
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES

FROM: DEBORAH SELDEN AND INTERNS ROBERT OWEN, DIMITRIOS GAKIDIS, JENNY BRZOWSKI, AND ZACHARY LEE

SUBJECT: 02/28/07 COURT OF CRIMINAL APPEALS OPINIONS

DATE: 03/09/07

CC: JACK THOMPSON

***State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].**

COCHRAN, J., *delivered the opinion of the Court in which PRICE, JOHNSON, KEASLER, and HOLCOMB, JJ., joined. WOMACK, J., filed a dissenting opinion, in which KELLER, P.J., and MEYERS, J., joined. HERVEY, J., concurred in the judgment.*

FACTS: A jury convicted defendant of driving while intoxicated. Defendant then filed a motion for new trial claiming, in part, that the court reporter failed to record a bench conference in which he objected to the prosecutor's final argument. The trial judge granted defendant's motion for new trial. The State appealed and the court of appeals reversed, concluding that the trial court abused its discretion in granting the motion for new trial. The Court of Criminal Appeals granted defendant's petition for discretionary review and held that Texas law does not require a party to preserve error for purposes of appeal as a precondition for the trial court to consider the merits of a motion for new trial. The Court of Criminal Appeals reversed the court of appeals and remanded the case to that court to consider the State's claims concerning the merits of the motion for new trial and whether any error affected defendant's substantial rights.

RIGHT RULING – WRONG REASON DOCTRINE

According to the “right ruling, wrong reason” doctrine, a trial court's ruling will be upheld if it is correct on any applicable legal theory, even if the court articulated an invalid basis. ***State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].**

MOTION FOR NEW TRIAL – TRIAL COURT'S DISCRETION

For more than 120 years, Texas trial judges have had the discretion to grant new trials in the interest of justice. ***State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].**

MOTION FOR NEW TRIAL – FINDINGS OF FACT

In ruling on a motion for new trial, the court may make oral or written findings of fact. A trial judge may summarize the evidence or explain the basis for granting or denying a motion for new trial, but this is a rule that cannot be applied to a hearing that occurred before its enactment. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR NEW TRIAL – COURT DISCRETION

A district court’s discretion to grant new trials is almost the only protection to the citizen against the illegal or oppressive verdicts of prejudiced, careless, or ignorant juries. Courts should never hesitate to use that discretion whenever the ends of justice have not been attained by those verdicts. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR NEW TRIAL – ABUSE OF DISCRETION – INTEREST OF JUSTICE

A trial judge has the authority to grant a new trial “in the interest of justice,” and his decision to grant or deny a defendant’s motion for new trial is reviewed only for an abuse of discretion. That discretion is not, however, unbounded or unfettered. A trial judge has discretion to grant or deny a motion for new trial “in the interest of justice,” but “justice” means in accordance with the law. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR A NEW TRIAL – REVIEW – ABUSE OF DISCRETION

An appellate court reviews a trial court’s denial of a motion for new trial under an abuse of discretion standard. A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court’s ruling. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR NEW TRIAL – AUTHORITY

A trial judge does not have authority to grant a new trial unless the first proceeding was not in accordance with the law. The trial judge cannot grant a new trial on mere sympathy, an inarticulate hunch, or a personal belief that defendant is innocent or “received a raw deal.” The legal grounds for which a trial court must grant a new trial are listed in the Rules of Appellate Procedure, but that list is illustrative, not exclusive. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR NEW TRIAL – INTEREST OF JUSTICE – HARMLESS ERROR

While a trial court has wide discretion in ruling on a motion for new trial which sets out a valid legal claim, it should exercise that discretion by balancing a defendant's "interest of justice" claim against both the interests of the public in finality and the harmless-error standards set out in the appellate rules. Trial courts should not grant a new trial if the defendant's substantial rights were not affected. Otherwise, the phrase "interest of justice" would have no substantive legal content, but would constitute a mere platitude covering a multitude of unreviewable rulings. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR NEW TRIAL – ABUSE OF DISCRETION – REVERSIBLE ERROR

