

# EVIDENCE

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## “The Rule”



## Rule 615: Exclusion of Witnesses

### “The Rule”

At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court’s discretion, the requested sequestration may be effective before *voire dire*, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness.

## Rule 615: Exclusion of Witnesses

- Applies to most witnesses, including rebuttal witnesses
- Exceptions:
  - Party Who is a Natural Person (defendant).
  - Designee of a Party (Victim, victim’s relative, Investigating Officer, i.e.). Government can have an officer or employee sit with counsel during trial and assist with trial.

1997 Advisory Commission Comment; *State v. Jordan*, 325 S.W.3d 1, 40 (Tenn. 2010).

- Essential Person (expert witnesses are generally deemed essential for purposes of trial).

2004 Advisory Commission Comment, *State v. Bane*, 57 S.W.3d 411, 423 (Tenn. 2001).

## Rule 615: Exclusion of Witnesses

- State’s designated representative IS NOT required to testify first.

*State v. Batey*, 2016 WL 3752968 (Tenn. Crim. App. July 8, 2016) citing *State v. Jordan*, 325 S.W.3d 1 (Tenn. 2010).

## Victim's Rights Act and Rule 615

- Tennessee Constitution specifically states a victim has the "right to be present at all proceedings where the defendant has the right to be present." Tenn. Const. Art. I, § 35.
- Reasonable to argue the victim is exempt from sequestration due to Victim's Rights Act, therefore the State may still designate someone to sit with the State and assist with the trial.

## Rule 615: Exclusion of Witnesses

### REBUTTAL WITNESSES

- ARE excluded by Rule 615.
- Exception established for true surprise and genuine need:

This Rule does not forbid testimony of a witness called at the rebuttal stage of a hearing, if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.

!!!!!!!!!!!!!!!

## Rule 615: Exclusion of Witnesses

- Remember to request the Rule!
- Make a reciprocal request if the defense asks first.
- Take a look around- remember who is in the courtroom.
- Exclusion is mandatory once invoked.

## Rule 615: Exclusion of Witnesses



## Rule 615

### VIOLATIONS OF RULE 615

- "Tennessee Courts have significant discretion when deciding how to best deal with a violation." *Jordan*
- Mistrial
- Adverse Ruling
- Contempt
- Exclusion of Witness's Testimony
- Remedies reserved for most serious or intentional violations. *Jordan*
- Lesser Sanctions
  - cross examination on violation of rule
  - jury instruction to consider violation when assessing weight to be given to testimony

## Violation of Rule 615?

- Rule imposed by the Court
- Defense opening statement references a posting on Facebook by co-defendant, a State's witness.
- Witness, prior to her testimony, is asked if there is anything the State should know about that was posted on Facebook.
- State did not question witness about Facebook on direct.
- Witness cross-examined, says she knew she would be asked about her Facebook posting.

## Violation of Rule 615?

- Attorney argues in closing witness was told information in violation of rules.
- Case ends with hung jury.
- Counsel for the State informs defense the State is allowed to ask witnesses questions.
- Trial #2, 8 months later

## Violation of Rule 615?



## Violation of Rule 615?



## Violation of Rule 615?

## Rule 615

“The Court shall order all persons not to disclose by any means to excluded witnesses *any live trial testimony or exhibits created in the courtroom by a witness.*”

## Rule 615

### 1997 Advisory Commission Comment:

Note that the rule prohibits disclosure of live testimony “by any means.” A lawyer may mention subject matter to a witness not yet called, even though the subject matter has been raised by evidence. Care must be taken, however, to avoid implying to the potential witness what an earlier witness said from the stand.



## 404(b)

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes.

## 404(b)

### Procedural Requirements

- 1) The court upon request must hold a hearing outside the jury's presence;
- 2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- 3) The court must find proof of the other crime, wrong, or act to be clear and convincing;
- 4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

## 404(b)

- Tennessee Courts advise it is a rule of exclusion, not inclusion.
- "Trial Courts are encouraged to take a restrictive approach of Rule 404(b)... because 'other act' evidence carries significant potential for unfairly influencing a jury.

*State v. Jones*, 450 S.W.2d 866, 891 (Tenn. 2014).

## 404(b)

- Admission of a  $\Delta$ 's bad acts carries inherent risk of the jury convicting  $\Delta$  of a crime based on his bad character or propensity to commit a crime, rather than a conviction resting on the strength of the evidence.
- The risk is greater when a  $\Delta$ 's prior bad acts are similar to the crime for which  $\Delta$  is on trial.

