EXTRANEOUS OFFENSES IN TEXAS

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Appendix A

REQUEST FOR NOTICE OF INTENT TO OFFER EXTRANEOUS CONDUCT UNDER RULE 404(b) AND EVIDENCE OF CONVICTIONS UNDER RULE 609(f) AND EVIDENCE OF AN EXTRANEOUS CRIME OR BAD ACT UNDER ARTICLE 37.07, § 3(g)

Appendix B

MOTION REQUESTING NOTICE OF INTENT TO OFFER EXTRANEOUS CONDUCT UNDER RULE 404(b) AND EVIDENCE OF CONVICTION UNDER RULE 609(f) AND EVIDENCE OF AN EXTRANEOUS CRIME OR BAD ACT UNDER ARTICLE 37.07, § 3(g)

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I. SCOPE OF PAPER

The subtitle to this paper comes from *Burrow v. State*, 668 S.W. 2d 441 (Text App.--El Paso 1984, no pet.), an opinion authored by Justice Ward. So much extraneous misconduct came in during that trial, from both sides, "that the original DWI charge became a minor sideshow." *Id*. at 443. With more than a hint of frustration, the court of appeals identified a point where "the trial turned from *Wigmore* to mudwrestling." *Id*. "The rules of relevance, materiality, extraneous offenses and argument within the record were almost totally eroded in this trial" *Id*. at 444.

From the defense standpoint, using the law to exclude extraneous offenses is almost always preferable to wrestling in the mudpit created by their introduction. This paper focuses on case law which lawyers can use to prevent the admission of such evidence during the guilt/innocence phase of the trial in Texas courts. It does not discuss misconduct introduced for some other purpose, such as for impeachment, or during the punishment phase of the trial.

II. WHAT IS EXTRANEOUS?

A. Definitions

1. "By definition, extraneous offenses are extra, beyond, or foreign to the offense for which the party is on trial. In other words, an extraneous offense is any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging instrument." *Shugart v. State*, 796 S.W. 2d 288, 293 (Text App.--Beaumont 1990, pet. ref'd)(citations omitted).

2. "An extraneous offense is any act or misconduct, whether resulting in prosecution or not, which is not shown in the charging instrument and which was shown to have been committed by the accused." *Hernandez v. State*, 817 S.W. 2d 744, 746 (Text App.--Houston [1st Dist.] 1991, no pet.).

3. "An extraneous offense is defined as any act of misconduct, whether resulting in prosecution or not, that is not shown in the charging papers." *Rankin v. State*, ____S.W. 2d ____,No. 1019-94 (Text Crim. App. January 10, 1995), slip op. 2. In *Rankin*, appellant was indicted for possession of cocaine. The state presented evidence at trial that appellant possessed a rock of cocaine which had been found underneath the seat of a patrol car where appellant had been sitting. Appellant testified in his own behalf, and denied possessing the cocaine which was found in the patrol car. He and his wife, however, testified that appellant had been in possession of cocaine earlier in the day, but that he had thrown it down the sink. The state argued that appellant could be convicted of possessing either cocaine. *Id*. at slip op. 1. Using the definition of extraneous offense just cited, the court of criminal appeals agreed. "Appellant's confession that he possessed a rock of crack cocaine earlier that morning is an act that is clearly 'shown in the charging papers.'" *Id*. at slip op. 2.

B. Extraneous Misconduct Need Not Amount To A Crime

1. In *Plante v. State*, 692 S.W. 2d 487 (Text Crim. App. 1985), the misconduct in question was unpaid debts. The court of appeals had referred to this as "extraneous transactions." The court of criminal appeals agreed with the terminology. "This terminology reflects the lesser prejudicial effect of non-criminal extraneous conduct . . . but should not be construed to imply a different standard for admissibility of the evidence. The analysis of the admissibility of extraneous conduct is the same whenever the extraneous conduct reflects adversely on the character of the defendant, regardless of whether that conduct might give rise to criminal liability." *Id*. at 490 n. 3. However, when balancing potential for prejudice against probative value, it is true that the noncriminal nature of conduct will tend to reduce its prejudicial effect. *Id.* at 494.

2. "Rule 404(b) "applies equally to evidence of extraneous acts or transactions as it does to evidence of extraneous offenses." *Bishop v. State*, 869 S.W. 2d 342, 345 (Tex. Crim. App. 1993). Evidence that appellant had liked to engage in anal intercourse with his ex-wife, that he had required her to fondle herself, and that he had been capable of extended sexual performance without ejaculation was, at a minimum, evidence of extraneous acts, and therefore subject to analysis under Rule 404(b). *Id*. at 344-45; *accord, Cooper v. State*, 901 S.W. 2d 757 (Tex. App.-Beaumont 1995), pet. dism'd, improvidently granted 933 S.W.2d 495 (Tex. Crim. App. 1996).

3. Although appellant could not be convicted for a bad thought, or a contemplated bad act, such evidence does come within Rule 403, because "the potential for unfair prejudice . . . is quite similar to that of evidence of other crimes, wrongs or acts." Both are objectionable because they "could possibly be used by jurors for the forbidden inference of propensity or character conformity." *Moreno v. State*, 858 S.W. 2d 453, 464 (Text Crim. App.), *cert. denied*, 114 S. Ct. 445 (1993)(trial court erred in admitting evidence that appellant once planned to kidnap another person, but the error was harmless); *but see Massey v. State*, 933 S.W.2d 141, 154 (Tex. Crim. App. 1996)(statements about appellant's thoughts on raping, killing and mutilating women in a very specific manner were not conduct and thus not subject to rule 404(b)).

4. "Obviously, reference by a witness to a defendant's prior incarceration in the penitentiary, formerly known as the Texas Department of Corrections and oftentimes colloquially referred to as 'TDC,' is improper because it violates the longstanding general rule which prohibits the introduction of collateral offenses and transactions." *Fuller v. State*, 827 S.W. 2d 919, 926 (Text Crim. App. 1992), *cert. denied*, 113 S.Ct.3035 (1993); *accord, Ecby v. State*, 840 S.W. 2d 761, 764 (Text App.--Houston [1st Dist.] 1992, pet. ref'd)(trial court erred in admitting unredacted TDC identification card).

5. The trial court errs in admitting a mug shot taken some five months before the instant offense was committed, because this picture tended to show commission of an

extraneous offense. *Richardson v. State*, 536 S.W. 2d 221, 223 (Tex. Crim. App. 1976). *Cf. Huerta v. State*, 390 S.W. 2d 770, 772 (Text Crim. App. 1965)(no error admitting police photo where [a]ll identification marks were removed, and, as far as the jury were able to determine, it might have been taken in a penny arcade"); *but see Smith v. State*, 595 S.W. 2d 120, 123 (Tex. Crim. App. 1980)(error waived absent objection).

6. The state argued that a reference in appellant's confession to "getting a car" was not an extraneous offense, since this could have referred to innocent behavior. The court disagreed, finding that the statement indicated an extraneous offense, in the context in which it was used. *Ramirez v. State*, 815 S.W. 2d 636, 644 (Tex. Crim. App. 1991).

7. "The terms 'extraneous offense' and 'prior misconduct' are not interchangeable. The former term refers to prior conduct which constitutes an offense under the penal code. The latter refers to acts which, while not inherently criminal, are regarded in our society as morally or ethically reprehensible." Both sorts of misconduct are analyzed in the same manner. *Templin v. State*, 711 S.W. 2d 30, 32 n. 1 (Tex. Crim. App. 1986)(electrocution of dogs and cats).

8. In *Brandley v. State*, 691 S.W. 2d 699 (Tex. Crim. App. 1985), *cert. denied*, 498 U.S. 817 (1990), the state argued that appellant's statement concerning high school girls, "if he got one of them alone, ain't no telling what he might do," was not extraneous matter. The court disagreed. "Initially we note that the extraneous matter need not constitute an *offense* in order to fall under the extraneous transaction rule. The established rule in this area applies to extraneous transactions which include but are not limited to acts which are not offenses." *Id*. at 705-706.

9. In *Gant v. State*, 649 S.W. 2d 30 (Tex. Crim. App. 1983), the trial court admitted appellant's confession in which appellant, among other things, admitted to buying a gun to shoot some people. The court of appeals had earlier held that the evidence was admissible because merely purchasing a gun with an intent to shoot someone is not a crime. The court of criminal appeals disagreed with this analysis. "The rule appellant invokes is not limited to a completed accomplishment of all elements of a penal offense defined in the code. It also embraces proof of similar occurrences, other extraneous transactions and prior specific acts of misconduct." *Id*. at 35.

10. Testimony in an aggravated robbery case from seven convenience store clerks that they had encountered appellant when working, and that, in their opinions, his reputation as a peaceful and law-abiding citizen was bad, "created an inference of specific instances of extraneous unadjudicated offenses." *Monroe v. State*, 864 S.W. 2d 140, 143-44 (Tex. App.--Texarkana 1993, pet. ref'd).

11. When appellant was arrested for possession of methamphetamine, the police seized $7,000.00 dollars cash from her car, and the state offered this evidence against her

at trial. "Since the only inference to be drawn from introduction of the money was that Appellant was dealing in narcotics, we conclude that the money was introduced in order to show an extraneous offense by Appellant." *Martin v. State*, 761 S.W. 2d 26, 30-31 (Tex. App.--Beaumont 1988, pet. granted), remanded for a harm analysis, 764 S.W. 2d 562 (Tex. Crim. App. 1989).

12. "[B]ecause a contempt proceeding is quasi-criminal in nature, and in view of the fact that appellant was ordered jailed 'day to day' until she complied with the court's order, the admission into evidence of the contempt order and the reading of its contents to the jury constituted the admission of an extraneous offense." *Turner v. State*, 715 S.W. 2d 847, 850 (Tex. App.-Houston [14th Dist.] 1986, no pet.).

13. "The complained of testimony concerning Hodges' girlfriend, subsequent divorce, and birth of an illegitimate child, was highly inflammatory, and should not have been admitted in evidence without relation to an essential element of the offense." *Hodges v. State*, 631 S.W. 2d 386, 389 (Tex. App.--Fort Worth 1983, no pet.).

14. Not every piece of damaging evidence, however, constitutes extraneous misconduct. A diary which did not tend to connect appellant to any prior bad acts or crimes appellant might have committed did not constitute an extraneous offense. *Lockhart v. State*, 847 S.W. 2d 568, 573 (Tex. Crim. App. 1992), *cert. denied*, 114 S. Ct. 146 (1993); *see Dixon v. State*, 828 S.W. 2d 42, 47-48 (Tex. App.--Tyler 1991, pet. ref'd)(possession of police scanner not an act of misconduct).

C. Extraneous Misconduct Found In Confessions

1. In *Gant v. State*, 649 S.W. 2d 30 (Tex. Crim. App. 1983), the trial court admitted appellant's confession in which appellant, among other things, admitted to buying a gun to shoot some people. The court of criminal appeals held that "the trial court should have caused to be excised from his confession appellant's gratuitous explanation of his decision to buy a pistol, and thereby rendered inadmissible all the extracurricular testimony and jury argument about the matter." *Id.* at 35-36(error harmless, though).

2. The trial court erred in allowing a portion of appellant's confession into evidence which referred to an extraneous automobile theft. *Ramirez v. State*, 815 S.W. 2d 636, 645 (Tex. Crim. App. 1991).

3. The trial court erred in not striking two extraneous offenses from appellant's confession where those offenses were not res gestae of the charged offense. *Wyle v. State*, 777 S.W. 2d 709, 715-16 (Tex. Crim. App. 1989).

Ill. PLATITUDES

A. Sometimes a policy argument can be helpful in excluding damaging evidence. The

cases contain a number of strong statements generally disfavoring the admission of extraneous offenses.

1. "It is a fundamental tenet of our system of jurisprudence that an accused must only be tried for the offense of which he is charged and not for being a criminal in general. Because extraneous offense evidence carries with it the inherent risk that a defendant may be convicted because of his propensity for committing crimes generally -- i.e., his bad character -- rather than for the commission of the charged offense, courts have historically been reluctant to allow evidence of an individual's prior bad acts or extraneous offenses." *Owens v. State*, 827 S.W. 2d 911, 914 (Tex. Crim. App. 1992).

2. "Evidence of a defendant's bad character traits possesses such a devastating impact on a jury's rational disposition towards other evidence, and is such poor evidence of guilt, that an independent mandatory rule was created expressly for its exclusion." *Mayes v. State*, 816 S.W. 2d 79, 86 (Tex. Crim. App. 1991)(that rule is Rule 404).

3. "The policy behind limiting the admissibility into evidence of extraneous offenses is well established. In our system of justice an accused person may not be tried for collateral criminal offenses or for being a criminal generally. As this Court has often noted, evidence of extraneous offenses is of an inherently prejudicial nature and may tend to confuse the issues of the case. Such evidence carries with it the additional danger that an accused person may be called upon to defend himself against an implied charge of having a propensity to commit crimes rather than the specific offense for which he is on trial." *Parks v. State*, 746 S.W. 2d 738, 739 (Tex. Crim. App. 1987)(citations omitted).

4. "It is a well established and fundamental principle in our system of justice that an accused person must be tried only for the offense charged and not for being a criminal (or a bad person) generally. It is for this reason that Anglo-American jurisprudence has always shown a marked reluctance to admit evidence of extraneous offenses or prior misconduct. Such evidence carries with it the danger that a defendant in a criminal action may be convicted of an implied charge of having a propensity to commit crimes generally rather than the specific offense for which he is on trial." *Templin v. State*, 711 S.W. 2d 30, 32 (Tex. Crim. App. 1986)(citations omitted).

5. "Evidence tending to establish a defendant is a 'criminal generally' is patently inadmissible." *Bordelon v. State*, 683 S.W. 2d 9, 12 (Tex. Crim. App. 1985).

6. "It is a generally accepted proposition that a defendant is entitled to be tried on the accusation in the State's pleading and not for a collateral crime or for being a criminal generally." *Cain v. State*, 642 S.W. 2d 806, 808 (Tex. Crim. App. 1982). "This limitation is imposed because evidence of extraneous offenses is prejudicial, tends to confuse the issues, and forces the defendant to defend against charges the State has not provided notice of." *Id*.

7. "Evidence of extraneous offenses generally is excluded because it confuses and prejudices the issue of guilt of the instant offense." *Gipson v. State*, 619 S.W. 2d 169, 170 (Tex. Crim. App. 1981). "In addition to confusing and prejudicing the issue of guilt, a third danger that the rule against proof of extraneous offenses guards against is unfair surprise." *Id.*

8. Extraneous offense evidence is "inherently prejudicial." *Sanders v. State*, 604 S.W. 2d 108, 111 (Tex. Crim. App. 1980).

9. "Limitations on the admissibility of evidence of an accused's prior criminal conduct are imposed, not because such evidence is without legal relevance to the general issue of whether the accused committed the act charged, but because such 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." *Albrecht v. State*, 486 S.W. 2d 97,100 (Tex. Crim. App. 1972).

10. "Evidence of this type is presumptively inadmissible under the Rules of Criminal Evidence. It is 'inherently prejudicial.'" *Kelly v. State*, 828 S.W. 2d 162, 166 (Tex. App.-Waco 1992, pet. ref'd).

11. "We are quite aware that exceptions to inadmissibility are often employed as a subterfuge for the admission of propensity type evidence." *Hargraves v. State*, 738 S.W. 2d 743, 749 n. 1 (Tex. App.--Dallas 1987, pet. ref'd).

IV. HISTORICAL ANALYSIS

A. Before The Rules Of Evidence Were Codified

Before the rules of evidence was codified, various tests were formulated in the case law.

1. Albrecht v. State

a. In *Albrecht v. State*, 486 S.W.2d 97 (Tex. Crim. App.1972), the court recognized that extraneous offenses are admissible under a wide variety of circumstances, and then proceeded to enumerate a non-exhaustive list of such circumstances:

> Evidence of extraneous offenses committed by the accused has been held admissible: (1) To show the context in which the criminal act occurred--what has been termed the "res gestae"--under the reasoning that events do not occur in a vacuum and 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 where the state lacks direct evidence on this 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 a part of a continuing plan or scheme of which the crime on trial is also a part. (6) To refute a defensive theory raised by the accused.

Id. at 100-101.

b. "Although the list of exceptions appearing in Albrecht is an accurate and well written statement as to the current law of evidence, it has created much confusion." *Parks v. State,* 746 S.W. 2d 738, 740 (Tex. Crim. App. 1987). The list is not exhaustive or exclusive, and it is not a standard to determine the admissibility of extraneous offenses. "Rather, the circumstances which justify the admissions of extraneous offenses are as varied as the factual circumstances of each case wherein the question arises." *Id.*

2. Williams v. State

Many believed *Albrecht* was the definitive extraneous offense case. Then came *Williams v. State*, 662 S.W. 2d 344 (Tex. Crim. App. 1983). There, appellants argued that extraneous offenses were inadmissible because they did not fit neatly into one of the exceptions recognized in *Albrecht*. The *Williams* court made it clear that the *Albrecht* list of examples, although a good one, was still only a list. Pursuant to the "true test," extraneous offenses "may become admissible upon a showing by the prosecution both that the transaction is relevant to a material issue in the case; and, the relevancy value of the evidence outweighs its inflammatory or prejudicial potential." *Williams v. State*, 662 S.W. 2d at 346.

V. RULE 404(b)

A. Applicability

1. Since September 1, 1986, Rules 401, 402, 403 and 404 of the Texas Rules of Criminal Evidence govern most questions concerning the admissibility of extraneous evidence. "Plainly, the most important guide to admissibility of extraneous misconduct in all penal contexts is now given by the Texas Rules of Criminal Evidence .... Those rules were drawn to include a codification of the general prohibition against proof of extraneous offenses to show character conformity." *Vernon v. State*, 841 S.W. 2d 407, 410-411 (Tex. Crim. App. 1992).

2. Some of the cases cited in this paper were decided before the Rules of

Criminal Evidence became effective. There is some indication that these pre-Rules cases may have limited precedential value. In *Wells v. State*, 810 S.W. 2d 179 (Tex. Crim. App. 1990), the court originally granted the state's petition for discretionary review. Subsequently, the court refused the petition, finding that the trial was held in April, 1986, before the rules of evidence became effective. "The admissibility of an extraneous offense is now governed by Tex.R.Crim.Evid. 404(b). Thus, we find that a resolution of the issue raised in the State's petition would neither contribute to the jurisprudence of this State nor be justified under Tex.R.App.Proc. 200." *Id.* at 179.

B. Text

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

Tex. R. Crim. Evid. 404(b).

