



Extraneous Acts

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STATE BAR OF TEXAS ANNUAL MEETING

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NOT JUST OFFENSES

- Crimes
 - Wrongs
 - Acts
 - Misconduct
- 

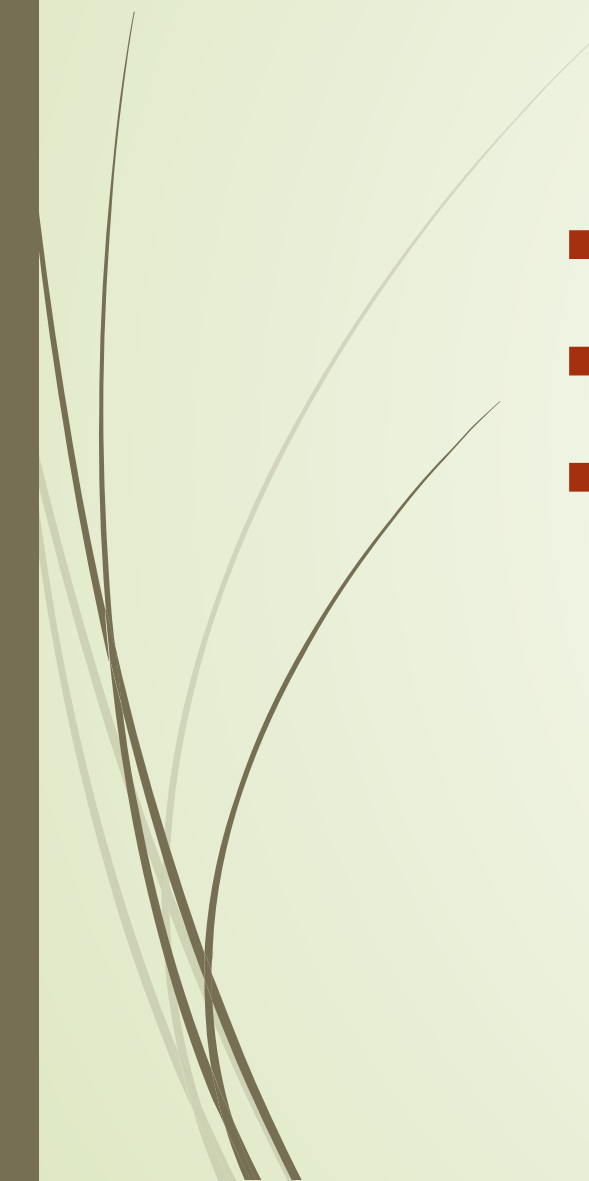


WHAT IT IS

- ▶ Extrinsic to charge
 - ▶ Not set out in charging instrument or
 - ▶ Not integral part of crime
- 



