

EXTRANEOUS OFFENSES

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CHAPTER 26

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 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239 (1978).....3

EXTRANEIOUS OFFENSES

I. INTRODUCTION—EXTRANEIOUS OFFENSES

Any discussion of extraneous offense law in Texas must begin with *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App. 1972). In *Albrecht*, the Court of Criminal Appeals reiterated the general proposition that “an accused is entitled to be tried on the accusation made in the state’s pleading and that he should not be tried for collateral crime or for being a criminal generally.” *Albrecht*, 486 S.W.2d at 100 (citations omitted). The Court recognized that even though evidence of other crimes or wrongs might be relevant to the general issue of whether the accused committed the offense for which he was being tried, extraneous offense evidence “is inherently prejudicial, tends to confuse the issues in the case, and forces the accused to defend himself against charges which he had not been notified would be brought against him.” *Id.* (citations omitted).

Similarly, the United States Supreme Court has explained that “[c]ourts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of his guilt.” *Michelson v. United States*, 335 U.S. 469, 475 (1948)(citations omitted). This rule exists not because the character issue is irrelevant, but rather because it can weigh too heavily with the jury and cause them to prejudge an accused with a bad general record denying him a fair opportunity to defend himself against the charged offense. *Id.* at 475-76. The rule prevents “confusion of issues, unfair surprise and undue prejudice.” *Id.* at 476 (citation omitted).

II. COMMON-LAW EXTRANEIOUS OFFENSE EXCEPTIONS

Even prior to the adoption of the rules of evidence, the Court of Criminal Appeals recognized that extraneous offense evidence might be admissible if it were both material and relevant to a contested issue in the case. *Albrecht*, 486 S.W.2d at 100 (citations omitted). Before such evidence could be admitted, the relationship between the extraneous evidence and the evidence needed to prove the accused committed the offense for which he was on trial had to be shown. *Id.* (citations omitted). The Court provided a list of the usual circumstances in which extraneous offense evidence can be material and relevant. Extraneous offense evidence is admissible:

- (1) To show the *context* in which the criminal act occurred—what has been termed “*res gestae*”²—under the reasoning that the jury has a

right to hear what occurred immediately prior to and subsequent to the commission of that act so that they may realistically evaluate the evidence.

- (2) To circumstantially prove *identity* when the state lacks direct evidence on the issue.
- (3) To prove *scienter*, where intent or guilty knowledge is an essential element of the state’s case and cannot be inferred from the act itself.
- (4) To prove *malice* or *state of mind*, when malice is an essential element of the state’s case and cannot be inferred from the criminal act.
- (5) To show the accused’s *motive*, particularly where the commission of the offense at bar is either conditioned upon the commission of the extraneous offense or is part of a continuing plan or scheme of which the crime on trial is also part.
- (6) To *refute a defensive theory* raised by the accused.

Id. at 100-01 (emphasis added)(citations omitted). These purposes were not mutually exclusive and did not represent all possible situations in which the state would be entitled to prove extraneous acts. *Id.* at 101.

Although *Albrecht* was decided almost fifteen years before the Texas Rules of Evidence went into effect, it is the seminal case on extraneous offenses and has continued to be cited as relevant authority on this subject. See *Wheeler v. State*, 67 S.W.3d 879, 886-87 n. 18 (Tex. Crim. App. 2002)(quoting *Albrecht v. State*, 486 S.W.2d at 101).

III. RULE OF EVIDENCE 404(B)—OTHER CRIMES, WRONGS, OR ACTS

A. The General Rule

1. Texas Rule of Evidence 404(b)

The Texas Rules of Evidence provide as a general rule that “[e]vidence of other crimes, wrongs or acts is not

everything that happened, and as a justification for allowing evidence of another crime because it has some relevancy to an element of the charged offense. 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 404.6.3 (2d ed. 1993 & Supp. 2001). Although “*res gestae*” has often been used as a justification for the admission of extraneous offense evidence, “its meaning has been far from clear.” *Id.* Because of the confusion associated with the use of this term, some commentators have suggested that courts abandon this terminology. *Id.* The better approach is to distinguish between offenses that are connected with the charged offense (same transaction contextual evidence) and general background evidence which might include other offenses (background contextual evidence). Under this approach, background contextual evidence is inadmissible when it conflicts with the general rule against character evidence. *Id.* at n.22 (discussing *Mayer v. State*, 816 S.W.2d 79, 86-87 (Tex. Crim. App. 1991); see also, our discussion of contextual evidence.

² The term “*res gestae*” has been used to refer to the need to allow witnesses to recount events in a natural way by telling

admissible to prove the character of a person in order to show action in conformity therewith.” TEX R. EVID. 404(b). As the text of the rule makes clear, “[t]here is no requirement that the evidence must be that of another criminal offense or even misconduct in order to fall within the purview of Rule 404(b).” *Bishop v. State*, 869 S.W.2d 342, 345 (Tex. Crim. App. 1993). The rule exists to prevent a party from introducing evidence to prove the character of a person to show that he acted in conformity with that character. *Id.* Thus, the “prohibition applies as equally to evidence of extraneous acts or transactions as it does to evidence of extraneous offenses.”³ *Id.* (citing *Plante v. State*, 692 S.W.2d 487 (Tex. Crim. App. 1985); *Crawley v. State*, 513 S.W.2d 62 (Tex. Crim. App. 1974)).

This inclusive definition for extraneous conduct notwithstanding, the Court of Criminal Appeals has held that this rule does not exclude evidence of statements made indicating an intent to commit an extraneous bad act. *See Massey v. State*, 933 S.W.2d 141, 159 (Tex. Crim. App. 1996); *Moreno v. State*, 858 S.W.2d 453, 463 (Tex. Crim. App. 1993). As the Court explained:

...the statements concerning [the defendant’s] thoughts... were just that, thoughts. There is no conduct involved which alone or in combination with these thoughts could constitute a bad act or wrong, much less a crime. Absent this, [the defendant’s] statements concerning his desire to kidnapp and kill [another person] did not establish prior misconduct and thus were not expressly excludable under Rule 404(b)...

Moreno, 858 S.W.2d at 463. And obviously multiple criminal acts alleged in a single indictment are not extraneous conduct inadmissible under this rule. *See Brown v. State*, 6 S.W.3d 571, 575 (Tex. App.—Tyler 1999, pet. ref’d)(citations omitted)(discussing multiple sexual offenses alleged in one charging instrument).

2. Federal Rule of Evidence 404(b)

Like the Texas Rules of Evidence, the Federal Rules of Evidence prohibit the introduction of evidence of other crimes, wrongs, or acts to show character conformity. FED. R. EVID. 404(b). This rule recognizes that the danger of extraneous offense evidence is that the jury might convict the accused because he is a bad person rather than because he is guilty of the charged offense. *See United States v. Avello*, 592 F.2d 1339, 1346 (5th Cir. 1979)(citing *Michelson v. United States*, 335 U.S. at 475-76); *see also United States v. Baptiste*, 264 F.3d 578, 590 (5th Cir. 2001)(citation omitted).

B. Rule 404(b) Exceptions

1. Texas

Like at common law, there are numerous exceptions to Rule 404’s general prohibition on extraneous offense evidence. Such evidence may “be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident... . TEX. R. EVID. 404(b). As the rule makes clear, extraneous offense evidence is relevant apart from character conformity if the proponent can show that the evidence “tends to establish some elemental fact, such as identity or intent; that it tends to establish some evidentiary fact, such as motive, opportunity, or preparation, leading inferentially to an elemental fact; that it rebuts a defensive theory by showing absence of mistake or accident; or that it is relevant upon a logical inference not anticipated by the rule.” *Montgomery v. State*, 810 S.W.2d 372, 388-89 (Tex. Crim. App. 1990)(op. on reh’g); *see also Powell v. State*, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001); *Wyatt v. State*, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000); *Santellan v. State*, 939 S.W.2d 155, 168-69 (Tex. Crim. App. 1997)(citations omitted); *Roberts v. State*, 29 S.W.3d 596, 253 (Tex. App.—Houston [1st Dist.] 2000, pet ref’d.). Extraneous offense evidence may be admissible for more than one purpose. *See Taylor v. State*, 920 S.W.2d 319, 322 (Tex. Crim. App. 1996)(citation omitted).

It is worth noting that the extraneous conduct can occur after the charged offense occurred and still be admissible under Rule 404(b). *See, e.g., Santellan*, 939 S.W.2d at 169 (citing *Pinkerton v. State*, 660 S.W.2d 58, 61-62 (Tex. Crim. App. 1983)(finding that trial court’s decision to admit evidence of sexual abuse of corpse within the zone of reasonable disagreement because evidence tended to prove an elemental fact with respect to capital murder—defendant’s intent to kidnap the victim).

³ It is this broader meaning that is intended when we refer generically to “extraneous offense evidence” throughout this paper.

2. Federal⁴

Federal Rule of Evidence 404(b) provides that evidence of other crimes, wrongs, or acts, is admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...”

FED. R. EVID. 404(b). In *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), the Fifth Circuit Court of Appeals “outlined a two-step test to determine the admissibility of evidence of a defendant’s prior wrongful acts.” See *United States v. Peters*, 283 F.3d 300, 312 (5th Cir. 2002). Under *Beechum*, evidence of extrinsic offenses is admissible if it is (1) relevant to an issue other than the defendant’s character, and (2) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice and otherwise meet the requirements of Federal Rule of Evidence 403. *Beechum*, 582 F.2d at 911 (citation omitted).

