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3. *§ 4.02 Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible*
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CHAPTER 4 ARTICLE IV. TENNESSEE LAW OF EVIDENCE—RELEVANCE

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§ 4.01 Rule 401. Definition of "Relevant Evidence"

[1] Text of Rule

Rule 401 Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Advisory Commission Comment:

This proposal does not change Tennessee common law. The theoretical test for admissibility is a lenient one, as it should be, and practical difficulties can be resolved under Rule 403 or the exclusionary rules of legal relevancy that follow.

The materiality concept is found in the words, "any fact that is of consequence to the determination of the action." To be relevant, evidence must tend to prove a material issue.

[2] Overview of Article IV

Article IV consists of thirteen rules, roughly divided into two groups. Rules 401 and 402 provide the general principles of *logical relevance*. These rules define the basic concept of relevance. Rules 403 through 412 include a variety of rules often described as *legal relevance.* They deal with general (Rule 403) or specific (Rules 404–412) areas in which for policy reasons special rules have been developed to regulate the admissibility of certain evidence.

The legal relevance rules are needed because the evidence they regulate arguably could be admitted under the theory of logical relevance, yet admitting the evidence would violate an important value that evidence law protects. The an excellent example is Rule 409, which generally bars the introduction of evidence that a person paid medical expenses caused by an injury, as proof that the person was liable for that injury. Although the fact that a person paid another's medical expenses could be logically relevant on whether the payor caused the injury that necessitated the medical bills, Rule 409 makes the evidence inadmissible in order to encourage the prompt payment of medical expenses.

The legal relevance rules can be further grouped for purposes of analysis. Rule 403 provides the general rule of legal relevance. It permits a court to exclude evidence when the probative value of the evidence is substantially outweighed by aspects of the policies of a fair and efficient trial.

Rules 404 through 412, on the other hand, deal with more specific values that require limits on the admissibility of evidence. Rules 404 and 405 regulate the admissibility of character and similar evidence. Rule 406 deals with habit evidence, which is sometimes difficult to separate from character evidence. Rule 407 bars, in most cases, evidence of subsequent remedial repairs. Rules 408 through 410 are designed to encourage out of court settlements in both civil and criminal cases by permitting open negotiations. Rules 408 and 410 permit settlement negotiations to occur in civil and criminal cases, respectively, while prohibiting the statements made in negotiations from being admitted into evidence at trial as admissions. Rule 409 prevents introduction of medical and similar payments made by a defendant on a plaintiff's behalf, and Rule 409.1 extends this prohibition to expression of sympathy or benevolence. Rule 411 bars certain proof that a person did or did not

have liability insurance. Rule 412 governs the admissibility of evidence of a victim's prior consensual sexual activity in a sex crime trial.

[3] Concept of Relevance

The concept of relevance is a key component of any legal system.[1] Factual issues can only be resolved accurately and efficiently if the trier of fact is presented with the pertinent evidence and screened from other evidence. Relevance is the modern legal term expressing this idea.

Actually, relevance has two facets: materiality and probative value.[2] Materiality limits evidence to proof of issues properly provable in this case. Thus, what is material in a case depends on the issues to be resolved in the case. Often the rules of substantive law rather than the rules of evidence will have to be consulted to determine the issues. For example, in a products liability case based on strict liability, a manufacturer's negligence may not be material on the issue of liability. On the other hand, if the action is based on negligence, obviously the manufacturer's negligence is material. Of course, the credibility of witnesses is also a material issue that can be addressed by proof in any case.

Probative value, the second facet of relevance, requires that evidence assists in proving what it is offered to prove. For example, assume that the issue is whether a signature on a document is real or forged. Proof is offered that the person who allegedly signed the document was left-handed. This evidence may have no probative value unless left-handedness would somehow help the trier of fact determine whether the signature was real or forged. The link could be established if an expert testified that the signature was made by a left-handed person. On the other hand, proof that the person who allegedly signed the document had red hair or was born in St. Louis may have no probative value on the issue of who signed the document.

[4] Definition of Relevance

[a] Helpful Proof

The definition of relevance in Rule 401 is a verbatim adoption of Federal Rule 401 and has been the Tennessee common law rule.[3] The relevance standard is intentionally a minimal one and applies to all types of evidence *except* scientific tests and the like. The admissibility of scientific tests is governed by special rules discussed elsewhere in this book.[4] Under Rule 401, evidence is relevant if it has "any tendency" to make a provable fact "more probable or less probable than it would be without the evidence."[4.1] In other words, evidence is relevant if it helps the trier of fact resolve an issue of fact.

It must be stressed that evidence may be relevant even if it is insufficient, in itself, to satisfy a party's burden of proof.[4.2] Indeed, evidence may be relevant if it is only slightly helpful to the trier of fact. The

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[1] *See generally*, Robert Banks, Jr. & Melissa Maravich, *Relevance: The Tennessee Balancing Act*, 57 Tenn. L. Rev. 33 (1989).

[2] *See* McCormick On Evidence 306 (6th ed. 2006).

[3] *State v. Banks, 564 S.W.2d 947 (Tenn. 1978)*.

[4] *See below §§ 7.02[13] et seq.*

[4.1] *See, e.g., State v. Clark, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 60* (Tenn. Crim. App. 2019 (statements showing that the victims were hospitalized for smoke inhalation after fire were relevant to aggravated arson offense under *Tenn. R. Evid. 401*, since they tended to make the existence of one element of the crime—i.e., that one or more persons were present in the building—more probable than it would have been without the evidence); *State v. Stewart, 2018 Tenn. Crim. App. LEXIS 6 (Tenn. Crim. App. 2018)*; *State v. Taylor, 2018 Tenn. Crim. App. LEXIS 1 (Tenn. Crim. App. 2018)*.

[4.2] *See* ***State v. Coulter, 67 S.W.3d 3, 2001 Tenn. Crim. App. LEXIS 485 (Tenn. Crim. App. 2001)***, overruled in part on other grounds, *State v. Johnson, ___S.W.3d___, 2013 Tenn. Crim. App. LEXIS 1051 (Tenn. Crim. App. 2013)* (relevant evidence need not be sufficient to satisfy a party's burden of proof; rather, each item of proof may make a small, incremental contribution

assistance can be by negative inference: if the evidence is not introduced, the trier of fact may be misled or induced to reach a certain conclusion. The phrase "any tendency" in Rule 401 represents a conscious decision to provide that evidence is relevant if it takes the trier of fact only a small way toward resolving a proper factual issue.[5] However, if the parties have stipulated or otherwise agreed that a fact exists, proof of that fact or a closely related one may be barred as irrelevant.[6]

[b] Fact of Consequence

Rule 401 states that evidence is relevant only if it helps prove a fact "of consequence to the determination of the action . . . ."[6.1] This phrase embraces the concept of "materiality." As noted above,[7] evidence is material if it helps prove a fact which is properly provable in the case. Since what is provable, to a large extent, is the product of the legal issues, the parties can affect what evidence is relevant by altering the theory of the case,[8] and, accordingly, the applicable substantive law. A matter may be properly provable even if it is not disputed or involves only background information. Absent a stipulation,[9] judicial notice,[10] judicial admission,[11] or other substitute for proof, a party is entitled to prove its case and offer evidence on uncontested issues that contribute to the party's development of the provable issues.[12]

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to a party's total efforts to meet its proof obligations). In *Coulter*, the court held that various notes and letters, including undated ones, written by defendant during the year prior to his wife's murder were relevant "in the context of other evidence introduced at trial" to assess whether such evidence could reasonably affect the probability of premeditation in his prosecution for first-degree murder).

[5] *See* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 1 FEDERAL RULES OF EVIDENCE MANUAL 401–05 (9th ed. 2006) (relevant evidence has tendency to make fact "even the least bit more probable or less probable than it would be without the evidence"). *See also,* State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019) (witness's inability to conclusively state that the gun in photograph was the same gun used in the offenses did not render the photograph irrelevant; phrase "any tendency" in Rule 401 represents a conscious decision to provide that evidence is relevant if it takes the trier of fact only a small way toward resolving a proper factual issue).

[6] See *e.g.*, Estate of Wilson v. Arlington Auto Sales, 743 S.W.2d 923 (Tenn. Ct. App. 1987) (since parties agreed on existence of cancer and fact that insured died from the same type of cancer they had discussed before the insurance contract was signed, medical expert's testimony concerning degree to which patient suffered from cancer was irrelevant in case against insurance company for nonpayment of proceeds from credit life policy).

[6.1] *See e.g.,* Higgs v. Green, 2017 Tenn. App. LEXIS 305 (Tenn. Ct. App. 2017) (no error in excluding evidence that defendant crossed a double-yellow line, because it was not a "fact of consequence" in vehicle accident case; defendant was making a left turn in order to enter a gas station, and he was no longer required to drive upon the right half of the roadway); State v. Martin, 2015 Tenn. Crim. App. LEXIS 269 (Tenn. Crim. App. 2015) (fact that defendant pawned items in the past, even items that had been stolen, not a fact of consequence in the defendant's trial for promoting the manufacture of methamphetamine); (fact that witness was attacked by a group of unidentified individuals after he spoke with police properly excluded, because it did not have any tendency to make a fact of consequence in the defendant's trial more or less probable).

[7] *See above* § 4.01[3].

[8] For example, if punitive damages are sought, some evidence of the defendant's conduct toward the plaintiff becomes relevant, but would be irrelevant absent the punitive damages claim. *See* Pridemark Custom Plating v. Upjohn, 702 S.W.2d 566 (Tenn. Ct. App. 1985).

[9] *See above* § 2.01[9].

[10] *See* Tenn. R. Evid. 201.

[11] *See above* § 2.01[9].

[12] This evidence may still be attacked using Rule 403. *See below* § 4.03[8].

[c] Opening the Door

A party must be careful in choosing its proof, since it may open the door to the admission of countervailing proof by the other side. Opening the door essentially changes the rules of relevance, making admissible evidence that would otherwise have been inadmissible.[12.1] "Opening the door" is an equitable principle that permits a party to respond to an act of another party by introducing otherwise inadmissible evidence.[12.2]

A good illustration is *Woodson v. Porter Brown Limestone Co.*,[13] where the plaintiff alleged that the defendant did not conduct regular safety meetings as required by trucking regulations. In order to rebut the plaintiff's allegations, the defendant was permitted to prove that such meetings were held.

Another illustration is *State v. Gomez*,[13.1] where a father and mother were tried together for felony murder and aggravated child abuse for the death of their child. The mother testified; the father did not. During cross-examination of the mother, counsel for the father asked whether the mother thought the defendant was capable of hurting their child. The mother answered that she did not think the father could hurt his daughter. The trial court ruled that this question essentially asked about the father's nonviolent character and thereby opened the door to the prosecution's evidence that the father had assaulted the mother multiple times. The Tennessee Supreme Court disagreed, holding that the father did not open the door to questions about his assault of the child's mother because the assaults on the mother and the child involved separate victims. The mother only testified the father would not hurt his daughter; she did not testify about his violence toward her. Gomez, therefore, underscores that after a witness has "opened the door," an opposing party should introduce evidence on the same subject matter or risk reversible error.[13.2]

[5] Relationship to Other Terms

[a] Material Evidence

The modern concept of relevance includes a number of facets that are sometimes, though erroneously, viewed as separate issues or are not carefully distinguished from other principles of evidence law. As noted above[14] and defined in Rule 401, relevance includes the concept of *materiality*. While an objection that evidence is "immaterial" is not incorrect under the modern rules of evidence, the objection is not as precise as it could be. A better objection is that the evidence is "irrelevant." The term "relevance," now defined and used throughout the Tennessee Rules of Evidence, has replaced "materiality" under the modern codes.[15]

[12.1] *State v. Gomez, 367 S.W.3d 237, 246 (Tenn. 2012)*; *State v. Burton, 2017 Tenn. Crim. App. LEXIS 538 (Tenn. Crim. App. 2017)* (the State was entitled to impeach defendant's testimony that he was a law-abiding citizen with all of his prior convictions despite the fact that they were more than ten years old at the time of trial; by testifying that he was a "law[-]abiding citizen,"defendant placed his prior criminal record at issue and increased the probative value of his felony convictions.

[12.2] *State v. Gomez, 367 S.W.3d 237, 246 (Tenn. 2012)*. *See also State v. Vance, 596 S.W.3d 229 (Tenn. 2020)* (discussing the doctrine's equitable purpose and distinguishing it from the doctrine of curative admissibility).

[13] *916 S.W.2d 896 (Tenn. 1996)*.

[13.1] *State v. Gomez, 367 S.W.3d 237 (Tenn. 2012)*.

[13.2] *State v. Burton, 2017 Tenn. Crim. App. LEXIS 538 (Tenn. Crim. App. 2017)*. See also *State v. Riels, 216 S.W.3d 737 (Tenn. 2007)* (trial court erred in ruling that defendant opened the door to unlimited cross-examination concerning details of the crime after defendant expressed remorse to the victims' families).

[14] *See above* § 4.01[4][b].

[15] Even after the principle embodied in Rule 401 was adopted in TennesSee some courts were using the terms relevance and materiality as if they were different. See *e.g.*, *Dill v. Gamble Asphalt Materials, 594 S.W.2d 719, 723 (Tenn. Ct. App. 1979)* (evidence is both material and relevant).

[b] Remote or Stale Evidence

Another outmoded term is *remoteness*. If evidence has no probative value because it is stale or old, the proper modern objection is that it is irrelevant. Using the language of Rule 401, the staleness of the evidence means that the evidence does not have "any tendency" to prove a proper issue.[16]

[c] Direct and Circumstantial Evidence

The related concepts of *direct* and *circumstantial* evidence must be distinguished from relevant evidence. Direct evidence does not require inferences or presumptions for its relationship to the fact to be proved.[17] For example, an eyewitness who saw the defendant stab the victim provides direct evidence of these facts. Circumstantial evidence, on the other hand, requires the trier of fact to draw some inferences in order to use the evidence to prove the appropriate fact. Stated differently, "[c]ircumstantial evidence is evidence of collateral facts and circumstances from which the trier-of-fact may infer that the main fact is based on reason and common experience."[18] Returning to the stabbing hypothetical above, a witness who saw the defendant hold a knife while approaching the victim but who saw nothing else, would provide circumstantial evidence that the defendant stabbed the victim.

The concept of relevance provided by Rule 401 does not distinguish between direct and circumstantial evidence. Direct evidence may or may not be relevant; the same is true for circumstantial evidence. Thus, whether evidence is direct or circumstantial is not dispositive in determining whether the evidence is relevant under Rule 401. Some Tennessee decisions have suggested that whether information is circumstantial may have a bearing on whether a party's burden of proof has been satisfied or whether some evidence should be given more weight than other evidence. However, the rules of evidence do not make these distinctions,[19] and the better cases do not use them.[20] The Tennessee Supreme Court has

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[16] *See* Ammons v. Bonilla, 886 S.W.2d 239 (Tenn. Ct. App. 1994) (left turn signal removed from car 30 months after accident; car had been in another accident 4 months after one at issue and car was then stored in cow pasture for 2 years; court had "serious reservations" about relevance of turn signal); State v. Haun, 695 S.W.2d 546 (Tenn. Crim. App. 1985) (lapse of time may affect tendency to prove appropriate fact, but the real issue is whether there is a rational connection between two events); Moon v. Scoa Indus., 764 S.W.2d 550 (Tenn. Ct. App. 1988) (maintenance of store, three years after accident, is irrelevant in assessing condition of accident scene at time of incident); State v. Norris, 874 S.W.2d 590 (Tenn. Crim. App. 1993) (witness may testify about defendant's driving habits one to two blocks from accident before collision occurred in an aggravated assault by auto case; events were sufficiently close in time to be admissible); Reed v. Allen, 522 S.W.2d 339 (Tenn. Ct. App. 1975) (general discussion of admissibility of testimony about driving conduct prior to accident); Coe v. State, 17 S.W.3d 193, 212 (Tenn. 2000) (stale evidence is irrelevant to issue of present mental competency).

[17] State v. Phillips, 138 S.W.3d 224, 231 (Tenn. Ct. App. 2003) (direct evidence establishes the main fact at issue without inference or presumption).

[18] State v. Phillips, 138 S.W.3d 224, 231 (Tenn. Ct. App. 2003). *See also* TENN. PATTERN JURY INSTRUCTIONS—CIVIL 2.02 (circumstantial evidence is a fact or group of facts that causes you to conclude that another fact exists).

[19] *See* TENN. PATTERN JURY INSTRUCTIONS—CIVIL 2.02 (law permits juror to give equal weight to direct and circumstantial evidence).

[20] *See* State v. Phillips, 138 S.W.3d 224, 230 (Tenn. Ct. App. 2003) (litigants may prove any material fact by direct or circumstantial evidence, or a combination of both); Aetna Cas. & Sur. Co. v. Parton, 609 S.W.2d 518 (Tenn. Ct. App. 1980) (in civil case, preponderance of evidence satisfies burden of proof regardless of whether based on direct or circumstantial evidence); State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991) (criminal conviction may be based entirely on circumstantial evidence where facts are so clearly interwoven and connected that they point only at the defendant); State v. Matthews, 805 S.W.2d 776 (Tenn. Crim. App. 1990) (criminal offense may be established by circumstantial evidence if facts and circumstances are so strong and cogent that they exclude every other reasonable hypothesis except guilt); State v. Thomas, 158 S.W.3d 361, 387 (Tenn. 2005) (adopting opinion of Court of Criminal Appeals) (guilty verdict may result from purely circumstantial evidence but must be so strong and cogent as to exclude every other reasonable hypothesis save guilt beyond a reasonable doubt);

specifically adopted the federal rule that direct and circumstantial evidence should be treated the same when assessing the sufficiency of the evidence.[21] Tennessee Court of Appeals has noted that direct and circumstantial evidence are equally relevant, and litigants may prove a material fact by either or both types of proof.[22] Indeed, in some situations "circumstantial evidence may be more convincing than direct evidence."[23] And in a criminal case, guilt may be established exclusively by circumstantial evidence.[24] The standard of appellate review is the same whether a criminal conviction is based on direct or circumstantial evidence or a combination of both.[25] However, some Tennessee authorities seem to make a distinction when only circumstantial evidence is presented. Guilt may be found only when "the facts and circumstances must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant."[26]

[d] Sufficiency of Evidence

The concept of relevance must be distinguished from the term *sufficiency of the evidence*, which refers to whether or not a party's burden of proof has been satisfied. In an ordinary civil case, evidence is sufficient if it meets the test of proving the necessary facts by a preponderance of evidence. A criminal case requires proof beyond a reasonable doubt,[26.1] and the sufficiency of the convicting evidence must be examined in light of all the evidence presented to the jury, including that which may have been improperly

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Hindman v. Doe, 241 S.W.3d 464, 468 (Tenn. Ct. App. 2007) (Tennessee law does not distinguish between the probative value of direct and circumstantial evidence).

[21] *State v. Dorantes, 331 S.W.3d 370, 381 (Tenn. 2011)*; *State v. Foust, 482 S.W.3d 20, 45 (Tenn. Crim. App. 2015)*(direct and circumstantial evidence should be treated the same when weighing the sufficiency of such evidence).

[22] *McEwen v. Tenn. Dept. Of Safety, 173 S.W.3d 815, 825 (Tenn. Ct. App. 2005)*.

[23] *McEwen v. Tenn. Dept. Of Safety, 173 S.W.3d 815, 825 (Tenn. Ct. App. 2005)*; *Hindman v. Doe, 241 S.W.3d 464, 468 (Tenn. Ct. App. 2007)* (law does not distinguish between the probative value of direct and circumstantial evidence; both may be equally relevant and probative; parties may prove a material fact by direct or circumstantial evidence, or a combination of both).

[24] *State v. Dorantes, 331 S.W.3d 370, 381 (Tenn. 2011)State v. Goldberg, 2019 Tenn. Crim. App. LEXIS 180 (Tenn. Crim. App. 2019)* (a conviction may be supported solely by circumstantial evidence, and the circumstantial evidence is not required to exclude every reasonable hypothesis except guilt); *State v. Wagner, 382 S.W.3d 289, 298 (Tenn. 2012)* (circumstantial evidence alone is sufficient to support a conviction and it need not exclude every reasonable hypothesis except that of guilt); *State v. Echols, 382 S.W.3d 266, 283 (Tenn. 2012)* (criminal offense may be established exclusively by circumstantial evidence); *State v. Sexton, 368 S.W.3d 371, 399 (Tenn. 2012)* (criminal offense may be established exclusively by circumstantial evidence); *State v. Hammers, 2016 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. 2016)*.

[25] *Id.*; *State v. Hill 333 S.W.3d 106, 132 (Tenn. Crim. App. 2010)*; *State v. Wagner, 382 S.W.3d 289, 297 (Tenn. 2012)* (circumstantial and direct evidence are reviewed under the same standard of review); *State v. Echols, 382 S.W.3d 266, 283 (Tenn. 2012)* (standard of review is same for evidence that is circumstantial, direct, and combination of both); *State v. Sexton, 368 S.W.3d 371, 399 (Tenn. 2012)* (standard of review is identical whether conviction is based on direct or circumstantial evidence).

[26] *State v. Hill 333 S.W.3d 106, 132 (Tenn. Crim. App. 2010)* (*quoting* *State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971)*.

[26.1] *State v. Goldberg, 2019 Tenn. Crim. App. LEXIS 180 (Tenn. Crim. App. 2019)* (appellate court must set aside a conviction if the evidence is insufficient to support the finding of guilt beyond a reasonable doubt. *Tenn. R. App. P. 13(e)*; the standard on appeal is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt).

admitted.[26.2]Direct and circumstantial evidence should be treated the same when weighing the sufficiency of the evidence.[26.3]

Relevance is not as stringent a standard. Evidence may be relevant yet not sufficient to satisfy the applicable standard of proof. Each item of proof may make a small, incremental contribution to a party's total efforts to meet its proof obligations. For example, in a particular tort case it may take twenty pieces of relevant evidence to satisfy the plaintiff's burden of proof. Each of the pieces of evidence is relevant, but the burden of proof is not satisfied until the last one is admitted.[26.4]

[e] Weight of Evidence

Relevance must also be distinguished from the concept of the *weight of the evidence.* Evidence is relevant if it has "any tendency" to prove an appropriate fact. The judge determines whether a piece of evidence is relevant.[27] The trier of fact determines the weight that piece of evidence is to be given.[27.1] In assessing weight, the trier of fact decides how convincing the evidence is in the context of the case.[27.2] Thus, a judge may rule that an item of evidence (a confession, for example) is relevant, but the jury may give it no weight (perhaps because the jurors believe the defendant's testimony that the confession was a lie).

[6] Judicial Discretion

Relevance questions often present difficult decisions for a trial judge. Even though Rule 401 provides a minimal standard, the standard is vague and provides a judge with little guidance in resolving a specific objection. Legal precedents are rarely helpful. The court is free to use common sense, based on experience and ordinary logic. The law is clear that "the determination of the relevance or probative value of evidence is within the trial court's discretion."[28] Because an assessment of whether or not a piece of evidence is relevant requires an understanding of the case's theory and other evidence as well as a familiarity with the evidence in question and

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[26.2] *Id.*

[26.3] *State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011)* (the standard of review [for sufficiency of the evidence] 'is the same whether the conviction is based upon direct or circumstantial evidence,' " quoting *State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)*); *State v. Farris, 2017 Tenn. Crim. App. LEXIS 620 (Tenn. Crim. App. 2017)* (the standard of review for sufficiency of the evidence is the same whether the conviction is based upon direct or circumstantial evidence); *State v. Pack, 421 S.W.3d 629 (Tenn. Crim. App. 2013)*.

[26.4] *See, e.g.,* ***State v. Coulter, 67 S.W.3d 3, 2001 Tenn. Crim. App. LEXIS 485 (Tenn. Crim. App. 2001)***, overruled in part on other grounds, *State v. Johnson, ___S.W.3d___, 2013 Tenn. Crim. App. LEXIS 1051 (Tenn. Crim. App. 2013)* (relevant evidence need not be sufficient to satisfy a party's burden of proof; rather, each item of proof may make a small, incremental contribution to a party's total efforts to meet its proof obligations).

[27] *See below § 4.01[6]*.

[27.1] *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019)* (the jury determines the weight to be given, and inferences to be drawn from, circumstantial evidence).

[27.2] *State v. Rice, 184 S.W.3d 646 (Tenn. 2006)* (jury decides the weight to be given to circumstantial evidence; the inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury); *State v. Farris, 2017 Tenn. Crim. App. LEXIS 620 (Tenn. Crim. App. 2017)*; *State v. Taylor, 2016 Tenn. Crim. App. LEXIS 653 (Tenn. Crim. App. 2016)*. See also, ***State v. Coulter, 67 S.W.3d 3, 2001 Tenn. Crim. App. LEXIS 485 (Tenn. Crim. App. 2001)***, overruled in part on other grounds, *State v. Johnson, ___S.W.3d___, 2013 Tenn. Crim. App. LEXIS 1051 (Tenn. Crim. App. 2013)* (jury entitled to assess whether letters and notes written by defendant in the year before wife's murder "could reasonably affect the probability" of premeditation "in the context of other evidence" introduced at trial).

[28] *State v. Leath, 744 S.W.2d 591, 593 (Tenn. Crim. App. 1987)*.

the other proof in the case, appellate courts give great deference to a trial judge's decision on relevance issues. Often it is stated that a trial court's decision on relevance will be reversed only for an abuse of discretion.[29]

Despite the widespread use of the term "abuse of discretion," it is rarely defined for purposes of evidence law. In *State v. Shuck,*[30] however, the Tennessee Supreme Court, while discussing the abuse-of-discretion standard in the context of expert testimony, noted that:

> [A]n appellate court should find an abuse of discretion when it appears that a trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.[31]

The same decision quoted a prior case on another issue as follows:

> Discretion denotes the absence of a hard and fast rule. When invoked as a guide for judicial action, it requires that the trial court view the factual circumstances in light of the relevant legal principles and exercise considered discretion before reaching a conclusion. Discretion should not be arbitrarily exercised. The applicable facts and law must be given due consideration.[32]

Another iteration by the Tennessee Supreme Court is that there is an abuse of discretion when the trial court goes outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by higher courts to guide the exercise of discretion.[33]

To facilitate appellate review, the trial judge should state on the record the reasons for admitting or excluding evidence on relevance grounds.[34]

[7] Special Rules and Illustrations

Relevance issues are resolved on a case-by-case basis. The facts and issues of each case are different and must be analyzed in assessing whether an item of evidence is relevant. Despite the unique features of relevance decisions, some patterns have emerged from the case law. Perhaps the most frequently discussed issue is the admissibility of photographs of an accident or crime scene, discussed elsewhere.[35]

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[29] See *e.g.*, State v. Sexton, 2012 Tenn. LEXIS 739 (Tenn. 2012) (trial courts have a wide latitude of discretion in determining whether evidence is relevant); State v. Hayes, 899 S.W.2d 175 (Tenn. Crim. App. 1995); State v. Hill, 885 S.W.2d 357 (Tenn. Crim. App. 1994); ***State v. Porterfield, 746 S.W.2d 441 (Tenn. 1988)***; State v. Delk, 692 S.W.2d 431 (Tenn. Crim. App. 1985); Strickland v. City of Lawrenceburg, 611 S.W.2d 832, 835 (Tenn. Ct. App. 1980); State v. Gray, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997) (admission of evidence is discretionary with trial judge and will not be disturbed on appeal absent a clear abuse of that discretion); State v. DuBose, 953 S.W.2d 649 (Tenn. 1997) (standard of review on relevance issue is abuse of discretion); Mercer v. Vanderbilt University, 134 S.W.3d 121, 131 (Tenn. 2004) (trial court's decision to admit or exclude evidence overturned on appeal only for abuse of discretion).

[30] 953 S.W.2d 662 (Tenn. 1997).

[31] Id. at 669, *citing* Ballard v. Herzke, 924 S.W.2d 652, 661 (Tenn. 1996). *See also* Mercer v. Vanderbilt University, 134 S.W.3d 121, 131 (Tenn. 2004) (trial court correctly excluded evidence that plaintiff in medical malpractice case had prior alcohol-related criminal convictions; irrelevant on loss of earning capacity or future medical expenses); State v. Lewis, 235 S.W.3d 136, 141 (Tenn. 2007) (virtually identical); State v. Sexton, 2012 Tenn. LEXIS 739 (Tenn. 2012). State v. Clark, 452 S.W.3d 268, 277 (Tenn. 2014).

[32] State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997), *citing* Ballard v. Herzke, 924 S.W.2d 652, 661 (Tenn. 1996) (dealing with modification of a protective order).

[33] State v. Lewis, 235 S.W.3d 136, 141 (Tenn. 2007).

[34] *See* ***State v. McCall, 698 S.W.2d 643, 648 (Tenn. Crim. App. 1985)***; State v. Driver, 634 S.W.2d 601, 607 n.2 (Tenn. Crim. App. 1981); State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995) (trial court's failure to make specific findings in excluding evidence hampered appellate review to some extent).

[35] *See below* § 4.03[9].

Another pattern stems from cases involving mental status. When a person's mental condition is at issue, some Tennessee authorities hold that "the courts generally allow considerable latitude in the introduction of evidence concerning the issue."[36] A good illustration is *State v. Phipps*,[37] an excellent opinion of the Court of Criminal Appeals by former Justice White, holding that post-traumatic stress disorder is relevant as to whether a criminal accused had the intent required for first-degree murder.

The Tennessee Supreme Court adopted the *Phipps* rule in *State v. Hall*.[38] The *Hall* Court held that in a criminal case the defendant may prove that he or she had a mental disease or defect (as opposed to a particular mental state or mental condition) that rendered him or her incapable of having the criminal intent charged for the crime. Often referred to as *diminished capacity*, this principle is really a rule of relevance rather than a formal criminal defense. It permits the accused to introduce expert psychiatric and related evidence that negates the mental state required for the alleged offense. Where an expert attempts to "infer" state of mind or fails to make a diagnosis of the defendant's capacity to form the required mens rea, the expert evidence will be excluded.[38.1]

Similar latitude has been articulated for fraud cases.[39] Also, evidence that a man french-kissed a child is relevant as to whether his touching her breast was intentional[40] and evidence of post-death injuries to a body is relevant as to the killer's intent.[41]

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[36] State v. Haun, 695 S.W.2d 546, 550 (Tenn. Crim. App. 1985). In *Haun*, an accused in a murder case raised an insanity defense. The defense sought to introduce proof that he had an organic mental defect several years before the crime. The trial court excluded the evidence as irrelevant. The Court of Criminal Appeals reversed, holding that there was a rational connection between the earlier defect and the accused's mental condition at the time of the crime. Nothing in the record suggested the accused had recovered from the defect in the time between the earlier diagnosis and the crime. The court suggested it would be especially liberal in finding such evidence relevant in insanity cases. It should be noted, however, that this special treatment was not necessary in *Haun.* Ordinary principles of relevance, a minimal standard, would have made the proof of an organic defect admissible on the issue of insanity.

[37] 883 S.W.2d 138 (Tenn. Crim. App. 1994). *See also* State v. Wingard, 891 S.W.2d 628 (Tenn. Crim. App. 1994) (upcoming parole hearing relevant on motive to escape); State v. Gentry, 881 S.W.2d 1 (Tenn. Crim. App. 1993) (statement by defendant that he would kill another T.V.A. employee in a similar situation and that he told the employee it was "my money or his life" is relevant on intent and motive); State v. Abrams, 935 S.W.2d 399 (Tenn. 1996) (defendant's mental condition relevant on issues of premeditation and deliberation, following *Phipps*).

[38] 958 S.W.2d 679 (Tenn. 1997); Nesbit v. State, 452 S.W.3d 779 (Tenn. 2014) (concept of diminished capacity is evidence rule allowing evidence to negate specific intent).

[38.1] *See* State v. Hall, 958 S.W.2d 679 (Tenn. 1997) (admissibility of an expert's testimony regarding a defendant's diminished capacity requires a two-pronged showing: (1) that the defendant lacked the capacity to form the culpable mental state and (2) that he lacked the capacity due to a mental disease or defect); State v. Ferrell, 277 S.W.3d 372 (Tenn. 2009) (clarifying *State v. Hall*, holding that mental health testimony is admissible only if it satisfies the relevancy and expert testimony provisions in the Tennessee Rules of Evidence and its content indicates that a defendant lacked the capacity to form the required mental state for an offense); State v. Thomas, 2015 Tenn. Crim. App. LEXIS 381 (Tenn. Crim. App. 2015) (where defendant was charged with first-degree murder, expert's testimony was properly excluded where the jury-out hearing established that he was only able to make "inferences" about defendant's psychological state after reviewing defendant's medical records and witness statements; he was unable to reach a diagnosis regarding defendant's mental state at the time of the crime and, therefore, could not conclude defendant was incapable of forming premeditation); State v. Bonsky, 2016 Tenn. Crim. App. LEXIS 314 (Tenn. Crim. App. 2016) (expert testified about defendant's PTSD, anxiety, and intoxication, but when the State specifically asked if she could say that defendant lacked the capacity to premeditate or act intentionally, she answered that she could only state that his ability to form a mental state was "impacted"; the court held that the fact that the defendant'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*).

[39] State v. Kenner, 640 S.W.2d 51, 55 (Tenn. Crim. App. 1982) ("[m]ore remote evidence is admissible as relevant in fraud cases than is generally admissible in other cases").

[40] State v. Hayes, 899 S.W.2d 175 (Tenn. 1995).

[41] State v. Barnard, 899 S.W.2d 617 (Tenn. Crim. App. 1994).

It should be noted that the latitude expressed in these areas is the product of decisional law. Rule 401 does not expressly single out any area for special treatment; it establishes a general rule to be applied in all areas of law.

There are countless illustrations of relevance embracing virtually every legal topic.[42]

Sometimes statutes will resolve relevance issues. For example, in Tennessee a child's failure to wear a bicycle helmet is inadmissible as evidence in any civil action.[43]

Another Tennessee statute makes the failure to wear a safety belt inadmissible in a civil action, except on the issue of cause of injuries in a products liability case.[44] Similarly, evidence of failure to use a child restraint

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[42] See *e.g.*, *State v. Brandon, 898 S.W.2d 224 (Tenn. Ct. App. 1994)* (in eminent domain case, evidence of environmental contamination and cost of remedial measures are relevant in determining fair market value); *Underwood v. Waterslides of Mid-America, 823 S.W.2d 171 (Tenn. Ct. App. 1991)* (proof that a person was hired after a waterslide accident to investigate the accident does not make it more or less probable that he was responsible for the entire waterslide rather than only a part of it); *Crain v. Brown, 823 S.W.2d 187 (Tenn. Ct. App. 1991)* (evidence of value of gift relevant on issue of undue influence in will contest); *State v. Black, 815 S.W.2d 166 (Tenn. 1991)* (threats to shoot someone on night of homicide relevant to prove possession of gun that same night; evidence of nature of executions irrelevant in capital case); *State v. Matthews, 805 S.W.2d 776, 782 (Tenn. Crim. App. 1990)* (proof of street value of cocaine at scene of crime relevant to whether defendant had intent to sell cocaine); *State v. Gray, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997)* (defendant's conduct after death of homicide victim is relevant; defendant attempted to clean up murder scene prior to arrival of police); *City of Johnson City v. Outdoor West, 947 S.W.2d 855 (Tenn. Ct. App. 1996)* (evidence of probability of lease's renewal and existence of cancellation provision are relevant in determining a leasehold's value in condemnation case); *In re Estate of Oakley, 936 S.W.2d 259 (Tenn. Ct. App. 1996)* (in will contest, evidence of testator's mental condition is relevant, but if that mental condition is temporary, superficial, accidental, occasional or intermittent, it has little or no probative value and is not sufficient to shift the burden of proving the testator's condition at the time the will was executed); *State v. Farmer, 927 S.W.2d 582 (Tenn. Crim. App. 1996)* (in case where defendant's only defense was that he did not kill the victim, the victim's intent to steal marijuana was irrelevant under any theory); *State v. Coolidge, 915 S.W.2d 820 (Tenn. Crim. App. 1995)* (memorandum about the inaccuracies in certain breath alcohol machines was not relevant in case involving another machine that was not mentioned in the memorandum as being inaccurate); *Tire Shredders, Inc. v. ERM-North Central, 15 S.W.3d 849 (Tenn. Ct. App. 1999)* (evidence of company A's unethical business practices is irrelevant on whether company B would have been able to perform a contract with company A); *Mercer v. Vanderbilt University, 134 S.W.3d 121 (Tenn. 2004)* (prior alcohol-related convictions are irrelevant on issue of loss of earning capacity or future medical expenses in personal injury action; result possibly different in wrongful death action); *Biscan v. Brown, 160 S.W.3d 462 (Tenn. 2003)* (juvenile's prior experience with alcohol is relevant on her ability to evaluate risk of riding with intoxicated driver); *Young v. Hartley, 152 S.W.3d 490 (Tenn. Ct. App. 2004)* (evidence of vaginal scarring is relevant on issue of causation of injuries); *State v. Jones, 151 S.W.3d 494, 499 (Tenn. 2004)* (seat belt warning sign relevant on issue whether defendant was criminally negligent in having her child in her arms in car); *Mosley v. McCanless, 207 S.W.3d 247 (Tenn. Ct. App. 2006)* (evidence of accidents and other information about an intersection after the accident at issue is inadmissible; no evidence rule cited and no reason given); *Sparks v. Mena, 294 S.W.3d 156, 161 (Tenn. Ct. App. 2008)* (in products liability case, other similar accidents are admissible to show existence of a particular dangerous condition or defendant's knowledge of the dangerous condition). *See e.g.,* *State v. Hayes, 337 S.W.3d 235 (Tenn. Crim. App. 2010)* (in criminal case for knowingly possessing controlled substance with intent to deliver or sell, it is relevant that defendant had guns and ammunition in the house where the drugs were found; jury may infer intent to sell or distribute from facts surrounding the arrest, including the presence of guns, beepers, and the like); *State v. Hill, 333 S.W.3d 106 (Tenn. Crim. App. 2010)* (in criminal case for abusing a corpse, videotape of victim's body being removed from creek is relevant as showing how the defendant disposed of the corpse); *In re Estate of Smallman, 398 S.W.3d 134 (Tenn. 2013)* (in wills case involving alleged fraud and undue influence, evidence of a party's financial condition is generally irrelevant, but is relevant on punitive damages and on whether a will is just and equitable; evidence of the financial condition of someone who would not benefit from a finding of undue influence is irrelevant); *In re Melanie T., 352 S.W.3d 687 (Tenn. Ct. App. 2011)* (domestic violence against children's mother by children's father is relevant in dependent and neglected case on issue whether the children were suffering in conditions adversely affecting their mental health because of the abusive and violent atmosphere in their home).

[43] *Tenn. Code Ann. § 55-52-106* (2008).

[44] *Tenn. Code Ann. § 55-9-604* (2008) (including failure to wear safety belt or receipt of citation or warrant for arrest for failure to wear).

system, including a booster seat, is generally inadmissible in a civil suit.[45] An exception exists in certain product liability cases, and cases in which a party to the civil action is not the parent or legal guardian.[46]

Statistical evidence. The usefulness of statistical evidence depends on all of the surrounding facts and circumstances.[46.1] Similarly, the Sixth Circuit explained, in the context of an employment discrimination claim, that:

> [s]tatistical evidence does not differ greatly from other types of proof. It is relevant, even when believed, only if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Statistics gain relevance in one of two ways: the statistics, standing alone, reasonably lead to a particular conclusion validated by human experience, or comparative statistics point out discrepancies in behavior that would cause the average person to scrutinize the employer's motives. Unless the statistics, standing alone or in comparison, are sufficient to lead the mind naturally to the conclusion sought, they have no probative value; they do not move the proof one way or another."[46.2]

[8] Parol Evidence Rule

[a] In General

A party to litigation may challenge the meaning of words in a contract. This effort may be difficult because of the *parol evidence rule*, which limits the admissibility of evidence that contradicts or supplements written agreements.[46.3] It applies to a wide variety of documents.[47]

The parol evidence rule, often characterized as a rule of substantive law rather than a rule of evidence, is designed to protect the integrity of written contracts and to provide a measure of predictability to business dealings. It has often been characterized as a guard against fraud and perjury. The parol evidence rule, if

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[45] *Tenn. Code Ann.§ 55-9-602* (2008).

[46] *Tenn. Code Ann. § 55-9-602(k)(1)(A)* (evidence admissible in products liability action) and *Tenn. Code Ann. § 55-9-602(k)(3)* (evidence is admissible in any civil action in which party is not parent or legal guardian).

[46.1] *Teamsters v. United States, 431 U.S. 324, 340 (1977)*.

[46.2] *Simpson v. Midland-Ross Corp., 823 F.2d 937 (6th Cir. Mich. 1987)*. *See also Martin v. Perma-Chink Sys., 2016 Tenn. App. LEXIS 432 (Tenn. Ct. App. 2016)* (plaintiff's chart of raw data, reflecting that certain employees over age 60 were terminated, was probative evidence of age discrimination, particularly since it was not the sole evidentiary basis for plaintiff's claim and was used to refute defendant's argument that its decision to fire plaintiff was based on a legitimate business reason; the court noted that Tennessee law does not require direct evidence of age discrimination, and such evidence is quite rare in such cases).

[46.3] Parol evidence that does not contradict or vary the terms that are plainly expressed in the writing, however, is admissible. *See Laxmi Hosp. Grp., LLC v. Narayan, 2018 Tenn. App. LEXIS 740 (Tenn. Ct. App. 2018)* (testimony lender was making one loan, evidenced by two identical promissory notes, was consistent with the terms of the notes and, therefore, did not constitute inadmissible parol evidence).