WHAT IT IS NOT

- ▶ Not character conforming
 - ▶ Not propensity
 - ▶ Not general criminality
- 




EXAMPLES INCLUDE

- Identity
 - Motive
 - Opportunity
 - Common plan
 - Knowledge
 - Rebuttal
- 




APPLICABLE TO

- Both phases of trial
 - Both parties
 - Both criminal & civil
- 

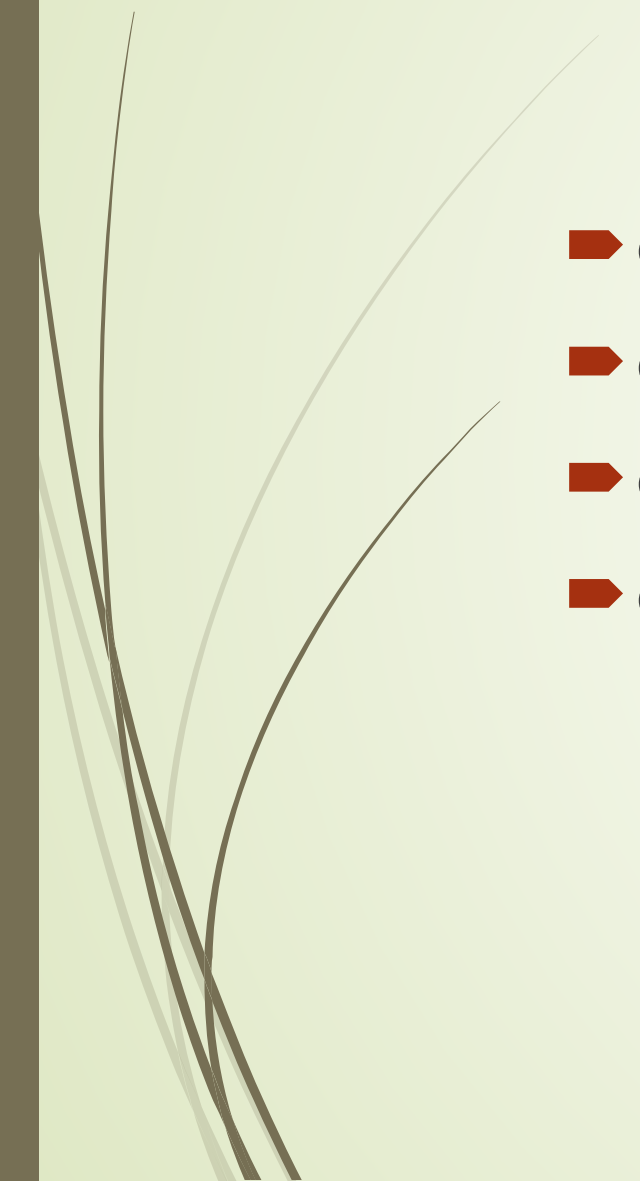


RULES OF EVIDENCE (TRE)

- 401: “relevant”
 - 402: admissibility
 - 403: “balancing test”
 - 404: character evidence
- 



STATUTES (TCCP)

- art. 37.07: punishment
 - art. 37.071: capital punishment
 - art. 38.36: murder
 - art. 38.37: assault of child
- 



TEXAS CASE LAW

- ▶ *Albrecht v. State*, 486 SW2 97 (TCA 1972)
- ▶ *Montgomery v. State*, 810 SW2 372 (TCA 1990)
- ▶ *Casey v. State*, 215 SW3 870 (TCA 2007)



FEDERAL CASE LAW

- ▶ *US v. Beechum*, 582 F.2 898 (5th Cir. 1978) (*en blanc*)



REFERENCES

- 1 Steven Goode, et al., Texas Practice: Guide to the Texas Rules of Evidence: Civil and Criminal (2nd ed. 1993 & Supp. 2017)
- C. McCormick, McCormick on Evidence (7th ed. 2016)
- Cathy Cochran, Texas Rules of Evidence Handbook (Jones McClure 7th ed. 2007-2008)
- O'Connor's, Texas Rules of Evidence Handbook 2018



REFERENCES, cont.

- ▶ Articles by:
 - ▶ Cathy Burnett
 - ▶ Cathy Cochran
 - ▶ Rusty Hardin
 - ▶ Jack Strickland



CONFRONTATION CLAUSE V. TRE

- May be in conflict
 - See, *Lopez v. State*, 18 SW3 220 (TCA 2000)
- 



BURDEN OF PROOF

- BARD
- Higher than for other evidence
- See, *Fischer v. State*, 268 SW3 552 (TCA 2008)



RULE 401

- ▶ Key: “Any fact of consequence”
- ▶ “Small nudge toward proving/disproving”
- ▶ *Gonzalez v. State*, ___ SW3 ___ (TCA PD-0181-17, 4/11/2018) 2018 WL 1736689



RULE 402

- Relevant evidence = admissible
 - Irrelevant evidence = inadmissible
- 



RULE 403

- ▶ Even if relevant, may still exclude if:
 - ▶ Probative v. unfair prejudice
 - ▶ Confusion of issues
 - ▶ Misleads jury
 - ▶ Undue delay
 - ▶ Cumulative



