

PUNISHMENT EVIDENCE

JOHN M. BRADLEY, *Georgetown*
District Attorney
Williamson County District Attorney's Office

State Bar of Texas
31ST ANNUAL ADVANCED CRIMINAL LAW COURSE
July 18 – 21, 2005
Corpus Christi

CHAPTER 28

Biography

John Bradley has been a prosecutor since 1987 and thinks there is no law other than criminal law since he graduated from University of Houston Law Center in 1985. He currently serves as the District Attorney in Williamson County, Texas.

After graduating from law school, Mr. Bradley worked for a judge on an appellate court. He read about someone else's trials for a couple of years, then became a prosecutor in the Harris County District Attorney's Office. In 1989, he moved to Georgetown and began working as a felony prosecutor in the Williamson County District Attorney's Office, eventually serving as the First Assistant District Attorney for five years.

In December 2001, Governor Rick Perry appointed Bradley as the District Attorney for Williamson County. Mr. Bradley subsequently ran a contested race and was elected to the office. He recently was re-elected in an uncontested race.

Mr. Bradley also has worked for the Texas Legislature. He helped rewrite the Penal Code in 1993 and then served as general counsel for the Senate Criminal Justice Committee. In 1996, he served on then Governor George W. Bush's Committee to Rewrite the Code of Criminal Procedure. He remains active in the legislative process.

Mr. Bradley speaks regularly at continuing legal education seminars in Texas and is frequently invited to speak throughout the United States. He also has spoken in Canada and Bermuda on legal issues. Both the Texas District and County Attorneys Association and National College of District Attorneys have publicly recognized him for his service to prosecutors. Mr. Bradley also has published numerous articles on criminal law and is the author or co-author of several criminal law books.

Mr. Bradley has appeared on Court TV, the Jim Lehrer New Hour, and National Public Radio and is a frequent contributor to legal magazines and newspapers. He also loves Apple computers and spends way too much time posting comments in legal discussions on the Internet. Mr. Bradley has been married since 1982 and has three children.

TABLE OF CONTENTS

I. CIRCUMSTANCES OF THE OFFENSE 1

II. CRIMINAL RECORD..... 1

 A. Jury Punishment..... 1

 B. Judge Punishment..... 1

 C. Types of Evidence..... 1

III. JUVENILE HISTORY..... 2

IV. UNADJUDICATED CRIMES AND BAD ACTS 2

 A. Jury Punishment 2

 B. Judge Punishment..... 3

V. PREVIOUS CONDUCT IN CUSTODY OR ON SUPERVISION..... 3

VI. CHARACTER EVIDENCE..... 3

VII. OPINION TESTIMONY 4

 A. Lay Witness..... 4

 B. Expert Witness..... 4

PUNISHMENT EVIDENCE

Generally, a judge or jury does not make a decision of fact during the punishment phase of a trial, although special or enhancement issues may arise. Instead, a judge or jury hears evidence and determines what sentence a defendant should receive within a punishment range.

For offenses committed after August 31, 1993, the legislature broadened the types of evidence available to a jury. The state or a defendant generally may offer into evidence "any matter the court deems relevant to sentencing." TEX. CODE CRIM. PRO. art. 37.07, § 3(a). Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TEX. R. CRIM. EVID. 401.

In addition, there are numerous sources of evidence the state or a defendant may use to educate a judge or jury about the choices related to sentencing a defendant to prison, state jail, county jail, or community supervision.

I. CIRCUMSTANCES OF THE OFFENSE

A jury may consider evidence regarding the circumstances of the offense, including any evidence already heard by the jury during the guilt/innocence stage of the trial. TEX. CODE CRIM. PRO. art. 37.07(a). The state need not reoffer the evidence admitted at the guilt/innocence stage; it is already before the jury. *Bolton v. State*, 619 S.W.2d 186 (Tex. Crim. App. 1981). Evidence of the long-term effect of an injury, including likely future pain and suffering, is admissible during punishment as a circumstance of the offense. *Miller-El v. State*, 782 S.W.2d 892, 897 (Tex. Crim. App. 1990); *Stavinoha v. State*, 808 S.W.2d 76 (Tex. Crim. App. 1991).

Additional victim impact or character evidence is admissible, so long as it does not shift the focus of the evidence "from humanizing the victim and illustrating the harm caused by the defendant to measuring the worth of the victim compared to other members of society." *Mosely v. State*, 983 SW2d 249 (Tex. Crim. App. 1998) (op. on reh'g); see, e.g., *Moreno v. State*, 38 SW3d 774 (Tex. App. 2001) (psychological impact of crime on victim's family was foreseeable by defendant and relevant at punishment). See also *Salazar v. State*, 90 S.W.3d 330 (Tex. Crim. App. 2002) (lengthy day-in-the life video with theme music too prejudicial); see also *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002) (questioning victim impact

testimony that called on defendant to put faith in Jesus Christ).