[47] See *e.g.*, *Grand Valley Lakes Property Owners Ass'n v. Cary, 897 S.W.2d 262 (Tenn. Ct. App. 1995)* (partial release of deed of trust); *Jennings v. Hayes, 787 S.W.2d 1 (Tenn. Ct. App. 1989)* (contract to buy stock); *Faithful v. Gardner, 799 S.W.2d 232 (Tenn. Ct. App. 1990)* (real estate sales contract); *GRW Enters. v. Davis, 797 S.W.2d 606 (Tenn. Ct. App. 1990)* (option to purchase real property); *United Am. Bank v. First Citizens, 764 S.W.2d 555 (Tenn. Ct. App. 1988)* (cashier's check); *International House of Talent v. Alabama, 712 S.W.2d 78 (Tenn. 1986)* (entertainment contract for exclusive service as agent); *First Tenn. Bank Nat'l Ass'n v. Wilson, 713 S.W.2d 907 (Tenn. Ct. App. 1985)* (promissory note); *Brown v. Brown, 45 Tenn. App. 78, 320 S.W.2d 721 (1958)* (deed); *Stickley v. Carmichael, 850 S.W.2d 127 (Tenn. 1992)* (deed).

rigidly applied, would require courts to ascertain the meaning and intention of the parties by looking to the contract signed by the parties.[48]

In general terms, the parol evidence rule provides that contracting parties may not use outside evidence to alter the plain meaning of an unambiguous written contract. According to a Tennessee decision:

> After preliminary negotiations and oral conversations are concluded and a contract is reduced to writing that is clear and unambiguous, there is a conclusive presumption that the parties have reduced their entire agreement to writing, and that any parol agreement is merged in the written contract. Testimony of prior or contemporaneous conversations for the purpose of altering, contradicting, or varying the terms of the written instrument are incompetent and inadmissible.[49]

Another Tennessee decision noted that the parol evidence rule barred evidence "to contradict, vary, or alter a written contract where the written instrument is valid, complete, and unambiguous, absent fraud or mistake or any claim or allegation thereof."[50]

The parol evidence rule has been codified in Tennessee's Uniform Commercial Code and applies to transactions covered by that Code:[51]

> **Final written expression; Parol or extrinsic evidence.** Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
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> **(a)** By course of performance, course of dealing, or usage of trade, pursuant to § 47-1-303; and

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[48] *Cf.* Stamp v. Honest Abe Log Homes, Inc., 804 S.W.2d 455, 457 (Tenn. Ct. App. 1990).

[49] Faithful v. Gardner, 799 S.W.2d 232, 235 (Tenn. Ct. App. 1990). *See also* ***Cummings Inc. v. Dorgan, 320 S.W.3d 316 (Tenn. Ct. App. 2009)***; Gates, Duncan and Vancamp Co. v. Levatino, 962 S.W.2d 21 (Tenn. Ct. App. 1997) (when contract language is unambiguous and there is no claim of fraud or mistake, parol evidence is inadmissible to contradict or vary the terms of a written contract); Squibb v. Smith, 948 S.W.2d 752 (Tenn. Ct. App. 1997) (parol evidence is inadmissible to contradict, alter, or vary the terms of a written, unambiguous contract); Book-Mart of Florida, Inc. v. National Book Warehouse, Inc., 917 S.W.2d 691, 694 (Tenn. Ct. App. 1995) (parol evidence rule excludes testimony for purpose of altering, contradicting, or varying the terms of a clear and unambiguous contract); Harry J. Whelchel Co. v. Ripley Tractor Co., 900 S.W.2d 691, 692–93 (Tenn. Ct. App. 1995) (parol evidence inadmissible to contradict, vary or alter a written contract that is valid, complete, and unambiguous, absent fraud or mistake).

[50] Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 259 (Tenn. Ct. App. 1990). *See also* City of Memphis v. Moore, 818 S.W.2d 13, 16 (Tenn. Ct. App. 1991) (parol evidence inadmissible to vary, alter, amend, modify or otherwise contradict unambiguous document); Stamp v. Honest Abe Log Homes, Inc., 804 S.W.2d 455, 457 (Tenn. Ct. App. 1990) ("general rule is that parol evidence is not admissible to contradict, alter, or vary the terms of a written instrument, except upon grounds of estoppel, fraud, accident or mistake"); Jennings v. Hayes, 787 S.W.2d 1 (Tenn. Ct. App. 1989) (evidence of prior or contemporaneous oral statements are inadmissible to contradict terms of final and complete written contract); Grand Valley Lakes Prop. Owners v. Cary, 897 S.W.2d 262, 266–67 (Tenn. Ct. App. 1994) (parol evidence inadmissible to vary terms of "written instrument which is clear and unambiguous on its face"; but parol evidence is admissible if ambiguity is present, to apply the description in a written instrument, but not to supply an omitted description); Ingram v. Earthman, 993 S.W.2d 611, 641 (Tenn. Ct. App. 1998) (parole evidence cannot be used to contradict or alter the terms of a written contract that is complete and unambiguous on its face); Hillard v. Franklin, 41 S.W.3d 106, 112 (Tenn. Ct. App. 2000) (parol evidence rule provides that contracting parties cannot use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract); Staubach Retail v. H.G. Hill Realty Co., 160 S.W.3d 521 (Tenn. 2005) (same); First Tenn. Bank Nat. v. Bad Toys, Inc. 159 S.W.3d 557 (Tenn. Ct. App. 2004) (same); Lyons v. Farmers Ins. Exch., 26 S.W.3d 888, 892 (Tenn. Ct. App. 2000) (parol evidence not admissible to contradict, vary, or alter a valid, complete, and unambiguous written instrument absent fraud or mistake).

[51] Tenn. Code Ann. § 47-2-202 (Supp. 2010). *See* ***Next Generation, Inc. v. Wal-Mart, Inc., 49 S.W.3d 860, 863 (Tenn. Ct. App. 2000)*** (reading Tenn. Code Ann. § 47-2-202 as stating "that a writing intended by the parties as a final expression of their agreement may not be contradicted by evidence of a prior or contemporaneous oral agreement, but may be explained or supplemented by consistent additional terms").

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.[51.1]

[b] Exceptions

The parol evidence rule is far from absolute. Sometimes it even appears that courts ignore it to prevent unjust results. Tennessee decisions, as well as those from every other jurisdiction, have created a number of exceptions, permitting parol evidence to be used in interpreting some contracts. The facts of each case determine whether an exception to the parol evidence rule applies.[52]

Existence of Another Contract. One logical exception is that Tennessee courts have permitted parol evidence to be introduced to prove the existence of another contract. Cases have admitted parol evidence to establish the existence of an agreement made subsequent to an earlier written agreement.[53] A related exception is proof of the existence of an independent or collateral agreement that does not conflict with the written contract.[54] The test for admitting proof of the collateral agreement is "whether the oral agreement

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[51.1] *See, e.g.*, Roby v. NationStar Mortg., LLC, 2020 Tenn. App. LEXIS 212 (Tenn. Ct. App. May 11, 2020) (since the agreement had an unambiguous integration clause indicating that the agreement was sole and complete, plaintiff's breach of contract claim failed; the claim relied on prior or contemporaneous statements that were not part of the agreement and constituted inadmissible parol evidence).

[52] Starnes v. First Am. Nat'l Bank, 723 S.W.2d 113, 117 (Tenn. Ct. App. 1986); Early v. Street, 192 Tenn. 463, 241 S.W.2d 531, 535 (1951).

[53] Smith v. Hi-Speed, Inc., 2016 Tenn. App. LEXIS 638 (Tenn. Ct. App. Aug. 30, 2016) (parole evidence rule does not bar parties from proving the existence of an agreement made after an earlier written agreement; accordingly, where plaintiffs asserted there was evidence in the record from which it could be concluded that the parties modified the written lease agreement, it would be error for the trial court to dismiss plaintiffs' claim, assuming there was evidence creating a genuine issue of fact on this matter); Galbreath v. Harris, 811 S.W.2d 88 (Tenn. Ct. App. 1990) (parol evidence rule does not bar evidence showing a consensual modification of an earlier amendment to a contract; a written contract "may be modified by the express words of the parties in writing, as well as by parol"); Starnes v. First Am. Nat'l Bank, 723 S.W.2d 113, 118 (Tenn. Ct. App. 1986) (parol evidence rule does not forbid evidence of agreement made subsequent to contract in question, even if subsequent agreement changes, modifies, or abrogates contract in question); Brunson v. Gladish, 174 Tenn. 309, 125 S.W.2d 144 (1939); ***Trice v. Hewgley, 53 Tenn. App. 259, 267–68, 381 S.W.2d 589, 593 (1964)***; Squibb v. Smith, 948 S.W.2d 752, 756 (Tenn. Ct. App. 1997) (parol evidence rule inapplicable to limit proof of agreements separate and apart from earlier agreement, even if they alter or even abrogate the original agreement); Lindsey v. Lindsey, 930 S.W.2d 553 (Tenn. Ct. App. 1996) (parol evidence rule does not bar extraneous evidence of later written agreement); Lancaster v. Ferrell Paving, Inc., 397 S.W.3d 606 (Tenn. Ct. App. 2011) (after a written contract is made, it may be modified by the express words of the parties in writing or orally when both parties consent to the modifications, even when the contract itself says it may only be modified in writing).

[54] See *e.g.*, Starnes v. First Am. Nat'l Bank, 723 S.W.2d 113, 117 (Tenn. Ct. App. 1986) (parol evidence admissible to prove existence of independent collateral agreement); Continental Bankers Life Ins. Co. v. Bank of Alamo, 578 S.W.2d 625, 630 (Tenn. 1979) (prior or collateral oral agreement which varies or contradicts express terms of an instrument is inadmissible); Isabell v. Aetna Ins. Co., 495 S.W.2d 821, 824 (Tenn. Ct. App. 1971); McGannon v. Farrell, 141 Tenn. 631, 637, 214 S.W. 432, 433 (1919); Mee v. Mee, 113 Tenn. 453, 82 S.W. 830 (1904) (parol evidence admissible to prove that deed, which did not mention a trust, conveyed property that was supposed to be held in trust; existence of trust did not contravene deed); Lyons v. Farmer's Ins. Exch., 26 S.W.3d 888 (Tenn. Ct. App. 2000) (parol proof of inducing representations or collateral agreements to a written contract must be limited to subject matter not contradicting or varying terms plainly expressed in the writing); First Citizens Bank of Cleveland v. Cross, 55 S.W.3d 564, 569 (Tenn. Ct. App. 2001) (parole evidence of an independent collateral agreement is admissible so long as it does not vary or contradict the writing; separate oral agreement admissible to establish that mortgagee will maintain insurance on mortgaged property when original agreement obligated mortgagor to provide insurance); Realty Store, Inc. v. Tarl P'ship, L.P., 153 S.W.3d 366, 370 (Tenn. Ct. App. 2004) (parol evidence rule does not exclude oral testimony if the parties have an underlying agreement or collateral contract).

considering the parties circumstances, the subject matter of the agreement and the nature of the writing, would ordinarily have been included in the written agreement."[55]

A good example of this principle is *Airline Construction, Inc. v. Barr,*[56] involving a Tennessee suit between a property owner and a contractor to build an addition to a motel. The property owner claimed that there was an oral agreement that a portion of the construction would be completed within six months. The written agreement specifically dealt with the completion date but did not include the six-month period claimed by the property owner. The Tennessee Court of Appeals held that the parol evidence rule barred proof of the six-month oral agreement. The court noted that "[p]arol proof of 'inducing representations' or 'collateral agreements' to the written contract must be limited to subject matter which does not *contradict* or *vary terms* which are plainly expressed in the writing."[57]

In cases where proof of a new contract is held not to violate the parol evidence rule, the statute of frauds may nevertheless bar evidence of a new oral contract that contradicts a written one.[57.1] Although a written contract is not necessary to satisfy the statute of frauds, a written memorandum or note evidencing the parties' agreement is required. While the writing required by the statute of frauds must contain the essential terms of the contract, it need not be in a single document. The general rule is that the memorandum, in order to satisfy the statute, must contain the essential terms of the contract, expressed with such certainty that they may be understood from the memorandum itself or some other writing to which it refers or with which it is connected, without resorting to parol evidence.[57.2]

The statute of frauds is not always an absolute bar to agreements that do not comply with the statute, however. Based on the recognition that "the [s]tatute itself can sometimes be turned into an instrument of the very types of evils it was designed to limit or prevent," our law does allow, in appropriate cases, for a party's performance to bring an oral contract out of the [s]tatute of [f]rauds.[57.3] Partial performance, however, will not bring an oral contract out of the statute of frauds if the contract involves interests in real

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[55] *Realty Store v. Tarl Partnership, 153 S.W.3d 366, 370 (Tenn. Ct. App. 2004)* (*quoting In re Media Center, Inc., 190 B.R. 316, 321 (E.D. Tenn. 1994)* (test for admitting a collateral agreement is whether the oral agreement, considering the parties' circumstances, the subject matter of the agreement, and the nature of the writing, would ordinarily have been included in a written agreement).

[56] *807 S.W.2d 247, 259 (Tenn. Ct. App. 1990)*.

[57] *Id. at 259* (emphasis in original).

[57.1] *See Jackson v. CitiMortgage, Inc., 2017 Tenn. App. LEXIS 369 (Tenn. Ct. App. 2017)* (where plaintiffs alleged defendant made oral representation to the plaintiffs and their agent, encouraging them to begin the loan modification process, cease payments during the review, and to submit numerous documents, which led them to believe defendant would postpone their foreclosure, the court held that any alleged oral contract or modification was presumptively barred by both the Statute of Frauds and the express terms of the mortgage note); *Smith v. Hi-Speed, Inc., 2016 Tenn. App. LEXIS 638 (Tenn. Ct. App. 2016)* (holding that plaintiffs' emails offered as evidence to show modification of original agreement did not satisfy Statue of Frauds, but they might satisfy the parole evidence rule if they sufficiently proved the existence of a second agreement). As the Tennessee Supreme Court has explained: "The parol evidence rule and the statute of frauds are separate rules that operate independently from each other … . The statute of frauds does not exclude parol evidence; it simply makes certain agreements unenforceable through suit unless they are evidenced by a signed memorandum. The parol evidence rule protects a completely integrated written contract from being varied or contradicted by extraneous evidence but does not require any particular type of agreement to be in writing. Thus, evidence that does not run afoul of the parol evidence rule may be ineffective under the statute of frauds, and vice versa." *GRW Enterprises, Inc. v. Davis, 797 S.W.2d 606, 611, 1990 Tenn. App. LEXIS 304 (Tenn. Ct. App. 1990)*.

[57.2] *Waddle v. Elrod, 367 S.W.3d 217 (Tenn. 2012)*; *Smith v. Hi-Speed, Inc., 2016 Tenn. App. LEXIS 638 (Tenn. Ct. App. 2016)*.

[57.3] *Shedd v. Gaylord Entm't Co., 118 S.W.3d 695, 698 (Tenn. Ct. App. 2003)*. *See also Smith v. Hi-Speed, Inc., 2016 Tenn. App. LEXIS 638 (Tenn. Ct. App. 2016)* (quoting *Shedd v. Gaylord Entm't Co.*).

estate.[57.4] The doctrine of equitable estoppel may be invoked to prevent unconscionable results in cases where the Statue of Frauds bar the admission of evidence but the parole evidence rules does not.[58]

Contract Terms Not in Dispute. Another obvious area in which the parol evidence rule is not applicable is the instance where the terms of a contract are not in dispute. In one case, for example, the plaintiffs sued for negligent misrepresentation on the theory that the defendant recommended an unqualified contractor. Since the terms of the agreement between the plaintiffs and the defendants did not need to be interpreted to support the plaintiffs' theory, the parol evidence rule was inapplicable.[59]

Unexpressed Actual Agreement. Other Tennessee cases have strayed far from the literal application of the parol evidence rule and have even permitted proof that the actual agreement of the parties was not expressed in the plain terms of a contract.[60] One case permitted parol evidence to be used "to understand the intention which the parties have expressed in a deed but not for the purpose of carrying out an intention not expressed."[61]

Ambiguous Terms. The most frequent parol evidence exception involves terms of a contract that are ambiguous. In these circumstances, the parol evidence is admissible to help the court ascertain the intent of the parties. For example, in *Faithful v. Gardner,*[62] the court had to determine whether the sale of a subdivision lot was as a unit or by the square foot. The contract simply referred to a sale of "Lot 1." Finding that the contract was not ambiguous, the court held that the parol evidence rule barred evidence of the intent of the parties.[63]

Some courts deal with certain ambiguities by characterizing them as patent or latent ambiguities. Parol evidence may be admissible to remove a latent ambiguity in a deed, but is inadmissible to explain a patent ambiguity.[64]

[57.4] *Smith v. Hi-Speed, Inc., 2016 Tenn. App. LEXIS 638 (Tenn. Ct. App. 2016)*; *Shedd v. Gaylord Entm't Co., 118 S.W.3d 695 (Tenn. Ct. App. 2003)*.

[58] *See e.g.*, *GRW Enters. v. Davis, 797 S.W.2d 606 (Tenn. Ct. App. 1990)*.

[59] *Stamp v. Honest Abe Log Homes, Inc., 804 S.W.2d 455, 457 (Tenn. Ct. App. 1990)*.

[60] See *e.g.*, *GRW Enters. v. Davis, 797 S.W.2d 606, 611 (Tenn. Ct. App. 1990)*; *Rentenbach Eng'g Co., Constr. Div. v. General Realty, Ltd., 707 S.W.2d 524, 526–27 (Tenn. Ct. App. 1985)*; *Freeze v. Home Fed. Sav. & Loan Ass'n, 623 S.W.2d 109, 112 (Tenn. Ct. App. 1981)*.

[61] *Brown v. Brown, 45 Tenn. App. 78, 320 S.W.2d 721, 728 (1958)*. *Cf.* *Frank Rudy Heirs Associates v. Sholodge, 967 S.W.2d 810, 814 (Tenn. Ct. App. 1997)* (although a contract cannot be varied by oral evidence, the court may look to certain matters in arriving at the intention of the parties to the contract, including the course of previous dealings, the circumstances in which the contract was made, and the situation of the parties).

[62] *799 S.W.2d 232 (Tenn. Ct. App. 1990)*.

[63] *See also* *Ingram v. Earthman, 993 S.W.2d 611, 641 (Tenn. Ct. App. 1998)* (parol evidence rule does not bar extraneous evidence to explain an ambiguous contractual provision concerning whether interest on loan was simple or compound); *Gant Oil Co. v. Ace Oil Co., 884 S.W.2d 131 (Tenn. Ct. App. 1994)* (parol evidence admitted when signature on note or draft creates ambiguity); *United Am. Bank v. First Citizens Nat'l Bank, 764 S.W.2d 555 (Tenn. Ct. App. 1988)* (parol evidence admitted to clear up ambiguous endorsement on check); *Jones v. Brooks, 696 S.W.2d 885, 886 (Tenn. 1985)* (parol evidence not admissible to vary plain meaning of contract terms, but is admissible to explain the actual agreement if there is an ambiguity in it; partnership dissolution agreement ambiguous in stating which party is responsible for known debts not included in list of debts); *McMillin v. Great Southern Corp., 63 Tenn. App. 732, 480 S.W.2d 152, 155 (1972)* (parol evidence inadmissible unless writing is ambiguous; in such case parol evidence is only admissible to explain, not to contradict or vary).

[64] *Moore & Assocs. Memphis LLC v. Greystone Homeowners Ass'n, 2017 Tenn. App. LEXIS 36 (Tenn. Ct. App. 2017)* (parol evidence is not admissible to remove a patent ambiguity but is admissible to remove a latent ambiguity); *Holt v. Tr. of the*

The rule that parol evidence is admissible if the contract is ambiguous dictates that the court must determine whether a contract is sufficiently imprecise to be considered ambiguous. Under Tennessee law, an ambiguity does not arise simply because the parties may differ on an interpretation, or because the contract language can be subjected to a strained construction.[65] Ordinarily, courts use a plain meaning test. If the words of the contract are subject to a reasonable interpretation using ordinary words, the contract is not ambiguous. In *Moore v. Moore*,[66] for example, the parties entered into a contract for the purchase of land. The contract was contingent upon the buyer's ability to obtain "adequate financing." The buyer was unable to secure financing in Shelbyville but had found it in Nashville. The Court of Appeals held that the term "adequate financing" was subject to reasonable interpretation and was not ambiguous. Therefore, the parol evidence rule would bar testimony about the meaning of "adequate financing."

Where a contract is ambiguous, the court may consider the context or surrounding circumstances of the contract, as well as the customs, practices, usages and terminology as generally understood in a particular trade or business.[66.1]

Never Was An Agreement. Another exception involves proof that there never was an agreement reached by the parties.[67]

Enforcement. The parol evidence rule also does not bar proof that the contract should not be enforced. Thus, the rule does not apply in a case alleging the contract was obtained by fraud.[68] Similarly, the parol

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Willoughby Cumberland Presbyterian Church Cemetary, 2015 Tenn. App. LEXIS 488 (Tenn. Ct. App. 2015) (discussing the difference between patent and latent ambiguities in the context of will construction); Horadam v. Stewart, 2008 Tenn. App. LEXIS 601 (Tenn. Ct. App. 2008) (a latent ambiguity is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of); Mitchell v. Chance, 149 S.W.3d 40, 44 (Tenn. Ct. App. 2004) (a patent ambiguity is one produced by uncertainty, contradictoriness, or deficiency of the instrument's language so that no proof can restore the doubtful sense without adding ideas not sustained by the actual words).

[65] ***Cookeville Gynecology & Obstetrics v. Southeastern Data Systems, 884 S.W.2d 458 (Tenn. Ct. App. 1994)***.

[66] 603 S.W.2d 736, 739 (Tenn. Ct. App. 1980). *See also* Campora v. Ford, 124 S.W.3d 624 (Tenn. Ct. App. 2003) (in construing contract, words should be given their usual, natural, and ordinary meaning; contract was not ambiguous so no parol evidence was admissible).

[66.1] Buchi v. Apex Supply Co., 1992 Tenn. App. LEXIS 1023 (Tenn. Ct. App. 1992); Taylor v. Wilson, 1989 Tenn. App. LEXIS 285 (Tenn. Ct. App. 1989).

[67] *See* General Motors v. Third Nat'l Bank, 812 S.W.2d 593 (Tenn. Ct. App. 1991) (parol evidence admissible to show that a contract was not formed because of noncompliance with condition precedent: ability to obtain down payment); Santa Barbara Capital Corp. v. World Christian Radio Found., 491 S.W.2d 852 (Tenn. Ct. App. 1972) (parol evidence rule does not bar proof of earlier agreement that certain conditions must be satisfied before later contract becomes operative); Crotzer v. Shawl, 5 Tenn. App. 240 (1927) (parol evidence admissible to prove no contract ever existed); Samuel v. King, 158 Tenn. 546, 14 S.W.2d 963 (1929) (parol evidence admissible to show failure of consideration); ***Next Generation, Inc. v. Wal-Mart, Inc., 49 S.W.3d 860, 864 (Tenn. Ct. App. 2000)*** (two documents not final expression of the parties' agreement).

[68] See *e.g.*, Lipford v. First Family Fin. Servs., 2004 Tenn. App. LEXIS 297 (Tenn. Ct. App. 2004); McMillin v. Great Southern Corp., 63 Tenn. App. 732, 480 S.W.2d 152, 155 (1972); Worley v. White Tire of Tenn., Inc., 182 S.W.3d 306, 310 (Tenn. Ct. App. 2005) (parol evidence admissible where there is fraud or mistake; reformation of deed to correct mutual mistake as to ownership of road); Roby v. NationStar Mortg., LLC, 2020 Tenn. App. LEXIS 212 (Tenn. Ct. App. May 11, 2020) (while parol evidence cannot be introduced to support a breach of contract claim where its admission would vary the terms of an express contract, it may be introduced to show the alleged fraud or mistake in a separate claim based on fraud, such as fraudulent inducement).

evidence rule does not apply in a suit for fraudulent misrepresentation in inducing a person to enter into a contract.[69] It also is inapplicable if the agreement reached offends public policy.

Reformation. Case law holds that the parol evidence rule does not apply in a suit for reformation of a contract.[70] Parol evidence has also been permitted to prove estoppel or waiver.[71]

Induce Contract. Parol evidence has also been admitted to prove statements made to induce a contract, because these statements would ordinarily not be found in a written agreement.[72]

Explain Terms. Parol evidence can be used to explain words commonly used in a particular trade.[73] Another later decision said that parol evidence is admissible "to explain the terms of an agreement."[74] Sometimes the court's reasoning seems strained. In a case interpreting the term "adequate financing" in a contract to purchase land, the Tennessee Court of Appeals held that the purpose of testimony about the meaning "was not to vary the terms of the contract, but to elucidate the situation in which the parties dealt in order to apply the wording of the contract to that situation."[75]

Identity. Parol evidence is also admissible to show the true identity of the parties to a contract.[76]

Deeds. The parol evidence rule also applies to the interpretation of deeds. The goal is to ascertain the parties' intent. The parol evidence rule bars such evidence to vary or contradict the language in a deed, but

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[69] *Power & Tel. Supply Co. v. SunTrust Banks, Inc., 447 F.3d 923 (6th Cir. Tenn. 2006)*; *Williams v. Havey, 2016 U.S. Dist. LEXIS 115530 (M.D. Tenn. 2016)* (parole evidence rule did not prohibit the court from considering other evidence about the nature of a loan between the parties, where plaintiff sought to introduce evidence that defendant lied to her in order to induce her to loan defendant money, and that, as a result, the gift letter between the parties was fraudulently induced); *Lipford v. First Family Fin. Servs., 2004 Tenn. App. LEXIS 297 (Tenn. Ct. App. 2004)*; *Butler v. Butler, 2008 Tenn. App. LEXIS 743 (Tenn. Ct. App. 2008)* (court refused to enforce marital dissolution agreement where evidence demonstrated that wife's attorney implied that the husband's property was not already damaged and would not be damaged prior to the parties' property exchange; husband testified that he specifically asked "why should I sign this before I get my stuff back?" and only executed the agreement after wife's attorney assured him that he would not permit wife to destroy husband's property); *Steed Realty v. Oveisi, 823 S.W.2d 195 (Tenn. Ct. App. 1991)*.

[70] See *e.g.*, *Rentenbach Eng'g Co., Constr. Div. v. General Realty, Ltd., 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985)* (contract reformation because of mutual mistake; extensive citations). *Cf.* *City of Memphis v. Moore, 818 S.W.2d 13, 16 (Tenn. Ct. App. 1991)* (parol evidence admitted in suit to reform contract in accordance with parties' intentions).

[71] *GRW Enters. v. Davis, 797 S.W.2d 606, 611 (Tenn. Ct. App. 1990)*; *Freeze v. Home Fed. Sav. & Loan Ass'n, 623 S.W.2d 109, 112 (Tenn. Ct. App. 1981)*; *Bailey v. Life & Cas. Ins. Co., 35 Tenn. App. 574, 582, 250 S.W.2d 99, 102 (1951)*.

[72] *See* *Bunge Corp. v. Miller, 381 F. Supp. 176, 178–79 (W.D. Tenn. 1974)*. For a discussion of cases addressing fraudulent inducement to enter a contract, see subsection [8][b] *Enforcement*, above. *See also* *Roby v. NationStar Mortg., LLC, 2020 Tenn. App. LEXIS 212 (Tenn. Ct. App. May 11, 2020)* (parol evidence was admissible as to fraudulent inducement claim, but not in breach of contract claim).

[73] *Ulhorn v. Cohen Grocery, 3 Tenn. App. 400 (1926)*.

[74] *Stamp v. Honest Abe Log Homes, Inc., 804 S.W.2d 455, 457 (Tenn. Ct. App. 1990)*.

[75] *Moore v. Moore, 603 S.W.2d 736, 739 (Tenn. Ct. App. 1980)*.

[76] *International House of Talent v. Alabama, 712 S.W.2d 78, 86–87 (Tenn. 1986)* (parol evidence admissible to establish that a person signed a contract in the person's representative capacity; *distinguishing* *Lazarov v. Klyce, 195 Tenn. 27, 255 S.W.2d 11 (1953)*); *United Am. Bank v. First Citizens Nat'l Bank, 764 S.W.2d 555, 557 (Tenn. Ct. App. 1988)*. *See e.g.,* *Burks v. Belz-Wilson Properties, 958 S.W.2d 773 (Tenn. Ct. App. 1997)* (parol evidence is admissible to establish true identity of parties to a contract); *Cf.* *Kozy v. Werle, 902 S.W.2d 404, 411 (Tenn. Ct. App. 1995)* (where there is no ambiguity or undisclosed principal, parol evidence is not admissible to vary the terms of contract).

permits parol evidence to be used to remove a latent ambiguity in the deed. The rule does not admit parol evidence to explain a patent ambiguity in a deed.[77]

[c] Procedures

The judge, not the jury, determines whether evidence is barred by the parol evidence rule. The court should look at all the evidence in the case to assess whether an exception to the parol evidence rule is present. For example, if it is alleged that there is an ambiguity in the terms of a contract, the trial court must determine whether there is in fact an ambiguity in order to decide whether parol evidence is admissible.[77.1]

Because the parol evidence rule is viewed as a rule of substantive rather than evidence law, Tennessee authorities have held that the rule can be considered by an appellate court even where no objection was made in the trial court and the issue was not argued on appeal.[78]

[9] Obstruction of Justice: In General

Although Rule 401 provides the general rule of relevance, patterns of decisions have developed in a number of areas. Counsel may find it helpful to consult judicial decisions decided both before and after the adoption of the Tennessee Rules of Evidence. One such area is generically categorized as obstruction of justice. It involves efforts by a person to avoid detection or apprehension. The question is whether those efforts are admissible against the person to prove an issue in the case.

Hearsay. Sometimes these issues are analyzed by asking whether the conduct is an admission that satisfies the hearsay exception. As discussed more fully elsewhere,[79] ordinarily flight and the like are not "statements" of the fleeing person and therefore are not hearsay under Tennessee evidence law.

[10] Flight and Evasion of Prosecution

Evading Prosecution; Flight. A long line of Tennessee cases has permitted introduction of evidence that a person tried to evade prosecution. This includes proof that the person fled or tried to flee the scene of a crime,[80] hid to avoid apprehension,[81] attempted suicide,[82] resisted arrest,[83] escaped from custody,[84] or did not appear

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[77] *Mitchell v. Chance, 149 S.W.3d 40 (Tenn. Ct. App. 2004)*.

[77.1] *Moore & Assocs. Memphis LLC v. Greystone Homeowners Ass'n, 2017 Tenn. App. LEXIS 36 (Tenn. Ct. App. Jan. 20, 2017)* (before a court may consider evidence outside the four corners of a contract, it must first determine whether the contract contains any ambiguity, and, if so, whether the ambiguity is patent or latent).

[78] *See First Tenn. Bank Nat'l Ass'n v. Wilson, 713 S.W.2d 907, 909 (Tenn. Ct. App. 1985)*; *Maddox v. Webb Constr. Co., 562 S.W.2d 198, 201 (Tenn. 1978)* (parol evidence rule is rule of substantive law and no exception or assignment of error is needed to ensure its application).

[79] *See below § 8.01[5]*.

[80] See *e.g.*, *State v. Rhoden, 739 S.W.2d 6 (Tenn. Crim. App. 1987)* (defendant went to airport to catch airplane immediately after rape); *State v. Beasley, 699 S.W.2d 565 (Tenn. Crim. App. 1985)* (witness saw defendant run from tavern where shooting occurred, get in car parked with motor running in middle of road with door open, and drive off); *Ledune v. State, 589 S.W.2d 936 (Tenn. Crim. App. 1979)* (defendant left Tennessee for California); *Jones v. State, 580 S.W.2d 329 (Tenn. Crim. App. 1978)* (defendant ran from homicide scene after determining there was someone else at scene); *State v. Kendricks, 947 S.W.2d 875 (Tenn. Crim. App. 1996)* (fleeing scene is evidence of attempting to evade prosecution); *State v. Dorantes, 331 S.W.3d 370 (Tenn. 2011)*(flight to Mexico is circumstance jury could consider as evidence of guilt). *See e.g.,* *State v. Dorantes, 331 S.W.3d 370, 388 (Tenn. 2011)* (flights and attempts to evade arrest are relevant circumstances from which, with other evidence, jury may draw inference of guilt; defendants' flight to Mexico was "especially probative of guilt"); *State v. Sisk, 343 S.W.3d 60, 67 n.4 (Tenn. 2011)* (burglary defendant ran when police came to arrest him for another crime and to speak with him about the burglary in the instant case; attempt to evade arrest and flight are relevant circumstances which, when considered with other evidence, jury may use to infer guilt); *State v. Smith, 492 S.W.3d 224 (Tenn. 2016)*(extensive discussion of flight instruction when indictment charges multiple crimes, including evading arrest).

for trial.[85] This circumstantial proof has been held to permit an inference that the fleeing person had a consciousness of guilt, criminal intent, knowledge or was somehow connected with the offense in question.[86]

An eloquent classic example is provided by *Tyner v. State*,[87] involving a man charged with stealing a horse. The defendant rode the horse to Nashville and sold it at auction. He stayed in a tavern under an assumed name. When the auctioneer saw the defendant on a steamboat, the accused leaped from the boat onto the wharf and ran away. The next day the defendant, on the same steamboat, again saw the auctioneer and again leaped from the boat and swam ashore. The court admitted the evidence, stating:

> These circumstances strongly manifest a consciousness, on the part of the prisoner, that some flagrant wrong had been committed by him, and an apprehension that it was known; which wrong probably related to his possession and disposition of the horse. We are told by an early and most venerable authority that the wicked fly when no one pursues; and we are told elsewhere that conscience makes men cowards.

Since evidence of flight is often admissible, the courts have authorized a jury instruction on the issue.[88] But the jury instruction should only be given if there was flight rather than a normal process of leaving a crime scene. The distinction has been analyzed as follows:

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[81] See *e.g.*, State v. Richardson, 995 S.W.2d 119, 128–29 (Tenn. Crim. App. 1998) (defendant ran away after shooting victim and remained hidden in the community for five days before turning himself in); ***State v. Smith, 893 S.W.2d 908 (Tenn. 1994)*** (defendant concealed himself in the community); State v. Eberhardt, 659 S.W.2d 807 (Tenn. Crim. App. 1983) (defendant "slumped down" in car to avoid detection by police officer at burglary scene); State v. Braggs, 604 S.W.2d 883 (Tenn. Crim. App. 1980) (defendant hid in basement of house to avoid arrest); State v. Hill, 875 S.W.2d 278 (Tenn. Crim. App. 1993) (drug suspect attempted to conceal himself between two houses after leaving scene of drug deal).

[82] *See* State v. White, 649 S.W.2d 598 (Tenn. Crim. App. 1982) (attempted suicide can be used by jury as circumstance tending to show consciousness of guilt).

[83] See *e.g.,* State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985) (at time of arrest, defendant rammed police car and shot at arresting officers). *Cf.* State v. Williams, 690 S.W.2d 517 (Tenn. 1985) (shortly after murder, defendant had encounter with police officer because defendant erroneously thought police were looking for him; encounter admissible to show consciousness of guilt).

[84] See *e.g.*, State v. Rimmer, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019) (trial court did not err by admitting evidence of defendant's prior escape attempts, including testimony that two shanks were found in his jail cell, because the evidence of the shanks corroborated details of defendant's escape plan and the court instructed the jury that it was only to consider this evidence to determine defendant's consciousness of guilt); State v. Harris, 2015 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. 2015) (thwarted escape plans admissible). State v. Townsend, 688 S.W.2d 842 (Tenn. Crim. App. 1984) (escape from jail); Broz v. State, 4 Tenn. Crim. App. 457, 472 S.W.2d 907 (1971), *cert. denied*, ***406 U.S. 949 (1972)*** (escape from jail; flight from state); Mitchell v. State, 458 S.W.2d 630 (Tenn. Crim. App. 1970) (escape from jail); State v. Burton, 751 S.W.2d 440, 450 (Tenn. Crim. App. 1988) (escape or attempt to escape from custody, no matter when the escape occurred after arrest).

[85] State v. Tidmore, 604 S.W.2d 879 (Tenn. Crim. App. 1980) (defendant left Tennessee in middle of trial).

[86] *See generally* Rogers v. State, 2 Tenn. Crim. App. 491, 455 S.W.2d 182 (1970) (extensive quotation on general issue from *Corpus Juris Secundum*); Mitchell v. State, 458 S.W.2d 630 (Tenn. Crim. App. 1970) (escape from jail); State v. Braggs, 604 S.W.2d 883, 886 (Tenn. Crim. App. 1980) ("any ex post facto indication by accused of a desire to evade prosecution may be shown as one of a series of circumstances from which guilt may be inferred"); Sotka v. State, 503 S.W.2d 212, 221 (Tenn. Crim. App. 1972) (attempt to evade arrest or escape is one of series of circumstances from which guilt may be inferred); State v. Caldwell 80 S.W.3d 31, 40 (Tenn. Crim. App. 2002) (attempts to evade arrest permit inference of guilt).

[87] 24 Tenn. 383 (1844).

[88] See *e.g.*, Rogers v. State, 2 Tenn. Crim. App. 491, 455 S.W.2d 182 (1970); State v. Dorantes, 331 S.W.3d 370 (Tenn. 2011).

> The law makes no nice or refined distinction as to the manner or method of a flight; it may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. However, it takes both a leaving the scene of a difficulty and a subsequent hiding out, evasion, or concealment in the community, or a leaving of the community for parts unknown, to constitute flight.[89]

This distinction between flight and leaving a crime scene is illustrated by *State v. Whittenmeir*,[90] involving a robbery and rape in a public park. After the crime, the defendant left the park and went home where he was subsequently arrested. He fully cooperated with the police, took them to the stolen property, and gave a confession. The Court of Criminal Appeals held that the trial court should not have given a jury instruction on inferences to be drawn from fleeing the scene of a crime. The defendant made no effort to evade the authorities; he simply went home after committing the offenses.

Although the cases indicate that flight involves more than leaving a crime scene, some courts have not been exacting in requiring much proof of the extra ingredient. In *State v. Dowell*,[91] an arrest warrant for a drug offense was issued on March 1 and the defendant turned herself in to the police on March 28. The court was permitted to give a flight instruction to the jury because there was evidence in the record to suggest the defendant "could not be found for purposes of arrest after she had knowledge of the charges against her." The appellate opinion did not indicate where the defendant had been, why she could not be arrested, or what efforts were made to locate her. Similarly, in *State v. Stafford*[92] the defendant was involved in a tavern fight where a stabbing occurred. In the aggravated assault trial, the court permitted a jury instruction on flight, although apparently the only proof was that the defendant left the tavern immediately after the stabbing, went to a friend's house and then returned to his home in another county.

Jury Instruction. This jury instruction on flight is not an unconstitutional comment on the evidence.[93] The jury is told that flight is one factor to be considered in assessing guilt or innocence.

Inference. Flight does not create a presumption of any kind; courts speak of flight as creating an "inference" which the jury may make or reject.[94] The United States Supreme Court has noted that the probative value of flight is sometimes doubtful since innocent people also flee the scene of a crime.[95]

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[89] *State v. Whittenmeir, 725 S.W.2d 686 (Tenn. Crim. App. 1987)*, *quoting* *Rogers v. State, 2 Tenn. Crim. App. 491, 455 S.W.2d 182 (1970)*.

[90] *725 S.W.2d 686 (Tenn. Crim. App. 1986)*. *See also* *United States v. Glenn, 312 F.3d 58, 67–68 (2d Cir. 2002)* (flight inference improper when defendant merely asked for a ride shortly after homicide; no evidence of suspicious conduct such as running or request to be driven to a remote location).

[91] *705 S.W.2d 138 (Tenn. Crim. App. 1985)*. *See also* *State v. Payton, 782 S.W.2d 490, 498 (Tenn. Crim. App. 1989)* (flight instruction permissible when defendant, after being confronted by police, ran to neighbor's lot where he fell and was arrested; very little time elapsed between confrontation and arrest); *State v. Balthrop, 752 S.W.2d 104, 108 (Tenn. Crim. App. 1988)* (flight instruction appropriate where defendant in vehicular homicide case remained at scene of collision until emergency lights appeared, then ran up embankment and disappeared for six hours before going to parents' house).

[92] *670 S.W.2d 243 (Tenn. Crim. App. 1984)*.

[93] *See* *Hill v. State, 3 Tenn. Crim. App. 331, 461 S.W.2d 50 (1970)* (jury instruction on flight does not violate *Tennessee Constitution, Art. 6 § 9* barring instructions on matters of fact).

[94] *See* *State v. Stafford, 670 S.W.2d 243, 246 (Tenn. Crim. App. 1984)*.

[95] *See* *Wong Sun v. United States, 371 U.S. 471, 483 n.10, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)*; *Alberty v. United States, 162 U.S. 499, 16 S.Ct. 864, 40 L.Ed. 1051 (1896)* (flight instruction places too much emphasis on flight).

Opportunity to Explain Flight. If evidence of flight and the like has been introduced, the party against whom it is used is entitled to explain the flight. This rebuttal may convince the jury to give little weight to the flight, but it ordinarily does not affect the admissibility of the evidence.[96]

Failure to Flee. While courts permit an instruction that the jury may infer guilt from flight and similar acts, they have refused the opposite instruction: that failure to flee is a factor in the defendant's favor.[97] But evidence of conduct supporting an inference of consciousness of innocence should be admitted. In *United States v. Biaggi*[98] the Second Circuit held that the criminal accused could present evidence that he refused an offer of immunity in exchange for certain information because he had no knowledge of that information. This evidence was admissible to show a consciousness of innocence and that he really lacked the information the government had bargained to get.

[11] Change of Name or Appearance

[a] In General

Tennessee law recognizes that the employment of an alias, like efforts to escape, permits an inference of guilt, consciousness of guilt, intent and the like.[99] This circumstantial evidence is to be considered along with the other proof. Of course, the use of an alias can be used to prove other matters directly involved in the particular case.[100]

[b] Change of Appearance

A change of appearance can also be used to infer guilt, consciousness of guilt and the like.[101] This can include changing clothes or hair color, cutting or growing head or facial hair, adding or removing glasses, and other alterations.[102]

[12] Lying and Fabrication or Concealment of Evidence

[a] In General

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[96] *See* Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979) (defendant entitled to testify that she fled scene of crime because she was on probation and feared being seen; but evidence of flight still admissible).

[97] *See* Holt v. State, 591 S.W.2d 785 (Tenn. Crim. App. 1979), *distinguishing* Braswell v. State, 2 Tenn. Cases (Shannon) 595 (1877).

[98] 909 F.2d 662 (2d Cir. 1990), *cert. denied*, ***499 U.S. 904, 111 S. Ct. 1102, 113 L. Ed. 2d 213 (1991)***.

[99] *See* Tyner v. State, 24 Tenn. 383 (1844) (horse thief used alias to register in hotel; circumstances manifest consciousness of guilt); Mendolia v. State, 192 Tenn. 656, 241 S.W.2d 606 (1951) (registration in hotel under alias tends to show defendants engaged in some transaction in which it was necessary to conceal their identity); Sotka v. State, 503 S.W.2d 212, 221 (Tenn. Crim. App. 1972) (defendant fled to another state and assumed alias).