*State v. Rickman*, 876 S.W.2d 824, 828 (Tenn. 1994)

### Material Issue Other than Conformity with Character Trait

- Motive
- Opportunity
- Intent
  - Settled Purpose to Harm
  - Preparation
- Identity
- Common Scheme or Plan
- Absence of Mistake
- Completion of the Story

*State v. Smith*, 868 S.W.2d 561 (Tenn. 1993)

*State v. Gilliland*, 22 S.W.3d 266, 272 (Tenn. 2000)

*State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004).

## 404(b)

- To whom does it apply?
- TN Supreme Court ruled “Evidence of other crimes, wrongs or acts, if relevant, is not excluded by Rule 404(b) if the acts were committed by a person other than the accused.”

*State v. Stevens*, 78 S.W.3d 817, 837 (Tenn. 2002)

## T.C.A. § 24-7-125

- Effective July 1, 2014
- In a criminal case, evidence of crimes, wrongs, or acts is not admissible to prove the character of any individual, including a deceased victim, a defendant, a witness or any third party, in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied are:

## T.C.A. § 24-7-125

- 1) The court must upon request hold a hearing outside the jury's presence;
- 2) The court must determine that a material issue exists other than conforming with a character trait and must upon request state in the record the material issue, the ruling, and the reasons for admitting the evidence;
- 3) The court must find proof of the other crime, wrong, or act to be clear and convincing;
- 4) The court must exclude the evidence if its probative value is outweighed by unfair prejudice.

## T.C.A. § 24-7-125

- No case law involving new statute
- Westlaw does not show *Stevens* to have been superseded by statute.
- Be prepared
- Have a copy of the statute with you in court.

## Completion of the Story

“[C]ontextual background evidence which contains proof of other crimes, wrongs or acts may also be offered as an ‘other purpose’ under Rule 404(b) when exclusion of that evidence would create a chronological or conceptual void in the presentation of the case and that void would likely result in significant jury confusion concerning the material issues or evidence in the case.”

*State v. Gilliland*, 22 S.W.3d 266, 272 (Tenn. 2000).

## Completion of the Story

When the State seeks to offer evidence of other crimes, wrongs or acts that is relevant only to provide a contextual background of the case, the State must establish and the trial court must find:

- 1) The absence of the evidence would create a chronological or conceptual void in the State's presentation of the case;
- 2) The void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case;
- 3) The probative value of the evidence is not outweighed by the danger of unfair prejudice.

*State v. Gilliland*, 22 S.W.3d 266, 272 (Tenn. 2000).

## Gilliland

- Murder case (premed, felony in course of robbery)
- State's theory: victim killed for large sum of money known to be carrying
- State calls witness to testify  $\Delta$  bragged about shooting 2 others,  $\Delta$  showed the shotgun to witness and witness bet  $\Delta$  "everything in his pocket" witness would do the same thing.
- Witness displays money in pocket.

## Gilliland

- State sought to introduce testimony related to  $\Delta$ 's involvement in other shooting to "paint a picture" as to why  $\Delta$  is displaying weapon, victim displaying cash.
- State argues without testimony, jury would be misled as to why  $\Delta$  was displaying weapon and why witness was talking to  $\Delta$ .
- Trial judge agrees with State, rules not unfairly prejudicial.
- CCA agrees with trial court.

## Gilliland

- SC rules trial court abused its discretion
- Absence of shooting would not have created chronological or conceptual void
- Information about shooting not necessary to establish  $\Delta$  possessed 20 gauge shotgun
- State could prove  $\Delta$  had knowledge of money without going into the reason why victim flashed money. Specific reason is inconsequential.
- Evidence has such little relevance its probative value was greatly exceeded by unfair prejudice.

## Contextual Background

- Rape, aggravated rape, sexual battery by authority figure, statutory rape by authority figure.
- 3 minor victims
- One victim discloses to his mother 2 years after abuse after seeing news story that  $\Delta$  was arrested.

*State v. Berkley*, 2016 WL 3006941 (Tenn. Crim.App.).

## Berkley

- News report of  $\Delta$ 's arrest prompted mother to ask if  $\Delta$  ever did anything to victim.
- Child limited to existence of news report, not allowed to discuss substance of news report.



