THE GUERRILLA'S GUIDE TO EVIDENCE

By: Greg Westfall

One thing I have noticed about truly great trial lawyers is that they take absolute control of the courtroom. From *voir dire* to closing arguments and even in addressing notes from the jury, everything seems to be done on their terms. There is absolutely no doubt in my mind that this affects the jury – and makes them more likely to render a verdict favorable to such lawyers. While a strong personality and confident style don't necessarily overcome those pictures of your client standing over a dead body with a gun in his hand, I am convinced that they can and will make a difference in the close cases.

There are two basic ways that come to mind to get control of the courtroom: (1) look and act like you know what you are doing; (2) capitalize ruthlessly on any mistake the prosecutor makes, thereby destroying his case, or making him look and act like he *doesn't* know what he is doing or, even better, that he is trying to hide something.[1] Both of these require a good basic knowledge of the Rules of Evidence.

In spite of the tales we all heard in law school, the simple truth is that you really don't need to know the Rules of Evidence all that well to try a case in a state court in Texas. Most possible objections don't get made anyway – usually for strategic reasons. Every *good* trial lawyer, however, knows the rules backward and forward – and, more importantly, knows how they work.

When I decided to become a trial lawyer, I read the rules of evidence several times, trying to internalize them. It didn't work. In order to have the intuitive – almost reflexive – feel for the Rules of Evidence that is necessary to know how they *work*, you can't just read about them. You really have to take them for a spin a few times in court. But this can really be fun. That is what this paper is about. This is not an "academic" paper as such, but a few of the tricks I have learned and that hopefully will be useful to others. Again, these are tricks I *learned* – I didn't make any of these up -- I just know they work. Use them when the prosecutor is not looking.

One final thought ...

"It is axiomatic that error is forfeited when the complaint on appeal differs from the complaint at trial."

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[1]Of course, it is really not *quite* as simple as this. The jury has to believe you are honest and sincere and that your client deserves relief. And both of these can be taken too far – if you come off as an arrogant know-it-all, you will lose the jury. Likewise, if you whip the prosecutor until he wets himself, the jury will convict your client because they feel sorry for the prosecutor. All things in moderation.

Judge Sharon Keller, writing for the majority,

McGinn v. State, 961 S.W.2d 161, 166 (Tex. Crim. App. 1998).

"If the trial court's decision to exclude evidence is correct on any theory of law applicable to the case, including Rule 403, it will be sustained."

PER CURIAM, writing for a unanimous court,

Weatherred v. State, 975 S.W.2d 323 (Tex. Crim. App. 1998).

The only technicalities left in the law are those concerning the criminal defendant's preservation of error for appeal. You have to know the rules to do it.

EXTRANEOUS OFFENSES – SUDDEN IMPALEMENT

Montgomery v. State, 810 S.W.2d 372 (Tex. Crim. App. 1990)(Op. On Reh'g) is the landmark case in this area. *Santellan v. State*, 939 S.W.2d 155 (Tex. Crim. App. 1997) re-iterated the rules in *Montgomery* and is especially widely cited for its Rule 403 analysis.

Preserving error where the state offers an extraneous act or offense into evidence requires certain definite steps:

1. Object to the evidence "on the grounds that the evidence is not relevant, violates Rule 404(b), or constitutes an extraneous offense." *Santellan*, 939 S.W.2d at 168.

2. The burden shifts to the "proponent of the evidence" (the state) to "satisfy the trial court that the extraneous offense evidence has relevance apart from its character conformity value." *Id.* The proponent of the evidence must show the trial court that the evidence is admissible for one or more of the "other purposes" alluded to in Rule 404(b). *See id.* The list of "other purposes"set out in Rule 404(b) is neither exclusive nor exhaustive.

3. "If the trial court determines the evidence has no relevance apart from supporting the conclusion that the defendant acted in conformity with his character, it is absolutely inadmissible." *Id.*

4. If, on the other hand, the trial court determines that the evidence does have relevance apart from character conformity, then the opponent of the evidence must further interpose an objection under Rule 403 that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, etc. *See id.* at 169.

IT IS ONLY AT THIS POINT THAT ERROR IS PRESERVED FOR APPEAL!!

A Smart "Optional Step":

5. It is a good practice to request that a limiting instruction be given by the court at the time the evidence comes in. *See* Rule 105(a)("in the absence of such a request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal").

   In *Rankin v. State*, 974 S.W.2d 707, 711-12 (Tex. Crim. App. 1998)(on Grant of Reconsideration), the Court of Criminal Appeals held that it was reversible error for the trial court to refuse a request to give a limiting instruction at the time the extraneous offense evidence was first introduced before the jury. The defendant is also entitled to such an instruction in the jury charge. Request the instruction at both guilt-innocence and punishment (in a non-capital case) where extraneous offense evidence has been admitted. *See* TEX. CODE CRIM. PRO. Art. 37.07 § 3(a) & (b). Note that the contemporaneous limiting instruction does not have to include a reference to the fact that the jury must also believe the extraneous offense beyond a reasonable doubt. *See Jackson v. State*, 992 S.W.2d 469, 477-78 (Tex. Crim. App. 1999). The instruction that goes into the charge, however, does. *See id.*

Rule 403 Analysis:

Santellan goes on to set out a series of factors that the trial court should consider when doing the Rule 403 balancing. *See id.* These factors 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, 939 S.W.2d at 169. These factors may be argued to both the trial court and the court

of appeals. However, the trial judge does not have to state his reasons for deciding the Rule 403 question. When the objection is lodged, the court is presumed to have done the balancing. *See* *Williams v. State*, 958 S.W.2d 186 (Tex. Crim. App. 1997). Whatever decision the judge makes will be reviewed on a "clear abuse of discretion" standard. *See Santellan*, 939 S.W.2d at 169. The court of appeals, however, must do the balancing on paper and through the use of the factors set out above. *See Rankin v. State*, 974 S.W.2d 707, 711 (Tex. Crim. App. 1998)(on Grant of Reconsideration). Thus, to the extent that the trial record can be further made to support the arguments, the appeals process might be slightly more enjoyable.