Under the Federal rule, the test for relevancy under the first prong is set out in Rule 401. *Id.* at 911. That is, does the evidence have the tendency 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. *Id.* (citing FED. R. EVID. 401). As for the second prong of the test, the “task for the court in its ascertainment of probative value and unfair prejudice under Rule 403 calls for a commonsense assessment of all circumstances surrounding the extrinsic evidence.” *Id.* at 914. The trial court should conduct this analysis on the record. *United States v. Alarcon*, 261 F.3d 416, 424 (5th

⁴ Given the sheer number of cases and the variations in application of Rule 404(b) among the Federal Circuit Courts of Appeals, even a cursory discussion of Federal Rule of Evidence 404(b) can be complicated and confusing. As Wright & Graham wrote in their introduction to their discussion of Rule 404(b):

There is no question of evidence more frequently litigated in the appellate courts than the admissibility of evidence of other crimes, wrongs, or acts. Yet despite the recurrence of the issues, the opinions are often poorly reasoned and provide little guidance to trial judges. Even at the theoretical level, the literature is spotty and inconsistent in analysis. Clearly this is a topic deserving some statutory ordering. Lamentably, the Advisory Committee chose to leave the law in its messy state; Rule 404(b) does nothing to clarify the issues, and in some respects have muddied the waters even more.

22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239 (1978)(citations omitted). With these comments in mind, we will do our best to offer a practical discussion of the rule and limit our discussion of the relevant case law to Fifth Circuit decisions.

Cir. 2001)(citing *United States v. Fox*, 69 F.3d 15, 20 (5th Cir. 1995)). If the objecting party fails to request the analysis, however, the trial court is not required to do so on the record. *Id.*

3. Burden of Proof

The proponent of the extraneous conduct evidence must satisfy the trial court that the extraneous offense evidence has relevance apart from its character conformity value. See *Feldman v. State*, 71 S.W.3d 738, 754 (Tex. Crim. App. 2002); *Santellan*, 939 S.W.2d at 168. That is, the proponent must establish that the evidence 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. EVID. 401. See *Mozon v. State*, 991 S.W.2d 841, 846 n.5 (Tex. Crim. App. 1999)(quoting *Rankin v. State*, 974 S.W.2d 707, 719-20 (Tex. Crim. App. 1998)(op. on reh’g)). If the trial court makes a determination that the evidence is not relevant apart from character conformity, then the evidence is inadmissible and the court has no discretion to admit it. *Feldman*, 71 S.W.3d at 754; *Montgomery*, 810 S.W.2d at 380. If, however, the trial court permits the introduction of extraneous offense evidence, it is under no duty to explain its decision. *Davis v. State*, 979 S.W.2d 863, 867 (Tex. App.—Beaumont 1998, no pet.)(citations omitted).

There must be sufficient evidence to show that the accused actually committed the extraneous offense before the evidence can be considered. See *Jones v. State*, 962 S.W.2d 158, 165 (Tex. App.—Fort Worth 1998, no pet.)(citing TEX. R. CRIM. EVID. 104(b), 404(b) [now TEX. R. EVID. 104(b), 404(b)]). Under state law, the extraneous conduct must be proven beyond a reasonable doubt. *Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Crim. App. 1994)(declining to follow the preponderance of the evidence standard set out in *Huddleston v. United States*, 486 U.S. 681 (1988)); *Jones*, 962 S.W.2d at 165 (citing *George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994)). It is improper to admit evidence of another offense when the defendant is not shown to be guilty of the offense. *Ruiz v. State*, 891 S.W.2d 302, 306 (Tex. App.—San Antonio 1994, pet. ref’d)(citing *Tippins v. State*, 530 S.W.2d 110, 111 (Tex. Crim. App. 1975); *Hobbs v. State*, 650 S.W.2d 449, 451 (Tex. App.—Houston [14th Dist.] 1982, pet. ref’d)). Unlike Texas, the burden of proof under Rule 404(b) of the Federal Rules of Evidence is a preponderance of the evidence. See *Huddleston v. United States*, 485 U.S. 681, 691 (1988).

C. Specific Exceptions

1. Evidence Relevant to Establish an Elemental Fact

Extraneous offense evidence is relevant for purposes other than supporting character conformity if it serves to make more or less probable an elemental fact. *Johnson v. State*, 932 S.W.2d 296, 301 (Tex. App.—Austin 1996, no

pet.) (citing *Montgomery*, 810 S.W.2d at 387-88). When an elemental act can be inferred from the offense itself and the defendant does not contest the element, admission of extraneous offense evidence can be cumulative of the proof established and serves only to demonstrate the accused's bad character. *Hankton v. State*, 23 S.W.3d 540, 546 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (citing *Albrecht v. State*, 486 S.W.2d at 101; *Jones v. State*, 481 S.W.2d 900, 902 (Tex. Crim. App. 1972)).

a. Identity

Extraneous offense evidence is admissible to show identity only when identity is an issue in the case. *Johnson v. State*, 68 S.W.3d 644, 651 (Tex. Crim. App. 2002) (citing *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996)). As in Texas, the Federal Rule permits the introduction of extrinsic evidence to prove identity. FED. R. EVID. 404(b). Identity is one of the most commonly used basis for the admission of extraneous offense evidence. 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 404.6.3 (2d ed. 1993 & Supp. 2001). The issue can be raised by the defendant during cross-examination of the State's witnesses. *Id.* (citing *Moore*, at 199; *Siqueiros v. State*, 685 S.W.2d 68, 71 (Tex. Crim. App. 1985); *Walker v. State*, 588 S.W.2d 920, 922 (Tex. Crim. App. 1979)); *Harvey v. State*, 3 S.W.3d 170, 175 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (citation omitted). It can also be raised when the defense challenges the accuracy of the defendant's own confession on cross-examination. *Lane*, 933 S.W.2d at 519.

Extraneous offense evidence is not rendered admissible simply because the defense raises the issue of identity. See *Johnson*, 68 S.W.3d at 651 (citing *Lane*, 933 S.W.2d at 519). "Ordinarily, to be admissible to show identity, an extraneous offense must be so similar to the charged offense as to mark the offenses as the defendant's handiwork." *Id.*; *Galvez v. State*, 962 S.W.2d 203, 205 (Tex. App.—Austin 1998, pet. ref'd) (evidence must show an extremely high degree of similarity to the charged offense) (citations omitted). It must be so "unusual and distinctive so as to be like a 'signature.'" *Taylor v. State*, 920 S.W.2d at 322 (citing *Owens v. State*, 827 S.W.2d 911, 916 (Tex. Crim. App. 1992); *Boutwell v. State*, 719 S.W.2d 164, 180 (Tex. Crim. App. 1985); *Avila v. State*, 18 S.W.3d 736, 740 (Tex. App.—San Antonio 2000, no pet.) (citation omitted). An extraneous offense not sufficiently similar to the charged offense should not be admitted because without a high degree of similarity, the prejudicial effect of the evidence outweighs its probative value. *Bishop v. State*, 869 S.W.2d at 346 (citations omitted).

Factors which the Court of Criminal Appeals has held sufficient to establish similarity include proximity in both time and place of the offenses and/or a common mode of committing the offenses. See *Lane*, at 519 (citing *Ransom*

v. State, 503 S.W.2d 810, 813 (Tex. Crim. App. 1974)). For example, in *Walker v. State*, the Court found two rapes sufficiently similar because: (1) both offenses occurred at night; (2) they occurred in the same area; (3) they occurred within a period of one month; (4) the defendant was the lone perpetrator in both cases; (5) he carried a small gun; (6) he tied both victims in the same way; (7) he robbed them before he raped them; and (8) although he took coins from the victims, he left the pennies. See *Walker v. State*, 588 S.W.2d at 924. In *Ransom*, the Court held the offenses were sufficiently similar because: (1) both offenses were robberies; (2) both were committed at gunpoint; (3) the defendant had a co-actor; and (4) the offenses occurred three days apart. *Ransom*, at 813. Although in *Ransom*, the Court found sufficient similarity with significantly less commonality between the offenses than in *Walker*, both cases show that similarity in time and place proximity will likely result in admission of the extraneous offense.

In contrast, when the similarity between the charged offense and the extraneous conduct is based solely on the mode of offense commission, the need for similarity between the offenses seems to increase. In *Lane v. State*, the Court of Criminal Appeals found the rape and murders of two young girls sufficiently similar based solely on the mode of committing the offenses and the circumstances surrounding the crimes although the crimes were committed more than a decade apart in different states. *Lane*, at 519. The similarities in the two offenses, however, were exceptionally alike. Both girls were of similar age (eight and nine years old); both girls were abducted from a public area near their homes and relocated to another area; the defendant had a connection to the location of the abduction; he physically and sexually assaulted each girl; each was strangled to death and their bodies were dumped; he had a co-actor in each crime; he was involved with the searches for the girls; and, he claimed a trophy from both crimes (he wore one girls underwear and took those of the other). *Id.* at 517. Given these similarities, the Court held that the admission of the extraneous offense evidence was proper. *Id.* at 519.