Finally, evidence that might otherwise be subject to objection under the Rules of Evidence at the guilt/innocence stage of the trial may nonetheless be admissible at punishment under the broader rules of admissibility for punishment evidence. *Tennison v. State*, 969 SW2d 578 (Tex. App. Texarkana 1998) (videotape of child admissible at punishment over hearsay objection).

II. CRIMINAL RECORD

The criminal record of a defendant that is available as evidence at punishment depends on whether punishment is being decided by a judge or jury.

A. Jury Punishment

A jury may hear evidence regarding previous deferred adjudications, convictions pending on appeal, previous convictions from a nonrecord court, or the details of a prior conviction. TEX. CODE CRIM. PRO. art. 42.12, § 5(c); *Davis v. State*, 968 SW2d 368 (Tex. Crim. App. 1998) (details of underlying offense resulting in deferred adjudication admissible); *Rogers v. State*, 991 SW2d 263 (Tex. Crim. App. 1999, pet. denied) (details of sentence admissible). *But see* TEX. R. CRIM. EVID. 803(22) (making evidence of judgment inadmissible if appeal pending); cf. *Sunbury v. State*, 88 S.W.3d 229 (Tex. Crim. App. 2002) (evidence of sentences in nonfinal convictions relevant at punishment hearing).

B. Judge Punishment

A judge may receive nearly unlimited information about a defendant's criminal record. Before imposing a sentence, a judge may direct a supervision officer to prepare a presentence investigation report. TEX. CODE CRIM. PRO. art. 37.07, § 3(d). The report summarizes the circumstances of the offense, the restitution amount, the criminal and social history of the defendant, and any other relevant data the judge has requested.

Even if a judge considers a presentence investigation report, the state and defendant may present additional evidence. *Pady v. State*, 908 S.W.2d 65 (Tex. App. -- Houston [1st Dist.] 1995).

C. Types of Evidence

Whether a judge or jury decides punishment, the state and a defendant may offer various forms of evidence regarding a defendant's criminal record.

Documentary. There are numerous sources of documentary evidence for a defendant's criminal history, including certified copies of judgments of

conviction and sentence from district and county clerks, pen packets from custodians of records at prison facilities, rap sheets from the Department of Public Safety, and booking cards from custodians of records at county jails. These documents generally are admissible as exceptions to the hearsay rule, assuming they are properly authenticated. TEX. R. CRIM. EVID. 803(6, 8 & 22); TEX. R. CRIM. EVID. 902(1, 4 & 10).

Witness. There are numerous sources of witness evidence for a defendant's criminal history, including family members, parole officers, community supervision officers, peace officers, and other persons with personal knowledge of the defendant's criminal convictions. TEX. R. CRIM. EVID. 602. In addition, a defendant's admissions to other persons about his previous convictions is also admissible. TEX. R. CRIM. EVID. 801(e)(2).

III. JUVENILE HISTORY

The criminal record of a defendant as a juvenile that is available as evidence at punishment depends on the date of the offense for which the defendant has been convicted. The state may obtain the records by submitting a written request to the juvenile court that adjudicated the juvenile. TEX. FAM. CODE § 58.007(g).

The state or the defendant may offer into evidence a defendant's prior adjudication of delinquency based on a felony or Class A or B misdemeanor. TEX. CODE CRIM. PRO. art. 37.07, § 3(a)(1-2). If the offense for which the defendant is being prosecuted occurred after September 1, 1997, the state may offer into evidence a defendant's prior adjudication of a Class A or B misdemeanor only if the conduct upon which adjudication was based occurred after December 31, 1995. TEX. CODE CRIM. PRO. art. 37.07(h).

Notwithstanding the limitations placed on admission of formal juvenile criminal history, testimony of unadjudicated crimes and bad acts may include misconduct that occurred when the defendant was a juvenile. *Strasser v. State*, 81 S.W.3d 468 (Tex. App. Eastland 2002). But it may not include victim impact testimony. *Karnes v. State*, 127 S.W.3d 184 (Tex. App. – Fort Worth 2003).

IV. UNADJUDICATED CRIMES AND BAD ACTS

The state may offer evidence of a defendant's unadjudicated offenses and misconduct that arose outside of the offense for which the defendant has been convicted.

A. Jury Punishment

If the state is prosecuting a defendant for an offense committed after August 31, 1993, the state may offer evidence during the punishment stage of a noncapital trial of an unadjudicated "extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible." TEX. CODE CRIM. PRO. art. 37.07, § 3(a). Double jeopardy concerns do not prevent the state from later prosecuting a defendant for the same extraneous offense. *Ex parte Smith*, 884 S.W.2d 551 (Tex. App. - Austin 1994).

