

Rule 403. Exclusion of Relevant Evidence on Special Grounds

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Test For Admissibility of Extraneous Offense, Review

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

Preservation of Error

To properly preserve error with regard to inadmissible extraneous offense evidence, a party must first object under Rule 404(b) that the evidence is irrelevant. Once that objection is made, the proponent of the evidence must then satisfy the trial court that the evidence has relevance apart from its tendency to prove character conformity. Once the trial court rules that the evidence is relevant apart from character conformity, the opponent must then object that the evidence, although relevant, should not be admitted because its probative value is substantially outweighed by the danger of unfair prejudice. The court then is required to conduct a balancing test to determine that question. *Montgomery v. State*, 812 S.W.2d 372, 388-90 (Tex. Crim. App. 1991)(on rehearing); *Beasley v. State*, 838 S.W.2d 695 (Tex.App.--Dallas 1992, no pet.).

Balancing Analysis

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

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

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

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

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

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

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

In reviewing the trial court's determination of the probative and prejudicial value of evidence under Rule 403, we do not make a

de novo determination, but reverse only upon a clear abuse of discretion. *Montgomery*, 810 S.W.2d at 392. But, reviewing for abuse of discretion in this context requires more than deciding that the trial judge did in fact conduct the required balancing between probative and prejudicial values; the trial court's determination must be reasonable in view of all relevant facts. *Id.* at 392. Accordingly, if the record reveals criteria reasonably conducing to a risk that the probative value of the tendered evidence is substantially outweighed by unfair prejudice, then the trial court acted irrationally in admitting it and abused its discretion. *Rachal v. State*, 917 S.W.2d 799, 808 (Tex. Crim. App. 1996).

Presumption of Admissibility

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