

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

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

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

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

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

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

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

(b) Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

Test For Relevance

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

"Opening the Door"

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

State, 164 Tex.Crim.App. 630, 301 S.W.2d 634 (1957); *Lewis v. State*, 933 S.W.2d 172, 179 (Tex.App.--Corpus Christi 1996, pet. ref'd).

Standard For Admissibility of Extraneous Offenses

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

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

Same Transaction / Contextual Evidence

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

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

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

A victim's extraneous acts of violence also remain admissible

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