual issues at punishment stage. Napier v. State (App. 9 Dist. 1994) 887 S.W.2d 265.

Test for relevancy of evidence is much broader at punishment phase of murder trial than it is at guilt phase, with purpose being to allow fact finder as much useful information as possible in deciding appropriate punishment for individual defendant. Bowser

v. State (App. 13 Dist. 1991) 816 S.W.2d 518.

24. Scientific evidence, generally

Scientific evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy requirement that the testimony be of assistance to the jury, and is thus inadmissible. Gammill v. Jack Williams Chevrolet, Inc. (Sup. 1998) 972 S.W.2d 713.

Scientific evidence is unnecessary to prove that a liquid contains alcohol; such testimony may be given by a non-expert witness. Kaldis v. State (App. 1 Dist. 1996) 926 S.W.2d 771, petition for discretionary review refused.

Social worker's testimony about use of anatomically correct dolls while interviewing child was not scientific evidence and, therefore, state was not required to establish scientific reliability of using anatomically correct dolls in prosecution for aggravated sexual assault of child under 14; social worker only testified that child chose two dolls and demonstrated inappropriate actions toward her and social worker did not repeat specific details of child's testimony, nor did she demonstrate child's use of dolls. Perez v. State (App. 13 Dist. 1996) 925 S.W.2d 324.

Horizontal Gaze Nystagmus (HGN) test is reliable as qualitative indicator of intoxication and, thus, its results are admissible in prosecution for driving while intoxicated. Anderson v. State (App. 1 Dist. 1993) 866 S.W.2d 685, petition for discretionary review refused, rehearing on petition for discretionary review denied.

In general, expert testimony is admissible under relevancy standard if witness is qualified as expert, testimony will assist jury, and probative value of testimony is not substantially outweighed by its prejudicial effect; burden of proof is on proponent of evidence to establish predicate facts by preponderance of evidence, and trial court's decision will not be overturned absent abuse of discretion. Trimboli v. State (App. 10 Dist. 1991) 817 S.W.2d 785, petition for discretionary review granted, affirmed 826 S.W.2d 953, petition for discretionary review refused.

Relevancy test, rather than Frye standard, is proper standard for determining admissibility of scientific evidence. Trimboli v. State (App. 10 Dist. 1991) 817 S.W.2d 785, petition for discretionary review granted, affirmed 826 S.W.2d 953, petition for discretionary review refused.

Under "relevancy" standard, court did not abuse its discretion in admitting DNA fingerprinting evidence; State presented witnesses qualifying as experts in DNA testing, State elicited testimony

which would assist jury, i.e., DNA testing which showed probability of defendant's DNA being same as evidentiary DNA, and State showed DNA evidence's probative value outweighed any prejudicial effect. Trimboli v. State (App. 10 Dist. 1991) 817 S.W.2d 785, petition for discretionary review granted, affirmed 826 S.W.2d 953, petition for discretionary review refused.

Under relevancy standard, evidence that defendant's DNA matched evidentiary DNA was properly admitted; to counter defendant's contention that laboratory did not follow its own protocol in determining that match existed, in that difference between defendant's DNA and evidentiary DNA exceeded three standard deviations, prosecution witnesses testified that visual assessment of autoradiograms was proper and that slight variation between defendant's DNA and evidentiary DNA was due to band shift, and State's expert testified that visual match was scientifically acceptable. Trimboli v. State (App. 10 Dist. 1991) 817 S.W.2d 785, petition for discretionary review granted, affirmed 826 S.W.2d 953, petition for discretionary review refused.

25. Speculation

In sexual assault prosecution, trial court did not abuse its discretion by disallowing, as speculative, defendant's cross-examination inquiring of officer whether victim's discontinuance of counseling after several months would be indicative of whether the sexual assaults alleged by her actually occurred. Jaramillo v. State (App. 2 Dist. 1991) 817 S.W.2d 842, petition for discretionary review refused.

26. Personal knowledge

Evidence of murder victim's violence against his son was not admissible to show defendant's state of mind, absent evidence that defendant knew of any such acts of violence at time of shooting. Buhl v. State (App. 10 Dist. 1998) 960 S.W.2d 927, petition for discretionary review refused, certiorari denied 119 S.Ct. 623, 525 U.S. 1057, 142 L.Ed.2d 561.