RULE 404 (b)

- Speaks directly to extraneous act evidence
- Non-exclusive list
- Notice provision (criminal cases)
- May take place before/after charged conduct
- *Santellan v. State*, 939 SW2 155 (TCA 1997)




ARTICLE 37.07, TCCP

- At punishment, any evidence court deems relevant is admissible
- 37.07 specifically exempts TRE 404 & 405



ARTICLE 37.071, TCCCP

- All evidence admissible absent unfair surprise
- TRE 404(b) does not apply



ARTICLE 38.36, TCCP

- Murder
- Available to either party
- All relevant facts, circumstances
- Surrounding killing
- Concerning previous relationship
- Showing state of mind
- TRE 404(b) & 403 still apply
- *Garcia v. State*, 201 SW3 695 (TCA 2006)

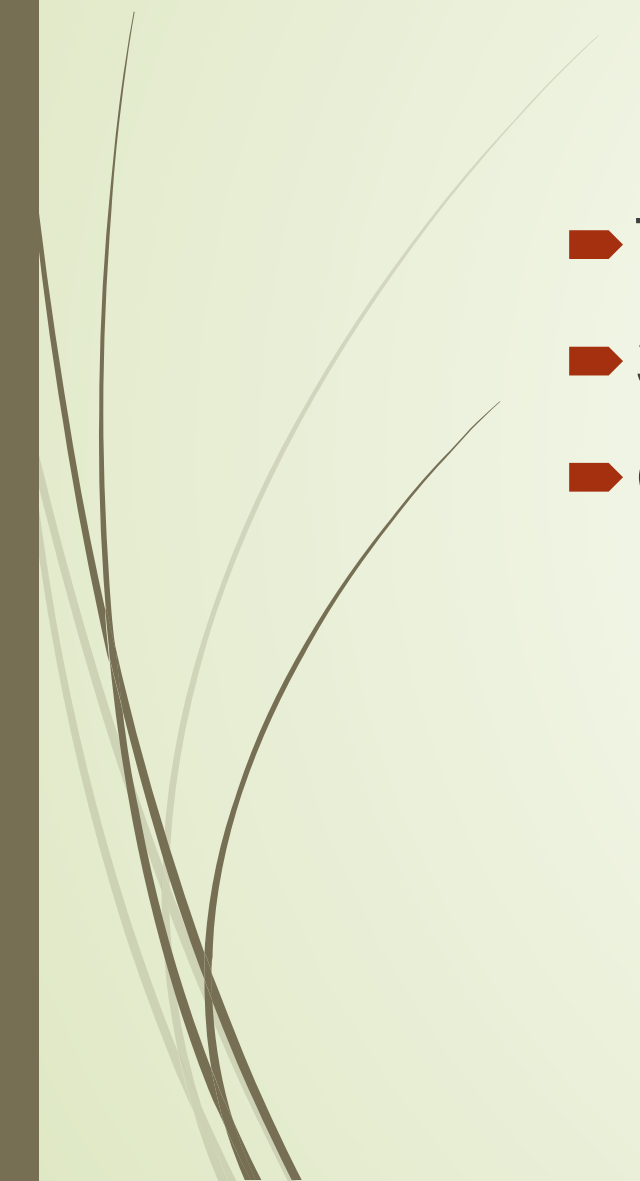


ARTICLE 38.37, TCCP

- ▶ Child assault, sex offenses
- ▶ Extraneous acts between defendant & child victim or
- ▶ Between defendant & any child victim (2013 amend.)
- ▶ See statute for
 - ▶ Categories of offenses
 - ▶ Age of victims
 - ▶ Applicable prosecutions
- ▶ Statute specifically exempts TRE 404(b) & 403