Whether evidence will be unfairly prejudicial in any given case is fact- and case-dependent and must be considered in light of the other evidence at trial. *See id.* Needless to say, there are hundreds of cases with examples of this analysis (a Westlaw "KeyCite" on *Montgomery v. State* brought up 1213 citations), so I will not even attempt to set out examples.

Things to remember about extraneous offenses:

a. The state *must* give you "reasonable notice" of the extraneous offenses it intends to offer in its case in chief, Rule 404(b), *but you must request it!!*

Early in the case, send a certified letter to the prosecutor on the case requesting written notice of any evidence the state intends to use pursuant to TEX. RULES EVID. 404(b) and 609(f), as well as TEX. CODE CRIM. PRO. Art. 37.07 § 3(g) and, in a case involving a child victim, Art. 38.37 § 3. If the state fails to comply within a reasonable time before trial, the evidence is inadmissible in the trial, period. An "open file" policy does not satisfy the requirement for notice, *Buchanan v. State*, 911 S.W.2d 226, 232-33 (Tex. Crim. App. 1995), although an argument can be made that if the evidence is in the "open file" then error in admitting the offense may be harmless.

DO NOT PUT YOUR REQUEST IN A MOTION FILED WITH THE COURT!!! A request for notice in a motion filed with the court is not effective until the court rules on it and grants it. This rule is stout and ruthlessly followed in the appellate courts. *See, e.g.*, *Mitchell v. State*, 982 S.W.2d 425 (Tex. Crim. App. 1998)(and cases cited therein).

The state does not have to give notice of intent to use "same transaction/ contextual" evidence. The words of Rule 404(b) create this exception and the courts follow it. *See, e.g.*, *Yates v. State*, 941 S.W.2d 357, 365-66 (Tex. App. – Waco 1997, pet. ref'd).

b. The extraneous offense must be proven to the trial court beyond a reasonable doubt as a condition of *admissibility*. *See George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994).

c. Always request a hearing outside the presence of the jury to go through all of the predicate for admission discussed above as well as the requirements of *George*.

Rule 104(a) requires the court to make preliminary determinations as to the admissibility of evidence. Rule 103(c) gives strong support to having such a hearing outside the presence of the jury.

The Court of Criminal Appeals last year held that a defendant had waived any error that might have been committed by the trial court in allowing an incompetent child witness to testify in violation of Rule 601(a)(2) because he did not request a hearing for the court to make a competency determination. *See McGinn v. State*, 961 S.W.2d 161, 164-66 (Tex. Crim. App. 1998). The defendant had argued that the trial court has a duty to *sua sponte* conduct such a hearing even in the absence of a request. The court did not stop at just disagreeing with the defendant's interpretation of Rule 601, but went on to state:

"Where the rule specifies a right to a hearing upon request, an objection to the substance of the testimony that would be the subject of such a hearing does not preserve error regarding the trial court's failure to conduct the hearing. [citation to Rule 705 omitted]. For the reasons stated below, we hold that this principle applies even if the rule, statute, or other law is silent about whether or not the party must request a hearing. That is, to complain about failing to obtain a hearing or other inquiry, the party must have requested the hearing unless the rule, statute, or other law conferring the right to a hearing provides that the trial court has a duty to sua sponte conduct one." *Id.*

d. If you don't go through the *Montgomery* song and dance, you're toast on appeal.

e. Be prepared to argue with the state over whether the evidence serves a legitimate purpose under Rule 404(b).

Just about any "other purpose" you can think of under Rule 404(b) has been litigated and there are rules that apply to it. Here are some examples:

Same transaction/contextual evidence ... Not!

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

> Gang affiliation not same transaction contextual evidence because it is not *relevant*. Discusses some of the limitations of such evidence, referencing *England v. State*, 887 S.W.2d 902, 915 (Tex. Cr. App. 1994). "Such evidence is admissible only when the offense would make little or no

sense without also bringing in the same transaction evidence."

Identity evidence ... Not!

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

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

Opening the door (rebutting a defensive theory) ... Not!

Lopez v. State, 990 S.W.2d 770 (Tex. App. – Austin 1999, no pet. hist.)(appellant did not "open the door," but error harmless (bummer)).

Wheeler v. State, 988 S.W.2d 363 (Tex. App. – Beaumont 1998, pet. filed) (appellant did not "open the door" – reversed and remanded!)

Matthews v. State, 979 S.W.2d 720 (Tex. App. – Eastland 1998, no pet.) (appellant did not "open the door," but error harmless).

f. Always be on the lookout for ways to use this stuff against the state!

"Opening the door" is one of my personal favorites.

THAT DOOR SWINGS BOTH WAYS

"Opening the door" implicates several Rules of Evidence -- Rules 404(b) and 403, Rule 608(b) and Rule 806 to name but a few. Rules 106 and 107 (Remainder of or Related Writings

or Recorded Statements, and the Rule of Optional Completeness) could even be considered "door opening rules." "Opening the door" in the purest sense is what happens when somebody leaves a false impression with the jury. The thing to remember is that the door can be opened *anytime* by *anyone* connected to a party. There is case support for the proposition that the door can even be opened during voir dire and opening statement. Here are the most popular areas.

Opening the Door to Extraneous Offenses Through Rule 404(b):

Since it is usually the defendant who opens the door, the law surrounding it invariably runs along that vein. Here are some guidelines:

a. "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." *Wheeler v. State*, 988 S.W.2d 363, 367 (Tex. App. – Beaumont 1999, pet. filed).

b. If the court determines that the door has been opened, then the opponent is allowed to introduce rebuttal evidence to correct the false impression.

c. The key here is (1) was there a false impression left with the jury? and (2) if so, will the rebuttal evidence the opponent proposes to use actually correct it?

"The trial court must be assured of two things before granting the State permission [to use the rebuttal evidence]." 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. ... "[W]hile 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." *Id.* at 367-68.

"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." *Id.* at 368.

