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Protecting Your Client?s Conduct While Admitting the Accuser?s: Texas Rules of Evidence 403, 404, 412, and 609

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In sexual offense cases?particularly those involving an alleged crime against a child?the defense is almost always playing on an uneven field. Special rules of admissibility of evidence favor the prosecution. At trial, the defense often faces a critical challenge of trying to keep out evidence of a client?s extraneous conduct. In some cases, the defense may battle to admit evidence of an accuser?s own sexual acts. The slanted rules of admissibility and procedure make these contests difficult to win, but not always impossible. This article addresses how to resist a prosecutor?s effort to admit into evidence your client?s alleged extraneous conduct, while fighting for admissibility of an accuser?s own relevant sexual acts.

Law of Admissibility in Child Sex Offenses

The primary tool that prosecutors use to offer into evidence a defendant?s extraneous, sexual conduct is Tex. Code Crim. Pro. Art. 38.37 (the ?Article?). As discussed below, the Article, entitled ?Evidence of Extraneous Offenses or Acts,? is essentially a two-pronged statute. The first prong applies to any prosecution for commission, attempt, or conspiracy to commit the following types of Texas Penal Code cases, if perpetrated against *a childunder **17 years of age** at the time of the alleged offense or act*: Chapter 21 (Sexual Offenses),[1] Chapter 22 (Assaultive Offenses), and Section 25.02 (Prohibited Sexual Conduct). Tex. Code Crim. Pro. Art. 38.37, Sec. 1 (a) (1). The first prong also applies to prosecutions for commission, attempt, or conspiracy to commit any of the following types of types of Penal Code offenses, if committed against *a person younger than **18 years of age** at the time of the alleged offense or act*: Section 43.25 (Sexual Performance by a Child), Section 20A.02 (a) (7) or (8) (relating to Child Trafficking), or Section 43.05 (a) (2) (Compelling Prostitution). Tex. Code Crim. Pro. Art. 38.37, Sec. 1 (a) (2).

The first prong of the Article mandates: ?Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs or acts committed by the defendant ***against the child who is the victim of the alleged offense*** [for which the defendant is on trial] . . . shall be admitted for its bearing on relevant matters, including: (1) the state of mind of the defendant and the child; and (2) the previous and subsequent relationship between the defendant and the child.? Tex. Code Crim. Pro. Art. 38.37, Sec. 1 (b) (emphasis added). Because of the broad and nearly unrestricted language relating to admissibility of a defendant?s extraneous conduct ***committed against thesame child who is the alleged victim of the charged offense(s), for which the defendant is on trial***, coupled with the lack of a statutorily required gatekeeping hearing, it is extremely difficult to keep out evidence of your client?s extraneous sexual conduct. Although the defense can and should object on federal and Texas constitutional grounds,2 as well as Tex. R. Evid. 403, the best chance for excluding a defendant?s extraneous sexual conduct in this instance may be to argue *improper notice*. Article 38.37, Sec. 3 provides: ?The state shall give the defendant notice of the state?s intent to introduce in the case in chief evidence described by Section 1 or 2 [i.e., the first two sections of the Article] not later than the 30th day before the date of the defendant?s trial [in the same manner as the state is required to give notice under Rule 404 (b), Texas Rules of Evidence].? Tex. Code Crim. Pro. Art. 38.37, Sec. 3.

In order to argue improper notice, the defense must first request notice under the statute. The easiest way to do this is to send the prosecutor or district attorney?s office handling the case something in writing (such as a letter) requesting ?notice? (or ?notice of evidence of extraneous offenses or acts?) under Article 38.37 of the Texas Code of Criminal Procedure. If you send your request by fax, make sure you keep a copy of the fax transmission receipt. If you send by email, ask for a reply acknowledging receipt of your email. For good measure, you may wish to file the request and the receipt or acknowledgment with the District Clerk, so that your judge will have convenient access to the proof that you need to show you made a proper request and the state received it.