ARTICLE 38.37 TCCP, NOTICE PROVISION

- ▶ Timelier notice required
 - ▶ 30 days before trial
 - ▶ Contrast with 404(b)
- 



CONSTITUTIONALITY OF ART. 38.37, TCCP

- ▶ Post-2013 amendment upheld
- ▶ *Bezarra v. State*, 485 SW3 133 (Tex. App. –Amarillo, pet. ref'd 2016), cert. denied, 137 S. Ct. 495 (2016)



REBUT DEFENSIVE THEORY

- ▶ May be admissible if it makes defensive evidence less probable
- ▶ *Martin v. State*, 173 SW3 463 (TCA 2005)



REBUT INSANITY DEFENSE

- ▶ May be admissible to rebut insanity defense
- ▶ *Hudson v. State*, 112 SW3 794 (Tex. App. –Houston [14th Dist.] 2002), pet. ref'd.

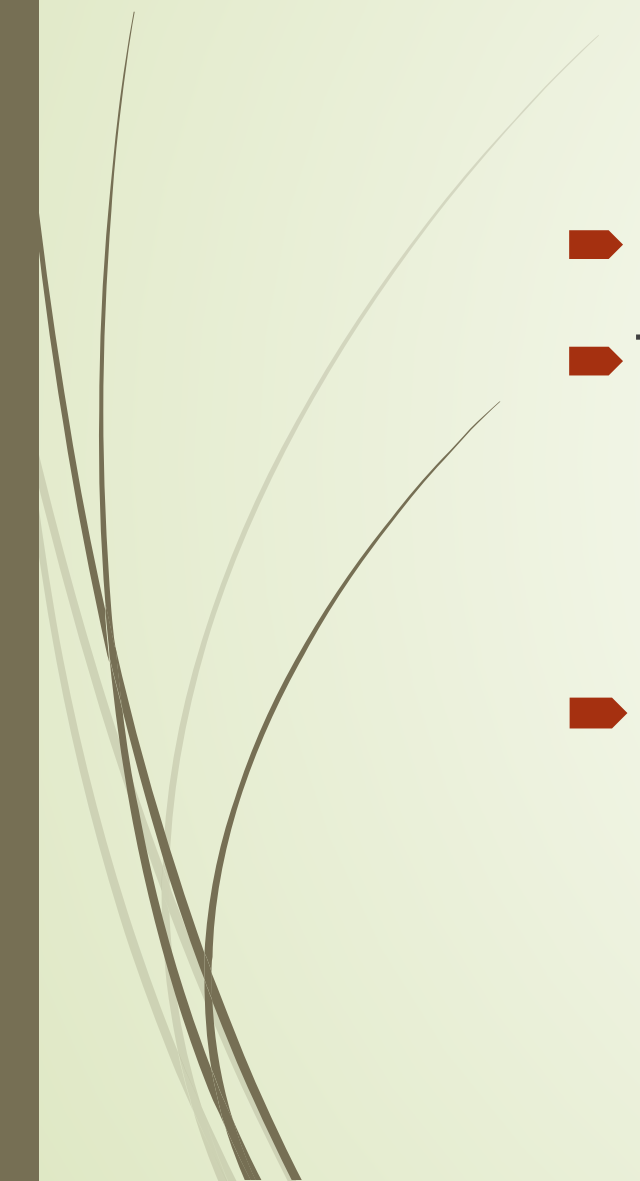


CROSS EXAMINATION

- Merely cross-examining State's witnesses does not open door
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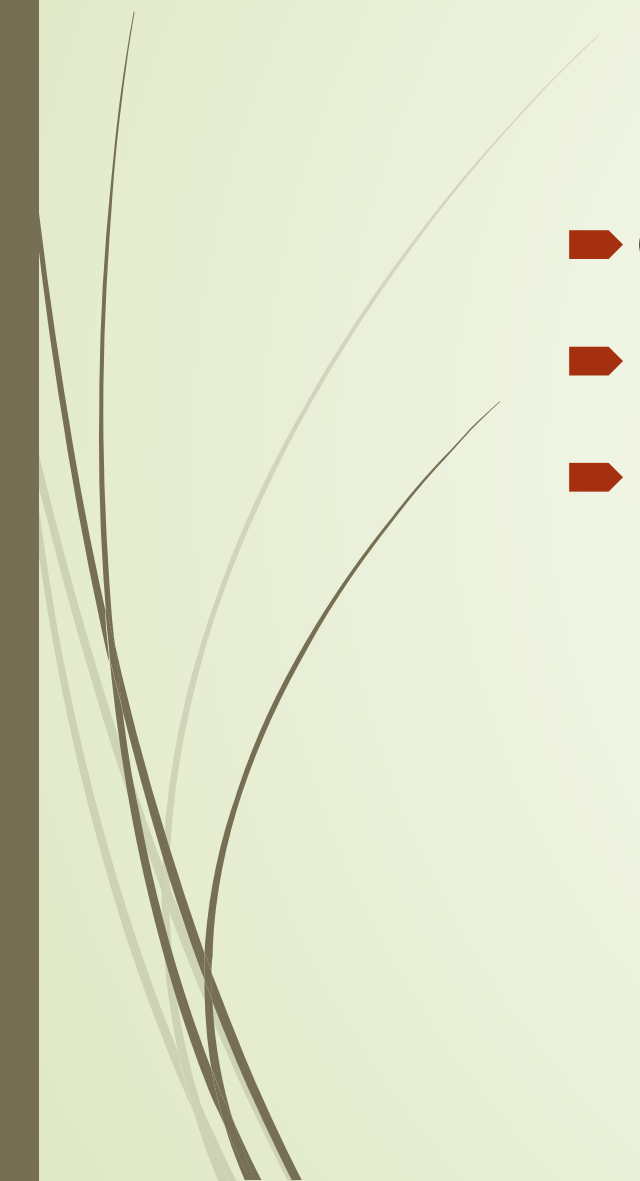


CONTEXTUAL EVIDENCE

- Formerly “*res gestae*” evidence
 - Two types
 1. Background Contextual Evidence
 2. Same Transaction Contextual Evidence
 - Not strictly extraneous evidence
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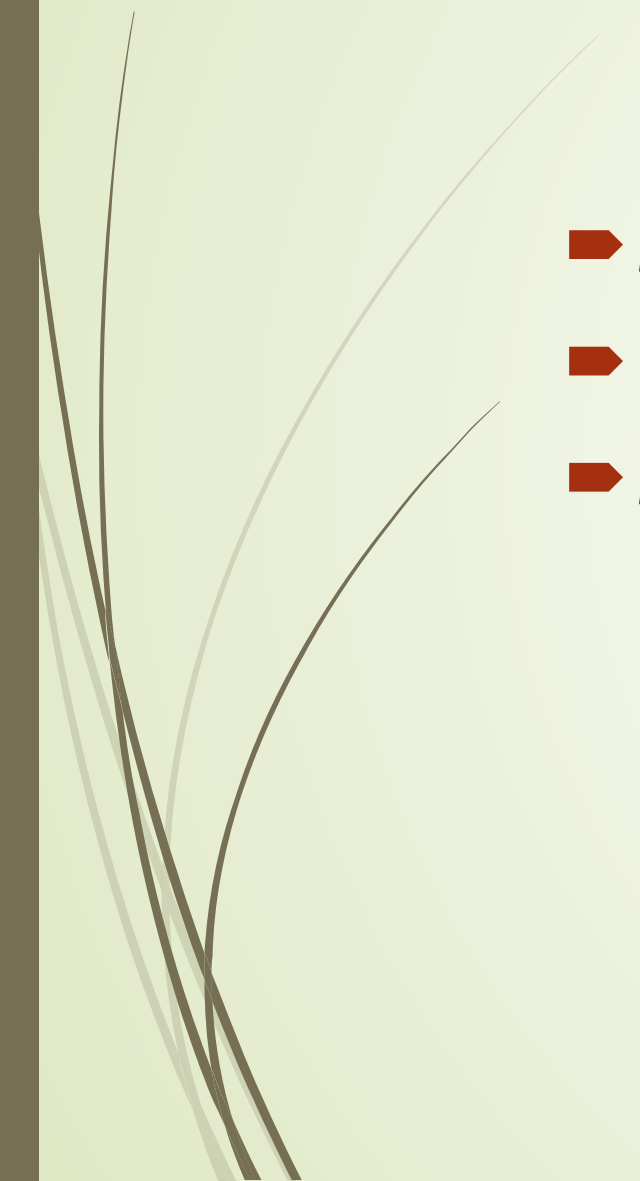