It also worth noting that extraneous offense evidence can be admissible to show misidentification of a defendant. In *Renfro v. State*, 822 S.W.2d 757 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd), the defendant was convicted of indecency with a child. *Id.* at 757. At trial, Renfro attempted to offer evidence that two other women had misidentified him as the perpetrator in similar offenses. *Id.* at 758. Both women had identified the defendant initially in photographic line-ups, as did the victim in the charged offense. *Id.* The other two women later realized that Renfro was not the perpetrator. *Id.* The trial court refused to admit this evidence and the Court of Appeals reversed the trial court and remanded for a new trial. *Id.* at 759. The court reasoned that if the two had positively identified the defendant the two extraneous offenses would have been

admissible under Rule 404(b) to show identity since the offenses were sufficiently similar to the charged offense. *Id.* at 759. According to the court, Rule 404(b) should “cut both ways and benefit an accused in appropriate circumstances just as it does the State.” *Id.*

b. Intent

Intent becomes a contested issue for purposes of justifying the admission of extraneous offense evidence when the intent for the charged offense cannot be inferred from the act itself or if the defendant presents evidence to rebut that inference. *Johnson v. State*, 932 S.W.2d at 302 (citing *Caro v. State*, 771 S.W.2d 610, 617 (Tex. App.—Dallas 1989, no pet.); *McGee v. State* 725 S.W.2d 362, 364 (Tex. App.—Houston [14th Dist.] 1987, no pet.)). The use of extraneous offense evidence to prove intent is common and widely accepted. 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 404.6.3 (2d ed. 1993 & Supp. 2001). The reasoning expressed in cases allowing use of extraneous offense evidence to show intent can also be applicable to prove “other states of mind such as knowledge and obviously overlap with the use of such evidence to rebut claims of mistake or accident.” *Id.* However, when the evidence clearly shows the intent element of the crime and the defendant does not contest the evidence either directly or through cross-examination, “the offer of the other crimes evidence would be unjustified.” *Id.* (citations omitted).

Unlike extraneous offense evidence used to show identity, the State is not required to show as high a degree of similarity between the charged offense and the extraneous offense for it to be admissible to show intent. *Keller v. State*, 818 S.W.2d 425, 429 (Tex. App.—Houston [1st Dist.] 1991, pet. ref’d)(citing *Plante v. State*, 692 S.W.2d at 493). For example, when the defendant offers evidence of self-defense or accident, the State may offer evidence of other violent acts where the defendant was the aggressor to show intent. *Robinson v. State*, 844 S.W.2d 925, 929 (Tex. App.—Houston [1st Dist.] 1992, no pet.)(citations omitted). See also *Johnson v. State*, 963 S.W.2d 140, 142 (Tex. App.—Texarkana 1998, pet. ref’d).

Again, the extraneous conduct can occur after the charged offense and still be admissible to show intent. *Hernandez v. State*, 817 S.W.2d 744, 747 (Tex. App.—Houston [1st Dist.] 1991, no pet.).

The degree of similarity between the charged offense and the extraneous conduct is different under the Federal Rules of Evidence. When extrinsic evidence is offered to show intent under 404(b), its “relevance is a function of its similarity to the offense charged.” *Beechum*, 582 F.2d at 911. While this does not require as high a degree of similarity as for identity, something more than a common characteristic is required. *Id.* As the court in *Beechum* explained:

Where the issue addressed is the defendant’s intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant’s indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense.

Beechum, 582 F.2d at 911 (citation omitted). As a general rule, if intent is not in issue, extrinsic evidence showing intent is not admissible. *United States v. Grimes*, 244 F.3d 375, 384 (5th Cir. 2001)(citing *United States v. Roberts*, 619 F.2d 379, 383 (5th Cir. 1980)). But the defendant must do more than just promise not to contest the issue, he must affirmatively remove the issue. *Id.* When an accused enters a plea of not guilty, he places his intent at issue. *United States v. Alarcon*, 261 F.3d at 424 (citing *United States v. McKinney*, 53 F.3d 664, 676 (5th Cir. 1995)).

As in Texas, under Fifth Circuit case law it is permissible to show bad acts that occur subsequent to the subject matter of the trial to show intent. See *United States v. Peterson*, 244 F.3d 385, 392 (5th Cir. 2001)(citing *United States v. Catano*, 553 F.2d 497, 499-500 (5th Cir. 1977); *Roe v. United States*, 316 F.2d 617, 623 (5th Cir. 1963)).

2. Evidence Relevant to Establish an Evidentiary Fact

a. Motive

Rule 404(b) of the Texas Rules of Evidence specifically permits the introduction of extraneous offense evidence to prove motive. TEX. R. EVID. 404(b). While the State is not required to establish the defendant’s motive for a particular offense, the State is nonetheless entitled to offer evidence of motive. See *Roy v. State*, 997 S.W.2d 863, 867 (Tex. App.—Fort Worth 1999, pet. ref’d)(citing TEX. R. EVID. 404(b); *Gosch v. State*, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991)). Evidence of “motive is always proper and relevant to assist in proving the defendant committed the charged offense.” *Booker v. State*, 929 S.W.2d 57, 63 (Tex. App.—Beaumont 1996, pet. ref’d)(citing *Sypnieski v. State*, 799 S.W.2d 432, 434 (Tex. App.—Texarkana 1990, pet. ref’d)). To be admissible as evidence of motive, the extraneous offense evidence must “tend to raise an inference that the accused had a motive to commit the alleged offense for which he is on trial.” *Abshire v. State*, 62 S.W.3d 857, 865 (Tex. App.—Texarkana 2001, pet. ref’d) (citing *Bush v. State*, 628 S.W.2d 441, 444 (Tex. Crim. App. 1982)).

Under this rule, evidence showing the defendant’s ill will and hostility toward a victim is admissible as circumstantial evidence showing motive. *Coward v. State*, 931 S.W.2d 386, 388 (Tex. App.—Houston [14th Dist.] 1996, no pet.) (citing *Page v. State*, 819 S.W.2d 883, 887 (Tex. App.—Houston [14th Dist.] 1991, pet. ref’d)(quoting *Foy v. State*, 593 S.W.2d 707, 709 (Tex. Crim. App.

1980)). Similarly, the State has been allowed to establish a defendant's prior use of drugs to establish motive for the charged offense. *Knox v. State*, 934 S.W.2d 678, 682-83 (Tex. Crim. App. 1996); *Etheridge v. State*, 903 S.W.2d 1, 11 (Tex. Crim. App. 1994)(citation omitted). Courts have also permitted the introduction of the defendant's gang affiliation to establish a motive for the offense. See *Vasquez v. State*, 67 S.W.3d 229, 239 (Tex. Crim. App. 2002); *Cunningham v. State*, 982 S.W.2d 513, 523 (Tex. App.—San Antonio 1998, pet. ref'd); *Stern v. State*, 922 S.W.2d 282, 287 (Tex. App.—Fort Worth 1996, pet. ref'd)(allowing introduction of evidence showing hostility between gangs).

Importantly, bad act evidence does not necessarily have to have occurred prior to the charged offense to be used to establish motive. For example, evidence that a defendant became physically aroused during police questioning about the sexual assault of a child was admissible to show motive as it could be viewed as giving rise to a logical inference that the defendant had feelings of sexual desire and attraction toward the victim. *Blakeney v. State*, 911 S.W.2d 508, 515 (Tex. App.—Austin 1995, no pet.)(citing *Brown v. State*, 657 S.W.2d 117, 118 (Tex. Crim. App. 1983)).

As in Texas, extrinsic evidence is admissible under Rule 404(b) if it relevant to establishing the accused motive for the offense. See *United States v. Williams*, 264 F.3d 561, 574 (5th Cir. 2001)(citing *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991)). When an accused enters a plea of not guilty, he places his motive at issue. *United States v. Alarcon*, 261 F.3d at 424 (citing *United States v. McKinney*, 53 F.3d 664, 676 (5th Cir. 1995)).

b. Opportunity

Under both the Texas and Federal Rules of evidence, extraneous offense evidence can be used to establish that the accused had the opportunity to commit the charged offense. See TEX. R. EVID. 404(b); FED. R. EVID. 404(b).

Furthermore, such evidence may be used to rebut a claim that the accused *lacked* the opportunity or it was impossible to commit the offense. *Wheeler*, 67 S.W.3d at 888 n.21

c. Preparation

Both Rules also permit the introduction of extraneous offense evidence to prove preparation. TEX. R. EVID. 404(b); see also, *Easter v. State*, 867 S.W.2d 929, 937 (Tex. App.—Waco 1993, pet. ref'd)(citing *Montgomery*, 810 S.W.2d at 387-88); FED. R. EVID. 404(b). For example, in *Davis v. State*, 831 S.W.2d 426 (Tex. App.—Austin 1992, pet. ref'd), the State was allowed to produce evidence that the defendant, a maintenance man, had entered the victim's apartment suspiciously a few days before the murder in preparation for the crime. *Id.* at 443.

d. Common Scheme or Plan

Extraneous offense evidence showing a common scheme or plan is also admissible. TEX. R. EVID. 404(b); FED. R. EVID. 404(b). The Court of Criminal Appeals has noted that this exception has often been used as a subterfuge to admit extraneous offense evidence which is nothing more than propensity evidence. *Boutwell v. State*, 719 S.W.2d at 180; see also *Lazcano v. State*, 836 S.W.2d 654, 660 (Tex. App.—El Paso 1992, pet. ref'd)(citing *Boutwell*, *supra*). Thus, the occurrence of a single comparable act does not constitute a common plan or scheme justifying the admission of similar act evidence under Rule 404(b). *Lazcano*, 836 S.W.2d at 660 (“The mere occurrence of numerous similar acts is insufficient to give rise to logical and legal relevance apart from showing a propensity to commit such acts.”).