Remember that this is all couched in the *Montgomery* objection framework discussed above. "Correcting a false impression" is one way to get into Rule 404(b). So after all of this, a Rule 403 objection would also be required and a limiting instruction should be requested.

Remember also that this goes both ways – the state's witnesses can open doors to their extraneous offenses, also. Listen for it to happen.

Opening the Door to Other Otherwise Inadmissible Evidence:

Everyone knows that a bonehead comment like, "I would never do something like that" is going to open some doors. But a false impression can be left with the jury on an infinite number of subjects other than a person's propensity to commit crimes. Evidence that would be irrelevant according to Rule 401 suddenly becomes relevant when it is used to rebut a false impression. Again, listen for it to happen. Watch out also, this one can sneak up on you. Use the same analysis and argument outlined immediately above to defend against it. Don't forget Rule 403.

Remainder of or Related Writings or Recorded Statements:

"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." TEX. RULES EVID. Rule 106.

Any *other* writing or recorded statement?

Considered contemporaneously with it?

If your opponent offers part of a document and it leaves a false impression with the jury, then argue that he or she has opened the door to *other* documents as well -- and you should be able to read them to the jury *right now!* The potential for mischief should be obvious. If you have to defend against this, don't forget Rule 403.

The Rule of Optional Completeness:

"When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement *which is necessary to make it fully understood or to explain the same* may also be given in evidence, as when a letter is read, all letters on the same subject between the same parties may be given." TEX. RULES EVID. Rule 107.

Two things to remember: (1) the part of the act, declaration, etc., must be entered into evidence and (2) the evidence offered to show the "other act, declaration, etc." evidence must be on the "same subject." Again, if you have to defend against this, do not forget to make the court do a Rule 403 analysis.

Rule 806 – Attacking the Credibility of the Hearsay Declarant:

"When a hearsay statement, or a statement defined in Rule 801(e)(2)(C), (D), or (E) ... has been admitted in evidence, the credibility of the declarant may be attacked ... by any evidence which would be admissible for those purposes if declarant had testified as a witness." TEX. RULES EVID. Rule 806.

On its face, this Rule is clearly confined to the strictures of Articles IV, VI and VII. But, if your opponent uses a hearsay declarant to create a false impression, then the sky's the limit. You can also combine Rule 806 with Rules 106 and 107.

"Evidence of a statement or conduct by the declarant at any time, offered to impeach the declarant, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." TEX. RULES EVID. Rule 806.

Cross-reference to Rule 613(a)(relating to inconsistent statements) and (b)(relating to bias or interest). In each of these rules, you have to (1) tell the witness the contents of the inconsistent statement as well as a description of the time and place and to whom the statement was given or describe the circumstances indicating bias; (2) give the witness a chance to explain or deny; and (3) if the witness admits to the inconsistent statement or bias, no extrinsic evidence may be introduced on that subject. No such constraints exist under Rule 806. *That* is handy.

The following case gives a good example of Rule 806 at work:

In *Griffith v. State*, 983 S.W.2d 282 (Tex. Crim. App. 1998), an ex-cop was on trial for capital murder (and received the death penalty, by the way). During the punishment phase, the state called a Ruben Diaz, a lieutenant with the Harris County Sheriff's Department and one of Defendant's former supervisors to the stand to testify that he had a bad opinion of Defendant.

During cross-examination, counsel for the defense confronted Diaz with Defendant's personnel file, which contained a number of documents favorable to Defendant written by former supervisors. Two of the authors of some of these favorable documents, however, had been fired from the sheriff's department for committing criminal offenses themselves, one of them for rape. On redirect and over Defendant's objection, the state brought this out.

The Court of Criminal Appeals' analysis was as follows:

"While the State did not complain of the admission of appellant's personnel file and its contents, the trial judge could have reasonably concluded that the documents contained within the file were hearsay. ... Because we conclude the statements qualified as hearsay, the credibility of each declarant could then be attacked pursuant to the dictates of Rule 806. If the declarants had testified as witnesses, the State would have been allowed to impeach their credibility with a felony conviction or the conviction of a crime involving moral turpitude. Hence, this same impeachment evidence could be used pursuant to Rule 806." *Id.* at 290.

Note the implications of this reasoning. First, you do not have to try to keep the evidence

out before you can go after the declarant under Rule 806. You have a choice: either object to the hearsay now, or use Rule 806 if you have something better you can do. Second, if that hearsay declarant opens some door, it is just the same as if someone on the witness stand did so. And you can use otherwise inadmissible extrinsic evidence to correct a "false impression." Also very handy.

But watch out – this one can sneak up on you, too.

IMPEACHMENT – SIX RECENT CASES

The Court of Criminal Appeals has been busy lately redefining the parameters of witness impeachment. What follows are four cases from that court, as well as two from courts of appeals.

The Rules on impeachment are mainly found in Article VI. However, impeachment always involves the rules of relevancy in Article IV, and may at any given time involve any other rule of evidence, especially those concerning hearsay (Article VIII). The following recent cases highlight some of the concepts of impeachment.

Calling A Witness Solely to Impeach:

"The credibility of a witness may be attacked by any party, including the party calling him." TEX. RULES EVID. Rule 607.

For some years now it has kind of been assumed that you could not call a witness to the stand, knowing he is going to deny certain things, solely so you can impeach him and thereby get otherwise inadmissible evidence (invariably hearsay) before the jury. Recently, the Court of Criminal Appeals had a chance to examine just such a situation. *See Hughes v. State*, 4 S.W.3d 1 (Tex. Crim. App.1999).

In that case, there was a pre-trial hearing where the wife of the defendant, who was accused of child molestation, denied that he had confessed to her. At the hearing, the state then called two CPS workers to the stand, who testified that she had, on an earlier occasion, told them that the defendant confessed to her and related details of the confession.

At trial, the state called the wife to the stand and she again denied that Defendant had confessed to her. Over Defendant's objection, the state then called the CPS workers to the stand and they also testified as they did in the pre-trial hearing. The defendant appealed his conviction.