Next, you may need to cite relevant case authority. In *Buchanan v. State*, 911 S.W.2d 11 (Tex. Crim. App. 1995), the Court of Criminal Appeals ruled that a state?s open file policy (i.e., that the defendant knew or should have known of the existence of the alleged extraneous conduct) did not satisfy the requirement that the state provide notice in advance of its intent to use in its case in chief evidence of other crimes, wrongs, or acts under Tex. R. Evid. 404 (b). Specifically, the Court held that ?[t]he 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.? *Buchanan*, 911 S.W.2d at 15; *cf. Lara v. State*, 513 S.W.3d 135, 140?43 (Tex. App.?Houston [14th Dist] 2016, no pet.) (Erroneous admission of Article 38.37 extraneous conduct evidence, due to state?s lack of proper notice to the defense, was non-constitutional error. Additionally, the error (if any) was harmless, because Defendant only complained of surprise that the state planned to *introduce* evidence of extraneous conduct in guilt-innocence (not surprise of *the existence* of extraneous conduct evidence); did not ask for a continuance; and did not establish harm?i.e., explain to the trial court how defendant?s trial strategy would have differed had he known of state?s intent to introduce extraneous conduct.).

To give yourself the best chance of succeeding on an improper or insufficient notice argument, and to ensure that your objection is preserved for appeal, you should object to admission of Article 38.37 extraneous conduct evidence and do the following, in sequence: (1) request that the evidence be suppressed; (2) if suppression request is overruled, consider requesting a mistrial; (3) if you don?t request a mistrial or your request is overruled, ask for a continuance in order to allow you to investigate the extraneous conduct allegations and incorporate your findings into your defense strategy (be prepared to state how long you will need and, if the judge overrules your request for a continuance, try to get the judge to state *on the record* that he or she will not grant a continuance of *any* length of time); and (4) clearly state on the record how your client will be harmed if the Article 38.37 evidence is admitted. Explain how your defense might have changed and how, for example, you would have conducted *voir dire* differently had you known the Article 38.37 extraneous conduct evidence would have been admitted. To be doubly safe, ask for continuing or ?running? objections on all the grounds you have asserted.

The second prong of Article 38.37 may offer a slightly better chance of excluding your client?s alleged extraneous conduct in a child sex crime case, if only because the second prong requires the trial court judge to examine the strength of the evidence, in a hearing outside the presence of the jury, *before* the evidence may be admitted. *See* Tex. Code Crim. Pro. Art. 38.37, Sec. 2-a (1) & (2).

Article 38.37, Section 2, applies only to the trial of a defendant for: ?(1) an offense under any of the following provisions of the Penal Code: (A) Section 20A.02, if punishable as a felony of the first degree under Section 10A.02(b)(1) (Sex Trafficking of a Child), (B) Section 21.02 (Continuous Sexual Abuse of Young Child or Children), (C) Section 21.11 (Indecency With a Child), (D) Section 22.011(a)(2) (Sexual Assault of a Child), (E) Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child), (F) Section 33.021 (Online Solicitation of a Minor), (G) Section 43.25 (Sexual Performance by a Child), or (H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code; or (2) an attempt or conspiracy to commit an offense described by Subdivision (1).? Tex. Code Crim. Pro. Art. 38.37, Sec. 2.

Strength of Evidence Test and Rule 403

One apparent difference between Sections 1 and 2 of Article 38.37 (the two prongs) is that they appear to cover different offenses. However, a close look at the statute reveals some overlap between the two sections. It would be more accurate to say that Section 1 is broader than Section 2, covering virtually all of the serious sexual conduct listed in Section 2, as well as some less serious and even some non-sexual conduct. Another difference, as previously mentioned, is that Section 2?s extraneous conduct may ***only*** be admitted into evidence after the trial judge ?(1) determine[s] that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt, and (2) conduct[s] a hearing out of the presence of the jury for that purpose.? Tex. Code Crim. Pro. Art. 38.37, Sec. 2-a (1) & (2). Finally, an important distinction between Sections 1 and 2 is that Section 1 applies to extraneous conduct with the *same* child, the complainant in the charged case(s). Tex. Code Crim. Pro. Art. 38.37, Sec. 1 (b) (?committed by the defendant against *the child who is the victim of the alleged offense*?) (emphasis added). Section 2 applies to extraneous conduct with a *different* child. Tex. Code Crim. Pro. Art. 38.37, Sec. 2 (b) (?evidence that the defendant has committed a ***separate*** offense?) (double emphasis added).