[100] See *e.g.*, Dandridge v. State, 552 S.W.2d 791 (Tenn. Crim. App. 1977) (receiving stolen automobile case; proof showed defendant used alias to register stolen auto in another state; alias admitted to prove scheme or design and identity).

[101] See *e.g.*, State v. Kyger, 787 S.W.2d 13, 29 (Tenn. Crim. App. 1989) (murder-robbery defendant fled crime scene and removed ski mask and changed clothes soon after crime; flight instruction appropriate).

[102] *See e.g.,* ***United States v. Gonzalez-Torres, 309 F.3d 594, 601 (9th Cir. 2002)*** (illegal entry case; proof defendant's index finger was "scratched up" is admissible on illegal entry because Border Patrol identification system used fingerprints of index finger).

The fabrication of evidence, like change of appearance and the use of an alias, can also be used to infer guilt. According to the United States Supreme Court, there is a "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' "[103] A good illustration is *State v. Caldwell*,[104] where defendant was questioned shortly after a murder and denied any knowledge of it. The Tennessee Court of Criminal Appeals held the denial was relevant as an inconsistent statement and an evasion of arrest from which the jury could infer guilt. Similarly in *Sotka v. State*[105] the jury was permitted to consider as evidence of guilt the defendant's repeated lies about the whereabouts of his wife and stepdaughter, whom he was convicted of murdering.

This evidence of a false exculpatory statement is often viewed as proof of consciousness of guilt or a guilty mind. It can embrace a number of topics, such as lying about an alibi, about ownership of an item, about a reason for an action,[106] about having met a certain person, and other topics.[107] Altering or attempting to alter another person's evidence may also qualify under this rubric.[108]

[b] Spoliation or Concealment of Evidence

Proof of Guilt. Spoliation or concealment of evidence can be used as circumstantial proof of guilt.[109] In *Sotka v. State*[110] the evidence showed the defendant, charged with murdering his wife and stepdaughter, buried the two bodies at the bottom of a lake. The Court of Criminal Appeals held that the jury could infer guilt from the accused's efforts to dispose of the bodies.

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[103] *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)* (*quoting Wright v. West, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992)*.

[104] *80 S.W.3d 31, 40 (Tenn. Crim. App. 2002)*.

[105] *503 S.W.2d 212, 221 (Tenn. Crim. App. 1972)*.

[106] *Frame v. Davidson Transit Org., 194 S.W.3d 429 (Tenn. Ct. App. 2005)* (the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose; such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt); *Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)* (employer's false explanation for firing employee is circumstantial evidence of intentional discrimination).

[107] *See e.g., United States v. Kemp, 500 F.3d 257 (3d Cir. 2007)* (lying during grand jury testimony is evidence of consciousness of guilt); *United States v. Frost, 234 F.3d 1023, 1025 (8th Cir. 2000)* (lying about signing name of another trustee; evidence of fraudulent intent and consciousness of guilt).

[108] *See e.g., United States v. Perholtz, 842 F.2d 343 (D.C. Cir.)*, *cert. denied*, ***488 U.S. 821 (1988)*** (proof that a defendant prepared a script for another person to influence the content of that person's evidence; was evidence of defendant's consciousness of role in crime).

[109] See *e.g.*, *State v. Chambless, 682 S.W.2d 227 (Tenn. Crim. App. 1984)* (defendant removed deceased's body from home and placed it in car trunk to be taken away; admissible on intent and guilty knowledge); *Sotka v. State, 503 S.W.2d 212, 220 (Tenn. Crim. App. 1972)* ("any attempt to suppress or destroy or conceal evidence is relevant as a circumstance from which guilt of an accused so acting may be inferred"); *State v. Furlough, 797 S.W.2d 631, 642 (Tenn. Crim. App. 1990)* (concealment of body tends to show concealer's guilt for murder of person whose body was hidden); *State v. Kendricks, 947 S.W.2d 875, 886 (Tenn. Crim. App. 1996)* (defendant's throwing gun out of window of car shortly after shooting is admissible to prove attempt to evade prosecution and may be used by jury as factor in inferring guilt). *See generally* Phoebe L. McGlynn, Note, *Spoliation in the Product Liability Context*, *27 U. Mem. L. Rev 663 (1997)*. *See e.g., State v. Hill, 333 S.W.3d 106, 127 (Tenn. Crim. App. 2010)* (videotape of homicide victim's removal from creek is relevant on efforts to conceal the crime which helps establish that the defendant premeditated the homicide).

[110] *503 S.W.2d 212 (Tenn. Crim. App. 1972)*.

Taint by Government. When the evidence is tainted by the police or prosecution, however, courts do not permit the spoliation to be used as evidence of weakness in the state's case, unless bad faith is shown. The leading case is *Williams v. State,*[111] a first degree-murder case in which the state's diagram of the crime scene was partially erased by the prosecutor between the first and second trials of the case. The prosecutor made the erasure to avoid suggesting to the witnesses in the second trial the content of their testimony. The defendant claimed that the erasure deprived him of the ability to cross-examine an eyewitness who had drawn on the diagram to illustrate testimony during the first trial. The Court of Criminal Appeals held that since there was no showing of the prosecutor's bad faith, there was no permissible inference to be drawn from the spoliation.

Civil Case. A similar rule has been applied in a civil case where evidence is lost, concealed, or destroyed for an improper purpose.[112] This "spoliation" allows a trial court to draw a rebuttable negative inference against the party who destroyed the evidence."[112.1] Though at one time this negative inference was permissible only when there was intentional misconduct by the spoliating party that caused the loss or concealment of the evidence, today the rule is more flexible with intentional misconduct only one factor in deciding the appropriate sanction.[112.2] A good illustration is *Leatherwood v. Wadley*,[113] where plaintiff was a spectator at a stock car race and was injured when part of a wheel came off defendant's car during a race. After the race, defendant replaced the damaged wheel remaining on his car but did not retain the damaged wheel or remember what happened to it. The Tennessee Court of Appeals refused to apply the "doctrine of spoliation of evidence," which would have permitted "a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered or concealed evidence." There was insufficient proof that the defendant intentionally lost, concealed, or destroyed the wheel in order to keep evidence from the court.

Constitutional Issues. Although the government's destruction of certain evidence may violate the defendant's due process rights, there must be some proof that the evidence existed and was subsequently destroyed.[114] However, in *Arizona v. Youngblood*,[115] the United States Supreme Court held that the

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[111] ***542 S.W.2d 827 (Tenn. Crim. App. 1976)***.

[112] *Foley v. St. Thomas Hosp., 906 S.W.2d 448, 453–54 (Tenn. Ct. App. 1995)* (there is no obligation to preserve body parts following an autopsy, but an adverse inference may be drawn if the destruction was done for an improper purpose); *see also Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148 (1st Cir. 1996)* (permissible to infer that outgoing telephone log, destroyed by defendant hotel being sued for failure to secure prompt aid for an ill guest, would have harmed the defendant's case had it been preserved).

[112.1] *Tatham v. Bridgestone Americas Holding, 473 S.W.3d 734, 740 (Tenn. 2015)*.

[112.2] *Tatham v. Bridgestone Americas Holding, 473 S.W.3d 734, 741 (Tenn. 2015)* (extensive discussion of possible sanctions for spoliation). *See also Wilson v. Weigel Stores, Inc., 2020 Tenn. App. LEXIS 224 (Tenn. Ct. App. May 19, 2020)* (applying *Tatham's* "totality of circumstances" test and upholding the trial court's decision not to impose an inference of negligence against defendant).

[113] *121 S.W. 3d 682,703 (Tenn. Ct. App. 2003)*. *See also Bronson v. Umphries, 138 S.W.3d 844 (Tenn. Ct. App. 2003)* (no evidence of destruction of evidence for improper purpose).

[114] *See Price v. State, 589 S.W.2d 929 (Tenn. Crim. App. 1979)* (no due process violation for police to fail to preserve and gather evidence at burglary scene when defendant had not shown that any such evidence existed). It should be noted that it would be difficult for the defendant to offer such proof since he claimed to know nothing about the burglary and complained about the police's failure to gather evidence that would prove his innocence.

[115] *488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)*.

government's failure to preserve evidence only violates due process if the defendant can show the government acted in bad faith.[116]

Other Evidence Rules. The fact that evidence was destroyed is not, of course, automatically admissible. Like other proof, admissibility is subject to other evidence rules, particularly Rule 403. In *Caparotta v. Entergy Corporation*,[117] for example, the court held that Rule 403 barred evidence of the accidental destruction of relevant records. The court found the proof of "miniscule" probative value but posed a threat of unfair prejudice and confusion of issues.

[13] Threats

Just as efforts to change appearance and conceal evidence can be used as circumstantial evidence of guilt, threats to a witness can be used to the same effect. In *Tillery v. State*[118] the trial court permitted an eyewitness to testify that several months after the murder the defendant threatened the witness. The Court of Criminal Appeals stated that an effort to suppress the testimony of a witness is admissible as a circumstance from which guilt may be inferred. Though ordinarily threats to a witness are used by the prosecution in a criminal case, they may also be relevant in a civil case.[119]

[14] Other Person Responsible

In criminal cases, the defendant may offer proof that someone else committed the crime. Some such evidence may attempt to establish that someone else had a motive or opportunity for the offense. Tennessee law has long recognized that a criminal accused is entitled to present evidence that someone else committed the offense.[120]

Before admitting such evidence, the defendant must establish that it is relevant under *Tenn. R. Evid. 401* and that it is not unfairly prejudicial under *Tenn. R. Evid. 403*.[120.1] The evidence "must be limited to such facts as are inconsistent with the defendant's guilt and that raise a reasonable inference or presumption as to the

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[116] *See also* *California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)* (government did not violate due process by destroying breath samples in drunk driving case; officers acted in good faith in accordance with normal policies about evidence retention).

[117] *168 F.3d 754 (5th Cir. 1999)*.

[118] *565 S.W.2d 509 (Tenn. Crim. App. 1978)*. *See also* *State v. Maddox, 957 S.W.2d 547, 552 (Tenn. Crim. App. 1997)* (veiled threat to witness to kill witness if witness snitches on defendant is relevant as circumstance from which guilt may be inferred); *State v. Austin, 87 S.W.3d 447 (Tenn. 2002)* (evidence of defendant's threats against witnesses is probative of conduct inconsistent with a claim of innocence or consistent with consciousness of guilt); *State v. Bell, 480 S.W.3d 486, 510 (Tenn. 2015)* (defendant entitled to admit proof that victim's husband had motive to kill victim because husband was having an affair with husband's ex-wife).

[119] *See e.g.,* *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987)* (in suit for proceeds of life insurance policy, witness could testify he received anonymous telephone threat he would be killed if he testified; shows consciousness of guilt of person with motive to frighten witness).

[120] *See e.g.*, *Sawyers v. State, 83 Tenn. 694 (1885)*. *See also* *United States v. Jordan, 485 F.3d 1214, 1219 (10th Cir. 2007)* (defendant may establish own innocence by offering proof that someone else did the crime, but such proof must show a *nexus* between the alternate perpetrator and the crime charged).

Failure to allow the accused to present proof that someone else committed the crime may raise serious constitutional issues. *See e.g.*, *Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)*(reversing capital conviction because trial court excluded evidence of third party's guilt).

[120.1] *State v. Reynolds, 2010 Tenn. Crim. App. LEXIS 1076, *87 (Tenn. Crim. App. Dec. 16, 2010)*.

defendant's innocence." Accordingly, evidence that has "no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another," is not relevant.[120.2]

In *State v. Powers*[121] the Tennessee Supreme Court rejected a suggestion that this kind of proof should be evaluated using a higher "direct connection" test[121.1] and held that this exculpatory evidence is to be evaluated under the normal rules of evidence, particularly the ordinary relevance rule of Rule 401. *Powers* noted that proof that a third party had a motive and opportunity to commit the offense "certainly would be relevant" under Rule 401.[122] As an illustration of the type of evidence that should be admitted, the defendant in *Powers* was, erroneously, not permitted to prove that the victim's husband had been at the casino and had upset the victim on the night of the victim's disappearance after leaving the casino. Such proof should have been presented to the jury in support of the defendant's assertion that the victim's husband had a motive and opportunity to commit the homicide.

However, *State v. Powers* also made it clear that some proof about third parties' behavior would not satisfy even the minimal standard of Rule 401. For example, the *Powers* court held that evidence that the murder victim had broken off a romantic relationship with a particular man two days before the homicide was not relevant because the evidence proffered by the defense was that the break-up was quite harmonious; there was no testimony about any animosity between the victim and the former lover. The lack of bad feelings made the evidence irrelevant under Rule 401 on the issue of the former lover's motive to kill the victim.[123]

Another illustration involves a defendant charged with rape and murder who sought to introduce evidence that the victim's brother might have been the source of semen on the victim.[124] The Tennessee Supreme Court

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[120.2] *Id., *88* (quoting 22A C.J.S. Criminal Law § 729 (1989)). *See also* *State v. Warner, 2018 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. May 9, 2018)* (murder trial where defense attempted, during cross examination, to introduce testimony about other acts or crimes by members of the homeless community, arguing that the testimony was relevant due to the "violent nature" of that community and the pathologist had previously testified that "there could have been other assailants"; the Court of Appeals held that the defendant's speculative assertion about members of the homeless community would have had "no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another" and, therefore, the evidence was inadmissible).

[121] *101 S.W.3d 383 (Tenn. 2003)*. *See also* *State v. Rice, 184 S.W.3d 646, 671–72 (Tenn. 2006)*; *State v. Stevens, 78 S.W.3d 817 (Tenn. 2002)*; *State v. Rogers, 188 S.W.3d 593, 613 (Tenn. 2006)* ("admissibility of third-party defense evidence is governed by the Rules of Evidence and not by any stricter standard").

[121.1] Some Court of Criminal Appeals decisions continue to reference the "direct connection" requirement rejected in *Powell*, even after acknowledging that the relevancy analysis should be determined under the Tennessee Rules of Evidence. *See, e.g.*, *State v. Warner, 2018 Tenn. Crim. App. LEXIS 353, *79 (Tenn. Crim. App. May 9, 2018)*, stating that evidence that a third party committed the crime must be "such proof that *directly connects the third party with the substance of the crime* and tends to clearly point out someone besides the accused as the guilty person (emphasis added)." *Warner* relied on *State v. Reynolds, 2010 Tenn. Crim. App. LEXIS 1076, *88 (Tenn. Crim. App. Dec. 16, 2010)*, but a review of *Reynolds* reveals that it cites *Hensley v. State, 28 Tenn. (1 Hum.) 243 (1848)*—a case that was obviously decided well before the adoption of the Tennessee Rules of Evidence and the Supreme Court's decision in *Powers*.

[122] *101 S.W.3d at 395*.

[123] *State v. Powers, 101 S.W.3d 383 (Tenn. 2003)*, also held irrelevant an injunction issued against a third party ordering the third party to stay away from the victim. The injunction was based on a letter written to the victim's husband to undermine the victim's relationship with her husband; there was no evidence the person who wrote the letter ever threatened or followed the victim. The *Powers* court also found irrelevant a post-nuptial agreement between the victim and her husband in which the couple provided for financial issues in case they later divorced. The Supreme Court noted that the agreement was not disadvantageous to the husband and he did not think it to be so. Accordingly, the post-nuptial agreement did not support a motive for the husband to kill his wife.

[124] *State v. Rogers, 188 S.W.3d 593 (Tenn. 2006)*.

rejected proof that the brother had claimed to have had sexual contact with the victim because there was no evidence that the brother had ever actually had a sexual relationship with her.

In another illustrative case the defendant was charged with murder in the context of a rape.[125] The Tennessee Supreme Court held that he had a constitutional right to offer proof that a prosecution witness (Evans) committed the rape and murder. This included evidence that Evans had a propensity for violence and had sexual relations with underage girls (the victim was a minor). The court found this information relevant under Rule 401.

An error in excluding evidence of another person's involvement in a crime does not necessarily result in an appellate reversal. The error may be deemed harmless in the context of the case.[126]

[15] Failure to Call Witness or Produce Evidence; Missing Witness Rule

[a] In General

A party will merely fail to call a witness or produce a document more often than he or she will take active measures to obstruct justice. In other words, the party will passively, rather than actively, conceal evidence that he or she could produce if minded to do so. Is this concealment relevant in a trial? The general rule is:

> A party may comment about an absent witness when the evidence shows "that the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and that the missing witness was available to the process of the Court for the trial."[127]

The missing witness rule only applies against a party who "it can be said with reasonable assurance … [would] have called the absent witness but for some apprehension about his testimony."[128] The burden is on the person asserting the missing witness rule to establish the necessary elements.[129]

Document. Failure to produce a document is equally relevant.[130] The person seeking a missing witness jury instruction for a document should establish (1) that the document existed, (2) that it was in the adversary's exclusive control, and (3) and the party possessing the document could have produced it.[131]

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[125] *State v. Rice, 184 S.W.3d 646 (Tenn. 2006)*.

[126] *See e.g., State v. Rice, 184 S.W.3d 646, 672 (Tenn. 2006)*; *State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002)*. *See also State v. Bell, 480 S.W.3d 486. 513 (Tenn. 2015)* (harmless error to exclude proof that victim's husband, not defendant, had motive to kill victim when husband had "uncontroverted proof" he was miles away at time victim was killed).

[127] *State v. Bough, 152 S.W.3d 453, 463 (Tenn. 2004)* (*quoting Delk v. State, 590 S.W. 3d 435, 440 (Tenn. 1979)*. *See also State v. Sanderson, 550 S.W.2d 236, 238 (Tenn. 1977)*; *State v. Baker, 785 S.W.2d 132, 135 (Tenn. Crim. App. 1989)*; *State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994)*. In *State v. Jones, 598 S.W.2d 209, 224 (Tenn. 1980)*, the Tennessee Supreme Court held that a requested jury instruction correctly stated Tennessee law. The instruction was as follows:

> Failure to call an available witness possessing peculiar knowledge concerning facts essential to party's cause, direct or rebutting, or to examine such witness as to facts covering his special knowledge, especially if witness be naturally favorable to party's contention, relying instead upon evidence of witnesses less familiar with the matter, gives rise to an inference that testimony of uninterrogated witness would not sustain contentions of such party.

See also Newcomb v. Kohler Co., 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006) (missing witness rule allows a party to argue, and jury be instructed, that if the other party has it peculiarly within his power to produce a witness whose testimony would naturally be favorable to him, the failure to call that witness creates an adverse inference that the testimony would not favor his contentions).

[128] *State v. Eldridge, 749 S.W.2d 756, 758 (Tenn. Crim. App. 1988)*.

[129] *State v. Bough, 152 S.W.3d 453, 463 (Tenn. 2004)*.

Permissive Inference. Although at one time the missing witness rule was said to have engendered a presumption, today it is recognized that it creates a *permissive inference*.[132] This inference can enter the trial in two respects. First, the court can give the jury a "missing witness" instruction that describes the inference.[133] Second, counsel's closing argument can note the absence of the witness and ask the jury to draw a negative inference from the absence.[134]

Few cases actually discuss the precise nature of the inference. It is clear, however, that the missing witness proof is less authoritative than some other kinds of proof. One Tennessee decision held that the missing witness rule creates an inference that does not amount to substantive evidence of a fact of which no other

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[130] See *e.g.*, Balderacchi v. Ruth, 36 Tenn. App. 421, 256 S.W.2d 390 (1952) (defendant's failure to produce checks with handwritten limitation on them creates presumption that favorable evidence in defendant's possession would have been brought forward; court assumed checks contained no limitation since not produced at trial); Murphy v. Reynolds, 31 Tenn. App. 94, 212 S.W.2d 686 (1948) (defendant's failure to produce contract at issue in case raises presumption that contract would have operated to defendant's prejudice had it been produced); Kurn v. Weaver, 25 Tenn. App. 556, 161 S.W.2d 1005 (1940) (defendant railroad's failure to produce its records concerning activities of a particular train permitted the trial court to conclude that had records been produced they would have been unfavorable to defendant's position and favorable to plaintiff's); Baker v. Hooper, 50 S.W.3d 463, 470 (Tenn. Ct. App. 2001) (omission of party to produce evidence—here, full tax documents—on a disputed matter when the proof is within the party's capabilities and peculiarly within the party's knowledge, frequently affords occasion for a presumption against that party, raising a strong suspicion that such evidence, if produced, would operate to the party's prejudice).

[131] Richardson v. Miller, 44 S.W.3d 1, 28 (Tenn. Ct. App. 2000).

[132] *See* State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984) (the missing witness rule is "now generally characterized as authorizing a permissive inference"); Nelson v. Justice, 2019 Tenn. App. LEXIS 35 (Tenn. Ct. App. 2019) (pursuant to the missing witness rule, a party's failure to call a witness gives rise to a permissible inference that the missing witness' testimony would have been unfavorable to the party who failed to call the witness); State v. Eldridge, 749 S.W.2d 756 (Tenn. Crim. App. 1988) (same); McReynolds v. Cherokee Ins. Co., 815 S.W.2d 208 (Tenn. Ct. App. 1991) (missing witness rule permits, but does not require, inference that the testimony of the absent witness would have been unfavorable to the party having special access to the witness's testimony); Raines v. Shelby Williams Indus., 814 S.W.2d 346, 348–49 (Tenn. 1991) (failure to produce available witness who is in position to know facts and is favorable to the party creates presumption or inference, permissive and rebuttable, that the witness's testimony would not support the party's contention); In re Estate of Price, 273 S.W.3d 113, 140 (Tenn. Ct. App. 2008).

[133] *See* Tenn. Pattern Jury Instructions, Civil 2.04 (2010) (absence of witness or evidence); regarding criminal cases, see 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 42.16. *See also,* Nelson v. Justice, 2019 Tenn. App. LEXIS 35 (Tenn. Ct. App. 2019) (the missing witness rule applies to jury trials where the trial judge instructs the jury how to interpret the evidence or lack thereof; rule does not apply to bench trials); Elchlepp v. Hatfield, 294 S.W.3d 146 (Tenn. Ct. App. 2008) (trial court did not err in its instruction).

[134] *See generally* ***Delk v. State, 590 S.W.2d 435 (Tenn. 1979)***; State v. Philpott, 882 S.W.2d 394 (Tenn. Crim. App. 1994). *See also* State v. Whitaker, 2015 Tenn. Crim. App. LEXIS 721 (Tenn. Crim. App. 2015) (the inference is not appropriate when the proof fails to establish all three of the Delk factors; due to the potentially critical effect of the missing witness rule, the Delk requirements must be strictly construed); Elchlepp v. Hatfield, 294 S.W.3d 146 (Tenn. Ct. App. 2008) (where plaintiffs purchased a termite-infested house from sellers and sued the sellers and pest company for fraudulent concealment and misrepresentation, the trial court ruled that it was a question of fact as to whether the missing witness rule should be applied to infer that the testimony of the vinyl siding installer would have been adverse to the defendant-sellers if he had been called as a witness; the trial court accordingly allowed plaintiffs' attorney to argue that the sellers were able, or should have been able, to find and call the installer as a witness, and that the reasonable inference would be that the installer's testimony would have been adverse to the sellers on the issue of whether the wood siding contained visible termite damage).

evidence is introduced. The extent of its effect is to impair the weight of the evidence of the party affected and to enhance the weight of his or her adversary.[135]

Illustrations. This missing witness principle can be illustrated with several cases. In *State v. Jones*,[136] the defendant was charged with solicitation to commit robbery. Two undercover agents were involved in contacting and inducing the defendant to join them in a series of unlawful activities. At trial, neither agent testified, although the defendant asserted an entrapment defense. The primary undercover agent, who was not called, was the only witness to the entire series of events and the only person who could explain ambiguities in tape recordings and other evidence. The prosecution did not call this witness because of her extensive history of criminal behavior and a conviction for obstruction of justice. In the words of the Tennessee Supreme Court, the missing witness was not a "sweet-smelling geranium." The Court held that the defendant was entitled to a jury instruction on the missing witness inference.

In a secured transaction case,[137] the issue was whether the creditor had given the debtor notice of the automobile sale under the security agreement. The creditor claimed he had advertised the sale but failed to call the employee who allegedly posted the notice. This failure created an unfavorable inference. In a wrongful death case,[138] the owner of a commercial swimming pool failed to call the lifeguard who was on duty at the time of the fatal accident. This failure created an inference unfavorable to the owner.

In another illustrative case, *State v. Hodge*,[139] the defendant was charged with numerous sex offenses against a minor girl, committed at defendant's home over several years. At trial, no one called the defendant's wife as a witness. During closing argument, the prosecution made a "missing witness" argument, suggesting that the defendant had called many witnesses who lived at defendant's house, but did not call defendant's wife who shared a bedroom with the defendant. The Tennessee Court of Criminal Appeals held that the missing witness argument was improper since no foundation was laid to establish that defendant's wife had knowledge of material facts, that she would naturally be inclined to favor the defendant, and that she was available to the process of the court.

Witnesses Included. The missing witness can be a fact witness or even a party. In *Runnells v. Rogers,*[140] the physician-defendant in a medical malpractice case did not testify. The Tennessee Supreme Court held

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[135] *McReynolds v. Cherokee Ins. Co., 815 S.W.2d 208, 210 (Tenn. Ct. App. 1991)*. *See also* *Newcomb v. Kohler Co., 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006)*; *In re Estate of Price, 273 S.W.3d 113, 140 (Tenn. Ct. App. 2008)* (will contest; trial court is free to accept or reject an inference that the missing witness's testimony would have been unfavorable; any inference in the missing witness rule is not substantive proof and does not relieve the party with the burden of proof of the responsibility for making out a prima facie case). *See also,* *In re Mattie L., 2020 Tenn. App. LEXIS 152 (Tenn. Ct. App. Apr. 14, 2020)*, where the Court of Appeals reversed the trial court's order terminating a father's parental rights, finding that the trial court had erroneously applied the missing witness rule in the father's bench trial. While recognizing that the missing witness rule allows a jury to draw adverse inferences similar to those a jury may draw when a party in a civil proceeding fails to testify, the Court held that the adverse inference does not allow a trial court to presume evidence; rather, the inference may only be used to "weigh" the facts. Thus, the adverse inference applies only when "the plaintiff's proof and the legal deduction therefrom make a prima facie case against the defendant." *Id., *10–11*. The Court concluded that even if the missing rule did apply to father's bench trial, which it did not, the trial court had applied it improperly; the trial court's termination order indicated that it had not merely applied an adverse inference to "weigh the facts" but had instead "presumed" the existence of statutory factors supporting willful abandonment. *Id., *11*.

[136] *598 S.W.2d 209, 224 (Tenn. 1980)*.

[137] *Mallicoat v. Volunteer Fin. & Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966)*.

[138] *Management Servs. v. Hellman, 40 Tenn. App. 127, 289 S.W.2d 711 (1955)*.

[139] *989 S.W.2d 717 (Tenn. Crim. App. 1998)*.

that the plaintiff was entitled to a missing witness jury instruction. While conceding that the defendant in a civil case need not testify and has the right to rely on the plaintiff to carry the burden of proof, when the plaintiff's proof does make out a prima facie case against the defendant, the plaintiff is entitled to a missing witness instruction if the defendant does not testify.

The missing witness may also be an expert. In *Dickey v. McCord*,[141] for example, boat passengers sued boat operators after a large wave hit the boat. The defendants identified an oceanographer as a trial witness, but did not call this witness at trial. The Tennessee Court of Appeals held that the missing witness rule could have been used by plaintiffs had the necessary foundation been established.

[b] Exceptions

Just because a potential witness is not called to testify does not, in every case, raise an inference that the testimony would have been unfavorable. A number of discrete exceptions have been created when it would be unfair and inappropriate to create the missing witness inference.

If the witness is unavailable, the inference does not apply.[142] This could occur if the witness were ill,[143] out of state and outside the reach of process,[144] or did not appear despite good faith efforts to have the witness present.[145] If the missing evidence is a document, the instruction may be given if the item was unavailable because of questionable negligence or dubious mishandling.[146]

Competent to Testify. No inference arises from the failure to call a witness unless there is some evidence that the witness is competent to testify.[147] But the law is less clear if the witness does not testify because of a privilege. Although dictum in the Tennessee Supreme Court's decision in *State v. Francis*[148] suggests that the missing witness rule is inapplicable if the witness is unavailable because of a privilege, the exception is not absolute. In the unusual case of *Boyd v. Boyd,*[149] decided by the Tennessee Supreme Court a few

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[140] ***596 S.W.2d 87 (Tenn. 1980)***. *See also* *In re Estate of Nichols, 856 S.W.2d 397 (Tenn. 1993)* (in civil cases, missing witness inference applies only when the plaintiff has made a prima facie case of liability; defense need not present witnesses until that time, so missing witness rule is inapplicable against the defendant until plaintiff has made requisite showing); *Dukes v. McGimsey, 500 S.W.2d 448 (Tenn. Ct. App. 1973)* (negligent entrustment case; missing evidence inference not proper because no prima facie case proven).

[141] *63 S.W.3d 714, 721–722 (Tenn. Ct. App. 2001)*.

[142] See *e.g.*, *State v. Francis, 669 S.W.2d 85, 88 n.3 (Tenn. 1984)*. *Newcomb v. Kohler Co., 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006)* (missing witness rule applies only when the missing witness is available to the process of the court for trial).

[143] *Conboy v. State, 2 Tenn. Crim. App. 535, 455 S.W.2d 605 (1970)* (witness under care of physician and unable to attend trial).

[144] *State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994)* (missing witness instruction inappropriate when witness was unavailable to the court's process); *State v. Philpott, 882 S.W.2d 394 (Tenn. Crim. App. 1994)*; ***Delk v. State, 590 S.W.2d 435 (Tenn. Crim. App. 1979)***; ***Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 230 S.W.2d 659 (1950)***.

[145] *Cf.* *State v. Pender, 687 S.W.2d 714 (Tenn. Crim. App. 1984)* (state subpoenaed out of state witness who promised to appear but did not do so).

[146] *Richardson v. Miller, 44 S.W.3d 1, 28 (Tenn. Ct. App. 2000)*.

[147] *See* *State v. Francis, 669 S.W.2d 85 (Tenn. 1984)* (six-year-old witness). *Cf.* *McReynolds v. Cherokee Ins. Co., 815 S.W.2d 208, 210–11 (Tenn. Ct. App. 1991)* (one factor in application of missing witness rule is witness's capability to elucidate transaction at issue).

[148] *669 S.W.2d 85, 88–89 n.3 (Tenn. 1984)*.

[149] *680 S.W.2d 462 (Tenn. 1984)*.

months after *Francis,* the Court upheld the use of the missing witness rule for a lawyer, who was also a party and a potential fact witness to the validity of a will. The lawyer could not testify because he also served as an attorney for another party. To avoid the missing witness instruction, the attorney should have declined to represent his client at the trial.

Content of Testimony. The content of the missing witness's testimony is also important in determining whether the rule applies. No missing witness inference is permitted if the testimony of the witness would be irrelevant,[150] unhelpful to the party seeking to use the missing witness rule,[151] or as likely to be favorable to one party as another.[152]

Witness Available to Both Parties. Another exception has arisen when the witness is equally available to each party. Some Tennessee decisions have refused to permit the missing witness inference because the party requesting the inference could obtain the testimony of the witness.[153] This equally-available exception has been rejected in some cases.[154] Irrespective of the merits of the missing witness inference, this exception, when taken to its logical conclusion, would virtually eliminate the missing witness inference since, in most cases where the inference is permissible, the party requesting it could have secured the attendance of the witness by the use of process.

[c] Caution in Using Inference

Although the missing witness rule has long been a part of Tennessee law, a Tennessee Supreme Court decision urged caution in applying it, especially in criminal cases. In *State v. Francis*,[155] the Tennessee

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[150] See *e.g.*, State v. Francis, 669 S.W.2d 85, 88–89 n.3 (Tenn. 1984); Dickey v. McCord, 63 S.W.3d 714, 720 (Tenn. Ct. App. 2001) (missing witness rule requires absent witness to have knowledge of material facts).

[151] *See* State v. Boyd, 867 S.W.2d 330 (Tenn. Crim. App. 1992) (missing witness instruction inappropriate if missing witness did not have peculiar knowledge of material facts; here, there is no evidence the missing witness would have added anything new to testimony of other witnesses). *Cf.* State v. Pender, 687 S.W.2d 714 (Tenn. Crim. App. 1984) (testimony of other witnesses showed missing witness would have favored state, not criminal accused who requested missing witness instruction).

[152] See *e.g.*, ***Henderson v. New York Life Ins. Co., 194 Tenn. 46, 250 S.W.2d 11 (1952)***.

[153] *See* State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994) (citing rule); State v. Francis, 669 S.W.2d 85, 88 n.1 (Tenn. 1984) (dictum; citation of rule); State v. Reed, 2011 Tenn. Crim. App. LEXIS 547 (Tenn. Crim. App. 2011) (no error in faililng to instruct no missing witness, where a confidential informant's identity was known to the defendant and was available to be called as a witness by either party); Elchlepp v. Hatfield, 294 S.W.3d 146 (Tenn. Ct. App. 2008) (missing witness rule could not be raised by defendant since the expert had been equally available to both parties); State v. Overton, 644 S.W.2d 416 (Tenn. Crim. App. 1982) (police officer named as prosecutor in indictment did not testify; no missing witness instruction because officer available to either party); ***Henderson v. New York Life Ins. Co., 194 Tenn. 46, 250 S.W.2d 11 (1952)*** (plaintiff's failure to call physicians who had examined plaintiff did not give rise to missing witness inference because physicians were not under plaintiff's control and were equally available to either party); State v. Boyd, 867 S.W.2d 330 (Tenn. Crim. App. 1992) (to trigger missing witness rule, witness who was not called must not have been equally available to both parties; officer who wrote report was not called by prosecution; missing witness instruction was inappropriate, since there was no proof that the defense tried to talk to the officer or that the officer would not have talked with the defense had the officer been approached); Elchlepp v. Hatfield, 294 S.W.3d 146, 154 (Tenn. Ct. App. 2008) (upholding trial court's refusal to apply the missing witness rule since absent witness equally available to both parties) ; Gwinn v. State, 595 S.W.2d 832 (Tenn. Crim. App. 1979) (defendant not entitled to missing witness instruction when prosecution failed to call F.B.I. lab witness whose test results were inconclusive; no proof state withheld witness with peculiar knowledge who was available to state but not the defense); Bland v. Allstate Ins. Co., 944 S.W.2d 372, 379 (Tenn. Ct. App. 1996) (missing witness rule inapplicable where witness was equally available to both parties and it seemed no more likely that his testimony would favor the plaintiff than the defendant).

[154] See *e.g.*, State v. Jones, 598 S.W.2d 209, 224 (Tenn. 1980) ("the defendant is under no obligation to call two witnesses that the state has paid a total of $6,760.00 to build a case against him"); Anderson v. State, 512 S.W.2d 665 (Tenn. Crim. App. 1974) (state not obligated to call witnesses to support defense; defendant should have called own witnesses).

Supreme Court pointed out some reasons why the rule should be approached with caution. First, the Court noted the danger that the missing witness rule could add a "fictitious weight to one side of the case, for example, by giving the missing witness an undeserved significance."[156] Second, since the missing witness rule will be used in closing argument, the opposing party will be unable to counter with any evidence why the witness was not called.

[d] Procedures

Consistent with the view that the missing witness rule should be approached with caution, certain procedures should be followed before the rule is invoked. When a party seeks to argue or obtain jury instructions on the missing witness rule, he or she should:

> [I]nform the court at the earliest opportunity so that an evidentiary hearing, if necessary, can be held to establish whether the requirements for laying a proper foundation … have been met. An advance ruling from the trial court on the permissibility of arguing before a jury the adverse inference to be drawn from the absence of a witness, will ultimately save judicial time and the expense of a retrial.[157]

[e] Foundation

Despite the large number of Tennessee cases invoking the missing witness rule, relatively few cases discuss the foundation that must be presented before the rule is applicable. Proof that a party did not produce a particular witness is, by itself, insufficient to justify application of the missing witness inference. The inference is permissible if "it can be said 'with reasonable assurance that it would have been natural for a party to have called the absent witness but for some apprehension about his testimony.' "[158]

In the leading case, *Delk v. State*,[159] the Court held that the missing witness rule will be invoked only when a foundation has been laid. The person seeking to use the rule must establish that (1) the witness has knowledge of a material fact, (2) a relationship exists between the witness and the party that would naturally incline the witness to favor the party, and (3) the witness was available to process of the court.[160] The fact that a prosecutor personally knew a witness was available was viewed as insufficient proof to satisfy the court. Apparently, the prosecutor should have requested a jury-out hearing to present proof. A

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[155] *669 S.W.2d 85, 89 (Tenn. 1984)*. *See also* *Newcomb v. Kohler Co., 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006)* (because of the potential effects of invoking the rule, courts must construe the requirements of the missing witness rule strictly and exercise restraint in those instances in which the rule is applicable).

[156] *Id. at 89*, *quoting* *Dent v. State, 404 A.2d 165, 171 (D.C. App. 1979)*.

[157] *Id. at 90 (Tenn. 1984)*. Relevant rules of appellate procedure should also be consulted. *See, e.g.*, *Tenn. R. Crim. P. 30* ("… any party may file written requests that the court instruct the jury on the law as set forth in the requests"); *Tenn. R. App. P. 24* (requiring transcript of jury instructions to be filed on appeal). In *State v. Buford, 2020 Tenn. Crim. App. LEXIS 40 (Tenn. Crim. App. Jan. 27, 2020)*, the Court of Criminal Appeals denied defendant relief for the trial court's failure to provide a missing witness instruction, because the defendant did not file a written request for instructions with the trial court pursuant to *Tenn. R. Crim. P. R. 30*, nor did he file a transcript of the jury instructions on appeal as required under *Tenn. R. App. P. 24(b)*.

[158] *Id.*, *quoting* *Burgess v. United States, 440 F.2d 226, 237 (D.C. Cir. 1970)*.

[159] ***590 S.W.2d 435, 440 (Tenn. Crim. App. 1979)***. In *State v. Francis, 669 S.W.2d 85 (Tenn. 1984)*, the court held that "the *Delk* requirements … are to be strictly construed, particularly when the rights of a criminal defendant may be affected." See also *State v. Whitaker, 2015 Tenn. Crim. App. LEXIS 721 (Tenn. Crim. App. 2015)* (the inference is not appropriate when the proof fails to establish all three of the Delk factors; due to the potentially critical effect of the missing witness rule, the Delk requirements must be strictly construed).

[160] *See also* *State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984)*; *State v. Hodge, 989 S.W.2d 717, 722 (Tenn. Crim. App. 1998)*; *Newcomb v. Kohler Co., 222 S.W.3d 368, 400 (Tenn. Ct. App. 2006)*.

later decision noted that *Delk* also contemplated some proof that the witness was competent.[161] Failure to lay the proper foundation can be reversible error.[162]

[f] Fifth Amendment: Criminal Cases

The missing witness rule has created special problems in criminal cases where the constitution bars drawing an inference from the defendant's exercise of the *Fifth Amendment* right to refuse to testify in his or her own trial.[163] Tennessee law also bars a direct or indirect allusion to the defendant's failure to testify or a jury argument that the defendant's failure to testify should engender an inference of guilt.[164] While a prosecutor is barred from making a direct or indirect comment on the criminal defendant's decision to not testify, Tennessee courts actually have permitted indirect comments in some circumstances. Many Tennessee decisions have permitted the prosecutor to comment on the failure of the defense to produce evidence. Occasionally, the prosecutor has even been permitted to note that certain evidence "stands uncontradicted"[165] or the defendant presented "no proof whatsoever."[166] An adverse inference has been permitted even when the defendant has failed to produce real evidence, such as a gun.[167]

These rules are of questionable soundness. Often they are, in fact, a comment on the accused's decision to not testify. Since this decision is fully protected by the Constitution, it should be protected against the creation of a harmful inference that draws the jury's attention to the defendant's choice. Some Tennessee courts have recognized the gray areas between permissible and impermissible argument and have cautioned prosecutors to avoid "remarks that skirt the edge of impermissible comment."[168] But when prosecutors have strayed too close to impermissible comment, Tennessee courts frequently find harmless error[169] or stress the fact that the judge remedied the error by telling the jury to disregard the defendant's failure to testify.[170]

[g] Fifth Amendment: Civil Cases

In civil cases, Tennessee law permits fact finders to draw adverse inferences against parties who invoke their *Fifth Amendment* right to remain silent. For non-parties, an adverse inference is analyzed on a case-by-case basis using four factors: nature of the relationship, degree of control of the party over the non-party

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[161] *State v. Francis, 669 S.W.2d 85, 90 n.5 (Tenn. 1984)*.

[162] *State v. Hodge, 989 S.W.2d 717 (Tenn. Crim. App. 1998)*.

[163] *See Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)*.

[164] *See Taylor v. State, 582 S.W.2d 98, 100 (Tenn. Crim. App. 1979)*.

[165] *Schweizer v. State, 217 Tenn. 569, 399 S.W.2d 743 (1966)*. *Accord*, *Hays v. State, 159 Tenn. 388, 19 S.W.2d 313 (1929)*; *Wallis v. State, 1 Tenn. Crim. App. 756, 450 S.W.2d 43 (1969)*. *Cf. Taylor v. State, 582 S.W.2d 98 (Tenn. Crim. App. 1979)* (dictum; Tennessee law permits prosecutor to argue that state's proof is unrefuted or uncontradicted).

[166] *See State v. Livingston, 607 S.W.2d 489 (Tenn. Crim. App. 1980)*.

[167] *Ford v. State, 184 Tenn. 443, 201 S.W.2d 539 (1945)*.

[168] *Taylor v. State, 582 S.W.2d 98, 101 (Tenn. Crim. App. 1979)*. *See also McCracken v. State, 489 S.W.2d 48, 51 (Tenn. Crim. App. 1972)* ("we would not hesitate to reverse and remand if we thought an argument, however subtle and indirect, told the jury it could infer the accused was guilty because he did not take the witness stand").

[169] *But see State v. Francis, 669 S.W.2d 85, 91 (Tenn. 1984)* (reversing criminal conviction because of improper closing argument on missing witness; reversal ordinarily required when credibility is crucial issue and an improper missing witness inference affects credibility).