C. General Rule

1. In general, extraneous misconduct is not excluded because it is irrelevant. If it were entirely irrelevant, it would of course be inadmissible for that reason alone, under Rules 401 and 402. Rather, even relevant evidence is excluded under Rule 404(b) if it is relevant only "to prove the character of a person in order to show that he acted in conformity therewith." Extraneous misconduct may be admissible, however, "if it has relevance apart from its tendency 'to prove the character of a person in order to show that he acted in conformity therewith.'" *Gilbert v. State*, 808 S.W. 2d 467, 471 (Tex. Crim. App. 1991). "Hence, the State may introduce such evidence where it logically serves 'to make . . . more probable' an elemental fact; where it serves 'to make . . . more probable' an evidentiary fact that inferentially leads to an elemental fact, or where it serves 'to make . . . less probable' defensive evidence that undermines an elemental fact." *Id.* at 472(evidence that made it marginally more probable that appellant committed the instant bank robbery -- because he was a bank robber in general, is precisely the sort of evidence which must be excluded by Rule 404(b).

2. "The propensity rule is mandatory; when the rule of exclusion codified in Rule 404 applies, only those purposes other than propensity, such as those listed in subsection (b) of Rule 404, will justify otherwise inadmissible character evidence. Such evidence must be directed at a consequential fact, and its probative value must not be outweighed by its prejudicial potential." *Mayes v. State*, 816 S.W. 2d 79, 86 (Tex. Crim. App. 1991).

3. "Rule 404(b) exists, in large part, to counter the possibility that evidence may be admitted to show a defendant's corrupt nature from which the jury may then render a verdict not on the facts of the case before them, but, rather, on their perception of the defendant's character." *Rankin v. State*, ___ S.W. 2d ___, No. 0374-94 (Tex. Crim. App. 1996), slip op. 2. Rule 404(b) contains a three part admissibility test. The evidence must have a purpose other than character conformity; it must have relevance to a "fact of consequence" in the case; and, it must be free of any other constitutional or statutory prohibitions. *Rankin v. State*, slip op. 2.

4. Nothing in Rule 404(b) provides that hearsay is admissible for the purpose of establishing evidence of other crimes. *King v. State*, 765 S.W. 2d 870, 872 (Tex. App.--Houston [1st Dist.] 1989, no pet.).

VI. "OTHER PURPOSES": EXCEPTIONS TO THE GENERAL RULE FORBIDDING EXTRANEOUS OFFENSE EVIDENCE

Rule 404(b) contains illustrations of the permissible "other purposes" to which extraneous misconduct can be put. *Gilbert v. State*, 808 S.W. 2d 467, 472 (Tex. Crim. App. 1991)(motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). These illustrations, of course, are not exhaustive. *E.g, Banda v. State*, 768 S.W. 2d 294, 296 (Tex. Crim. App.), *cert. denied*, 493 U.S. 2d 923 (1989); *Peoples v. State*, 874 S.W. 2d 804, 809 (Tex. App.---Fort Worth 1994, pet. ref'd); *Torres v. State*, 794 S.W. 2d 596, 599 (Tex. App.--Austin 1990, no pet.). In fact, the "other purposes" sentence in the rule "has sometimes been more a source of confusion than guidance." *Rankin v. State*, ___S.W. 2d ___,No. 0374-94 (Tex. Crim. App. 1996), slip op. 3.

A. MOTIVE

1. Held Admissible

a. Evidence of an extraneous aggravated robbery was admissible to show appellant's motive and intent. *Smith v. State*, 898 S.W. 2d 838, 842 (Tex. Crim. App. 1995).

b. Evidence of needle marks was admissible, since appellant's drug use was relevant to show his motive in committing capital murder. *Etheridge v. State*, 903 S.W.2d 1, 11 (Tex. Crim. App. 1994).

c. Evidence that appellant was afraid of having to serve federal time, and that he committed the instant offense to finance his flight to Belize, is admissible to show motive. *Gosch v. State*, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991).

d. The state was permitted to prove that defendant had been *investigated* (not convicted) several years earlier for kidnaping and sexual assault, where there

was evidence that he feared further investigation when he shot a policeman. According to the court, this proved motive. *Hafdahl v. State*, 805 S.W.2d 396, 398 (Tex. Crim. App. 1990).

e. Evidence that appellant was on federal parole, and knew that a warrant had been issued for his arrest due to parole violations, was admissible to prove his motive for killing a police officer -- namely to avoid apprehension. *Valdez v. State*, 776 S.W. 2d 162, 168 (Tex. Crim. App. 1989).

f. Evidence of a robbery 11 days prior to killing a police officer was relevant to prove that defendant's motive in shooting the officer was to avoid apprehension. *Porter v. State,* 623 S.W. 2d 374, 384 (Tex. Crim. App. 1981); *accord, Barefoot v. State*, 596 S.W. 2d 875, 886 (Tex. Crim. App. 1980); *Hughes v. State*, 563 S.W. 2d 581, 589 (Tex. Crim. App. 1978); *see also Crane v. State*, 786 S.W.2d 338, 350 (Tex. Crim. App. 1990) (probation).

g. Evidence that defendant had previously been charged with robbing the deceased was admissible to prove his motive to eliminate the principal witness in that prosecution. *Russell v. State*, 598 S.W. 2d 238, 251 (Tex. Crim. App. 1980).

h. Evidence of a prior murder was admissible to rebut appellant's defensive theory that he neither killed the complainant nor knew his co-defendant would kill him. *Taylor v. State*, 920 S.W. 2d 319, 322 (Tex. Crim. App. 1996).

i. Evidence of appellant's sexual passion or desire for the complainant was admissible to show motive to commit the charged sexual offense. *Hernandez v. State*, 900 S.W.2d 835, 838 (Tex. App. --Corpus Christi 1995).

j. Evidence that appellant was sexually aroused while talking to the police about the child victim was admissible to show appellant had a motive for sexually assaulting the child; that is, his passion or desire for the child. *Blakeney v. State*, 911 S.W.2d 508, 515 (Tex. App. --Austin 1995).

k. Threatening phone calls made by appellant's wife, with appellant in the background, demonstrated motive for the murder and were therefore, admissible. *Bisby v. State*, 907 S.W.2d 949, 959 (Tex. App.--Fort Worth 1995).

l. Evidence of appellant's prior drug use was admissible in appellant's capital murder trial to show the motive of why someone from Alabama would rob a drug store in Galveston. Because an affirmative link existed between the underlying offense of robbery of a pharmacy and appellant's use of narcotics, the evidence complained of established a motive for the charged offense and was admissible. *Knox v. State*, 934 S.W.2d 678, 682-83 (Tex. Crim. App. 1996).

m. In a charge of retaliation, evidence of prior acts committed by the

appellant against the complainant, cursing him, and admitting that he, the appellant was a convict, was circumstantial evidence of the existence of a motive to commit the offense charged. *Coward v. State*, 931 S.W.2d 386, 388 (Tex. App. -- Houston [14th Dist.] 1996).

n. Evidence that appellant was driving a stolen car was admissible to show motive for assaulting the peace officer that had stopped him for speeding. *DeLeon v. State*, 937 S.W.2d 129, 135 (Tex. App. -- Waco 1996).

2. Held Inadmissible

a. Evidence that appellant used and sold methamphetamine was not admissible to show his motive to commit burglaries. "We have previously held such arguments to be overly speculative and without merit." *Rogers v State*, 853 S.W. 2d 29, 34 (Tex. Crim. App. 1993).

b. The trial court erred in admitting evidence that appellant was in possession of a syringe when arrested for the instant burglary. "There is no suggestion or indication that appellant burglarized the warehouse to obtain money or property to support a drug habit." *Couret v. State*, 792 S.W. 2d 106, 108 (Tex. Crim. App. 1990).

c. Where appellant admitted he knew he was selling some kind of dope, but claimed that he did not know it was heroin, the trial court erred in admitting evidence of multiple indictments for delivery of heroin. The court of criminal appeals was "unpersuaded that their admission could have been of any assistance to the jury in resolving the material issues regarding appellant's motive, intent or guilty knowledge, which were contested by defensive testimony." *Bates v. State*, 643 S.W. 2d 939, 945 (Tex. Crim. App. 1982).

d. In *Bush v. State*, 628 S.W. 2d 441, 443 (Tex. Crim. App. 1982), appellant was tried for capital murder, the proof showing that appellant killed a police officer during commission of a burglary of a pharmacy. Proof of the burglary was admissible since it was so connected to the murder as to "constitute an indivisible criminal transaction." *Id.* The state also, however, put on evidence that appellant had used Preludins intravenously to get high. This evidence was inadmissible. It was not related in time or place to the capital murder. *Id.* at 443-44. Nor was this evidence relevant to prove motive. Such evidence was not offered to prove the motive for the offense charged -- capital murder -- but rather for another offense, burglary of the pharmacy. "We find that the extraneous offense of drug use is impermissibly offered to show a motive to commit an additional extraneous offense and that it is not material or relevant to the offense charged." *Id*. at 444. There is no relevancy in demonstrating the motive for an offense other than the one charged. *Id.*

e. Evidence that appellant had been previously acquitted for murder by reason of insanity was not admissible to prove appellant's knowledge of the commitment process, which was his motive for faking the insanity defense. *Sanders v. State*, 604 S.W. 2d 108,

112 (Tex. Crim. App. 1980).

f. Evidence that appellant had needle marks in his arm was not admissible to prove his motive to commit the charged offense -- theft. "The chain of inferences is too long and contains too many gaps to allow the introduction of evidence of needle marks alone to show possible motive for theft. The prejudicial effect of such evidence far outweighs any probative value it might have. To admit such testimony without showing some affirmative link between the theft and narcotics would show only that the accused is 'a criminal generally.'" *Powell v. State*, 478 S.W. 2d 95, 98 (Tex. Crim. App. 1972).

g. Appellant's propensity to lure susceptible females away from the public view and assault them does not show that he harbored some ill will or other motive to murder the complainant or females in general. "Such an inference is precisely the type of character conformity evidence that Rule 404(b) does not allow." *Lazcano v. State*, 836 S.W.2d 654, 660 (Tex. App.--El Paso 1992, pet. ref'd).

h. Motive, intent or knowledge for appellant's alleged possession of cocaine were not at issue. *Nelms v. State*, 834 S.W. 2d 110, 113-14 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd).

I. A hearsay statement from the deceased complainant to her mother some two weeks before her death that she was afraid and had found proof that appellant had killed his former wife was not admissible to prove motive. "The extraneous offense referred to happened seven years previously. There was no evidence, other than objected-to hearsay, that appellant killed a prior wife. It is clear that the prejudice to appellant of admitting testimony regarding a possible murder of a prior wife is substantial. The prosecution had already put on overwhelming evidence of marital problems between appellant and his wife and that his wife feared him. The extraneous offense evidence was simply unnecessary, whose relevance value did not outweigh its prejudicial potential." *Ridgely v. State*, 756 S.W. 2d 870, 872 (Tex. App.--Fort Worth 1988, no pet.).

j. The trial court erred in admitting evidence that appellant had been found in contempt of court in her trial for capital murder. "The rule is clear that evidence showing motive must be offered to show a motive to commit the offense for which the defendant was charged -not to show a motive to commit an additional extraneous offense." *Turner v. State*, 715 S.W. 2d 847, 852 (Tex. App.--Houston [14th Dist.] 1986, no pet.).

k. In *Escort v. State*, 713 S.W. 2d 733 (Tex. App.--Corpus Christi 1986, no pet.), appellant was charged with killing her boyfriend or former common-law husband, and the state was permitted to prove that she had previously killed an ex-husband, for the purpose of showing motive and rebutting her defense of self-defense. This was error. The state put on overwhelming evidence of appellant's guilt, refuting her defense. The extraneous offense was "overkill." Unrelated violence toward a third party could not have been helpful to the jury in

resolving the contested issue of self-defense. The fact that appellant shot an ex-husband provides no insight into her motive for the instant murder. Id. at 737.

l. In *Martinez v. State*, 705 S.W. 2d 772 (Tex. App.--San Antonio 1986, pet. ref'd), appellant was charged with attempting to murder a Mr. Hackett, who was permitted to testify that appellant had participated in the killing of her husband. "The justification for the introduction of the extraneous offense was to establish motive, however, there is no proof in this record that appellant was guilty of that offense or that she had ever been indicted for it." *Id*. at 776.

m. Testimony concerning appellant's girlfriend, subsequent divorce, and birth of an illegitimate child, was highly inflammatory, and, contrary to the assertions of the prosecutor, "did not fairly raise an inference of motive and was clearly prejudicial to the rights of the appellant to a fair trial." *Hodges v. State*, 631 S.W. 2d 386, 389 (Tex. App.--Fort Worth 1983, no pet.).

n. That appellant had previously been abusive to his 16 year live in girl friend was not admissible to prove motive for injuring a two year old child. Motive evidence is usually required to relate or pertain to other acts by the accused against the victim of the instant crime. Additionally, "it must fairly tend to raise an inference in favor of the existence of the motive on the part of the accused to commit the offense for which he is being tried." Neither is true here. The extraneous assaultive evidence does not explain why appellant would assault the child victim here, other than that it showed his propensity to do so. *Zuliani v. State*, 903 S.W. 2d 812, 827 (Tex. App.--Austin 1995).

o. Evidence of appellant's prior act of misconduct where he, while under the influence of drugs, went over to his ex-girlfriend's house, undressed, and climbed into her bed was not admissible to show motive in appellant's trial for murder of someone other than the ex-girlfriend and the victim was not killed in bed and no evidence existed that appellant was using drugs at the time of the murder. *Lopez v. State*, 928 S.W.2d 528, 532 (Tex. Crim. App. 1996).

B. <u>OPPORTUNITY</u>

1. <u>Held Inadmissible</u>

a. Whatever its speculative value, evidence in a possession of cocaine case that appellant, when arrested, had marijuana hidden in his shoe and sock, was not admissible to prove knowledge or opportunity. *Garcia v. State*, 871 S.W. 2d 769, 772 (Tex. App.--Corpus Christi 1994, pet. ref'd).

C. INTENT

1. Held Admissible

a. "The issue of intent is of such overriding importance in a case of forgery that it effectively becomes the focus of the State's case. Establishing intent in such cases is so crucial and so difficult to do that, as a practical matter, evidence of extraneous offenses is nearly always admissible." *Parks v. State*, 746 S.W. 2d 738, 739 (Tex. Crim. App. 1987).

b. A high degree of similarity is required when extraneous offenses are offered to show identity. "Clearly, such a high degree of similarity is not required when the purpose of the proof is to show intent." *Plante v. State*, 692 S.W. 2d 487, 493 (Tex. Crim. App. 1985)(certain extraneous debts admissible because they made criminal intent more likely in theft by deception case).

c. Extraneous election law violations were found to be admissible in this election law prosecution. "Extraneous offenses are admissible '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.'" *Beck v. State*, 583 S.W. 2d 338, 346-47 (Tex. Crim. App. 1979).

d. Forty other instances in which appellant's books had shown shortages were admissible in her trial for theft on the issue of her intent. *McCarron v. State*, 605 S.W. 2d 589, 593-94 (Tex. Crim. App. 1980).

e. Evidence of an extraneous aggravated robbery was admissible to show appellant's motive and intent. *Smith v. State*, 898 S.W. 2d 838, 842 (Tex. Crim. App. 1995).

f. "The allowed evidence demonstrated appellant's intent to go beyond what a prenatal patient consents to in a pelvic examination, and indicated that appellant knew [the complainant] would be unable to resist." *Suarez v. State*, 901 S.W. 2d 712, 721 (Tex. App.-Corpus Christi 1995).

g . Evidence of a prior murder was admissible to prove appellant's intent and motive. *Taylor v. State*, 920 S.W.2d 319, 322 (Tex. Crim. App. 1996).

h. Evidence that appellant hit the victim in the stomach approximately two weeks prior to her death is relevant to the issue of whether the appellant had a conscious objective or desire to cause serious bodily injury to the victim, and thus, is relevant to intent. *Hernandez v. State*, 914 S.W.2d 226, 232 (Tex. App.--Waco 1996).

I. Extraneous offense of shooting at an individual in a car was substantially similar to the charged offense of capital murder by shooting at a person in a car, as

to be admissible when appellant claimed lack of intent to kill the person in the car. *Johnson v. State*, 932 S.W.2d 296, 303 (Tex. App. -- Austin 1996)..

j. Evidence of a sexually explicit magazine containing explicit photographs of a young girl holding a teddy bear was admissible in appellant's trial for indecency with a child as circumstantial evidence of intent to arouse and gratify his sexual desire by photographing the victim posed with a teddy bear. *Darby v. State*, 922 S.W.2d 614, 619 (Tex. App. -- Ft. Worth 1996).

2. Held Inadmissible

a. Extraneous forgeries, because of their similarity to the instant offense, were clearly relevant. However, the court found that the probative value of this evidence was outweighed by its prejudicial effect. When she signed her name to 22 checks, appellant established her fraudulent intent. No other alternative was put forth. "Thus, the inclusion of the extraneous offenses was not necessary to shore up the State's case or disprove an otherwise innocent intent. Consequently its comparative prejudicial impact outweighed its minimal probative value in the instant case." *Clark v. State*, 726 S.W. 2d 120, 124 (Tex. Crim. App. 1986)(citations omitted).

b. In the instant case, appellant was charged with the aggravated kidnaping of a twelve year old girl, with intent to terrorize, sexually violate and sexually abuse her. To prove his intent, the state offered an extraneous offense, several months before, in which appellant committed sodomy on a twelve year old boy. The court of criminal appeals held this evidence inadmissible. Relevance is a function of similarity. "The extraneous offense involved in the instant case is simply not sufficiently similar to be probative on the issue of intent. As is amply pointed by the Court of Appeals there are numerous similarities and differences between the two offenses." *Garza v. State*, 715 S.W. 2d 642, 644 (Tex. Crim. App. 1986). Even under the relaxed similarity requirement that applies to proof of intent, the extraneous offense here is not sufficiently similar to justify its admission. *Id.*

c. The probative value of certain extraneous misconduct was too low to make it admissible concerning appellant's intent. Some of these debts were too dissimilar, others were too remote in time, and, in one, the evidence did not clearly show that appellant committed the misconduct. *Plante v. State*, 692 S.W. 2d 487, 495 (Tex. Crim. App. 1985).

d. Where appellant admitted he knew he was selling some kind of dope, but claimed that he did not know it was heroin, the trial court erred in admitting evidence of multiple indictments for delivery of heroin. The court of criminal appeals was "unpersuaded that their admission could have been of any assistance to the jury in resolving the material issues regarding appellant's motive, intent or guilty knowledge, which were contested by defensive testimony." *Bates v. State*, 643 S.W. 2d 939, 945 (Tex. Crim. App. 1982).

e. Evidence of an extraneous burglary/theft and rape was not admissible to prove that appellant had the intent to commit theft when he committed the instant burglary. "Appellant's intent to commit theft was presumed after the complainant testified that appellant entered her locked apartment without her consent in the nighttime." *Jones v. State*, 587 S.W. 2d 115, 119 (Tex. Crim. App. 1978).

f. Where appellant used a deadly weapon to commit the instant capital murder, "intent to kill was not really in issue." *Riles v. State*, 557 S.W. 2d 95, 99 (Tex. Crim. App. 1977). Nor was the evidence of intent to rob equivocal. Here, intent to commit robbery during the course of a murder was clearly inferable from the acts of the appellant. "Thus, where the intent can be inferred from the act, extraneous offenses are not admissible." *Id.*

g. Here, the trial court admitted an extraneous aggravated robbery even though intent was not seriously contested. This was error. "In this case, the trial court abused its discretion by admitting extraneous offense evidence that was relevant only to issues that were not seriously contested and that were proved by direct evidence or were readily inferred from other available evidence." *Castillo v. State*, 865 S.W. 2d 89, 96-97 (Tex. App.--Corpus Christi 1993, no pet.).

h. The evidence that appellant caused another's sexual organ to contact his mouth was also sufficient to establish the requisite intent. The trial court therefore erred in admitting extraneous misconduct. *Hill v. State*, 852 S.W.2d 769, 770 (Tex. App.--Fort Worth 1993, pet. ref'd).