A trial court would not generally abuse its discretion in granting a motion for new trial if the defendant: (1) articulated a valid legal claim in his motion for new trial; (2) produced evidence or pointed to evidence in the trial record that substantiated his legal claim; and (3) showed prejudice to his substantial rights under the harmless error standard. The defendant need not establish reversible error as a matter of law before the trial court may exercise its discretion in granting a motion for new trial. Trial courts do not have the discretion to grant a new trial unless the defendant demonstrates that his first trial was seriously flawed and that the flaws adversely affected his substantial rights to a fair trial. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR NEW TRIAL – PRESERVATION OF ERROR

Nothing in the appellate rules or any Texas statute requires, as a predicate to the trial court's authority to exercise its discretion to grant a motion for new trial, the defendant to preserve the error during trial that he asserts in his post-trial motion for new trial. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR NEW TRIAL V. APPEALS– PRESERVATION OF ERROR

If the trial court exercises its discretion and grants a motion for new trial, the defendant, as the prevailing party, need not have preserved, during trial, the error that he complained about in that post-trial motion. If the trial judge denies a motion for new trial, however, the defendant, as the losing party, must have preserved that same error before he may claim it as a basis for reversal on appeal. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR NEW TRIAL – LEGAL ERROR – INTEREST OF JUSTICE STANDARD

A specific legal error is not always required to grant a motion for new trial in the “interest of justice.” *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

MOTION FOR A NEW TRIAL – LEGAL ERROR – INTEREST OF JUSTICE

The interest of justice standard requires the district court to balance the alleged errors against the record as a whole and evaluate the fairness of the trial. *State v. Herndon*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1954-03, 02/28/07].

Ex Parte Roemer, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 104].

MEYERS, J., delivered the opinion of the Court, in which KELLER, P.J, and PRICE, WOMACK, KEASLER, and HOLCOMB, JJ., joined. KEASLER, J., filed a concurring opinion, in which HERVEY, J., joined. COCHRAN, J., filed a dissenting opinion. JOHNSON, J., concurred in the result.

FACTS: Defendant was indicted for the offense of misdemeanor Driving While Intoxicated. Upon his lawyer’s advice, he stipulated to a prior offense of Involuntary Manslaughter and pled guilty. The stipulated prior offense was used for enhancement purposes and defendant was sentenced to four years imprisonment. Defendant filed an application for habeas corpus alleging that his counsel was ineffective for stipulating to the prior involuntary manslaughter conviction for the purposes of enhancing his offense to a felony and that his sentence was illegal. The Court of Criminal Appeals granted relief, finding that defendant’s stipulation was improperly used to raise his conviction from a misdemeanor to a felony.

ENHANCEMENT – INTOXICATION OFFENSES

TEX. PEN. CODE ANN. § 49.09 governs enhancement of intoxication offenses. There are two situations in which the statute permits prior offenses relating to the operation of a motor vehicle while intoxicated to be used for enhancement: 1) a prior offense relating to the operation of a motor vehicle while intoxicated may be used to raise an offense from a Class B misdemeanor to a Class A misdemeanor; and 2) if a defendant has two prior convictions for offenses relating to the operating of a motor vehicle while intoxicated, then an offense charged may be enhanced to a third-degree felony. *Ex Parte Roemer*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 104].

ENHANCEMENT – INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter, unlike intoxication manslaughter, cannot be used for enhancement of intoxication offenses under TEX. PEN. CODE ANN. § 49.01(b)(1). *Ex Parte Roemer*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 104].

ESTOPPEL – INVITED ERROR

An applicant for habeas corpus relief may be estopped from requesting relief if he invited the error that he later complains about. Invited error is when a party asks for something, gets what he asked for, and subsequently complains about his request. *Ex Parte Roemer*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 104].

Ex Parte Noyola, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 428].