[170] See *e.g.*, *Taylor v. State, 582 S.W.2d 98, 101 (Tenn. Crim. App. 1979)*.

witness, compatibility of the interests of the party and non-party witness in the outcome of the case, and the role of the non-party witness in the litigation.[171]

[h] Refusal to Take Physical Examination or Give Exemplar

Sometimes a plaintiff in a personal injury case will refuse to submit to a physical examination when requested by the defendant. Although the defendant may be able to secure a court order to obtain the examination, it is also possible, and perhaps tactically advisable in some cases, to bring to the jury's attention the plaintiff's refusal to be examined, thus raising inferences more damaging than the results of the examination.[172]

The same logic applies in a criminal case when the accused refuses to provide a handwriting exemplar[173] or other physical information.[174]

[16] Results of Disciplinary Proceedings

Various professionals are subject to disciplinary proceedings conducted by their profession's administrative organization. Sometimes the same actions resulting in disciplinary proceedings also produce civil or criminal actions. Absent a statute to the contrary, the general rule is that the results of the disciplinary proceedings are admissible when relevant to the subsequent civil or criminal action.

In *Roy v. Diamond*,[175] for example, the Tennessee Board of Professional Responsibility recommended that a lawyer be disbarred for improper handling of an estate. The Tennessee Court of Appeals held that the findings of the disciplinary proceeding were admissible in the subsequent legal malpractice action based on the same misconduct. A violation of the applicable professional ethical standards was characterized as relevant since the standards may provide guidance in defining a lawyer's obligation to a client.

[17] Other Contracts or Business Transactions

[a] Dealings with Others

Under the doctrine of *res inter alios acta* (transactions involving others), Tennessee courts have refused to admit a contract between A and X if offered in a suit by A against B.[176] Although it is arguable that A's prior business dealing reflects his or her method of doing business and thus sheds some light on A's present transaction, generally the courts have not found the evidence sufficiently relevant to be admissible.

The theory supporting admission is that the terms of prior contracts or transactions between these parties may show custom or continuing course of dealing between them. Such issues are resolved in Tennessee

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[171] *Levine v. March, 266 S.W.3d 426, 442 (Tenn. Ct. App. 2007)*.

[172] *See Williams v. Chattanooga Iron Works, 131 Tenn. 683, 176 S.W. 1031 (1915)*; *Richardson v. Johnson, 60 Tenn. App. 129, 444 S.W.2d 708 (1969)*.

[173] *See e.g.*, United States v. Jackson886 F.2d 838 (7th Cir. 1989) (failure to provide handwriting exemplar is probative of consciousness of guilt).

[174] *See e.g., United States v. Mitchell, 556 F.2d 371 (6th Cir. 1977)* (court-ordered voice exemplar); *United States v. Johnson, 24 Fed. Appx. 70 (2d Cir. 2001)* (palm and finger prints).

[175] *16 S.W.3d 783 (Tenn. Ct. App. 1999)*.

[176] *Dark Tobacco Growers' Co-op. Assn v. Mason, 150 Tenn. 228, 263 S.W. 60 (1924)* (contracts between other farmers and plaintiff "clearly incompetent").

under Rule 401, not 404(b) which applies only to actions of the criminal accused.[177] The general rule is, however, that courts refuse to admit evidence of unrelated transactions.[178]

> There are judicial recognized exceptions to the general rule. For example, evidence concerning unrelated transactions may be used to show matters such as knowledge, absence of mistake or accident, fraudulent intent, or the existence of a common scheme or plan.[179]

[b] Dealings with Same Parties

Prior contracts between the same parties have been found to be relevant and thus admissible under Rule 401. For example when a dispute arises regarding the terms of a written contract, if the same parties had previously entered into a more explicit contract involving the same subject matter, the prior contract may be reflective of the way these two parties do business with one another.[180] Of course, the parol evidence rule will impact the extent, if any, to which such evidence might be admissible.[181]

[c] Authority of an Agent

Prior contracts and similar transactions can also be relevant under Rule 401 if the authority of an agent is in question.[182] If a particular individual has previously acted as an agent for another under substantially similar circumstances, this may make it more probable than not that he or she has authority to act in the same agency capacity.

[d] Uniform Commercial Code

The Uniform Commercial Code has specific provisions regarding prior contracts under certain circumstances. Pursuant to *Tennessee Code Annotated § 47-1-303*,[183] the previous transactions between the parties, known as *course of dealing*, are highly relevant. "Course of dealing" is defined as:

> [A] sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.[184]

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[177] *See State v. Stevens, 78 S.W.3d 817 (Tenn. 2002)* (Rule 404(b) applies only to acts of the criminal accused; not to acts of third persons). *See above § 4.04 [7]*.

[178] *Keith v. Murfreesboro Livestock Market, 780 S.W.2d 751, 756 (Tenn. Ct. App. 1989)*. *See also Davidson v. Holtzman, 47 S.W.3d 445, 456 (Tenn. Ct. App. 2000)* (evidence of extrinsic transactions having no connection with transaction at issue is not admissible).

[179] *Keith v. Murfreesboro Livestock Market, 780 S.W.2d 751, 757 (Tenn. Ct. App. 1989)* (citations omitted). *See also McGowan v. Cooper Industries, Inc., 863 F.2d 1266 (6th Cir. 1988)* (suit brought by several plaintiffs after new air compressor at chemical plant exploded during test run; trial court erred in barring evidence of routine practices in the industry).

[180] CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, 1 FEDERAL EVIDENCE 605 (3d ed. 2007) (*citing* Hartford Steam Boiler Inspection & Ins. Co. v. Schwartzman Packing Co. (10th Cir. 1970)).

[181] *Id. See above § 4.01[8]*.

[182] MCCORMICK ON EVIDENCE 325 (6th ed. 2006). Rule 404(b) is inapplicable since in Tennessee it applies only to actions of the criminal accused. See above *§ 4.04 [7]*.

[183] *Tenn. Code Ann. § 47-1-303* (Supp. 2010).

[184] *Tenn. Code Ann. § 47-1-303* (Supp. 2010).

Other concepts specifically defined are *course of performance* and *usage of trade*.[185] Under Tennessee's Uniform Commercial Code, a usage of trade, course of performance, and course of dealing give added and particular meaning to the terms of any agreement.[186] Generally, the explicit terms of an agreement are, if possible, interpreted in conjunction with any course of dealing, course of performance, and any usage of trade between the parties.[187] In the event of conflict, the express terms of the contract receive top priority, followed by course of performance, course of dealing and, finally, usage of trade.[188]

[18] Damages

Past bad acts and the like may also be admissible under Rule 401 on the issue of damages. In Hensley v. Harbin,[189] a wrongful death case, the defendant sought to introduce proof that the victim had committed a burglary a month before the victim was killed by the defendant. The trial court excluded the evidence. The Tennessee Court of Appeals held that the evidence was admissible on the issue of the deceased's inclination to honestly earn a livelihood:

> Certainly the commission of a crime places one's future in jeopardy and if convicted could render one's ability to support his family completely ineffectual. In our opinion, the evidence of a commission of a crime is competent on the question of the pecuniary value of the life of the deceased, and the court erred in excluding such testimony in this case.[190]

Because of the real likelihood that such evidence will cause unfair prejudice, it is submitted that courts should examine carefully whether Rule 403 should exclude the evidence of the prior misconduct. When punitive damages are at issue, a defendant's financial condition is relevant.[190.1]

[19] Element of a Cause of Action or Crime

Sometimes a prior bad act constitutes an element of a cause of action. In such cases the prior act is not used as character evidence to prove action in conformity with character. In *State v. Wingard*,[191] for example, the court admitted proof of two prior felonies to establish guilt of the crime of escaping from a penal institution while under sentence for a felony. It should be noted that the Court of Criminal Appeals permitted proof of both the fact of the prior felony convictions and their nature (first degree murder and felony attempt), despite the defendant's argument that only the former was necessary. Although the *Wingard* decision refused to apply Rule 403 to limit proof to the former in order to minimize prejudice, this use of Rule 403 would have been consistent with its purpose of limiting unfairly prejudicial proof.

Conspiracy cases present another illustration of this principle since often bad acts help prove the existence of the conspiracy itself. In *United States v. Dierling*,[192] a drug conspiracy case, the trial court properly admitted a

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[185] "Usage of trade" is defined as "any practice or method of dealing having such regularity of observance … as to justify an expectation that it will be observed with respect to the transaction in question." *Tenn. Code Ann. § 47-1-303* (Supp. 2010). *See also Country Clubs, Inc. v. Allis-Chalmers, Inc., 430 F.2d 1394 (6th Cir. 1970)*.

[186] *Tenn. Code Ann. § 47-1-303* (Supp. 2010).

[187] *Id.* at § 47-1-303 (Supp. 2010).

[188] *Id.*

[189] *782 S.W.2d 480 (Tenn. Ct. App. 1989)*.

[190] *Id. at 481*.

[190.1] *In re Estate of Smallman, 398 S.W.3d 134, 151 (Tenn. 2013)*.

[191] *891 S.W.2d 628 (Tenn. Crim. App. 1994)*.

number of bad acts in order to prove the existence and methods of the conspiracy. These included evidence that conspirators killed someone who owed a drug debt, a conspirator had committed arson of a barn, a conspirator had weapons at his house, and conspirators had been in car chases with law enforcement officers.

[20] Real and Demonstrative Evidence: In General

[a] In General

Frequently, evidence other than oral testimony is utilized in the presentation of a case at trial. This evidence is often divided into two categories: real and demonstrative evidence. Each is discussed in greater detail in this and succeeding sections. *Real evidence* is tangible proof that was actually involved in the chain of events giving rise to the cause of action, such as the instrumentality of a crime. *Demonstrative evidence*, on the other hand, was not involved in the event at issue but is presented to assist the trier of fact in comprehending and evaluating the other evidence and the facts in general. Like oral testimony, both real and demonstrative evidence are admissible only if they are relevant. Under Rule 401, this means that the evidence must make facts of consequence to the cause of action more or less probable than they would be without the evidence.[193] Often real or demonstrative evidence that is relevant is attacked under Rule 403 as too prejudicial or time-consuming.[194]

[b] Real Evidence

The term *real evidence* is commonly used for items that played a direct or indirect role in the events leading up to the lawsuit.[195] Also referred to as *physical evidence*, this category includes such items as the murder weapon in a homicide case, the defective tool in a products liability case, or confiscated narcotics in a drug case. In a criminal case, an article of a defendant's clothing might be relevant for identification purposes. A victim's blood-stained clothing taken from a crime scene might be probative of injuries received, as well as serving as a subject for scientific analysis in order to establish the killer's identity by proving that the defendant's blood was on the victim's clothing.[196] Blood-stained or damaged clothing also might be used in a civil case to show the severity of injuries received in an accident. A special sub-category of real evidence is the demonstration or exhibition of actual bodily harm by the injured person, who shows the jury the actual scar or other injuries involved in the case. From examining real evidence, the trier of fact is able to draw a first-hand impression of the facts.

Procedures. There are several prerequisites to the admission of real evidence. First, it must be relevant under Rule 401.[197] Second, it must be authenticated.[198] This means that there must be sufficient proof that the item is what it is claimed to be.[199] If, for example, an item is to be introduced at trial as the murder weapon, testimony must be presented that the weapon in court is the same weapon found at the crime scene. If the item is not unique, there also may have to be proof that the item remains in substantially the

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[192] *131 F.3d 722 (8th Cir. 1997)*, *cert. denied*, ***523 U.S. 1066 (1998)***.

[193] *See above §§ 4.01[3]*, *[4]*.

[194] *See below § 4.03[3]*.

[195] MCCORMICK ON EVIDENCE 372 (6th ed. 2006).

[196] *See below § 7.02[19]*.

[197] *See above § 4.01[3]*.

[198] *See below § 9.01[2]*.

[199] *Tenn. R. Evid. 901(a)*.

same condition as at the time of the murder, free from alteration or substitution. This authentication process, known as the "chain of custody," is discussed extensively elsewhere in this book.[200]

A common concern is that real evidence will so effectively demonstrate a facet of the case and convey an impression of reality that it will either be overemphasized by the trier of fact, be misleading or be unfairly prejudicial. The provisions of Rule 403 can be invoked, in the court's discretion, to exclude relevant but overly prejudicial, confusing or misleading real evidence.[201]

[c] Recorded Real Evidence

Under certain circumstances, the events giving rise to a cause of action are recorded, and the recording is later introduced at trial as evidence. An example is the photograph or videotape made by a bank's camera during a robbery.[202] Another is an airport videotape that unexpectedly captures a plane crash. These recordings, if properly authenticated, constitute real evidence.

[d] Demonstrative Evidence

Demonstrative or *illustrative* evidence encompasses many other types of non-oral proof intended to illustrate or explain to the trier of fact the events giving rise to the cause of action. Ordinarily, demonstrative evidence has no probative value in and of itself, but rather aids the judge or jury in comprehending the other evidence.

Demonstrative evidence frequently consists of visual aids. For example, a lawyer may use a life-size mannequin in a murder case to demonstrate the paths of the bullets through the victim's body.[203] Similarly, x-rays can be admitted to illustrate a doctor's testimony regarding an individual's medical condition.[204] Photographs,[205] videotapes,[206] and other recordings serve as aids for the trier of fact. They are typically introduced in conjunction with related testimony in order to give the jury or judge a more extensive and comprehensible perception of the testimony, and, sometimes, its relation to other evidence.

Charts and diagrams[207] in support of a witness's testimony can be especially helpful.[208] These exhibits clarify the facts or opinions in the witness's testimony, especially in the case of an expert witness. Charts summarizing voluminous writings, recordings or photographs are specifically approved under Rule 1006 against best evidence objections.[209]

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[200] *See below* *§ 9.01[13]*.

[201] *See below* *§§ 4.03[2]*, [8].

[202] See *e.g.*, *State v. Williams, 913 S.W.2d 462, 466 (Tenn. 1996)* (properly authenticated surveillance photographs depicting an actual robbery at a convenience store are recorded real evidence, permitting the trier of fact to draw a first-hand impression of the facts rather than to draw a second-hand impression based on the impressions of others).

[203] *State v. Harrington, 627 S.W.2d 345, 348 (Tenn. 1981)*. *See also* *State v. Reid, 164 S.W.3d 286, 344 (Tenn. 2005)* (adopting opinion of Court of Criminal Appeals) (styrofoam heads used as demonstrative evidence by medical examiner to illustrate the location of head wounds suffered by homicide victim).

[204] See *e.g.*, *Sparks v. State, 563 S.W.2d 564 (Tenn. Crim. App. 1978)*.

[205] *See below* *§ 4.03[9]*.

[206] *See below* *§ 4.01[22]*.

[207] *See below* *§ 4.01[24]*.

[208] Such charts are to be distinguished from the charts prepared to summarize voluminous testimony. *See below* *§ 10.06[2]*.

[209] *See below* *§ 10.06[2]*.

Another illustrative aid is a drawing or diagram[210] made during testimony. For example, frequently a courtroom contains a chalkboard or large pad of paper with markers. The witness may be given the opportunity to sketch for the jury his or her version of the facts in diagram form.

Demonstrative evidence, like other evidence, is subject to exclusion under the rules of evidence, such as Rule 401 (relevance). It may also be excluded under Rule 403 as too prejudicial.[211]

[21] Photographs

[a] In General

A photograph is commonly used as proof in court. Tennessee cases have long held that the trial judge is given great discretion in determining whether a photograph is admissible into evidence.[212] Nevertheless, regardless of the purpose for which a photograph is being introduced, certain basic evidentiary requirements must be met before the picture is admissible.[212.1]

A statute may also regulate the admissibility of photographs. For example, Tennessee law bars the admissibility of photographs taken from drones.[212.2] Another statute admits an "appropriate photograph" of a homicide victim while the victim was alive; the picture must be offered by the prosecutor in a homicide case to show the victim's general appearance and condition.[212.3]

[b] Satisfaction of Original Writing Rule

First, it must satisfy the so-called "*best evidence*" or in modern terms, *the original writing* rule. Because liberal modern evidence rules consider a print of a negative to be the "original" photographs should rarely be excluded because of the original writing rule.[213] The same should be true of a print or on-screen picture

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[210] *See below* *§ 4.01[24]*.

[211] *See e.g.*, *State v. Riels, 216 S.W.3d 737, 747 n.4 (Tenn. 2007)* (inappropriate during capital sentencing hearing for state to be permitted to have defendant, who testified about his remorse, step down from witness stand and demonstrate how he attacked the victim. Court stated it could "think of no circumstances in which such evidence should be admissible during a capital sentencing hearing.").

[212] See *e.g.*, *State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978)*. *See also* *State v. Evans, 838 S.W.2d 185, 193 (Tenn. 1992)*.

[212.1] Before any photograph can be admitted into evidence, it must be verified and authenticated by a witness with knowledge of the facts. When determining the admissibility of relevant photographic evidence, a trial court should consider the accuracy and clarity of the picture and its value as evidence, the adequacy of testimonial evidence in relating the facts to the jury, and the need for the evidence to establish a prima facie case of guilt or to rebut a defendant's contentions. *State v. Reynolds, 2019 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. June 25, 2019)*.

[212.2] *Tenn. Code Ann. § 39-13-905* (Supp. 2014).

[212.3] *Tenn. Code Ann. § 40-38-103(c)* (2015). The Tennessee Supreme Court has held that "[g]enerally, photographs taken during the life of a victim are not so prejudicial as to warrant a new trial." *State v. Adams, 405 S.W.3d 641, 657 (Tenn. 2013)*. This lenient admissibility rule applies even if the photograph is not relevant to a contested issue. *See* *State v. Toles, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019)* (where the State offered to introduce a photograph of the victim standing with his arm around his longtime girlfriend pursuant to *Tenn. Code Ann. § 40-38-103(c)*, and defendant objected that the photograph was prejudicial because it tended to elicit sympathy from the jury; the court held it was not an abuse of discretion for the trial court to admit the photo).

[213] Under the original writing rule, a "photograph" includes still photographs, x-rays, videotapes, and motion pictures, Rule 1001(2). An "original" of a photograph includes the negative or any print from the negative, Rule 1001(3). Therefore, the traditional version of a photo—a print from a negative—is defined as an original. To prove the contents of a photograph, an "original" is ordinarily required, Rule 1002. Since the photo print is defined as an "original," production of the print satisfies the

from a digital photo source, although the foundation rules should be carefully followed to ensure accuracy since the digital version is especially subject to manipulation.

[c] Relevance

Second, and most importantly, it must be established that the photograph is relevant under Rule 401.[214] This requires proof that it will assist the trier of fact. It should do so if it deals with a pertinent topic. It must also be a true and accurate depiction of its subject matter.[215]

Tennessee case law contains many examples of photographs deemed sufficiently relevant to be admitted. Examples include: a bank photograph of an alleged robber;[216] a photograph of a rape victim to show the victim's size and age at the time of the offense;[217] a photograph of the defendant holding the weapon allegedly used in a homicide;[218] a photograph of a rape suspect taken shortly after the offense that was used to prove his hair length and appearance at the time of the offense;[219] a photograph of a victim to establish the disputed fact that there was a sexual assault;[220] a photograph of two people to show their resemblance in order to explain a misidentification;[221] a photograph of a homicide victim to establish both identity and the fact that the victim was a human being;[222] and a photograph of a homicide victim used to prove the extent of the wounds.[223] Photographs of a murder victim have been deemed relevant to show the position of the body, the location of the body in the market where the crime occurred, and its proximity to the market's safe.[224] When determining the admissibility of photographs of victims, the trial court should consider their accuracy and clarity, and whether they were taken before the corpse was moved if the position and location of the body when found is material.[224.1]

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original writing rule. An original of a photograph need not be produced if the original was lost or destroyed, is unobtainable through judicial process, in the possession of the opponent, or if the photograph pertains only to a collateral issue, Rule 1004.

[214] *See above* *§ 4.01[3]*.

[215] *See* *State v. Banks, 564 S.W.2d 947 (Tenn. 1978)* (before photograph admissible, it must be verified and authenticated by a witness with knowledge of the facts). *See below* *§ 4.01[21][e]*.

[216] *State v. Leath, 744 S.W.2d 591 (Tenn. Crim. App. 1987)*.

[217] *State v. Gann, 733 S.W.2d 113 (Tenn. Crim. App. 1987)*. *See also* *State v. Thomas, 158 S.W.3d 361, 394 (Tenn. 2005)* (adopting opinion of Tennessee Court of Criminal Appeals) (photos admissible to refute defendant's claim that death was the result of obesity).

[218] *State v. Evans, 710 S.W.2d 530 (Tenn. Crim. App. 1985)*.

[219] *State v. Elliott, 703 S.W.2d 171 (Tenn. Crim. App. 1985)*.

[220] *State v. Duncan, 698 S.W.2d 63 (Tenn. 1985)*. *See also* *State v. McCary, 119 S.W.3d 226 (Tenn. Crim. App. 2003)* (about 100 photographs of sex abuse victims in non-sexual situations found in defendant's office relevant to show his preoccupation with the victims).

[221] *State v. Harries, 657 S.W.2d 414, 421 (Tenn. 1983)*.

[222] *State v. Thomas, 158 S.W.3d 361, 393 (Tenn. 2005)* (adopting opinion of Tenn. Court of Criminal Appeals).

[223] *Hawkins v. State, 555 S.W.2d 876 (Tenn. Crim. App. 1977)*.

[224] *State v. Evans, 838 S.W.2d 185, 194 (Tenn. 1992)*. *See also* *State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993)* (color photographs of murder victims not excessively gruesome or unnecessarily cumulative).

[224.1] *State v. Simpson, 2019 Tenn. Crim. App. LEXIS 173 (Tenn. Crim. App. 2019)*.

Relatively few reported Tennessee cases exclude photographs as irrelevant. A few examples of irrelevant photographs include one showing the homicide victim before the offense,[225] and a photograph of a criminal defendant when the date of the photograph could not be established.[226] Although the trial judge has broad discretion in determining whether a particular photograph is sufficiently accurate to be admitted into evidence, photos are liberally admitted in Tennessee courts, even when the subject matter is in some way different than at the time in question.[227]

[d] Rule 403

Even if a photograph is deemed relevant, it may still be excluded under Rule 403, which states that relevant evidence may be barred if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or waste of time. This issue is discussed more fully elsewhere in this book.[228] A photograph's probative value may be compromised by the camera angle, a change in the subject matter, or other factors. This may suggest that the evidence would mislead, rather than enlighten, the trier of fact. A photograph may cause unfair prejudice and confusion if it is inflammatory. On the other hand, a photograph may be admissible even if "graphic, gruesome, and even horrifying" if relevant and the probative value is not outweighed by the danger of unfair prejudice.[229]

[e] Authentication

A photograph can by authenticated by proof that it depicts what it is claimed to depict, Rule 901(a). An older Tennessee case held that a photograph is admissible "when shown to be [a] reasonably accurate representation of the place or thing in question."[230]

The photographer who took the photo may serve as the authenticating witness by testifying that the photo in court is the one the witness took on a particular date, and is an accurate depiction of the matter photographed. For example, the plaintiff can testify that, after being rear-ended by the defendant, plaintiff got out of the car and took photographs of the accident scene with a cell phone camera. In this example, the photographer is also a fact witness and a party.

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[225] *Cf.* State v. Richardson, 697 S.W.2d 594, 597 (Tenn. Crim. App. 1985) (photograph of crime victim before offense "added little or nothing to the sum total of knowledge of the jury"); State v. Strouth, 620 S.W.2d 467 (Tenn. 1981), *cert. denied*, ***455 U.S. 983 (1982)*** (same; harmless error); Taylor v. State, 475 S.W.2d 551 (Tenn. Ct. App. 1972) (photograph of female homicide victim, showing her partially nude and taken well before homicide, excluded as irrelevant).

[226] Hardy v. State, 519 S.W.2d 400 (Tenn. Crim. App. 1975). *See also* State v. Trusty, 326 S.W.3d 582, 604 (Tenn. Crim. App. 2010) (photos of remote area where homicide victim's body was found are admissible to show appearance of crime scene and great efforts made to conceal the body, relevant to premeditation).

[227] *See* State v. Banks, 564 S.W.2d 947 (Tenn. 1978) ("policy of liberality" in admitting photographic evidence); State v. Trusty, 326 S.W.3d 582, 604 (Tenn. Crim. App. 2010) (Tennessee courts follow policy of liberal admission of photos in civil and criminal cases); State v. Delk, 692 S.W.2d 431, 438 (Tenn. Crim. App. 1985) (photos showing slightly different condition of floor admitted when jury apprised of alteration in condition of floor); Little v. Nashville, Chattanooga & St. Louis Ry. Co., 39 Tenn. App. 130, 281 S.W.2d 284 (1954) (photograph of railroad intersection admissible even though it was taken in winter, when there was no foliage, but collision occurred in spring, when shrubbery was thick); Gasteiger v. Gillenwater, 57 Tenn. App. 206, 417 S.W.2d 568 (1966) (subsequent repairs shown in photograph do not automatically render it inadmissible); State v. Brock, 327 S.W.3d 645, 693 (Tenn. Crim. App. 2009)(Tennessee courts have policy of liberality in admitting evidence in civil and criminal cases).

[228] *See below* § 4.03[9].

[229] State v. Brock, 327 S.W.3d 645, 694 (Tenn. Crim. App. 2009); State v. Simpson, 2019 Tenn. Crim. App. LEXIS 173 (Tenn. Crim. App. 2019).

[230] Hughes v. State, 126 Tenn. 40, 68–69, 148 S.W. 543, 550 (1912).

It is not necessary, however, that the witness through whom a photo is being introduced was also the photographer who took the photo in question. Any person, whether or not a photographer, familiar with the place or item that was photographed can authenticate the picture by testifying that it is a true and accurate depiction of the location or item at issue in the case. For example, in *Hughes v. State*[231] a photograph of a homicide scene in a hotel room was authenticated by a hotel employee who was familiar with the room and had seen it immediately after the homicide when the body was still on the floor. The employee testified that he knew the positions of the objects in the room, and the photograph accurately portrayed them. Similarly, a police officer can authenticate the overall accuracy of a crime scene photograph by testifying that it was a true and accurate representation of the scene at the time he arrived, despite the defendant's posture being "slightly more upright" than the photo depicts.[231.1]

Failure to convince the court that the photograph was taken at a relevant time may induce the court to exclude the evidence, especially when the important fact in the photo is transitory, such as facial hair, and the date of the picture is critical.[232] One court suggested such photographs of transitory facts should be admitted with "great caution."[233]

The following is an example of a simple direct examination of a fact witness who did not take the photograph, but can authenticate it.

> Q. Mr. Jones, are you familiar with the intersection of Kingston Pike and Cherokee Boulevard in Knoxville, Tennessee?
>
> A. Yes, I'm quite familiar with it.
>
> Q. How did you become familiar with it?
>
> A. I grew up in the west part of Knoxville and have ridden through that intersection on my way downtown since I was a child. I presently live on Scenic Drive, near that intersection, and I drive through the intersection at least ten times each week travelling to and from work.
>
> Q: I am showing you a photograph marked "Plaintiff's Exhibit 1 for Identification." Can you identify the scene depicted in this photograph?
>
> A: Yes, that is the intersection of Kingston Pike and Cherokee Boulevard.
>
> Q: From which direction was it taken?
>
> A: It was taken by someone standing on the west side of the intersection, facing east toward downtown.
>
> Q: Does this photograph truly and accurately represent the intersection as it existed in April of 2011?
>
> A: Yes, it does.

In some instances, the professional photographer who took the photographs should be the witness through whom they are introduced into evidence. If there is any allegation that the photographs have been altered or touched up to enhance the impact on the finder of fact, the photographer can verify their validity. Similarly, if the time or date on which the pictures were taken is important, the professional photographer can provide this information. Testimony from a professional photographer who makes a good appearance can have a favorable impact on the jury, perhaps making the exhibits seem more important. Tennessee

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[231] *126 Tenn. 40, 148 S.W. 543 (1912)*.

[231.1] *See State v. Long, 2017 Tenn. Crim. App. LEXIS 609 (Tenn. Crim. App. 2017)*.

[232] *See Hardy v. State, 519 S.W.2d 400 (Tenn. Crim. App. 1975)* (court properly refused to allow drug defendant to introduce undated photo of him with huge afro hair style; defendant "unable to fix the date the photograph was taken within any reasonable proximity to the date of the offense"). Another approach may have been for the court to have admitted the photograph and let both sides present the jury with proof of the date of the photo.

[233] *Hardy v. State, 519 S.W.2d 400, 402 (Tenn. Crim. App. 1975)*.

courts are given wide discretion in decisions about the technical presentation of photographs. For example, the trial judge may admit enlargements of photographs if helpful to the jury and not unfairly prejudicial.[234]

Advances in the field of photography will likely result in an increase in the amount of photographic evidence. With the advent of disposable cameras, digital cameras and cameras contained in cellular telephones, it is common for someone at the scene of an accident or event to have the ability to take pictures depicting the scene.

However, modern technology has also resulted in somewhat greater concern in the area of authentication of photographs. The electronic image that results when a digital photograph is taken is contained in a data file. Such files are easy for the layman to modify with readily available computer software. Thus, the question of whether a photo-print submitted as an exhibit is a true and accurate representation of the place or thing in question could become a more common issue than in times past.

[22] Videos and Motion Pictures

Tennessee courts have long recognized the admissibility of motion pictures as a corollary to rules admitting photographic evidence.[235] In modern times, the rules for motion pictures also embrace videotapes and digital videos. The motion picture or video is subject to the same scrutiny as a photograph to determine its admissibility.[236] It must be a true and accurate depiction of the events it recorded. Of course, it must also be relevant under Rule 401 and not excluded as unfairly prejudicial under Rule 403.

To some degree, a video is more likely than a still photograph to provide an accurate depiction of the facts. In some situations, this realism may increase the risk of undue prejudice, such as in the case of the video of a crime scene showing a large amount of blood. By the same token, the video can also be the most accurate and effective means of demonstrating the facts to the trier of fact. For example, a color video of a murder scene, filmed by a homicide officer before the scene had been disturbed, was admissible to demonstrate how the area looked and how the bodies were positioned, but the officer's narration on the tape should not have been permitted.[237]

There are two common scenarios in which videos are utilized as evidence. The first is the video that constitutes real evidence because it shows the precise event at issue in the case. Examples include the bank camera's video of a robbery, or a home video that unintentionally captures an event which later gives rise to a cause of action, such as a plane crash or automobile accident.[237.1] To authenticate such evidence, the photographer or

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[234] *See* State v. Irick, 762 S.W.2d 121, 127 (Tenn. 1988).

[235] *See e.g.,* ***Kasper v. State, 206 Tenn. 434, 326 S.W.2d 664, 668 (1959)***, *cert. denied*, ***361 U.S. 930 (1960)***. *See generally* Karen Martin Campbell, *Roll Tape—Admissibility of Videotape Evidence in the Courtroom*, 26 U. Mem. L. Rev 1445 (1996).

[236] MICHAEL H. GRAHAM, 1 HANDBOOK OF FEDERAL EVIDENCE 377 (6th ed. 2006); Anderson v. American Limestone Co., 168 S.W.3d 757, 762 (Tenn. Ct. App. 2004) (videotape is subject to the same scrutiny as a photograph in determining its admissibility).

[237] State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993). *See also* State v. Cauthern, 967 S.W.2d 726, 743 (Tenn. 1998) (adopting opinion of Court of Criminal Appeals) (color videotape, excluding any sound, of crime scene is admissible in capital sentencing hearing on issue of heinous, atrocious, and cruel aggravating factor; not so gruesome as to shock the conscience); State v. Reid, 164 S.W.3d 286, 330 (Tenn. 2005) (adopting opinion of Court of Criminal Appeals) (admitting videotape of murder scene to help in understanding testimony of medical and other witnesses; video not particularly gruesome); State v. Polochak, 2015 Tenn. Crim. App. LEXIS 35 (Crim. App. 2015) (trial court held video of crime scene depicting the victim's body was relevant because it permitted the jury to "be in touch with" the scene and to view firsthand where things were located and how events unfolded; on appeal, the court of appeals affirmed, holding that the recording 1) was neither inflammatory nor gruesome, 2) was extremely probative of the condition and appearance of the victim and the scene, and 3) corroborated defendant's statements about how the victim was killed).

[237.1] Such evidence has been held admissible even when the video fails to run at the correct speed, so long as the jury is instructed as to that fact. State v. Baker, 2017 Tenn. Crim. App. LEXIS 668 (Tenn. Crim. App. 2017) (motel video surveillance

one who set up the automatic camera or monitored its tape or video images would be the ideal witness.[238] The authenticating witness should be prepared to show, to the court's satisfaction, that the video accurately portrays what it is presented to prove.[238.1] This will require the authenticating witness to establish when and where the video was made, under what circumstances, and that it has not been altered in any fashion. Even if the photographer is available, anyone else can authenticate it who can establish that the video produced a true and accurate depiction of the event recorded.

The other common scenario is the "day in the life" video of the injured plaintiff. This is a video depiction of the life of the plaintiff after injuries were allegedly inflicted upon him or her by the defendant. Typically, such a video will demonstrate the degree of difficulty experienced by the plaintiff in performing routine tasks, such as eating and dressing. Ideally, such a video will be introduced through a witness who routinely plays a role in the life of the individual featured in the recording and who can testify that this is a typical day, that it is in fact the video taken on a particular day, that it has not been altered, and that it fairly and accurately depicts the daily routine of the subject. Counsel seeking to introduce such a video should be prepared to respond to an objection on the grounds of authenticity, and under Rule 403, unfair prejudice. In response, counsel should suggest that there is no other way to accurately demonstrate the effect that the defendant's actions have had on the plaintiff's life, and that the prejudice, if any, is reasonable and appropriate.

Videos may also be used in other situations. For example, a video statement of a crime victim's immediate family member is admissible at a Tennessee parole hearing if the family member is unable to attend in person. This testimony should relate to the offender's fitness for parole.[239] And in a criminal case for premeditated murder and abusing a corpse, the court admitted a video of the victim's body being removed from a creek.[240] The court found the video directly relevant to abusing the corpse and also helped establish premeditation by depicting efforts to dispose of the body. Another use of videos that has gained approval in federal court is the video re-enactment of a crime.[241]

Another—and controversial—use of videos is to record various investigative interviews. By statute, a video recording of a child's forensic interview describing sexual conduct is admissible in a criminal trial for this conduct.[241.1] The child must be under age 13[241.2] and testify under oath, and the video recording must possess

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after crime depicting defendant carrying victim's property was properly admitted; although defendant argued that the incorrect speed was unfairly prejudicial because jury would not be able to view evidence of defendant's level of impairment—which was critical to defendant's defense, the appellate court ruled that any possible prejudice arising from the speed of the video was cured by the trial court's instruction to jury that the video was "not playing in real time").

[238] *See e.g.,* State v. Thomas, 158 S.W.3d 361, 396 (Tenn. 2005) (adopting opinion of Tennessee Court of Criminal Appeals) (assistant manager of store authenticated video tape of homicide by testifying that he was familiar with the store surveillance cameras and describing how they operate.)

[238.1] State v. Long, 2017 Tenn. Crim. App. LEXIS 609 (Tenn. Crim. App. 2017) (defendant challenged accuracy of apartment complex surveillance video because maintenance worker testified time stamp on video was inaccurate; court held that because the worker also tesitfied that the time stamp had "always been off by an hour and four minutes" and that "he did not know how to switch it over", and further testified that he had seen defendant at the apartment complex and that the video was a true and accurate depiction of what had happened, the video was not improperly authenticated).

[239] Tenn. Code Ann. § 40-35-503(d)(2) (2006).

[240] State v. Hill, 333 S.W.3d 106, 126 (Tenn. Crim. App. 2010).

[241] Persian Galleries v. Transcontinental Ins. Co., 38 F.3d 253 (6th Cir. 1994) (admission of videotape of reenactment of burglary was not an abuse of discretion; alleged discrepancies between conditions on video and conditions at actual crime scene went to credibility, not admissibility); *but* see United States v. Baldwin, 418 F.3d 575 (6th Cir. 2005) (excluding videotape reenactment due to significant differences between the actual event and the video). See *also below* § 4.01[22].

[241.1] *See also* State v. Alvarado, 2017 Tenn. Crim. App. LEXIS 548 (Tenn. Crim. App. 2017) (forensic interview properly admitted where the trial court held a pre-trial hearing to determine the admissibility of the forensic interview in accordance with Tennessee Code Annotated § 24-7-123(b)); State v. Smith, 2017 Tenn. Crim. App. LEXIS 370 (Tenn. Crim. App. 2017) (video of the victim's

particularized guarantees of trustworthiness. The interviewer must satisfy specific qualifications relating to experience, training, and employment. The video recording is not part of any public record; it is sealed as part of the court record. The Tennessee Supreme Court has upheld the constitutionality of this statute.[241.3]

A court reviewing the admissibility of a video has many options, including admitting only part of it. For example, in *Anderson v. American Limestone Co.,*[242] a nuisance case involving the operation of a rock quarry, plaintiffs sought to introduce a video. The court admitted some of it but excluded portions because the oral commentary was more prejudicial than probative and the perspective rendered by the camera's zoom lens made the alleged nuisance appear closer to plaintiff's property that it actually was.

Drones. Evidence obtained from illegal drone use is not admissible in any criminal or juvenile proceeding, civil action, or administrative proceeding except to prove a violation of the statute. If evidence is obtained by law enforcement in violation of the Freedom from Unwarranted Surveillance Act, it shall not be admissible as evidence in a criminal prosecution, absent exigent circumstances or another authorized exception to the warrant requirement.[242.1]

[23] Tape and Digital Recordings

Tape and digital recordings, especially of telephone conversations, pose unique problems as evidence, but have been admissible for many years. For example, a tape recording made by an Internal Revenue Service agent during a bribery attempt was held to be admissible by the United States Supreme Court.[243] Often the actual recording is played for the jury, and a transcript of the recording may also be made and introduced into evidence, a practice upheld by Tennessee courts.[244]

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forensic interview was properly admitted because defendant stipulated the forensic interviewer met the requirements of the statute, the victim testified under oath that the video was a true and correct recording of the events, she available for cross-examination at trial, and the trial court determined that the recording possessed particularized guarantees of trustworthiness).

[241.2] Where a forensic interview is taken of a child over the age of 13, the interview is inadmissible under the statute and must be admitted in accord with the Tennessee Rules of Evidence and other applicable law. Thus, where a forensic interview of a 16-year-old was admitted as a prior consistent statement, the court held that the interview was improperly admitted to "bolster" her testimony. *State v. Herron, 461 S.W.3d 890, 2015 Tenn. LEXIS 246 (Tenn. 2015)* (when the conditions of tatutes are met) (although Tennesese Rules of Evidence do not specifically address admissibility of prior consistent statements, Tennessee decisional had held that prior consistent statements are generally not admissible to bolster the testimony of a witness; allowing such statements to be used to bolster a witness's testimony would pose a danger of the jury being influenced to decide the case on the repetitive nature of or the contents of the out-of-court statements instead of on the in-court, under-oath testimony). The *Herron* ruling does not apply, however, when the conditons of *Tenn. Code Ann. § 24-7-123* have been met. *See State v. Smith, 2017 Tenn. Crim. App. LEXIS 370 (Tenn. Crim. App. 2017)*; *State v. Alvarado, 2017 Tenn. Crim. App. LEXIS 548 (Tenn. Crim. App. 2017)*.

[241.3] *State v. McCoy, 459 S.W.3d 1 (Tenn. 2014)* (statute does not infringe powers of judiciary, is valid hearsay exception, and does not violate defendant's confrontation rights).

[242] *Anderson v. American Limestone Co., 168 S.W.3d 757 (Tenn. Ct. App. 2004)* (no comprehensive discussion of issue because appellant failed to make an offer of proof of the excluded videotapes).

[242.1] *Tenn. Code Ann. § 39-13-905* (evidence obtained from illegal use of drone); § 39-13-609 (evidence obtained by law enforcement in violation of Freedom from Unwarranted Surveillance Act).

[243] *Lopez v. United States, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963)*; *accord*, *State v. Mosher, 755 S.W.2d 464 (Tenn. Crim. App. 1988)*; *State v. Lee, 618 S.W.2d 320 (Tenn. Crim. App. 1981)*.

[244] See *e.g.*, *State v. Mosher, 755 S.W.2d 464, 469 (Tenn. Crim. App. 1988)* (transcript of tape recordings admissible; did not unduly emphasize the content of the tape recording; jury instructed that the tape rather than the transcript is the actual evidence in the case); ***State v. Coker, 746 S.W.2d 167, 172 (Tenn. 1987)*** (permissible to play tape recording for jury and also give jury transcript to read while tape played).

Perfection is not required. Tape recordings of conversations have been admitted in Tennessee even if they are of poor quality and somewhat inaudible.[245] In *State v. Beasley, 699 S.W.2d 565, 569 (Tenn. Crim. App. 1985)*, the court held that a tape's audibility affects its weight but not its admissibility. But surely at some point a tape becomes irrelevant and inadmissible under Rule 401 if it is so inaudible that it is not helpful to the trier of fact. Similarly, the inaudible portions may be so crucial to a fair understanding of the conversation recorded that the tape is unfairly prejudicial and should be excluded under Rule 403.

Tape and digital recordings present many legal issues. Under the Tennessee Rules of Evidence, tape and video recordings are subject to the best evidence or original writing rule, Rule 1001(1). This means that the "original" of the tape or digital recording should ordinarily be used, Rule 1002. A re-recording of the original recording is viewed as a "duplicate" and is admissible to the same extent as an original unless there is a question as to the authenticity of the original, Rule 1003.

So long as one party to the conversation is aware of and consents to the recording by law enforcement officials, it does not offend the *Fourth Amendment's* search and seizure prohibition[246] and is generally admissible in Tennessee if properly authenticated.[247] Authentication requires a showing that the recording is an accurate reproduction of the matter recorded. One method of authentication is to have a person who was present during the conversation or who monitored it testify that the recording is an accurate reproduction of the conversation.[248] Another is to have the custodian of a 911 tape or digital recording testify how the item was processed and retrieved.[249] The jury may then determine whether the recording was of the 911 call at issue in the case. Authentication of the identity of parties to a telephone conversation is discussed elsewhere in this book.[250]

Of course the conversation must be relevant under Rule 401, and not excluded as unfairly prejudicial or misleading under Rule 403.[250.1] The recorded telephone conversation should also not violate state[251] or federal[252] wiretap laws.[253] A recording made when a tape recorder was placed near a telephone and recorded

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[245] See *e.g.*, *State v. Elrod, 721 S.W.2d 820, 823 (Tenn. Crim. App. 1986)* (tape recordings of conversation admitted even though tapes contained inaudible portions; transcript of tape contents also used; witness also summarized the conversations he had personally heard). *See also* *State v. Baker, 2017 Tenn. Crim. App. LEXIS 668 (Tenn. Crim. App. 2017)* (admitting videotape that played a faster-than-normal speed).