Side-stepping the issue of the state calling the witness solely to impeach, the Second Court of Appeals affirmed. The trial court had, at the time the testimony was rendered, instructed the jury that they could not consider the statements for their truth, but only as they

bore on the wife's credibility. The court of appeals held this was protection enough. The court also held that this was proper impeachment under Rule 607.

The Court of Criminal Appeals reversed, holding not that this maneuver violates Rule 607, but that such testimony is unfairly prejudicial under Rule 403. Even though Rule 607 no longer has a "surprise requirement," the lack of surprise is a factor to be considered in balancing the probative value versus unfair prejudice.

"Because grafting a surprise requirement would contravene the plain language of Rule 607, we decline to adopt this common-law distinction. Instead, we conclude the State's knowledge that its own witness will testify unfavorably is a factor the trial court must consider when determining whether the evidence is admissible under Rule 403. Analyzing lack of surprise or injury in terms of Rule 403 is preferable not only because it comports with the plain language of Rule 607, but because it will lead to the conclusion that a trial court abuses its discretion under Rule 403 when it allows the State to admit impeachment evidence for the primary purpose of placing evidence before the jury that was otherwise inadmissible. The impeachment evidence must be excluded under Rule 403's balancing test because the State profits from the witness' testimony only if the jury misuses the evidence by considering it for its truth. Consequently, any probative value the impeachment testimony may have is substantially outweighed by its prejudicial effect." *Id.* at *3.

It is important to note that no hearsay exception applied to the statements. If some exception had applied, the result would probably have been different. Likewise, if the state had actually been surprised by the wife's denial, the result might very well have been different.

In light of this case, I guess it is important to discover whether the state knows that it will have to impeach any of its witnesses before they take the stand. Theoretically, under *Brady v. Maryland*, I guess they ought to tell us....

Getting Around Rule 608:

TEX. RULES EVID. Rule 608 sets out the guidelines for attacking the credibility of a witness. First, the credibility of the witness may only be attacked through reputation or opinion testimony that goes only to his character for truthfulness or untruthfulness, Rule 608(a), and second, specific instances of conduct cannot be inquired into or proved through extrinsic evidence for purposes of attacking credibility. Rule 608(b).[2] The lone exception to this rule is impeachment by evidence of a conviction for a felony or crime involving moral turpitude. Rule 608(b); Rule 609. Rule 609 then goes on to state that a conviction cannot be used if the person has been pardoned, etc., and that if the conviction is on appeal, it likewise cannot be used. Rule 609(c) & (e), respectively.

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[2]Note that this rule does not prohibit proving specific instances of conduct for purposes other than attacking credibility. There is no conflict with Rule 404(b) which allows impeachment with specific instances of conduct for such other purposes.

Even though it would facially appear that only final convictions could be used for impeachment – to the exclusion of any other posture a criminal proceeding could be in – this has not been the case for some time. State's witnesses have been impeachable for being on probation since *Davis v. Alaska* was decided in 1974. *See id.*, 415 U.S. 308 (1974). But it appears the shoe may soon be on the other foot.

Davis and cases like it held that where a state's witness is on probation or has pending charges, an inference arises that he may have a motivation to testify favorably to the state becaue of this "vulnerable relationship." In *Dixon v. State*, 2 S.W.3d 263 (Tex. Crim. App.1999)(Op. On Reh'g), the court tackled the question of whether a defense witness' pending charges might make him biased *against* the state. While the appellant in *Dixon* was ultimately poured out because his complaint on appeal did not match his complaint at trial, the Court of Criminal Appeals did first indulge in an engaging chat about the difference between Rule 608 and 612(b), a large part of which is set out verbatim:

"The prosecution sought to impeach defense witness Pelfrey with two pending felony indictments. [The indictments were for aggravated sexual assault and indecency with a child and Dixon was charged with sex offenses against a child as well.] Appellant objected under ... Rule 608(b) claiming that only 'final felony convictions may be used to impeach testimony.' The trial court permitted the impeachment under ... Rule 612(b) to show 'bias and motive.'

...

"While ... Rule 608 and Rule 612(b) deal with the same general subject matter of impeaching witnesses, they nevertheless are distinct rules which serve different purposes. Rule 608(a) says how to impeach a witness's general character for truthfulness. Rule 608(b) expressly bars impeaching a witness's general character for truthfulness with specific acts of conduct 'other than conviction of crime as provided in Rule 609.'

"Rule 612(b) permits impeaching a witness by proof of 'circumstances or statements' showing the witness's bias or interest in a particular case. Unlike Rule 608(b), Rule 612(b) does not expressly bar the use of specific instances of conduct to show bias or interest.

...

"So Rule 612(b) is different from Rule 608. Rule 608 addresses a witness's general character for truthfulness. Rule 612(b) addresses a witness's trustworthiness in the particular case because of some bias or interest.

"Unlike attacks on a witness's character, which reflect on the witness's truthtelling tendencies generally, attacks concerning bias or interest relate only to specific litigation or parties. The impeaching party must attempt to show that the witness's attitude is such that he is likely to favor or disfavor a particular litigant's position for reasons unrelated to the merits of the suit." *Id.* at 271.

All of this was intended to reinforce the court's conclusion that Defendant's objection

under Rule 608 was insufficient to preserve error under Rule 612(b), so the actual issue presented was never addressed. But when it ultimately is, how is the bias to be shown – and how is it to be compared to that observed in cases like *Davis*? Is the defendant going to dismiss his witness' cases if he does a good job testifying -- or send him to prison if he doesn't? Obviously, no "vulnerable relationship" can be shown between the defendant and his witness. *See, e.g.*, *Carpenter v. State*, 979 S.W.2d 633, 634 (Tex. Crim. App. 1997)("For the evidence to be admissible, the proponent must establish some causal connection between the pending charges and the witness' 'vulnerable relationship' or potential bias or prejudice for the State, or testimony at trial."). Since the bias is then reduced to "he hates the state because we have him under indictment," will that overcome a Rule 403 objection?