I. Approximately an hour after he was arrested for aggravated assault on a peace officer, appellant said he wanted to kill the first white officer he saw after getting out of jail. The state argued that this statement was admissible on the question of intent. The court of appeals disagrees. Because it was made well after the instant offense, "[t]here is clearly no relevance to the statement other than as propensity evidence." *Peterson v. State*, 836 S.W. 2d 760, 764 (Tex. App.-El Paso 1992, pet. ref'd).

j. Nothing about the extraneous sexual assault indicated any intent to kill, since appellant voluntarily released his choke hold. Also, it does not appear that appellant challenged intent. Finally, the circumstances surrounding the offense "abundantly support a strong inference of Appellant's intent to kill without the need for support by way of extraneous offense evidence." *Lazcano v. State*, 836 S.W. 2d 654, 659-660 (Tex. App.--El Paso 1992, pet. ref'd).

k. Motive, intent or knowledge for appellant's alleged possession of cocaine were not at issue. *Nelms v. State*, 834 S.W. 2d 110, 113-14 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd).

1. In *Garcia v. State*, 827 S.W. 2d 27 (Tex. App.--Corpus Christi

1992, no pet.), the state argued that extraneous sexual misconduct with other children was admissible to prove appellant's intent to arouse and gratify his sexual desire in the instant case. The court of appeals disagreed. The evidence of intent in the instant case could be amply inferred from the act itself. On the other hand, such intent was not necessarily implied in the extraneous conduct. The state had no compelling need to prove the extraneous misconduct. *Id*. at 31.

m. The trial court erred in admitting two extraneous robberies which were remote and insufficiently similar to be relevant and probative on the question of intent. *Birl v. State*, 763 S.W. 2d 860, 862 (Tex. App.--Texarkana 1988, no pet.).

n. Where the circumstances surrounding the offense of aggravated sexual assault abundantly support the inference of intent, an extraneous offense was more prejudicial than probative. *Hargraves v. State*, 738 S.W. 2d 743, 748 (Tex. App.--Dallas 1987, pet. ref'd).

o. Although intent was relevant where appellant was charged with burglary, intent was not a contested issue. "When the required intent can be inferred from the act itself, and the defendant puts on no evidence to rebut the inference, intent cannot be said to be a contested issue." Here, the circumstances were clearly sufficient for the jury to infer an intent to commit theft. *Ortega v. State*, 626 S.W. 2d 746, 747-48 (Tex. Crim. App. 1981); *see McGee v. State*, 725 S.W. 2d 362, 365 (Tex. App.--Houston [14th Dist.] 1987, no pet.).

p. The trial court erred in admitting extraneous assaultive evidence in an injury to a child case where the circumstances surrounding the offense abundantly supported a strong inference of intent. "Here, there was medical testimony about the victim's injuries and the cause of death. Photographs introduced into evidence reflected those injuries. There was testimony from [several witnesses] about appellant's repeated verbal and physical conduct towards the victim." *Zuliani v. State*, 903 W. 2d 812, 827 (Tex. App.--Austin 1995).

q. In *Cooper v. State*, 901 S.W. 2d 757 (Tex. App.--Beaumont 1995), *pet. dism'd, improvidently granted*, 933 S.W.2d 495 (Tex. Crim. App. 1996), the court of appeals rejected the state's attempt to justify extraneous offenses on the "intent" rationale. This theory was not propounded at trial, and seemed to the appellate court as "a rather transparent attempt at resurrecting admissibility at the eleventh hour." *Id*. at slip op. 10. "At any rate, we are not prepared to concede that evidence of otherwise consensual sexual relations between an adult male and female, albeit involving anal intercourse, is relevant in the prosecution of said adult male for engaging in forcible sex acts perpetrated upon male and female children, albeit also involving anal intercourse." *Id.*

r. Evidence that appellant had a teardrop tattoo and that this tattoo symbolized either that one has murdered someone, or that one has served time in jail, was not relevant to the issue of intent in a murder and attempted murder case. *Palomo v. State*, 925 S.W.2d 329, 337 (Tex. App. -- Corpus Christi 1996).

D. PLAN

1. General Rule

a. Trial courts have routinely employed the common plan or scheme exception "as a subterfuge to admit evidence which amounts to only propensity-type evidence." *Lazcano v. State*, 836 S.W. 2d 654, 660 (Tex. App.--El Paso 1992, pet. ref'd). "In order to truly constitute a common plan or scheme, the proffered extraneous offenses must demonstrate the steps taken in furtherance of or in contemplation of accomplishing a scheme or plan. 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." *Lazcano v. State*, 836 S.W. 2d 654, 660 (Tex. App.--El Paso 1992, pet. ref'd).

2. Held Admissible

a. Evidence that appellant solicited the help of another to commit a robbery before the instant offense was admissible as part of appellant's plan and preparations to carry out the instant offense. Also, the evidence is admissible as "same transaction contextual evidence." *Burks v. State*, 876 S.W. 2d 877, 899-900 (Tex. Crim. App. 1994).

3. Held Inadmissible

a. "The 'common plan' exception has been often employed as a 'subterfuge for the admission of propensity-type evidence.'" *Boutwell v. State*, 719 S.W. 2d 164, 180 (Tex. Crim. App. 1986). "A series of similar acts are not enough to show a common plan or design." *Id*. "Central to the common plan or scheme exception is that there be a plan or scheme and the extraneous offenses are steps taken toward the accomplishment of the plan." Mere general similarities do not show a plan or preconceived scheme. "In the instant case there is no evidence of a plan such that the extraneous offenses could be viewed as steps taken toward the accomplishment of a plan. A showing of appellant's commission of other similar offenses, without more, does not show a common plan so that the various acts are 'to be explained as caused by a general plan of which they are individual manifestations.'" *Id*. at 181.

b. "The proof offered as to the alleged offense clearly showed the fraudulent scheme and the lack of consent on the part of the complainant. The extraneous offenses were not needed to prove a fraudulent scheme or the other elements of the offense. They served only to establish the appellant's bad character. *Nance v. State*, 647 S.W. 2d 660, 663 (Tex. Crim. App. 1983).

c. In *Lazcano v. State*, 836 S.W. 2d 654, 660 (Tex. App.--El Paso 1992, pet. ref'd), the state argued that a prior sexual assault accompanied by choking was admissible to show a common plan or scheme. The court of appeals disagreed. "Due to the deplorable prevalence of such similar acts, it cannot be said that evidence of an accused's

commission of a single generally similar act, without more, constitutes a logically related central plan, scheme or motivation." *Id.* at 661.

d. "[T]here is no evidence that the extraneous offenses were committed during a continuing course to accomplish a plan to sexually assault the complainant. The showing of appellant's commission of similar offenses with third parties does not, of itself, show a plan or scheme." *Dove v. State*, 768 S.W. 2d 465, 468 (Tex. App.--Amarillo 1989, pet. ref'd).

e. The instant offense was aggravated sexual assault, and the state offered evidence that appellant had attacked another woman and stolen jewelry from her a week after the instant offense. The court found that the fact that appellant took a piece of jewelry from each woman failed to show a common plan or scheme to commit aggravated sexual assaults. "The extraneous offense involved in the instant case is simply not sufficiently similar to support its admissibility on a 'common plan or scheme' exception to the general rule." *Hargraves v. State*, 738 S.W. 2d 743, 749 (Tex. App.--Dallas 1987, pet. ref'd).

f. Evidence of extraneous sex offenses committed by the appellant against third parties was not admissible to show a continuing course of conduct on the part of the appellant. Such acts prove nothing but propensity. *Cruz v. State*, 737 S.W. 2d 74, 77 (Tex. App. San Antonio 1987, no pet.).

g. "The evidence showing extraneous offenses is no more indicative of a plan than of the possibility that the appellant did not know what was going to happen when he brought the horse over to the girls, but, instead, formed the intent to molest each girl separately." *Rankin v. State*, ___ S.W. 2d __, __ No. 0374-94 (Tex. Crim. App. 1996), slip op. 5.

E. KNOWLEDGE

1. Held Admissible

a. That appellant presented multiple identification cards when arrested was relevant to show that he knew a crime had been committed and that he was a likely suspect. *Felder v. State*, 848 S.W. 2d 85, 98 (Tex. Crim. App. 1992), *cert. denied*, 114 S. Ct. 95 (1993).

b. Extraneous election law violations were found to be admissible in this election law prosecution. "Extraneous offenses are admissible '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.'" *Beck v. State*, 583 S.W. 2d 338, 346-47 (Tex. Crim. App. 1979).

c. Evidence that the vehicle appellant was driving was stolen was admissible to show appellant had knowledge of the existence of the firearm in the vehicle. *Boyd*

v. State, 899 S.W.2d 371, 376 (Tex. App.--Houston [14th Dist.] 1995).

d. The actions of appellant in giving false identification to a police officer after his arrest and while sitting in the patrol car followed by a violent outburst resulting in the appellant kicking out the door to the patrol car indicate a guilty knowledge of the charged assault. *Butler v. State*, 936 S.W.2d 453, 459 (Tex. App. -- Houston [14th Dist.] 1996).

e. In a driving while license suspended trial, appellant's driving record, which contained various instances of lifting and reimposing of license suspension, was relevant to show that appellant knew his license was suspended at the time of arrest. *Moore v. State*, 938 S.W.2d 521, 524 (Tex. App. -- Ft. Worth 1997).

2. Held Inadmissible

a. Where appellant admitted he knew he was selling some kind of dope, but claimed that he did not know it was heroin, the trial court erred in admitting evidence of multiple indictments for delivery of heroin. The court of criminal appeals was "unpersuaded that their admission could have been of any assistance to the jury in resolving the material issues regarding appellant's motive, intent or guilty knowledge, which were contested by defensive testimony." *Bates v. State*, 643 S.W. 2d 939, 945 (Tex. Crim. App. 1982).

b. Evidence that appellant had been previously acquitted for murder by reason of insanity was not admissible to prove appellant's knowledge of the commitment process, which was his motive for faking the insanity defense. *Sanders v. State*, 604 S.W. 2d 108, 112 (Tex. Crim. App. 1980).

c. The instant charge was aggravated possession of amphetamine. The trial court admitted a prior conviction for burglary, which occurred some 36 months prior to appellant's arrest for the instant offense. The state argued that this burglary was relevant to prove appellant's knowledge, because appellant stole, among other things, glassware commonly used to manufacture amphetamine. The court disagreed, chiding the state for the series of assumptions required. "The chain of inferences is too attenuated. The first offense was too dissimilar and too far removed in time to be relevant for the purpose of proving [appellant's] 'guilty knowledge.' By no reasonable perception of common experience can it be concluded that a burglary conviction has a tendency to make more or less probable the fact that [appellant] knew what amphetamine was and knew that it was a controlled substance." *Nolen v. State*, 872 S.W. 2d 807, 812-13 (Tex. App.--Fort Worth 1994, pet. ref'd).

d. Whatever its speculative value, evidence in a possession of cocaine case that appellant, when arrested, had marijuana hidden in his shoe and sock, was not admissible to prove knowledge or opportunity. *Garcia v. State*, 871 S.W. 2d 769, 772 (Tex. App.--Corpus Christi 1994, pet. ref'd).

e. Where the evidence merely established a credibility question between the respective witnesses, evidence that appellant was a drug dealer because he wore a beeper was inadmissible. Motive, intent or knowledge for appellant's alleged possession of cocaine were not at issue. *Nelms v. State*, 834 S.W. 2d 110, 113-14 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd).

f. Although possession of a large amount of money might be admissible to show knowledge in a possession of methamphetamine case, this evidence is not admissible absent some affirmative link between it and appellant. *Martin v. State*, 761 S.W.2d 26, 30-31 (Tex. App. Beaumont 1988, pet. granted), remanded for a harm analysis, 764 S.W. 2d 562 (Tex. Crim. App. 1989).

g. Appellant's prior conviction for possession of cocaine is not admissible in the instant charge of possession of cocaine simply because the prior possession would demonstrate that appellant had knowledge of what cocaine looks like. The court of appeals held that whether appellant knows what cocaine looks like is neither an element of the crime, nor an issue raised by the defense and is excludable under Rule 404(b). *Perry v. State*, 933 S.W.2d 249, 254 (Tex. App. -- Corpus Christi 1996).

F. IDENTITY

1. General Rule

a. At least two things must be true before the identity exception applies. First, identity must be in issue in the case. *Beets v. State*, 767 S.W. 2d 711 (Tex. Crim. App. 1987). Second, even when identity is disputed, "the extraneous matter may still be inadmissible unless there are distinguishing characteristics common to both offenses such that the accused's acts are earmarked as his handiwork; his 'signature' must be apparent from a comparison of circumstances in both cases." Id. at 740.

2. Held Admissible

a. In *Beets v. State*, 767 S.W. 2d 711 (Tex. Crim. App. 1987), appellant was on trial for killing her then husband for remuneration. The state contended that appellant herself killed the deceased. Appellant's defensive theory was that another person, not she, was the trigger person. The trial court admitted evidence that she had also killed a former husband on the question of identity. The distinguishing characteristics were sufficient in *Beets*:

> In the case at bar, the "signature" is close to perfect. A similar and unique weapon with a barrel grooved with a 'left-hand twist' was used in each shooting. The initial act of murder by means of multiple .38 caliber bullet wounds to the back of the head is the same. So too is the time of the killing, occurring late at night after

> the victim had retired for the evening and lay unguarded in sleep. The reason behind the murders appears to be the same, for pecuniary gain of which the actor would not otherwise be entitled. Comparison of the coverup activity in both cases is also instructive. The bodies of both men were enshrouded in sleeping bags and buried in the yard around appellant's trailer house. Holes for the bodies had been previously excavated, ostensibly for a 'bar-b-que pit' in the back yard and a 'wishing-well planter' in the front yard. Innocuous-looking structures were placed over each grave site and the yard was tended in a normal fashion by appellant. Taking all of the above facts into consideration, we find the State has shown the existence of sufficient common distinguishing characteristics between the extraneous and primary offenses to tip the balance in favor of admitting the extrinsic probative evidence going to the contested, material issue of identification.

Id. at 740.

b. "When the appellant raises the defensive theory of alibi, he places his identity in issue." *Jones v. State*, 587 S.W. 2d 115, 119 (Tex. Crim. App. 1978). Extraneous offenses are "admissible to prove identity only if there is some distinguishing characteristic common to both the extraneous offense and the offense for which the accused is on trial." *Id.* Here, there were sufficient distinguishing characteristics. *Id*. at 120.

c. Evidence of a prior murder was admissible to prove identity where both elderly victims were found with some cloth and a wire coat hanger wrapped around their necks. *Taylor v. State*, 920 S.W. 2d 319, 322 (Tex. Crim. App. 1996).

d. Evidence of prior similar burglaries were admissible under the identity exception when appellant presented the defensive theory that he was not the person who committed the charged burglary. *Barrett v. State*, 900 S.W.2d 748, 750 (Tex. App.--Tyler 1995).

e. Evidence of a prior murder was admissible to prove identity where both victims were young girls who were strangled and sexually assaulted and the appellant kept the underwear of both victims as a trophy. *Lane v. State*, 933 S.W.2d 504, 519 (Tex. Crim. App. 1996).

f. In a trial for sexual assault of his adopted daughter, appellant placed the issue of identity before the jury by contending that the victim's biological father had committed the offense. Therefore, evidence that appellant had committed similar sexual acts with the victim was admissible to prove appellant's identity. *Turner v. State*, 924 S.W.2d 180, 182 (Tex. App. -- Eastland 1996).