[246] See *e.g.*, *State v. Mosher, 755 S.W.2d 464, 467 (Tenn. Crim. App. 1988)* (federal and Tennessee Constitutions are not violated by electronic recording of conversation if one of the participants consents to the recording).

[247] See *e.g.*, *Stroup v. State, 552 S.W.2d 418 (Tenn. Crim. App. 1977)*, *cert. denied*, ***434 U.S. 955 (1977)*** (applying what is now *Tenn. Code Ann. § 65-21-110* (2004)); *State v. Crawford, 783 S.W.2d 573 (Tenn. Crim. App. 1989)* (tape recording of conversation between undercover informant wearing hidden microphone and defendant is admissible).

[248] *See* ***State v. Coker, 746 S.W.2d 167, 172 (Tenn. 1987)***, overruled in part on other grounds, as stated in *State v. West, 19 S.W.3d 753 (Tenn. 2000)*.

[249] *State v. Hinton, 42 S.W.3d 113, 127 (Tenn. Crim. App. 2000)*.

[250] *See below §§ 9.01[7]* (identification of voice), 9.01[8] (authentication of telephone conversation).

[250.1] *See, e.g.*, *State v. Wooten, 2020 Tenn. Crim. App. LEXIS 12 (Tenn. Crim. App. Jan. 13, 2020)* (trial court erred in admitting 911 tape since its probative value was far outweighed by the danger of unfair prejudice and needless presentation of cumulative evidence, but the error was deemed harmless).

[251] *Tenn. Code Ann. § 65-21-110* (2004).

[252] *18 U.S.C. § 2510 et. seq.*

[253] See *e.g.*, *State v. Crawford, 783 S.W.2d 573 (Tenn. Crim. App. 1989)* (tape recording of conversation between undercover informant wearing hidden microphone and defendant is admissible; does not offend federal wiretapping law; federal wiretapping

one side of the conversation was held admissible since the person operating the recorder could have testified as to what he heard.[254]

Even if a conversation can be recorded without violating state or federal law, counsel should be aware of the ethical requirements related to procuring recorded conversations and other evidence. According to Tennessee's Rules of Professional Conduct:

> [A] lawyer may not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded. It would be a violation of RPC 4.1 or RPC 8.4(c), however, if the lawyer stated falsely or affirmatively misled another to believe that a conversation or an activity was not being recorded. By itself, however, secret taping does not violate either RPC 8.4(c) (prohibition against dishonest or deceitful conduct) or RPC 8.4(d) (prohibition against conduct prejudicial to the administration of justice).[255]

Furthermore, such activity is not, in and of itself, prejudicial to the administration of justice.[256] This is a substantial change from prior Tennessee law.[257]

However, in adopting the provision set forth above into Tennessee ethics law, the Tennessee Supreme Court did not give attorneys the unlimited right to tape record or conduct other types of surveillance. An attorney has an affirmative duty to respect the rights of third persons,[258] and the lawyer must have "a substantial purpose other than to embarrass or burden the persons being recorded."[259] Additionally, while the mere act of recording is not unethical, an attorney must not take any steps in conjunction with the recording activities that are dishonest or deceitful. For example, falsely stating that a conversation is not being recorded, or affirmatively misleading another into believing that no recording is being done, is unethical.[260] Counsel should also exercise caution and prudence when broaching the subject of audio or video recordings to be undertaken by someone other than the attorney.

The ethics rules cannot be sidestepped by allowing an agent to engage in unethical conduct at the attorney's direction. Therefore, if the client is tape recording a telephone conversation with the opposing party either at the direction of or with the knowledge of his or her attorney, the prudent lawyer should have advised the client regarding respecting the rights of others and not falsely representing that a conversation is not being recorded.

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law is constitutional); *Stroup v. State, 552 S.W.2d 418 (Tenn. Crim. App. 1977)*; *see also* *State v. Eldridge, 749 S.W.2d 756 (Tenn. Crim. App. 1988)*; *State v. Lee, 618 S.W.2d 320 (Tenn. Crim. App. 1981)*; *Clariday v. State, 552 S.W.2d 759 (Tenn. Crim. App. 1976)*. *Cf*. *Born v. Born, 614 S.W.2d 49 (Tenn. Ct. App. 1981)* (civil case).

[254] *Mimms v. Mimms, 780 S.W.2d 739 (Tenn. Ct. App. 1989)*.

[255] Tenn. Sup. Ct. R. 8, RPC 4.4, Comment 1 (2017); *see also* comment to TENN. R.P.C. 4.4 (2003). Note that this rule applies not only to audio recordings, such as a tape recording of a conversation, but also to surreptitious recording of the activities of another, such as surveillance video recordings.

[256] Comment to TENN. R.P.C. 4.4 (2011).

[257] Formal Ethics Opinion 86-F-14(a) (1986), held that, under the prior Code of Professional Responsibility, secret tape recording was deceitful and violated Disciplinary Rule 1-102(A)(4).

[258] TENN. R.P.C. 4.4 (2011).

[259] Comment to TENN. R.P.C. 4.4 (2011).

[260] Comment to TENN. R.P.C. 4.4 (2011) (citing TENN. R.P.C. 4.1 [truthfulness and candor in statements to others] and 8.4(c)[conduct involving dishonesty, fraud, deceit, or misrepresentation].

Similarly, if a private investigator is involved, counsel is well advised to ensure that the investigator is aware of the bounds of permissible conduct, both legally and ethically.[261]

[24] Diagrams, Charts, and Models

Often counsel in Tennessee courts will use diagrams, charts, models or the like to illustrate testimony in the case. Sometimes this evidence, particularly charts, will summarize other evidence. In one illustrative case a special agent used charts and graphs to summarize and explain his analysis of various bank records.[262] A summary which has been admitted is permissible under the so-called best evidence rule, Rule 1006.[263] If, however, it summarizes other evidence and is to be used as substantive evidence, then the evidence summarized must have previously been admitted into evidence or otherwise satisfy Rule 1006.[264] If the chart or model is used to illustrate and explain in-court testimony, it is not hearsay, but must nevertheless be properly authenticated.[265]

By statute, in civil cases, demonstrative evidence such as "a blackboard, models or similar devices, also any picture, plat or exhibit introduced into evidence"[266] can be used by counsel when arguing a case to the jury. The statute does not state that the demonstrative aid must have been introduced into evidence as an exhibit. Frequently, such illustrative items as diagrams sketched on a blackboard never become actual trial exhibits. In the unusual case when counsel wants them preserved as part of the record, the attorney should take appropriate steps such as having the item itself formally retained with other evidence or perhaps preserved by photo or other means, with court approval.

The statute addresses only civil cases. *State v. Wiseman*[267] has been cited for the proposition that the statutory provision also extends to criminal cases. However, a careful reading of the opinion reveals that, although *Tennessee Code Annotated § 20-9-303* was cited, the issue being determined was the admissibility of a chart prepared by an auditor who testified that it summarized his findings based on voluminous records already in evidence.[268] Under the Tennessee Rules of Evidence, such a chart is admissible pursuant to Rule 1006, and the holding in *Wiseman* does not open the door in criminal cases for full scale use in the final argument of demonstrative aids not introduced as exhibits. It is submitted, however, that the criminal court judge has the

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[261] It appears that a private investigator is a "nonlawyer employed, retained by, or associated with a lawyer" and that Rule 5.3 requires the attorney to take reasonable efforts to ensure the investigator's compliance with the ethics rules. Knowledge of the nonlawyer's unethical conduct can, under some circumstances, subject the attorney to discipline. Tenn. R.P.C. 5.3. *See also*, TENN. R.P.C. 8.4 (2107), comment 5, specifically noting that in some circumstances "prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful" and, therefore, Rule 8.4 does not prohibit such conduct. The reference to "authorized by law" places a clear limitation on investigative agent' techniques and, impliedly, on prosecutors. Thus, a prosecutor who "looks the other way" while an investigator exceeds the boundaries of the law faces a potential ethical violation.

[262] *State v. Purkey, 689 S.W.2d 196, 200 (Tenn. Crim. App. 1984)*.

[263] *See below § 10.06[2]*.

[264] *See State v. Purkey, 689 S.W.2d 196 (Tenn. Crim. App. 1984)*.

[265] *See State v. Furlough, 797 S.W.2d 631, 646–47 (Tenn. Crim. App. 1990)* (police detective's drawing of murder scene not hearsay; used to illustrate the officer's live testimony).

[266] *Tenn. Code Ann. § 20-9-303* (2009). *See also* In a medical malpractice case, the use of power point presentations in opening and closing argument was not inappropriate because counsel acted within the provisions of *Tenn. Code Ann. § 20-9-303*. *Stanfield v. Neblett, 339 S.W.3d 22, 2010 Tenn. App. LEXIS 373 (Tenn. Ct. App. 2010)*.

[267] *643 S.W.2d 354 (Tenn. Crim. App. 1982)*.

[268] *Id. at 365*.

discretion to permit such items to be used during the trial and in closing argument in criminal cases in Tennessee. The exercise of this discretion will not be disturbed absent an abuse of discretion.[269]

Obviously, diagrams, charts and models should be accurate. Rule 901 states that authentication requires a witness to establish that the item is what it is claimed to be. A witness familiar with the area or subject can testify that the diagram, chart, or model is a fair representation of the reality it is reproducing. If the item is not accurate, it can be excluded as irrelevant under Rule 401, or as too misleading or too prejudicial under Rule 403.

The diagram, chart, or model does not have to be perfect. Tennessee courts look at all the proof in the case in assessing whether the evidence should be excluded. If other evidence in the case corrects any misimpression, the diagram, chart, or model may be admitted. In *State v. Delk*,[270] for example, diagrams of a homicide scene were not drawn to scale. Nevertheless, the appellate court did not find the evidence objectionable, in part because the jury was frequently informed of the errors in the diagrams and because photographs of the same area were also introduced into evidence and thus gave the jury a proper sense of scale.[271] In another Tennessee case, an out-of-scale diagram drawn by a police officer was admitted when the officer testified that his diagram was not to scale and the jury could fairly assess his testimony and the diagram.[272]

[25] Demonstrations, Experiments, and Exhibitions

Demonstrations, experiments, and exhibitions pose special evidentiary concerns. A *demonstration* or *exhibition* involves a process in which acts or events are "acted out" for the jury. In many respects these are experiments conducted in court. For example, a witness may re-enact how an event occurred or how a particular item of evidence is used.[273] A leading Tennessee case permitted the plaintiff in a tort case to exhibit his injured knee and to demonstrate how it affected his movement.[274] Another illustrative case allowed the prosecutor to demonstrate, and have the jurors themselves demonstrate, how difficult it was to pull the trigger on the murder weapon.[275]

The defense had suggested the possibility that the weapon discharged accidentally, while the prosecution maintained it had been fired intentionally.

Indeed, a criminal defendant, pursuant to the due process right to offer a full defense, may have a right to dress as the alleged offender in order to demonstrate the offender's appearance.[276] The defendant need not take the witness stand in order to exercise this right.[277] The Tennessee trial judge has the discretion to permit a

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[269] See *e.g.*, *State v. Delk, 692 S.W.2d 431, 438 (Tenn. Crim. App. 1985)* (diagrams of inside of market and of area surrounding store in which homicide occurred).

[270] *692 S.W.2d 431 (Tenn. Crim. App. 1985)*.

[271] *Delk* may have found harmless error in the admission of the diagrams. The opinion is unclear on this issue. *See State v. Delk, 692 S.W.2d at 438*.

[272] *Cole v. State, 512 S.W.2d 598, 602 (Tenn. Crim. App. 1974)*.

[273] See *e.g.*, *Squires v. State, 525 S.W.2d 686, 691 (Tenn. Crim. App. 1975)* (FBI agent, who was expert in gambling machines, demonstrated how a confiscated gambling machine worked).

[274] See *e.g.*, *Arkansas River Packet Co. v. Hobbs, 105 Tenn. 29, 58 S.W. 278 (1900)*.

[275] ***State v. Coulter, 67 S.W.3d 3, 55 (Tenn. Crim. App. 2001)***, overruled in part, on other grounds, by *State v. Johnson, 2013 Tenn. Crim. App. LEXIS 1051* (Crim. App. Dec. 3, 2013).

[276] See *e.g.*, *Campbell v. State, 469 S.W.2d 506 (Tenn. Crim. App. 1971)*.

[277] *State v. Rodriguez, 752 S.W.2d 108 (Tenn. Crim. App. 1988)* (defendant, who exercised right not to testify, entitled to put on shirt and cap allegedly worn by robber to prove that he was not the robber).

demonstration or exhibition to be performed in the courtroom.[278] This discretion will not be reversed on appeal absent an abuse of that discretion.[279]

The term *experiment* is used to describe a testing process that takes place out of court, but the results of which are presented in court. Forensic, ballistic[280] and blood alcohol[281] tests are common examples in the criminal arena. Experiments are also common in products liability and negligence actions, and in most circumstances, these tests will be presented through expert witnesses who either conducted the experiment or reviewed its result.

Experts are not always necessary, however. In *Harwell v. Walton*,[282] a lay witness was permitted to testify about an experiment in which she determined how fast her car would run between two points. The court held that a layperson could so testify because the experiment required no specialized knowledge. If scientific tests are involved, the test must satisfy the *McDaniel* test described elsewhere in this book.[283] Of course, demonstrations, experiments and exhibitions can be excluded under Rule 403 if too prejudicial or time-consuming.[284]

On rare occasions, the members of a jury may perform an unauthorized experiment in or out of the jury room. Since the experiment will not have been tested by ordinary adversary procedures, appellate courts may reverse unless the issue is deemed harmless error. In *Jim v. State*,[285] jurors in a homicide case conducted two unauthorized experiments. They performed tests to determine the length of shoe tracks and to assess whether a voice could be heard through a closed door. The Tennessee Supreme Court reversed the conviction, reasoning:

> [W]e can not permit verdicts which have been obtained like this, upon uncertain and dangerous experiments, instead of a calm, deliberate, and philosophical examination of the proof, to stand where the lives of individuals are at stake.[286]

A new type of demonstration is the videotape reenactment of an event that is central to the issues being tried.[287] In a federal court case involving an insurance company's failure to pay for Oriental rugs allegedly stolen during a burglary, the insurer argued the burglary was an inside job. This conclusion was based in part on the speed with which the theft would have had to occur, according to records of the burglar alarm company. The

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[278] *See* ***State v. Underwood, 669 S.W.2d 700 (Tenn. Crim. App. 1984)*** (re-enactment of how defendant committed crime); *Arkansas River Packet Co. v. Hobbs, 105 Tenn. 29, 58 S.W. 278 (1900)* (plaintiff demonstrated injured knee).

[279] *See* ***State v. Coulter, 67 S.W.3d 3, 55–56 (Tenn. Crim. App. 2001)***, overruled in part, on other grounds, by *State v. Johnson, 2013 Tenn. Crim. App. LEXIS 1051* (Crim. App. Dec. 3, 2013).

[280] *See below § 7.02[25].*

[281] *See above § 3.03 and below §§ 7.02[18], 7.02[19].*

[282] *820 S.W.2d 116, 118 (Tenn. Ct. App. 1991)*.

[283] *See below § 7.02[14].*

[284] *See below § 4.03[3].*

[285] *23 Tenn. 289 (1843)*.

[286] *Id. at 292*.

[287] Computer animated evidence is discussed in *§ 4.01[23], below.*

court allowed the plaintiff to introduce a videotape demonstrating a reenactment of the crime within the brief timespan, showing that such a burglary was possible.[288]

[26] Computer Animated Evidence

A significant trend in American evidence law is computer-generated demonstrative proof. This evidence is created on a computer and can be offered for several purposes. One, ordinarily referred to as an *animation*, is admitted to illustrate and explain a witness's testimony.[289] A jury should be instructed that an animation is not evidence in and of itself but is offered only to illustrate the testimony of the expert witness.[290]

In *State v. Farner*[291] a police officer investigated a serious accident and prepared a report that contained photographs of the scene. A computer visualization expert then took the report and created an animated visualization of the accident. The visualization included the exact make and model of the vehicles involved in the crash, and purported to use their exact speeds as well as the identical physical characteristics of the area where the event occurred. The resulting videotape showed the collision at three different speeds (full, half, and quarter) and from five different viewpoints. The jury was thus presented with a videotape that showed two cars drag racing, then one of the vehicles losing control and colliding with other vehicles.

The Tennessee Supreme Court held that the visualization in *Farner* was improperly admitted into evidence. After noting that the computer animation of expert testimony is only admissible if the expert testimony itself is admissible under the usual rules for such expert proof, the Court then noted that the visualization is admissible only if it is "a fair and accurate depiction of the event it purports to portray."[292] According to *Farner*, this test is especially important for computer-generated animations because the jury, after viewing a powerfully persuasive life-like videotape depiction, may be unable to visualize a different version of the event.

The *Farner* Court also noted that the balancing test of Rule 403 applies to such proof. If the animation is inaccurate, its probative value decreases and the likelihood of its exclusion under Rule 403 increases. Applying these tests, *Farner* held that the computer animation should not have been admitted because it was not a fair and accurate portrayal of the evidence, thereby rendering it inadmissible under Rule 403. The problem was that the expert witness, whose testimony the animation was to demonstrate, had been unable to determine the speed of one of the cars, yet the animation depicted the car at varying speeds. Moreover, the animation showed the cars in a position that was contradicted by eyewitness testimony and not supported by expert testimony. *Farner* also noted that the animation showed the event fifteen times, a repetition that the Court found might make the evidence cumulative and unduly increase the risk of unfair prejudice.

The second approach is to use this computer-generated evidence as a simulation in which data are entered into a computer that analyzes the data and draws a visual conclusion from the information. The resulting set of images is, in essence, a duplication of the event. Since such simulations actually involve the computer using scientific principles, often physics, and then drawing a conclusion from the data, courts ordinarily require the science which the computer uses to be validated under the rules for admission of scientific evidence.[293]

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[288] *Persian Galleries v. Transcontinental Ins. Co., 38 F. 3d 253 (6th Cir. 1994)* (admission of videotape of reenactment of burglary was not an abuse of discretion; alleged discrepancies between conditions on video and conditions at actual crime scene went to credibility, not admissibility); *but see* *United States v. Baldwin, 418 F.3d 575 (6th Cir. 2005)* (exclusion of videotape of reenactment was not an abuse of discretion).

[289] *See generally* ***State v. Farner, 66 S.W.3d 188, 208–210 (Tenn. 2001)***.

[290] ***Id. at 210***.

[291] ***66 S.W.3d 188 (Tenn. 2001)***.

[292] ***Id. at 209***.

[293] ***Id. at 208***.

[27] Jurors' Utilization of Exhibits

[a] In General

When evidence is admitted in a civil or criminal case, it is tendered to a court clerk who usually retains it as part of the official record. When the jury retires to deliberate, the physical evidence that has been admitted into evidence may be so instructive that the jury would like it brought into the jury room to be used in deciding the case. Under Tennessee law, the rules for permitting the jury to have access to this evidence differ in criminal and civil cases.

[b] Criminal Case

Criminal cases are controlled by *RULE 30.1, TENNESSEE RULES OF CRIMINAL PROCEDURE*, which provides:

> Unless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence.[294]

The trial judge in a criminal case has discretion to prohibit a particular exhibit from going to the jury room. For example, if its submission could be unduly prejudicial, if it could endanger the jurors' health and safety, or if it could be misused by the jury or unduly prejudice a party, the court, on motion of counsel or on its own motion, can bar an exhibit from the jury room.[295] In *State v. Case*,[295.1] the Tennessee Court of Criminal Appeals addressed how a trial judge should comply with Tenn. R. Crim. P. 3.01 when the jury room is not equipped to review an exhibit:

> Ideally, "the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence." *Tenn. R. Crim. P. 30.1*. Moreover, regardless of whether the jury reviews the evidence in the jury room or the courtroom, it should do so in private … . In this case, where the jury room was not equipped to play the video, the better practice would have been for the court officer to bring the jury into the courtroom without the presence of the judge or counsel. However, if the jury must review the evidence in the courtroom in the presence of the trial court and counsel, then we believe that the defendant also should be present. Under those circumstances, the jury's review of the evidence, particularly if the trial court communicates with the jury, may become a critical stage of the proceedings.[295.2]

The omission of depositions in Rule 30.1 suggests that depositions are not covered by the automatic access rule. It is unclear whether the trial court has the discretion to give depositions to the jury during

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[294] *Tenn. R. Crim. P. 30.1*. Prior to 1995, when Rule 30.1 was enacted, the exhibits presented at trial did not accompany the jury to the jury room for deliberations absent agreement by all parties. *See e.g.*, *State v. Flatt, 727 S.W.2d 252 (Tenn. Crim. App. 1986)*.

[295] *Tenn. R. Crim. P. 30.1* Advisory Commission Comment.

[295.1] *State v. Case, 2015 Tenn. Crim. App. LEXIS 944 (Tenn. Crim. App. 2015)*, *appeal denied*, *State v. Denver, 2016 Tenn. LEXIS 208 (Tenn. 2016)*.

[295.2] *Id.,* at *2015 Tenn. Crim. App. LEXIS 944, 39, (Tenn. Crim. App. 2015)*.

deliberations in criminal cases.[295.3] To avoid having the jury give too much weight to a deposition, the better practice is for the court to have the deposition reread to the jury if the jury so requests.

Rule 30.1 does not require that an exhibit be published in its entirely during the trial, so long as the entire exhibit is made available to the jury during deliberations.[295.4]

[c] Civil Case

In civil cases the question of exhibits accompanying the jury to the jury room for deliberations is addressed by statute. *Tennessee Code Annotated § 20-9-510* provides:

> The trial judge in civil cases may, in his discretion, on motion of either party, upon his own motion, or on request by the jury, submit all exhibits admitted in evidence to the jury for their consideration during deliberations on their verdict.

The Tennessee trial judge is given great discretion in determining whether to permit or deny the jury access to exhibits during jury deliberations in civil cases.[296] For example, in an automobile accident case, the jury requested in the midst of its deliberations that it be permitted to examine the exhibits reflecting the plaintiff's medical expenses. The chancellor's ruling declining this request was upheld on appeal.[297]

Since the statute encompasses depositions filed as exhibits, the court has the discretion to permit or deny the use of this written testimony in jury deliberations. In a breach of warranty action,[298] the trial court refused to permit the plaintiff's deposition to be given to the jury during deliberations. The appellate court endorsed this action and the philosophy that unfair advantage may result when the jury, during its deliberations, has written statements of one party, but only the oral testimony of another.[299]

Depositions filed as exhibits can be permitted to accompany the jury under different circumstances. When the only medical testimony in an automobile accident case consisted of two contradictory depositions of doctors, the court had discretion to allow the jury access to both during deliberations.[300] The depositions were not being evaluated against any oral medical expert testimony because there was none, and the danger of unfair advantage was therefore not present.[301]

[295.3] In *State v. Long, 45 S.W.3d 611, 2000 Tenn. Crim. App. LEXIS 409 (Tenn. Crim. App. 2000)* (*quoting* *State v. Young, 1998 Tenn. Crim. App. LEXIS 566 (Tenn. Crim. 1998)*, the court explained the danger associated with allowing depositions in the jury room: "A deposition is testimony given under oath, with the assistance of counsel, and when entered into evidence 'becomes part of the body of testimony as if it had been presented at trial. If the deposition were taken into the jury room during deliberations, a danger exists that the jury might place too great an emphasis on this one portion of the testimony.' " The court also construed *Tenn. R. Crim. P. Rule 30.1*, noting that its specific exclusion of depositions and lack of reference to other types of evidence "necessarily requires that all other evidence be treated as within the scope of the rule." Thus, where the jury asked to rehear defendant's audiotape recording during its deliberations, the trial court erred by not following the guidelines set forth in *Tenn. R. Crim. P. 30.1* and allowing the tape in the jury room, where there was no good cause to keep the tape from the jury).

[295.4] *See* *State v. Pollard, ___ S.W.3d ___, 2017 Tenn. Crim. App. LEXIS 937 (Tenn. Crim. App. Oct. 30, 2017)* (State of Tennessee did not limit a jury's consideration of a recording to only that portion of the recording that it published to the jury during the trial; rather, the entire recording was entered as an exhibit and was readily available for the jury to view during deliberations and for the appellate court to consider in examining the sufficiency of the evidence and, therefore, *Tenn. R. Crim. P. Rule 30.1* was satisfied).

[296] See *e.g.*, *Fletcher v. Coffee County Farmers Coop., 618 S.W.2d 490, 495 (Tenn. Ct. App. 1981)*.

[297] *Newsom v. Markus, 588 S.W.2d 883, 888 (Tenn. Ct. App. 1979)*.

[298] *Fletcher v. Coffee Cty. Farmers Co-op, 618 S.W.2d 490 (Tenn. Ct. App. 1981)*.

[299] *Id. at 495*.

[300] *Duvall v. Jones, 671 S.W.2d 851, 853 (Tenn. Ct. App. 1984)*.

[301] *Id.*

Sometimes an error is made and an exhibit is erroneously taken to the jury room. In *Davis v. Hall,*[302] for example, a tape recording was admitted for purposes of identification but was mistakenly taken into the jury room with the other exhibits. The Court of Appeals essentially held that counsel should have checked what items were taken into the jury room and would not be permitted to complain on appeal that a rejected item of evidence was taken into the jury room. This decision makes it clear that counsel must carefully monitor what evidence is physically taken into the jury room.

[28] Body Parts

Sometimes a trier of fact may better resolve an issue if permitted to examine parts of a person's body. The propriety of this procedure is determined on a case-by-case basis. The usual objections are that the evidence is irrelevant or overly prejudicial under Rule 403.

In *State v. Copenny*,[303] for example, the defendant wanted to introduce a photograph of the homicide victim's body scars to prove the victim's propensity for violence and thereby help establish self-defense. The Tennessee Court of Criminal Appeals held that the scars may be relevant under Rule 401, but were excludable under Rule 403.

By way of contrast, in *State v. Hill,*[304] the state had the assault victim remove his shirt and show the jury the scars from the wounds inflicted by the defendant. Defense counsel argued the scars were irrelevant since it had been stipulated that the victim suffered injury. The defense also argued unfair prejudice under Rule 403 since the scars were still pink in color. The Tennessee Court of Criminal Appeals held that the viewing of the scars was permissible on the issue of the location of the wounds, which would help the jury assess what happened on the night of the assault.

There are many other examples.[304.1]

[29] Jury Views

The judge or lawyers may believe that the jury will better understand the facts of a case if the jury personally views a particular location that is important to the cause of action. Ordinarily this means that the jury will be transported as a group to the scene and will tour it. Obviously this process involves a number of serious risks. It is virtually impossible for the jury view to be accurately included in the trial record that is reviewed on appeal. Moreover, during the view, the jurors could be exposed to information from people at the scene, could see a somewhat different scene than that at issue, and could be subtly influenced by lawyers and others in the case.[304.2]

For these reasons, trial judges are reluctant to permit a jury view and Tennessee case law is ambivalent about the issue.[304.3] If both sides consent to the view, it is clear that a view is permissible in both civil and criminal cases.[305] This does not mean that a party can compel the court to order a jury view. A criminal conviction was

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[302] *920 S.W.2d 213 (Tenn. Ct. App. 1995)*.

[303] *888 S.W.2d 450 (Tenn. Crim. App. 1993)*.

[304] *885 S.W.2d 357 (Tenn. Crim. App. 1994)*.

[304.1] *See e.g.*, *State v. Pike, 978 S.W.2d 904 (Tenn. 1998)* (skull); *State v. Robinson, 146 S.W.3d 469 (Tenn. 2004)* (skull); *State v. Larkin, 443 S.W.3d 751 (Tenn. Crim. App. 2013)* (several bones of homicide victim).

[304.2] *See State v. Wright, 2014 Tenn. Crim. App. LEXIS 827 (Tenn. Crim. App. 2014)* (holding there was no abuse of discretion in denying a jury view where the trial court considered multiple factors, including the harmful effects on the jury).

[304.3] *State v. Wright, 2014 Tenn. Crim. App. LEXIS 827, 18, (Tenn. Crim. App. 2014)* (the court noted that "view by jury is rare in civil cases and rarer still in criminal trials").

upheld even though the trial court refused to grant the defendant's request for a jury view.[306] While the criminal defendant has no right to a jury view, there is authority for the proposition that the defendant can bar a jury view by withholding consent.[307] The accused has a constitutional right to be present during the jury view if one is held.[307.1]

Tennessee law specifically provides for jury views in condemnation actions.[308] In such cases, the taking of property is at issue and an examination of the subject property will be of assistance in determining damages. Provisions for jury viewing of the subject property apply whether the action was initiated by the one seeking to appropriate the land[309] or by the owner of land that has already been appropriated.[310]

In actions other than condemnation cases, the court will most likely order a jury view only when there is no other effective way to demonstrate to the jury the information necessary to accurately resolve the case.[310.1] In evidence terms, the jury view is permitted when it is relevant under Rule 401 because it will assist the trier of fact, and not excluded under Rule 403 as too prejudicial or time-consuming.

Tennessee follows the minority view that the observations made by the jurors during the view are evidence.[311] Many jurisdictions hold to the contrary, due to the fact that neither the jury view, nor the perceptions of the jurors that result, can be placed in the official record and thus cannot be reviewed on appeal. As a practical matter, however, the jury's experience in viewing a site or other evidence has an impact on its ultimate decision and should be treated as evidence, despite the inherent difficulty in appellate review of this part of the proof.

Tennessee law does not require that the judge accompany the jury and participate in the view.[311.1] Frequently, the process is conducted by a court officer. However, because of the potential for unauthorized comments and

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[305] *Cf.* State v. Shaw, 619 S.W.2d 546 (Tenn. Crim. App. 1981) (recognizing split in national authorities but indicating there is Tennessee authority for requiring the consent of both parties before permitting a jury view).

[306] State v. Wright, 2014 Tenn. Crim. App. LEXIS 827 (Tenn. Crim. App. 2014) (it is within the trial court's discretion to allow the jury to view a crime scene and, therefore, a trial court's ruling in allowing or denying a jury view is reviewed for abuse of discretion; appellate court held there was no abuse of discretion by trial court in denying defendant's motion for a jury view during trial for aggravated rape, since (1) the court considered multiple factors, including the effect on the jury; (2) the State introduced a video recording of the restaurant and the restroom; and (3) the general manager of the restaurant testified regarding the layout and dimensions through a sketch/diagram); Boyd v. State, 4 Tenn. Crim. App. 687, 475 S.W.2d 213 (1971) (no error for trial court to refuse defendant's request for jury to tour city jail where crime occurred; there was other evidence that accurately informed jury about jail interior); Canady v. State, 3 Tenn. Crim. App. 337, 461 S.W.2d 53 (1970) (no error for trial judge to refuse criminal defendant's request for jury to view crime scene).

[307] State v. Shaw, 619 S.W.2d 546 (Tenn. Crim. App. 1981) (court states there is no reported Tennessee case where a jury view was granted over objection of the criminal defendant; harmless error to grant a jury view over defendant's objection in this case).

[307.1] State v. Campbell, 2006 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. July 20, 2006), *aff'd by* Campbell v. State, 2015 Tenn. Crim. App. LEXIS 1015 (Tenn. Crim. App. 2015); State v. Shaw, 619 S.W.2d 546 (Tenn. Crim. App. 1981).

[308] Tenn. Code Ann. § 29-16-113 (2000).

[309] *Id.*

[310] Tenn. Code Ann. § 29-16-123.

[310.1] State v. Campbell, 2006 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. 2006), aff'd by Campbell v. State, 2015 Tenn. Crim. App. LEXIS 1015 (Tenn. Crim. App. 2015) (the object of the jury in viewing the scene is to make clear the situation as to which they are uncertain or confused). *See also* State v. Wright, 2014 Tenn. Crim. App. LEXIS 827 (Tenn. Crim. App. Mar. 21, 2014) (a view by the jury is rare in civil cases and rarer still in criminal trials, but it is within the trial court's discretion to allow the jury to view a crime scene; an appellate court reviews a trial court's ruling in allowing or denying a jury view for abuse of discretion).

[311] Watson v. State, 166 Tenn. 400, 61 S.W.2d 476 (1933).

other potential improper events in any type of case, and because of the constitutional rights of the accused in the criminal case, the trial judge should accompany the jury when the jury view takes place.[312] Counsel for all parties should attend the view to ensure that it is done properly and that no extraneous information reaches the jurors. Absent a waiver, the accused should also be present at a jury view in a criminal case.[313]

On rare occasions members of a Tennessee jury have taken an unauthorized trip to inspect places or objects involved in the lawsuit. This procedure is improper. It gives the jurors information that was not formally presented, screened, and subjected to the adversary process, and that may be inaccurate. For example, the jurors may see a scene of an automobile collision and not be told about physical changes occurring since the date of the accident. When jurors do make an unauthorized view, this amounts to extraneous information the jurors can testify about under Rule 606.[314] Despite the possibility of significant harm, Tennessee appellate courts use a harmless error standard in assessing whether there should be a reversal of a judgment based on the decision of a jury which took an unauthorized view.[315]

The facts of each case are reviewed in assessing whether any error was harmless. In *Paisley v. Pennington*,[316] one juror drove his car by the scene of the automobile accident at issue. He did not stop or take any measurements. He testified that he had been at that same place many times and was quite familiar with it. Since he also testified that the unauthorized view did not in any way affect his decision, the Tennessee Court of Appeals upheld the judgment and found that the error was harmless.

[30] View by Judge

Judges, like jurors, may want to visit the scene of an event to better understand the trial evidence and perhaps even to gather information that will assist in the decision. Illustrations include a visit to the scene of an automobile accident or crime or property dispute. While this experience may help the judge resolve an issue, it has a number of shortcomings. A major one is that there may be no or virtually no way to create a record of the field experience that an appellate court could use in reviewing the trial judge's decision.

In *Tarpley v. Hornyak*[317] the Tennessee Court of Appeals issued the definitive decision on the validity of views by a Tennessee trial judge. The case involved a nuisance dispute between landowners over whether a new concrete causeway caused flooding on adjacent property. The trial judge suspended proceedings until he could visit the site during heavy rain to observe any flooding. After making this visit and seeing accumulated water at the causeway, the judge ruled in favor of the plaintiffs.

311.1 *State v. Campbell, 2006 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. 2006)*, aff'd by *Campbell v. State, 2015 Tenn. Crim. App. LEXIS 1015 (Tenn. Crim. App. 2015)*; *State v. Shaw, 619 S.W.2d 546 (Tenn. Crim. App. 1981)*.

312 *See generally* McCormick On Evidence 386(6th ed. 2006). *See State v. Shaw, 619 S.W.2d 546, 549 (Tenn. Crim. App. 1981)* ("is always the safer and better course for the presiding judge to be present at the view"). *See also State v. Campbell, 2006 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. 2006)*, aff'd by *Campbell v. State, 2015 Tenn. Crim. App. LEXIS 1015 (Tenn. Crim. App. 2015)*; *State v. Shaw, 619 S.W.2d 546 (Tenn. Crim. App. 1981)*.

313 *Watson v. State, 166 Tenn. 400, 61 S.W.2d 476 (1933)* (reversible error for jury to view crime scene in absence of criminal defendant).

314 *See below §§ 6.06[4], [5]*.

315 See *e.g.*, *City of Columbia v. Lentz, 39 Tenn. App. 350, 282 S.W.2d 787 (1955)* (harmless error; during lunch break four jurors drove to scene of alleged nuisance, but testified they did not see source of nuisance, they were unaffected by what they saw, and they did not tell other jurors about their trip).

316 *55 Tenn. App. 241, 399 S.W.2d 322 (1965)*.

317 *Tarpley v. Hornyak, 174 S.W.3d 736 (Tenn. Ct. App. 2004)*.

After an extensive review of case and treatise authorities, the Tennessee Court of Appeals held that a Tennessee trial judge may view the scene of an event to assist in understanding the issues and evidence, but the view itself cannot supply new or independent evidence of a fact. The court observed:

> We … hold that a trial judge has the inherent discretion to take a view of the site of a property dispute, a crime, an accident, or any other location, where such a view will enable the judge to assess the credibility of witnesses, to resolve conflicting evidence, or to obtain a clearer understanding of the issues. However, the view cannot be made to obtain additional evidence or to replace the requirement that evidence be produced at trial with the judge's personal observations of the site. Thus, the proper purpose of a view is to enable the judge to better understand the evidence that has been presented in court, not as a substitute for such evidence. Any determination of factual issues in a case where a judge has taken an on-site view must be supported by significant and material evidence in the record. Appellate courts will review such evidence appearing in the record under *Tenn. R. App. P. 13*, and where the evidence independent of the judge's personal observations preponderates against the finding, it is subject to being reversed on appeal.[318]

The *Tarpley* court also suggested some procedures that should be followed when a judge makes a view of a site. In order to ensure that the view is fair and can be addressed on appeal if necessary, the court condemned a view taken without notice to the parties and the opportunity to be present and to have a court reporter present.[319] Without such notice, the *Tarpley* court held that "the view becomes an extrajudicial investigation or off-the-record fact gathering by the judge."[320]

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[318] *Tarpley v. Hornyak, 174 S.W.3d 736, 748–749 (Tenn. Ct. App. 2004)*.

[319] *Tarpley v. Hornyak, 174 S.W.3d 736, 750 n. 12 (Tenn. Ct. App. 2004)*.

[320] *Tarpley v. Hornyak, 174 S.W.3d 736 (Tenn. Ct. App. 2004)*. *See also* *Homeowners of Ash Grove Estates v. Hurley, 2018 Tenn. App. LEXIS 336 (Tenn. Ct. App. June 13, 2018)* (applying *Tarpley* and determining that the judge's property visit did not result in an "improper substitution" of what he observed for the evidence submitted by the parties at trial).

§ 4.02 Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

[1] Text of Rule

Rule 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible.

Advisory Commission Comment:

Once evidence satisfies the definition of relevance, it becomes admissible unless a rule excludes it.

[2] General Rule on Admissibility of Relevant Evidence

Rule 402 provides the general rule for the admissibility of logically relevant evidence. Relevance is defined in Rule 401.[321] Rule 402 actually states two closely related but different rules. First, the last sentence of the rule states unequivocally that irrelevant evidence is not admissible. No other objection is necessary. Irrelevant evidence[321.1] is excluded even if it satisfies every other evidence rule and even if its admission would cause no harm or prejudice to the opposing party.[322]

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[321] *See above § 4.01[4].*

[321.1] Evidence may be ruled irrelevant and, therefore, inadmissible under Rule 402 for a variety of reasons, depending on the issues at trial. *See, e.g., State v. Taylor, 2018 Tenn. Crim. App. LEXIS 1 (Crim. App. Jan. 3, 2018)* (victim's immigration status was irrelevant and inadmissible under *Tenn. R. Evid. 402*, since it had no bearing on whether a crime of aggravated robbery occurred, whether the defendant was involved in the crime, or whether the victim could identify the defendant as one of the perpetrators; it also had no relevance as to the victim's credibility); *State v. Sharp, 2017 Tenn. Crim. App. LEXIS 930 (Oct. 24, 2017)* (photograph depicting defendant with a goatee was irrelevant and inadmissible under *Tenn. R. Evid. 402* as to any issue on trial, because the State could not prove when photograph had been taken and, therefore, could not use it as substantive evidence that the defendant had a goatee on the night of the crimes; although the State could use the photograph to impeach the defendant's father, who testified that the defendant "never had a goatee," the trial court committed reversible error by failing to provide a limiting instruction to the jury); *State v. Williams, ___ S.W.3d ___, 2016 Tenn. Crim. App. LEXIS 652 (Tenn. Crim. App. Aug. 31, 2016)* (amount of victim's disability income held irrelevant, because it did not tend to prove a material fact, including whether the victim was credible; the fact that the victim received disability income did not show that she was more likely to lie about the facts leading to the burglary and vandalism, and her financial situation did not make her more likely to lie about defendant's actions).

[322] It has been suggested that there is one category of irrelevant evidence that is admissible in some circumstances. If one party introduces irrelevant evidence and the other party does not object, the latter party may attempt to introduce irrelevant evidence to respond to the first party's irrelevant (though admitted) proof. One authority suggests the judge has the discretion to admit the irrelevant evidence after considering the interests of justice. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 1 FEDERAL RULES OF EVIDENCE MANUAL 402–3 (9th ed. 2006).

The first sentence of Rule 402 states an opposite, though far less absolute, rule. This sentence establishes the beguiling principle that all relevant evidence is admissible unless it is rendered inadmissible by some other legal rule. In other words, relevance is only one hurdle that evidence must pass in order to be admitted in a court. Evidence that is relevant can still be excluded because of a large number of other exclusionary rules. Each of the exclusionary rules is based on one or more policies deemed so important that they justify the exclusion of evidence that would be helpful to the trier of fact.[323]

Rule 402 lists five sources of legal principles that can exclude evidence even though it is relevant. The first source is the United States Constitution. For example, both the self-incrimination and *confrontation clauses* in the United States Constitution may require the exclusion of relevant evidence.

The second source is the Tennessee Constitution, which, like the federal document, bars certain evidence that would incriminate the speaker.[324] The first two exceptions, therefore, make it clear that the Tennessee Rules of Evidence do not even purport to deal with constitutional standards for excluding (or, for that matter, including) evidence.

The third and most important source is contained in the other rules of evidence. For example, relevant evidence may be excluded because it is inadmissible hearsay,[325] violates the best evidence rule,[326] or is too prejudicial.[327]

The fourth and fifth sources are "other rules or laws of general application in the courts of Tennessee." This refers to statutes and court rules that exist now or may be added in the future. Presumably it also covers judicial interpretations of the various laws and rules. It does not cover, however, local court rules. The phrase "of general application in the courts of Tennessee" prevents a circuit or sessions court judge from adding new evidence rules that exclude otherwise relevant evidence. Rules or laws that bar relevant evidence must be applicable throughout the state. This provision is designed to facilitate uniformity among courts in various parts of Tennessee and to prevent individual judges from drastically altering the rules of evidence applicable in Tennessee courts.

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[323] *See generally* *Goodale v. Langenberg, 243 S.W.3d 575, 587 (Tenn. Ct. App. 2007)* (Tennessee rules of evidence reflect the policy that evidence which is relevant under Rule 401 is admissible unless explicitly excluded on constitutional or statutory grounds, by the rules themselves, or under Rule 403).