To truly constitute evidence of a common scheme or plan, the evidence “must demonstrate the steps taken in furtherance of or in contemplation of accomplishing a scheme or plan.” *Id.* For example, in *Mares v. State*, the Eighth Court of Appeals permitted the State to introduce evidence of two extraneous sexual assaults by a teacher of his female students because each of the victims, including the complainant in the charged offense, testified to a series of events in which the teacher took advantage of the student's requests for tutoring to become increasingly more physically intimate with the girls. 758 S.W.2d 932, 936-37 (Tex. App.—El Paso 1988, pet. ref'd). Similarly, in *Jones v. State*, the state was permitted to introduce evidence that the accused, a nurse, had used similar injections to create the appearance of the need for an intensive pediatric unit. 716 S.W.2d 142, 161 (Tex. App.—Austin 1986, pet. ref'd). In contrast, in *Lazcano* court found that evidence of a similar prior offense was improper where there was no indication that the acts “constituted the necessary steps in the completion of a formed design... .” 836 S.W.2d at 660-61.

e. Knowledge

Extraneous offense evidence showing the defendant's knowledge is admissible. TEX. R. EVID. 404(b); see also *Taylor v. State*, 920 S.W.2d at 321 (evidence of extraneous murder admissible to show defendant's knowledge that co-defendant would kill victim). When an accused enters a plea of not guilty, he places his knowledge at issue. *United States v. Alarcon*, 261 F.3d at 424 (citing *Doggett*, 230 F.3d at 167). Under this exception, the government has been permitted to introduce evidence that an accused had fabricated bills of lading to show that he had knowledge that his cargo was illegal. *United States v. Garcia-Flores*, 246 F.3d 451, 454 n.1 (5th Cir. 2001)(citing *Beechum*, 582 F.2d at 911)).

3. Evidence that Rebuts a Defensive Theory

Evidence of extraneous offenses is admissible as rebuttal to a defensive theory. *Wolfberg v. State*, 73

S.W.3d 441, 443 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (citing *Ransom*, 920 S.W.2d at 301). The State is entitled to present as rebuttal evidence that tends to refute a defensive theory and to refute any evidence the defense offered in support of that theory. *Schweinle v. State*, 893 S.W.2d 708, 712 (Tex. App.—Texarkana 1995), *rev'd on other grounds*, 915 S.W.2d 17 (Tex. Crim. App. 1996). “As a general rule, the defensive theory that the State wishes to rebut through the use of extraneous offense evidence must be elicited on direct examination by the defense and may not be elicited by ‘prompting or maneuvering’ by the State.” *Wheeler v. State*, 67 S.W.3d at 885 (citing *Shipman v. State*, 604 S.W.2d 182, 185 (Tex. Crim. App. 1980); *Mares v. State*, 758 S.W.2d 932, 936 (Tex. App.—El Paso 1985, pet. ref'd)). The defensive theory, however, may also be put forth by the defendant’s opening statement or cross-examination by the defense during the State’s case-in-chief. *See Powell*, 63 S.W.3d at 439-40. Under these circumstances, the State may present extraneous offense evidence during its case-in-chief. *See id.*

a. Absence of Mistake or Accident

If the defendant claims accident or mistake, intent can no longer be inferred and the state is permitted to introduce extraneous offense evidence. *Johnson*, 932 S.W.2d at 302 (citations omitted); *see also Booker*, 929 S.W.2d at 63 (“it is well established that extraneous offenses are admissible to negate or rebut the possibility of accident.”)(citing *Bryson v. State*, 820 S.W.2d 197, 199 (Tex. App.—Corpus Christi 1991, no pet.)).

The Federal Rule also specifically permits the prosecution to introduce extrinsic evidence showing lack of accident or mistake. FED. R. EVID. 404(b); *see also United States v. Powell*, 124 U.S. 655, 661 (5th Cir. 1997). When an accused enters a plea of not guilty, he places absence of mistake at issue. *United States v. Alarcon*, 261 F.3d at 424 (citing *Doggett*, 230 F.3d at 167).

b. Self-defense

The state is allowed to present extraneous offense evidence to refute a defendant’s claim of self-defense. *See Lemmons v. State*, 75 S.W.3d 513, 523 (Tex. App.—San Antonio 2002, pet. ref'd); *Easley v. State*, 978 S.W.2d 244, 251-52 (Tex. App.—Texarkana 1998, no pet.)(State was permitted to produce testimony of the defendant’s ex-husband that she had stabbed him without provocation while he slept, to rebut her assertion that she killed her current husband because he was abusing her).

c. Insanity

The state is allowed to present extraneous offense evidence to refute a defendant’s defense of insanity. *See Bigby v. State*, 892 S.W.2d 864, 883 (Tex. Crim. App. 1994).

d. Consent

Extraneous offense evidence can be admissible to rebut a defendant’s claim that the victim consented. *See Davis v. State*, 979 S.W.2d at 867; *Rubio v. State*, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980); *Ponce v. State*, 901 S.W.2d 537, 542 (Tex. App.—El Paso 1995, no pet.). For example, testimony from sexual assault victim that her first contact with the defendant was outside of bar where he offered to sell her marijuana was admissible to rebut defendant’s consent defense since the defendant claimed the two had spoken while inside the bar and it explained why the two exited the bar together and were outside together).

e. Entrapment

Extraneous offense evidence may be admissible to issue of entrapment. *England v. State*, 887 S.W.2d 902, 914 (Tex. Crim. App. 1994).

4. Evidence that is Relevant upon a Logical Inference not Anticipated by the Rule

The list provided in rule 404(b) is merely illustrative and is neither exclusive nor collectively exhaustive. *Rankin*, 974 S.W.2d at 718 (citing *Montgomery*, 810 S.W.2d at 388). Proper inquiry is whether the evidence is relevant to any issue in the case apart from or beyond its tendency to prove defendant’s character to show that he acted in conformity with it. *Powell*, 63 S.W.3d at 439; *see also Powell*, 124 F.2d at 662. The following are examples of recognized purposes for which extraneous offense evidence can be admissible.

a. Consciousness of Guilt

Extraneous offense evidence which shows a defendant’s consciousness of guilt is admissible as exception to the general rule. *Madden v. State*, 911 S.W.2d 236, 243 (Tex. App.—Waco 1995, pet. ref'd)(citing *Torres v. State*, 794 S.W.2d 596, 598-600 (Tex. App.—Austin 1990, no pet.)); *Peoples v. State*, 874 S.W.2d 804, 809 (Tex. App.—Fort Worth 1994, pet. ref'd)(citation omitted).

Evidence of flight, unlike other extraneous offense, shows a consciousness of guilt for the crime for which the defendant is on trial and is admissible. *Bigby v. State*, 892 S.W.2d at 883. Similarly, evidence that a defendant attempts to destroy evidence shows a consciousness of guilt and is admissible. *See, e.g., Bradley v. State*, 960 S.W.2d 791, 803 (Tex. App.—El Paso 1997, pet. ref'd)(evidence that defendant dismembered corpse)(citing *Lee v. State*, 866 S.W.2d 298, 302 (Tex. App.—Fort Worth 1993, pet. ref'd); *Yates v. State*, 941 S.W.2d 357, 366-67 (Tex. App.—Waco 1997, pet. ref'd)(evidence that defendant abandoned and dismantled victims property admissible)(citation omitted).

Evidence that the defendant attempted to intimidate or silence witnesses is relevant extraneous offense evidence.

Peoples v. State, 874 S.W.2d at 809; *Greene v. State*, 928 S.W.2d 119, 123 (Tex. App.—San Antonio 1996, no pet.) (citing *Brown v. State*, 657 S.W.2d 117, 119 (Tex. Crim. App. 1983)); *Peoples*, 874 S.W.2d at 809). Likewise, evidence that the defendant attacked his lawyer and the prosecution in the courtroom is admissible because it shows consciousness of guilt. *Ransom v. State*, 920 S.W.2d 288, 299 (Tex. Crim. App. 1994).

b. Defendant's State of Mind

Evidence of the victim's extraneous acts of violence are admissible to show the defendant's state of mind. *Mozon v. State*, 991 S.W.2d at 846. Similarly, evidence that the defendant had previously committed acts of violence against his murder victim were admissible to show his state of mind at the time of the offense. *Pena v. State*, 864 S.W.2d 147, 150 (Tex. App.—Waco 1993, no pet.) (citations omitted).

5. Contextual Evidence (Same-Transaction Contextual Evidence)

There are two types of contextual evidence (1) background contextual evidence, and (2) same-transaction contextual evidence. See *Mayer v. State*, 816 S.W.2d 79, 86-87 (Tex. Crim. App. 1991). Background contextual evidence is simply general background evidence. See *Rogers v. State*, 853 S.W.2d at 33 (citing *Mayer*, 816 S.W.2d at 86-87). Same-transaction contextual evidence, on the other hand, is evidence of other offenses connected with the primary offense. *Id.* Background contextual evidence is not admissible when it conflicts with Rule 404(b)'s prohibition against character evidence used to show character conformity. *Mayer*, 816 S.W.2d at 88. Same-transaction contextual evidence is admissible to the extent that it is needed for the jury's understanding of the charged offense. *Wyatt v. State*, 23 S.W.2d at 25. That is, when the charged offense would make little or no sense without also bringing in the same-transaction contextual evidence, it is properly admissible. *Wyatt v. State*, 23 S.W.3d at 25 (citations omitted). The prejudicial nature of same-transaction contextual evidence will rarely make the evidence inadmissible. *Sparks v. State*, 935 S.W.2d 462, 466 (Tex. App.—Tyler 1996, no pet.) (citing *Mock v. State*, 848 S.W.2d 215, 223 (Tex. App.—El Paso 1992, pet. ref'd)).

Both types of contextual evidence have sometimes been referred to as "res gestae" evidence. Because of the confusion associated with this term it is better to avoid it and instead use the more specific labels. Even as the use of the specific labels becomes more prevalent, some commentators believe that "further clarification of this concept is needed before we return to the confusion of *res gestae*." See discussion 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 404.6.3 n. 34.15 (2d ed. Supp. 2001).