If a defendant makes a timely request for notice of the state's intent to introduce such evidence, the state must inform the defendant of the date of the extraneous offense or bad act, the county in which it was committed, and the name of any victim. TEX. CODE CRIM. PRO. art. 37.07, § 3(g); *but see Johnson v. State*, 84 S.W.3d 726 (Tex. App. Houston [1st Dist.] 2002) (enhancement notice in indictment sufficient). The state may not satisfy this notice requirement through an open file policy. *Buchanan v. State*, 911 S.W.2d 11 (Tex. Crim. App. 1995); *Dodgen v. State*, 924 S.W.2d 216 (Tex. App. -- Eastland 1996). But a pretrial motion by the defense alone does not trigger the notice requirement. *Ford v. State*, 106 S.W.3d 765 (Tex. App. Texarkana 2003).

The reasonableness of the timing of any notice is determined by the circumstances. *Henderson v. State*, 29 SW3d 616 (Tex. App. Houston [1st Dist.] 2000, pet. refused) (notice during trial and 8 days before testimony was reasonable under circumstances); *Patton v. State*, 25 SW3d 387 (Tex. App. Austin 2000, pet. refused) (notice two days before trial reasonable under circumstances); *Webb v. State*, 2000 Tex. App. Lexis 584 (Tex. App. Houston [14th Dist.] 2000) (discussing what is "reasonable" notice).

A defendant has no right to a pretrial determination of the admissibility of unadjudicated offenses offered at punishment. *Wooden v. State*, 929 S.W.2d 77 (Tex. App. -- El Paso 1996). Before admitting the evidence, the judge should find the evidence is relevant to punishment and that the state has a good faith basis for believing it can prove the crimes or bad acts beyond a reasonable doubt. *Mann v. State*, 13 SW3d 89 (Tex. App. Austin 2000, pet. granted) (trial court need not hold hearing outside presence of jury and may decide admissibility based on written or oral proffer of prosecutor).

Many of the restrictions regarding proof of an offense do not apply to proof of unadjudicated crimes or bad acts at punishment. *Rachal v. State*, 917

S.W.2d 799 (Tex. Crim. App. 1996) (prior grand jury no bill does not prevent use of evidence); *Stevenson v. State*, 963 SW2d 801 (Tex. App. Fort Worth 1998, pet. refused) (no venue); *Tow v. State*, 953 SW2d 546 (Tex. App. Fort Worth 1997) (no statute of limitations); *Johnson v. State*, 969 SW2d 134 (Tex. App. Texarkana 1998, pet. refused) (no accomplice witness corroboration requirement). However, a judge must instruct the jury to find beyond a reasonable doubt that the defendant committed the offense or bad act before considering the evidence in assessing any punishment.

B. Judge Punishment

If a judge requests a presentence investigation report before sentencing a defendant, he will receive a broad spectrum of evidence through the report, including the circumstances of the offense, the amount of restitution, the defendant's criminal and social history, and "any other information relating to the defendant or the offense requested by the judge." TEX. CODE CRIM. PRO. art. 42.12, § 9(a). For example, the report may contain a history of a defendant's arrests and pending charges. *Jackson v. State*, 680 S.W.2d 809, 812 n. 3 (Tex. Crim. App. 1984). The report also may contain evidence of a defendant's extraneous unadjudicated offenses or misconduct.

V. PREVIOUS CONDUCT IN CUSTODY OR ON SUPERVISION

Public officials must maintain numerous records showing a defendant's conduct in prison, state jail or county jail or on parole, mandatory supervision, or community supervision, including his participation in various work, education, or treatment programs. These records may be admissible during a punishment hearing. TEX. R. CRIM. EVID. 803(6) (business records) & 803(8) (public records and reports).

Sex offenders. The state or defendant may obtain information concerning a sex offender from a law enforcement authority, a criminal justice agency, or a treatment provider. The state may use the information only for the administration of criminal justice.

Prison records. The institutional division must maintain a defendant's work record while in prison, including a description of the types of jobs held by the defendant in prison as well as evaluations of his work and attendance. TEX. GOV. CODE § 497.095. In addition, the division maintains records of a defendant's conviction, sentence, time served, and the trade he learned while in prison. TEX. GOV. CODE § 501.016. The division also must maintain a record of a

defendant's conduct in a state boot camp. TEX. CODE CRIM. PRO. art. 42.12, § 8(b).

State jail records. A director of a state jail must maintain a record of a defendant's conduct in state jail. A sheriff may keep a record describing a defendant's conduct while in county jail. TEX. CODE CRIM. PRO. art. 42.03, § 4.

Parole records. The paroles and pardons division must maintain a record of a defendant's release on parole or mandatory supervision, including the contract with conditions of release signed by a defendant upon early release from prison. Other information collected or maintained by the paroles and pardons division about a defendant may be confidential.