## Berkley

- De novo review
- Evidence admissible for "other purpose" of offering contextual background information relevant to why child came forward 2 years after abuse.
- Relevant to material issue other than propensity: credibility of child.
- Excluding evidence of news report would likely have created conceptual void in jury's understanding of case, resulted in significant jury confusion regarding why mother asked child if  $\Delta$  ever did anything to him.
- Trial court properly restricted testimony on substance of news report.

## Full Story of the Crime

- Theft, vandalism, coercion of witness case
- Victim identified defendant as one of perpetrators
- Victim received 4 letters from jail with threatening/ intimidating messages
- Defendant's fingerprints on two of letters
- Δ challenges admission of other two letters on grounds unfair prejudice outweighed probative value

*State v. Trammel*, 2016 WL 690537 (Tenn.Crim.App).

## Trammel

- Introduction of all 4 letters helped jury understand full story of the crimes, given that she received them all in the same day's mail.
- Evidence of victim receiving letters was clear and convincing.
- No evidence probative value was outweighed by unfair prejudice.
- No error.

## Not Bad Acts

- Possession of a knife and handgun are not bad acts requiring application of Rule 404(b).  
*State v. Sanders*, 2015 WL 9433473 (Tenn.Crim.App.) citing *State v. Reid*, 213 S.W.3d 792, 814 (Tenn. 2006).
- Alcohol consumption, standing alone, is neither illegal nor stigmatized in the community such that its inclusion in trial testimony would prejudice Δ.  
*State v. Itzol-Deleon*, 2016 WL 1192806 (Tenn.Crim.App.).
- Unexpectedly entering house of a person, asking to "have a couple words" with the third party in a love triangle.  
*State v. Brown*, 2016 WL 1446221 (Tenn.Crim.App).
- Nicknames  
*State v. Jackson*, 2015 WL 6756318 (Tenn.Crim.App.).

## Moral Wrongs

- Behavior that, while not criminal, constitutes a moral wrong must meet the strictures of Rule 404(b).
- Pornography- requires 404(b) analysis.  
*State v. Clark*, 452 S.W.3d 268, 289 (Tenn. 2014).
- Gang affiliation is character evidence subject to Rule 404(b).  
*State v. Jackson*, 2015 WL 6756318 (Tenn.Crim.App).

## Admissible or Not Admissible?

- First Degree Murder trial
- Defendant calls 911 stating he found girlfriend on floor, not breathing, blood on her head, blood on the couch, victim had "just barely any clothes on," blood on the floor.
- Investigator testifies victim is naked from waist down except for socks, legs spread open, underwear cut off at waist. Jeans cut at top. No injuries to victim's waist or legs.

*State v. Giles*, 493 S.W.3d 504 (Tenn.Crim.App. 2016)

## Admissible or Not Admissible?

- Defendant repeatedly asks if victim was raped.
- References victim's desire for certain sexual acts, including wanting Δ to rape her.
- Evidence on defendant's computer that, the day before the murder and in preceding months, he conducted several internet searches and visited pornographic websites depicting women getting raped.

*State v. Giles*, 493 S.W.3d 504 (Tenn.Crim.App. 2016)

## Admissible or Not Admissible?

- State seeks to introduce internet history to show intent.
- Trial court initially rules probative value did not outweigh danger of unfair prejudice.
- State asks Court to reconsider.
- Trial court ruled viewing pornography is not a bad act, 404(b) did not apply. Admissible under 403.
- Trial court stated alternatively, admissible under 404(b) to show intent, knowledge of rape scene, premeditation.

*State v. Giles*, 493 S.W.3d 504 (Tenn.Crim.App. 2016)

## Subsequent Acts Can Show Intent

- CCA states “using adult pornography is not a crime” but many consider it a “moral wrong” and it should be addressed through 404(b).
- “Rule 404(b) is not limited to prior wrongs or bad acts. It also allows for introduction of subsequent acts to establish one’s intent during a prior act in appropriate cases.”
- “Evidence of efforts to conceal the crime are highly probative to establish the intent of a perpetrator.”

*State v. Giles*, 493 S.W.3d 504 (Tenn.Crim.App. 2016)

## Admissible or Not Admissible?

- Trial for First Degree Murder.
- State’s theory was that murder was gang related, and that Δ did not want victim to have his child.
- State sought to introduce evidence of Δ’s gang affiliation, references to gang in letters and phone calls.
- Trial court ruled gang-related evidence was relevant to consciousness of guilt as Δ was extensively involved in pressuring witness to fail to appear at trial.
- Trial court found gang expert would greatly assist jury understand evidence, including gang rank and organizational hierarchy.