So, putting aside any potential issues relating to a constitutional challenge (which will likely fail)3 and improper notice (which can be argued during trial, at the time the evidence is offered), the defense may have a chance to keep out Section 2 extraneous conduct (involving a different child) by requesting the trial court to conduct a ?strength of evidence? analysis outside the presence of the jury.4 Additionally, assuming the trial court determines during this gatekeeping hearing that the evidence ?will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt,?5 the defense should use the hearing as an opportunity to advance a Rule 403 argument. The relevant factors for a trial court in determining whether the prejudice of alleged extraneous conduct in a child sex abuse case substantially outweighs its probative value include: ?(1) how compellingly the extraneous-offense evidence serves to make a fact of consequence more or less probable?a factor that is related to the strength of the evidence presented by the [state] to show the defendant in fact committed the extraneous offense; (2) the potential the other offense has to impress the jury ?in some irrational but nevertheless indelible way?; (3) the time the [state] will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and (4) the force of the proponent?s need for this evidence to prove a fact of consequence, i.e., whether the proponent has other probative evidence available to him to help establish this fact, and whether this fact is related to an issue in dispute.? *Burke v. State*, 371 S.W.3d 252, 258 (Tex. App.?Houston [1st. Dist.] 2011, pet. ref?d, untimely filed) (citing *Mozon v. State*, 991 S.W.2d 841, 846-47 (Tex. Crim. App. 1999)).

Adult Sex Crime Cases

Article 38.37 of the Texas Code of Criminal Procedure does not apply to adult sex crime cases. Therefore, the defense is free to argue anything and everything: Constitutional challenges to the evidence, improper notice, plus violations of Texas Rules of Evidence, including 402 (relevance); 403 (unfair prejudice); and 404 (other crimes, wrongs, acts). If the alleged extraneous conduct is in the form of a prior conviction, look to Texas Rule of Evidence 609 to determine whether the prosecution can establish admissibility, in the event your client elects to testify. *See Theus v. State*, 845 S.W.2d 874 (Evidence of prior felony arson conviction was not admissible to impeach defendant charged with possessing drugs.).

Texas Rape Shield Law

In Texas, as in other states, evidence of a complainant?s previous sexual conduct is generally inadmissible in a criminal prosecution for sexual assault, aggravated sexual assault, or attempt to commit sexual or aggravated sexual assault. Tex. R. Evid. 412. Specifically, the trial court may not admit ?reputation or opinion evidence of a [complainant?s] past sexual behavior; or specific instances of a [complainant?s] past sexual behavior.? *Id*. at (a). There are, however, exceptions to this rule. ?Evidence of specific instances of a [complainant?s] past sexual behavior is admissible if: (1) the court admits the evidence in accordance [with procedures relating to proffering the evidence outside the presence of the jury and sealing the record] and . . . (2) the evidence: (A) is necessary to rebut or explain scientific or medical evidence offered by the prosecutor, 6 (B) concerns past sexual behavior with the defendant and is offered by the defendant to prove consent, (C) relates to the [complainant?s] motive or bias, (D) is admissible under [Texas Evidence] Rule 609, or (E) is constitutionally required to be admitted; and (3) *the probative value of the evidence outweighs the danger of unfair prejudice.*7 *Id*. at (b) (emphasis added).