There are two distinct reasons for admitting evidence of other another offense as same-transaction evidence. It is admissible: (1) where the evidence of an extraneous event is significantly blended or interwoven with the facts of the charged offense, and (2) where the extraneous event tends to prove the allegations of the charged offense. *Yates v. State*, 941 S.W.2d at 366 (citing *Santellan*, 939 S.W.2d at 168). "Where the evidence of several crimes is so intermixed or connected so that they form indivisible criminal transaction, and it is impractical to narrate events of one without describing events of others, then such extraneous-offense evidence is admissible as 'same transaction contextual evidence.'" *Hernandez v. State*, 914 S.W.2d 226, 230 (Tex. App.—Waco 1996, no pet.) (citing *Mayer v. State*, 816 S.W.2d at 86-87; *Lockhart v. State*, 847 S.W.2d 568, 572-73 (Tex. Crim. App. 1992)). The mere fact that the extraneous conduct is mentioned in defendant's statement does not make the evidence admissible as contextual evidence. *Etheridge v. State*, 903 S.W.2d at 11 (citing *Ramirez v. State*, 815 S.W.2d 636, 644-45 (Tex. Crim. App. 1991)).

As in Texas, same transaction evidence is not excluded under Federal Rule 404(b). See *United States v. Maceo*, 947 F.2d 1191, 1199 (5th Cir. 1991); *United States v. Knout*, 66 F.3d 1420, 1425 (5th Cir. 1995). Evidence of uncharged offenses is not extraneous offense evidence if it is "inextricably intertwined" with the evidence of the charged offense. *United States v. Baptiste*, 264 F.3d at 590 (citing *United States v. Morgan*, 117 F.3d 849, 861 (5th Cir. 1997)). As the Fifth Circuit has explained, the fear that the jury will use the extrinsic evidence to convict the accused, "is not implicated where offenses are uncharged only because the government indicts a defendant for less than all of his actions in a single criminal episode." *Id.* (citing *United States v. Aleman*, 592 F.2d at 885). The evidence is also admissible if it is background information that completes a witness's account of his various dealings with the accused. *United States v. Miranda*, 248 F.3d 434, 440-41 (5th Cir. 2001) (holding that drug transactions that occurred more than five years before charged offense were properly admissible as background) (citing *United States v. Wilson*, 578 F.2d 67, 72 (5th Cir. 1978)).

D. Notice Requirements of Rule 404(b)

1. Texas

Under the Rule, the state is required to give notice of its intent to introduce extraneous offense evidence: "[P]rovided that upon timely notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction." TEX. R. EVID. 404(b). The State's duty to provide notice arises upon the request of the defendant and is not dependant on any action by the trial court. *Hughes v. State*, 962 S.W.2d 689, 695 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd) (citing *Espinoza v. State*, 853 S.W.2d 36, 39 (Tex. Crim. App. 1993)). The defendant's

request therefore must be made directly to the State and not in a motion to trigger State's duty to provide notice. *Dade v. State*, 956 S.W.2d 75, 81 (Tex. App.—Tyler 1997, pet. ref'd)(citations omitted). Absent a request by the defendant, the State is under no duty to provide notice. *Id.* Failure to request notice precludes the defendant from complaining of the sufficiency of the notice. *Webb v. State*, 995 S.W.2d 295, 296 (Tex. App.—Houston [14th Dist.] 1999, no pet.)(citing *Espinoza*, 853 S.W.2d at 38).

The notice requirements of Rule 404(b) do not apply to same transaction contextual evidence. *Patton v. State*, 255 S.W.3d 387, 392 n.4 (Tex. App.—Austin 2000, pet. ref'd); *Brown v. State*, 978 S.W.2d 708, 712 (Tex. App.—Amarillo 1998, pet. ref'd). Nor do they apply where the evidence is only offered in rebuttal and not in the State's case-in-chief, *Jaubert v. State*, 74 S.W.3d 1, 4 (Tex. Crim. App. 2002), or to the punishment phase of capital murder trial. *Alvarado v. State*, 912 S.W.2d 199, 217 (Tex. Crim. App. 1995)(citing *Adanandus v. State*, 866 S.W.2d 210, 233 (Tex. Crim. App. 1993)).

"[T]he reasonableness of the timing of the State's notice depends in part on the timing of the defendant's request . . ." *Chimney v. State*, 6 S.W.3d 681, 694 (Tex. App.—Waco 1999, no pet.). The purpose of the notice requirement is to apprise the accused of the extraneous conduct the prosecution intends to introduce at trial so the defense can prepare. *Umoja v. State*, 965 S.W.2d 3, 7 (Tex. App.—Fort Worth 1997, no pet.)(citing *Hernandez*, 914 S.W.2d at 234). Notice is presumptively reasonable if given ten days before trial. *Chimney*, at 694. At least one Court of Appeals has held that notice given the morning of trial was untimely. *Umoja*, 965 S.W.2d at 7.

This rule does not necessarily require that the State give its notice in writing. *Chimney v. State*, 6 S.W.3d at 696 (citation omitted). Nonetheless, an open file policy is generally not sufficient to provide notice under this rule. *Buchanan v. State*, 911 S.W.2d 11, 15 (Tex. Crim. App. 1995). Delivery of witness statements detailing extraneous offenses can, however, be sufficient to satisfy the notice requirements of Rule 404(b). *Hayden v. State*, 66 S.W.3d 269, 272 (Tex. Crim. App. 2001). According to the Court of Criminal Appeals, the rule requires "reasonable" notice. *Id.* Whether the delivery of the witness statements will constitute reasonable notice will depend on the timing of the delivery. *Id.* That is, the closer in time the delivery of the witness statements are to the request for notice, the more likely the recipient will conclude that the statements are being given in response to the 404(b) request. *Id.*

2. Federal

Federal Rule 404(b) requires "that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. FED. R. EVID. 404(b). The rule was amended in

1991 to add the notice requirement. *See* FED. R. EVID. 404(b), Advisory Committee Notes, 1991 Amendments. Although the rule does not specify the mechanism with which notice should be given, the rule "expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion." *Id.* There are no specific time limits set by the rule. *Id.* Nor is there a specific requirement for how the notice is to be given. *Id.* Unlike notice requirements under the Texas rules, no matter how the extraneous evidence may be used at trial, i.e., during the case-in-chief, rebuttal, or impeachment, the prosecution is required to give notice. *Id.* It is left to the trial court's discretion to determine if the notice actually given was reasonable. *Id.*

E. Probative Value v. Prejudicial Effect

Again, not only must the evidence be admissible for some other purpose, its probative value must outweigh its prejudicial effect. *See Perry v. State*, 933 S.W.2d 249, 253 (Tex. App.—Corpus Christi 1996, pet. ref'd) ("In order for extraneous offense evidence to be admissible, a two part test must be met. First, the evidence must be relevant to a material issue in the case. Second, its relevancy value must not be substantially outweighed by its inflammatory or prejudicial potential."); *see also* TEX. R. EVID. 403. "It is only when the danger of unfair prejudice substantially outweighs the probative value of the extraneous offense evidence that it must be excluded." *Madden v. State*, 911 S.W.2d at 243.

Several factors may be used to determine whether probative value of other crimes evidence outweighs its prejudicial effect, including similarity between extraneous transaction and charged offense, closeness in time of acts, and availability of other sources of proof. *Suarez v. State*, 901 S.W.2d 712, 721 (Tex. App.—Corpus Christi 1995, pet. ref'd). In conducting this balancing, courts consider: (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable; (2) potential the other offense evidence has to impress the jury in some irrational but nevertheless indelible way; (3) time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and, (4) force of the proponent's need for the evidence to prove a fact of consequence. *Mozon v. State*, 963 S.W.2d at 847 (citing *Santellan*, 939 S.W.2d at 169).

F. Limiting Instruction

If requested, the trial court should instruct the jury that its consideration of the extraneous offense evidence is limited to whatever purpose the proponent has persuaded the court the evidence serves. *Ex Parte Varelas*, 45 S.W.3d 627, 631 (Tex. Crim. App. 2001); *Abdnor v. State*, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994)(citations omitted). This instruction should be given at the time the

evidence is admitted and included in the written charge. *Varelas*, 45 S.W.3d at 631 n.3. Failure to give a properly requested instruction is reversible error. *Abdnor*, 871 S.W.2d at 738 (citing *Porter v. State*, 709 S.W.2d 213, 216 (Tex. Crim. App. 1986)).

A limiting instruction is proper since the extraneous offense evidence is admissible for some purposes, but inadmissible for others. *Robbins v. State*, 27 S.W.3d 245, 251 (Tex. App.—Beaumont 2000, no pet.) (citing *Rankin v. State*, 974 S.W.2d at 711-12). And a limiting instruction lessens the prejudicial effect of the extraneous offense evidence. *Caddell v. State*, 865 S.W.2d 489, 453 (Tex. App.—Tyler 1993, no pet.) (citing *McFarland*, 845 S.W.2d at 837; *Plante v. State*, 692 S.W.2d at 494; *Keller v. State*, 818 S.W.2d 425 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd)).

When co-defendants are tried together and extraneous offense is admissible against only one of the defendants, the trial court should instruct the jury not to consider the evidence against the other defendant. *United States v. Petterson*, 244 F.3d at 393-94. While such an instruction should be given at the time is offered, “an instruction at the conclusion of trial will often be sufficient.” *Id.* (citing *United States v. Chihak*, 137 F.3d 252, 258-59 & n.3 (5th Cir. 1998)).