Witnesses' testimony that shots were fired in their neighborhood before night defendant shot victim was irrelevant in determining whether defendant was justified in using deadly force and therefore, testimony was inadmissible; witnesses did not know who had fired shots and there was no evidence that witness conveyed his experience to defendant which would support reasonableness of her beliefs. Herrera v. State (App. 4 Dist. 1993) 848 S.W.2d 244.

Defendant's personal knowledge of facts to which witnesses testified was not required for admissibility of testimony in prosecution for failure to report child abuse. Morris v. State

(App. 14 Dist. 1992) 833 S.W.2d 624, rehearing denied, petition for discretionary review refused, certiorari denied 113 S.Ct. 1387, 507 U.S. 961, 122 L.Ed.2d 762.

Testimony of potential witnesses who were convicted of delivering controlled substances to same undercover police officer and confidential informant involved in instant prosecution for delivery of cocaine was properly excluded as irrelevant; witnesses would have testified to their prior dealing with confidential informant, and both conceded that they had no personal knowledge of transaction which gave rise to instant prosecution. Goodnight v. State (App. 9 Dist. 1991) 820 S.W.2d 254.

27. Polygraph tests

Trial court acted prematurely in excluding defendant's oral statements made in connection with taking of polygraph examination solely on basis that statements were tightly intertwined with taking of exam; court ruled before state sought to introduce statements and before trial court could properly evaluate all factors, in context, for or against admissibility. State v. Taft (App. 13 Dist. 1996) 926 S.W.2d 613, rehearing overruled, petition for discretionary review granted, vacated 958 S.W.2d 842.

As general rule, state is entitled to present on rebuttal any evidence that tends to refute defensive theory and evidence introduced to support that theory. Marles v. State (App. 4 Dist. 1996) 919 S.W.2d 669, petition for discretionary review refused.

Psychiatrist's testimony that polygraph tests were used in his line of work as both diagnostic tool and treatment tool for pedophiles and that he recommended such tests for defendant was not excludable from trial for indecency with child, where psychiatrist did not testify whether defendant took test, whether defendant refused to take test, or what results of any test were. Garcia v. State (App. 13 Dist. 1995) 907 S.W.2d 635, petition for discretionary review granted, affirmed 981 S.W.2d 683.

Because of its inherent unreliability, and its tendency to be unduly persuasive, the results of polygraph examination are not admissible for any purpose. Sparks v. State (App. 3 Dist. 1991) 820 S.W.2d 924.

Results of polygraph test may be improperly disclosed not only by affirmative statement of witness, but merely by question revealing that polygraph examination has been administered. Sparks v. State (App. 3 Dist. 1991) 820 S.W.2d 924.

28. DNA tests

DNA evidence is admissible, if relevant, so long as probative value of evidence is not outweighed by its prejudicial value. Williams v. State (App. 6 Dist. 1993) 848 S.W.2d 915.

Deoxyribonucleic acid (DNA) fingerprinting evidence was admissible in murder prosecution; state presented witnesses qualified as experts in DNA testing, elicited testimony which would assist jury, and showed that DNA evidence's probative value outweighed any prejudicial effect. Trimboli v. State (Cr.App. 1992) 826 S.W.2d 953, petition for discretionary review refused.

Notwithstanding defendant's guilty plea to offense of driving while intoxicated (DWI), videotape was relevant circumstantial evidence from which jury could infer degree of defendant's intoxication and thereby assess appropriate level of punishment. Jones v. State (App. 13 Dist. 1991) 825 S.W.2d 470, petition for discretionary review refused.

28.4. Medical records

Testimony regarding how patient's wife, who brought malpractice action against doctor and medical center to recover for patient's death that resulted from heart attack he suffered two days after undergoing vascular surgery, discovered results of patient's electrocardiogram (EKG) test, which was taken 30 minutes prior to patient's heart attack and which was absent from hospital's records, was inadmissible on grounds that it was irrelevant to issue of whether patient was exhibiting heart-attack symptoms in hours preceding his death, was cumulative, and would only have served to unfairly prejudice defendants, where there was no evidence that EKG results were destroyed, and both results and testimony interpreting results were presented to jury. Pace v. Sadler (App. 4 Dist. 1998) 966 S.W.2d 685.