3. Held Inadmissible

a. In *Bishop v. State*, 869 S.W. 2d 342 (Tex. Crim. App. 1993), the state offered evidence of the defendant's sexual behavior with his ex-wife as a basis for establishing his identity as the rapist. The state argued that the extraneous acts were admissible to show identity. *Id.* at 345. The court of criminal appeals disagreed. "The traditional rule in regard to admission of extraneous acts for the purpose of showing identity is that the acts sought to be admitted must be so similar to the offense charged that the accused's acts are marked as his handiwork, that is, his 'signature' must be apparent from a comparison of circumstances in both cases." That is, the similarity between the extraneous acts of misconduct and the charged offense must be shown to have a higher degree of similarity than extraneous acts sought to be admitted for other purposes in order for the probative value to overcome the prejudicial effect of the evidence. *Id.* at 346.

b. Although identity is a material issue raised in every indictment, that alone does not necessarily insure the admission of extraneous offenses. Here, the state elicited a direct, positive identification of appellant which was in no way impeached or even weakened by cross-examination. "Thus, the issue was utterly uncontested at the time the State instituted its barrage of evidence regarding the extraneous offense." *Elkins v. State*, 647 S.W. 2d 663, 665-66 (Tex. Crim. App. 1983).

c. That appellant assaulted adult women as they returned to their cars in public places was not so distinctive as to mark these assaults as appellant's handiwork. "To say that two sexual assaults are similar because they are both acts of sadistic sexual deviations is not to point to a device that is so unusual and distinctive as to be like a signature; it is merely to characterize a feature of that general class of offenses. Almost any two sexual assaults could be characterized as sadistic acts, just as almost any two murders could be characterized as violent acts. This is nothing more than dressing in psychological garb the very thing that the law on evidence of extraneous offenses forbids: proof of the repeated commission of a class of offenses to demonstrate that the defendant is a criminal (or sexual deviate) generally." *Collazo v. State*, 623 S.W. 2d 647, 649 (Tex. Crim. App. 1981).

d. An extraneous assault was not admissible to prove identity where there was no question of identity. "The only question was, which of the shots which were fired from various guns was the one that struck the victim." *Cross v. State*, 586 S.W. 2d 478, 481 (Tex. Crim. App. 1979).

e. That appellant used heroin three months after the instant delivery was alleged to have occurred "adds little, if anything, in the way of probative evidence to rebut his defensive theory of alibi." *Hines v. State*, 571 S.W. 2d 322, 325 (Tex. Crim. App. 1978).

f. Remoteness of time together with other circumstances "were such

as to render the evidence of the rape in Florida two years and nine months prior to the instant offense, when appellant was less than 13 years old, to be inadmissible. *James v. State*, 554 S.W. 2d 680, 683 (Tex. Crim. App. 1977).

g. That appellant choked and sexually assaulted two young females in the El Paso area within a six week time frame after meeting them at a social gathering is insufficiently similar to justify admission. "[W]e find these general 'similarities' to be wholly innocuous as such features would tend to be common to many cases. It is not enough to say the offenses are sufficiently similar. Rather, the offenses must be distinctively similar. Nothing within the instant 'similar' facts indicates an unusual and distinctive method or commission of an offense such that it can be considered an earmark of the perpetrator's handiwork." *Lazcano v. State*, 836 S.W. 2d 654, 659 (Tex. App.--El Paso 1992, pet. ref'd).

h. Although appellant raised identity with his alibi defense, the instant and the extraneous offenses were insufficiently similar. *Wysner v. State*, 763 S.W. 2d 790, 793 (Tex. App.--Dallas 1987, pet. ref'd). "With regard to both extraneous offenses, the fact that they occurred in Oak Cliff within a two week span, involved violence and stealing, involved second persons, and involved thefts of cash from small businesses, does not illustrate characteristics that are so nearly identical in method to the instant offense as to earmark them as the handiwork of appellant. Far from being distinctive, these 'characteristics' would describe a great many robberies and thefts committed by persons other than appellant." Id. Also, since the complainant consistently testified that appellant was the robber, the probative value of the extraneous offenses is outweighed by its prejudicial effect. *Id.*

I. There were insufficient distinguishing characteristics to constitute a "signature." Additionally, appellant's identity had already been proven by an eyewitness. *McGee v State*, 725 S.W. 2d 362, 365 (Tex. App.--Houston [14th Dist.] 1987, no pet.). "The State introduced circumstantial evidence of the extraneous offense even though appellant's identity had already been proven adequately. The inflammatory and prejudicial effect outweighed any probative value the extraneous offense might have had." *Id.*

j. Although there were several distinctive similarities concerning the victims, locations, and times of the two offenses, the court also found certain dissimilarities. In analyzing both the similarities and dissimilarities, the court was unable to find the type of distinctive signature necessary to justify admission of the extraneous offense. *Martin v. State*, 722 S.W. 2d 172, 174-75 (Tex. App.--Beaumont 1986, pet. ref'd).

k. Extraneous sexual misconduct was not admissible where "identity was clearly not an issue." *Cooper v. State*, 901 S.W. 2d 757, 762 (Tex. App.--Beaumont 1995), *pet. dism'd., improvidently granted*, 933 S.W.2d 495 (Tex. Crim. App. 1996).

1. Evidence that appellant choked his wife and that the perpetrator choked the complainant is not of such a similarity to even approach the "requisite level of

uniqueness to mark both incidents as appellant's handiwork". *Kiser v. State*, 893 S.W.2d 277, 282 (Tex. App.--Houston [1st. Dist.] 1995).

G. ABSENCE OF MISTAKE OR ACCIDENT

1. Held Admissible

a. Where appellant was charged with aggravated perjury for having lied about certain prior convictions, additional convictions were admissible to show that appellant had not mistakenly or accidentally forgotten about his past. *Hicks v. State*, 864 S.W. 2d 693, 695 (Tex. App.--Houston [14th Dist.] 1993).

b. Testimony concerning appellant's role in burning another mobile home was admissible to rebut appellant's defensive theory that the instant arson was a mistake or accident. *Logan v. State*, 840 S.W. 2d 490, 497 (Tex. App.--Tyler 1992, pet. ref'd).

c. Evidence of prior misconduct with a witness was admissible to prove that appellant's pinching of the complainant in the instant case was not accidental or inadvertent, but rather, was an intentional act. *Bryson v. State*, 820 S.W. 2d 197, 199 (Tex. App.--Corpus Christi 1991, no pet.).

d. In a prosecution of an employee for helping his wife receive paychecks for work she did not perform, the testimony of a witness that he also was paid for work he did not do by falsely filling out time sheets at the appellant's direction, and that he did personal work for the appellant on state time, was admissible to show an absence of mistake and that the appellant had knowledge and opportunity to commit the charged offense. *Willis v. State*, 932 S.W.2d 690, 697 (Tex. App. -- Houston [14th Dist.] 1996).

e. Evidence of sexual abuse of the victim was admissible in a trial for injury to a child to rebut the defensive theory that the victim's head injury was the result of an accident. *Stiles v. State*, 927 S.W.2d 723, 732 (Tex. App. -- Waco 1996).

2. Held Inadmissible

a. Evidence that appellant was a drug dealer because he wore a beeper was not admissible in this possession case because "there is no issue of accident or mistake to explain possession." *Nelms v. State*, 834 S.W. 2d 110, 114 (Tex. App.--Houston [l st Dist.] 1992, pet. ref'd).

b. In *Baker v. State*, 781 S.W.2d 688 (Tex. App.--Fort Worth 1989, pet. ref'd), the state offered extraneous misconduct to prove that appellant touched the child with intent to gratify his sexual desire, and not by accident. "We note that if extraneous offenses are used to negate the possibility the present act was an accident, such offenses must be sufficiently

similar in nature to the charged offense so that the inference of improbability of accident logically comes into play." *Id*. at 690. Not so here. "The facts and circumstances of each alleged offense are different." *Id.*

c. Evidence of a previous attempted capital murder was not admissible in the charged attempted capital murder to refute the appellant's absence of mistake. *Booker v. State*, 929 S.W.2d 57, 64 (Tex. App. -- Beaumont 1996).

H. CONTEXTUAL EVIDENCE

1. General Rule

a. Context is sometimes used synonymously with "res gestae." "Simply put, to qualify as 'res gestae', the evidence of extraneous offenses must be so closely interwoven with the offense on trial that it shows the context in which the offense occurred." *Maynard v. State*, 685 S.W. 2d 60, 67 (Tex. Crim. App. 1985)(evidence of marijuana and switchblade did not constitute res gestae because there was absolutely no relationship or connection between these offenses and the burglary with which appellant was charged).

b. What was formerly called "res gestae" evidence is now called "background" evidence. A two-part test is employed to determine the admissibility of background evidence. "The first question to be addressed is whether the background evidence is relevant under Rule of Criminal Evidence 401. If the background evidence in question is relevant, the next issue to be resolved is whether the evidence 'should be admitted as an "exception" under Rule 404(b)'" *Rogers v. State*, 853 S.W. 2d 29, 32 (Tex. Crim. App. 1993)(citations omitted).

c. There are two different types of contextual evidence: "same transaction" contextual evidence, and "background" contextual evidence. *Mayes v. State*, 816 S.W. 2d 79, 86-87 (Tex. Crim. App. 1991).

2. "Same transaction" contextual evidence

a. General rule

I. "Same transaction contextual evidence is deemed admissible as a so-called exception to the propensity rule where several crimes are intermixed, or blended with one another, or connected that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others.' The reason for its admission 'is simply because in narrating the one it is impracticable to avoid describing the other, and not because the other has any evidential purpose. Necessity, then seems to be one of the reasons behind admitting evidence of the accused's acts, words and conduct at the time of the commission of the offense." *Mayes v. State*,

816 S.W. 2d 79, 86-87 n.4 (Tex. Crim. App. 1991)(citations omitted).

b. Held admissible

I. The state was entitled to prove an extraneous attempted capital murder during the instant capital murder trial where appellant simultaneously sexually assaulted and stabbed two women. "The facts and circumstances of the charged offense would make little or no sense without also admitting the same transaction contextual evidence as it related to the second victim. It would have been impracticable to avoid describing the charged offense without also describing the attempted capital murder of the second victim." *Nelson v. State*, 864 S.W. 2d 496, 499 (Tex. Crim. App. 1993), *cert. denied*, 114 S.Ct. 1338 (1994).

ii. Admission of extraneous kidnaping and murders were admissible as "same transaction contextual evidence," to prove appellant's intent at the time of the burglary. *Camacho v. State*, 864 S.W. 2d 524, 532 (Tex. Crim. App. 1993).

iii. Evidence that appellant attempted to buy drugs in a stolen car with stolen license plates was contextual evidence indivisibly connected to the offense of capital murder and therefore admissible. This evidence explains why the deceased police officer pursued appellant. It describes the circumstances surrounding his death and is necessary to the jury's comprehension of the offense. *Lochart v. State*, 847 S.W. 2d 568, 571 (Tex. Crim. App. 1992), cert. denied, 114 S. Ct. 146 (1993).

iv. Evidence that van used as get away vehicle in a robbery was stolen was admissible as contextual evidence. *Nash v. State*, 893 S.W.2d 261, 263 (Tex. App.--Texarkana 1995).

v. Evidence of another stolen vehicle and stolen property found in the vehicle for which appellant was on trial for stealing, was held admissible as same transaction contextual evidence because this crime spree evidence described the circumstances culminating in the wreck of the charged stolen car and the subsequent arrest of the appellant. *Sparks v. State*, 935 S.W.2d 462, 466 (Tex. App. -- Tyler 1996).

vi. In a capital murder trial for murder in the course of attempting to commit kidnaping, evidence that appellant sexually abused the corpse of the victim was so interwoven with the indicted offense that it was essential to the understanding of the context and circumstances of the crime charged. *Santellan v. State*, 939 S.W.2d 155, 168 (Tex. Crim. App. 1997).

c. Held inadmissible

I. In *Rogers v. State*, 853 S.W. 2d 29 (Tex. Crim. App. 1993), the instant offenses were burglary of habitation and possession of methamphetamine. Id. at 31. When they arrested appellant, the police found marijuana in a bedroom. Appellant admitted that

he possessed, used and sold the marijuana, and the trial court admitted this confession. The court of criminal appeals held that evidence concerning appellant's possession, use and sale of marijuana constituted same transaction contextual evidence, "as such evidence is of 'acts, words and conduct' of appellant at the time of his arrest." *Id*. at 33. "Necessity, then is an 'other purpose' for which same transaction contextual evidence is admissible under Rule 404(b). Only if the facts and circumstances of the instant offense would make little or no sense without also bringing in the same transaction contextual evidence, should the same transaction contextual evidence be admitted." *Id.* Here, the court found that, although evidence of the marijuana might have been relevant to whether appellant also possessed methamphetamine, it was not admissible under Rule 404(b), because the police could have described appellant's arrest for the instant offenses without mentioning the marijuana. "We hold that the evidence concerning the marijuana was not 'necessary' to the jury's understanding of the offense of burglary and possession of methamphetamine and was therefore not admissible as same transaction contextual evidence under Rule of Criminal Evidence 404(b)." *Id*. at 34.

ii. Evidence that appellant possessed a switchblade knife was not relevant to the possession of a small amount of cocaine. And, even if it had been relevant, evidence of the switchblade was not necessary to the jury's understanding of the offense of possession of cocaine. *Garrett v. State*, 875 S.W. 2d 444, 446-47 (Tex. App.--Austin 1994, pet. ref'd).

iii. Evidence in a possession of cocaine case that appellant also had marijuana hidden in his shoe and sock had "no other relevance but to show character conformity, and the State could have proved the charged offense without referring to the extraneous offense. Such evidence is substantially more prejudicial than probative." *Garcia v. State*, 871 S.W. 2d 769, 772 (Tex. App.--Corpus Christi 1994, pet. ref'd).

iv. Evidence that a large amount of money was found in the car when appellant was arrested is not admissible at her trial for possession of methamphetamine. " [W]e believe that the jury would not have been greatly hindered in its consideration of this case had the money not been introduced. On the other hand, it is obvious that one who is charged with possessing a controlled substance is greatly prejudiced by the introduction of evidence which indicates he is a drug dealer." *Martin v. State*, 761 S.W. 2d 26, 31 (Tex. App.--Beaumont 1988, pet. granted), remanded for a harm analysis, 764 S.W. 2d 562 (Tex. Crim. App. 1989).

v. Evidence of appellant's drug use was not necessary to the jury's understanding of the charged offense of indecency with a child. *Heiman v. State*, S.W. 2d ,No. 01-94-00312-CR (Tex. App.--Houston [1st Dist.] August 17, 1995), slip op. 56(counsel, however, was not ineffective for not objecting to this evidence).

vi. A prior incident that occurred several days before the instant offense and which was a distinct and totally separate event was not so intermixed or blended with the instant offense as to form an indivisible criminal transaction such that full proof

of one could not be given without showing the other. *Buchanan v. State*, 911 S.W. 2d 11 (Tex. Crim. App. 1995).

vii. Evidence of defendant's gang affiliations and activities was not relevant or necessary to the jury's understanding of how the defendant planned to rob and murder the victim. *Poindexter v. State*, 942 S.W.2d 577 (Tex. Crim. App. 1996)(held to be harmless error).

3. "Background" contextual evidence

a. General rule

I. "Background" contextual evidence is not indivisibly connected with the primary offense. Rather, as the name suggests, it is simply general background evidence, which is helpful to a full understanding of the case. "Contextual 'background' evidence has been admitted not out of necessity but out of judicial grace." *Mayes v. State*, 816 S.W. 2d 79, 86-88 (Tex. Crim. App. 1991).

b. Held inadmissible

I. In *Mayes v. State*, 816 S.W.2d 79 (Tex. Crim. App.1991), the court carefully distinguished "background" and "same transaction" contextual evidence. After *Mayes*, it appears that mere background evidence is rarely admissible. The court held that the trial court erred in admitting background evidence which referred to appellant's habitation of an administrative segregation wing in TDC. Such evidence may have been background, but it also had a "character component," conveying that appellant was a threat to others. The court went on, however, to find that the error was harmless. *Mayes v. State*, 816 S.W. 2d 79, 88 (Tex. Crim. App. 1991).

ii. Background evidence offered only for the reason that it is background evidence and therefore helpful to the jury is not admissible under Rule 404(b). *Rogers v. State*, 853 S.W. 2d 29, 33 n.5 (Tex. Crim. App. 1993).

iii. The state was allowed to prove that appellant committed a bank robbery the day before the instant capital murder and that the murder was committed with a gun stolen in a burglary some seven months earlier. This was error. Such evidence was not connected to the instant offense, nor was it necessary the jury's comprehension of that offense. *Lockhart v. State*, 847 S.W. 2d 568, 572-73 (Tex. Crim. App. 1992), cert. denied, 114 S. Ct. 146 (1993)(error harmless, though).

c. Held admissible

I. Evidence of the previous relationship and the quarreling

between appellant and the deceased was proper contextual or background evidence. *Peden v. State,* 917 S.W. 2d 941, 951 (Tex. App.--Fort Worth 1996).

ii. Evidence of possession of firearms and attempt to conceal them was admissible as background or contextual evidence in appellant's trial for involuntary manslaughter in a traffic death. *Lum v. State*, 903 S.W.2d 365, 372 (Tex. App.--Texarkana 1995).

iii. Evidence by a gang intelligence officer describing the Bloods, Crips, and the malice between them was admissible in appellant's murder trial as contextual background evidence. *Stern v. State*, 922 S.W.2d 282, 287 (Tex. App. -- Ft. Worth 1996).

iv. Evidence of the previous relationship between the murder victim as a drug dealer, and the appellant as a drug purchaser, was proper background evidence. *Peden v. State*, 917 S.W.2d 941, 951 (Tex. App. -- Ft. Worth 1996).

4. Other Context Cases

a. Held admissible

I. A murder that occurred in the same continuous transaction as the instant offense may be proven. *Lincecum v. State*, 736 S.W. 2d 673, 681 (Tex. Crim. App. 1987); *Mann v. State*, 718 S.W. 2d 741, 743 (Tex. Crim. App. 1986).

ii. Murders that occurred a half hour before the instant murder were admissible to show "one continuous episode," and to show that the case on trial was "blended or closely interwoven." *Moreno v. State*, 721 S.W. 2d 295, 301 (Tex. Crim. App. 1986).

iii. Evidence of an extraneous burglary was admissible to "show the context in which the criminal act occurred." *Wools v. State*, 665 S.W. 2d 455, 471 (Tex. Crim. App. 1983).

b. Held inadmissible

I. "It is certain, following Mayes and Rogers, however, that invoking 'context' of the offense is not enough to justify admission of 'other crimes, wrongs or acts.'" *England v. State*, 887 S.W. 2d 902, 915 (Tex. Crim. App. 1994). In England, the question was whether extraneous misconduct was admissible to prove the context of persuasion, where appellant mounted an entrapment defense. The court found that it was not. Evidence of prior sales of LSD was not relevant to whether the persuasion later brought to bear was such as to cause a reasonable person to deliver drugs. "The character or degree of persuasiveness used does not depend upon the apparent willingness of the accused on other occasions." *Id.*

ii. The trial court erred in this burglary case in admitting evidence that appellant was driving a car which had been stolen earlier in the day. The state is entitled to put on evidence of what occurs immediately before and after the commission of the instant offense, "if that evidence is relevant to something at issue in the case, and is not inherently prejudicial." Although the fact that the car was stolen would have been relevant to show probable cause to stop the car, probable cause was not at issue before the jury. "Therefore, no evidence supporting (or contesting) probable cause was admissible at trial on grounds of relevancy to any issue of probable cause." *Christopher v. State*, 833 S.W. 2d 526, 529 (Tex. Crim. App. 1992). Nor was this evidence admissible to show the context in which the offense occurred. The circumstance was "of little significance" and "simply was not part of the 'context of the offense' ...." *Id.*

iii. The trial court erred in allowing a portion of appellant's confession into evidence which referred to an extraneous automobile theft in this capital murder case. *Ramirez v. State*, 815 S.W. 2d 636, 644-45 (Tex. Crim. App. 1991). The act of stealing the car had no connection to the capital murder except to provide transportation to and from the vicinity of the crime. "We hold the extraneous offense of stealing the car was not so interwoven with the charged capital murder as to be res gestae of the offense, and the trial judge erred in allowing the statement regarding this extraneous transaction into evidence via the confession." *Id.*

iv. In the instant case, appellant was arrested during the commission of a burglary of a building. Extraneous matters which occurred during this arrest which were relevant to place the offense in a proper setting and to show the jury the whole transaction would certainly be admissible to show the context of the offense. But, possession of a hypodermic needle does not meet this test. There is no suggestion or indication that appellant burglarized the warehouse to obtain money or property to support a drug habit. *Couret v. State*, 792 S.W. 2d 106, 108 (Tex. Crim. App. 1990).

v. In *Fitzgerald v. State*, 782 S.W.2d 876 (Tex. Crim. App.1990), the instant offense was escape. The state was also allowed to prove that some 12 hours after the escape, appellant committed burglary and attempted murder. This was error. Since the escape was complete 12 hours prior to the extraneous offenses, these offenses were not a part of a single criminal episode. *Id.* at 881.