In *Hammer v. State*, the Texas Court of Criminal Appeals (CCA) held that evidence related to a child complainant?s anger toward the defendant (her father), after he took her to a hospital for a sexual-assault examination after she ran away from home was admissible to show the complainant?s ***motive*** to falsely accuse the defendant of sexual molestation. *See Hammer v. State*, 296 S.W.3d 555, 567?69 (Tex. Crim. App. 2009). Evidence of the complainant?s previous sexual behavior was contained in medical records of a sexual-assault examination. *Id*. The CCA ruled that the probative value of the medical records, as well as the complainant?s statements to a witness that her sexual activities when she ran away from home were consensual and not assaultive (as she had falsely reported to a nurse), was not substantially outweighed by the danger of unfair prejudice. *Id*. at 568?569. Additionally, the CCA held that the trial court abused its discretion by preventing defendant?s attorney from cross-examining the complainant about her allegations that ?all of her mother?s boyfriends had sexually molested her,? an incident about being held at knife point by five men, and the complainant?s statements concerning a purported sexual assault by a third party. *Id*. at 570. The CCA specifically noted that evidence of the child complainant?s statements to others that she had been sexually molested by her mother?s boyfriends, and that she lied to her grandmother about being held at knife point by five men who threatened to rape her, was admissible under the ?Doctrine of Chances.? *Id*. at 565?570.8 Citing ?Wigmore?s doctrine of chances,? the CCA observed that it was ?highly unlikely that [the complainant] was molested by all of her mother?s boyfriends.? *Id*. at 569. ?A rational factfinder might . . . reasonably conclude that at least some of these accusations, if not all, were false.? *Id*.

In addition to any applicable exceptions set forth in Tex. R. Evid. 412, which exceptions allow for admission into evidence of the complainant?s previous sexual behavior, the defense should argue ?Doctrine of Chances? whenever a complainant?s specific instances of conduct (such as an unfounded or false allegation of sexual abuse against a third party) is similar to the complainant?s allegations in the case for which your client is on trial.

Offering Rule 412 Evidence

There are several things to keep in mind when offering Rape Shield Law (Tex. R. Evid. 412) evidence. First, the statute *only* applies to cases involving prosecutions for sexual assault, aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault. Tex. R. Evid. 412 (a). This does not mean that evidence of a complainant?s sexual reputation, or opinion evidence regarding a complainant?s sexual reputation or past sexual behavior, or specific instances of the complainant?s past sexual

conduct, is automatically admissible. It only means you do not have to follow the Rule 412 admissibility and procedure guidelines for offering evidence of a complainant?s past sexual conduct. Be prepared to argue why the proffered evidence is relevant and admissible under other Rules of Evidence.

Second, be aware that ?before offering any evidence of [a complainant?s] past sexual behavior, [the defense attorney] must inform the court outside the jury?s presence.? Tex. R. Evid. 49 (c). ?The court must then conduct an in camera hearing, recorded by a court reporter, and determine whether the proposed evidence is admissible.? *Id*. ?The defendant may not refer to any evidence ruled inadmissible without first requesting and gaining the court?s approval outside the jury?s presence.? *Id*. Finally, know that the ?court must preserve the record of the in camera hearing, under seal, as part of the record.?10 *Id*. at (d).

Conclusion

One of the biggest mistakes a defense lawyer can make when arguing to keep out evidence of a client?s alleged extraneous conduct, or when fighting to admit into evidence a complainant?s past sexual conduct, is to assume that the slanted rules of evidence and procedure have rendered the situation hopeless. It is true that you will not always win your arguments and you may not always prevail at trial. However, a working knowledge of the rules, combined with a persistent and tenacious approach in applying them, will give you the best chance for success at trial or (if necessary) beyond.

Endnotes

1. These include Continuous Sexual Abuse of a Young Child or Children, Public Lewdness, Indecent Exposure, Bestiality, Indecency with a Child, Improper Relationship Between Educator and Student, and a few others. Tex. Pen. Code § 21.01, et seq.