Stay tuned. In the mean time, make your objections (including Rule 403) and arguments.

What if the Defendant is the One on Probation?

In *Moreno v. State*, 1999 WL 974269 (Tex. Crim. App., Oct. 27, 1999), the court held that the defendant himself could not be impeached with the fact that he was currently on felony probation because, even if he got a "not guilty" at trial, he could still be revoked. Because of this fact, the court held that the evidence was substantially more prejudicial than probative under Rule 403.

Witness in State Court with Pending Federal Charges:

In *Carpenter v. State*, 979 S.W.2d 633 (Tex. Crim. App. 1998), the court held that a state's witness could not be impeached by the fact that he had federal charges pending. This evidence does not show a "vulnerable relationship with the state" and thus is irrelevant under Rule 401.

R.I.P. Juror Misconduct:

Under TEX. RULES CRIM. EVID. 606(b), jurors could testify to anything relevant to the validity of the verdict they rendered. It was common practice to obtain affidavits from jurors describing how parole entered their decisionmaking process, how one of the jurors shared extensively his personal experiences and even personal knowledge, how race entered into the equation, etc.

No more. The new TEX. RULES EVID. 606(b) states that "a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment." It means what it says. *See Sanders v. State*, 1 S.W.3d 885 (Tex. App. – Austin1999, no pet..); *Hines v. State*, 3 S.W.3d 618 (Tex. App. – Texarkana1999, pet. ref'd).

THE S.O.B. STILL NEEDS KILLIN' -- CAN I STILL KILL HIM?

For years in Texas, when floating a self-defense case, the defense was allowed to introduce evidence of specific acts on the part of the victim to show the defendant's state of mind (reasonable apprehension of fear) or to show who was the first aggressor in the conflict. *See Dempsey v. State*, 266 S.W.2d 875 (1954). With the advent of the Rules of Evidence, the continued viability of this practice has recently been called into question. *See Mozon v. State*, 991 S.W.2d 841 (Tex. Crim. App. 1999); *Tate v. State*, 981 S.W.2d 189 (Tex. Crim. App. 1998).

In *Mozon*, the Court of Criminal Appeals held that while the Rules of Evidence did supersede the Dempsey line of cases, the same evidence can still be proven through the Rules. *See id.* at 845-46. Rule 404(a)(2) provides that in a criminal case, "evidence of a pertinent character trait of the victim" is admissible. "Consequently," the court held, "evidence of a victim's character for violence remains admissible to show the victim was the first aggressor." *Id.* at 845-46. The court went on to observe that "[a] victim's extraneous acts of violence also remain admissible [under Rule 404(b)] to show the defendant's state of mind." *Id*. at 846. "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." *Id.* The only thing that is new is that Rule 403 now applies to this evidence as well. *See id.* at 846.

In *Tate v. State*, 981 S.W.2d 189 (Tex. Crim. App. 1998), the same result was reached, but with an express treatment of Rule 405 as well. Rule 405(a) says that character may only be proven through reputation or opinion. Rule 405(b) creates an exception and allows inquiry into specific acts when character or a character trait "is an essential element of a charge, claim or defense."

It is at best arguable whether specific acts could come in under Rule 405(b) to prove first aggressor or state of mind. The Court of Criminal Appeals' position is that they cannot. See *Tate*, 981 S.W.2d at 192-93. According to the court, "a victim's character is not an essential element of a claim of self-defense." *Id*. at 193 n.5. Not to worry, though, the evidence still all

comes in under Rule 404(b). Just be aware that in the face of an obstinate judge, Rule 405(b) is probably not the correct objection.

WEIRD SCIENCE – USING AND ABUSING EXPERTS[3]

[3]Parts of this section were taken from Cynthia Hujar Orr's paper on Expert Witnesses that she spoke on at the 1999 Rusty Duncan course.

In the past several years, the law surrounding the admissibility of expert testimony has seen more evolution than in the entire previous century. Texas decisions in *Kelly vs. State*, 824 SW2d 568 (Tex.Crim.App. 1992), *E.I. du Pont de Nemours & Co. vs. Robinson*, 923 SW2d 549 (Tex. 1995) and the U.S. Supreme Court's *Daubert vs. Merrell Dow Pharmaceutical*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S.Ct. 2786 (1993) have redefined how the trial courts will determine whether proffered expert testimony will be admitted. With the recent decisions in *Kumho Tire Company v. Carmichael*, 119 S.Ct. 1167 (1999) and *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998), the evolution of the law appears to be basically complete, with only a case-by-case application remaining.

The primary thing to remember about the *Daubert* analysis is that a two-prong showing must be made — the proferred testimony must be shown to be both reliable and relevant. Relevance is basic relevance under TEX. RULES OF EVID. Rules 401, 402 and 403. Reliability is tested by application of the framework introduced in *Kelly* and *Daubert* and their progeny.

No expert library would be complete without the following cases. I definitely recommend that you read them:

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

> The original — established the *Daubert* standard before *Daubert* did. A DNA case, the court analyzed RFLP DNA analysis as "novel scientific evidence," ultimately holding it admissible.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993)

> The Supreme Court's version of *Kelly* — the name we all use (pronunciations differ)

E.I. du Pont de Nemours & Co., Inc., v. Robinson, 923 S.W.2d 549 (Tex. 1995)

> The Texas Supreme Court expressly adopts the *Kelly*/*Daubert* standard

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

> Eyewitness identification case — expands upon the tow-prong analysis of reliability and relevance — very good explanation.