In action to recover medical expenses for work-related accident, medical bill was properly excluded as irrelevant, where employee failed to establish that charges for doctor's services were reasonable and necessary. Castillo v. American Garment Finishers Corp. (App. 8 Dist. 1998) 965 S.W.2d 646.

Medical records exhibit was adequately identified as defendant's so as to be admissible; several individuals testified for the state about defendant and his condition and they referred to the medical records to refresh their memories, the first page of the state's medical records exhibit was a self-proving affidavit provided by the medical records custodian stating that these records pertained to defendant, and assistant director of medical records was subject to cross-examination on the issue. Corpus v. State (App. 3 Dist. 1996) 931 S.W.2d 30, petition for discretionary review granted, review dismissed as improvidently granted 962 S.W.2d 590, rehearing

on petition for discretionary review denied.

28.6. Nonverbal actions

Many nonverbal actions of a defendant at time of arrest are relevant and admissible. Marles v. State (App. 4 Dist. 1996) 919 S.W.2d 669, petition for discretionary review refused.

29. Flight

If defendant flees when officer announces his arrest, this evidence is admissible as circumstance from which inference of guilt may be drawn; flight is not less relevant if it is only flight from custody or to avoid arrest. Marles v. State (App. 4 Dist. 1996) 919 S.W.2d 669, petition for discretionary review refused.

Evidence of flight or escape is admissible as circumstance from which inference of guilt may be drawn. Bigby v. State (Cr.App. 1994) 892 S.W.2d 864, rehearing denied, certiorari denied 115 S.Ct. 2617, 515 U.S. 1162, 132 L.Ed.2d 860.

To support admission of evidence of escape from custody or flight it must appear that escape or flight has some legal relevance to offense under prosecution. Bigby v. State (Cr.App. 1994) 892 S.W.2d 864, rehearing denied, certiorari denied 115 S.Ct. 2617, 515 U.S. 1162, 132 L.Ed.2d 860.

Evidence of flight, unlike many other extraneous offenses, shows consciousness of guilt of crime for which defendant is on trial. Bigby v. State (Cr.App. 1994) 892 S.W.2d 864, rehearing denied, certiorari denied 115 S.Ct. 2617, 515 U.S. 1162, 132 L.Ed.2d 860.

Evidence of attempted escape by defendant during guilt phase of trial was relevant to defendant's guilt of crime charged. Bigby v. State (Cr.App. 1994) 892 S.W.2d 864, rehearing denied, certiorari denied 115 S.Ct. 2617, 515 U.S. 1162, 132 L.Ed.2d 860.

To have evidence of escape from custody or flight excluded under relevancy challenges, burden shifts to defendant to show affirmatively that escape and flight was directly connected to some other transaction and further that it was not connected with offense at trial. Bigby v. State (Cr.App. 1994) 892 S.W.2d 864, rehearing denied, certiorari denied 115 S.Ct. 2617, 515 U.S. 1162, 132 L.Ed.2d 860.

Evidence of flight is admissible as circumstance from which inference of guilt may be drawn but, before such evidence is admitted, it must appear that it has some relevance to offense under prosecution. Burks v. State (Cr.App. 1994) 876 S.W.2d 877,

rehearing denied, certiorari denied 115 S.Ct. 909, 513 U.S. 1114, 130 L.Ed.2d 791.

Once relevancy requirement for admission of flight evidence is met, evidence of escape from custody or flight to avoid arrest is admissible unless defendant shows that escape or flight were related to circumstances unrelated to charged offense. Burks v. State (Cr.App. 1994) 876 S.W.2d 877, rehearing denied, certiorari denied 115 S.Ct. 909, 513 U.S. 1114, 130 L.Ed.2d 791.