A limiting instruction is not required for same-transaction/contextual extraneous offense evidence. *Castaldo v. State*, 78 S.W.3d 345, 352 (Tex. Crim. App. 2002) (citing *Camacho v. State*, 864 S.W.2d 524, 532 (Tex. Crim. App. 1993); *Westbrook v. State*, 29 S.W.3d 103, 114 (Tex. Crim. App. 2000)).

G. Objecting to the Extraneous Conduct

Under both the Texas and Federal Rules of Evidence, a party must make a timely specific objection and obtain a ruling from the trial court to preserve the complaint for appellate review. *See* TEX. R. EVID. 103(a)(1); FED. R. EVID. 103(a)(1); *see also*, TEX. R. APP. P. 33.1(a). Objecting that evidence is irrelevant is generally sufficient to preserve error under rule 404(b). *See Etheridge v. State*, 903 S.W.2d at 10 n.5 (citing *Montgomery v. State*, 810 S.W.2d at 387). However, the party must specifically object under Rule 403 to preserve that complaint. *See Bryson v. State*, 820 S.W.2d at 200; *Marable v. State*, 840 S.W.2d 88, 94 (Tex. App.—Texarkana 1992, pet. ref'd). Even if a proper objection is made to the evidence when is first offered, if the same evidence is offered through another witness without objection, the complaint is waived and the harm is cured. *Madden v. State*, 911 S.W.2d at 242. Obviously a party cannot complain if they were the one who introduced the evidence. *Eaglin v. State*, 872 S.W.2d 332, 338 (Tex. App.—Beaumont 1994, no pet.).

A motion to suppress evidence is not the proper mechanism for challenging the admission of extraneous offense evidence. *See Jackson v. State*, 65 S.W.3d 317, 320 (Tex. App.—Waco 2001, no pet.) (citing *State v.*

Roberts, 940 S.W.2d 655, 658 (Tex. Crim. App. 1996)). This is because the purpose of a motion to suppress is not to decide simple evidentiary matters based on the rules of evidence, but rather to exclude evidence which has been secured illegally in violation of the constitution. *Id.* Nor is a motion in limine sufficient to preserve a complaint for appellate review. *Wilson v. State*, 7 S.W.3d 136, 144 (Tex. Crim. App. 1999).

IV. ARTICLE 38.36 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

The Texas Code of Criminal Procedure provides: “In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense. TEX. CRIM. PROC. CODE art. 38.36(a)(West 2002). Although this provision of the Code seems to provide a significant opportunity for the party to admit extraneous evidence, any evidence offered under this article must still be admissible under the Rules of Evidence. *See generally* *Bush v. State*, 958 S.W.2d at 505.

V. EXTRANEOUS OFFENSES USED FOR PURPOSES OF IMPEACHMENT

A. Evidence of Conviction of a Crime⁵

1. Texas Rule of Evidence 609

Texas Rule of Evidence 609 allows for the introduction of evidence that a witness has been convicted of a crime “if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.” TEX. R. EVID. 609(a). Although the conviction can be used to impeach a witness’ credibility, as a general rule the details of the offense are not admissible. *See Mays v. State*, 726 S.W.2d 937, 953 (Tex. Crim. App. 1986); *Stevens v. State*, 671 S.W.2d 517, 522 (Tex. Crim. App. 1984). As with Rule 404(b), the burden is on the proponent of the Rule 609 evidence to demonstrate its admissibility. *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). The trial court has the discretion to refuse to permit the introduction of the impeachment evidence if the proponent fails to sufficiently link the convictions to the witness. *Davis v. State*, 791 S.W.2d 308, 310 (Tex. App.—Corpus Christi 1990, pet. ref'd). Also, the State is required to give notice before trial if requested. TEX. R. EVID. 609(f).

2. Federal Rule of Evidence 609

Rule 609(a) of the Federal Rules of Evidence provides that “evidence that a witness other than an accused has

⁵ Because this topic is covered in more detail in this course, our discussion of the rule will be limited.

been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” FED. R. EVID. 609(a). Details of the prior conviction are not normally admissible, but a defendant can open the door for this type of testimony by giving his own version of the events. See *United States v. White*, 222 F.3d 363, 370 (7th Cir. 2000). Additionally, a trial court abuses its discretion in permitting impeachment with a prior conviction arising from the same transaction as the current charge. *United States v. Martinez*, 555 F.2d 1273, 1277 (5th Cir. 1977).

When determining if evidence of a defendant’s prior convictions is more probative than prejudicial the following factors apply: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and, (5) the centrality of the defendant’s credibility. *United States v. Hursh*, 217 F.3d 761, 768 (9th Cir. 2000). In determining whether the evidence of the prior conviction is more prejudicial than probative under Rule 403, the judge should ensure that the record adequately reflects the factors balanced and the weight the judge has given to each factor. *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), cert. denied, 429 U.S. 1025 (1976). Unlike Texas, the federal rule does not give the trial court discretion to exclude convictions involving dishonesty or false statement without regard to Rule 403. FED. R. EVID. 609(a)(2).

B. Extraneous Offenses and Witness Bias or Interest⁶

1. Texas Rule of Evidence 613

Texas has a rule that specifically permits a party to impeach with any evidence that reveals a bias or interest on the part of the witness. See TEX. R. EVID. 613(b). Unlike other impeachment evidence, evidence of bias or motive which operates on the mind of a witness is always material. See *Koehler v. State*, 679 S.W.2d 6, 10 (Tex. Crim. App. 1984). As such, this rule permits the introduction of evidence that might otherwise be inadmissible impeachment evidence. See *Dixon v. State*, 2 S.W.3d 263, 271 (Tex. Crim. App. 1999)(Rule 608(b) prohibition against evidence of specific instances of misconduct for impeachment purposes, does not prohibit the introduction of such

evidence pursuant to Rule 612(b) [now Rule 613(b)], as they are distinct rules that serve different purposes); *Paley v. State*, 811 S.W.2d 226, 229 (Tex. App.—Houston [1st Dist.] 1991, pet. ref’d)(for the purpose of measuring eyewitness’ credibility and the extent to which the State might have influenced his testimony, the jury was entitled to know about his deferred adjudication status and any conversations he might have had with the prosecution, police, or his probation agent about ending his probation). Thus, evidence of unadjudicated crimes can be admissible to show the bias or interest of a witness. *Moreno v. State*, 22 S.W.3d 482, 485-86 (Tex. Crim. App. 1999). The Court of Criminal Appeals has held that evidence that a State’s witness is on deferred adjudication is admissible to show bias or interest. *Maxwell v. State*, 48 S.W.3d 196, 200 (Tex. Crim. App. 2001).

2. Federal Rule

Unlike Texas, the Federal Rules of Evidence have no specific rule permitting impeachment evidence of this kind. Nonetheless, the Sixth Amendment right to confrontation requires that a defendant be given great latitude to show any fact that would tend to establish ill feelings, bias, motive, or animus on the part of a witness testifying against him. See *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). “Bias is a term used in the ‘common law of evidence’ to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness’ like, dislike, or fear of a party, or by the witness’ self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weight of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *United States v. Abel*, 469 U.S. 45, 52 (1984). There is no need to lay a specific predicate before introducing evidence of bias, but the witness must be given the opportunity to explain or deny the bias at some point during the trial. *United States v. Betts*, 16 F.3d 748, 764 (7th Cir. 1994).

C. Defense Can Open the Door to Extraneous Offense Evidence

The defense can open the door to extraneous offense evidence. *Creekmore v. State*, 860 S.W.2d 880, 892 (Tex. App.—San Antonio 1993, pet. ref’d) (op. on reh’g) (citing *Bell v. State*, 620 S.W.2d 116, 126 (Tex. Crim. App. 1981) (op. on reh’g)). When the defendant, during direct examination, leaves a false impression as to the extent of his (1) arrests, (2) convictions, (3) charges, or “trouble” with the police, he has opened the door to the admission of evidence of prior offenses. *Turner v. State*, 4 S.W.3d 74, 79 (Tex. App.—Waco 1999, no pet.)(citing *Ochoa v. State*, 481 S.W.2d 847, 850 (Tex. Crim. App. 1972)). For example, if a witness creates a false impression of law

⁶ Because this topic is covered in more detail in this course, our discussion of the rule will be limited.

abiding behavior, the opposing party is allowed to expose the falsehood by using his past criminal history. *Metts v. State*, 22 S.W.3d 544, 549 (Tex. App.—Fort Worth 2000, pet. ref'd)(citing *Prescott v. State*, 744 S.W.2d 128, 130-31 (Tex. Crim. App. 1988)). See also *Prescott v. State*, 744 S.W.2d at 132 n.4 (citing *Ex parte Carter*, 621 S.W.2d 786 (Tex. Crim. App. 1981)(incomplete listing during direct examination of his prior troubles); *Bell v. State*, 620 S.W.2d 116 (Tex. Crim. App. 1981)(incomplete response to question, “Have you anything in your past that is of a criminal nature?”); *Reese v. State*, 531 S.W.2d 638 (Tex. Crim. App. 1976)(incomplete response to question, “What kind of trouble do you have with the law?”); *Hoffman v. State*, 514 S.W.2d 248 (Tex. Crim. App. 1974)(denial of the existence of any prior complaints); *Gilmore v. State*, 493 S.W.2d 163 (Tex. Crim. App. 1973)(defendant denied involvement in any prior robbery on direct examination); *Page v. State*, 486 S.W.2d 300 (Tex. Crim. App. 1972)(denial of any prior arrests for violent crimes, cross-examination as to arrest for concealed weapon, robbery, burglary and theft was therefore proper); *Hamilton v. State*, 480 S.W.2d 685 (Tex. Crim. App. 1972)(denial of any prior burglaries or robberies on direct); *Alexander v. State*, 476 S.W.2d 10 (Tex. Crim. App. 1972)(defendant testified on direct that “he had not been in trouble before”); *Heartfield v. State*, 470 S.W.2d 895 (Tex. Crim. App. 1971)(defendant testified that since 1949 he had not been in trouble with the law); *Barnett v. State*, 445 S.W.2d 205 (Tex. Crim. App. 1969)(denial of “any trouble with the law in the past eight years.”); *Orozco v. State*, 301 S.W.2d 634 (Tex. Crim. App. 1957)(“Have you ever been convicted of a felony or a misdemeanor or paid a fine or anything of that nature?”)).