2. *See, e.g.*, U.S. Const. 6th Amend. (rights of confrontation and effective assistance of counsel), Art. 1, Sec. 10, of Tex. Const. (Texas counterpart to Sixth Amendment), and Due Process of Law provision of United States Constitution and Due Course of Law provision of Texas Constitution; *see also Alvarez v. State*, 491 S.W.3d 362, 367?69 (Tex. App.?Houston [1st Dist.] 2016, pet. ref?d) (Defendant failed to preserve for appellate review claim that statute, which allowed State to provide evidence of other children defendant had assaulted, violated his right to due process.).

3. *See Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002) (In determining whether the prejudicial effect of C.C.P. Article 38.37 evidence substantially outweighs its probative value, under Rule 403, trial court should consider the following factors: ?1. how compellingly evidence of the extraneous offense serves to make a fact of consequence more or less probable; 2. the extraneous offense?s potential to impress the jury in some irrational but indelible way; 3. the trial time that the proponent will require to develop evidence of the extraneous misconduct; and 4. the proponent?s need for the extraneous transaction evidence.?).

4. *See Harris v. State*, 475 S.W.3d 395, 398?403 (Tex. App.?Houston [14th Dist.] 2016, pet. ref?d) (Article 38.37 of Texas Code of Criminal Procedure found constitutional.).

5. Nothing in Article 38.37 requires the judge to conduct a strength of evidence analysis ***during*** trial. The rule only requires the analysis be conducted ?out of the presence of the jury.? Tex. Code Crim. Pro. Art. 38.37, Sec. 2-a (2). Therefore, the defense (and the state) may ask the court to conduct a strength of evidence test, as well as any constitutional challenge and a Rule 403 analysis, ***before*** trial. A creative way to do that might be for the defense (either by itself or jointly with the state) to file a ?Motion to Declare Admissibility of Extraneous Conduct Evidence? and request a pretrial hearing. The defense could benefit from obtaining a pretrial ruling by?depending on the judge?s ruling?either adjusting its trial strategy or perhaps avoiding a trial altogether. The state might benefit in the same ways as the defense, as well as not losing ?momentum? during trial by having to break up its case-in-chief by conducting a hearing outside the presence of the jury. Finally, the court might benefit by shortening (or perhaps avoiding) a trial and wasting less of a jury?s time.

6. Tex. Code Crim. Pro. Art. 38.37, Sec. 2-a (2).

7. *See, e.g., Miles v. State*, 61 S.W.3d 682, 686?87(Tex. App.?Houston [1st Dist.] 2001, pet. dism?d) (Complainant?s prior statements regarding sexual intercourse with someone other than defendant should have been admitted. Witnesses could testify to the complainant having sex with another individual prior to her medical evaluation.).

8.Note the ?modified Rule 403 balancing test.? It is not whether the probative value of the evidence is *substantially* outweighed by the danger of unfair prejudice. The question is whether the probative value of the evidence outweighs the danger of unfair prejudice. Therefore, once the defense establishes a legitimate purpose to offer the evidence of a complainant?s previous sexual behavior, the trial court applies a simple balancing test to determine admissibility. Although this standard does not necessarily favor admissibility of the evidence, it is not accurate to say that the Rape Shield Rule favors inadmissibility of evidence, once a legitimate purpose has been established.

9. For good analysis of the ?Doctrine of Chances,? *see Hammer*, 296 S.W.3d 555, 565?570 (Tex. Crim. App 2009); *see also De La Paz v. State*, 279 S.W.3d 336 (Tex. Crim. App. 2009) (Defendant?s involvement in two previous instances of conduct?similar to the charged offenses of tampering with evidence and aggravated perjury in a drug case?were admissible under Doctrine of Chances.).

10. For discussion regarding the unsealing of a Rule 412 hearing record, *see Dees v. State*, 508 S.W.3d 312, 314?16 (Tex. App.?Ft. Worth 2013, pet. dism?d).