Flight evidence is no less relevant if it is only flight from custody or to avoid arrest. Burks v. State (Cr.App. 1994) 876 S.W.2d 877, rehearing denied, certiorari denied 115 S.Ct. 909, 513 U.S. 1114, 130 L.Ed.2d 791.

Lapse of time between commission of offense and defendant's flight does not always adversely affect admissibility of flight evidence. Burks v. State (Cr.App. 1994) 876 S.W.2d 877, rehearing denied, certiorari denied 115 S.Ct. 909, 513 U.S. 1114, 130 L.Ed.2d 791.

Evidence of defendant's flight from arrest was admissible in felony-murder prosecution; defendant was already identified as suspect in case and, thus, his flight when confronted by police was relevant to issue of whether he committed charged offense, and defendant made no showing that flight was related to circumstances unrelated to that offense. Burks v. State (Cr.App. 1994) 876 S.W.2d 877, rehearing denied, certiorari denied 115 S.Ct. 909, 513 U.S. 1114, 130 L.Ed.2d 791.

Evidence of defendant's failure to appear for his first scheduled trial and his forfeiture of bond was properly admissible to show flight, notwithstanding that flight occurred more than a year after the offense. Hyde v. State (App. 13 Dist. 1993) 846 S.W.2d 503, petition for discretionary review refused.

To exclude evidence of flight, defendant has burden to affirmatively show that flight was directly connected to some other transaction, and not with offense on trial. Hyde v. State (App. 13 Dist. 1993) 846 S.W.2d 503, petition for discretionary review refused.

Evidence of flight is admissible even though it may show commission of other crimes. Rabb v. State (App. 12 Dist. 1992) 835 S.W.2d 270.

Bond forfeiture papers were admissible as tending to show flight, from which jury could infer guilt. Davis v. State (App. 1 Dist. 1992) 830 S.W.2d 762, petition for discretionary review refused.

30. Bolstering

A party may attempt to prove a fact by more than one witness, and if the party does so, the additional testimony is not improper bolstering testimony. Morales v. State (App. 6 Dist. 1999) 2 S.W.3d 487, petition for discretionary review refused.

"Bolstering" occurs when testimony's sole purpose is to enhance the credibility of another witness, without adding anything to the proof of a relevant fact. Morales v. State (App. 6 Dist. 1999) 2 S.W.3d 487, petition for discretionary review refused.

Testimony of police officer that he would have paid between $50 and $80 apiece for the four stolen crepe myrtle plants was not improper "bolstering" of owner's testimony that four stolen crepe myrtle plants were valued at $50 each, and thus did not improperly influence the trial court in assessing punishment by making plants appear more valuable than they actually were, in absence of any indication that officer's testimony had any effect on assessment of punishment. Morales v. State (App. 6 Dist. 1999) 2 S.W.3d 487, petition for discretionary review refused.

Bolstering is not proper objection when third person testifies to out-of-court identification of individual who testified at trial and is subject to cross- examination. Van Zandt v. State (App. 8 Dist. 1996) 932 S.W.2d 88, petition for discretionary review refused.

"Bolstering" occurs when additional evidence is used to add truthfulness or greater weight to earlier, unimpeached evidence offered by that same party; stated differently, "bolstering" refers to any evidence sole purpose of which is to convince trier of fact that particular witness or source of evidence is worthy of credit, without substantively contributing to make existence of fact that is of consequence to determination of action more or less probable than it would be without that evidence. Williams v. State (App. 8 Dist. 1996) 927 S.W.2d 752, petition for discretionary review refused.

Admission in voluntary manslaughter prosecution of victim's eight-year-old daughter's videotaped statement that defendant had previously threatened to kill victim did not "bolster" victim's trial testimony to that effect; rather, videotape was properly admitted for purpose of rehabilitating child after she was impeached on cross-examination. Williams v. State (App. 8 Dist. 1996) 927 S.W.2d 752, petition for discretionary review refused.

Officer's testimony regarding award of commendation he had recently received was not improper bolstering, and trial court was within its discretion to admit testimony as general background information; evidence was not improperly used to add credence to

earlier unimpeached evidence offered by state. Zemen v. State (App. 14 Dist. 1995) 912 S.W.2d 363.