Community supervision records. A supervision officer must maintain a record of a defendant's conduct on community supervision. A community correctional facility must maintain a record of a defendant's conduct in the facility. TEX. CODE CRIM. PRO. art. 42.12, § 18(d-e).

VI. CHARACTER EVIDENCE

During a punishment hearing, the state or a defendant may offer evidence of a defendant's character, whether good or bad. TEX. CODE CRIM. PRO. art. 37.07, § 3(a). Such evidence may even show a defendant's membership in a gang. *Beasley v. State*, 902 S.W.2d 452 (Tex. Crim. App. 1995). Depending on certain circumstances, the evidence may be in the form of opinion or reputation testimony or specific acts of conduct.

Opinion or reputation. Character evidence may be offered in the form of opinion or reputation testimony. TEX. R. CRIM. EVID. 405(a). Opinion evidence comes from a witness with personal knowledge of the underlying facts or information forming the opinion about character. Reputation evidence comes from a witness who has heard about the defendant's reputation in the community. *Hernandez v. State*, 800 S.W.2d 523 (Tex. Crim. App. 1990). Both an opinion and a reputation witness must have become familiar with a defendant's character before the day the offense being prosecuted was committed. TEX. R. CRIM. EVID. 405(a).

On cross-examination of a character witness, the state or a defendant may inquire into "relevant specific instances of conduct." *Hernandez v. State*, 800 S.W.2d 523 (Tex. Crim. App. 1990). For a reputation witness, this means the questions will be phrased, "Have you heard ...?" *Rutledge v. State*, 749 S.W.2d 50 (Tex. Crim. App. 1988); *but see Bratcher v. State*, 771 S.W.2d 175 (Tex. App. -- San Antonio 1989) (suggesting both forms of questions proper). For an

opinion witness, this means the questions will be phrased, "Did you know ...?" *Thomas v. State*, 759 S.W.2d 449 (Tex. App. -- Houston [14th Dist.] 1988, pet. ref'd); *Reynolds v. State*, 848 S.W.2d 785 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd).

Specific instances of conduct. If a character trait of a defendant is an essential element of an issue, the state or a defendant also may offer evidence of specific instances of a defendant's conduct regarding that issue. TEX. R. CRIM. EVID. 405(b). This type of evidence may become admissible during a punishment hearing that requires the judge or jury to decide a special issue raising character or a character trait. For example, if the state alleges in a special issue that a defendant selected the victim because of a particular bias or prejudice against that person or group, the state may be able to offer specific instances of previous acts of discrimination toward a similar person or group.

VII. OPINION TESTIMONY

Generally, the state or a defendant may offer evidence regarding the proper punishment only through an expert witness.

A. Lay Witness

A witness who is not testifying as an expert or character witness may testify only to those opinions that, based on rational inferences from facts the witness has personally observed, would be helpful to the jury. TEX. R. CRIM. EVID. 701. Applying that standard, appellate courts have consistently held that a lay witness, even a complainant, may not offer an opinion about the proper punishment. *Sattiewhite v. State*, 786 S.W.2d 290 (Tex. Crim. App. 1989); *Hughes v. State*, 787 S.W.2d 193, 196 (Tex. App. -- Corpus Christi 1990, pet. ref'd).

B. Expert Witness

An expert witness may testify about specialized information that will help the jury understand the evidence or resolve a fact issue. TEX. R. CRIM. EVID. 702. In addition, the expert may testify about an opinion that is based on what would otherwise be inadmissible information if such an expert would normally rely on such information in forming an opinion. TEX. R. CRIM. EVID. 703.

Applying that standard, appellate courts have approved expert testimony on several punishment issues:

- ◆ *vacated on other grounds*, 772 S.W.2d 130 (Tex. Crim. App. 1989). Such evidence also may be presented in the form of a chart summarizing the information. TEX. R. CRIM. EVID. 1006.);
- ◆ the merits of probation versus prison, *Ortiz v. State*, 834 S.W.2d 343 (Tex. Crim. App. 1992); *Wilkerson v. State*, 766 S.W.2d 795 (Tex. App. -- Tyler 1987); *but see Sattiewhite v. State*, 786 S.W.2d 271, 290 (Tex. Crim. App. 1989) (judge properly excluded testimony of expert on whether defendant should be sentenced to life or death).); and
- ◆ evidence regarding a special issue (for example, a deadly weapon finding), *Davidson v. State*, 602 S.W.2d 272, 273 (Tex. Crim. App. 1980).

Note: If a defendant plans to introduce or introduces punishment evidence through an expert who examined the defendant, the state may have its own expert examine the defendant. *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997).

- ◆ financial value and profit in illegal drug production and sale, *Pike v. State*, 758 S.W.2d 357, 364 (Tex. App. -- Waco 1988),