KEASLER, J., *delivered the opinion for a unanimous Court.*

FACTS: In January 1988, defendant pled guilty to felony burglary of a habitation, and entered a plea of true to the enhancement paragraph in the indictment that alleged he had previously been convicted of burglary of a habitation in 1984. Defendant was sentenced to eighteen years imprisonment. On December 10, 1992, defendant was convicted of aggravated assault on a peace officer and sentenced to ten years imprisonment. Defendant was released on parole on April 10, 2000. Almost four years later, on April 5, 2004, the Texas Department of Criminal Justice (TDCJ) issued a pre-revocation warrant, and defendant's parole was subsequently revoked. Defendant filed an application for a writ of habeas corpus challenging TDCJ's refusal to credit his eighteen-year sentence under TEX. GOV'T CODE ANN. § 508.283(c) for time he spent on parole, "street time credit." The Court of Criminal Appeals filed and set this case to decide whether the mandatory supervision statute in effect at the time the inmate committed the offense is used to determine the inmate's eligibility for time credit under Section 508.283(c).

STATUTORY CONSTRUCTION

To discern the fair, objective meaning of a statute's text at the time of its enactment, courts should focus on the literal text and give effect to the plain meaning of the statutory text unless such an application would lead to absurd consequences the Legislature could not possibly have intended. Courts should only consult extra-textual factors, such as legislative history, when the plain language of the statute is ambiguous or when a literal interpretation would lead to absurd results. *Ex Parte Noyola*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 428].

STREET TIME CREDIT – ELIGIBILITY

An inmate may be entitled to credit for time served while released on parole or mandatory supervision if the inmate meets two conditions: 1) the inmate is not a person described by TEX. GOV'T CODE ANN. § 508.149(a) (e.g. i) use or exhibition of a deadly weapon in the commission of a felony or flight; ii) first degree or second degree murder; iii) capital murder, iv) first or second degree aggravated kidnapping; v) second or third degree indecency with a child; vi) second degree sexual assault; vii) first or second degree aggravated assault; viii) first degree aggravated sexual assault; ix) injury to a child, elderly individual, or disabled individual; x) first degree arson; xi) second degree robbery; xii) first degree aggravated robbery; xiii) first degree burglary; xiv) a felony for which the punishment was increased due to its commission in a “drug free zone”; or xv) a felony for which the punishment was increased because a child was used in the commission of the offense); and 2) on the date that the pre-revocation warrant or summons initiating the revocation process is issued, the remaining portion of the inmate’s sentence is less than the time the inmate spent on parole. *Ex Parte Noyola*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 428].

MANDATORY SUPERVISION – ELIGIBILITY – APPLICABLE RULE

The mandatory supervision statute in effect on the date an inmate commits an offense controls the inmate’s eligibility for release to mandatory supervision. *Ex Parte Noyola*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 428].

STREET TIME CREDIT – STARTING POINT

Section 508.283(c) and Section 508.149(a) of the Texas Government Code work in tandem in determining whether an inmate is eligible for street-time credit. In determining eligibility for street-time credit, courts must look to the version of Section 508.149(a) in effect when the inmate’s parole or mandatory supervision is revoked. *Ex Parte Noyola*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 428].

STREET TIME CREDIT – ENUMERATED OFFENSES

The offenses in Section 508.149(a) (e.g. i) use or exhibition of a deadly weapon in the commission of a felony or flight; ii) first degree or second degree murder; iii) capital murder, iv) first or second degree aggravated kidnapping; v) second or third degree indecency with a child; vi) second degree sexual assault; vii) first or second degree aggravated assault; viii) first degree aggravated sexual assault; ix) injury to a child, elderly individual, or disabled individual; x) first degree arson; xi) second degree robbery; xii) first degree aggravated

robbery; xiii) first degree burglary; xiv) a felony for which the punishment was increased due to its commission in a “drug free zone”; or xv) a felony for which the punishment was increased because a child was used in the commission of the offense) include the predecessors to the enumerated offenses. Therefore, commission of either an enumerated offense or a predecessor to an enumerated offense makes an inmate ineligible for mandatory supervision. *Ex Parte Noyola*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75, 428]. *Bahm v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0273-06].

HOLCOMB, J., *delivered the opinion of the Court, in which MEYERS, PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, and COCHRAN, JJ., joined. KELLER, P.J., dissented without written opinion.*

FACTS: Defendant was charged with aggravated sexual assault of a child. He pled guilty and the trial court deferred adjudication and placed him on community supervision for eight years. Five months later, the State moved to revoke community supervision and adjudicate guilt, alleging that defendant had committed eleven violations of the conditions of his community supervision.