"Bolstering" occurs when additional evidence is used to add truthfulness or greater weight to earlier, unimpeached evidence offered by same party. Pryne v. State (App. 9 Dist. 1994) 881 S.W.2d 593, petition for discretionary review refused.

State did not bolster testimony of rape victim by submitting corroborating testimony of other witnesses on issue of victim's ability to identify defendant in photographic lineup when her left eye was swollen shut; defendant challenged victim's ability to identify him by cross-examining her on that issue. Pryne v. State (App. 9 Dist. 1994) 881 S.W.2d 593, petition for discretionary review refused.

Prosecution did not bolster rape victim's credibility by presenting witness who testified about victim's truthfulness; defense counsel extensively attacked victim's character for truthfulness by eliciting several prior inconsistent statements, confronting her at length about the sexy outfit she wore as cocktail waitress, accusing her of dancing with customers in sexy manner, and asking questions that suggested that victim had lied to defendant about whether she knew who stole his cooler and tools. Pryne v. State (App. 9 Dist. 1994) 881 S.W.2d 593, petition for discretionary review refused.

Prosecutor may not go outside record to bolster credibility of witness. Grant v. State (App. 14 Dist. 1993) 858 S.W.2d 29.

Prosecutor improperly bolstered witness' credibility in closing argument with unsworn testimony rather than merely responding to defendant's argument, where he asserted that if victim had criminal history, defendant would have brought it out; however, comment was not so egregious that it denied defendant a fair and impartial trial. Grant v. State (App. 14 Dist. 1993) 858 S.W.2d 29.

Police officer's testimony that witness had identified defendant in photospread as person he saw riding away from victim's house on bicycle at time of offense was not inadmissible bolstering evidence; officer's testimony was substantive evidence linking defendant to charged offense that happened to corroborate witness' earlier identification testimony, and there was no indication that police officer's testimony was offered for sole purpose of convincing jury that witness was worthy of credit. Solomon v. State (App. 2 Dist. 1993) 854 S.W.2d 265.

Expert testimony concerning behavioral characteristics typically exhibited by child victims of sexual abuse and describing behavior observed in complaining witnesses was admissible relevant evidence,

despite defendant's claims that the testimony "bolstered" testimony of complaining witnesses. Cohn v. State (Cr.App. 1993) 849 S.W.2d 817.

"Bolstering" occurs when party uses item of evidence to add credence or weight to some earlier unimpeached evidence that party offered. Vollbaum v. State (App. 10 Dist. 1992) 833 S.W.2d 652, petition for discretionary review refused.

Bolstering occurs when evidence is used to add credence to a previously unimpeached piece of evidence; there must be a relation between the bolstering testimony and the impeachment in order to be admissible. Jones v. State (App. 14 Dist. 1992) 833 S.W.2d 634, petition for discretionary review refused.

31. Prejudicial evidence

Social worker's testimony about child's use of anatomically correct dolls in prosecution for aggravated sexual assault of child under 14 was neutral, rather than prejudicial; testimony did not provide specific details of alleged sexual abuse, but merely described interview process and did not repeat child's testimony, offer opinion about child's truthfulness, state that child was sexually abused, or bolster child's credibility. Perez v. State (App. 13 Dist. 1996) 925 S.W.2d 324.

Since almost any relevant evidence offered by one side is prejudicial to opposing party, only unfair prejudice provides basis for excluding evidence. Marles v. State (App. 4 Dist. 1996) 919 S.W.2d 669, petition for discretionary review refused.

Any error in capital murder case arising from admission into evidence of empty envelopes that were allegedly irrelevant to any issue in case was harmless; envelopes were not incriminating in any way, and did not place defendant in poorer light. Alvarado v. State (Cr.App. 1995) 912 S.W.2d 199.

Prejudicial nature of results of breath test taken two and one-half hours after automobile accident did not outweigh their probative value where tests were not shown to be unreliable, and expert testimony that results could not be used to determine the level of alcohol in driver's system at time of accident and that breath tests could produce erroneous results eliminated potential for undue persuasiveness. Verbois v. State (App. 14 Dist. 1995) 909 S.W.2d 140.