vi. The trial court erred in admitting extraneous offenses concerning possession of five pounds of marijuana and a .357 Magnum handgun in this capital murder case. The gun was not used in the instant murder. Since the handgun was possessed at least 24 hours prior to the murder, it cannot be argued that appellant was engaged in one continuous criminal episode. Although it is arguable that appellant was in the midst of flight from the commission of this capital murder when he transferred the marijuana, this does not make the marijuana offense admissible, since the possession and transfer of marijuana in no way facilitated appellant's escape, nor did it place the murder in its immediate context. *Wyle v. State*,

777 S.W. 2d 709, 716 (Tex. Crim. App. 1989).

vii. In *Smith v. State*, 646 S.W. 2d 452 (Tex. Crim. App. 1983), appellant was prosecuted for aggravated robbery. The arresting officer testified that as he approached appellant's car, an unidentified woman ran away screaming "He robbed me! He was going to rape me!" *Id*. at 454-55. This so-called spontaneous declaration was erroneously admitted under the res gestae exception. "[B]efore a spontaneous declaration, uttered at the scene of the accused's arrest, is admissible in evidence at the trial of an accused, the State must establish and demonstrate that the spontaneous declaration is related to or connected in some material way with the offense for which the accused is on trial for committing." *Id*. at 457. Here, there was no showing that the declaration was related to the instant offense. *Id*. at 458.

viii. The trial court erred in admitting evidence of rape and sodomy committed by appellant's co-defendants, in his absence. The evidence was sufficient to show that appellant participated in the abduction of the complainant, and robbed her. Still, the subsequent offenses were inadmissible against him. "Because we are unable to state that the offense of robbery and the extraneous offenses committed at the second location were sufficiently connected to establish that they were part of one continuous transaction, or that the rape and sodomy offenses were part of the case on trial, or so blended, or closely interwoven therewith, or that the offenses of rape and sodomy were the ordinary, probable, or foreseeable consequences of the abduction, kidnaping, and robbery offenses, which would have warranted the admission into evidence of the latter offenses, we *hold that the rape and sodomy offenses should not have been admitted into evidence." Cain v. State*, 642 S.W. 2d 806, 809 (Tex. Crim.App. 1982).

ix. In *Bush v. State*, 628 S.W.2d 441, 443 (Tex. Crim. App. 1982), appellant was tried for capital murder, the proof showing that appellant killed a police officer during commission of a burglary of a pharmacy. Proof of the burglary was admissible since it was so connected to the murder as to "constitute an indivisible criminal transaction." *Id.* The state also, however, put on evidence that appellant had used Preludin intravenously to get high. This evidence was inadmissible. It was not related in time or place to the capital murder. *Id*. at 443-44.

x. The charged offense was aggravated robbery. When arrested 13 days after the robbery, appellant was in possession of a large number of weapons. Although the arresting officers testified that they were unaware of any connection between these weapons and the instant offense, the trial court permitted their proof. This was error. *Stanley v. State*, 606 S.W. 2d 918, 920 (Tex. Crim. App. 1980).

xi. The trial court erred in admitting extraneous evidence concerning a burglary in the prosecution of appellant for possession of paraphernalia. The question of probable cause was not raised before the jury. "Therefore, the validity of the arrest was not a contested issue before the jury and hearsay evidence concerning probable cause to

arrest was not admissible upon this issue." *Gaston v. State*, 574 S.W. 2d 120, 121 (Tex. Crim. App. 1978).

xii. Appellant was arrested after hours in a bank and charged with burglary of a building. A strip search at the jail revealed cocaine. The state prosecuted appellant for the cocaine and introduced the burglary as an extraneous offense. This was error. The only issue was whether appellant possessed cocaine. "The evidence of the burglary was improperly admitted since it was irrelevant and prejudicial." The circumstances surrounding the arrest are not automatically admissible. They must still be relevant and not unduly prejudicial. *Clark v. State*, 722 S.W. 2d 14, 15 (Tex. App.--Houston [1st Dist.] 1986, no pet.)(error harmless, though).

xiii. The trial court erred in permitting the prosecutor to establish that appellant also committed the offense of unlawfully carrying a weapon on licensed premises at the time he committed the instant aggravated assault. *Johnson v. State*, 649 S.W. 2d 111, 118 (Tex. App.--San Antonio 1983), aff'd on other grounds, 662 S.W. 2d 368 (Tex. Crim. App. 1984).

5. Rule 403

a. Although Rule 404(b) does not govern the admissibility of "same transaction" background evidence, a Rule 403 balancing must be done. Houston v. State, 832 S.W. 2d 180, 182-83 (Tex. App.--Waco 1992),pet. ref'd, 846 S.W. 2d 848 (Tex. Crim. App. 1993).

I. REBUTTAL OF A DEFENSIVE THEORY

1. Held Admissible

a. Other crime evidence might be admissible either to establish or rebut the defense of entrapment to the extent it is relevant to the issues of inducement or persuasion. *England v. State*, 887 S.W. 2d 902, 909 (Tex. Crim. App. 1994).

b. Extraneous offense evidence is admissible to rebut a defensive theory and establish participation in the instant offense. *Crank v. State*, 761 S.W. 2d 328, 347 (Tex. Crim. App. 1988).

c. Evidence that appellant stole property from the victim several hours after he killed him is admissible to rebut a claim of self-defense. *Roberson v. State*, 866 S.W. 2d 259, 265 (Tex. App.--Fort Worth 1993).

d. The trial court properly admitted evidence of extraneous sexual misconduct to rebut appellant's claim that he was the victim of a conspiracy engineered by the

complainant and his mother. "An accused's claim that he was framed is a recognized defensive theory which may be rebutted by evidence of similar extraneous acts." *Creehmore v. State*, 860 S.W. 2d 880, 893 (Tex. App.--San Antonio 1993, pet. ref'd).

e. "When the accused claims self-defense or accident, the State, in order to show the accused's intent, may show other violent acts where the defendant was an aggressor." *Robinson v. State*, 844 S.W. 2d 925, 929 (Tex. App.--Houston [1st Dist.] 1992, no pet.).

f. Evidence of a prior murder was admissible to rebut appellant's defensive theory that he neither killed the complainant nor knew his co-defendant would kill him. *Taylor v. State*, 920 S.W. 2d 319, 322 (Tex. Crim. App. 1996).

g. Evidence that appellant stole the murder weapon is admissible to rebut a defensive theory raised during cross-examination which may have raised the inference that appellant did not own this weapon. *Ransom v. State*, 920 S.W. 2d 288, 301 (Tex. Crim. App. 1996).

h. Extraneous offense evidence that appellant had stolen items from a food store prior to retrieving tools from a shed that had been broken into was admissible to rebut the sole defensive theory that appellant claimed he paid a person at the food store for the tools. *Higginbotham v. State*, 919 S.W.2d 502, 506 (Tex. App.--Fort Worth 1996).

i. Evidence that appellant offered to sell marijuana to the victim was relevant to rebut the defensive theory of consent in an aggravated sexual assault prosecution. *Ponce v. State*, 901 S.W.2d 537, 542 (Tex. App.--El Paso 1995).

j. Evidence that appellant kicked out the door of a patrol car after he was arrested, and gave false identification to the police was admissible to refute the appellant's alibi that he was rabbit hunting when the charged assault occurred. *Butler v. State*, 936 S.W.2d 453, 459 (Tex. App. -- Houston [14th Dist.] 1996).

k. Evidence of prior threats and assaults on the deceased wife of appellant was admissible in his murder trial to shed light on his state of mind and to rebut the defensive theories that the victim was the aggressor and that appellant acted under the immediate influence of sudden passion. *Williams v. State*, 927 S.W.2d 752, 758 (Tex. App. -- El Paso 1996).

2. Held Inadmissible

a. In *Pavlacka v. State*, 892 S.W. 2d 897 (Tex. Crim. App. 1994), the state argued that an extraneous sexual assault was admissible to rebut defensive evidence that the child's testimony was the product of improper influence or motive. The court of criminal appeals rejected this theory. It was the state, on direct examination, which asked the witnesses whether

they had suggested the child implicate appellant, and both witnesses emphatically denied they had done so. Appellant did not pursue the matter on cross-examination or in summation. Also, the state did not argue this theory of admissibility at trial. *Id.* at 901.

b. The Pavlacka court also rejected the state's assertion that this extraneous misconduct was admissible to rebut appellant's emphatic denials that he had committed the instant offense. This is not a permissible purpose of Rule 404(b). *Pavlacka v. State*, 892 S.W. 2d 897, 901 -02 (Tex. Crim. App.1994). The only logical force of evidence in this context is to show character conformity, and this, of course, is expressly forbidden by Rule 404(b). *Id.* at 902.

c. An extraneous sexual assault against his daughter was not admissible to rebut appellant's implied theory of "frame-up." "[T]his 'frame-up' theory was not presented to the jury in the trial court's limiting instruction. Absent such additional instruction, there is no way for an appellate court to know whether the jury properly applied the evidence of appellant's 'system' to rebut the weight or credibility of appellant's 'frame-up' theory or relied on it for an improper basis such as character conformity." *Owens v. State*. 827 S.W. 2d 911, 917 (Tex. Crim. App. 1992).

d. Evidence that appellant committed burglary and attempted murder in his trial for escape was not admissible to rebut his defense of necessity. These extraneous offenses occurred some 12 hours after the escape was complete. "That an escapee later in time and place committed extraneous offenses or engaged in other misconduct has no bearing on whether at the threshold he reasonably believed it immediately necessary to leave custody in confinement to avoid imminent harm." That is, this extraneous evidence is not relevant to any material issue in the defense of necessity. *Fitzgerald v. State*, 782 S.W. 2d 876, 883-85 (Tex. Crim. App. 1990).

e. The fact that appellant killed his uncle and was found not guilty by reason of insanity did not tend to prove that appellant was sane at the time of the instant offense, nor did it tend to rebut his defensive theory. *Sanders v. State*, 604 S.W. 2d 108, 111 (Tex. Crim. App. 1980). There was no attempt here to establish a mental defect solely by adducing evidence of repeated criminal acts, and even if there had been, repeated commission of criminal acts does not prove sanity. *Id.* at 111-112.

f. On cross-examination, appellant testified that he thought he was being framed and that one Jackie Morgan was in fact the perpetrator. On rebuttal, the state called Morgan, who denied any sexual misconduct with the complainant, but claimed that appellant had sexually assaulted him. This was error. This was a collateral matter. It is improper for the state to first extract a defensive theory on cross-examination, and then to proceed to impeach or rebut appellant's denial. Nor did Morgan's testimony about appellant serve to rebut appellant's defensive theory. "[I]t does no more than show generally appellant's propensity to commit the crime of sexual assault." *Celeste v. State*, 805 S.W. 2d 579, 581 (Tex. App.--Tyler 1991, no pet.).

g. Defensive theory that appellant did not own the car nor have exclusive access to the car in which the cocaine was found did not open the door to evidence of a prior conviction for possession of cocaine by appellant. *Perry v. State*, 933 S.W.2d 249, 254 (Tex. App. -- Corpus Christi 1996).

J. FLIGHT

1. Held Admissible

a. "[B]ecause flight is a circumstance from which guilt may be inferred, evidence of flight is admissible even though it may show the commission of other crimes. Such evidence is also relevant 'to show the efforts made to locate or apprehend the accused, his pursuit and capture, including his resistance to arrest when overtaken.'" *Thompson v. State*, 652 S.W. 2d 770, 772 (Tex. Crim. App. 1981)(citations omitted). Here, an extraneous robbery in which appellant stole a car and traveled approximately 16 miles before his arrest was admissible to show his attempted flight to avoid arrest. *Id.* at 773.

b. Evidence that appellant kidnaped two teenage boys was admissible to show flight. *Alba v. State*, 905 S.W. 2d 581, 586 (Tex. Crim. App. 1995).

c. Evidence of flight and attempted suicide during flight was admissible in an aggravated robbery trial because it was not evidence of an extraneous offense, but rather proof of an element of aggravated robbery, which includes proving a person was in the course of committing theft. In the course of committing theft means "conduct that occurs in an attempt to commit, during the commission, or *in immediate flight after the attempt* or commission of theft. *Harper v. State*, 930 S.W.2d 625, 630 (Tex. App. -- Houston [1st Dist.] 1996).

2. Held Inadmissible

a. In *Fitzgerald v. State*, 782 S.W. 2d 876 (Tex. Crim. App. 1990), the instant offense was escape. The state was also allowed to prove that some 12 hours after the escape, appellant committed burglary and attempted murder. This was error. The evidence was not admissible on the theory that it proved flight, since the objective of appellant is ambiguous, at most. *Id.* at 882.

b. Where both the instant and the extraneous offenses were committed in Houston, some blocks apart, and within 40 minutes, "[w]e cannot conclude under these circumstances that flight is shown so as to justify the admission of extraneous offenses on that theory." *Riles v. State*, 557 S.W. 2d 95, 99 (Tex. Crim. App. 1977).

c. The trial court erred in admitting evidence of appellant's high speed chase in a stolen car where, at the time, the police were unaware of the instant robbery some three months before, and where appellant had not then been identified as one of the robbers.

There is no specific evidence that appellant's flight was due to his guilt of the extraneous robbery. *Hines v. State*, 646 S.W. 2d 469, 471 (Tex. App.--Houston [1st Dist.] 1982, pet. ref'd).

K. SYSTEM OR MODUS OPERANDI

1. General Rule

a. "In the context of extraneous offenses, the term 'system' can be used synonymously with the terms 'modus operandi' or 'methodology' to refer to a defendant's distinctive and idiosyncratic manner of committing criminal acts. Evidence of a defendant's particular modus operandi is a recognized exception to the general rule precluding extraneous offense evidence, if the modus operandi evidence tends to prove a material fact at issue, other than propensity." *Owens v. State*, 827 S.W. 2d 911, 914-15 (Tex. Crim. App. 1992)(citations omitted). The crimes must be more than similar; they must be so unusual and distinctive as to be like a signature. *Id.* at 915.

2. Held Admissible

a. Testimony of prior "smash and grab" burglaries committed by the appellant was admissible as it showed a certain "distinctive modus operandi." *Barrett v. State*, 900 S.W.2d 748, 750 (Tex. App.--Tyler 1995).

3. Held Inadmissible

a. An extraneous sexual assault was inadmissible where the similarities between it and the instant offense were "not so unusual or idiosyncratic as to signal conclusively that the two offenses were the handiwork of the same individual." *Owens v. State*, 827 S.W. 2d 911, 915 (Tex. Crim. App. 1992). Although the two offenses were alike in that they were both sexual assaults against appellant's minor daughters of approximately the same age, they "were not so compellingly similar that an objective trier of fact could, upon examining only the similarities of the two offenses, conclude with any certitude that they were so alike as to identify both crimes as the work of the same person." Additionally, there were several important dissimilarities between the two offenses. *Id.* To hold that these two offenses were similar enough to constitute a system would be to allow almost any two crimes of the same class and against the same type of victim to be found a system. This is forbidden under Rule 404(b). *Owens v. State*, 827 S.W. 2d 911, 915-16 (Tex. Crim. App. 1992).

b. Even assuming the state showed a system of criminal activity, "we find that such evidence was not relevant to any material fact in dispute." *Owens v. State*, 827 S.W. 2d 911, 916 (Tex. Crim. App. 1992). There was no contested issue of identity, nor was there any other issue pursuant to Rule 404(b). "We fail to see how evidence of appellant's 'system' could assist the jury in its determination of whether or not appellant molested his daughter, except that it tends to show character conformity in violation of Rule 404." *Id.* at

916-17.

c. Even if it could be argued that appellant's alleged sexual misconduct with his former wife was sufficient to prove modus operandi or system, this evidence was not relevant here where identity was clearly not in issue. *Cooper v. State*, 901 S.W. 2d 757, 761 (Tex. App.-Beaumont 1995), *pet dism'd, improvidently granted*, 933 S.W.2d 495 (Tex. Crim. App. 1996).

L. CONSCIOUSNESS OF GUILT

1. Held Admissible

a. "The 'a consciousness of guilt' exception to the general rule is alive and well in Texas. Reports of its demise have been widely exaggerated." *Torres v. State*, 794 S.W. 2d 596, 599 (Tex. App. 1990, no pet.). The trial court properly admitted evidence that appellant threatened his wife from the jail if she testified. The court of appeals called this sort of evidence "perhaps one of the strongest kinds of evidence of guilt." *Id.* at 598.

b. Evidence that appellant threatened a witness in an attempt to coerce her testimony is admissible to show consciousness of guilt. *Peoples v. State*, 874 S.W. 2d 804, 809 (Tex. App.--Fort Worth 1994, pet. ref'd).

c. Attacks upon the prosecutor and defense in the courtroom during trial clearly fall within the "consciousness of guilt" exception to the general rule excluding extraneous offenses. *Ransom v. State*, 920 S.W. 2d 288, 299 (Tex. Crim. App. 1996).

d. Evidence that appellant stated he would shoot anyone, including the police, who tried to stop him from leaving the state went to his "consciousness of guilt" and were admissible. *Madden v. State*, 911 S.W.2d 236, 243 (Tex. App.-- Waco 1995).

2. Held Inadmissible

a. It was ineffective assistance of counsel to fail to object to extraneous offense evidence that a witness for the appellant had been threatened or abused by the appellant because the defense had not opened the door to these issues and it did not demonstrate consciousness of guilt. *Greene v. State*, 928 S.W.2d 119, 123-24 (Tex. App. -- San Antonio 1996).

M. CONTROL

1. Held Admissible

a. The trial court properly admitted a pistol found during a drug raid

because it served to affirmatively link appellant to the drugs. "It is reasonable to conclude appellant placed the pistol in the bathroom to protect whatever drugs he possessed. The pistol makes more probable appellant's dominion over the drugs. Evidence which makes control more or less probative is both relevant and admissible under Tex. R. Crim. Evid. 404(b)." *Hawkins v. State*, 871 S.W. 2d 539, 541-42 (Tex. App.--Fort Worth 1994).