[324] *Tenn. Const. Art. 1, § 9*. *See* *Staples v. State, 89 Tenn. 231, 14 S.W. 603 (1890)*.

[325] *Tenn. R. Evid. 801*.

[326] *See* *id. at 1001–08*.

[327] *See below* *§§ 4.03[4]*, *4.03[6]*. *See also* *State v. Melton, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 109 (Tenn. Crim. App. Feb. 16, 2018)* (trial court did not err by permitting the State to cross-examine defendant regarding his purported interest in pornography, because the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice under *Tenn. R. Evid. 402*, *403*; the trial court conducted more than one thorough and thoughtful bench conference, with an eye toward the potential prejudicial impact of the testimony, and strictly limited the State's ability to question defendant about any specific pornographic material).

§ 4.03 Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

[1] Text of Rule

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

> **Although relevant, evidence may be excluded if its 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, waste of time, or needless presentation of cumulative evidence.**

Advisory Commission Comment:

The Tennessee Supreme Court approved this rule for both civil and criminal cases in *State v. Banks, 564 S.W.2d 947 (Tenn. 1978)*.

[2] Policy of General Exclusionary Rule

Rule 403 represents a codification of the common law principle that a judge has the inherent authority to exclude relevant evidence that would waste time or threaten the fairness of the trial process.[327.1] A general rule is necessary because the variety of facts and issues arising in legal cases precludes use of more specific rules to achieve the same end.

The theoretical underpinning of the rule is based on the principle that some evidence, even though relevant, should not be admitted because doing so would violate the more important values of saving time or facilitating a fair trial. In other words, Rule 403 assumes that logical relevance is only one value and not always the most important value at stake in deciding whether evidence should be admitted.

Because of the overriding importance of these other values, Rule 403 is a generic rule that applies to virtually every type of evidence. Thus, this rule can be used to challenge real and demonstrative evidence, documentary evidence, and live testimony.

[3] The "403" Test: In General

Rule 403, a verbatim restatement of Federal Rule 403, has been Tennessee law since 1978.[328] The rule has a number of elements, some of which have been glossed over by Tennessee courts. In general terms, Rule 403

[327.1] A judge's inherent authority to exclude evidence under Rule 403 must, of course, be applied in conformity with constitutional principles. Exclusion of evidence may violate the *Due Process Clause of the Fourteenth Amendment* even if the exclusion complies with applicable rules of evidence; thus, when the court excludes evidence that unreasonably restricts the defendant's right to cross-examine witnesses, the trial court abuses its discretion. *See State v. Zeigler, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2019)* (just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense, and this right is a fundamental element of due process of law; the following factors should be considered when determining whether the exclusion of evidence results in a due process violation: (1) whether the excluded evidence is critical to the defense; (2) whether the evidence bears sufficient indicia of reliability; and (3) whether the interest supporting exclusion of the evidence is substantially important).

permits a court to exclude relevant evidence if the probative value of that evidence is substantially outweighed by the dangers of an unfair trial or an inefficient judicial process. Thus, in assessing whether evidence should be excluded under Rule 403, the trial judge must carefully balance competing, important values.

The first words of Rule 403 are "[a]lthough relevant." This means that Rule 403 is to be considered only *after* evidence has been found to be relevant under Rule 401. If the evidence is irrelevant, it is excluded under Rule 402; in such cases the court should never get to the issue of whether it should also be excluded under Rule 403.

[4] Balancing Competing Values: The "Substantially Outweigh" Test

The heart of Rule 403 is its balancing test. The rule states that the court may exclude evidence "if its 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, waste of time, or needless presentation of cumulative evidence." In other words, the evidence is to be admitted unless the probative value is *substantially* outweighed by the listed considerations.[329]

The word "substantially" is not defined in the Tennessee or equivalent federal rule or the legislative history of either, but the rule suggests that the evidence is to be admitted unless the other listed considerations greatly outweigh the probative value of the evidence. This approach means that Rule 403 "is an extraordinary remedy that should be used sparingly."[330] If the balance is close, the evidence should be admitted.[331]

By adopting the "substantially outweighed" test, Rule 403 places a significant burden on the party who wants evidence excluded.[332] This is sensible, however, since the evidence is, by definition, relevant and would assist

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[328] The Tennessee Supreme Court adopted Federal Rule 403 in State v. Banks, 564 S.W.2d 947 (Tenn. 1978).

[329] *See, e.g.*, State v. Stewart, 2018 Tenn. Crim. App. LEXIS 6 (Tenn. Crim. App. Jan. 4, 2018) (relevant evidence may be excluded if its 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, waste of time, or needless presentation of cumulative evidence under Tenn. R. Evid. 403).

Some Tennessee decisions have lacked precision in stating the balancing test. It is not clear whether the imprecise standard affected the court's conclusion. See *e.g.*, State v. Aucoin, 756 S.W.2d 705, 710 (Tenn. Crim. App. 1988) (probative value must outweigh undue prejudicial effect); State v. Gann, 733 S.W.2d 113, 115 (Tenn. Crim. App. 1987) (same); ***State v. Fears, 659 S.W.2d 370, 379 (Tenn. Crim. App. 1983)*** (probative value was clearly outweighed by prejudicial value); State v. Brown, 756 S.W.2d 700 (Tenn. Crim. App. 1988) (same); State v. Washington, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983) (prejudicial effect far outweighs probative value).

[330] State v. Davidson, 509 S.W.3d 156, 2016 Tenn. LEXIS 913 (Tenn. 2016) (exclusion of relevant evidence is an extraordinary remedy that should be used sparingly, and the party seeking to exclude the evidence bears a heavy burden of persuasion); State v. Zeigler, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2019) (excluding relevant evidence is an extraordinary remedy that should be used sparingly; new trial was required since trial court violated defendant's due process rights by improperly excluding evidence concerning expert witness' license suspension and probation status); In re Angel M., 2017 Tenn. App. LEXIS 519 (Tenn. Ct. App. 2017) (excluding relevant evidence is an extraordinary step that should be used sparingly; trial court is in the most suitable position to conduct the Rule 403 balancing test); State v. James, 81 S.W.3d 751, 757 (Tenn. 2002) (*quoting* White v. Vanderbilt Univ., 21 S.W.3d 215, 227 (Tenn. Ct. App. 1999)); Richardson v. Miller, 44 S.W.3d 1, 21 (Tenn. Ct. App. 2000);

Goodale v. Langenberg, 243 S.W.3d 575, 587 (Tenn. Ct. App. 2007) (Rule 403's exclusion of evidence is extraordinary step that should be used sparingly; when balance is close, evidence should be admitted); White v. Beeks, 469 S.W.3d 517, 528 (Tenn. 2015) (Rule 403 is extraordinary remedy to be used sparingly; evidence should be admitted if the 403 balance is close).

[331] Goodale v. Langenberg, 243 S.W.3d 575, 587 (Tenn. Ct. App. 2007) (plain language of Rule 401 strongly suggests that when the balance between probative value and prejudice is close, the evidence should be admitted). *See also,* State v. Zeigler, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2019) (a trial court should not exclude evidence when the balance between the probative worth of the evidence and the countervailing factors is "fairly debatable").

the trier of fact if admitted. If the evidence is excluded, the court deprives the jury of relevant evidence and, according to some authorities, risks usurping the function of the jury.[333]

It must be noted that some courts and other authorities read Rule 403 as containing a two-step balancing process. The first, described above, involves a balance of probative value and a number of concerns of unfairness and trial inefficiency. The second arises only after the first balancing effort has concluded that the probative value is substantially outweighed by the listed dangers. During this second process the court, now empowered to exclude the evidence under Rule 403, decides whether to exercise its discretion and actually exclude the proof.[334] Although Rule 403 does create this two-step process by making exclusion permissive rather than mandatory, it is difficult to imaging a case where step one would authorize exclusion but the court would use its discretion under step two and refuse to exclude the evidence. This would be especially troublesome if step one established that the danger of unfair prejudice substantially outweighed the proof's probative value. It is more understandable if the "danger" was waste of time or unnecessary cumulative evidence.

[5] Balancing Competing Values: Probative Value; Stipulations

[a] Probative Value

Rule 403 requires the trial judge to weigh the "probative value" of the evidence against the harm the evidence may cause. In assessing probative value, the court must understand the proof and theory of the case, and whether there is a real dispute about the issue the evidence is to prove.[335]

The probative value of any item of evidence may depend on the strength of this evidence and on what other evidence has been or could be introduced on that same issue. Sometimes the evidence in question is better than other available evidence on the same point.[336] On the other hand, the other available evidence may well be sufficiently probative to reduce the probative value of the evidence in question.[337]

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[332] *See* State v. James, 81 S.W.3d 751, 757 (Tenn. 2002) ("Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence"); State v. Patlan, 2011 Tenn. Crim. App. LEXIS 89 (Tenn. Crim. App. 2011); State v. Zeigler, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2019) (Tenn. R. Evid. 403 is narrow in its application and is a rule of admissibility, and a party seeking to exclude otherwise admissible and relevant evidence has a "significant burden of persuasion").

[333] *See* White v. Vanderbilt Univ., 21 S.W.3d 215, 227 (Tenn. Ct. App. 1999).

[334] *See* White v. Vanderbilt Univ., 21 S.W.3d 215 (Tenn. Ct. App. 1999); Richardson v. Miller, 44 S.W.3d 1, 21 (Tenn. Ct. App. 2000) (using two-step process). In re Angel M., 2017 Tenn. App. LEXIS 519 (Tenn. Ct. App. 2017).

[335] State v. Young, 196 S.W.3d 85, 106 (Tenn. 2006) (in assessing probative value, court must understand the proof and theory of the case as well as whether there is a real dispute about the issue the evidence is to prove; photographs of homicide victim shown to defendant which induced defendant to confess were barred by Rule 403 as unfairly prejudicial and having minimum probative value since the motive for defendant to confess was not really disputed in case).

[336] See *e.g.*, State v. Harbison, 704 S.W.2d 314 (Tenn. 1986) (gruesome photos of deceased victim's head provide better description of extent of wounds than testimony of medical examiner and funeral director).

[337] See *e.g.*, State v. Duncan, 698 S.W.2d 63 (Tenn. 1985) (trial court should have excluded photos of victim's throat because the detailed testimony of the medical examiner was adequate)State v. Stewart, 2018 Tenn. Crim. App. LEXIS 6 (Crim. App. Jan. 4, 2018) (although evidence of defendant's tattoos as an identifying characteristic had minimal relevancy where the defendant's identity was established by the victim's testimony that the defendant was the perpetrator, the victim and the defendant had a familial relationship, and nothing in the record suggested the victim was unsure about the identity of the perpetrator, the trial court did not abuse its discretion in failing to redact testimony, since nothing in the record established that the reference to the tattoos was unfairly prejudicial).

A good example of the assessment of probative value is *Ammons v. Bonilla,*[338] where the plaintiff sued after his motorcycle collided with a car. At trial, plaintiff sought to introduce the left-turn signal to prove it was defective at the time of the accident. The appellate court excluded it because in the Rule 403 calculation, the probative value was slight. The car had been involved in a second accident four months after the one at issue and had been stored in a cow pasture for two more years before the turn signal was removed.

[b] Offer to Stipulate: *Old Chief*

In assessing admissibility under Rule 403, courts evaluate the probative value of an item of evidence. The issue is complicated if the party against whom the evidence is to be used offers to stipulate the underlying facts. Does this offer reduce the probative value to the point that that evidence can be excluded under Rule 403?

The United States Supreme Court recognized this principle in *Old Chief v. United States*,[339] when it held that a Rule 403 assessment of the weight of the "probative value" may include a calculation of evidentiary alternatives. *Old Chief* involved a defendant charged with both assault with a dangerous weapon and possession of a firearm by someone with a prior felony conviction. In order to prevent the jury from learning about a prior felony conviction for assault causing serious bodily injury, defense counsel offered to stipulate that the defendant had been convicted of a prior felony (thus satisfying an element of the weapons possession crime). The prosecution refused the stipulation and the court permitted the prosecution to prove that the defendant had a prior criminal conviction for assault with serious bodily injury.

The United States Supreme Court reversed, holding that the court should have accepted the stipulation in order to minimize the risk of unfair prejudice. The Supreme Court appeared to limit *Old Chief* to the admission of facts of a prior conviction. The Court did not articulate a general rule that the prosecution may not prove its case but must accept stipulations if offered. The *Old Chief* Court noted:

> What we have said shows why this will be the general rule when proof of convict status is at issue, just as the prosecutor's choice will generally survive a Rule 403 analysis when a defendant seeks to force the substitution of an admission for evidence creating a coherent narrative of his thoughts and actions in perpetrating the offense for which he is being tried.[340]

Many federal decisions read *Old Chief* narrowly as applying primarily to proof of status as a convicted felon.[341]

In *State v. James*,[342] the Tennessee Supreme Court applied the reasoning in *Old Chief*, which was based on an interpretation of Rule 403, to an analysis under Rule 404(b). *James* held that when the defendant charged with felony escape offers to stipulate that he or she was incarcerated for a felony, the court should accept the offer rather than permit the prosecution to identify the specific offenses for which the defendant

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[338] *886 S.W.2d 239 (Tenn. Ct. App. 1994)*. *See also White v. Vanderbilt Univ., 21 S.W.3d 215 (Tenn. Ct. App. 1999)* (careful balance of probative value of expert's deposition).

[339] *519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)*.

[340] *Id. at 655–56*.

[341] *See e.g.*, *United States v. Grimmond, 137 F.3d 823 (4th Cir.)*, *cert. denied*, ***525 U.S. 850 (1998)*** (prior crimes admissible to prove possession of firearm, but not status as convicted felon, which status was stipulated by the defendant); *United States v. Rezaq, 134 F.3d 1121 (D.C. Cir.)*, *cert. denied*, ***525 U.S. 834 (1998)*** (*Old Chief* applies to proof of status, not to autopsy photos); *United States v. Becht, 267 F.3d 767, 770 (8th Cir. 2001)* (stipulation that photos constituted child pornography did not require exclusion of actual photos offered by government to prove defendant knew they were child porn).

[342] *81 S.W.3d 751 (Tenn. 2002)*. *James* is discussed *below* in *§ 4.04[7][b]*. *See also State v. Saylor, 117 S.W.3d 239 (Tenn. 2003)*, discussed *below* in *§ 4.03 [8]*.

was incarcerated. *James* involved previous convictions for virtually the same crimes for which the defendant was being tried; it is not clear whether the logic of *James* also applies when the underlying crimes are dissimilar to those in the instant case.[343]

[6] Balancing Competing Values: Unfair Trial

[a] Unfair Prejudice; Surprise

Rule 403 weighs the probative value of the evidence against two concerns: unfair trial and efficient administration of the courts. The notion of an unfair trial is inherent in the "danger of unfair prejudice, confusion of the issues, or misleading the jury," Rule 403. The three categories, though similar, merit individual discussion.

The key word in the phrase *unfair prejudice* is *unfair*. Most evidence is prejudicial to one side. Rule 403 is only concerned with prejudice that is "unfair."[343.1] According to the Advisory Committee's Note to Federal Rule 403, the term "unfair prejudice … means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[344] Judge Weinstein includes in this category evidence that appeals to the jury's sympathies, sense of horror, or instinct to punish.[345] Professor Graham adds the emotions of "bias, sympathy, hatred, contempt, retribution or horror."[346] Professors Mueller and Kirkpatrick include evidence that is sensational; shocking; that provokes anger, hostility, revulsion, or punitive impulses; inflames passions; arouses overwhelming sympathetic reactions; or appeals entirely to emotion rather than reason.[347]

"Unfair prejudice" in Rule 403 includes more than appeals to emotion. It also embraces situations where a jury could misuse otherwise admissible proof. The best example is evidence admissible for one purpose but not another. Although a limiting instruction under Rule 105 could help alleviate possible misuses of the evidence, sometimes these instructions are insufficient to ensure that the jury will use the evidence for the

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[343] [Reserved].

[343.1] *See, e.g.*, State v. Zeigler, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2019) (evidence does not present a danger of *unfair* prejudice unless it threatens the fundamental goals of Tenn. R. Evid. 401 and 403: accuracy and fairness); State v. Taylor, 2018 Tenn. Crim. App. LEXIS 1 (Tenn. Crim. App. Jan. 3, 2018) (victim's immigration status was generally irrelevant to the facts at issue during the trial, and the evidence could have only served to confuse the issues for the jury and inflame any prejudice against unlawful immigration, see Tenn. R. Evid. 403; accordingly, the trial court did not abuse its discretion by excluding evidence of the victim's immigration status).

[344] State v. Davidson, 509 S.W.3d 156, 2016 Tenn. LEXIS 913 (Tenn. 2016); Advisory Committee Note, 56 F.R.D. 183, 218. *See* State v. Simpson, 2019 Tenn. Crim. App. LEXIS 173 (Crim. App. 2019) (same); State v. Brock, 327 S.W.3d 645, 694 (Tenn. Crim. App. 2009) (same; color autopsy photos of homicide victim); Witter v. Nesbit, 878 S.W.2d 116 (Tenn. Ct. App. 1993) (no error to admit psychological interview concerning the race of plaintiff's mother's boyfriend because it was relevant to family history affecting psychological problems; appellate court did not explain how probative value was not outweighed by possible race-based prejudice); Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439 (Tenn. 1992) (trial court properly refused to admit evidence of all fifty-one alleged incidents of insurance fraud that defendant insurance company claimed plaintiff had engaged in); State v. McCary, 922 S.W.2d 511, 515 (Tenn. 1996) (trial court probably should have disallowed letting jury see pornographic magazines and videotapes in sex abuse cases; shocking and horrifying a jury does not assist them in making a reasoned determination), superseded by statute as stated in State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Crim. App. Mar. 13, 2012); State v. Larkin, 443 S.W.3d 751, 809 (Tenn. Crim. App. 2013) (admitting several bones of homicide victim to show injuries and possible cause; bones were old, dried, and cleaned and not inherently "horrific").

[345] JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL (Student Edition) 6-22 (March 2004 Supp).

[346] MICHAEL H. GRAHAM, 1 HANDBOOK OF FEDERAL EVIDENCE 487–504 (6th ed. 2006). *See also,* State v. Zeigler, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2019) (prejudice becomes unfair when the primary purpose of the evidence at issue is to elicit emotions of bias, sympathy, hatred, contempt, retribution, or horror).

[347] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE 644–45 (3d ed. (2007).

proper purpose.[348] In such cases, Rule 403 may permit the trial judge to exclude or otherwise limit the evidence.

Another illustration is *White v. Vanderbilt University*,[349] where a medical malpractice plaintiff sought to introduce the deposition of a defense medical expert. The Tennessee Court of Appeals conducted a well-reasoned balance under Rule 403 and concluded that the deposition was not excludable but Rule 403 barred informing the jury that the expert was originally retained by the defendants. Telling the jury of the expert's initial affiliation was characterized as creating an unwarranted impression the defendant had suppressed evidence it was obligated to present and giving the expert undue credibility. Accordingly, the deposition was admitted but information about the deponent's relationship with the defense was barred by Rule 403.

The federal drafters of Rule 403 expressly did not include surprise as a ground for exclusion.[350] A continuance was deemed a better alternative. This does not mean, however, that surprise could not constitute "unfair prejudice" in an unusual case, perhaps involving intentionally hidden evidence where a continuance would be useless because rebuttal evidence is no longer available. Other evidence rules do attempt to limit surprise by requiring advance notice. For example, Rule 412(d) requires, in some cases, notice of intent to offer evidence of a sexual assault victim's sexual behavior. Rules 608 and 609 mandate advance notice of an intent to offer certain impeachment proof of prior acts and criminal convictions.

In *State v. McCaleb*,[350.1] a case addressing the admission of defendant's post-polygraph statements under Rule 403, the Tennessee Supreme Court held a trial court's "undue prejudice" analysis may include "not only the impact of the evidence itself but also *the impact of potential cross-examination* resulting from admission of the evidence (emphasis added)." This standard "preserves the criminal defendant's fundamental right to a fair trial."[350.2]

[b] Confusion of the Issues

Confusion of the issues may occur when the evidence offered will prompt a serious consideration of tangential matters. It will distract the jury from its primary decisions, perhaps by requiring proof and counter proof of relatively unimportant issues. A good example is *Stengel v. Belcher*,[351] a federal case involving a civil rights action against a police officer who killed two men and injured a third during a dispute in a cafe. The trial court excluded the defendant officer's evidence that the three victims had been involved in four previous incidents where they caused trouble in bars. The Sixth Circuit Court of Appeals upheld the trial court's decision that the excluded evidence would have led to confusion of the issues since each of the four previous incidents would have been controverted and led to a trial-within-a-trial on a collateral issue.

Another illustration is provided by *State v. Conway*[352] where the defendant was charged with driving while intoxicated. The arresting officer testified about the results of a breathalyzer test but the trial court refused to allow the officer to be cross-examined about the technology used in the machine. The Court of Criminal

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[348] *See above § 1.05[3]*.

[349] *21 S.W.3d 215 (Tenn. Ct. App. 1999)*.

[350] *56 F.R.D. 218–219*.

[350.1] *State v. McCaleb, 582 S.W.3d 179, 2019 Tenn. LEXIS 371 (Tenn. Aug. 21, 2019)*.

[350.2] *Id., *196*.

[351] *522 F.2d 438 (6th Cir. 1975)*. *See also Caparotta v. Entergy Corp., 168 F.3d 754 (5th Cir. 1999)* (proof defense counsel accidentally destroyed documents related to the lawsuit had minuscule probative worth but risked confusion of issues).

[352] *77 S.W.3d 213 (Tenn. Crim. App. 2001)*.

Appeals held that such questions may be excluded under Rule 403 as confusing and misleading the jury since under Tennessee law the officer is not required to understand the scientific underpinnings for the machine or to be an expert scientific witness.

[c] Misleading the Jury

Misleading the jury may occur when the evidence is difficult to understand or apply, or easy to misapply by a lay jury. Scientific evidence, particularly probability evidence,[353] may be attacked on this ground. Lie detector results also illustrate this danger.[354] Challenges to scientific evidence often involve expert testimony and implicate Rule 702 (which allows expert testimony if scientific, technical, or other specialized knowledge will substantially assist the trier of fact) or Rule 703 (which provides that trial courts shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate a lack of trustworthiness).[354.1]

[7] Balancing Competing Values: Trial Inefficiency

[a] Undue Delay

The other three categories for exclusion under Rule 403 are facets of the concept of judicial efficiency. Evidence in these categories ordinarily has little probative value and poses a small likelihood of causing an unfair trial. Nevertheless, it is excluded because the trial court is given the authority to make evidence rulings that promote efficient use of judicial resources.

The three categories listed are not defined and are difficult to distinguish from one another. Evidence can be excluded because it would cause *undue delay*. This may embrace evidence that would take a long time to present or would permit the other side to introduce time-consuming rebuttal evidence to establish that the initial proof had little probative value. A related concern is that the evidence is so extensive that the judge and jury would have to spend an inordinate amount of time sorting through it. The judge can use Rule 403 to require counsel to reduce the quantity of the evidence or to avoid any proof on the issue.

[b] Waste of Time

Another ground for exclusion is *waste of time*. This could occur if the evidence has little probative value and would not materially contribute to the trier of fact's decision-making. If the probative value of the evidence is minimal or nonexistent, an objection based on relevance, Rule 401, may be even more appropriate than one based on Rule 403. If surprise evidence offered by one side would mandate that the other side be given a continuance to avoid unfair prejudice, the evidence could be barred under Rule 403 if the evidence has little probative value and the continuance would interfere with the trial's efficient progress.

[c] Needless Presentation of Cumulative Evidence

The final ground is *needless presentation of cumulative evidence*. This category gives the trial judge discretion to limit repeated efforts to prove the same thing. For example, this rule would permit the court to place reasonable limits on the number of character witnesses, or the admission of multiple photographs of

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[353] See *e.g.*, *United States v. Massey, 594 F.2d 676 (8th Cir. 1979)* (comparison of hair samples). *State v. Ayers, 200 S.W.3d 618 (Tenn. Crim. App. 2005)* (trial court erred when it excluded expert's testimony, which was based on statistical studies, over concerns the testimony would mislead the jury; the appellate court noted that the trial court's concern with a jury finding guilt based on "probabilities and odds" rather than on "the mandated standard of proof beyond a reasonable doubt" could be resolved with appropriate jury instructions or by exclusion of the foundation testimony).

[354] *See below § 7.02[26].*

[354.1] *See below §§ 7.02–7.03.*

virtually the same scene.[355] Similarly, a 911 call may be needlessly cumulative where witness testimony sufficiently proves the relevant facts.[355.1]

An illustrative case involved photographs and bones of a homicide victim.[355.2] The court admitted both despite an objection the bones were cumulative evidence and the photographs alone were sufficient. The court reasoned that the bones were not cumulative because they helped the pathologist illustrate the victim's injuries and how the bones fit together.

[8] Judicial Application

Procedures. Rule 403 decisions require a difficult and delicate weighing of important competing values. The trial court must assess the weight of the probative value of the proposed evidence, and balance that against the harm or wastefulness if the evidence is introduced.[355.3] The court should state for the record its reasons for a Rule 403 decision.[356] A motion in limine may have been filed to challenge evidence on Rule 403 grounds. This is an excellent procedure that can reduce the negative impact of inadmissible evidence that would be difficult for a jury to ignore once it heard the proof.

Application Discretionary. Rule 403 states that the court "may" exclude evidence. The use of the word "may" suggests that the decision is discretionary rather than mandatory. Accordingly, a number of Tennessee decisions indicate that Rule 403 decisions are within the discretion of the trial court and will not be overturned absent an abuse of discretion.[357] This approach makes sense for three reasons. First, the necessary balance of

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[355] See *e.g.*, ***Hunter v. Burke, 958 S.W.2d 751 (Tenn. Ct. App. 1997)*** (portions of confession were cumulative and could have been excluded); *Wade v. State, 914 S.W.2d 97 (Tenn. Crim. App. 1995)* (in post-conviction relief hearing alleging ineffective assistance of counsel, court properly disallowed testimony of witness who would have testified that the defense counsel had not contacted her during the initial investigation; the defense lawyer had previously testified that he had unsuccessfully attempted to contact this witness; witness's testimony was cumulative and barred under Rule 403); *State v. Brown, 53 S.W.3d 264, 282 (Tenn. Crim. App. 2000)* (trial court upheld in decision to disallow testimony of judge that victim had a reputation for violence when drinking or using drugs; this evidence was cumulative under Rule 403 because many other witnesses testified that the victim was violent and had threatened to kill the defendant; trial court also upheld under cumulative evidence provision in Rule 403 for disallowing medical records to establish that a witness had been beaten by the defendant; the witness had already testified about the beating and no one contested that the beating occurred).

[355.1] *State v. Wooten, 2020 Tenn. Crim. App. LEXIS 12 (Crim. App. Jan. 13, 2020)* (911 recording of victim's sister after she found her brother's dead body, which included the mother's crying in the background and described the condition of the body, was held needlessly cumulative and unfairly prejudicial, since there was no issue as to the defendant's involvement, only his level of culpability, and the police officers testified extensively as to the condition of the home and the crime scene).

[355.2] *State v. Larkin, 443 S.W.3d 751 (Tenn. Crim. App. 2013)*.

[355.3] At times, trial court fails to properly conduct this balancing act. *See, State v. Zeigler, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2019)* (trial court failed to engage in the appropriate weighing analysis under Rule 403; defendant's due process rights were violated by improper exclusion of evidence relating to witness' license suspension and probation status).

[356] ***State v. McCall, 698 S.W.2d 643 (Tenn. Crim. App. 1985)***.

[357] *Allen v. Albea, 476 S.W.3d 366, 2015 Tenn. App. LEXIS 241 (Tenn. Ct. App. 2015)* (court did not its discretion by denying defendant's motion in limine to exclude photographs of the parties' vehicles from admission into evidence, where evidece was undisputed that the parties' vehicles sustained minimal damage, and the defendant testified with respect to the damage to his vehicle and stated that he repaired the damages himself); See *e.g.*, *State v. Banks, 564 S.W.2d 947 (Tenn. 1978)* (photograph); *State v. Biggs, 218 S.W.3d 643, 667 (Tenn. Crim. App. 2006)* (admissibility of evidence under Rule 403 is matter within trial court's discretion and will not be reversed on appeal absent an abuse of that discretion); *State v. Brock, 327 S.W.3d 645, 694 (Tenn. Crim. App. 2009)* (same; photograph of homicide victim's autopsy). *State v. Mitchell, 343 S.W.3d 381, 389 (Tenn. 2011)* (Rule 403 decisions overturned only for abuse of discretion; no error in admitting evidence that defendant convicted of disorderly conduct had called officer "nigger" because this word was probative of charge of disorderly conduct since defendant was angry and directly challenged African-American police officer who confronted defendant at a political rally); *State v. Pruitt, 415 S.W.3d*

factors in Rule 403 means that each ruling must be based on the unique facts of the case, including the credibility of witnesses and the weight of evidence on a particular issue. The trial judge is in a far better position to apply this balance than the appellate judges.[357.1]

Second, the six listed factors in Rule 403 are imprecise at best and absurdly vague at worst. The trial judge is better equipped than appellate judges to assess whether a photograph or testimony is "prejudicial" or "unfairly prejudicial." The trial judge should have a better understanding of the theories and proof in the case and can better make this judgment. Third, trial judges need ample discretion to conduct proceedings in an efficient, orderly, and fair manner. Precise rules are impossible since each case is unique. The best approach, adopted in Rule 403, is to trust judges with the countless decisions inherent in administering a judicial system. In making these necessary administrative decisions, judges need to know that appellate courts will not second guess every such judgment.

Despite this discretionary aspect, on occasion the appellate courts have read Rule 403 as if the word "shall" were in it. The appellate courts have reversed a trial court that erroneously did not exclude evidence that should have been excluded under Rule 403. Technically, the appellate courts found an abuse of discretion. More frequently, however, the error of admitting the evidence does not cause a reversal because the mistake is characterized as harmless error.[358]

Several courts have observed that although the discretionary nature of the decision to admit or exclude evidence under Rule 403 does not shield the trial court completely from appellate review, it does result in less rigorous appellate scrutiny. Thus, when the trial court's discretionary decision involves a choice among acceptable alternatives, the appellate court may not second-guess the trial court's exercise of its discretion merely because the trial court chose an alternative the appellate courts would not have chosen.[358.1]

180, 240 (Tenn. 2013) (ruling on admissibility of gruesome photographs overturned only for abuse of discretion); *State v. Adams, 405 S.W.3d 641, 657 (Tenn. 2013)* (same).

[357.1] As the court explained in *In re Angel M., 2017 Tenn. App. LEXIS 519 (Tenn. Ct. App. 2017)*: *Tenn. R. Evid. 403* requires trial courts to conduct a two-part balancing test. First, the trial court must balance the probative value of the challenged evidence against the countervailing factors. After the court has engaged in the balancing analysis, it may then exercise its discretion to determine whether the evidence should be excluded if the prejudice substantially outweighs the probative value of the evidence. The trial court is in the most suitable position to conduct this balancing test under Rule 403. *See also White v. Vanderbilt Univ., 21 S.W.3d 215 (Tenn. Ct. App. 1999)*.

[358] In *State v. Banks, 564 S.W.2d 947 (Tenn. 1978)*, the Tennessee Supreme Court adopted Federal Rule 403, found that photographs violated that rule, and then reinstated the conviction because the error was harmless. *See also* ***State v. McCall, 698 S.W.2d 643 (Tenn. Crim. App. 1985)***; *State v. Smith, 857 S.W.2d 1 (Tenn. 1993)* (sheriff's testimony regarding finding murder victim in a pool of coagulated blood was not unfairly prejudicial nor gruesome or inflammatory); ***State v. Hunter, 958 S.W.2d 751 (Tenn. Ct. App. 1997)*** (any error in admitting cumulative portion of confession was harmless). Commonly, the appellate court bases its finding of harmless error on the fact that there was sufficient additional evidence supporting the conviction and, therefore, the outcome would not likely have been different even had the lower court properly admitted or excluded the challenged evidence. *See Clardy v. State, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. 2018)* (even though the post-conviction court erred by refusing to admit photographs of an alternate suspect because it might have been relevant, given that it could have been compared to the description of the suspect given by the victims, the error was harmless; the post-conviction court would not likely have reached a different conclusion as to defendant's guilt, since the photographs did not undermine the witness's identification of petitioner as the shooter); *State v. Brown, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)* (even though trial court erred by admitting photographs from defendant's cell phone and evidence that the murder victim was a confidential informant for the police, the errors were harmless since 1) the photographs defendant challenged were copies, close-ups, or similar to the photographs that were properly admitted at trial; and 2) other evidence was presented at trial to support premeditation and defendant's involvement in the murder, and defense counsel's cross-examination of witnesses at trial established the lack of any connection between defendant and the victim's actions as a confidential informant).

[358.1] *In re Angel M., 2017 Tenn. App. LEXIS 519 (Tenn. Ct. App. 2017)*; *In re Melanie T., 352 S.W.3d 687 (Tenn. Ct. App. 2011)*; *Estate of Fuller v. Evans, 2004 Tenn. App. LEXIS 874 (Tenn. Ct. App. 2004)*; *White v. Vanderbilt Univ., 21 S.W.3d 215 (Tenn. Ct. App. 1999)*.

Courts can be creative in responding to Rule 403 objections. They can look beyond the existing proof in an effort to admit the evidence while responding to legitimate concerns about prejudice. Thus, they can consider whether limiting instructions would reduce the likelihood of prejudice.[359] They can also decrease the quantity of potentially harmful evidence by admitting only some of the proffered proof.[360] Still another approach is to reduce the negative impact of the evidence by admitting a less objectionable version. For example, black and white photographs of a bloody crime scene can be substituted for color shots of the same room.[361] Another approach is to alter testimony so that the jury is presented with more neutral language.[362] In making these adjustments in the nature of proof, the trial court must consider whether it is depriving a party of the legitimate probative value of the evidence. Finally, a party's offer to stipulate or to not dispute a fact is a factor in assessing the probative value of the evidence proving that fact.[363]

Stipulation. In some unusual cases, a criminal accused's offer to stipulate a fact may, as a matter of law, make certain evidence inadmissible under Rule 403. The leading case is *State v. James*,[364] where the Tennessee Supreme Court held that Rule 403, as a matter of law, bars evidence of the names of the defendant's prior felonies when the defendant is charged with felony escape and offers to stipulate that he has the necessary prior felony convictions for the offense.

However, a party's offer to stipulate a certain fact should not always lead to a Rule 403 exclusion of evidence on that fact.[364.1] Each side is entitled to prove its case. Sometimes evidence has a probative value that reaches beyond a fact that can be stipulated. A good example is a photograph of an injury. While a stipulation as to the extent of the injury may be helpful, a photograph may be more instructive on the issue of the extent of pain and suffering. Another illustration is *State v. Saylor*,[365] when the parties stipulated that the homicide victim was the

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[359] *Cf. above* § 1.05[2]. *See also* Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 908 (Tenn. 1996) (trial judge should have given detailed, limiting instruction to minimize unfair prejudice; wording of possible instruction included in opinion).

[360] *See e.g.*, State v. Price, 46 S.W.3d 785, 816 (Tenn. Crim. App. 2000) (court admitted twenty-two photos of homicide victim's body; this number "could have and should have been reduced;" many photos were "duplicative of others" but any error was harmless).

[361] In State v. Brock, 327 S.W.3d 645, 693–697 (Tenn. Crim. App. 2009), the trial court conducted an extensive jury-out hearing to determine whether color or black-and-white autopsy photos would be admitted in a homicide trial. The pathologist testified whether the color photos would be more helpful than the black-and-white ones. A color photo was admitted as better demonstrating the extent of the victim's injuries.

[362] See *e.g.*, United State v. Neill, 166 F.3d 943 (9th Cir.), *cert. denied*, ***526 U.S. 1153 (1999)*** (to avoid informing jury that defendant was on work release at time of robbery, trial court should have referred to the Work Release Center as a "residential program").

[363] *See* State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978); Gladson v. State, 577 S.W.2d 686 (Tenn. Crim. App. 1978) (reversible error to admit two slides of murder victim's cranial bone and brain, when defendant offered to stipulate cause of death and other photos of the wounds had been admitted); State v. Saylor, 117 S.W.3d 239 (Tenn. 2003) (in criminal case, existence of a stipulation is not, in itself, sufficient to invoke the narrow provisions of Rule 403); State v. Thomas, 158 S.W.3d 361, 400 (Tenn. 2005) (adopting opinion of Tennessee Court of Criminal Appeals) (permitting testimony of fingerprint expert despite defendant's stipulation that fingerprint on getaway car matched that of defendant). *See also* Old Chief v. United States, 519 U.S. 172 (1997); see *above* § 4.03[5][b].

[364] 81 S.W.3d 751, 756 (Tenn. 2002).

[364.1] Thus, where the State had to prove that the defendant possessed a firearm and had a previous conviction for a felony drug offense, but defendant refused to stipulate to his status as a convicted felon, the Court of Criminal Appeal held that absent a stipulation, the probative value of the defendant's prior conviction outweighed the prejudicial effect. The court also noted that "it is not the duty or function of a trial court to require one of the parties to the litigation to stipulate with his adversary." State v. Buchanan, 2019 Tenn. Crim. App. LEXIS 105, at *19–20 (Tenn. Crim. App. Feb. 21, 2019) (*quoting* State v. Ford, 725 S.W.2d 689. 691 (Tenn. Crim. App. 1986)).

first aggressor but the defendant's self defense proof was that the victim had previously said she would kill the defendant. The Tennessee Supreme Court held that this stipulation alone did not bar the defendant's evidence under Rule 403. The Court suggested that the stipulation itself was not conclusive in the criminal case.[366]

In another illustrative case, one of the defendant's many charges in a multiple homicide prosecution was possession of a firearm after being convicted of a felony involving the use of force or violence. The prosecution rejected defendant's offer to stipulate he had been convicted of prior felonies, but without mentioning the prior crimes involved force or violence. The appellate court upheld a later stipulation that the prior crimes involved force or violence. The court reasoned the government had a right to prove the elements of the possession charge, but the details of those prior crimes were not necessary.[366.1]

[9] The Special Case of Photographs

Liberal Admission. The many Tennessee decisions applying Rule 403 overwhelmingly deal with the admissibility of photographs. With increasing frequency, Tennessee cases also consider the sister technology, videos, which are evaluated under the same standards as photographs.[367] Photographs appearing on social media are likewise subject to the same standards[367.1] as any other photograph. The trial court makes the required balance[368] and usually decides that the photographs are admissible.[368.1] Some Tennessee judicial authorities have observed that Tennessee courts follow a policy of liberality in admitting photographs in both civil and criminal cases.[369] Tennessee appellate courts frequently rely on the rule that "a trial court's discretion

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[365] *117 S.W.3d 239 (Tenn. 2003)*

[366] *117 S.W.3d at 249 n.8*).

[366.1] *State v. Foust, 482 S.W.3d 20 (Tenn. Crim. App. 2015)*.

[367] *Anderson v. American Limestone Co., 168 S.W.3d 757, 762 (Tenn. Ct. App. 2004)*.

[367.1] *See, e.g.*, *State v. Wright, 2020 Tenn. Crim. App. LEXIS 434 (Tenn. Crim. App. June 22, 2020)* (two photos posted on defendant's Twitter account showing him holding weapons aimed at the camera, which the State offered to show defendant's identity, were not connected to defendant's involvement in the offenses and were, therefore, unnecessary, misleading, and unfairly prejudicial under Rules 401 and 403, particularly since there were many other non-inflammatory family photos depicting defendant on the same Twitter feed that could have been used to show identity; although the defendant also objected to the photos on the ground that they violated Rule 404(b)'s prohibition against "bad acts" and crimes, the Court of Criminal Appeals noted that possession of a weapon is not a crime or bad act, and thus, Rule 404(b) was inapplicable).

[368] *See above § 4.03[4]*.

[368.1] *See*, e.g., *State v. Boyd, 797 S.W.2d 589 (Tenn. 1990)*, admitting mug shots into evidence. On appeal, although the Supreme Court court noted "the danger in admitting mugshot evidence is that the jury may infer that the photograph came from a prior criminal conviction," the court held that "mugshots standing alone are not likely to cause a jury to infer the existence of prior criminal convictions. *Id. at 594*.

[369] *See e.g., State v. Morris, 24 S.W.3d 788, 810 (Tenn. 2000)*, *cert. denied,* ***526 U.S. 1071 (2001)***; *State v. Caldwell, 80 S.W.3d 31, 40 (Tenn. Crim. App. 2002)*; *State v. Carter, 114 S.W.3d 895, 902 (Tenn. 2003)* (Tennessee courts follow policy of liberality in admission of photographs in civil and criminal cases); *State v. Faulkner, 154 S.W.3d 48, 67 (Tenn. 2005)* (same); *State v. Robinson, 146 S.W.3d 469 (Tenn. 2004)* (same); *State v. Brock, 327 S.W.3d 645, 694 (Tenn. Crim. App. 2009)*(same); *State v. Foust, 482 S.W.3d 20, 48 (Tenn. Crim. App. 2015)* (Tennessee courts follow a liberal policy of admitting photographs in both civil and criminal cases).

regarding the admissibility of photographs will not be reversed on appeal absent a clear showing of an abuse of discretion."[370]

In weighing the probative value of the photograph, the courts frequently find the photo to be admissible in the case. Many different theories are used. For example, photos have been admitted to prove intent to kill and malice,[370.1] the type of wound,[371] the extent or cause of injuries,[372] the manner in which a body was hidden,[373]

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[370] State v. Harper, 2015 Tenn. Crim. App. LEXIS 885 (Tenn. Crim. App. 2015); State v. Cazes, 875 S.W.2d 253, 262–263 (Tenn. 1994). *See also* State v. Vann, 976 S.W.2d 93, 103 (Tenn. 1998) (trial judge's decision to admit photograph into evidence will not be overturned on appeal absent a clear showing of an abuse of discretion); State v. Schafer, 973 S.W.2d 269 (Tenn. Crim. App. 1997) (appellate court will not overturn trial court's decision to admit photograph absent clear abuse of discretion); State v. Griffis, 964 S.W.2d 577, 594 (Tenn. Crim. App. 1997) (appellate court will not interfere with trial court's discretion to admit photographs of crime victim unless record shows clear abuse of discretion); State v. Bordis, 905 S.W.2d 214, 226 (Tenn. Crim. App. 1995) (whether to admit photograph is within trial court's discretion and will not be overturned absent abuse of discretion); ***State v. Chalmers, 28 S.W.3d 913, 920, 926 (Tenn. 2000)***, *cert. denied*, ***532 U.S. 925 (2001)*** (adopting opinion of Court of Criminal Appeals).