VI. EXTRANEOUS OFFENSE EVIDENCE IN SEXUAL OFFENSES AND OFFENSES INVOLVING CHILDREN

The Texas Code of Criminal Procedure specifically permits evidence of other crimes, wrongs, or acts committed by the defendant against a child under seventeen who is the victim of sexual and other assaultive crimes. TEX. CRIM. PROC. CODE art. 38.37 (West 2002).

Similarly, the Federal permits the introduction of sexual offense evidence against an accused in a sexual assault case admissible. FED. R. EVID. 413(a). The rule provides: “In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.” FED. R. EVID. 413(a). The rule requires that the evidence be disclosed by the prosecution at least fifteen days before date of trial unless the court finds good cause to allow a shorter time period. FED. R. EVID. 413(b). Like Rule 413, Rule 414 provides: “In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s

commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.” FED. R. EVID. 414(a). Again, notice must be given at least fifteen days before trial unless the trial court determines good cause exists to shorten the time. FED. R. EVID. 414(a).

VII. EXTRANEOUS OFFENSE EVIDENCE DURING THE PUNISHMENT PHASE OF A NONCAPITAL TRIAL

A. Punishment by a Jury

The Code of Criminal procedure provides that “evidence may be offered by the State as to any matter the court deems relevant to sentencing, including... any other evidence of an 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, regardless of whether he has previously been charged with or finally convicted of the crime or act.” TEX. CRIM. PROC. CODE ANN. art. 37.07 § 3(a)(West 2002). It requires that the evidence of the extraneous conduct be “shown beyond a reasonable doubt by evidence to have been committed by the defendant.” TEX. CRIM. PROC. CODE art. 37.07 § 3(a)(West 2002). The Court of Criminal Appeals has held that the beyond-a-reasonable-doubt standard of art. 37.07 is the same as that applied to extraneous offense evidence during the guilt-innocence phase. See *Mitchell v. State*, 931 S.W.2d 950, 954 (Tex. Crim. App. 1996)(“When evidence of extraneous offenses has been offered, regardless of the respective phase of a trial, the law requires that it be proved beyond a reasonable doubt”). The trial court must instruct the jury that it cannot consider evidence of an extraneous offense in assessing punishment unless the jury is satisfied beyond a reasonable doubt that the extraneous offense is attributable to the defendant if so requested. See *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999). The State is not barred from prosecuting an unadjudicated offense even if it is considered by the jury in assessing punishment. See generally *Broxton v. State*, 888 S.W.2d 23, 28 (Tex. Crim. App. 1994)(discussing unadjudicated offenses admitted during the punishment phase of a capital murder trial).

If the accused makes a timely request, notice of intent to introduce evidence under the article is to be given in the same manner as required by Rule 404(b). TEX. CRIM. PROC. CODE art. 37.07 § 3(g)(West 2002). The requirement that the State give notice applies only if the defendant makes a timely request to the attorney representing the State for notice. *Id.* The notice requirement does not apply to same-transaction contextual evidence. See *Brown v. State*, 978 S.W.2d at 712.

The Code also specifies what constitutes reasonable notice: “If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence, notice of that intent is

reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act.” TEX. CRIM. PROC. CODE art. 37.07 § 3(g)(West 2002).

Under this rule, the State is allowed to present evidence of a defendant’s gang affiliation because it is relevant to show the character of the defendant. *See Anderson v. State*, 901 S.W.2d 946, 950 (Tex. Crim. App. 1995)(citations omitted); *Beasley v. State*, 902 S.W.2d 452, 456(Tex. Crim. App. 1995). Additionally, the jury is entitled to know the types of activities the gang engages in so that they can determine if the defendant’s gang membership reflects positively or negatively on his character as a whole. *Id.* And it is not necessary to link the defendant to the bad acts or misconduct generally engaged in by the gang members so long as (1) the jury is provided evidence of the defendant’s gang membership; (2) the jury is provided with evidence of the character and reputation of the gang; (3) the jury is not required to determine if the defendant committed the bad act or misconduct; and (4) the jury is only asked to consider the reputation or character of the accused. *Beasley v. State*, 902 S.W.2d at 457.

B. Punishment by a Judge

A trial court is permitted to obtain a pre-sentence investigation report that includes the defendant’s criminal and social history along with any other information relating to the defendant or the case that the judge requests. TEX. CRIM. PROC. CODE art. 42.12 § 9(a)(West 2002). In addition the defendant, with the consent of the state, may admit his guilt to an unadjudicated offense and ask the trial court to consider that offense when assessing his punishment. TEX. PENAL CODE § 12.45(a)(West 2002). Once the unadjudicated offense is taken into consideration, the state can no longer prosecute the defendant for the offense. TEX. PENAL CODE § 12.45(c)(West 2002). Because of this, if the offense occurred in another jurisdiction the court must obtain the permission of the prosecutor from that jurisdiction before considering the offense. TEX. PENAL CODE § 12.45(a)(West 2002). Unless the defendant follows the procedure set out above, the state is not barred from prosecuting the unadjudicated offense.

VIII. CONCLUSION

Ultimately no one paper or case dealing with extraneous conduct can adequately prepare a criminal lawyer for every conceivable instance in which such evidence may become an issue in a trial. Perhaps the best advice that can be given on this topic was written by Judge Odom almost three decades ago:

The circumstances which justify the admission of evidence of extraneous offenses are as varied as the factual contexts of the cases in which the question of the

admissibility of such evidence arises. Each case must be determined on its own merits.

Albrecht, at 100.

EXTRANEOUS OFFENSES

2005 CASE SUPPLEMENT

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226th District Court

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Case Supplement - 2005

Bible v. State, No. AP-74, 713 (Tex. Crim. App. May 4, 2005).

Appellant was convicted of sexual assault. Appellant contends that portions of his confessions relating to the sexual assault of two of his nieces were improperly admitted at the punishment phase for lack of corroborating evidence. This Court declined to expand the *corpus delicti* doctrine to extraneous offenses at the punishment phase of a trial. This Court reasoned that the *corpus delicti* doctrine is concerned with preventing a conviction from being based solely upon a false confession. When dealing with an extraneous offense offered at the punishment phase of trial no such concern exists.

Thornton v. State, 145 S.W. 3d 228 (Tex. Crim. App. 2004).

Appellant was convicted of burglary of a habitation with the intent to commit sexual assault in Texas. To prove appellant's intent to commit sexual assault, the prosecution presented evidence of a similar offense committed in Arizona (that case was thrown out when the evidence was suppressed based upon an illegal arrest) in 1995 by appellant (DNA evidence had proven appellant was responsible for the previous sexual assault). Appellant argued that the Arizona extraneous offense should not have been allowed into evidence in the Arizona case because the evidence had been suppressed by the Arizona courts. This Court ruled there were attenuating factors such as the passage of four years time between the illegal arrest in Arizona; the DNA sample taken in the instant case being proper; and the commission of similar crimes by the defendant which dissipated the taint of appellant's illegal arrest in Arizona from the DNA evidence that may have been obtained as a result of it. Finally, this Court held that the most important consideration is that Texas authorities did not violate appellant's Fourth Amendment rights.

Johnston v. State, 145 S.W. 3d 215 (Tex. Crim. App. 2004).

Appellant was charged with intentionally or knowingly causing injury to a child, by burning the child's hand with a lit cigarette. The trial court admitted twelve pictures, depicting bruising of the victim's sister, over appellant's objections. This Court held that the pictures did not tend to show that it was appellant rather than his wife who burned the victim's hand nor did the pictures rebut the defensive theory that appellant accidentally burned the victim's hand. However, this Court concluded that the admission of the photographs did not affect appellant's substantial rights nor did they play a role in his conviction based on other evidence presented tending to prove appellant's guilt.

Resendiz v. State, 112 S.W. 3d 541, (Tex. Crim. App 2003).

Appellant was convicted of one count of murder. Appellant's defense was that he was legally insane at the time of the commission of the offense. Evidence at trial established that he committed several other murders. The trial court properly sustained the prosecution's objection to crime scene photographs of extraneous murders for which appellant was responsible. The defense attempted to enter the gruesome photographs in an effort to support the theory that appellant was insane at the time he committed the instant murder. This Court found that the photographs would likely distract the jury from the facts of the instant case. Although relevant to the issue of appellant's sanity, viewing the photographs would not establish that appellant was legally insane at the time he committed the instant murder. This Court determined the probative value of the photographs was limited and the trial court did not abuse its discretion in excluding the photographs.

Escamilla v. State, 143 S.W. 3d, 814 (Tex. Crim. App. 2004).

Appellant was convicted of capital murder. Appellant objected to the use of extraneous offenses that were not proven beyond a reasonable doubt. This Court declined to revisit well settled law in allowing the use of unadjudicated extraneous offenses at the punishment phase of a capital punishment trial.

Prible v. State, No. AP-74, 487 (Tex. Crim. App. January 26, 2005).