N. SEXUAL OFFENSES

1. Many years ago, Texas recognized in child sex cases a narrow exception to the general rule against propensity evidence. Accordingly, extraneous sexual conduct between the accused and the complainant in the instant case was admissible to explain the instant charge, and to permit the jury to view such an unnatural act in light of the relationship of the parties and to make the child's accusation more plausible. *See Battles v. State*, 140 S.W. 783, 788 (Tex. Crim. App. 1911). Later, this narrow exception was broadened to permit the introduction of sex acts between appellant and third parties in addition to the instant complainant. See generally McDonald v. State, 513 S.W. 2d 44 (Tex. Crim. App. 1974); *Johnston v. State*, 418 S.W. 2d 522 (Tex. Crim. App. 1967). A pre-Rules case -- *Boutwell v. State*, 719 S.W. 2d 164 (Tex. Crim.App. 1986) -- overruled McDonald and Johnston to the extent they admitted extraneous acts between the accused and third parties on a probability or unnatural attention exception. *Boutwell v. State*, 719 S.W. 2d at 179. *accord, Hernandez v. State*, 754 S.W. 2d 321, 327 (Tex. App.--Houston [14th Dist.] 1988), aff'd on other grounds, 861 S.W. 2d 908 (Tex. Crim. App. 1993)(trial court erred in admitting evidence that appellant arranged for other men to sexually assault complainant because there were not sexual acts between appellant and complainant). *Boutwell*, however, continued to permit proof of misconduct between the accused and the instant complainant to the extent that it was necessary to understand the context of the relationship. *Id.* at 178-79. This was the law until the rules of evidence became effective.

2. In *Montgomery v. State*, 810 S.W. 2d 372, 394 (Tex. Crim. App. 1991), the court pointed out that sexual misconduct evidence is not necessarily admissible after the rules of evidence took effect. The court did recognize that extraneous sex offenses might be admissible under Rule 404(b), not to show character, but rather to counter a perceived societal aversion to the notion that parents or others in similar positions would actually sexually abuse their own children.

3. In *Vernon v. State*, 841 S.W. 2d 407 (Tex. Crim. App. 1992), the trial court admitted extraneous sexual misconduct between appellant and the instant complainant on the theory that this six year course of conduct was really a single act of misconduct, and because it was necessary to illuminate the unnatural relationship that existed. *Id.* at 410. The court of criminal appeals first disagreed that this was a single course of conduct. *Id.* The court then discussed the Battles and the Boutwell cases, and found they had no "significant precedential value today." *Id.* Specifically, the court held that the rule restated in Boutwell has no "legal force independent of Rule 404(b)." *Id.* at 411. "[U]nless it can plausibly be argued that the repetition of 'unnatural' acts actually makes an elemental fact more likely, then its repetition is not an

evidentiary fact of consequence either." *Id.* The court went on to hold the extraneous evidence inadmissible, noting that appellant did not cross-examine the prosecution witnesses, or tender any witnesses of his own. *Id.*

4. In *Pavlacka v. State*, 892 S.W. 2d 897 (Tex. Crim. App. 1994), the trial court admitted an extraneous sexual assault allegedly committed by appellant against the complainant, after the complainant was impeached with a prior inconsistent statement. Appellant contended that testimony from the same complainant about another offense committed by the same person who allegedly committed the charged offense cannot logically rehabilitate the complainant. In other words, an impeached complainant cannot logically rehabilitate himself. The court of criminal appeals agreed. "Simply put, an impeached complainant's own testimony as to other molestations, without more, is just as unreliable as rehabilitative evidence of the accused's lascivious intent and willingness to act on it as is his testimony regarding the charged offense. It cannot therefore serve logically to rehabilitate him." When the impeached complainant is the only source of the extraneous misconduct, such misconduct is not admissible to rehabilitate. *Id.* at 902-03. *See Hill v. State*, 852 S.W. 2d 769, 770 (Tex. App.--Fort Worth 1993, pet. ref'd)("testimony concerning extraneous offenses was subject to the same challenge as the testimony concerning the indicted offense, and therefore, could not rebut a challenge to the credibility of testimony concerning that offense").

5. An extraneous sexual assault against his daughter was not admissible to rebut appellant's implied theory of "frame-up." "[T]his 'frame-up' theory was not presented to the jury in the trial court's limiting instruction. Absent such additional instruction, there is no way for an appellate court to know whether the jury properly applied the evidence of appellant's 'system' to rebut the weight or credibility of appellant's 'frame-up' theory or relied on it for an improper basis such as character conformity." *Owens v. State*, 827 S.W. 2d 911, 917 (Tex. Crim. App. 1992).

6. Evidence of extraneous sexual misconduct between appellant and a third party is not admissible to prove "the unnatural attitude of the appellant towards the complaining witness and the probability of the act charged." *Turner v. State*, 754 S.W. 2d 668, 674 (Tex. Crim. App. 1988); *see Kelly v. State*, 828 S.W. 2d 162, 165 (Tex. App.--Waco 1992, pet. ref'd).

7. Testimony from the child complainant that appellant had sexually assaulted her on other occasions should not have been admitted. *Jessup v. State*, 853 S.W. 2d 141, 143 (Tex. App.--Fort Worth 1993, pet. ref'd). Evidence from the complainant herself does not logically rebut a challenge to her credibility. Nor was the evidence admissible to show the context in which the offense occurred. This evidence simply shows that appellant repeatedly committed the same sort of offenses against her child. Finally, there is no longer an exception which permits the admission of extraneous offenses "to overcome an aversion to the notion that parents would sexually abuse their children." *Id.*

8. In *Garcia v. State*, 827 S.W. 2d 27 (Tex. App.--Corpus Christi 1992, no

pet.), the state argued that extraneous sexual misconduct with other children was admissible to prove appellant's intent to arouse and gratify his sexual desire in the instant case. The court of appeals disagreed. The evidence of intent in the instant case could be amply inferred from the act itself On the other hand, such intent was not necessarily implied in the extraneous conduct. The state had no compelling need to prove the extraneous misconduct. Sexual misconduct with children is inherently inflammatory. "The conclusion is inescapable that appellant was tried and convicted primarily for his personal character and not for the specific offense for which he was charged." *Id.* at 31; *see also Castillo v. State*, 910 S.W. 2d 124,128 (Tex. App.--El Paso 1995)(state had no compelling need to prove intent where intent was inferable from the act itself and appellant's subsequent behavior).

9. Evidence of extraneous sex offenses committed by the appellant against third parties was not admissible to show a continuing course of conduct on the part of the appellant. Such acts prove nothing but propensity. *Cruz v. State*, 737 S.W. 2d 74, 77 (Tex. App.--San Antonio 1987, no pet.).

10. The danger that juries will convict on propensity evidence is even more pronounced in sex cases. *Celeste v. State*, 805 S.W. 2d 579, 580 (Tex. App.--Tyler 1991, no pet.).

11. Evidence that appellant had previously abused the complainant came only from the complainant, and was therefore not admissible to rebut appellant's denial of the charged offense. *Heiman v. State*, S.W. 2d , No. 01-94-00312-CR (Tex. App.--Houston [1st Dist.] August 17, 1995), slip op. 6-7 (counsel, however, was not ineffective for not objecting to this evidence).

12. Evidence of a previous sexual encounter with the child victim was admissible to show motive. "The uncharged misconduct evidence presented at appellant's trial was admissible to prove his motive for the charged offense -- that motive being his abnormal sexual desire for the complainant -- regardless of whether the complainant's credibility was challenged. *Hernandez v. State*, 900 S.W.2d 835, 838 (Tex. App.--Corpus Christi 1995).

VII. MONTGOMERY v. STATE

A. The Holding

In *Montgomery v. State*, 810 S.W. 2d 372 (Tex. Crim. App. 1990), appellant was charged with committing indecency with a child against two of his daughters. In addition to the conduct charged in the indictments, the state proved that he would quite frequently walk around in front of his daughters in the nude, with an erection. *Id.* at 393. The court of criminal appeals found that the trial court erred in admitting this evidence because the probativeness of the evidence was substantially outweighed by the danger of unfair prejudice. *Id.* at 397. In arriving at this conclusion, the court analyzed in great detail the relevancy rules, particularly Rules 403 and 404(b), and formulated standards for the admissibility of extraneous offenses, and the roles

expected of trial counsel, the trial court, and the appellate courts.

B. Rule 404(b)

1. *Montgomery* begins by restating the general rule: Character evidence is generally inadmissible if it is offered solely to show that the person acted in conformity with this character trait. The court refers to such evidence as "character conformity" evidence. Such evidence is "absolutely inadmissible" under Rule 404(b). *Id.* at 386-87.

2. Extraneous offense evidence is, however, admissible under Rule 404(b) if it has relevance apart from its tendency to show mere character conformity. Specifically, it is admissible if it makes an "elemental fact" more or less probable; if it makes more or less probable an "evidentiary fact" that inferentially proves an "elemental fact," or, if it makes more or less probable defensive evidence that undermines an "elemental fact." Id. at 387. Illustrative of permissible purposes to which extraneous offenses may be put are those listed in Rule 404(b), including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." These purposes, however, are only illustrative, and "neither mutually exclusive nor collectively exhaustive." *Id.* at 387-88.

3. The opponent of such evidence bears the burden of timely objecting. The optimal objection is that the evidence is inadmissible under Rule 404(b). Although not as precise as it might be, an objection that the evidence is not relevant, or that it constitutes an extraneous offense or misconduct, will ordinarily be sufficient to apprise the trial court of the nature of the complaint. *Id.*at 387.

4. Once the objection is lodged, the proponent of the evidence must satisfy the court that the extraneous offense has relevance apart from its tendency to prove character conformity. "The trial court should honor any request by the opponent of the evidence of articulation into the record of the purpose for which evidence is either offered by the proponent or ultimately admitted by the trial court." *Id.* at 387.

5. If the evidence has no relevance apart from character conformity, then it is absolutely inadmissible and the trial court has no discretion to admit it. If the trial court believes that it is relevant to some other issue, the trial court may admit the evidence. "Should he admit the evidence, then upon timely further request, the trial judge should instruct the jury that the evidence is limited to whatever purpose the proponent has persuaded him it serves." *Id.* at 387-88.

C. Rule 403

1. Even if evidence is relevant to something other than character conformity, and therefore admissible under Rule 404(b), it must still pass muster under Rule 403. That is, its

prejudicial effect must not substantially outweigh its probative value. While an "extraneous offense" objection may be sufficient to preserve Rule 404(b) error, it will not be sufficient to preserve Rule 403 error. Thus, the opponent must make a further objection to the evidence under Rule 403. "It is now incumbent upon him, in view of the presumption of admissibility of relevant evidence, to ask the trial court to exclude the evidence by its authority under Rule 403, on the ground that the probative value of the evidence, assuming it is relevant apart from character conformity, is nevertheless substantially outweighed by, *e.g.*, the danger of unfair prejudice." *Id.* at 388-89. An objection that the evidence is :"highly prejudicial" and "inflammatory" is sufficient to invoke Rule 403. *Moreno v. State*, 858 S.W. 2d 453, 463 (Tex. Crim. App.), *cert. denied*, 114 S. Ct. 445 (1993).

2. Once this objection is made, "the trial court is called upon to weigh probativeness of the evidence against its potential for 'unfair' prejudice." *Id.* at 389. "The court would do well to inquire of the opponent what his view of the prejudice is. On the other hand, the court should ask the proponent to articulate his need. But once the rule is invoked, 'the trial judge has no discretion as to whether or not to engage in the balancing process.'" Trial courts should favor admission in close cases, since there is a presumption of admissibility of relevant evidence.

3. The court enumerated several factors which should go into the trial court's balancing decision. These factors include the inherent probativeness of the extraneous act, which is a function of both the similarity of this act to the charged conduct, and the strength of the evidence showing that appellant is guilty of the extraneous act. Another factor is the potential for the extraneous conduct to "impress the jury in some irrational but nevertheless indelible way." This is often a function of the nature of the misconduct. Also important is the amount of trial time needed to prove extraneous misconduct. "Finally, how great is the proponent's 'need' for the extraneous transaction?" This last factor has three subparts. Does the proponent have other available evidence to prove that which the extraneous conduct goes to prove, how strong is that other evidence, and is the fact to be proved related to an issue in dispute. "When the proponent has other compelling or undisputed evidence to establish the proposition or fact that the extraneous misconduct goes to prove, the misconduct evidence will weigh far less than it otherwise might in the probative versus prejudicial balance." *Id.* at 389-90.

D. The Role Of The Appellate Courts

1. The court also discussed the function of the appellate courts. The trial courts have no discretion to admit evidence relevant only to character conformity, over objection. And, the trial court has no discretion to refuse a request to conduct a Rule 403 balancing inquiry. But, after conducting that balancing, the trial court must be given wide latitude. "So long as the trial court thus operates within the boundaries of its discretion, an appellate court should not disturb its decision, whatever it may be." *Id.* at 390.

2. The standard of review on appeal regarding the Rule 404(b) decision is "abuse of discretion." As long as the ruling "was at least within the zone of reasonable

disagreement, the appellate court will not intercede. The trial court's ruling is not, however, unreviewable. Where the appellate court can say with confidence that by no reasonable perception of common experience can it be concluded that proffered evidence has a tendency to make the existence of a fact of consequence more or less probable than it would otherwise be, then it can be said the trial court abused its discretion to admit that evidence. Moreover, when it is clear to the appellate court that what was perceived by the trial court as common experience is really no more than the operation of a common prejudice, not borne out in reason, the trial court has abused its discretion." *Id.* at 391.

3. The appellate standard of review for the Rule 403 decision is also abuse of discretion. An "appellate court should not reverse a trial judge whose ruling was within the zone of reasonable disagreement." This decision is not unreviewable. Indeed, exclusion is required when prejudice substantially outweighs probative value. The appellate court will not, however, conduct a de novo review. In fact, it should reverse only rarely, after a clear abuse of discretion.

4. Relevant 403 criteria are: "that the ultimate issue was not seriously contested by the opponent; that the State had other convincing evidence to establish the ultimate issue to which the extraneous misconduct was relevant; that the probative value of the misconduct evidence was not, either alone or in combination with other evidence, particularly compelling; that the misconduct was of such a nature that a jury instruction to disregard it for any but its proffered purpose would not likely have been efficacious." When the record reveals one or more criterion, an appellate court should conclude that the trial court acted irrationally in admitting extraneous offense evidence. *Id.* at 392-93.

5. The court noted that review "would be facilitated by on-the record articulation of the consideration that governed the trial court's decision." Although the court was not required to decide whether this is necessary in this case, it did "note that the Fifth Circuit has required the federal district courts, upon request, to make the record reflect those consideration, on pain of remand." *Id.* at 393 n.4.

6. Applying these rules to the facts in *Montgomery,* the court found that the trial court did not err in admitting the evidence under Rule 404(b), because the fact that appellant walked around with an erection in front of his children had some tendency to prove the "elemental fact" of intent to arouse and gratify his own sexual desire. *Id.* at 394. The court reversed, however, because it found that the prejudicial effect of this evidence did substantially outweigh its probative value, considering the relevant factors. *Id.* at 397.

7. Even though the appellant failed to properly object pursuant to Rule 403, the court of appeals must engage in the balancing test unless the state raises the fact that appellant waived the error on appeal. *Peterson v. State*, 836 S.W. 2d 760, 763 (Tex. App.--El Paso 1992, pet. ref'd).

VIII. RULE 403

A. Text

> Although relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Tex. R. Crim. Evid. 403.

B. Montgomery v. State

1. *Montgomery v. State*, 810 S.W. 2d 372 (Tex. Crim. App. 1990), is essential reading. Its significance as far as Rule 403 goes was discussed above in § VII. C & D. In summary, *Montgomery* teaches that evidence might be admissible under Rules 401, 402 and 404(b), but inadmissible under Rule 403; that a separate objection under Rule 403 is required to preserve error; that the trial court must balance prejudice and probity; and, that certain factors must be employed in the balancing test. Appellant Montgomery himself obtained a reversal in his case under Rule 403, even though the extraneous offenses were properly admitted under Rule 404(b). *Id.* at 397.

C. The Balancing Test

1. The balancing test described in *Montgomery* is mandatory if a proper objection is made. *Rankin v. State*, ___S.W. 2d ____, ____ No. 0374-94 (Tex. Crim. App. 1996), slip op. 5. A complete balancing test requires inquiry into all the factors set out in Montgomery. "Likewise, we hold that courts of appeals must fully explain their Rule 403 determinations, detailing both the evidence and reasoning used to arrive at those decisions, else we may be unable to discern whether the correct test was used in reaching any given result." *Id.* at slip op. 6-7. In *Rankin*, the court remanded the case to the court of appeals for proper analysis under Rule 403.

D. Illustrative Cases

1. In *Templin v. State*, 711 S.W. 2d 30 (Tex. Crim. App. 1986), appellant was charged with murdering his wife by electrocution. The trial court admitted evidence that appellant had told two cousins that, when he was ten or twelve years old, some ten to fifteen years prior to trial, he had electrocuted cats and dogs. Appellant had made similar statements to an uncle when he was fourteen or fifteen. The court of criminal appeals found that this evidence was relevant to several issues other than character conformity, and therefore admissible under Rule 404(b). Nonetheless, the court found the evidence inadmissible under Rule 403. It was not so much the length of time that had passed that made it unduly prejudicial. "Rather, it is the fact

that appellant was, according to testimony at trial, between the ages of ten and twelve when he was alleged to have committed the acts in question." *Id.* at 34. The court also rejected the state's argument that its analysis properly went to the weight, not the admissibility of the evidence. "It is the court's duty to determine if the risk to our fundamental scheme of justice is justified by the probative value of the evidence in question. If this evidence is permitted in this case, it would be equally logical to admit into evidence the fact that the defendant in a theft case had stolen property at the age of ten or that the defendant accused of an assaultive offense had struck a playmate as a child." *Id.*

2. In *Stewart v. State*, 874 S.W. 2d 752 (Tex. App.--Houston [14th Dist.] 1994, pet. ref'd), appellant was charged with possession of cocaine. The court found that the police officer witness's expertise in drug trafficking was relevant to prove that appellant knowingly possessed the cocaine. Even though relevant, however, the state ought to have qualified the expert concerning his experience with drug possessors, not drug dealers. The probative value of his expertise in drug trafficking was substantially outweighed by the danger of unfair prejudice, and should therefore have been excluded under Rule 403. *Id.* at 756.

3. In *Ewes v. State*, 841 S.W. 2d 16 (Tex. App.--Dallas 1992, pet. ref'd), following appellant's conviction for unlawful delivery of a controlled substance, the state put on the testimony of a Dallas police officer, David McCoy. After establishing his credentials as an expert, officer McCoy was permitted, over appellant's objections, to testify that "Our Homicide Division roughly estimates that over fifty percent of all the homicides in Dallas are drug-related." *Id.* at 17. On appeal appellant complained that McCoy's testimony was inadmissible under Rule 403 because it sought to punish him for collateral crimes for which he was not on trial. The court of appeals agreed and reversed the judgment below. "We . . . hold that the trial court erred in admitting the evidence because its probative value was substantially outweighed by the danger of unfair prejudice and its admission tended to confuse the punishment issues before the jury. *Id.* at 18.

4. In *Zuliani v. State*, 901 S.W. 2d 812, 827 (Tex. App.--Austin 1995), the court found that the trial court violated Rule 403 by admitting evidence of appellant's stormy relationship with a live-in girlfriend and all its details in an injury to a child case.