Defendant filed an untimely motion for new trial. This motion was supported by three documents, each entitled "Affidavit." One of these was attached to his own affidavit, stating in relevant part, "I . . . declare under penalty of perjury that according to my belief the foregoing information in this Affidavit are [sic] true and correct." The other one was attached to his motion for new trial, similarly stating, in relevant part, "I . . . declare under penalty of perjury that according to my belief the foregoing information and allegations of the Motion are true and correct." The trial court promptly denied his motion. Defendant then filed a notice of appeal, but the court of appeals dismissed the appeal for want of jurisdiction. Defendant subsequently petitioned the Court of Criminal Appeals for a writ of habeas corpus, and the Court granted defendant an out-of-time appeal. Defendant filed a second motion for new trial based on several grounds. The trial court denied the second motion without a hearing. The court of appeals affirmed, focusing solely on defendant's ineffective assistance claim and holding that the affidavits submitted by appellant in support of his motion for new trial were insufficient. The Court of Criminal Appeals granted review to consider what language is appropriate for an inmate declaration to constitute a sworn statement in lieu of an affidavit. Holding that the court of appeals erred, the Court of Criminal Appeals found defendant's affidavits did meet the statutory requirements of an unsworn declaration. The

Court of Criminal Appeals reversed and remanded to the trial court for an evidentiary hearing on defendant's motion for new trial.

UNSWORN DECLARATION – INMATE EXCEPTION

The Texas Civil Practice and Remedies Code allows an inmate in the Texas Department of Corrections or in a county jail to use an unsworn declaration "in lieu of a written sworn declaration . . . or affidavit." The code requires that such declarations be 1) written and 2) subscribed by the person making the declaration as true under penalty of perjury. The code provides a form for inmates to use in making unsworn declarations, "I . . . declare under penalty of perjury that the foregoing is true and correct." However, the code requires only *substantial compliance* with the form. ***Bahm v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0273-06].**

UNSWORN DECLARATIONS – PERJURY

A person is guilty of perjury, a class A misdemeanor, if he makes a false unsworn declaration under chapter 132 of the Texas Civil Practice and Remedies Code. ***Bahm v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0273-06].**

UNSWORN DECLARATION – SUBSTANTIAL COMPLIANCE

An unsworn declaration is admissible so long as it is 1) written, and 2) made under penalty of perjury. Once the phrase "under penalty of perjury" is included in the unsworn declaration, and the declaration at issue is in writing, the instrument is sufficiently qualified to be subject to perjury. The addition of other phrases, such as "according to my belief," does not lessen a declarant's liability for perjury. Therefore, inclusion of other phrases, such as "according to my belief," in an unsworn declaration does not take the statement out of the statutory requirements of an unsworn declaration. ***Bahm v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0273-06].**

MOTION FOR NEW TRIAL – RECORD

The judicial requirement that motions for new trial be supported by affidavits is applicable only to cases where the motion is grounded on matters that are not already contained as a part of the case record. Where the matters are grounded in the case record, the movant need not support such motions with affidavits. ***Bahm v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0273-06].**

***Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].**

HOLCOMB, J., *delivered the opinion of the Court, in which KELLER, P.J., MEYERS, WOMACK, JOHNSON, KEASLER, HERVEY, and COCHRAN, JJ., joined.* PRICE, J., *dissented.*

FACTS: Defendant was charged with aggravated sexual assault. A jury convicted him of the lesser offense of sexual assault. The court of appeals reversed the judgment of the trial court, holding that the trial court erred in admitting numerous sexually explicit photographs because the events depicted did not have any tendency to make the existence of a fact of consequence more or less probable. The court also found that the photographs improperly encouraged the jury to convict defendant on the basis of his debauched character. Finally, the court of appeals concluded the use of the term “victim” in the jury charge was clearly calculated to injure defendant’s rights and was harmful. The Court of Criminal Appeals reversed and remanded to the appellate court to address defendant’s remaining points of error.