*State v. Hall*, 2016 WL 1222755 (Tenn.Crim.App)

## Understanding the Evidence, Motive

- CCA states testimony about hierarchy of gang was necessary to make evidence comprehensible.
- Testimony about promotion and rank achieved through violence explained why others would be motivated to look for witness on Δ’s orders.
- If gang promotions are achieved through violence, and violence against witness was authorized by Δ, it explains why Δ promised to seek promotions for those who followed orders.
- Also supplied motive for Δ to have committed crime.

*State v. Hall*, 2016 WL 1222755 (Tenn.Crim.App)

## Gang Evidence

- Some evidence not relevant, such as origin of Five Deuce Hoover Crips.
- Some conversations and correspondence not relevant.
- Any error was harmless.

*State v. Hall*, 2016 WL 1222755 (Tenn.Crim.App)

## Sanitizing Proof



## Sanitizing Proof

- Trial for Attempted First Degree Murder, Aggravated Child Abuse for placing pillow over 4 year old's face.
  - State files notice of intent to introduce proof of "medical abuse" (seeking unnecessary medical treatment for victim causing victim's father and doctors to become suspicious).
  - Court allows State to question witnesses about history of medical treatment and complaints, not "medical abuse."
  - Neither the defendant's involvement in custody battle nor her seeking medical treatment for her child show a propensity toward smothering a child.
  - Even if a bad act, admissible to show motive and intent.
- State v. Hammers*, 2016 WL 4054090 (Tenn.Crim.App.)

## Sanitizing Proof

- Trial for Premeditated Murder
- No 404(b) Notice filed by State.
- No motion to exclude testimony regarding gangs filed by defense.
- Just prior to shooting, Δ said "Cuz, don't say shit else to me. On the FAM."
- State did not seek to introduce testimony about Δ being a member of the FAM, only that he mentioned it just before shooting victim, stating it was relevant to premeditation and motive.
- Witness explains FAM was a "neighborhood gang or a group."
- Court questions witness for further information.

*State v. Claxton*, 2016 WL 1615648 (Tenn.Crim.App.)

## Sanitizing Proof

- Court says let's not talk about a gang. You can talk about a group of guys... is that what it is, basically?
- "It's a group of guys and they're younger guys. They all hang out together."

*State v. Claxton*, 2016 WL 1615648 (Tenn.Crim.App.)

## Claxton

- The trial court excised from the Δ's statement what could have been viewed by the jury to be evidence of "other crimes, wrongs or acts" under Rule 404(b).
- Association with a group of guys that hang out together is not, in and of itself, a bad act.
- By prohibiting the use of the word "gang" in reference to Δ's statement, the trial court effectively eliminated the 404(b) issue.

## Admissible or Not?

- Prosecution for 2 counts attempted first degree murder, employing firearm in commission of dangerous felony.
- Weapon used in shooting recovered from Δ's car during traffic stop.
- Shell casings from shooting verified to be from recovered weapon.
- State sought to introduce photos and video of Δ in possession of weapons that "looked like the ones" that fired shell casings in the case.

*State v. Cuben Lagrone*, 2016 WL 5667514 (Tenn.Crim.App.)

## Identity

- Trial court stated images were highly probative because they were one of the main things connecting Δ to the weapon used in the crime.
- CCA agrees.
- Images were highly probative to establish Δ either owned or had access to weapons that were used in the shooting and made it more likely than not Δ was connected to or the perpetrator in the shooting.

*State v. Cuben Lagrone*, 2016 WL 5667514 (Tenn.Crim.App.)

## Admissible or Not?

- Double homicide trial (premed/ felony in perpetration of robbery)
- State seeks to introduce testimony that Δ went to the Quality Inn a couple weeks before the murders, getting out of the car stating he was there to “hit a lick” meaning rob someone.
- Δse argues conformity evidence.

*State v. Wade*, 2016 WL 5416340 (Tenn.Crim.App)

## Motive, Identity

- Trial court finds material issue exists regarding motive, insinuation Δ did not know victims or where they stayed.
- CCA finds testimony showed motive and previous attempt to rob victim, and contradicted Δ’s statement he did not know victims or where they stayed.
- CCA states identity and motive highly contested, testimony revealed prior plan to rob victims, in similar scenario as they were killed, Δknew victims had money.