5. In *Castillo v. State*, 910 S.W. 2d 124, 128 (Tex. App.--El Paso 1995), the court held that evidence of extraneous offenses was not needed to prove intent because intent was inferable from the acts themselves. Accordingly, the state had not compelling need to prove the extraneous offenses. And, while the evidence was relevant, it had only minimal probative value and was highly inflammatory. "For these reasons, we conclude that the trial court abused its discretion in failing to exclude it under Rule 403." *Id.*

6. A trial court can also violate Rule 403 by excluding evidence. See *Henderson v. State*, S.W. 2d , No. 08-94-00298-CR (Tex. App.--El Paso August 17, 1995), slip op. 17.

7. Appellant's statements to friends that he desired to kill and mutilate a woman in exactly the manner in which the victim of the instant offense was harmed were highly probative of appellant's motive and identity and therefore, not more prejudicial than probative. *Massey v. State*, 933 S.W.2d 141, 154 (Tex. Crim. App. 1996).

IX. NOTICE

A. Rule 404(b)

Rule 404(b) also has a notice provision. Accordingly, extraneous misconduct is admissible "provided, upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction." Tex. R. Crim. Evid. 404(b).

B. Espinosa v. State

1. *Espinosa v. State*, 853 S.W. 2d 36 (Tex. Crim. App. 1993), construed the notice requirement of Rule 404(b). Espinosa had made his request for notice long before trial in a general motion for discovery, but it had not been ruled on in advance of trial. The court held that "when a defendant relies on a motion for discovery to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule. In this case, appellant's discovery motion did not operate as such a request." *Id.* at 39. Had the trial court granted appellant's motion for discovery, the state would have been required to give notice. *Id.* at 39 n.4.

2. In his concurring opinion in Espinosa, Judge Baird offered the following helpful practice tip:

> To make an adequate request under Rule 404(b), the better practice is for the defendant to file a document entitled "Rule 404(b) Request for Notice of Intent to Offer Extraneous Conduct" and to timely serve the State with a copy of the request. In this situation, the defendant is not required to obtain a ruling from the trial judge. However, if the request is made within a discovery motion, the defendant is compelled to obtain a ruling because the State need not comply with the requests in a discovery motion until the trial judge orders compliance. Finally, a motion in limine is insufficient to invoke the notice provisions of Rule 404(b).

Espinosa v. State, 853 S.W.2d at 39-40 (Baird, J., concurring).

3. The Austin Court of Appeals applied the rationale of *Espinosa* to requests for notice under article 37.07 § 3 (g). Here the appellant filed a pleading styled Rule 404(b)

Request for Notice of Intent to Offer Extraneous Conduct, but it was addressed "to the Honorable Judge of Said Court" and requested the court to order the state to give notice. The court held this to be a motion requiring a ruling by the trial judge. *President v. State*, 926 S.W.2d 805, 808 (Tex. App. -- Austin 1996).

C. Other Cases

1. In *Buchanan v. State*, 911 S.W. 2d 11, 15 (Tex. Crim. App. 1995), appellant complained at trial that extraneous offense evidence was inadmissible because the state had not given him notice, as required by Rule 404(b). The state argued that it provided sufficient notice by giving appellant a copy of an offense report which referred to the extraneous offense in question. The court of criminal appeals disagreed. "We cannot conclude that the mere opening of its file containing an offense report detailing extraneous evidence satisfies the requirement of giving notice 'of intent to introduce' such evidence. The mere presence of an offense report indicating the State's awareness of the existence of such evidence does not indicate an 'intent to introduce' such evidence in its case in chief." *Id.* at slip op. 7.

2. "By its very terms the notice requirements are not applicable to rebuttal evidence." *Yohey v. State*, 801 S.W. 2d 232, 235 (Tex. App.--San Antonio 1990, pet. ref'd); accord, *Stringer v. State*, 845 S.W. 2d 400, 403 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd)(under the plain reading of the rule itself, notice need not be given when the extraneous offense is offered only for rebuttal purposes).

3. In *Self v. State*, 860 S.W.2d 261 (Tex. App.--Fort Worth 1993, pet. ref'd), the court of appeals refused to impose a 14 day notice requirement. There, appellant received notice at least five days before trial. At a pretrial hearing, appellant cross-examined the witness about specifics concerning the extraneous misconduct. The court thus concluded that appellant was not surprised. *Id.* at 264.

4. Three days notice of intent to offer extraneous offense evidence was not 'reasonable notice' under rule 404(b). *Hernandez v. State*, 914 S.W.2d 226, 234 (Tex. App.--Waco
1996)(error held to be harmless).

5. In *Alone v. State*, 935 S.W.2d 433, 440 (Tex. App. -- Tyler 1996), the court of appeals found that it was not ineffective assistance of counsel to have failed to file a request for notice of appellant's prior conviction for escape, because it was "highly unlikely" that such evidence would have been inadmissible.

6. Although appellant requested notice of intent to offer extraneous offenses under Rule 404(b), he did not request such notice under 37.07 § 3 (g). Therefore, no error resulted from the state's use of an extraneous offense during the punishment phase of the trial without prior notice. *Williams v. State*, 933 S.W.2d 662 (Tex. App. -- Eastland 1996).

7. The State's furnishing of a record of the appellant's criminal history was not a sufficient notice of intent to introduce evidence of the appellant's prior convictions during the punishment phase pursuant to 37.07 § 3(g). *Dodgen v. State*, 924 S.W.2d 216, 219 (Tex. App. -- Eastland 1996, *pet. granted*).

8. Same transaction contextual evidence is not subject to the requirement in Rule 404(b) that the state must give the accused notice of the state's intent to introduce such evidence. *Hodge v. State*, 940 S.W.2d 316, 319 (Tex. App. -- Eastland 1997).

9. The state is not required to notify the defendant of its intent to use character evidence during the punishment phase of the trial under article 37.07 § 3(g). *Hardaway v. State*, 939 S.W.2d 224, 226 (Tex. App. -- Amarillo 1997).

10. The state is not required to give notice of its intent to use evidence of extraneous acts in the punishment phase when offered only in rebuttal and not in its case in chief. *Washington v. State*, 1997 WL 111083 , No. 2-95-436-CR (Tex. App. -- Ft. Worth, March 13, 1997).

D. Sample Motions

1. Request For Notice Of Intent To Offer Extraneous Conduct Under Rule 404(b), And Evidence Of Conviction Under Rule 609(f), And Evidence Of An Extraneous Crime Or Bad Act Under Article 37.07, § 3(g). [Appendix A]

2. Motion Requesting Notice Of Intent To Offer Extraneous Conduct Under Rule 404(b) And Evidence Of Conviction Under Rule 609(f) And Evidence Of An Extraneous Crime Or Bad Act Under Article 37.07, § 3(g). [Appendix B]

3. Letter To The Prosecutor Requesting Notice. [Appendix C]

X. PROCEDURE

A. Montgomery v. State

Montgomery v. State, 810 S.W. 2d 372 (Tex. Crim. App. 1990), was discussed at length in § VII, above. It is crucial to understanding how to make a record concerning extraneous offenses.

B. The Burden Of Proof

1. For years, the court has held that the standard for admissibility of extraneous offenses is "clear" proof, without clarifying what is meant by "clear" proof The logical interpretation is that clear proof means proof beyond a reasonable doubt. Thus, the

standard of admissibility for extraneous offense evidence is proof beyond a reasonable doubt. *Harrell v. State*, 884 S.W. 2d 154, 158-59 (Tex. Crim. App. 1994).

2. The standard for admissibility of extraneous offense evidence, even after the adoption of the Rules of Criminal Evidence, is proof beyond a reasonable doubt that the defendant committed the extraneous offense. *George v. State*, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994).

3. While the trial court might not be compelled to make a preliminary finding under Rule 104(a) as to the proof of extrinsic evidence, under Rule 104(b) it must nevertheless make an initial determination as to the relevancy of the evidence, dependent upon the fulfillment of a condition of fact. *Id.* at 159-160.

4. "We therefore hold that in deciding whether to admit extraneous offense evidence in the guilt/innocence phase of trial, the trial court must, under rule 104(b), make an initial determination at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." *Id.* at 160.

5. The United States Supreme Court has established a lesser standard for admission of extraneous offenses under the Federal Rules of Evidence. Accordingly, such evidence is admissible in federal court if the jury could conclude that appellant committed same, by a preponderance of the evidence. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988).

6. Appellate courts have reached different conclusions regarding the requirement that an extraneous act be proved beyond a reasonable doubt in the punishment phase. *Mitchell v. State*, 892 S.W.2d 213, 215 (Tex. App. -- Texarkana 1995, pet. granted), held that this is a preliminary requirement for the admissibility of the evidence and therefore, the judge, not the jury, makes the determination at the punishment phase of the trial. Two other appellate courts, however, addressed the same issue and reached the opposite conclusion, that is, that if properly requested the defendant is entitled to an instruction on the burden of proof for extraneous offenses during the punishment phase. *Guerra v. State*, 942 S.W.2d 28, 34 (Tex. App. Corpus Christi 1996); *Escovedo v. State*, 902 S.W.2d 109, 113 (Tex. App. -- Houston [1st Dist.] 1996, pet. granted).

C. <u>The Contemporaneous Objection</u>

1. <u>The General Rule</u>

a. The general rule, of course, requires a specific and timely objection to preserve error concerning the improper admission of evidence. See Tex. R. Crim. Evid. 103(a).

b. *Montgomery v. State*, 810 S.W.2d 372 (Tex. Crim. App.1990),

teaches that the optimal objection is that the evidence is inadmissible under Rule 404(b). Although imprecise, objections as to relevancy, or that the evidence is that of an extraneous offense or misconduct will ordinarily suffice. *Id.* at 387.

c. Although appellant never used the phrase "extraneous offense," his objection was sufficient because it provided the prosecutor and trial judge with notice that appellant was complaining of an extraneous offense. The prosecutor argued that the offense was admissible under the res gestae exception. "Since the record clearly reflects that all parties involved at trial were aware of appellant's complaint, we hold that his objection preserved the issue for appellate review." *Maynard v. State*, 685 S.W. 2d 60, 65 (Tex. Crim. App. 1985).

d. Since a Rule 404(b) demands a relevancy objection, a defendant is not required to explicitly object under Rule 402. *Rankin v. State*, S.W. 2d No. 0374-94 (Tex. Crim. App. 1996), slip op. 3.

2. Exceptions To The General Rule

a. The preferred way to preserve error is to object, to move for an instruction to disregard, and then to move for a mistrial. This is not always necessary, however. In *Fuller v. State*, 827 S.W. 2d 919 (Tex. Crim. App. 1992), *cert. denied*, 113 S.Ct. 3035 (1993), the court found that "the most important procedure is to press the specific objection to the point of obtaining an adverse ruling." There, appellant first moved for a mistrial and asked for a mistrial, which requests were overruled. Although appellant never objected, he preserved error by obtaining adverse rulings on the requests made. *Id.* at 926; *see Hadden v. State*, 829 S.W. 2d 838, 841-42 (Tex. App.--Corpus Christi 1992, pet. ref'd)(objection implicitly sustained when the trial court instructed the jury to disregard).

D. The Instruction To Disregard

1. Generally. An Instruction To Disregard Cures The Error

a. "[E]xcept in extreme cases, if the trial court sustains a timely objection and instructs the jury to disregard an improper response referring to an extraneous offense, the error is cured." Moody v. State, 827 S.W.2d 875, 890 (Tex. Crim. App. 1992).

2. But Not Always

a. In *Lockett v. State*, 744 S.W.2d 229 (Tex. App.--Houston [14th Dist.] 1987, pet. ref'd), the prosecutor asked appellant, "Isn't it a fact that you burglarized another home while you were on bond for this case?" The objection was sustained and the jury was instructed to disregard. The court of appeals found that the question was improper, and that the error was not cured or rendered in harmless, in light of the fact that appellant was young and had no prior convictions, but was still assessed the maximum term of imprisonment. The court also

noted that, "The harm is especially great where, as here, the improper question is phrased as an assertion of fact." *Id.* at 230-31.

b. Reversal is required where "the admission of the testimony concerning extraneous offenses was error of such a nature that could probably not be cured by instruction." *Govan v. State*, 671 S.W. 2d 660, 663 (Tex. App.--Houston [1st Dist.] 1984, pet. ref'd).

E. Rule 52(b)

1. Text

a. Rule 52(b) of the Texas Rules of Appellate Procedure provides, in pertinent part: "When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections."

2. Cases

a. In *Maynard v. State*, 685 S.W. 2d 60 (Tex. Crim. App. 1985), appellant made a motion in limine concerning extraneous offenses, and objected to same, both in the jury's presence, and outside its presence. The court first noted that motions in limine do not preserve error. Next, the court found that appellant's objection in the jury's presence "was too global to preserve error." Finally, though, and fortunately for appellant, the court found that appellant's objection outside the jury's presence was sufficient to preserve error. *Id.* at 64-65. The court also noted that the fact that appellant's objection in front of the jury differed from his objection outside the jury's presence did not waive the error. That occurs only when counsel affirmatively states "no objection." *Id.* at 65 n.3.

b. Appellant preserved error concerning the admission of an extraneous offense where he objected to same outside the presence of the jury, following a hearing on the voluntariness of his confession, and where he did not affirmatively state "no objection" when the evidence was later offered in the presence of the jury. *Wyle v. State*, 777 S.W. 2d 709, 715 n.5 (Tex. Crim. App. 1989).

c. An objection offered outside the presence of the jury was sufficient to preserve error concerning the later introduction of the evidence before the jury. *Bush v. State*, 628 S.W. 2d 441, 442 n.1 (Tex. Crim. App. 1982).

3. Sample Motion

a. Motion To Exclude Evidence Of Alleged Extraneous Misconduct. Pursuant To Rule 52(b). [Appendix D]

F. Motions In Limine.

1. A true motion in limine will not preserve error. *Maynard v. State*, 685 S.W. 2d 60, 64 (Tex. Crim. App. 1985).

2. "A motion to suppress 'eliminate[s] [evidence] from the trial of a criminal case.' A motion in limine merely requires a party to approach the trial judge before introducing or referring to certain evidence; the trial judge may, at that time, either exclude or allow the evidence." *State v. Monroe*, 813 S.W. 2d 701, 702 (Tex. App.--Houston [1st Dist.] 1991, pet. ref'd)(citations omitted).

3. Sample Motions

a. Motion In Limine Number One. [Appendix E]

b. Motion In Limine Number Two. [Appendix F]

G. The Running Objection

1. In *Ethington v. State*, 819 S.W. 2d 854 (Tex. Crim. App. 1991), appellant objected once, when the state's witness first began testifying about the extraneous, but not thereafter. The court of appeals relied upon a civil rule and held that the first objection was sufficient, without the need of counsel reurging his objection each time the witness mentioned the extraneous offense again. The court of criminal appeals disagreed. There are only two exceptions to the contemporaneous objection rule. The first is Rule 52(b), discussed in § E, above. The second is the so-called "continuing" or "running" objection. The court reiterated that the continuing objection is not only permissible, but that in some circumstances, it is actually desirable. Unfortunately for appellant here, though, appellant did not obtain a running objection. "Defense counsel's initial objection . . . should have been followed by further objections or a request for a "running" objection." Error was waived. *Id.* at 857-60.

2. A running objection was found sufficient to preserve error in *Nelson v. State*, 864 S.W. 2d 496, 498 (Tex. Crim. App. 1993), *cert. denied*, 114 S.Ct. 1338 (1994).

H. Curative Admissibility

1. Under the doctrine of curative admissibility, error is waived when the defendant offers the same evidence to which he earlier objected. *See Navaiz v. State*, 840 S.W.2d 415, 430 (Tex. Crim. App. 1992), *cert. denied*, 113 S.Ct. 1422 (1993).

2. If the defendant takes the stand to refute, deny, contradict or impeach evidence properly objected to, no waiver occurs. Generally, though, if, the defendant admits or confirms the truth of the evidence, then there is a waiver.

3. A slightly different rule applies with regard to extraneous offenses. Then, no waiver occurs when the accused testifies to the same facts which were earlier admitted over his objection. "This is sound policy because it is fair policy. An extraneous offense is collateral to the facts in issue at trial and is inherently prejudicial. That it actually took place does not affect its lack of relevance. To require the defendant to sit mute in the face of such harmful evidence to preserve the issue for appellate review is to unfairly hamstring the defendant at trial. Once the evidence is admitted, correctly or incorrectly, the defendant is compelled by the exigencies of trial to mitigate such inherently prejudicial evidence as best as he or she can." *Maynard v. State*, 685 S.W. 2d 60, 66 (Tex. Crim. App. 1985).

4. Appellant did not waive error concerning the improper admission of extraneous evidence of marijuana use, possession and sale, where he testified to rebut improperly admitted evidence that he was a dealer of methamphetamine. *Rogers v. State*, 853 S.W. 2d 29, 35 (Tex. Crim. App. 1993).

I. The DeGarmo Doctrine

1. By testifying at the punishment phase and admitting his guilt of the crime for which he has been convicted, a defendant can waive the right to complain on appeal about errors that arose at the first phase of the trial. "The law as it presently exists is clear that such a defendant not only waives a challenge to the sufficiency of the evidence, but he also waives any error that might have occurred during the guilt stage of the trial." *DeGarmo v. State*, 691 S.W. 2d 657, 661 (Tex. Crim. App. 1985)(emphasis supplied).

2. This "common-sense rule of procedure" does not deny defendant due process. *Bodde v. State*, 568 S.W. 2d 344, 348 (Tex. Crim. App. 1978).

3. The *DeGarmo* doctrine is alive and well. In *McGlothlin v. State*, 896 S.W. 2d 183 (Tex. Crim. App. 1995), various extraneous offenses were admitted at the guilt/innocence phase, over appellant's objection. Appellant did not testify at the first phase of the trial, but he did at punishment, at which time he admitted both the instant offense, as well as the extraneous offenses. On direct appeal appellant contended that the extraneous offenses were erroneously admitted. McGlothlin's case purports to re-examine the *DeGarmo* doctrine, and, after doing so, to reaffirm its validity. "After the complainant testified and the jury found appellant guilty, appellant testified at the punishment phase in support for his application for probation. Had appellant chosen to not testify, he would not be faced with the issue of waiver. However, when appellant admitted the charged offense the *DeGarmo* doctrine controlled and he waived all error committed during the guilt/innocence phase of his trial." *Id.* at 189 (citations omitted).

4. Error that occurs at punishment is not waived. Also, the court must carefully examine the elements of the offense to ensure that a judicial confession, was, in fact, given. *McGlothlin v. State*, 896 S.W. 2d at 188.