EVIDENCE – CHARACTER CONFORMITY

Evidence that does not have relevance apart from character conformity is inadmissible. ***Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].**

EVIDENCE – EXTRANEOUS OFFENSE EVIDENCE

Extraneous offense evidence is not inadmissible if the extraneous-offense evidence is relevant to a fact of consequence apart from its tendency to show conduct in conformity with character. Extraneous-offense evidence is admissible when it is offered to rebut an affirmative defense or a defensive issue that negates one of the elements of the crime. ***Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].**

EVIDENCE – RULE 403

Relevant evidence is generally admissible. However, 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. Trial courts should favor admission in close cases. ***Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].**

EVIDENCE – PROBATIVE VALUE

Probative value refers to the inherent probative force of an item of evidence, i.e. how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation coupled with the proponent’s need for that item of evidence. ***Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].**

EVIDENCE – UNFAIR PREJUDICE

Unfair prejudice refers to a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. Unfair prejudice does not arise from the mere fact that evidence injures a party's case; all evidence offered by a party opponent is likely prejudicial to the opponent's case. Evidence is unfairly prejudicial **only** when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justifies its admission into evidence. The prejudicial effect may be created by the tendency of the evidence to prove some adverse fact not properly in issue or to unfairly excite emotions against the defendant. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

EVIDENCE – CONFUSION OF THE ISSUES

Confusion of the issues refers to a tendency to confuse or distract the jury from the main issues in the case. Evidence that consumes an inordinate amount of time to present or answer, for example, might tend to confuse or distract the jury from the main issues. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

EVIDENCE – MISLEADING THE JURY

Misleading the jury refers to a tendency of an item of evidence to be given undue weight by the jury on other than emotional grounds. For example, scientific evidence might mislead a jury not properly equipped to judge the probative force of the evidence. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

EVIDENCE – UNDUE DELAY

Undue delay and needless presentation of cumulative evidence concern the efficiency of the trial proceeding rather than the threat of an inaccurate decision. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

EVIDENCE – PROBATIVE VALUE VS. UNFAIR PREJUDICE

To decide whether relevant evidence is admissible, the trial court must balance the inherent probative force of the proffered item of evidence along with the proponent's need for that evidence against any tendency of the evidence to 1) suggest decision on an improper basis, 2) to confuse or distract the jury from the main issues, or 3) be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence. The court should also consider the likelihood that presentation of the evidence will consume an

inordinate amount of time or repeat evidence already admitted. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

EVIDENCE – CONSENT

When the defensive theory of consent is raised in a prosecution for sexual assault, the defendant necessarily disputes his intent to engage in the alleged conduct without the complainant’s consent and places his intent to commit sexual assault at issue. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

EVIDENCE – MODUS OPERANDI

The term *modus operandi* refers to a defendant’s distinctive and idiosyncratic manner of committing criminal acts. Evidence of a defendant’s particular *modus operandi* is an exception to the general rule precluding extraneous offense evidence if that evidence tends to prove a material fact at issue, other than propensity. The *modus operandi* theory refers to the identity of a specific person as well as the “doctrine of chances” theory to show lack of consent, motive, and the manner of committing an offense. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

EVIDENCE – LACK OF OTHER EVIDENCE

When the proponent has other compelling or undisputed evidence to establish the proposition or fact that the evidence goes to prove, the probative value of the evidence will weigh far less than it otherwise might in the probative versus prejudicial balance. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

APPELLATE REVIEW – NON-CONSTITUTIONAL ERROR

An appellate court must disregard a non-constitutional error that does not affect a criminal defendant’s substantial rights. An appellate court may not reverse for non-constitutional error if the court, after examining the record as a whole, has fair assurance that the error did not have a substantial and injurious effect or influence in determining the jury’s verdict. *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].

JURY CHARGE – IMPERMISSIBLE COMMENTS

A trial court must provide a jury charge distinctly setting forth the law applicable to the case. Where the charge sets forth the law by tracking the language of a statute, a trial court does not abuse its discretion by including an arguably prejudicial word, such as the word “victim.” *Casey v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0548-05].