BACKGROUND CONTEXTUAL EVIDENCE

- General background information
 - Places events in context
 - If it conflicts with 404(b), not admissible
- 



SAME TRANSACTION CONTEXTUAL EVIDENCE

- More likely to be admitted than background
 - Events do not occur in a vacuum
 - May occur before/after charged offense
- 



SAME TRANSACTION CONTEXTUAL EVIDENCE, cont.

- ▶ *Wyatt v. State*, 23 SW3 18 (TCA 2000)
- ▶ Limiting instruction not required
- ▶ *Castaldo v. State*, 78 SW3 345 (TCA 2002)



OPENING THE DOOR

- Snatching defeat from jaws of victory
- Usually occurs when State rebuts defensive strategy, e.g.
 - Mistake/accident
 - Insanity
 - Consent
 - Self-defense



NOTICE

- No independent State duty absent request
- Trial court not initially involved
- Failure to request waives issue



NOTICE contd.

- ▶ Failure by State to notify is error
- ▶ Failure by State to timely notify may be error
- ▶ Harm analysis
- ▶ *Hernandez v. State*, 176 SW3 821 (TCA 2005)



OBJECTIONS

- ▶ Make in reverse order:
 - ▶ TRE 404(b): relevance
 - ▶ If necessary,
 - ▶ TRE 403: balancing test



LIMITING INSTRUCTIONS

- ▶ Consideration limited to specific purpose for which admitted
- ▶ *Ex parte Varelas*, 45 SW3 627 (TCA 2001)
- ▶ Request when evidence admitted
- ▶ TRE 105
- ▶ *Rankin v. State*, 974 SW2 707 (TCA 1996)



LIMITING INSTRUCTIONS, cont.

- ▶ Failure to request at admission results in admission for all purposes
- ▶ *Hammock v. State*, 46 SW3 889 (TCA 2001)



LIMITING INSTRUCTIONS, cont.

- ▶ Include in court's charge
- ▶ *Ex parte Varelas, infra.*
- ▶ Failure to give properly request charge is reversible error.
- ▶ *Abdnor v. State*, 871 SW2 726 (TCA 1994)
- ▶ See also, *Almanza v. State*, 686 SW2 157 (TCA 1984)



APPELLATE REVIEW

- No *de novo* review
- Reversal only for clear abuse of discretion
- *Moses v. State*, 105 SW3 622 (TCA 2003)



INEFFECTIVE ASSISTANCE

- ▶ Failure to properly object to extraneous acts
- ▶ *Ex parte Rogers*, 369 SW3 858 (TCA 2012)



INEFFECTIVE ASSISTANCE, cont.

- Claims include
 - No notice
 - Inadequate notice
 - No requested limitation
 - No requested charge
 - No reasonable doubt charge
 - Improper jury argument
 - Opening door



CONCLUSION

- ▶ Extraneous acts may be State's most potent weapon
- ▶ Prosecutors: be prepared re: relevance
- ▶ Defense: be prepared re: objections & instructions