S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996)

> Really a statute of limitations case, but extensive analysis done on expert testimony regarding repressed memories of childhood sexual abuse. The language of the majority opinion sounds a lot like the language that would appear

later in *Nenno v. State* (below)

Hartman v. State, 946 S.W.2d 60 (Tex. Crim. App. 1997)

Proffered testimony involved the Intoxilyzer machine — the court expressly held that the two-prong *Kelly*/*Daubert* analytical framework applies to all "scientific evidence," not just "novel scientific evidence"

Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex. 1998)

Texas Supreme Court holds that *Daubert* applies to all "scientific evidence"

Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998)

Expert testimony on future dangerousness. Court of Criminal Appeals keeps the two-prong test, but modifies the *Kelly*/*Daubert* reliability analysis to accommodate "soft sciences" — expert testimony other than that derived from the scientific method (scientific evidence). Clears the way for all expert testimony based on "other specialized knowledge"

Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999)

Settles once and for all the issue of whether *Daubert* applies to expert testimony other than "scientific" testimony — it does. The fundamental two-prong analysis applies to all expert testimony. The only thing that changes is the actual reliability analysis, which the trial court must tailor to fit the particular type of testimony offered. All decisions will be judged on an abuse of discretion standard.

What follows are some of the basic principles set out by these cases.

Trial Judges are "Gatekeepers"

Recognizing that expert testimony might be unreliable, unnecessary or confusing, the United States Supreme Court and the Court of Criminal Appeals held that trial courts have a duty to act as gatekeepers regarding the admissibility of such testimony into evidence. Both Courts rejected the *Frye* "general acceptance"[4] test for admissibility and replaced it with the rules of

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[4]*Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923)[emphasis added].

"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to

evidence. *See Kelly v. State*, 824 S.W. 2d 568 (Tex.Cr. App. 1992); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed 2d 469 (1993); *see also* Rules 401 [relevancy] and 702 [expert testimony] Federal Rules of Evidence and Texas Rules of Evidence. Trial courts would now have to determine not whether proffered expert testimony was generally accepted, but whether it satisfied the mandates of Rule 702 as outlined by *Kelly* and *Daubert*.

The *Kelly* and *Daubert* courts set out non-exclusive factors which trial courts should consider to determine the admissibility of expert witness testimony.

> "Faced with a proffer of expert scientific testimony, then the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate. Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been tested. ... Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. ...Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate or error....
>
> ...Finally, 'general acceptance' can yet have a bearing on the inquiry. ...Its overreaching subject is the scientific validity - and thus the evidentiary relevance and reliability - of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L.Ed. 2d 469, 482-484 (1993).

Also, *Kelly v. State*, 824 S.W. 2d 568, 573 (Tex.Crim.App. 1992), set out non-exclusive factors a trial court should consider if the proffer evidence was "novel scientific" evidence:

> "As a matter of common sense, evidence derived from a scientific theory, to be considered reliable, must satisfy three criteria in any particular case: (a) the underlying scientific theory must be valid; (b) the technique applying the theory

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> define. Somewhere in the twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained **general acceptance** in the particular field in which it belongs."

> must be valid; and (c) the technique must have been properly applied on the occasion in question. *See generally* TEX.R.CRIM. EVID. 705; P. Giannelli & E. Imwinkelried, SCIENTIFIC EVIDENCE Sec. 1-1 (1986). Under Rule 104 (a) and (c) and Rule 702, all three criterial must be proven to the trial court, outside the presence of the jury, before the evidence may be admitted. Factors that could affect a trial court's determination of reliability include, but are not limited to, the following: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question. See 3J.Weinstein & M. Berger, WEINSTEIN'S EVIDENCE page. 702[03] (1991)." *Kelly v. State*, 824 S.W.2d 568, 573 (Tex.Crim.App. 1992).

Both Courts noted that the factors each outlined were not the exclusive factors trial courts should consider. Therefore (presumably), similarly exacting analysis should be employed by a trial court deciding whether to admit opinion testimony regarding technical or other specialized matter.

> "We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is 'flexible' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. *See General Electric Co. v. Joiner*, 552 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). ... at the same time ... some of *Daubert's* questions can help to evaluate the reliability even of experience-based testimony." *Kumho Tire Company v. Carmichael*, 119 S.Ct. 1167, 1171, 1176 (1999).

The applicability of these new principles expanded over time to encompass the whole of Rule 702. The expansion came in three phases:

1. Gatekeeping Role Applies to "Novel Scientific Evidence"

Finding that our system of justice requires the integrity of evidence and the finality of results, the Supreme Court noted that science has a different goal. It seeks to test a number of hypothesis with the truth eventually surfacing.

> "Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. **Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment–often of great consequence–about a particular set of events in the past.** We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993)[emphasis added].

The Supreme Court, therefore, requires courts to exclude scientific evidence, if it is not proven by a preponderance of the evidence, to be relevant, reliable and helpful to the jury.[5] The Court of Criminal Appeals requires that the proponent of such evidence prove that it is admissible by clear and convincing evidence. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex.Crim.App. 1992).

2. Gatekeeping Role Applies to All "Scientific Evidence"

The Court of Criminal Appeals was first to extend the Court's gatekeeping role beyond preliminary questions of the admissibility of novel scientific evidence to expert opinion evidence generally. *See Hartman v. State*, 946 S.W.2d 60, 62-63 (Tex.Crim.App. 1997)[*Daubert* applied to all scientific evidence, not just that which is novel. *Hartman* applied *Kelly v. State*, 824 S.W. 2d 568 (Tex.Crim.App. 1992) to testimony regarding the intoxilyzer.

The Texas Supreme Court used its gatekeeping function to exclude the testimony of two mechanical engineers while at the same time concluding that the *Daubert* test applied to all scientific evidence in *Gammill v. Jack Williams Chevrolet,* 972 S.W.2d 713 (Tex. 1998). This case, like *Hartman*, extended *Daubert* to testimony based upon individual skill, experience or training.

3. The Gatekeeping Role as it Applies to "Soft Science" Testimony (a/k/a Opinions Based On "Other Specialized Knowledge")

In 1996, Justice Dauphinot of the Fort Worth Court of Appeals expressed concerns about

[5]*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), held that the standard of proof is a preponderance of the evidence.

the rigid application of the *Kelly* test to expert testimony that could not really be classified as "scientific." *See Forte v. State*, 935 S.W.2d 172, 178-79 (Tex. App. — Fort Worth 1996, pet. ref'd)(Dauphinot, J., concurring). *Forte* was an eyewitness identification case and the court held that the testimony was properly excluded because it failed the *Kelly* test. Dauphinot worried about what effect this standard might have on certain other types of testimony — testimony regarding the Child Sexual Abuse Accommodation Syndrome was her case in point (as well as other syndrome evidence). *See id.* at 179. There was a debate whether the test enunciated in *Daubert* and *Kelly* applied to such testimony — commonly referred to as "soft science" testimony. *See, e.g.*, Tarlow, *"Does Daubert Apply To Soft Expert Testimony?"* THE CHAMPION, June 1998 at 48.