J. Limiting Instructions

1. General Rule

a. "When extraneous offenses are admitted for a limited purpose, the defendant is entitled, on timely request, to an instruction by the trial judge to the jury limiting the jury's consideration of the extraneous offenses to those purposes for which they are admitted. Failure to give a limiting instruction, upon timely request, is 'reversible error.'" *Abdnor v. State*, 871 S.W. 2d 726, 738 (Tex. Crim. App. 1994)(citations omitted); *see Crank v. State*, 761 S.W.2d 328, 347 (Tex. Crim. App. 1988).

b. Limiting instructions may lessen the prejudice from an extraneous offense. *Plante v. State*, 692 S.W. 2d 487, 494 (Tex. Crim. App. 1985).

c. "But where no limiting instruction is given, however, we must conclude that any prejudice resulting from introduction of the extraneous offense is unabated." *Abdnor v. State*, 871 S.W. 2d 726, 738 (Tex. Crim. App. 1994).

d. A limiting instruction will not cure error where "the evidence was clearly calculated to inflame the minds of the jury to the extent that the charge could not withdraw the impression the evidence made upon the jury." *Ecby v. State*, 840 S.W. 2d 761, 764 (Tex. App.--Houston [1st Dist.] 1992, pet. ref'd).

e. In *England v. State*, 887 S.W. 2d 902 (Tex. Crim. App. 1994), appellant raised the defense of entrapment. The court of criminal appeals found that certain extraneous offenses were admissible to rebut the notion that appellant had been induced to commit the instant offense, but were not admissible to show that the persuasion used was likely to cause a reasonable person to commit the offense. *Id.* at 914-15. In this situation, the appellant would be entitled to a limiting instruction under Rule 105(a) of the Texas Rules of Criminal Evidence, requiring the jury to limit its consideration of extraneous offenses to the issue of whether appellant engaged in the conduct charged because he was induced to do so by a law enforcement officer. Appellant would also be entitled to a limiting instruction which told the jury not to consider the same evidence for the purpose of whether the persuasion used was likely to cause an average law-abiding person to commit the offense. "Finally, the trial court should instruct the jury upon request that it is not to consider the evidence of 'other crimes, wrongs, or acts' in its deliberations of the primary question whether the accused in fact committed the alleged offense." Because the extraneous offense evidence was admissible only to rebut an element of the entrapment defense, the trial court should not have instructed the jury that it could consider such evidence "only . . . in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of the defendant, if any, in connection with the offense, if any, alleged against him in the indictment and for no other purpose." *Id.* at 915-16 n. 12.

f. An extraneous sexual assault against his daughter was not admissible to rebut appellant's implied theory of "frame-up." "[T]his 'frame-up' theory was not presented to the jury in the trial court's limiting instruction. Absent such additional instruction, there is no- way for an appellate court to know whether the jury properly applied the evidence of appellant's system' to rebut the weight or credibility of appellant's 'frame-up' theory or relied on it for an improper basis such as character conformity." *Owens v. State*, 827 S.W. 2d 911, 917 (Tex. Crim. App. 1992).

g. Although the court obviously intended to give a limiting instruction, in fact it gave a charge which authorized the use of an extraneous offense "in determining the guilt of the defendant." This charge aggravated the introduction of the extraneous offense. *Nance v. State*, 647 S.W. 2d 660, 663 (Tex. Crim. App. 1983).

h. "The State's argument that a limiting instruction suffices to tip the prejudicial effect/probative value balance in favor of admission might be well taken in a case in which we find the evidence probative to some issue which is in dispute at trial. However, if the evidence is admissible only for showing things not in dispute (*e.g.* identity and intent to commit theft), Rule 403 should dictate the evidence be excluded no matter what limiting instructions the court might attach." That was the case here, where intent and identity were not seriously contested and were proved by other evidence and were readily inferable from the acts themselves. *Castillo v. State*, 865 S.W. 2d 89, 96-97 (Tex. App.--Corpus Christi 1993, no pet.).

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

j. An instruction purporting to limit the jury's consideration of extraneous evidence to motive had no curative value where the evidence was not admissible to prove motive. *Escort v. State*, 713 S.W. 2d 733, 737-38 (Tex. App.--Corpus Christi 1986, no pet.).

k. When a limiting instruction is given, the trial judge should instruct the jury that the evidence is limited to whatever specific purpose the proponent advocated. A limiting instruction which names four separate purposes is not impermissibly broad where the evidence is relevant to the four purposes instructed on. Evidence of a prior murder was admissible to rebut appellant's defensive theory that he neither killed the complainant nor knew his co-defendant would kill him. *Taylor v. State*, 920 S.W. 2d 319, 322 (Tex. Crim. App. 1996).

l. The Tyler Court of Appeals held that a limiting instruction is not required when evidence is admitted as same transaction contextual evidence. *Alone v. State*, 935 S.W.2d 462, 466 (Tex. App. -- Tyler 1996); *see also Jackson v. State*, 927 S.W.2d 740, 743 (Tex. App. -- Texarkana 1996).

m. Trial counsel was ineffective for not seeking a limiting instruction on extraneous sexual offense when the state failed to prove a sexual offense occurred on the date charged. *Yzaguirre v. State*, 938 S.W.2d 129, 133 (Tex. App. -- Amarillo 1996).

n. A limiting instruction was not required in a driving while license suspended case for evidence of the appellant's driving record showing previous suspensions of the appellant's driver's license, because this evidence proved two of the three elements of the state's case, that appellant's license was suspended, and that appellant had knowledge of the suspension. The court analogized this to proving a prior criminal record, in that the state is only allowed to show the conviction and not any surrounding facts. Therefore, the record does not have to be proven beyond a reasonable doubt and the holding in *George* does not apply when proof of an underlying, separate offense is a required element of proof for the present offense. *Moore v. State*, 938 S.W.2d 521, 524 (Tex. App. -- Ft. Worth 1997).

2. Almanza v. State

a. *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984), is the single most important case interpreting jury instruction law. It will not tell you whether it is error to give or deny a particular charge. Once you determine that error was committed, however, Almanza will tell you whether the error requires reversal. It is a good place to begin the discussion because virtually every case discussed in this paper involves, at some stage, an Almanza analysis.

b. In *Almanza*, the court of criminal appeals re-examined 130 years of law on the question of fundamental error in the jury charge. Exhaustive historical analysis enabled the court to distill two different standards of review:

> After researching Texas statutory and decisional law from 1857 forward, we have concluded that Article 36.19 actually separately contains the standards for both fundamental error and ordinary reversible error. If the error in the charge was the subject of a timely objection in the trial court, then reversal is required if the error is "calculated to injure the rights of defendant," which means no more than that there must be some harm to the accused from the error. In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless.
>
> On the other hand, if no proper objection was made at trial and the accused must claim that the error was "fundamental," he will obtain a reversal only if the error is so egregious and created such harm that he "has not had a fair and impartial trial" -- in short "egregious harm."

> In both situations the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole.

Id. at 171. Thus, there are two tests to determine whether charge error requires reversal, depending on whether a proper objection to the charge was made. If objection was made, reversal is required if, in light of the record as a whole, some harm befell the appellant. If no proper objection was made, reversal is required only if the appellant suffered "egregious harm."

3. When Must The Limiting Instruction Be Given

a. This limiting instruction should be requested contemporaneously, at the time of the evidence is admitted, pursuant to Rule 105 of the Texas Rules of Criminal Evidence. *See* 8 M. McCormick & T. Blackwell, Texas Criminal Forms and Trial Manual, § 88.00 (Texas Practice 9th Ed. Supp. 1992); *see also Thompson v. State*, 795 S.W.2d 177, 178 (Tex. Crim. App. 1990)(Miller, J., joined by Clinton & Teague J.J., dissenting to dismissal of petition for discretionary review)(the trial judge who refuses contemporaneous instruction "runs the risk of being reversed for abuse of discretion should an appellate court find that the failure to timely instruct the jury resulted in harm").

b. In *Rankin v. State*, __S.W. 2d __, ___ No. 0374-94 (Tex. Crim. App. April 10, 1996), appellant requested a limiting instruction at the time the trial court admitted extraneous offenses. The trial court denied this contemporaneous instruction, instead giving the standard instruction later, in the court's charge to the jury. The court of criminal appeals held that this was error. A limiting instruction should curb the improper use of evidence, and should do so effectively as possible. "Working under these notions, logic demands that the instruction be given at the first opportunity. If limiting instructions impede the improper use of evidence, then an instruction given when the evidence is admitted limits that evidence to its proper scope immediately. An instruction given for the first time during the jury charge necessarily leaves a window of time in which the jury can contemplate the evidence in an inappropriate manner." *Id.* at slip op. 7-8. The court also held that, if requested, the limiting instruction should also be given again in the final jury charge. *Id.* at slip op. 9 n.3.

K. Appellate Review

1. In *Boutwell v. State*, 719 S.W. 2d 164 (Tex. Crim. App. 1985), appellant complained of the admission of extraneous offenses for the first time in a supplemental brief in the court of appeals. The court of criminal appeals recognized the general rule, at least at that time, that an issue raised for the first time in a supplemental brief is not properly before the court for review. Nonetheless, the court treated this ground as unassigned error and reviewed it, "because of the constitutional implications." *Id.* at 173. "Where the improper use of such

extraneous acts in the context of the instant case might well have influenced the outcome and affected the fundamental fairness of the trial in this particular case, we feel compelled to address the issue." *Id.*

XI. HARMLESS ERROR

A. General Rule

1. Tex. R. App. Proc. 81(b)(2) provides:

> If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment.

2. In *Harris v. State*, 790 S.W. 2d 568 (Tex. Crim. App. 1989), the court of criminal appeals recognized that it had "failed to articulate a coherent standard for determining when an error is harmless." So, it took that opportunity to come up with the following standard:

> In summary, a reviewing court in applying the harmless error rule should not focus upon the propriety of the outcome of the trial. Instead, an appellate court should be concerned with the integrity of the process leading to the conviction. Consequently, the court should examine the source of the error, the nature of the error, whether or to what extent it was emphasized by the State, and its probable collateral implications. Further, the court should consider how much weight a juror would probably place upon the error. In addition, the Court must also determine whether declaring the error harmless would encourage the State to repeat it with impunity. In summary, the reviewing court should focus not on the weight of the other evidence of guilt, but rather on whether the error at issue might possibly have prejudiced the jurors' decision-making; it should ask not whether the jury reached the correct result, but rather whether the jurors were able properly to apply law to facts in order to reach a verdict. Consequently, the reviewing court must focus upon the process and not on the result. In other words, a reviewing court must always examine whether the trial was an essentially fair one. If the error was of a magnitude that it disrupted the juror's orderly evaluation of the evidence, no matter how overwhelming it might have been, then the conviction is tainted. Again, it is the effect of the error and not the other evidence that

must dictate the reviewing court's judgment.

Id. at 587-88(finding the admission of two extraneous offenses to be harmless beyond a reasonable doubt); *accord, Lazcano v. State*, 836 S.W. 2d 654, 661-62 (Tex. App.--El Paso 1992, pet. ref'd)(finding the error harmful after a detailed *Harris* analysis); *Hadden v. State*, 829 S.W. 2d 838, 843-45 (Tex. App.--Corpus Christi 1992, pet. ref'd)(same).

3. "[O]nce error has been found, there is a presumption of error arising from the language of Rule 81(b)(2) itself. The reviewing court is then called upon to make its own analysis to determine whether it can consider the error to have been harmless 'beyond a reasonable doubt.' Tex. R. App. P. 81(b)(2). The State has no 'burden of proof or burden of persuasion' in the sense that it would if it bore the responsibility to come forth with arguments establishing the harmlessness of an error in order to prevail, but it will indeed suffer reversal on appeal if the reviewing court cannot determine after its examination of the record that an error was harmless beyond a reasonable doubt." *Mayes v. State*, 816 S.W. 2d 79, 88 (Tex. Crim. App. 1991).

4. The harmless error review "requires an evaluation of the entire record in a neutral, impartial, and even-handed manner, not in the light most favorable to the prosecution." *Vernon v. State*, 870 S.W. 2d 362, 363 (Tex. App.--Fort Worth 1994).

B. Cases In Which The Courts Have Found The Error Not Harmless

1. Where the state seeks admission of evidence for some limited purpose, but then argues in its summation that this evidence has a different, more inflammatory purpose, the court is more likely to find that the error in the admission of this evidence was not harmless. *Templin v. State*, 711 S.W. 2d 30, 34-35 (Tex. Crim. App. 1986). "It is clear that the evidence was not sought nor used solely in accordance with the State's stated purpose in requesting it. The prejudicial and inflammatory effect of the improper admission of this evidence was thus aggravated." *Id.* at 35.

2. In *Bordelon v. State*, 683 S.W.2d 9 (Tex. Crim.App.1985), the "determinative issue" was whether the erroneous admission of an extraneous offense was harmless. The court found that the evidence was not harmless. The court first then noted that the evidence was sufficient, but not overwhelming. The court then examined the prosecutor's argument at length, finding that the argument seriously compounded the error. *Id.* at 12- 13.

3. Although the evidence was harmless at the guilt/innocence phase, it was not harmless at the punishment phase, in light of the fact that appellant, who was statutorily eligible for probation, was sentenced to seven years imprisonment. *Maynard v. State*, 685 S.W. 2d 60, 67-68 (Tex. Crim. App. 1985).

4. Where it appears from the evidence and the arguments of the state that

appellant was prosecuted in part for the extraneous offenses, the court cannot say that the error was harmless. *Stanley v. State*, 606 S.W. 2d 918, 920-21 (Tex. Crim. App. 1980).

5. "Although appellant was clearly eligible for probation, she received a ten-year prison sentence from the jury. With this in mind we think it reasonable that the introduction of the extraneous offenses contributed to the punishment assessed, if not the actual conviction." *Clark v. State*, 726 S.W. 2d 120, 124 (Tex. Crim. App. 1986).

6. "As the rules contemplate, and our discussion of the admission of extraneous offense evidence under Rule 403 shows, extraneous offense evidence is inherently prejudicial. When a trial court admits such evidence over objection for no good purpose, a reviewing court is loath to blind itself to that prejudicial effect and find the error harmless." *Castillo v. State*, 865 S.W. 2d 89, 97 (Tex. App.--Corpus Christi 1993, no pet.).

7. It is unreasonable to expect that the jury, which heard that appellant had been run off from another school for messing with a student, could properly apply the law to the facts. "The reference to this statement by the State in closing argument highlighted the statement, and evidence of other extraneous acts did not diminish its damage." *Reynolds v. State*, 856 S.W. 2d 547, 551 (Tex. App.--Houston [1st Dist.[1 1993).

8. "Because the evidence of the four extraneous acts served no other purpose than as proof of Hill's bad character and that the alleged offense was consistent therewith, we cannot say it did not contribute to his conviction." *Hill v. State*, 852 S.W. 2d 769, 771 (Tex. App.--Fort Worth 1993, pet. ref'd).

9. "Evidence of this type is presumptively inadmissible under the Rules of Criminal Evidence. It is 'inherently prejudicial.'" *Kelly v. State*, 828 S.W. 2d 162, 166 (Tex. App.--Waco 1992, pet. ref'd).

10. "The admission of improper evidence puts a heavy burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error did not contribute to the conviction or the punishment assessed. We cannot say from the record before us that the State has met its heavy burden." *Hargraves v. State*, 738 S.W. 2d 743, 749 (Tex. App.--Dallas 1987, pet. ref'd)(citations omitted).

11. "Although the evidence of appellant's guilt was overwhelming,- t he punishment she received was the maximum allowable in this instance." *Escort v. State*, 713 S.W. 2d 733, 738 (Tex. App.--Corpus Christi 1986, no pet.).

12. Evidence is not harmless where the state argued that extraneous offenses showed "what this man is capable of." By this argument the state erroneously used the evidence to show appellant's character and to suggest that he acted in conformity therewith. *Zuliani v. State*, 903 S.W. 2d 812, 828 (Tex. App.--Austin 1995).

13. Extraneous sexual misconduct is "inherently inflammatory," and in this case had the effect of prejudicing any defense raised by appellant. Additionally, the court noted that the state had the benefit of two decisions from appellate courts which condemned this sort of evidence. One of those cases involved the same prosecuting agency. *Cooper v. State*, 901 S.W. 2d 757, 761 (Tex. App.--Beaumont 1995), pet. dism'd, improvidently granted, 933 S.W.2d 495 (Tex. Crim. App. 1976).

14. In *Castillo v. State*, 910 S.W. 2d 124, 128 (Tex. App.--El Paso 1995), the court of appeals reversed even though the trial court instructed the jury that the evidence was admitted only to prove intent. Where the state utilized extraneous offense, not to show intent, but to demonstrate that appellant's conduct conformed to his character, the court is unable to say that the error was harmless beyond a reasonable doubt. *Id.*

C. Cases In Which The Courts Have Found The Error Harmless

1. Although the trial court erred in admitting background contextual evidence which established that appellant was housed in an administrative segregation wing at TDC, the error was harmless beyond a reasonable doubt because other evidence was admitted without objection which proved the same fact that the inadmissible evidence sought to prove. *Mayes v State,* 816 S.W. 2d 79, 88 (Tex. Crim. App. 1991).

2. "In light of appellant's admission to this offense, we are persuaded beyond a reasonable doubt that the error in admitting evidence of the aggravated bank robbery and the burglary did not contribute to appellant's conviction." Appellant's only defense to capital murder was self-defense, and self-defense was not shown as a matter of law. *Lockhart v. State*, 847 S.W. 2d 568, 573 (Tex. Crim. App. 1992), *cert. denied*, 114 S. Ct. 146 (1993).

3. In *Clark State*, 722 S.W. 2d 14, 15 (Tex. App.--Houston [1st Dist.] 1986, no pet.), the state prosecuted appellant for possession of cocaine, and introduced evidence that she was caught in the act of burglarizing a bank. Although error, the error was harmless. The cocaine was found in her bra, thus constituting overwhelming evidence of guilt. And, her punishment -- 25 years -- was the minimum she could have received as a habitual offender. *Id.* at 16.

4. In *Jones v. State*, 587 S.W. 2d 115, 119 (Tex. Crim. App. 1978), the state put on the extraneous evidence before the alibi defense was raised, and was therefore premature. This error, however, was rendered harmless when appellant ultimately did put on his alibi defense. *Id.* at 120.

5. Erroneous admission of two extraneous acts of sexual misconduct with the child victim in the case was harmless because such evidence would be admissible on retrial under Texas Code of Criminal Procedure art. 38.37. *Massey v. State*, 933 S.W.2d 582, 588 (Tex. App. -- Houston [1st Dist.] 1996).

D. Instructions To Disregard

1. "[T]estimony referring to or implying extraneous offenses allegedly committed by the defendant may be rendered harmless by the trial court's instruction to disregard." *Thompson v. State*, 612 S.W. 2d 925, 928 (Tex. Crim. App. 1981).

2. A witness's inadvertent reference to an extraneous offense is generally cured by a prompt instruction to disregard. *Sperling v. State*, 924 S.W.2d 722, 725 (Tex. App. -- Amarillo 1996).