Evidence may be both relevant and prejudicial, and being relevant, evidence is admissible subject to rules of evidence. Castillo v. State (App. 13 Dist. 1993) 865 S.W.2d 89, rehearing denied.

32. Discretion of court

Trial court was not required to announce for record that it had completed, in its own mind, balancing test, whereby it determined that evidence's probative value substantially outweighed danger of unfair prejudice to defendant such that it should be admitted; appellate court could imply from record that proper balancing test was done. Moyer v. State (App. 2 Dist. 1997) 948 S.W.2d 525, rehearing overruled, petition for discretionary review refused.

Trial court has broad discretion in determining admissibility of evidence, and its ruling should not be reversed on appeal absent clear abuse of discretion. Richards v. State (App. 8 Dist. 1996) 932 S.W.2d 213, petition for discretionary review refused.

Unless there is clear showing of abuse of discretion, trial court's ruling on admissibility of evidence should not be reversed. Turner v. State (App. 14 Dist. 1996) 931 S.W.2d 52.

Trial court abuses its discretion in criminal case only when it applies erroneous legal standard, or when no reasonable view of record could support trial court's conclusions under correct law and facts viewed in light most favorable to its legal conclusion. Araiza v. State (App. 4 Dist. 1996) 929 S.W.2d 552, rehearing overruled, petition for discretionary review refused.

Complaints regarding admission or exclusion of evidence in criminal case are subject to abuse of discretion standard of review. Araiza v. State (App. 4 Dist. 1996) 929 S.W.2d 552, rehearing overruled, petition for discretionary review refused.

Determination of whether to admit evidence is within trial court's discretion, and its ruling will not be disturbed absent abuse of discretion. Carter v. State (App. 11 Dist. 1996) 928 S.W.2d 745, petition for discretionary review refused.

Appellate court should not set aside trial court's rulings to exclude or admit evidence absent showing in record that trial court abused its discretion. Perez v. State (App. 13 Dist. 1996) 925 S.W.2d 324.

Trial court's ruling on admissibility of evidence is subject to abuse of discretion standard on appeal, and abuse of discretion will be found only when trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. Draheim v. State (App. 4 Dist. 1996) 916 S.W.2d 593, petition for discretionary review refused.

Trial court clearly abuses its discretion when its decision is so clearly wrong as to lie outside that zone within which reasonable

persons might disagree. Foster v. State (App. 14 Dist. 1995) 909 S.W.2d 86, petition for discretionary review refused.

Determination of admissibility of evidence is within sound discretion of trial court and will not be reversed on appeal absent clear abuse of discretion. Foster v. State (App. 14 Dist. 1995) 909 S.W.2d 86, petition for discretionary review refused.

Trial court is afforded broad discretion in determining questions concerning admissibility of evidence and existence of a privilege and its ruling will not be reversed absent an abuse of discretion. Welch v. State (App. 8 Dist. 1995) 908 S.W.2d 258, rehearing overruled.

Admissibility of evidence generally rests in sound discretion of trial judge. Melugin v. State (App. 1 Dist. 1995) 908 S.W.2d 12, review granted, vacated 956 S.W.2d 43, on remand 989 S.W.2d 470, petition for discretionary review refused.

Trial court's evidentiary ruling will be reversed only for abuse of discretion. Melugin v. State (App. 1 Dist. 1995) 908 S.W.2d 12, review granted, vacated 956 S.W.2d 43, on remand 989 S.W.2d 470, petition for discretionary review refused.

On review of trial court's determination to admit or exclude evidence, appellate court must afford trial court great discretion in its evidentiary decisions, as trial judge is in superior position to evaluate impact of evidence. Bisby v. State (App. 2 Dist. 1995) 907 S.W.2d 949, rehearing overruled, petition for discretionary review refused.

On review of trial court's determination to admit or exclude evidence, test for abuse of discretion is not whether, in opinion of reviewing court, facts present appropriate case for trial court's actions, but whether court acted without reference to any guiding rules and principles; reviewing court looks to see whether act was arbitrary or unreasonable, and judicial rulings will be affirmed if trial court follows appropriate analysis and balancing factors, though reviewing court may disagree with weight given to those individual factors. Bisby v. State (App. 2 Dist. 1995) 907 S.W.2d 949, rehearing overruled, petition for discretionary review refused.