The Court of Criminal Appeals settled the issue in Texas criminal law in *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998). *Nenno* was a death penalty case and the issue was the admissibility of expert testimony predicting the future dangerousness of the defendant. *See id.* at 559-62. The court held that the "general principles announced in *Kelly* (and *Daubert*) apply [to nonscientific expert testimony, or "soft science" expert testimony], but the specific factors outlined in those cases may or may not apply depending upon the context." *Id.* at 560. "When addressing fields of study aside from the hard sciences, such as the social sciences or fields that are based primarily upon experience and training as opposed to the scientific method, *Kelly's* requirement of reliability applies but with less rigor than to the hard sciences." *Id.* at 561.

The modified *Kelly* standard that applies to soft sciences, therefore, contains the following "appropriate questions": "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field." *Id.* The court characterized this test as "an appropriately tailored translation of the *Kelly* test to areas outside of hard science." *Id.* The court concluded with the observation that "hard science methods of validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences." *Id.* In a footnote, however, the court noted that it was not "categorically [ruling] out employing such factors in a appropriate case." *Id.* at n.9. (To be slightly cynical, one would guess that the first "appropriate case" will involve defense-offered expert testimony.)

The United States Supreme Court this year applied Daubert to all expert testimony in *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999).

Expert Testimony is Also Subject to Analysis Under Rule 403

The trial court must first determine if the "proffered expert testimony is reliable [and thus probative and relevant]. Then, (probably upon further objection), the court must determine

whether, on balance, that testimony might nevertheless be unhelpful[6] to the trier of fact for other reasons." *Kelly v. State*, 824 S.W. 2d 568, 572 (Tex.Crim.App. 1992).

> "[E]ven reliable and relevant expert testimony may be unhelpful if it is merely cumulative or would confuse or mislead the jury, or would consume an inordinate amount of trial time. In short, if the trial judge determines that the proffered expert testimony is reliable and relevant, he must still decide whether the probative value of the testimony is outweighed by one or more of the factors identified in Rule 403." *Kelly v. State*, 824 S.W.2d 568, 522 (Tex. Cr. App. 1992).

This second step is that contained in Rules 402 and 403 of the Texas Rules of Evidence and is incorporated in Rule 702.[7] The Federal Rule, like the Texas Rule expressly limits opinion testimony.[8] The testimony must be about "technical", "scientific" or "specialized" matter. It must "assist" the trier of fact to "understand the evidence" or "determine a fact in issue."

Thus, expert opinion evidence must consist of scientific, technical or other specialized knowledge, it must be helpful to the jury and its probative value must outweigh the factors set

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[6]*See e.g., Duckett v. State*, 797 S.W.2d 906, 911 (Tex.Crim.App. 1990); *Rousseau v. State*, 855 S.W.2d 666, 686 (Tex.Crim.App. 1993). Most importantly, the testimony must constitute "knowledge"; not "subjective belief or unsupported speculation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court suggested a non-exclusive set of factors with which to evaluate offered expert scientific opinion evidence.

[7]"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Texas Rules of Evidence, Rule 702 [emphasis added].

"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." Texas Rules of Evidence, Rule 402.

"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." Texas Rules of Evidence, Rule 403.

[8]"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Federal Rule of Evidence, Rule 702.

out in Rule 403; unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence.

Voir Dire Under Rule 705

Texas Rules of Evidence 705(b) provides that before an expert may testify about his opinions or underlying facts or data, that the opposing party shall be permitted, if a request is timely made, to conduct a voir dire outside the hearing of the jury. This voir dire is limited to determining the underlying facts or data upon which the opinion is based under Rule 705 (b). However, many courts will utilize this voir dire as an excellent opportunity to also challenge the qualifications of the witness or relevance of the opinions expressed. This *Daubert* challenge should usually be made pre-trial or at least before the witness is allowed to testify. If the trial court has not conducted a *Daubert* test analysis, rule provides a potential opportunity for such analysis prior to the opinion being expressed before the jury.

1. Voir Dire Request Must be Timely Made

In *Alba vs. State*, 905 SW2d 581 (Tex.Crim.App. 1995), a death penalty case, the state called a psychiatric expert to testify on the issue of future dangerousness based on a hypothetical question. A request for the Rule 705 voir dire was made after the state had asked a thirteen page hypothetical question and then asked his opinion on the issue of future dangerousness. The trial judge overruled the objection and did not allow the voir dire. The Court of Criminal Appeals held that the trial court did not abuse its discretion in denying the request on the rationale that the jury had all the facts and data before it upon which the expert was to express an opinion. If any error was established, it was harmless.

Along the way, the court declared that Rule 705 (b) provides an undeniable right, upon timely request, to conduct a voir dire examination, outside the presence of the jury, as to what underlying facts or data the expert's opinions will be based. This provides a proper forum for the eliciting of potentially damaging and inadmissible evidence. *See also Goss vs. State*, 826 SW2d 162 (Tex.Crim.App. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 3035, 125 L. Ed. 2d 722 (1993). Rule 705 (b) is mandatory and therefore a denial of such voir dire is error but subject to the harmless error analysis.

In this case, however, the jury already had before it all the facts and date upon which the expert witness was to express his opinion. The trial court did not err therefore in denying the voir dire since the purpose of Rule 705 (b) would not be meet by the late voir dire upon underlying facts and date. The defendant would have a full opportunity to cross-examine the expert and present evidence himself and therefore no unfairness in the trial procedure is found.