*State v. Wade*, 2016 WL 5416340 (Tenn.Crim.App)

## Admissible or Not Admissible?

- Trial for Attempted First Degree Murder, Employing Firearm in Commission of Dangerous Felony, Felony Murder
- Shooting at a nightclub, innocent bystander killed
- Defense says “cat fight” and “girl drama”
- State says gang related feud
- Defense files motion to preclude State from mentioning gang affiliation, nicknames, Facebook photos showing Δ with fellow gang members

*State v. Jackson*, 2015 WL 6756318 (Tenn.Crim.App)

## Admissible or Not Admissible?

- Trial court rules nicknames admissible
- No one can refer to group as gang; can say friends, group, association.
- No reference to Crips
- Additional witness testifies about “ganging” to become a member, ladies looking for fights.
- Group engaging in fights on FB and in reality, making friends, making enemies
- State allowed to talk about schemes, motives, purposes of the ladies

*State v. Jackson*, 2015 WL 6756318 (Tenn.Crim.App)

## Motive, Intent, History of Parties

- CCA says gang-related evidence relevant to identify Δ as criminally responsible, establish motive.
- Relevant to Δ’s intent
- No abuse of discretion in allowing name of 111 Westside Neighborhood Crips into evidence-probative value outweighed unfair prejudice.
- Nicknames not prejudicial, not specifically linked to gang activity or status
- Facebook photos with members and comments about victim after a fight show history between the intended victim and defendant.

*State v. Jackson*, 2015 WL 6756318 (Tenn.Crim.App)

## Admissible or Not Admissible?

- Trial for First Degree Murder, 3 counts Attempted First Degree Murder, Employing Firearm in Commission of Dangerous Felony
- DV situation
- One victim is ex of Δ, deceased is her boyfriend
- State sought to introduce evidence of domestic assault arrest (several years ago) of Δ in case involving then girlfriend
- Evidence Δ slashed deceased’s tires and admitted it to ex-girlfriend.

*State v. Brown*, 2016 WL 1446221 (Tenn.Crim.App)

## Hostility, Settled Purpose to Harm

- Trial court finds prior assaults relevant to intent
- Would show volatile nature of relationship and provide insight on  $\Delta$ 's state of mind
- CCA says information established nature of relationship,  $\Delta$ 's hostility toward victim, settled purpose to harm victim

*State v. Brown*, 2016 WL 1446221 (Tenn.Crim.App)

## Hostility, Intent

- Trial court found slashing deceased victim's tires was material to  $\Delta$ 's state of mind and the nature of the relationship between the parties.
- CCA agrees, stating it shows hostility toward victims,  $\Delta$ 's intent night of shooting.

*State v. Brown*, 2016 WL 1446221 (Tenn.Crim.App)

## Settled Purpose to Harm

- “[V]iolent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant’s hostility toward the victim, malice, intent, and a settled purpose to harm the victim.”

*State v. Smith*, 868 S.W.2d 561 (Tenn. 1993).

## The “Smith Rule”

## Admissible or Not Admissible?

- First degree murder (premeditated and felony), especially aggravated kidnapping trial, DV related, 2011 incident.
- State introduces testimony of witness who took victim to hospital in 2008 after altercation with  $\Delta$ , swollen eye. Witness did not witness assault.
- Trial court rules it is admissible as “settled purpose to harm” victim and  $\Delta$ 's intent to murder victim.

*State v. Burrows*, 2016 WL 154728 (Tenn.Crim.App)

## Settled Purpose to Harm

- CCA states “Tennessee courts have accepted this use of evidence of homicide defendant’s threats or prior violent acts directed toward the victim as a means of allowing the State the opportunity to establish intent, theorizing such evidence is probative of the defendant’s mens rea at the time of the homicide because it reveals a ‘settled purpose’ to harm the victim.”

*State v. Burrows*, 2016 WL 154728 (Tenn.Crim.App) *Citing Smith*.

## Settles Purpose to Harm

- CCA says evidence of the prior assault fits squarely within the *Smith* rule.
- Evidence established violent nature of relationship and  $\Delta$ 's hostility toward victim.

*State v. Burrows*, 2016 WL 154728 (Tenn.Crim.App)

## Admissible or Not Admissible?

- Trial for 2010 Premeditated and Felony Murder. DV related case.
  - State sought to introduce
    - 2000 assault where victim had been punched, kicked and choked unconscious by Δ, leaving her bruised and with loose tooth.
    - 2008 kidnapping and assault of victim and her children, victim was beaten and choked to unconsciousness with baby blanket. Δ stated he would do it again and kill her next time.
- State v. Moody*, 2016 WL 1045660 (Tenn.Crim.App.)