[370.1] Post-mortem pictures can be relevant to the issue of deliberation or premeditation; the intent to kill may be inferred from the brutality of the attack. *See* State v. Davidson, 509 S.W.3d 156 (Tenn. 2016); State v. Banks, 564 S.W.2d 947 (Tenn. 1978). Thus, the succession of blows, the patently vicious manner of their infliction, the enormity of the cruelty and the horrendous injuries suffered provide further evidence of a willful execution of an intent to kill. *See* State v. Davidson, 509 S.W.3d 156 (Tenn. 2016); State v. Banks, 564 S.W.2d 947 (Tenn. 1978); State v. Brown, 836 S.W.2d 530 (Tenn. 1992) (no error in the trial court's admission of nine color, close-up photographs of the deceased victim's; under the *Banks* standards, the court held the graphic photographs were relevant to the brutality of the attack and extent of force used against the victim, from which the jury could infer the element of malice).

[371] *E.g.*, State v. Davidson, 2015 Tenn. Crim. App. LEXIS 164 (Tenn. Crim. App. 2015) (trial court carefully culled the numerous photographs offered by the State and admitted the challenged photographs only to depict specific injuries described by a doctor); State v. Simon, 635 S.W.2d 498, 503 (Tenn. 1982); State v. Vann, 976 S.W.2d 93, 103 (Tenn. 1998) (photographs of murder victim's anal and vaginal regions admissible to prove that victim could have been penetrated anally at time of injury without sustaining any evidence of injury and that victim had been penetrated vaginally); ***State v. Chalmers, 28 S.W.3d 913, 920, 926 (Tenn. 2000)***, *cert. denied*, ***532 U.S. 925 (2001)*** (adopting opinion of Court of Criminal Appeals) (photo of murder victim admissible to show victim was shot in the back and fell face down; also corroborates confession); State v. Watson, 227 S.W.3d 622, 650 (Tenn. Crim. App. 2006) (photograph of homicide victim showing blood splatter on the victim's chest was admissible to prove the close range of the fatal shots).

[372] *E.g.*, State v. Willis, 496 S.W.3d 653, 2016 Tenn. LEXIS 405 (Tenn. 2016) (where the State sought to establish premeditation in part by demonstrating the perpetrator's methodical, deliberate actions and exceptional cruelty, photograph of victim's decapitated head was relevant to premeditation); State v. Cool, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. 2018) (although additional photographs generally showed the injuries, the close-up images of the injuries were relevant to assisting the medical examiner explain to the juries the injuries with specificity); State v. Long, 2017 Tenn. Crim. App. LEXIS 368 (Tenn. Crim. App. 2017) (trial court carefully considered the probative value and prejudicial effect of each crime scene photo and ruled some admissible because they were relevant to the issues on trial, notwithstanding their gruesome and horrifying character; the autopsy photos were relevant to show the variety and severity of the victim's injuries and they assisted the jury in understanding the medical testimony, and defendant was not entitled to relief);State v. Brown, 756 S.W.2d 700 (Tenn. Crim. App. 1988) (in homicide case, extent of injuries bears upon issue of deliberation); State v. Norris, 874 S.W.2d 590 (Tenn. Crim. App. 1993) (photographs admissible to provide extent of injuries in aggravated assault case; State v. Griffis, 964 S.W.2d 577, 594 (Tenn. Crim. App. 1997) (in attempted murder case, photographs of multiple injuries to victim admissible on issue of whether defendants attempted to kill the victim); State v. Vigil, 65 S.W.3d 26 (Tenn. Crim. App. 2001) (photographs of assault victim admissible to show extent of injuries, permitting inference that victim feared defendant); State v. Carter, 114 S.W.3d 895 (Tenn. 2003) (in capital sentencing hearing, color photographs of victim admitted to establish that victims suffered torture, thus proving an aggravating circumstance); State v. Brock, 327 S.W.3d 645, 696 (Tenn. Crim. App. 2009)(color autopsy photo admissible on extent of injuries). State v. Larkin, 443 S.W.3d 751 (Tenn. Crim. App. 2013) (autopsy photo to show extent of injury); State v. Sweeney, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 232 (Tenn. Crim. App. Mar. 29, 2018) (trial court did not abuse its discretion by admitting a photograph of the victim's buttocks because it was not overly prejudicial for the jury to see the extent of the victim's stage one bed sore and to hear an explanation of the bed sore from the nurse who examined him; the photograph was probative to the determination of whether the victim was grossly neglected, and it was merely one piece in the

the crime scene,[374] the identity of the defendant soon after arrested,[375] to rebut a statement that the victim was shot only twice,[376] to rebut a defendant's testimony that injury occurred as result of self defense, accidental injury, or other cause unrelated to homicide,[376.1] and to corroborate a rape victim's statement that violence was

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proof that defendant committed gross neglect and neglect of an impaired adult); *State v. Morris, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 391 (Tenn. Crim. App. May 18, 2018)* (trial court did not err in admitting autopsy photographs of the minor victim, as they provided different views of the victim's various injuries and were used by the doctor in her testimony; the photographs were relevant to show that all of the victim's injuries were inflicted during the course of one continuing episode, no blood was visible in any of the photographs, and the trial court took deliberate steps to redact photographs showing the victim's genitalia or open eyes, to minimize prejudice).

[373] *E.g.*, *State v. McKinney, 603 S.W.2d 755, 758 (Tenn. Crim. App. 1980)*; *State v. Furlough, 797 S.W.2d 631, 646 (Tenn. Crim. App. 1990)* (photographs of homicide victim admitted to show concealment of body in case where defendant was charged with unlawful disposal of body); *State v. Caldwell, 80 S.W.3d 31, 40 (Tenn. Crim. App. 2002)* (photograph of homicide victim's body admissible to show secluded location of murder and whether victim's wallet was taken before or after he was killed).

[374] *State v. Richardson, 2017 Tenn. Crim. App. LEXIS 93 (Tenn. Crim. App. 2017)* (admitted photograph, which was relevant to show the victim's location inside the car after the shooting, was not overly gruesome, and the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice); *State v. Black, 745 S.W.2d 302 (Tenn. Crim. App. 1987)*; *State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992)* (photographs of murder victim's flashlight and of handcuff attached to his wrist relevant to show position of these items at crime scene); *State v. Bowers, 744 S.W.2d 588 (Tenn. Crim. App. 1987)* (photograph of homicide victim admitted to show crime scene); *State v. Evans, 838 S.W.2d 185, 194 (Tenn. 1992)*; *State v. Watson, 227 S.W.3d 622, 650 (Tenn. Crim. App. 2006)* (photograph of homicide victim at the crime scene was admissible to show where the body was found); *State v. Foust, 482 S.W.3d 20, 49 (Tenn. Crim. App. 2015)* (photo of arson victim's burned body admitted to show crime scene).

[375] *State v. Elliott, 703 S.W.2d 171, 176 (Tenn. Crim. App. 1985)*.

[376] *State v. Harbison, 704 S.W.2d 314 (Tenn. 1986)*. *See also* *State v. Dickerson, 885 S.W.2d 90 (Tenn. Crim. App. 1993)* (photos admitted to prove victim was shot twice); *State v. Webster, 81 S.W.3d 244 (Tenn. Crim. App. 2002)* (photographs of homicide victim admissible to show number and location of gunshot wounds; photos illustrate testimony of pathologist).

[376.1] *State v. Jones, 2017 Tenn. Crim. App. LEXIS 29 (Tenn. Crim. App. 2017)* (trial court did not abuse its discretion in admitting three photographs of the victim's charred corpse into evidence, as each was admitted during the testimony of an expert witness, who said that the photographs were useful in explaining his testimony and how he drew his conclusions that the victim had died from asphyxiation, not hanging as defendant claimed, and while the photographs were sad, they were not particularly graphic or horrific); *State v. Burrows, 2016 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. 2016)*, *app. denied*, *2016 Tenn. LEXIS 364 (Tenn. May 6, 2016)* (autopsy photo of victim, depicting the scalp retracted to expose the multiple areas of hemorrhaging beneath, was held admissible to negate defendant's claim that the victim died as the result of a single, accidental blow to the head when she fell; the photo, though graphic, was not so shocking or gruesome that the probative value of the photograph was substantially outweighed by the danger of unfair prejudice); *State v. Valentine, 2015 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. 2015)* (court properly admitted photographs of the victim's scars, because defendant was charged with attempted first degree murder and aggravated assault, and as such, the photographs were relevant to establish defendant's premeditation and intent, as well as to rebut defendant's claims that he shot the victim in self-defense, that he did not aim at the victim, and was shooting haphazardly at a car); *State v. Grant, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 294 (Tenn. Crim. App. Jan. 4, 2018)* (defendant was not entitled to plain error relief regarding the admission of the photograph of the 12-year-old victim that had been taken at the Child Advocacy Center on the morning of the shooting as it was relevant and the probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury because the photograph accurately depicted the child's age at the time of the crimes; it assisted the jury in evaluating the child's actions on the night of the shooting; and it helped the jury determine whether the child's mother, the murder victim, used lawful force against defendant in order to protect the child, which impacted the success of defendant's self-defense claim).

used.[377] Occasionally the finding of relevance is strained.[378] Other theories have also been advanced for

[377] State v. LaRue, 700 S.W.2d 574 (Tenn. Crim. App. 1985) (photos of bruises on arms and legs of rape victim).

[378] See *e.g.*, State v. Scott, 626 S.W.2d 25, 28 (Tenn. Crim. App. 1981) (a photograph of the deceased with members of his family was admitted to prove that the deceased was a "reasonable creature in being," and thus covered by Tennessee homicide law. Considering the other evidence, including the medical testimony, that must have been introduced in this murder case, it is doubtful that the photo had any real probative value on this issue, which was probably not even contested). *See* State v. Boyd, 797 S.W.2d 589, 594 (Tenn. 1990) (police photograph of front and side of capital defendant admitted into evidence with all identifying marks hidden; probative value was questionable since witness identified defendant in court; no error).

admitting photographs.[379]

The negative balance in photograph cases is generally provided by the argument that the photos would cause "unfair prejudice."[379.1] Usually this is because the photos contain gruesome or bloody portraits of a body or

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[379] See *e.g.*, State v. Thompson, 2017 Tenn. Crim. App. LEXIS 179 (Tenn. Crim. App. 2017) (autopsy photos were relevant, given that the multiple gunshot wounds belied defendant's argument that the victim was not aware of his impending death); State v. Pewitte, 2016 Tenn. Crim. App. LEXIS 853 (Tenn. Crim. App. 2016) (trial court did not abuse its discretion by admitting photographs of the victim's injuries at various stages of treatment and healing because the photographs were probative and helpful to the jury, and since the State was required to prove serious bodily injury, the photographs were relevant to prove the nature of the victim's injuries; evidence of disfigurement and impairment of function as depicted in the photographs was relevant to serious bodily injury as defined by statute); State v. Barnard, 899 S.W.2d 617 (Tenn. Crim. App. 1994) (photographs of homicide victim admitted to prove number of bruises and wounds, to aid testimony of medical examiner, and to corroborate witness's version of the killing); ***State v. Smith, 893 S.W.2d 908 (Tenn. 1994)*** (photographs of homicide victim in bathtub where she was found, during autopsy showing neck wound, and during pathologist's examination are admissible on heinous, atrocious, and cruel aggravating circumstances); State v. Porter, 885 S.W.2d 93 (Tenn. Crim. App. 1994) (position of shell casings in relation to body); State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994) (photograph of homicide victim's body admitted to illustrate the location of the body and the bullet hole); ***State v. Brimmer, 876 S.W.2d 75 (Tenn. 1994)*** (photograph of clothed homicide victim admitted to prove time of death); State v. Cazes, 875 S.W.2d 253 (Tenn. 1994) (photographs of homicide victim admitted to establish especially heinous, atrocious, or cruel aggravating circumstance; amount of force used against the victim; the identity of the perpetrator; and the cause of death); State v. Furlough, 797 S.W.2d 631, 646 (Tenn. Crim. App. 1990) (numerous photographs of homicide victim's body and scene of crime admitted to rebut self-defense claim); State v. McAfee, 784 S.W.2d 930, 933 (Tenn. Crim. App. 1989) (three photographs of homicide victim at scene of crime admitted to show premeditation in first degree murder case); ***State v. Wilcoxson, 772 S.W.2d 33, 37 (Tenn. 1989)*** (photographs of homicide victim admitted to show position of victim's body, circumstances of offense, and crime scene; clarified testimony of police officers as to what was found at crime scene); ***State v. Porterfield, 746 S.W.2d 441, 449–50 (Tenn. 1988)*** (photographs of homicide victim admitted at sentencing phase of capital case to prove aggravating factor that murder was especially heinous, atrocious or cruel); State v. Bowers, 744 S.W.2d 588 (Tenn. Crim. App. 1987) (photograph of homicide victim admitted to show there was no weapon on victim's person); State v. Schafer, 973 S.W.2d 269 (Tenn. Crim. App. 1997) (photograph of homicide victim admitted to illustrate expert witness's testimony); State v. Bivens, 967 S.W.2d 821, 824 (Tenn. Crim. App. 1996) (photographs of homicide victims at crime scene are admissible to establish position and location of bodies and nature of wounds inflicted; helpful to assess defendant's claim of provocation and self-defense); State v. Bush, 942 S.W.2d 489, 515 (Tenn. 1997) (photographs of homicide victim admissible to supplement testimony of medical examiner and investigating officer on issue of cause of death and to show brutality of attack and extent of force used against the victim); State v. Robinson, 930 S.W.2d 78, 84 (Tenn. Crim. App. 1995) (crime scene photographs of homicide victims admissible to corroborate defendant's detailed description of the crime); State v. Zirkle, 910 S.W.2d 874, 889 (Tenn. Crim. App. 1995) (in murder case, photograph of homicide victim admissible to prove intent and to corroborate a confession of codefendant); State v. Bordis, 905 S.W.2d 214, 226 (Tenn. Crim. App. 1995) (in murder case where child allegedly starved to death, photograph of victim admissible to prove what defendant knew or should have known about victim's condition before death); State v. Price, 46 S.W.3d 785, 817 (Tenn. Crim. App. 2000) (photographs of homicide victim help establish brutality of attack that is probative of elements of intent and premeditation); State v. Faulkner, 154 S.W.3d 48, 68 (Tenn. 2005) (photographs of homicide victim at autopsy admissible to prove premeditation and intent); State v. Cole, 155 S.W.3d 885, 911–913 (Tenn. 2005) (family photograph relevant to establish homicide victim's identity; autopsy photo of homicide victim's skull admissible to show premeditation since they show the wound was inflicted at close range and contradict self defense argument); State v. Robinson, 146 S.W.3d 469 (Tenn. 2004) (post-mortem photograph of victim's right forehead admissible to show premeditation, cause of death, victim's location and body position, and to illustrate the testimony of the government's witnesses); State v. Gann, 251 S.W.3d 446, 456 (Tenn. Crim. App. 2007) (photograph of defendant's shoes showing reddish-brown stains, possibly blood; though no blood testing was conducted, court upheld admission of photographs that had little probative value but were not unfairly prejudicial in view of other evidence in the case); State v. Thomas, 158 S.W.3d 361, 394 (Tenn. 2005) (affirming opinion of Court of Criminal Appeals) (photographs of homicide victim admissible to support testimony about victim's condition before death, to illustrate victim's fluid retention at time of death, and to refute defense argument that victim's death was result of his obesity); State v. Faulkner, 154 S.W.3d 48, 69 (Tenn. 2005) (affirming opinion of Court of Criminal Appeals) (photographs of homicide victim's injuries, showing repeated blows to the head, are admissible on issue of intent); State v. Cole, 155 S.W.3d 885, 912–913 (Tenn. 2005) (affirming opinion of Court of Criminal Appeals) (family photograph of homicide victim admissible to establish victim's identity; post-mortem photographs of homicide victim's scalp admissible to show gunshot was fired at close range and to establish premeditation; photographs supplemented the testimony of the medical examiner). State v. Pruitt, 415 S.W.3d 180, 240 (Tenn. 2013) (autopsy photos of homicide victim admitted to "supplement" medical examiner's testimony).

crime scene. The general rule seems to be that the more gruesome the photos, the more difficult it is to establish that their probative value is sufficient to justify admission.[380] Frequently these arguments fail as the courts find that the evidence has a high probative value and is not "inflammatory."[381] If the photos are black and white instead of color, the courts tend to find that the inflammatory impact is minimized.[382]

When photos are held to have been improperly admitted due to their graphic, gruesome, or inflammatory nature, the appellate court may still determine that their introduction was harmless error.[382.1]

Evidence Excluded. On occasion the photographic evidence is excluded under Rule 403.[383] In some of these decisions the courts have assessed the probative value by looking at what other evidence was, or could have

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[379.1] Various descriptions have been used to explain "unfair" prejudice in the context of photographs. The courts in Tennessee seem to have adopted the definition that prejudice becomes unfair "when the primary purpose of the evidence at issue is to elicit emotions of bias, sympathy, hatred, contempt, retribution, or horror." *See* State v. Jenkins, 2017 Tenn. Crim. App. LEXIS 293, 51, (Tenn. Crim. App. 2017) (*quoting* State v. Collins, 1998 Tenn. Crim. App. LEXIS 254, 19, (Tenn. Crim. App. 1998)). The courts also describe unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly … an emotional one"). *See* State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978); State v. Collins, 1998 Tenn. Crim. App. LEXIS 254, 19, (Tenn. Crim. App. 1998) (quoting *Banks*). One commentator has also described unfairly prejudice evidence as that which is designed to appeal to the sympathy, sense of horror, or instinct to punish. *See* Weinstein and M. Burger, Weinstein's Evidence Manual 6-20 to 6-21 ((Student ed. 1987).

[380] State v. Davidson, 509 S.W.3d 156 (Tenn. 2016); State v. Willis, 496 S.W.3d 653 (Tenn. 2016); State v. Melson, 638 S.W.2d 342, 365 (Tenn. 1982); State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978).

[381] *E.g.*, State v. Wilson, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. 2019) (although photograph contained some blood, it was properly characterized by the trial court as not unduly gruesome); State v. Simpson, 2019 Tenn. Crim. App. LEXIS 173 (Tenn. Crim. App. 2019) (five photographs were not overly gruesome where the wounds had been cleaned); State v. LaRue, 700 S.W.2d 574 (Tenn. Crim. App. 1985) (five photos of rape victim's bruised arms and legs are not gruesome or inflammatory; probative on issue of consent). Courts sometimes use a different adjective than "unduly," reaching the same result. *See* State v. Jenkins, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 110 (Tenn. Crim. App. Feb. 15, 2019) (only two autopsy photographs were admitted, and neither one was "particularly" gruesome or inflammatory).

[382] See *e.g.*, State v. Simon, 635 S.W.2d 498, 503 (Tenn. 1982); State v. McKinney, 603 S.W.2d 755, 758 (Tenn. Crim. App. 1980).

[382.1] *See e.g.,* State v. Thompson, 2017 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. 2017) (even though the trial court erred by admitting into evidence numerous graphic photographs of the victim's face during surgery, as the extent of the victim's injuries was clearly stated and not contested, the error was harmless because it was not more probable than not that the photos affected the jury's decision, given the conflicts in the testimony and the fact that the jury found defendant guilty of a lesser-included offense on one charge and acquitted him of the other); State v. Thompson, 2017 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. Apr. 27, 2017) (admission of inflammatory surgical photos, though improper, was harmless); State v. Fleming, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 218 (Tenn. Crim. App. Mar. 22, 2018) (probative value of autopsy photographs was outweighed by their prejudicial effect, given that whether the victims died as a result of the accident was not at issue, as defendant only challenged evidence of his intoxication; however, given the blood test results showing he had consumed alcohol and cocaine, the jury would have rendered the same verdict had the photographs been excluded, but had the question of his intoxication been less clear or the pictures more graphic, he would have been entitled to a new trial).

[383] *E.g.*, State v. Thompson, 2017 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. 2017) (trial court should have excluded surgical photos, since the exact method used to cause the injuries was not at issue and, therefore, photographs of the repair surgery were unnecessary to prove attack angles, position of the victim's body, etc.; in short, it was the damage done, not what was done to repair it, that was relevant); State v. Harper, 2015 Tenn. Crim. App. LEXIS 885 (Tenn. Crim. App. 2015) (appellate couft weighed "the inflammatory nature of the graphic photographs" against the probative value and held that the trial court had abused its discretion in admitting photographs into evidence); State v. Duncan, 698 S.W.2d 63, 69 (Tenn. 1985) (should have excluded photos of throat wound); State v. Young, 196 S.W.3d 85, 106 (Tenn. 2006) (excluding under Rule 403 photographs of homicide victim that had been shown to defendant to induce a confession; motive for confession was not a real issue in case and photos posed significant danger of unfair prejudice by appealing to the emotions of the jurors); State v. Foust, 482 S.W.3d 20, 49 (Tenn. Crim. App. 2015) (autopsy photos of arson victim).

been, introduced in lieu of the photographs.[384] Recent rulings have held, however, that photographs of a corpse—even autopsy photos—are not necessarily rendered inadmissible because they are cumulative, or because other evidence or descriptive words could be used.[384.1] Post-autopsy photos are especially troublesome since the autopsy may increase the prejudicial effect,[385] and lay jurors may lack the experience to draw correct inferences from the appearance of internal organs.[386] Judge (now Justice) Gary Wade assessed the state of the law and noted, "an increasing concern that courts are becoming too liberal in their admission of inflammatory autopsy photographs."[387]

Adequate Record. A party seeking to preserve the issue that the unfair prejudice of photographs was compounded by the method of displaying them to the jury must ensure that the record reflects the necessary information. In *State v. Price*,[388] for example, the defendant complained that gruesome photos of a homicide victim were unfairly prejudicial because, in part, of the manner in which they were shown to the jury. The photos were passed to the jury, shown on a television monitor, and displayed during the state's closing argument. The Court of Criminal Appeals, however, found the defendant had not made a sufficient record of "how the photographs were used, either during the testimony of the state's witnesses or during the state's closing argument."[389] Counsel should have described, on the record, what occurred.

[10] Other Illustrations

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[384] *E.g.*, *State v. Duncan, 698 S.W.2d 63 (Tenn. 1985)* (photos of throat wound should have been excluded because of prior detailed testimony about wound by medical examiner); *State v. Banks, 564 S.W.2d 947 (Tenn. 1978)* (photo may be excluded if it adds nothing to testimonial description of injuries); *Gladson v. State, 577 S.W.2d 686 (Tenn. Crim. App. 1978)* (two slides of victim's cranial bones and brain should have been excluded; defendant offered to stipulate cause of death and other photos were admitted); *State v. Norris, 874 S.W.2d 590 (Tenn. Crim. App. 1993)* (photographs of assault victim's head injuries, taken in the emergency room, were admissible to prove extent of injuries; trial judge said he would have excluded the photographs if defendant had stipulated to serious bodily injury; defendant refused to so stipulate, but said that he would not contest that the victim suffered serious bodily injury); *State v. Collins, 986 S.W.2d 13 (Tenn. Crim. App. 1998)* (six photographs of deceased baby should have been excluded at murder trial since medical testimony established virtually all the facts that the photos were offered to prove). *State v. Adams, 405 S.W.3d 641, 657–658 (Tenn. 2013)* (portrait-style photographs of homicide victim should have been excluded as proof victim was a human being because this issue was not disputed at trial and other photos proved this anyway).

[384.1] *See* *State v. Willis, 496 S.W.3d 653 (Tenn. 2016)*; *State v. Jenkins, 2017 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. 2017)*; *State v. Cobbins, 2014 Tenn. Crim. App. LEXIS 886 (Tenn. Crim. App. Sept. 2014)*; *State v. Grasty, 2013 Tenn. Crim. App. LEXIS 320 (Tenn. Crim. App. 2013)*.

[385] *See* ***State v. McCall, 698 S.W.2d 643 (Tenn. Crim. App. 1985)*** (photos during or after autopsy are most often condemned, but here autopsy photos were less inflammatory than pre-autopsy photos); *Gladson v. State, 577 S.W.2d 686 (Tenn. Crim. App. 1978)* (error to admit two slides of murder victim's head after autopsy; one photo showed victim "scalped" to reveal cranial bone; other photo was view of victim's brain); *State v. Smith, 868 S.W.2d 561 (Tenn. 1993)* (color photographs taken at morgue, showing wounds after bodies of victims were cleaned, were admissible to illustrate the testimony of the medical examiner; also proved premeditation, malice, and intent).

[386] *State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978)*. *Cf.* *Boyd v. Hicks, 774 S.W.2d 622, 629 (Tenn. Ct. App. 1989)* (photographs of microscopic view of trachea portion of the deceased inadmissible in medical malpractice action; photos highly technical and subject to contradictory interpretation by experts; unlikely that photographs would have helped jury).

[387] *State v. Collins, 986 S.W.2d 13, 21 (Tenn. Crim. App. 1998)*.

[388] *46 S.W.3d 785, 817 (Tenn. Crim. App. 2000)*.

[389] *Id.*

Rule 403 is a general rule, applicable to virtually every type of evidence. It can be used to challenge such evidence as a newspaper article,[390] a witness's statement,[391] scars on a victim's body,[392] or a skull.[393] Tennessee cases contain many other illustrations of the use of Rule 403.[394]

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[390] *See* Emerson v. Garner, 732 S.W.2d 613, 617 (Tenn. Ct. App. 1987).

[391] *Cf.* State v. Venable, 606 S.W.2d 298 (Tenn. Crim. App. 1980) (criminal defendant unsuccessfully argued that Rule 403 should exclude statement of witness; evidence admitted to prove malice and rebut self-defense).

[392] State v. Copenny, 888 S.W.2d 450 (Tenn. Crim. App. 1993). *But see* State v. Hill, 885 S.W.2d 357 (Tenn. Crim. App. 1994) (no error to permit jury to examine scars on victim to determine location of wounds).

[393] *Cf.* State v. Morris, 641 S.W.2d 883 (Tenn. 1982) (actual skull admitted to assist expert in demonstrating injuries to victim). *See also* State v. Cazes, 875 S.W.2d 253 (Tenn. 1994) (victim's cleaned and reconstructed skull is admissible to illustrate forensic expert's testimony regarding injury and evidence of "signature" or identification of the murder weapon); State v. Pike, 978 S.W.2d 904, 925 (Tenn. 1998) (adopting opinion of Tennessee Court of Criminal Appeals) (victim's skull admitted in evidence to illustrate medical examiner's testimony concerning what had occurred to the victim, the amount of force applied, and the type of weapon used to inflict the head injuries); State v. Robinson 146 S.W.3d, 469 (Tenn. 2004) (victim's cleaned and reconstructed skull admissible to illustrate pathologist's testimony).

[394] See *e.g.*, State v. Oody, 823 S.W.2d 554 (Tenn. Crim. App. 1991) (Rule 403 objection unsuccessful in barring admissibility of ax found near homicide victim's body which was identified as possibly having inflicted some of the fatal blows; no proof defendant had any connection with the ax); State v. Burns, 979 S.W.2d 276, 282 (Tenn. 1998) (Rule 403 applies to victim impact evidence during penalty phase of murder trial); State v. Nesbit, 978 S.W.2d 872, 892 (Tenn. 1998) (mandating jury instruction to assist jury in assessing victim impact evidence in capital case); State v. Jefferson, 938 S.W.2d 1 (Tenn. Crim. App. 1996) (unsuccessful 403 challenge to exhibition of rape victim's scars; were relevant to establish the use of force and to bolster the victim's credibility in that it provides a motive for her to identify the man who raped her; record did not indicate how the scars appeared at trial, therefore making it impossible for appellate court to assess danger of unfair prejudice); State v. Taylor, 240 S.W.3d 789, 795 (Tenn. 2007) (videotape of defendant wearing jail uniform and conversing with cell mate was not excluded under Rule 403 because it was very relevant to the interaction of the defendant and the cell mate who testified against the accused; jury had already been told the defendant was in jail when he met the cell mate, so there was minimal prejudicial risk); State v. Gann, 251 S.W.3d 446, 456 (Tenn. Crim. App. 2007) (photographs of defendant's shoes containing reddish-brown stains were admissible over Rule 403 objection; stains had not been tested to determine whether they were blood; though "not particularly probative" the stained shoes were not unfairly prejudicial in light of the other evidence).

§ 4.04 Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

[1] Text of Rule

Rule 404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same or, if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.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. The conditions which must be satisfied before allowing such evidence are:

(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; and

(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Advisory Commission Comment:

Part (a) has always been the law in Tennessee for criminal prosecutions.

In civil actions, Tennessee is one of a minority of jurisdictions admitting character evidence in some situations to prove circumstantial conduct involving "moral turpitude." *Spears & Solomon v. International Insurance Co., 60 Tenn. 370 (1872)*. The proposed rule would change that

minority position; character would be inadmissible circumstantially in all civil cases. Of course, if character is directly at issue in a civil action, such as in a defamation action, character evidence necessarily is relevant and admissible under Rule 405(b).

The Commission drafted Part (b) in accord with the Supreme Court's pronouncements in *State v. Parton, 694 S.W.2d 299 (Tenn. 1985)*. There the Court established precise procedures to emphasize that evidence of other crimes should usually be excluded. In the exceptional case where another crime is arguably relevant to an issue other than the accused's character—issues such as identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake—the trial judge must first excuse the jury. The judge must decide what material issue other than character forms a proper basis for relevancy. If the objecting party requests, the trial judge must state on the record the issue, the ruling, and the reason for ruling the evidence admissible. Finally, the judge must always weigh in the balance probative value and unfair prejudice. If the danger of unfair prejudice outweighs the probative value, the court should exclude the evidence even though it bears on a material issue aside from character. Finally, according to Parton, the trial judge must find that the evidence is "clear and convincing" that the defendant committed another crime.

1991 Advisory Commission Comment:

The character of the victim of a sex crime is not governed by Rule 404(a)(2) but rather by T. R. EVID. 412.

2003 Advisory Commission Comment:

The third condition for admitting other crimes, clear and convincing proof, has been required by case law before and after adoption of the Rules of Evidence. This principle was first enunciated in *Wrather v. State, 179 Tenn. 666 (1943)*, reversing a mother's conviction for murdering her adult son by arsenic poisoning. Evidence that she killed her father-in-law and brother-in-law with arsenic was not clear and convincing. The Supreme Court again approved this standard in *State v. Parton, 694 S.W.2d 299 (Tenn. 1985)*.

2005 Advisory Commission Comment:

The word "person" in Rule 404(b) has been construed to refer solely to the defendant in a criminal prosecution. *State v. Stevens, 78 S.W.3d 817 (Tenn. 2002)*.

2009 Advisory Commission Comment:

If the accused attacks the character of the alleged victim, amended Rule 404(a)(1) allows the prosecution to prove the accused's character for the same trait. This is an additional way the accused "opens the door" to character evidence.

[2] Character Evidence: Background and Overview

Evidence of a person's character can be helpful to a trier of fact. If someone has the character "of a thief," the trier of fact could use this to determine whether the person shoplifted on a certain afternoon. While it is difficult to define "character," one often-cited definition is "a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness."[395] Character must be distinguished from reputation, which is a community's evaluation of a person. Sometimes reputation deals with character. For example, a person may have the reputation of being an honest person or of being a thief. Reputation evidence is one way to prove a person's character, but there are other ways as well.[396]

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[395] MCCORMICK ON EVIDENCE 322 (6th ed. 2006).

[396] *See below §§ 4.05[2],[4]*.

Historical Reluctance to Admit Character Evidence. American evidence law has traditionally been ambivalent about admitting evidence of a person's character. On the one hand, character is sometimes an element to be proven or at least a most important facet of impeachment. On the other hand, it is widely recognized that character evidence can be unnecessarily embarrassing, time consuming, given inappropriate weight by the trier of fact, and subject the person to the possibility the jury will punish for past misdeeds rather than for the acts at issue in the instant case. Because of these competing concerns, the rules of evidence have struck a compromise with regard to character evidence. Sometimes the evidence is admitted; sometimes it is not. Special procedures are used in many jurisdictions, including TennesSee to provide an unusually thorough screening of character evidence before it is admitted in a trial.

The Tennessee Rules of Evidence reflect this ambivalence. Rules 404 and 405, in combination with several other rules discussed below, provide a structure for the admission of character evidence in some circumstances. In general terms, Rule 404 describes when character and character-like evidence is admissible, but does not state the form that proof can take. Rule 405 complements Rule 404 by indicating, in most situations, the methods of proving a person's character when such proof is authorized by Rule 404.

[3] General Rule: Character Evidence Inadmissible as Circumstantial Evidence of Action in Conformity with Character

Rule 404(a), which, when drafted, was virtually identical with Federal Rule 404(a) then in effect, states the general principle that in civil and criminal cases, evidence of a person's character or trait of character is not admissible in most situations to prove the person acted in accordance with that character at a particular time. To put it more simply, character evidence cannot be used to prove that a person did a certain act because the person had a propensity to commit it.[397] This means that a plaintiff in a tort case cannot prove that the defendant was a careless person in order to prove the defendant was negligent at the time of an automobile accident. Proof that the defendant was a careless person would be viewed as character evidence and barred by Rule 404(a).

It should be clear from the above example that character evidence covered by Rule 404(a) is properly characterized as circumstantial proof because it requires the trier of fact to rely on a number of inferences before the character proof helps resolve a factual issue. Thus, proof that X is a careless person is circumstantial evidence that X was negligent when X's car collided with Y's car.

Rule 404(a) prevents character evidence from being introduced as circumstantial evidence to prove action in conformity with character in many cases, but does not act as a total bar. As described below, there are a number of exceptions in which character or similar evidence is admissible for a limited purpose. It should be noted, however, that many of the exceptions apply only to criminal cases, and even these exceptions are narrowly drawn to prevent the prosecution from using character evidence in its case-in-chief in many circumstances. A Tennessee judge accurately summarized Tennessee law when he wrote, "any testimony of

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[397] See *e.g.*, *State v. Adkisson, 899 S.W.2d 626 (Tenn. Crim. App. 1994)* (in drug case, prosecution cannot ask defendant's wife whether she has ever known her husband to be involved in drug dealing; propensity proof inadmissible); *Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 907–08 (Tenn. 1996)* (in negligent entrustment case, defendant should not be permitted to prove that the truck driver was conscientious in the care and maintenance of his truck; this was inadmissible propensity proof that driver was a careful man; defendant also should not have been permitted to prove driver had recently avoided an accident; this was inadmissible character proof he was a careful person, though there is a hint that this evidence could have been used to counter proof of bad eyesight had proper limiting jury instruction been given); *State v. Bordis, 905 S.W.2d 214 (Tenn. Crim. App. 1995)* (in murder case stemming from starved infant, state was barred from using character evidence about defendant's lifestyle and sexual exploits; was propensity proof forbidden by Rule 404(a)); *State v. Clark, 452 S.W.3d 268 (Tenn. 2014)* (propensity evidence closely scrutinized in child rape case; defendant's exposure to pornography inadmissible propensity evidence).

prior bad acts by a defendant, when used as substantive evidence of guilt of the crime on trial, is not usually permissible.[398] The use of character evidence in civil cases is even more severely limited.[399]

[4] Exception: Character of Criminal Accused

[a] In General

One important exception to the general rule barring character evidence is provided by Tennessee Rule 404(a)(1), which permits the accused in a criminal case to "open the door" by introducing evidence of his or her own *pertinent* character trait or a character trait of the crime victim. Obviously, this proof will stress positive facets of the defendant's character and negative aspects of the victim's character. Until the defendant takes this step, the government is barred from introducing evidence of the defendant's bad character to prove the defendant acted in conformity with that character.[400]

The underlying theory behind the rule is that negative character evidence is too prejudicial to be used routinely by the prosecution. However, the theory continues, if the defendant wants to have the trier of fact consider the defendant's character in determining whether the defendant did a certain act, courts should permit this in order to allow the defense to put on its best case.[401] Once the accused puts his or her character in issue by presenting this evidence, the prosecution is free to offer relevant character evidence to rebut the accused's proof. If the prosecution were denied the right to counter the defendant's character evidence, the trier of fact would be given a one-sided view of the offender's character.

[b] Pertinent Character Trait

Evidence under Rule 404(a)(1) is limited to proof of a *pertinent* character trait. What is pertinent will vary according to the nature of the case. In an embezzlement case, for example, the trait of honesty is clearly pertinent on the issue whether the accused falsified business records, but the traits of violence or kindness are probably not pertinent. Sometimes the pertinent character trait is quite general. In a federal drug possession case, defendant's character as a "law-abiding person" was deemed pertinent.[402]

The rule that the circumstantial character evidence must be "pertinent" limits the accused and the prosecution in different ways. While the accused is permitted to offer character evidence that is pertinent to the charges, the prosecution can only offer proof that rebuts the pertinent character trait the accused has offered character evidence to prove. In other words, the defense can determine the focus of the prosecution's character proof by limiting the focus of its own character proof.

[c] Opening the Door

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[398] *State v. Jones, 15 S.W.3d 880, 894 (Tenn. Crim. App. 1994)*.

[399] Rule 404(a)'s limit on character evidence in a civil case rejects older Tennessee authorities permitting moral character proof if the plaintiff's good character is challenged by the defense. *See* *Spears & Solomon v. International Ins. Co., 60 Tenn. 370 (1872)*.

[400] *See* *Tenn. R. Evid. 404(a)(1)*; FED. *R. EVID. 404(a)(1)*.

This provision expands the character evidence the prosecution may introduce in a federal criminal case.

[401] "… [t]he accused deserves the benefit of all reasonable doubts and that good character may produce a reasonable doubt." STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 1 FEDERAL RULES OF EVIDENCE MANUAL 404–10 (9th ed. 2006). Obviously, Rule 404(a)(1) rejects older Tennessee decisions holding that the defendant can offer character evidence only in doubtful cases. *See* Roman v. State, 1 Tenn. Cases (Shannon) 470, 471–72 (1875) (rejecting view that defense character evidence is admissible only in doubtful cases).

[402] *United States v. Yarbrough, 527 F.3d 1092 (10th Cir. 2008)*. *But see* *Nash v. State, 167 Tenn. 288, 69 S.W.2d 235 (1934)* (general character evidence inadmissible in statutory rape prosecution; must relate to character for peace and morals).

Character Witnesses. The defense can open the door by the use of character witnesses who testify about a pertinent character trait of either the defendant or victim.[403] Usually the defense will call its own character witnesses, but on rare occasions the defendant may open the door to character proof by cross-examining prosecution witnesses about the defendant's good character. Sometimes the defense may be surprised that its witness has opened the door.[403.1] In *State v. Patton,*[404] for example, the defendant unsuccessfully raised an insanity defense in his murder trial. A defense psychiatrist, testifying that the accused had amnesia about the homicide, stated that the accused could not remember things "which were foreign to his nature." The Tennessee Supreme Court held that this testimony amounted to proof that violent acts were foreign to the defendant's nature.[405] This opened the door to the prosecutor's cross-examination of the defendant about prior specific acts of violence to prove that such acts were not foreign to his nature.

Another example is *State v. Nichols*,[406] a capital case involving a rape-murder committed by a defendant with five prior rape convictions. The trial court admitted proof of an earlier assault conviction to counter defense testimony that the homicide was inconsistent with the defendant's normally placid, peaceful behavior. Although the Tennessee Supreme Court upheld admission of the evidence under Rule 404(b), perhaps a more accurate rationale was that the evidence constituted a specific act admissible on cross-examination under Rule 405(a) to counter character evidence admissible under Rule 404(a).

In State v. Mendez,[406.1] where the defendant was on trial for child rape, the defendant's wife was called to testify as a character witness and stated that the defendant was "incapable" of committing the crimes. On cross examination, the trial court allowed the prosecutor to ask her if she was aware of "a previous allegation of rape" against defendant made "by another" 13-year-old. The defense objected, and the jury-out hearing revealed that the other rape allegation had arisen after the defendant had been charged. On appeal, the Court of Criminal Appeals held that questions about the other rape constituted error under Rule 405 and that the error was not harmless, because the only evidence of defendant's guilt was the victim's testimony, and the trial court failed to instruct the jury that the specific acts of conduct were admitted for the limited purpose of evaluating the credibility of the character witness. Consequently, defendant's guilt "hinged on the jury's assessment of the credibility" of the victim and the defendant, which "more probably than not, made it easier for the jury to disbelieve" the defendant."[406.2]

The *Mendez* court was particularly concerned that reports of the other rape allegation had arisen *after* the defendant was charged with the crime he was currently facing.[406.3] In such cases, the court held that the

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[403] *State v. Phipps, 883 S.W.2d 138, 153 (Tenn. Crim. App. 1994)* (character of accused).

[403.1] See *State v. Mendez, 2019 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. 2019)* (a defense witness's testimony can raise the issue of a pertinent character trait of the defendant "even when the defense may be surprised that its witness has opened the door") (*quoting* Neil P. Cohen, et al., *Tennessee Law of Evidence, § 4.04[4][c]* (6th ed. 2011).

[404] *593 S.W.2d 913 (Tenn. 1979)*.

[405] *Id.*

[406] *877 S.W.2d 722 (Tenn. 1994)*.

[406.1] *State v. Mendez, 2019 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. 2019)*.

[406.2] As the court explained, "This danger is particularly acute where the character or credibility defect is one that garners the understandable public revulsion that is directed by the public towards sexually exploitative acts towards children." *Id. at *21*.

[406.3] "[R]eports of specific instances of conduct which do not arise until *after a crime has been committed* are inherently suspect and may not form the basis for inquiry under Rule 405 [emphasis added]." *Id.*

State must offer proof at the jury-out hearing showing that the specific instance of other conduct was *reported before* the charged crime occurred.[406.4]

Defendant's Testimony. The accused can also open the door by testifying personally about the pertinent trait. However, if the defendant does take the stand and testifies about his or her character, the defendant not only lets the prosecution introduce its own character evidence on the pertinent trait, the accused can also be impeached using the normal techniques. These include an attack on the witness's character for truthfulness.[407] If, on the other hand, the accused takes the stand and does not testify about character, the state can impeach by using evidence of character for truthfulness, Rule 608, but cannot present character proof to show the defendant acted in conformity with the pertinent character trait. In other words, the criminal accused does not "open the door" under Rule 404(a)(1) simply by taking the stand.[408] The door is also not opened simply by remarks in an opening statement, which is not evidence.[409]

Evidence of Victim's Character. Another way the accused opens the door to evidence about his or her own character is by offering evidence of a pertinent character trait of the alleged *victim*. Tennessee Evidence Rule 404(a)(1) provides that, if such character evidence of a victim is admitted, the prosecution may present evidence of the same character trait of the *accused*. For example, if the defense in an assault case offers a witness to testify that the victim is a violent person, under Rule 404(a)(1), this opens the door for the prosecution to prove that the defendant has the character trait of being a violent person. This possibility means that the defense must be careful in attacking the victim's character to avoid admitting otherwise inadmissible evidence of the defendant's own character.[409.1]

Methods of Proving Character. According to Rule 405(a), the defendant's proof under Rule 404(a)(1) is limited to reputation and opinion evidence. The prosecution on cross-examination can use specific instances of conduct.