Rule 705 (b) has as its primary purpose the quick and efficient eliciting of helpful expert opinions which would aid the jury in its fact finding determination. Since the defendant already new the underlying facts upon which the expert was to express an opinion, no Rule 705 (b) voir

dire would be helpful for discovery of information already known.

See also Jenkins vs. State, 912 SW2d 793 (Tex.Crim.App. 1993) which held that the trial court did not violate Rule 705 (b) by failing to allow voir dire of expert witness since the request was not made to explore underlying facts or data of the opinion but for other purposes.

2. Plug the Voir Dire into Rule 705(c) and Rule 403

Rule 705(c) states, "If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible." *This* is the reason for the voir dire. Go through the voir dire methodically, outlining the experts opinions and the facts and data, including the expert's education and experience, that supposedly support them.

Pretrial Disclosure

The State Discovery Rule, Article 39.14 of the Texas Code of Criminal Procedure, makes no express mention of discovering expert opinions and provides:

> "...the court in which an action is pending may order the State before or during trial of a criminal action ...to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies." Code of Criminal Procedure, Art. 39.14.

And, while Rule 614 of the Texas Rules of Evidence compels production during trial of an expert witness' report as his or her statement,[9] and Rule 611 will compel production of such a report if it is used by the witness to refresh his or her memory before or during testimony, there is no mechanism available to the defense to actually compel pretrial disclosure of the identity of expert witnesses, their opinions, the basis for their opinions or the witnesses' qualifications (as does the current federal rule).

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[9]However, beware of the court's recent opinion in *Jenkins v. State*, 912 S.W.2d 793 (Tex.Crim.App. 1995) [if witnesses' reports are not in the prosecutor's possession or in the possession of a part of the prosecutorial arm of the government, the defendant can be denied their production].

Last year, the legislature enacted Senate Bill 557, which amended Art. 39.14 by adding the following language:

> (b) On motion of a party and on notice to the other parties, the court in which an action is pending may order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. The court shall specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party shall make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins.

How this gets used in actual practice remains to be seen. The rationale behind the amendment was to give the state a mechanism whereby they could discover defense experts. However, the rule obviously goes both ways. A motion must be filed and the rules demands a court order to be effective. The new provision does not set out a particular sanction for disobeying the court's order, but exclusion of the expert testimony no doubt will be sought.

"Expert" Lay Witness Testimony

A lay witness may express opinions about his or her common knowledge, perceptions, as well as observations based upon experience, Thus, a lay witness may testify regarding such matters as height, weight, smell, distance, speed or color. *Boothe v. State*, 474 S.W.2d 219 (Tex.Crim.App. 1971)[smell of marijuana]. A lay witness who is familiar with a particular person may testify regarding the person's voice, handwriting or sanity. *See Cadd v. State*, 587 S.W.2d 736, 739 (Tex.Crim.App. 1979)[handwriting]. *See also* Art. 38.27 Texas Code of Criminal Procedure [jury makes handwriting comparison].

In 1997 the Court of Criminal Appeals gave extensive treatment to the subject of lay witness opinion under Rule 701 in Fairow v. State, 943 S.W.2d 895 (Tex. Crim. App. 1997). The court set out the framework for analysis as follows:

"When conducting a Rule 701 evaluation, the trial court must decide (1) whether the opinion is rationally based on perceptions of the witness and (2) whether it is helpful to a clear understanding of the witness's testimony or to determination of a fact in issue [citing Rule 701]. The initial requirement that an opinion be rationally based on the perceptions of the witness is itself composed of two parts. First, the witness must establish personal knowledge of the events from which his opinion is drawn and, second, the opinion drawn must be rationally based on that knowledge." *Id.* at 898.

HEARSAY – THE OTHER HALF OF THE "STATEMENT AGAINST INTEREST" RULE

It could be said that Rule 803(24) consists of two parts – the part we know and the part we sometimes forget. The part we know goes like this:

"A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true."

Then there is the part we sometimes forget:

"In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Rule 803(24) oftentimes becomes a substitute for the co-conspirator exception found in 801(e)(2)(E) because 803(24) does not require that the statement be made "during the course or in furtherance of the conspiracy" as does Rule 801(e)(2)(E). Therefore, if five years after the offense an alleged co-conspirator says "we did it," it is a statement against penal interest and sails into evidence even though there is no way that it could satisfy Rule 801(e)(2)(E).

Not so fast. Statements against penal interest must not only be corroborated but the corroborating circumstances must clearly indicate the trustworthiness of the statement. The Court of Criminal Appeals has recently addressed the corroboration requirement in two cases, *Dewberry v. State*, 4 S.W.3d 735 (Tex. Crim. App.1999), and *Bingham v. State*, 987 S.W.2d 54 (Tex. Crim. App. 1999). Both cases reaffirmed the holding in *Davis v. State*, 872 S.W.2d 743 (Tex. Crim. App. 1994) wherein the court set out a framework for analyzing corroborating circumstances:

"A trial court should consider a number of factors:

(1) whether the guilt of declarant is inconsistent with the guilt of the defendant;
(2) whether the declarant was so situated that he might have committed the crime;
(3) the timing of the declaration;
(4) the spontaneity of the declaration;
(5) the relationship between the declarant and the party to whom the statement is made;
(6) and the existence of independent corroborative facts."

Dewberry, 4 S.W.3d at 751 (citing *Bingham*, 987 S.W.2d at 58; *Davis*, 872 S.W.2d at 749). The "focus of the inquiry," the court has stated, "should be on verifying to the greatest extent possible

the trustworthiness of the statement, so as to avoid the admissibility of a fabrication." *Bingham*, 987 S.W.2d at 58. Don't forget to object under Rule 403 as well.

CONCLUSION

I have barely scratched the surface of the Rules of Evidence and what can be done with them in this paper. I hope that you find some of these suggestions helpful. A good knowledge of the Rules of Evidence and a little creativity can go a long way in keeping the state off-balance and taking control of the courtroom. And hey, if you can't do that, at least you can look good.

Good luck!