## Admissible or Not Admissible?

- Information from OP application which included victim being held hostage and being beaten all day, coming to work with black eyes, that the defendant had tried to run her off the road.
  - A March, 2009 assault where defendant slapped, bruised and pulled victim's hair, chased her stated he would kill her.
  - Victim's mother observed bruises on victim's chest within one year of beginning to date Δ.
- State v. Moody*, 2016 WL 1045660 (Tenn.Crim.App.)

## Admissible or Not Admissible?

- Security guard at motel where victim was found observed two separate arguments between defendant and victim the day before the victim disappeared.
- State v. Moody*, 2016 WL 1045660 (Tenn.Crim.App.)

## Intent and Motive

- CCA found testimony was relevant to Δ's intent and motive in strangling the victim.
  - Quotes language from *Smith*.
- State v. Moody*, 2016 WL 1045660 (Tenn.Crim.App.)

## 404(b)

- Admission of a Δ's bad acts carries inherent risk of the jury convicting Δ of a crime based on his bad character or propensity to commit a crime, rather than a conviction resting on the strength of the evidence.
- The risk is greater when a Δ's prior bad acts are similar to the crime for which Δ is on trial.

*State v. Rickman*, 876 S.W.2d 824, 828 (Tenn. 1994)

## Opening the Door to Prior Bad Acts?

- Trial for First Degree Murder, Especially Aggravated Robbery.
  - Defendant presents Dr. Murray Smith to testify Δ suffered from amnesia caused by brain poisoning from intoxication. Survival brain enabled Δ to flee after the shooting.
  - State introduces surveillance video of Δ robbing convenience store after casing, within hours of murder, it as part of rebuttal proof.
- State v. Bonsky*, 2016 WL 1719466

## Admissible or Not Admissible?

- Defense argues conformity.
- State argues motive, planning a robbery.
- Trial court says it goes toward culpable mental state, knowledge.
- Trial court finds it is “highly relevant” to show Δ’s ability to form mental state.
- CCA: Proof of another robbery within 4 hours is potentially highly prejudicial.
- On the other hand, similarity may make probative value great.
- Here, convenience store robbery committed during time frame Δ alleged he was intoxicated, not thinking clearly, making probative value great.

*State v. Binsky*, 2016 WL 1719466 (reversed on other grounds)

## Admissible or Not Admissible?

- Trial for Aggravated Robbery
- Δ had committed two robberies close in time.
- Admits to police he committed both.
- Says in jail call to momma “I admitted to two robberies.”
- Witness testifies Δ was at her house and stated he was going to “hit a lick,” left with shirt over his head.

*State v. Sanders*, 2016 WL 327277 (Tenn.Crim.App)

## Admissible or Not Admissible?

- Defense files motion to exclude jail call because only 1 robbery being tried.
- State argues “no doubt” it related to one of the robberies Δ admitted to because it was 3 hours after admissions to police.
- Trial court ruled it has been established by clear and convincing evidence as it was an admission by Δ. Orders call sanitized to “I admitted to a robbery.”

*State v. Sanders*, 2016 WL 327277 (Tenn.Crim.App)

## Admissible or Not Admissible?

- Defense again requests 404(b) hearing.
- Court rules it is not 404(b), it is an admission.
- Defense argues State failed to present any evidence the call related to the incident on trial.
- Defense argues witness’s testimony related to other robbery, not the one on trial (factual inconsistencies).
- Court heard witness testify and ruled it was a fact question for jury’s determination.

*State v. Sanders*, 2016 WL 327277 (Tenn.Crim.App)

## Error

- CCA states witness should have been heard, trial court should have determined whether testimony was precursor to this crime or related to another crime (if another, 404(b) analysis).
- “We are puzzled as to how the court could determine that Δ was admitting to robbing the victim without hearing proof on the issue. The State advised the court that Δ had admitted to two robberies, one of which was the robbery of the victim, *but called no witnesses to testify to that evidence.*”
- Δ had no opportunity to challenge he was admitting to robbing victim.