Questions of relevance should be left largely to the trial court, relying upon its own observations and experience, and its decision will not be reversed absent abuse of discretion. Skillern v. State (App. 3 Dist. 1994) 890 S.W.2d 849, rehearing overruled, petition for discretionary review refused.

Trial court is afforded discretion to exclude or admit evidence,

and appellate court should not set aside trial court's ruling absent showing that trial court abused its discretion by acting in arbitrary and capricious matter. Pritchett v. State (App. 14 Dist. 1994) 874 S.W.2d 168, rehearing denied, petition for discretionary review dismissed, petition for discretionary review refused.

If trial court determines that evidence is irrelevant, evidence is absolutely inadmissible and trial court has no discretion to admit it. Pritchett v. State (App. 14 Dist. 1994) 874 S.W.2d 168, rehearing denied, petition for discretionary review dismissed, petition for discretionary review refused.

Whether evidence is admissible on issue at trial is subject to discretion of trial judge and will not be overruled absent abuse of discretion. Ladner v. State (App. 12 Dist. 1993) 868 S.W.2d 417, rehearing denied, petition for discretionary review refused.

Determination of whether evidence is relevant to any issue in case lies within discretion of court. Easter v. State (App. 10 Dist. 1993) 867 S.W.2d 929, petition for discretionary review refused, rehearing on petition for discretionary review denied.

33. Presumption of admissibility

There is presumption of admissibility of relevant evidence. Silvestre v. State (App. 1 Dist. 1995) 893 S.W.2d 273, petition for discretionary review refused.

Admissibility of relevant evidence is favored by the rules, and it is presumed that relevant evidence is more probative than prejudicial. Laca v. State (App. 8 Dist. 1995) 893 S.W.2d 171, petition for discretionary review refused.

If logically relevant, evidence will be admissible unless opponent demonstrates that it should be excluded because of some other constitutional, statutory or evidentiary provision. Hawkins v. State (App. 2 Dist. 1994) 871 S.W.2d 539.

When court excludes testimony offered by defendant, burden on appeal is to show that court abused its discretion in excluding evidence. Easter v. State (App. 10 Dist. 1993) 867 S.W.2d 929, petition for discretionary review refused, rehearing on petition for discretionary review denied.

34. Gang association

Trial record established that evidence implying that defendant and defense witness were affiliated with gang was admitted solely for limited purpose of showing bias on part of defense witness, and associational rights of defendant and defense witness were not

implicated. McKnight v. State (App. 2 Dist. 1994) 874 S.W.2d 745.

Evidence implying that defendant and defense witness were affiliated with gang was admissible to show bias on part of defense witness. McKnight v. State (App. 2 Dist. 1994) 874 S.W.2d 745.

35. Particular cases

There was no error in allowing the comparison of fingerprints obtained at trial with latent fingerprints found at scene, even though defendant complained of prints obtained before trial without counsel present; possibility that officer compared complained-of pretrial prints to latent prints did not taint comparison of trial prints to latent prints, and officer testified that he did not rely on the pretrial prints in matching trial prints to latent prints, and pretrial fingerprints complained of by defendant would have been admissible. Garcia v. State (App. 12 Dist. 1996) 930 S.W.2d 621.

Concoctions prepared by defendant on trial for possessing liquor with intent to sell without proper permit and for selling liquor at prohibited hour, designed to show the liquids seized from his club were in fact nonalcoholic, were not admissible as part of an "experiment" to be performed by jury to determine if the substances smelled or tasted like liquor. Kaldis v. State (App. 1 Dist. 1996) 926 S.W.2d 771, petition for discretionary review refused.

Social worker's testimony regarding interview process with child and anatomically correct dolls in prosecution for aggravated sexual assault of child under 14 was relevant to show child's ability to explain what happened. Perez v. State (App. 13 Dist. 1996) 925 S.W.2d 324.