Appellant was convicted of capital murder. Appellant shot and killed two individuals at their home in the course of the same criminal episode and was charged with their murders. In order to escape detection appellant set fire to the house. A neighbor noticed smoke and kicked open the garage door where he found one victim lying in a pool of

blood. The fire was smoldering and confined to the living room, where the second victim was found. The couple had three children whose bodies were found in the bedroom. The children died of asphyxiation from smoke inhalation. At trial a cell mate of appellant testified that appellant had confessed to the killings. The prosecution also entered crime scene and autopsy photos of the children's bodies. Appellant objected, arguing the photos were improperly admitted extraneous offenses. This Court concluded the photos were entered to corroborate appellant's confession to his cell mate and because the photos were part of the crime scene they were properly submitted. This Court went on to say that the danger of the photographs being prejudicial was small because the photos did not depict charred or mutilated bodies. This Court determined it was error to admit the autopsy photographs of the children. The error was harmless because the photographs were clinical depictions.

Williams v. State, 114 S.W. 3d 920, (Tex. Crim. App. 2003).

Williams was convicted of criminal non support. The indictment alleged appellant committed the offense "on or about" June 1, 2000, which could have included the entire time appellant failed to pay child support beginning on October 1, 1988. However, appellant stipulated the offense occurred "on June 1, 2000." Prior to 1994 the offense of criminal non support was a class A misdemeanor, in 1994 the punishment for the offense changed to a state jail felony. This Court held that because appellant stipulated to the offense occurring on June 1, 2000, he did not plead to nor was he convicted of any conduct occurring prior to 1994. This Court held that the offense was properly punished as a state jail felony.

Russell v. State, 155 S.W. 3d 176, (Tex. Crim. App. 2005) (not designated for publication).

A jury convicted appellant of capital murder for intentionally causing the death of an individual while in the course of committing the offense of retaliation against her. The jury sentenced appellant to death. Appellant was in a relationship with the victim who was also a police informant. The victim took undercover narcotics officer's to appellant's home and introduced them to appellant. Subsequent to that encounter, appellant agreed to sell several ounces of crack cocaine to the undercover officers. When they met at a store later to complete the transaction appellant was arrested. Appellant was released pending sentencing on the delivery of a controlled substance charge. Appellant admitting to killing the victim three days later stating she had set him up. Appellant argued that the trial court erred in allowing evidence at the guilt/innocence phase of the trial of his prior drug conviction. Appellant argued that the evidence was irrelevant and tended to show only that he was a criminal generally. This Court held that the prior drug offense was not used to establish appellant was a "criminal generally" as appellant contended but rather used to establish a motive for the killing, namely that the victim had cooperated with a police officer and introduced appellant to the police officer who later arrested him for delivery of a controlled substance.

Page v. State, 137 S.W. 3d 75 (Tex. Crim. App. 2004).

Appellant stopped a prostitute, flashed a badge and told her to "come here." The victim complied and got in the car. As they drove along appellant told the victim that he was about to finish his shift and he didn't want to fill out the necessary paperwork. Appellant told the victim that she would have to perform oral sex on him to avoid going to jail. He forced her to perform oral sex on him. After a brief time she refused to continue and told him that he would have to take her to jail. Appellant took her back and told her to get out of the car. Several days later she saw the car again and decided to report the incident to the police. The police tracked appellant down and the victim identified him in a photo line-up. Evidence established that he was not a police officer but a prison guard. During the victim's testimony on cross examination defense counsel brought into question her identification of appellant stating she had said appellant weighed around 200 pounds when in fact he weighed much more than that, 265 pounds. Two other prostitutes were called to testify and outside the jury's presence stated that appellant did essentially the same thing to them. Appellant objected under 403 and 404(b). The state argued that the evidence was admissible because the victim's testimony had been impeached with respect to the identity of appellant and the victim's own drug use. The court of appeals held it was error to admit the evidence. This Court reversed the court of appeals stating that evidence of the extraneous offenses was admitted to show the identity of appellant. This Court held that identity was placed in issue by the defense cross-examination and therefore there was no error in allowing the extraneous offense evidence to be admitted.

Bluitt v. State, 137 S.W. 3d 51 (Tex. Crim. App. 2004).

Appellant was convicted of indecency with a child by sexual contact. Appellant took the stand at trial and denied that he had inappropriately touched his girlfriend's eight year old daughter, the victim. He testified that the girl was angry at him for disciplining her. On cross examination the prosecution introduced evidence of four prior convictions; one for assault on a family member; two for assault-domestic violence; and one for fraud. Those extraneous offenses were re-introduced at the punishment phase of trial along with three other convictions. Appellant complained on appeal the trial court erred, at the punishment phase of trial, in refusing to instruct the jury that in order to consider evidence of extraneous offenses it must first believe beyond a reasonable doubt that the defendant committed the offenses. This Court held it was not error because each of the offenses the State introduced were prior *convictions*. Article 37.07 of the Code of Criminal Procedure does not require that prior convictions be proved beyond a reasonable doubt only unadjudicated offenses and bad acts.

Ex Parte Goodman, 153 S.W. 3d 416, (Tex. Crim. App. 2004).

Appellant was convicted of theft. At trial appellant objected to the admission of a written statement arguing the statement contained extraneous offenses. The indictment alleged only one offense of theft on one date. Over appellant's objection the trial court granted the state's motion to dismiss the indictment. Appellant was re-indicted alleging a scheme and continuing course of conduct through a period of time. This court concluded that double jeopardy barred the use of the theft alleged in the initial indictment but did not preclude the conviction of the other offenses.

Campbell v. State, 149 S.W. 3d 149, (Tex. Crim. App. 2004).

Appellant was convicted of possession with intent to deliver a controlled substance. Appellant was a passenger in a vehicle which was stopped for having an expired dealer's tag. The police arrested the driver for an outstanding warrant. The driver released the vehicle to appellant. Upon checking appellant's license officers discovered he also had a warrant for his arrest and arrested appellant. Upon the inventory of the vehicle the officer found a backpack lying in the backseat. The backpack had the name of appellant's stepson on it, and inside some men's clothing, a towel, a cell phone and charger, a pager and a daytime organizer. Inside the organizer the officer discovered two baggies containing 8.64 grams of methamphetamine, several empty baggies, a set of small scales, two syringes, a tourniquet, and an address book. The driver became hysterical when the items were discovered and claimed they did not belong to her. The officer told appellant he believed the drugs to be appellant's because of the men's clothing in the bag. Appellant admitted "Yes, that's my stuff." At trial, appellant admitted that the belongings in the bag were his but alleged the officer was lying about discovering his belongings inside the backpack. Appellant argued that the backpack and drugs belonged to his estranged wife and her boyfriend who were dealing drugs. The driver testified that appellant got in the car with the backpack, but appellant claimed she was the one who told him his wife left the backpack in the car. Appellant stated that he feared the driver's husband's tendency toward violence so he stated the drugs belonged to him. He also wanted to spare his wife and his stepson who has Down Syndrome. He did admit to having drugs in a toolbox in his car at the motel where he and the driver of the vehicle were staying. Based on this testimony appellant requested a jury instruction on a lesser included offense which was denied. Appellant appealed, claiming the trial court erred in denying his request for the lesser included offense of possession. The court of appeals affirmed appellant's conviction. This Court reviewed distinguishing this case from *Rankin* stating that the issue at bar is not whether the offense is an extraneous offense, as in *Rankin*, but whether it is a lesser included offense. This Court declined to consider whether the offense was an extraneous offense but instead considered the narrower issue of whether it was a lesser included offense. This Court took great pains to establish that they were not implicitly finding that the offense was not an extraneous because neither side contended that it was an extraneous offense.

King v. State, No. 03-01-00531-CR, (Tex. App.—Austin, October 2, 2003, pet. ref'd) (not designated for publication).

This is an appeal from an assault conviction whereby appellant attacked his estranged wife while she sat in a car. Normally, assault bodily injury is a class A misdemeanor but may be enhanced to a third degree felony when committed against a member of the defendant's family if it is shown on the trial that the defendant has previously been convicted of a prior offense for assault against a family member. The State introduced a judgment dated May 6, 1992, where his then girlfriend was the victim, the very same person who was the victim in the instant case. Appellant argued that the prior assault was never designated as one against a family member. The appellate court

held the trial court did not err in allowing evidence of the extrinsic assault in order to enhance an assault bodily injury to an assault against a family member. The court held that nothing precludes the use of extrinsic evidence to establish that a prior assault was committed against a family member, even after the fact.

Martin v. State, 144 S.W. 3d 29, (Tex. App.—Beaumont May 13, 2004, pet. granted).

On conviction for sexual assault, the trial court allowed evidence of a prior sexual assault occurring approximately three months prior. The court of appeals held that because the defensive theory raised the issue of consent, the extraneous offense evidence was relevant to rebut the theory that the victim was a willing participant. This court held that the probative value of the evidence outweighed any danger of unfair prejudice. The evidence was not merely introduced to show appellant's character as a sexual predator but to establish lack of consent on the victim's part.

Webb v. State, No. 04-03-00216-CR (Tex. App.-San Antonio 2005, no pet. h.) (not designated for publication)

Appellant was convicted of murder. The victim was found dead in her home. Appellant was her next door neighbor. At trial the prosecution introduced evidence of an encounter whereby Webb made sexual advances toward a third individual approximately one month before the murder. This Court agreed that the evidence was "irrelevant and immaterial". It explained that it neither established a motive nor proved the identity of appellant. Because evidence of appellant's guilt was not overwhelming this court could not say that the jury was not influenced and reversed and remanded the case.