*State v. Sanders*, 2016 WL 327277 (Tenn.Crim.App)

## Error

# REVERSED

*State v. Sanders*, 2016 WL 327277 (Tenn.Crim.App)

## 404(b) Reminders

- File your notices. You will not get evidence in without trying.
- Include information in an abundance of caution.
- Request a hearing- present testimony, not just arguments
- Request specific fact findings as to the material issue.
- Request specific findings as to the probative value vs. unfair prejudice.
- Make the defense go through this process with victims, witnesses.
- Be prepared to offer a sanitized version, if applicable.



## Expert Witness

- If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.



### **McDaniel v. CSX Transportation**

955 S.W.2d 257 (Tenn. 1997) (adopting from *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993))

- 1) Whether scientific evidence has been tested and the methodology with which it has been tested;
- 2) Whether the evidence has been subjected to peer review or publication;
- 3) Whether a potential rate of error is known;
- 4) Whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community; and
- 5) Whether the expert's research in the field has been conducted independent of litigation.

### Consider Qualifying Officers

- Drug Trafficking/ Drug Deals (Narcotics Officers)  
*State v. Carmelo Gonzalez-Fonesca*, 2016 WL 3977258 (Tenn.Crim.App).
- Gang Units/ Gang training  
*State v. Hall*, 2016 WL 1222755 (Tenn.Crim.App)

## 703 Bases of Expert Opinion

- Facts or data that are the basis of an opinion need not be admissible in evidence;
- Facts and data underlying the opinion are not admissible by proponent unless the court determines the probative value in assisting the jury evaluate the expert's opinion substantially outweighs their prejudicial effect;
- Courts shall disallow testimony if underlying facts or data are untrustworthy.

## State v. Hall

958 S.W.2d 679 (Tenn. 1997)

- Diminished capacity – not a defense
- Expert testimony must satisfy relevancy standards as well as 702 and 703
- Psychiatric evidence- a defendant lacks capacity to form requisite culpable mental state is admissible
- Psychiatric testimony must demonstrate a defendant's inability to form the requisite culpable mental state was the product of a mental disease or defect, not just a particular emotional state or mental condition

## State v. Ferrell

277 S.W.3d 372, 379 (Tenn. 2009)

- *Hall* established that mental health testimony is properly admissible if it satisfies the relevancy and expert testimony provisions in TRE, and its content indicated that a defendant lacked the capacity to form the requisite mental state for an offense.
- *Hall* was based on legal principle that expert testimony relevant to negating intent is admissible in Tennessee even though diminished capacity is not a defense.
- A defendant may negate an element of the offense as a defense to prosecution.

## State v. Bonsky

2016 WL 1719466

- Dr. Lynn Zager diagnosed Δ with PTSD, polysubstance abuse and dependence, anxiety.
- Defendant's ability to form requisite mental state was "impacted" by a self reported substance intoxication.
- Did not agree with Dr. Smith that Δ did not have ability to form a specific intent for premeditation.

## State v. Bonsky

2016 WL 1719466

- Dr. Zager's testimony was inadmissible under *Hall* because she did not testify that Δ lacked the mental capacity to commit the crimes.
- The fact that Δ's mental disease may have impaired or reduced his capacity to form the requisite mental state does not satisfy the two-prong requirement in *Hall*.
- No abuse of discretion in excluding testimony.

## State v. Jackson

2016 WL 6756318

- Dr. Jeffrey Neuschatz offered by defense to give "substantial assistance" to the jury for use in analyzing testimony of two eyewitnesses.
- Defense sought to show witnesses' memories may not be correct.
- Dr. Neuschatz proffered that memories were not written in stone and they changed when a person thought about it, collecting information from outside sources, filling in memory gaps with their expectations.

## *State v. Jackson*

2016 WL 6756318

- Trial court ruled testimony invaded province of jury as they are told to use their collective memories.
- Trial court ruled it would open the door to challenging jury system.
- It may be misleading.
- Excluded Dr. Neuschatz.



## *State v. Jackson*

2016 WL 6756318

- CCA says admission of expert testimony would have been superfluous and would have confused and mislead the jury as  $\Delta$  could have been found guilty by criminal responsibility by her own admission.
- Jury instruction provided assistance on how to on how to evaluate eyewitness testimony: included much of what Dr. Neuschatz would have stated.
- No abuse of discretion
- However, rationale that it would invade province of jury was misplaced.

## **Expert Witnesses**

- Give notice of your expert and provide discovery
- Request discovery
- Move to exclude witness's testimony if appropriate
- Research expert (yours and defense's)

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