Testimony that victim's brother started crying upon being told that his brother had been killed was irrelevant and, thus, inadmissible at guilt or innocence phase of murder trial. Irizarry v. State (App. 4 Dist. 1996) 916 S.W.2d 612, petition for discretionary review refused.

36. Financial matter

Rules of Evidence prohibit references to collateral source benefits received by injured party, even absent motion in limine precluding such references. Kendrix v. Southern Pacific Transp. Co. (App. 9 Dist. 1995) 907 S.W.2d 111, rehearing overruled, writ denied, rehearing of writ of error overruled.

Evidence of $60,000 plaintiff received in settlement of workers' compensation claim approximately a year and a half after his injury and discharge by employer was properly excluded in plaintiff's suit

against employer alleging retaliatory discharge for filing workers' compensation claim, since it represented evidence of income from a collateral source. Pacesetter Corp. v. Barrickman (App. 12 Dist. 1994) 885 S.W.2d 256.

Testimony concerning wealth or poverty of party is ordinarily inadmissible in civil case; evidence is inadmissible because it is irrelevant and often prejudicial. Carter v. Exxon Corp. (App. 11 Dist. 1992) 842 S.W.2d 393, rehearing denied, writ denied.

Evidence regarding oil royalties paid by lessee under oil and gas leases to lessor's estate was admissible in dispute concerning payment of gas royalties, notwithstanding contention of heirs of estate that evidence was irrelevant and unfairly prejudicial; the heirs were portrayed as being "poor folks," which had effect of presenting otherwise collateral fact, and, thus, evidence of oil royalties was relevant because of heirs' presentation of similar evidence and it was not unfairly prejudicial since it tended to offset prejudice caused by similar evidence. Carter v. Exxon Corp. (App. 11 Dist. 1992) 842 S.W.2d 393, rehearing denied, writ denied.

37. Rebuttal

Opening statement by employer's counsel, in suit for wrongful termination, that "no one was ever fired as a result of a worker's comp. claim," opened door to employee's evidence indicating company policy of dismissing employees filing worker's compensation claims. Durbin v. Dal-Briar Corp. (App. 8 Dist. 1994) 871 S.W.2d 263, rehearing overruled, application for writ of error filed, writ denied.

38. Illegally obtained evidence

Illegally obtained evidence may be admissible in civil lawsuits, but admissibility of evidence illegally obtained is tempered by Rule of Evidence providing for admissibility of all relevant evidence except as otherwise provided by statute. Collins v. Collins (App. 1 Dist. 1995) 904 S.W.2d 792, rehearing overruled, writ denied 923 S.W.2d 569, rehearing of writ of error overruled.

Before illegally obtained taped telephone conversation evidence could be excluded from trial, party seeking exclusion was required to show that exclusion was required under federal or state statute. Collins v. Collins (App. 1 Dist. 1995) 904 S.W.2d 792, rehearing overruled, writ denied 923 S.W.2d 569, rehearing of writ of error overruled.

Trial court in divorce action erred in admitting evidence consisting of taped phone conversations that were illegally obtained, even though statutes making taping illegal did not

specifically provide that illegally taped conversations were inadmissible, as provisions rebutted presumption of admissibility under Rules of Evidence, where federal law prohibited the use or disclosure of the tapes except as provided by statute, state statute provided cause of action against any person who divulges information obtained by illegal wiretap, and provided that party may ask court for injunction prohibiting divulgence or use of information obtained by intercepted communication; thus, admission of such evidence would make court partner to illegal conduct. Collins v. Collins (App. 1 Dist. 1995) 904 S.W.2d 792, rehearing overruled, writ denied 923 S.W.2d 569, rehearing of writ of error overruled.

39. Negligence

Evidence that truck driver was directed by his supervisor to take a drug test after collision with driver, and that he did not do so, was not relevant to show negligent entrustment and gross negligent entrustment of vehicle by his employer, in driver's action against truck driver and his employer for damages resulting from collision with truck; act of entrusting vehicle to truck driver necessarily took place prior to collision, to which truck driver's conduct subsequent to collision had no bearing. Huynh v. R. Warehousing & Port Services, Inc. (App. 12 Dist. 1998) 973 S.W.2d 375.

Rules of Evid., Rule 402

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