[5] Exception: Character of Victim

[a] In General

Sometimes the accused seeks to introduce character evidence of the victim of the crime. There are a number of theories that can support this use.

[b] Self-defense: Reason for Fear

If self-defense is raised in a case involving a homicide or other violent crime, the reasonableness of the accused's fear may be a critical issue. Accordingly, Tennessee evidence law correctly permits the defendant to offer proof that the defendant knew of the victim's reputation for violence. The accused may testify personally about what he or she has been told of the victim's recent violent acts against others.[410] In

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[406.4] *Id.*

[407] *See* Rules 404(a)(3) *above, and* 607, 608, 609 *below.*

[408] *See* State v. Patton, 593 S.W.2d 913 (Tenn. 1979).

[409] *See* State v. Copenny, 888 S.W.2d 450 (Tenn. Crim. App. 1993) (defense counsel's opening argument alluded to victim as first aggressor but offered no proof on the issue; door not opened).

[409.1] *See* State v. Baker, 2017 Tenn. Crim. App. LEXIS 321 (Crim. App. Apr. 28, 2017) (defendant's prior conviction for aggravated assault inadmissible where his testimony regarding his fear of the victim and brief reference to the previous altercations were not intended to show the defendant's or the victim's character for particular traits, see Tenn. R. Evid. 404(a)(1), 404(a)(2); his testimony did not show that the defendant was generally peaceful or that the victim acted in conformity with any alleged propensity for domestic assault or violence, but instead, was introduced to establish defendant's state of mind at the time of the altercation).

some circumstances, a third party may testify about what he or she told the defendant about the victim's violent history.[411]

Since the accused is proving his or her own fear rather than an action by the victim, Rule 404(a), which deals with character evidence to prove action in conformity with that character, does not apply.[411.1] If self-defense is raised by the defense, the prosecution can introduce evidence of the victim's good reputation to prove the defendant was not placed in fear.[411.2]

[c] Self-defense: Substantive Evidence of Victim's Character

If self-defense is raised by the defense in a criminal case, Rule 404(a)(2) permits the defendant to offer proof of the victim's "pertinent" character for violent behavior to help establish that the victim was the aggressor. Under Rule 405(a), this proof may be by either reputation or opinion evidence. Specific acts are admissible only on cross-examination. This evidence is substantive evidence.

[d] Self-defense: Corroboration of Defendant's Claim of Self-defense

Victim's Prior Violent Acts. Since the adoption of the Tennessee Rules of Evidence, some appellate decisions have held that if the issue of who was the first aggressor is raised by the evidence (as opposed to by the arguments of counsel), proof of the victim's prior violent acts is admissible to corroborate the defendant's claim of self-defense.[412] These prior acts may have involved the victim's assaults on people other than the defendant. It must be stressed that this use of the victim's prior acts is not covered by Rule 404(a)(2), which deals with substantive evidence rather than corroborative proof.

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[410] *Williams v. State, 565 S.W.2d 503 (Tenn. 1978)*. *Williams,* decided before the Tennessee Rules of Evidence were promulgated, holds that the accused must be the witness who presents this information, but it is doubtful that this interpretation is correct under the Tennessee Rules of Evidence. *See also* *State v. Furlough, 797 S.W.2d 631, 648 (Tenn. Crim. App. 1990)* (*citing Williams*, the defendant may testify as to his or her knowledge of recent acts of violence by the victim against others; proof limited to what the defendant was actually told by others).

[411] In *State v. Hill, 885 S.W.2d 357, 361 n.1 (Tenn. Crim. App. 1994)*, the court relied on *Williams v. State, 565 S.W.2d 503 (Tenn. 1978)*, for the following rules:

> When an accused seeks to establish his apprehension or fear of being seriously injured by the victim based upon the victim's prior convictions and bad acts involving violence, the accused, and the accused alone, may testify concerning his or her knowledge of the victim's recent violent conduct. However, if the state introduces evidence to establish that the accused was not aware of this information prior to the incident, the accused may then introduce the testimony of a third party to establish what that party told the accused regarding the victim's violent acts. In each instance the evidence must be limited to what the accused actually perceived through his or her senses or what a third person actually told the accused.

[411.1] *See, e.g.*, *Gayden v. State, 2019 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. Apr. 23, 2019)* (there is a distinction between prior acts of violence by the victim to corroborate the defense theory that the victim was the first aggressor under Rule 404(a) versus prior acts used to establish the defendant's fear of the victim; when a defendant's fear of the victim is relevant, the defendant can testify about his knowledge of the victim's violent conduct and Rule 404(a) is inapplicable).

[411.2] The defense must have proffered evidence in support of the self-defense theory before the prosecution can introduce reputation evidence. Thus, where the defense attorney merely referred to self-defense in his opening statement, but no evidence had been admitted yet suggesting that the victim was the first aggressor, the trial court erred by allowing the State to admit evidence of the victim's character for peacefulness. *State v. Toles, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019)* (error held harmless).

[412] See *e.g.*, *State v. Ruane, 912 S.W.2d 766, 780 (Tenn. Crim. App. 1995)*; *State v. Hill, 885 S.W.2d 357, 362 (Tenn. Crim. App. 1994)*. *Cf.* *State v. Copenny, 888 S.W.2d 450, 454 (Tenn. Crim. App. 1993)* (victim's prior criminal convictions and pending drug charges were irrelevant to the issue that the victim carried a gun, citing only Rules 401 and 403; fact that victim carried a bullet in his body from a previous wound and had body scars were relevant on the issue of propensity for violence, but excluded under Rule 403). The leading pre-rule case is *State v. Furlough, 797 S.W.2d 631 (Tenn. Crim. App. 1990)*.

Since Rule 404(a)(2) does not apply to the corroborative use of evidence of the victim's prior violent acts, Rules 405(a) and (b) also do not appear to apply. This means that the usual rule that specific acts may be used only on cross-examination apparently is not applicable. Accordingly, in a criminal case where there is some evidence suggesting that the victim was the first aggressor, the defendant may offer proof of the victim's prior violent acts with third persons.[412.1] Such proof may be presented on direct examination.

A good illustration is *State v. Ruane*,[413] a homicide case where the defendant shot the victim in a bar. The defendant testified that the victim had assaulted him on several prior occasions and that he shot the victim because he thought the victim was "coming at him." As proof that the victim was the first aggressor, the defendant called witnesses who testified on direct examination that six years earlier the victim had assaulted a third person in a bar. The Tennessee Court of Criminal Appeals held that the prior specific act—the assault on the third person—should have been admitted to corroborate the defendant's claim that the victim was the first aggressor. The opinion also suggested that such proof could occur on direct examination since it was not limited by Rule 404(a)(2), but this conflicts with another contemporaneous decision.[414]

Victim's Threats. A related issue is the admissibility of evidence that the victim threatened the defendant, who then raises self-defense in trial. As noted above,[415] if the defendant was aware of the threat, the threat is admissible on the issue of whether the defendant had the apprehension of imminent bodily injury. If the defendant were not aware of the threat or the victim's violent character, the threat may still be admissible under another line of Tennessee cases. In *State v. Saylor* the defendant was convicted of voluntary manslaughter.[416] At trial the defendant sought to introduce the testimony of a witness who would testify that she heard the homicide victim threaten to kill the defendant. Although this threat was never communicated to the defendant, the Tennessee Supreme Court held that the evidence should have been admitted to help prove the state of mind of the deceased victim. This mental state is relevant to explain the conduct of the deceased in establishing who was the first aggressor.

If self-defense is not raised, the victim's behavior may be irrelevant and inadmissible.[417]

[412.1] *White v. State, 2020 Tenn. Crim. App. LEXIS 61 (Crim. App. Feb. 3, 2020)*. Since the evidence cannot be used substantively, it is not controlled by *Tenn. R. Evid. 404(a)(2)* and *Tenn. R. Evid. 405*. Such evidence must still satisfy the balancing test set forth in *Tenn. R. Evid. 403*. Thus, before a trial court can admit evidence of a victim's prior violent acts to corroborate a defendant's claim that the victim was the first aggressor, the following requirements must be met: (1) the issue of self-defense must be raised by the proof and not simply by statements of counsel; (2) there must be a factual basis for the defendant's claim that the victim had first-aggressor tendencies; and (3) the probative value of the evidence must outweigh the danger of unfair prejudice. *Id., *23–24*. The fact that the victim had a conviction or arrest is, on its own, inadequate to corroborate allegations that a victim may have been the first aggressor; instead, the defendant must present "competent proof of the underlying facts of the alleged prior acts of aggression." *Id., *27* (evidence of first-aggressor tendencies was inadequate where the petitioner admitted the victim's criminal history along with supporting affidavits of complaint, but failed to provide any testimony explaining the underlying nature, circumstances, or outcome of the offenses); *Derek T. Payne v. State, 2010 Tenn. Crim. App. LEXIS 44, 2010 WL 161493 (Tenn. Crim. App. Jan. 15, 2010)* (evidence failed to support claim of a violent reputation or prior violent acts where the petitioner offered only a "Record of Arrest" showing that the victim was arrested for unlawful possession of a weapon and an affidavit of complaint showing facts leading to a misdemeanor conviction for harassment).

[413] *912 S.W.2d 766 (Tenn. Crim. App. 1995)*.

[414] This result seems to conflict with *State v. Hill, 885 S.W.2d 357, 362–63 (Tenn. Crim. App. 1994)*, where the Tennessee Court of Criminal Appeals suggested that when specific instances of conduct are admitted to corroborate the defendant's contention that the victim was the first aggressor, the evidence of the prior convictions and bad acts are only admissible on cross-examination of the victim.

[415] *See* § 404[5][b] *above*.

[416] *State v. Saylor, 117 S.W.3d 239 (Tenn. 2003)*. *See also* *State v. Butler, 626 S.W.2d 6 (Tenn. 1981)* (court admitted testimony that murder victim brandished a pistol and said she was going to get rid of the defendant one way or another; admissible on victim's state of mind and helpful to establish who was first aggressor).

[e] Victim of Sexual Assault

Because of the need to protect victims of sexual assault from irrelevant and embarrassing evidence about their sexual history, Tennessee and most other jurisdictions have enacted "rape shield" laws. These limit the admissible information about the assault victim. Rule 412 controls the admissibility of evidence of most sexual assault victim's sexual history.[418] Rule 412 supersedes Rule 404(a)(2) in cases covered by Rule 412.[419]

Civil Cases. In civil cases, the parameters involved in delving into the victim's sexual history are less clear. One malpractice statute is quite specific, however. Tennessee has a statute prohibiting sexual misconduct by a therapist or other mental health counselor on a patient.[420] Recognizing that such patients entrust their emotional and mental well-being to mental health professionals at a time when they are particularly vulnerable, and further recognizing that traditional malpractice law does not always provide an adequate remedy, the statute imposes liability on any therapist who is guilty of sexual misconduct.[421] The statute also contains a rape shield section, which makes the sexual history of the victim inadmissible in most cases arising under the statute. However, it further provides that, where the therapist and patient had engaged in a sexual relationship prior to the time their therapist-patient relationship began, their sexual activity is not proscribed conduct. Discovery of the victim's sexual history is not permissible except to determine when the sexual relationship began; any other evidence of the victim's sexual history is inadmissible.[422]

[f] Pertinent Character Trait of Victim to Prove Action in Conformity with Character

Another important exception is Rule 404(a)(2), an almost verbatim copy of Federal Rule 404(a)(2), which permits the criminally accused to "open the door" to the crime victim's character by offering evidence of a "pertinent trait" of the victim in order to prove the victim acted in conformity with that character.[422.1] The defendant can use reputation or opinion evidence, Rule 405(a). For example, in a barroom battery case where the accused claims self-defense, he or she can introduce evidence that the victim had a reputation for violent behavior when drunk as circumstantial proof that the victim was the aggressor at the bar. Once the defendant puts this character trait of the victim into evidence, the prosecution, under Rule 404(a)(2),

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[417] See *e.g.*, *State v. Taylor, 774 S.W.2d 163, 166 (Tenn. 1989)* (in capital homicide case, defendant not permitted to prove homicide victim had assaulted a third party, because self-defense was not raised as an issue in the capital case); *State v. Robinson, 971 S.W.2d 30, 39–40 (Tenn. Crim. App. 1997)* (defendant's failure to introduce evidence that victim was first aggressor made victim's reputation for violence irrelevant).

[418] Rule 412 replaced *Tenn. Code Ann. § 40-17-119*, the former rape shield law, which was repealed in 1991.

[419] *See below § 4.12[2]*. Rule 404(a)(2) makes Rule 404(a) inapplicable to sexual misbehavior situations governed by Rule 412.

[420] *Tenn. Code Ann. § 29-26-204* (2000).

[421] The statute of limitations is two years from injury or discovery, whichever is later, but no later than three years after the date of the last communication between therapist and patient. Where the sexual misconduct involves a minor, the statute of limitations is one year after the minor's eighteenth birthday, except where subsection (a) or (b) of the statute would provide for a longer time in which to bring a claim, in which case the provision that provides the longest time in which to bring a claim applies. Damages include recovery for economic losses, pain and suffering, wrongful death and punitive damages. *Tenn. Code Ann. §§ 29-26-208*, 209 (2000).

[422] *Tenn. Code Ann. § 29-26-207* (2000).

[422.1] *See State v. Baker, 2017 Tenn. Crim. App. LEXIS 321 (Crim. App. Apr. 28, 2017)* (purpose behind *Tenn. Rule Evid. 404(a)(2)* is to present evidence of a victim's prior bad act or character trait to show that the victim acted in conformity with the prior bad act at the time of the incident; defendant's direct testimony in attempted voluntary manslaughter and aggravated assault case did not "open door" to allow admission of his prior conviction for aggravated assault under Rule 404).

can offer evidence to rebut the defense proof about the victim's character. Under Rule 404(a)(1), the government can also introduce proof of the same character trait of the defendant.[423]

Homicide Cases—Self Defense. Rule 404(a)(2) establishes a special rule for evidence of a homicide victim's character when the defendant alleges the killing was in self-defense and the victim was the first aggressor.[423.1] In this small category of cases, whenever the accused introduces evidence that the victim was the first aggressor, the government may prove that the victim had a character trait for peacefulness.

The defense's proof, which triggers the prosecution's character evidence, need not be character proof itself. Any proof that the victim was the first aggressor will suffice. For example, if the defense calls an eyewitness who testifies that he or she saw the entire incident and watched the victim attack the defendant for no reason, the door is open under Rule 404(a)(2) for the prosecution to introduce proof that the victim had a character for truthfulness. Of course, the same door is open if a defense witness testifies the victim had a violent character.

In a Tennessee second degree murder case, the accused sought to prove self-defense by proving that the homicide victim had prior convictions for disorderly conduct.[424] The Tennessee Court of Criminal Appeals held that the evidence was inadmissible because the defendant did not prove that he knew of the deceased's prior violent acts. Although the Court of Criminal Appeals was correct in excluding the evidence, its reasoning is questionable. Rule 404(a)(2) permits proof of a victim's propensity for violence, irrespective of the accused's knowledge of that propensity, in order to establish that the victim was violent on a specific occasion.[424.1] According to Rule 405(a), however, this propensity proof can only be offered on direct examination in the form of reputation or opinion evidence. Specific acts may be brought up only on cross-examination. Thus, in the Court of Criminal Appeals decision, the prior specific acts of aggression would be inadmissible if offered on direct examination; they should have been admissible if proven during cross-examination.

[6] Exception: Impeachment

While Rule 404(a) provides a general ban on character evidence, a major exception is authorized by Rule 404(a)(3), a carbon copy of Federal Rule 404(a)(3). This subsection states that character evidence is admissible if authorized by Rules 607 (permitting a party to impeach its own witness), 608 (permitting impeachment by proof of character for truthfulness or untruthfulness), and 609 (permitting impeachment by proof of criminal conviction). These substantial exceptions, discussed more fully under the specific rules, have

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[423] *Tenn. R. Evid. 404(a)(1)*. *See above § 4.04[4][c]*. *See also State v. Land, S.W.3d , 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020)* (defendant's lengthy direct testimony regarding the victim's violent tendencies, including specific instances in which the victim was violent towards defendant and others, opened the door for the State to offer evidence of the same trait in the defendant under Rule 404(a)(1)); *State v. Baker, 2017 Tenn. Crim. App. LEXIS 321 (Crim. App. Apr. 28, 2017)* (because the defendant did not raise the issue of his character for peacefulness during direct testimony when he asserted the victim was the initial aggressor, admission of the defendant's previous conviction for aggravated assault pursuant to *Tenn. R. Evid. 404(a)(1)* was improper; defendant did not testify that he was generally peaceful or that the victim had a propensity for domestic assault or violence, but rather, that he was afraid during the present incident due to previous altercations with the victim).

[423.1] *See State v. Baker, 2017 Tenn. Crim. App. LEXIS 321 (Crim. App. Apr. 28, 2017)* (in prosecution for attempted voluntary manslaughter and aggravated assault where defendant testified that (1) he was afraid of the victim due to previous altercations, (2) he acted in self defense, and (3) the victim was the initial aggressor, the State was entitled to question the defendant about any previous altercations to which the defendant alluded during his direct examination, but admission of defendant's prior conviction for aggravated assault was improper under *Tenn. R. Evid. 404* and *Tenn. R. Evid. 609*).

[424] *State v. West, 825 S.W.2d 695, 697 (Tenn. Crim. App. 1992)*.

[424.1] Generally, this provision is used to present evidence of the victim's previous history of violence to show that the victim was the first aggressor. *State v. Baker, 2017 Tenn. Crim. App. LEXIS 321 (Crim. App. Apr. 28, 2017)* (citing Neil P. Cohen et al., *Tennessee Law of Evidence § 4.04[5][f]* (6th ed. 2011).

the effect of permitting character evidence to be introduced in virtually every civil and criminal case and stand in sharp contrast to Rule 404(a)'s general proscription against character evidence.[424.2] If character evidence is admitted solely to impeach, counsel may want to invoke Rule 105 and request limiting jury instructions.

[7] Other Crimes, Wrongs, Acts: In General

[a] Overview

The effect of Rule 404(a)'s general ban on character evidence is greatly diminished in criminal cases because of the principles embraced in Rule 404(b) as amended by statute, which permits other crimes, wrongs or acts of any individual, including a deceased victim, the defendant, or a third-party witness, to be introduced for purposes other than to prove character.[424.3] These acts may have resulted in a criminal conviction, or involved an uncharged crime, or even non-criminal behavior.[424.4] They even may have been expunged.[425] And they may be either prior to, contemporaneous with, or subsequent to the act at issue in the case.[426] Rule 404(b) is used frequently to admit evidence that a criminal accused did a harmful act other than the one at issue in the trial. This other act is admitted to prove such issues as motive, intent,

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[424.2] *See e.g.*, State v. Melton, 2018 Tenn. Crim. App. LEXIS 109 (Tenn. Crim. App. Feb. 16, 2018) (where defendant testified that he was not "into pornography" and attempted to limit his knowledge of pornography to that which he had seen on HBO and similar programming, the State was allowed to question the defendant about his possession of printed pornographic material); State v. Gwin, 2017 Tenn. Crim. App. LEXIS 402 (Tenn. Crim. App. 2017) (in an aggravated rape case, trial court did not err in ruling that defendant's prior sexual battery conviction, similar to that for which he was on trial, could be introduced under Rule 609 if he opened the door to its admissibility by raising defense of consent). *See also* §§ 6.07–6.09, below.

[424.3] Tennessee Rule of Evidence 404(b) was amended by statute, Tenn. Code Ann. § 24-7-125 (Supp. 2014). Evidence Rule 404(b) applied only to "a person" but the statute increased coverage in a criminal case to "any individual, including a deceased victim, the defendant, a witness, or any other third-party." According to the statute's legislative history, this change was designed to reduce evidence of a crime victim's prior acts. 2014 TENN. PUB. CHAP. 713. *See also* State v. Buckingham, 2018 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Aug. 20, 2018) (although Tenn. Code Ann. § 24-7-125 allows evidence of a victim's conduct to be admitted when the requirements of Tenn. R. Evid. 404(b) are met, trial court properly applied the procedural requirements of Rule 404(b) and found the evidence relating to victim's burglaries to be less than clear and convincing and, therefore, inadmissible).

[424.4] State v. Reid, 213 S.W.3d 792 (Tenn. 2006) (Rule 404(b) governs the admissibility of behavior constituting a "moral wrong"; possession of pornography is one such behavior, since members of society could perceive it as wrong). *See also* State v. Melton, 2019 Tenn. Crim. App. LEXIS 629 (Tenn. Crim. App. Oct. 7, 2019) (videos made by defendant depicting the victim swimming nude and changing clothes had "the potential to reflect upon defendant's character" and, thus, their admissibility was subject to Rule 404(b)); State v. Margaret L. Holt, 2012 Tenn. Crim. App. LEXIS 147, 2012 WL 826523 (Tenn. Crim. App. Mar. 13, 2012) (evidence that the defendant gave the minor a romantic kiss and invited the minor to spend the night, as well as testimony about the defendant's controlling behavior, were bad acts subject to Rule 404(b)).

[425] State v. Schindler, 986 S.W.2d 209 (Tenn. 1999).

[426] *Cf.* State v. Elkins, 102 S.W.3d 578 (Tenn. 2003) (acts admissible under Rule 404(b) on issue of intent may include acts subsequent to event at issue as long as they are probative of intent at time of event at issue). *See also* State v. Butler, 2016 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 2016) (defendant argued the bad acts were not "prior," as they occurred after the burglaries of the victim's apartment, but the court rejected this argument since Rule 404(b) allows "other crimes, wrongs, or acts," and is not limited to "prior" bad acts).

knowledge, absence of mistake or accident, common scheme or plan, identity, completion of the story, opportunity, and preparation.[427]

Evidence Rule 404(b) is used most frequently by the prosecution in a criminal case to prove another act of the accused, but in a criminal case by statute it now covers the acts of any individual, including a deceased victim.[428] The statute does not address how rule 404(b) applies in civil cases. Presumably case law,[429] which indicated 404(b) does not apply in civil cases, is still good law, meaning that Rule 401 would apply in civil cases. The Tennessee Supreme Court has been hesitant to accept legislative commands to admit evidence that is otherwise covered by Rule 404(b).[430]

Theory. The theory underlying Rule 404(b) is that the "other act" evidence is not banned by the rule barring character evidence because the other acts are not used to prove that a criminal accused acted in conformity with character.[430.1] In other words, the other act is not to prove the defendant's propensity to commit another act.[431] Rather the other acts are used for some non-character issue, such as intent,[431.1] motive,[431.2] common scheme or plan,[431.3] identity,[431.4] absence of mistake, or contextual background.[43.5].

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[427] Tennessee Rule 404(b) does not provide examples of the kinds of issues it covers. The Tennessee provision simply says that other crimes and the like may be admissible for "other purposes." Federal Rule 404(b), on the other hand, lists nine examples of issues which Rule 404(b) evidence could be used to prove. These include motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The lack of examples in Tennessee Rule 404(b) should not be read as suggesting an intent to have different results than achievable under Federal Rule 404(b). Rather, by deleting the examples listed in the federal rule, the Tennessee Advisory Commission intended to encourage lawyers and judges to use care in identifying the issues to be addressed by the Rule 404(b) evidence. There was some fear that by adopting the federal laundry list of examples, some Tennessee judges would, with too little reflection, rely on one of the listed categories instead of thinking carefully whether the category actually applied in the particular case. Regarding the scope of Rule 404(b) generally, see *State v. Little, 402 S.W.3d 202 (Tenn. 2013)* (evidence of other acts may be admissible for non-propensity purposes); *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)* (discussion of admissibility of "other act" evidence under Rule 404(b) when it is offered for the purpose of providing contextual background). Regarding intent, see *State v. Horton, 2018 Tenn. Crim. App. LEXIS 242 (Tenn. Crim. App. Mar. 29, 2018)* (Tennessee courts have accepted the use of evidence of a homicide defendant's threats or prior violent acts directed toward the homicide victim as a means of allowing the State the opportunity to establish intent, theorizing that 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; thus, violent 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).

[428] In *State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002)*, the Tennessee Supreme Court held that Rule 404(b) applied only to evidence reflecting on the character of the criminal accused; it did not apply to any other witness in a criminal case or to a civil case. *Tenn. Code Ann. § 24-7-125* (Supp. 2014), essentially restated Rule 404(b) but reversed *Stevens* by making it clear that in criminal cases the principles in Rule 404(b) applied to any individual (including a deceased victim), not just to the criminal accused.

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

[430] *See State v. Mallard, 40 S.W.3d 473 (Tenn. 2001)*.

[430.1] *State v. Little, 402 S.W.3d 202 (Tenn. 2013)* (evidence of other acts may be admissible for non-propensity purposes).

[431] *See e.g.*, *State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985)* (pre-rules decision).

[431.1] *See, e.g.*, *State v. Horton, 2018 Tenn. Crim. App. LEXIS 242 (Tenn. Crim. App. Mar. 29, 2018)* (Tennessee courts have accepted the use of evidence of a homicide defendant's threats or prior violent acts directed toward the homicide victim as a means of allowing the State the opportunity to establish intent, theorizing that 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; thus, violent 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).

Under this logic, Rule 404(b) is actually unnecessary. The same conclusions could be reached using general relevance principles embraced in Rule 401.[43.6]

Expansion of Ban on Propensity Evidence. The first sentence of Rule 404(b) essentially repeats the similar language at the first of Rule 404(a), both of which ban the use of character trait proof to show "action in conformity with the character trait." A Tennessee Supreme Court decision limited Rule 404(b) to proof of acts of the criminal accused; the acts of others were not covered by Rule 404(b).[431.7] To some, this may have suggested that character proof of people (such as crime victims) other than the criminal accused was

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[431.2] *See, e.g.*, State v. Ledbetter, 2020 Tenn. Crim. App. LEXIS 106 (Tenn. Crim. App. Feb. 20, 2020) (evidence of defendant's numerous sexual offenses against the victim, which occurred over three years and largely conformed to his sexual fetishes, were admissible to show motive, *i.e.*, sexual gratification).

[431.3] *See, e.g.,* State v. Ledbetter, 2020 Tenn. Crim. App. LEXIS 106 (Tenn. Crim. App. Feb. 20, 2020) (defendant's numerous sexual offenses involving the victim, which occurred in the same way and at the same location, continuing over three years, were not unduly prejudicial but were highly probative of defendant's concerted effort to abuse the victim over a period of years, thereby establishing a common scheme or plan); State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019) (where State's theory was that defendant was "criminally responsible" under Tenn. Code Ann. § 39-11-401(a), evidence that defendant breached confidential informant agreement by refusing to provide suspect's address was properly admitted by the trial court; the State's theory required evidence of the defendant's relationship with the suspect and his use of the suspect's assistance in committing the offenses, and thus, evidence that defendant helped the suspect avoid detection by breaching the agreement was admissible under Tenn. R. Evid. 404(b), because it was offered for a reason other than propensity, namely, the defendant's relationship to the suspect and his use of the suspect in carrying out the offense).

[431.4] State v. Lester, ___S.W.3d___, 2018 Tenn. Crim. App. LEXIS 889 (Tenn. Crim. App. 2018 (trial court did not abuse its discretion in allowing the State to introduce evidence of defendant's gang affiliation and rank over codefendant to help establish defendant's identity and to provide contextual background and a completion of the story because, while the planning and execution of the robbery might not have been in furtherance of a gang mission or to otherwise benefit the gang, the fact that the three people involved happened to all be members of the same gang explained why they would come together to commit the robbery; and codefendant's affiliation with defendant through the gang made it more likely that her identification of him was accurate).

[43.5] Contextual background evidence may be offered as an "other purpose" under Rule 404(b) only when exclusion of that evidence "would create a chronological or conceptual void in the presentation of the case" and such a 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 (Tenn. 2000); State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019). Accordingly, when the State seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the State must show that (1) the absence of the evidence would create a chronological or conceptual void in the state's presentation of its 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; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice. State v. Gilliland, 22 S.W.3d 266 (Tenn. 2000). *See also,* State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019) (evidence that defendant defendant had been incarcerated on a probation violation was properly admitted under Rule 404(b), since evidence was relevant as "contextual evidence" to explain why the defendant was wearing a GPS monitoring device and why he agreed to act as a confidential informant); State v. Ward, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. 2019) (referencing *Gilliland*; evidence of prior drug transactions was relevant to defendant's motive to shoot the victim, which in turn was probative of his criminal intent to commit attempted homicide; since State's theory of the case was that defendant was unhappy with two previous drug transactions he had with the victim, evidence of those transactions was necessary to avoid creating a chronological or conceptual void in the State's case).

[43.6] For instance, evidence is routinely found to be relevant under Rule 401 to establish an element of the crime charged, or the identity of the perpetrator, in which case it is admissible despite Rule 404(b). *See* State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019) (text messages from defendant's cell phone did not constitute inadmissible character evidence under Tenn. R. 404(a), but rather, was relevant and admissible under Tenn. R. Evid. 401; the messages demonstrated the defendant's intent to remove his GPS monitoring device and commit first-degree premeditated murder). *See also,* § 4.01-4.02.

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

not barred by Rule 404(b). To make clear that Rule 404(b)'s ban on character proof in criminal cases applies to anyone, including the crime victim, in 2014, the Tennessee legislature enacted a statute that essentially applied Rule 404(b) in its entirety to any individual.[431.8] The bottom line is that under this statute, character proof may not be introduced under Rule 404(b) to establish that anyone acted in conformity with his or her character. Of course the Rule 404(b) exceptions, discussed below, which do permit other-act evidence to be introduced now appear to apply to the acts of any witness, not just the criminal accused. Future case development will flesh out the ramifications of the important 2014 statute.

[b] Comparison of Admissibility Under Rules 401 and 404(b)

The primary differences between the use of Rule 401 and Rule 404(b) as a theory to admit evidence of conduct are that Rule 404(b) mandates the use of procedures that are not required by Rule 401 and Rule 404(b) reaches far more limited content than Rule 401.

Procedural Differences. There are many procedural differences between Rules 401 and 404(b). Unlike Rule 401, before evidence is admissible under Rule 404(b) the court should, upon request, hold a jury-out hearing, determine that the evidence in question deals with issues other than a character trait, and is established by clear and convincing evidence, and find that the probative value is not outweighed by the danger of unfair prejudice.[431.9] By way of contrast, under Rule 401 no such jury-out hearing is required and the balancing test for admitting the evidence is the uneven one, favoring admission, of Rule 403. Moreover, while the other act must be proven by clear and convincing evidence under Rule 404(b), the standard is far less exacting under Rule 401.

Also, the judge admitting evidence under Rule 404(b) must, upon request, state on the record the issue the evidence would prove, the ruling, and the reasons for admitting the evidence. There is no such requirement for evidence admitted under Rule 401, though good practice suggests that such procedures would be sound under Rule 401 as well. In addition, the judge's decision under Rule 401 is reviewed on appeal using the abuse of discretion standard. For matters resolved under Rule 404(b), the same abuse of discretion standard is used on appeal if the proper 404(b) procedures were followed. But if the trial court erred in not substantially following Rule 404(b)'s procedures, the appellate court should give the trial court's decision no deference.[432]

Applies to Any Individual in Criminal Case. While at the present time Rule 404(b) applies to "any person," a decision by the Tennessee Supreme Court narrowly interpreted this language to apply only to the criminal accused.[433] However, a 2014 statute rejected this narrow interpretation and expanded coverage of Rule

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[431.8] *Tenn. Code Ann. § 24-7-125* (Supp. 2014). *See also* *State v. Buckingham, 2018 Tenn. Crim. App. LEXIS 637 (Crim. App. Aug. 20, 2018)* (although *Tenn. Code Ann. § 24-7-125* allows evidence of a victim's conduct to be admitted when the requirements of *Tenn. R. Evid. 404(b)* are met, trial court properly applied the procedural requirements of Rule 404(b) and found the evidence relating to victim's burgaries to be less than clear and convicing and, therefore, inadmissible).

[431.9] A 404(b) hearing must also be conducted during a post-conviction evidentiary hearing, when post-conviction relief is based on counsel's failure to suppress "other act" evidence during the trial. *See, e.g.*, *Grimes v. State, 2020 Tenn. Crim. App. LEXIS 23 (Tenn. Crim. App. Jan. 16, 2020)* (petitioner's post-conviction appeal claimed deficient performance or prejudice based on counsel's failure to suppress evidence of other offenses under 404(b), but because petitioner failed to conduct a 404(b) hearing at his post-conviction hearing, relief on the issue was denied); *Adams v. State, 2011 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. Mar. 1, 2011)* (same).

[432] *State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997)*. *See also* *State v. James, 81 S.W.3d 751, 759 (Tenn. 2002)* (if Rule 404(b)'s procedures are substantially followed, trial court's decision is given great deference and reversed only for an abuse of discretion); *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)* (if the trial court has substantially complied with the procedure mandated by *Tenn. R. Evid. 404(b)*, the trial court's decision is reviewed under an abuse of discretion standard; if the trial court has failed to substantially comply with the procedural mandates of Rule 404(b), the appellate court's standard of review is de novo). *State v. Butler, 2016 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 2016)* (where the trial judge has substantially complied with procedural requirements, the standard of review for the admission of bad act evidence is abuse of discretion).

404(b) to "any individual, including a deceased victim, the defendant, a witness, or any other third-party."[433.1] Based on prior judicial precedent, the principles of Rule 404(b) in a civil case are handled under Rule 401 rather than 404(b),[433.2] though this conclusion is subject to further analysis as the courts sort out the implications of the 2014 statutory alteration of Rule 404(b).

Distinguishing 401 and 404(b) Cases: Content of Evidence. It is often difficult to assess whether Rule 401 or 404(b) should be used. In *State v. Dubose,*[434] the Tennessee Supreme Court attempted to provide guidance in making this decision. The key distinction between Rule 401 and Rule 404(b) evidence, according to *DuBose,* is whether the evidence of other crimes, wrongs or acts could be construed as implicating the character of the accused:

> Where the evidence of other crimes, wrongs, and acts may reflect upon the character of the accused, the procedure set forth in Rule 404(b) should be followed, even though the evidence is offered to prove a material fact not necessarily related directly to the accused. If, after hearing the evidence, the trial court finds that the evidence does not implicate the accused, the weighing of probative value against unfair prejudice will be made pursuant to Rule 403. If the court finds that the evidence reflects upon the character of the accused, the weighing will be made pursuant to Rule 404(b).[435]

A good illustration of this difference is the leading case, *State v. DuBose*,[436] in which the defendant was convicted of first degree murder by aggravated child abuse. During the prosecution's case-in-chief, the medical examiner testified that the child victim had suffered prior injuries to the abdomen. These injuries occurred anywhere from one week to several months before the ones that killed the child. The medical examiner reported that the prior injuries caused scarring which then prompted the subsequent injuries to tear the connective tissues of the small intestines. This, in turn, eventually led to the child's bleeding to death. The Tennessee Supreme Court held that the evidence of prior abdominal injuries was admissible to show causation under Rule 401, not to show identity under Rule 404(b). The cause of death was a relevant issue in the homicide prosecution, irrespective of the identity of the person who inflicted the earlier wounds. Since the issue was resolved under Rule 401, the Tennessee Supreme Court applied the pro-admission balancing test of Rule 403 (may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, etc.) rather than the even-balanced one in Rule 404(b) (must exclude if the probative value is outweighed by the danger of unfair prejudice).

In this same murder case, the prosecution also sought to introduce evidence of an incident four months before the child's death. The child's fingers were injured when he was with the defendant. The emergency room physician who examined the child after the finger incident testified at the murder trial that the finger incident caused the doctor to suspect child abuse. The Tennessee Supreme Court analyzed the admissibility of the finger incident under Rule 404(b), since the evidence was used to prove that the later homicide was both intentional and non-accidental. Using the even balancing test in Rule 404(b), the

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

[433.1] *Tenn. Code Ann. § 24-7-125* (Supp. 2014). *See also State v. Buckingham, 2018 Tenn. Crim. App. LEXIS 637 (Crim. App. Aug. 20, 2018)* (although *Tenn. Code Ann. § 24-7-125* allows evidence of a victim's conduct to be admitted when the requirements of *Tenn. R. Evid. 404(b)* are met, trial court properly found the evidence relating to victim's burgaries to be less than clear and convicing, and thus, inadmissible).

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

[434] *953 S.W.2d 649 (Tenn. 1997)*.

[435] *State v. DuBose, 953 S.W.2d 649, 655 (Tenn. 1997)*. *See also State v. Gilliland, 22 S.W.3d 266, 270 (Tenn. 2000)* (Rule 404(b) rather than Rule 401 applies because proof of murder defendant's involvement in a prior shooting "is an act reflecting on the … [defendant's] character").

[436] *953 S.W.2d 649 (Tenn. 1997)*. *See also State v. Lacy, 983 S.W.2d 686 (Tenn. Crim. App. 1997)* (applying *DuBose*).

Supreme Court found that the evidence of the finger incident was probative of intent and lack of accident and the probative value was not outweighed by the danger of unfair prejudice.

In *State v. March*,[437] the murder defendant wrote a letter concerning payment of money owed from a previous lawsuit. The state argued that the lawsuit was the source of friction between the defendant and the homicide victim and provided a motive for the killing. In analyzing the admissibility of the letter, the court held that the letter did not establish propensity evidence. Rather, it was assessed under Rule 404(b) and found to be admissible on motive.

A similar approach was taken in *State v. Sexton*,[438][439][439] where the defendant was accused of homicides motivated by his belief that the homicide victims were responsible for the defendant's being charged with multiple counts of sex abuse. At trial, a witness testified that the sex assault victim had accused the defendant of the sex crimes. The defendant thought that the homicide victims had induced the sex victim to make the allegations and, according to the state, killed them in retaliation. The Tennessee Supreme Court analyzed the witness's testimony under Rule 401 instead of Rule 404(b) because allegations of the sex abuse were not offered for their truth as a prior bad act but rather to establish the motive for the killing. In other words, there was no attempt to offer them for a propensity purpose. The allegations were relevant on motive, under Rule 404(b), because they were made, irrespective of the truth of the allegations.

[8] Other Crimes, Wrongs, Acts: Special Procedures

[a] Overview

It is axiomatic that evidence permitted by Rule 404(b) has a significant impact on the trier of fact. Having heard about the "other act," a jury may be more inclined to find the defendant guilty of the act charged. These dangers led the Tennessee Supreme Court to observe, "The starting point in considering testimony regarding prior offenses, when offered as substantive evidence of guilt and not merely for purposes of impeachment, is a rule of exclusion."[440] This means that courts in Tennessee are encouraged to take a restrictive approach to Rule 404(b) evidence because of its significant potential for unfairly influencing the jury.[440.1] In recognition of the substantial risks of unfairness that accompany introduction of "other act" evidence, Rule 404(b) follows pre-rules Tennessee precedent[441] and differs markedly from the federal rule that contains fewer procedural guidelines. The Tennessee provision establishes several protective procedures that must be followed before evidence can be admitted under Rule 404(b). The Tennessee Supreme Court has strongly endorsed these procedures:

> [T]his case illustrates the utility and purpose of *Tennessee Rule of Evidence 404(b)* which provides that before evidence of prior bad acts is admitted, the trial court must hold a jury out hearing, determine that the evidence is relevant to a material issue other than character, state on the record the *specific* issue

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[437] *State v. March, 395 S.W.3d 738 (Tenn. Crim. App. 2011)*.

[438] *State v. Sexton, 368 S.W.3d 371, 408 (Tenn. 2012)*.

[439] [Reserved]

[440] *State v. Rounsaville, 701 S.W.2d 817, 820 (Tenn. 1985)*.

[440.1] *State v. Sexton, 368 S.W.3d 371, 403 (Tenn. 2012)*; *State v. Dotson, 254 S.W.3d 378, 387 (Tenn. 2008)*; *State v. Dotson, 450 S.W.3d 1 (Tenn. 2014)*; *State v. Jackson, 444 S.W.3d 554, 601 (Tenn. 2014)* (same). *State v. Nowakowski, 2015 Tenn. Crim. App. LEXIS 971 (Tenn. Crim. App. 2015)* (noting that the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance; the more similar the conduct or act to the crime for which the defendant is on trial, the greater the potential for a prejudicial result).

[441] *State v. Parton, 694 S.W.2d 299 (Tenn. 1985)*.

> to which the evidence is relevant, and conclude that the prejudicial effect of the evidence does not outweigh its probative value. Not only does the admission of irrelevant bad acts evidence have a high potential for prejudice, the testimony required to establish, as well as rebut, the prior bad act can substantially lengthen a trial, as this case demonstrates. Rule 404(b) should be followed closely to avoid prejudicing the rights of the accused and to maintain the focus of the trial.[442]

If the procedures in Rule 404(b) are substantially followed, the trial court's decision is given great deference and will be reversed only for an abuse of discretion.[443] On the other hand, if the strict procedures of this rule are not substantially adhered to, the decision of the trial court should be given no deference.[444.3]

[b] Notice of Intent to Use Other-Act Evidence

Tennessee Rule 404(b) does not mandate advance notice of an intent to use evidence covered by the rule. This means that the criminal defendant could be surprised when such proof is tendered by adversary counsel. The procedures (jury-out hearing and the like) are triggered when counsel objects to the Rule 404(b) proof and requests a jury-out hearing.[444]

[c] Jury-Out Hearing

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[442] *State v. Bigbee, 885 S.W.2d 797, 806 (Tenn. 1994)* (emphasis in original).

[443] *State v. Carmody, 2020 Tenn. Crim. App. LEXIS 386 (Tenn. Crim. App. June 3, 2020)* (no procedural error in admitting evidence under Rule 404(b) even though the trial court did not specifically address whether it found the proof to be clear and convincing before admitting testimony that defendant possessed a gun while he was a convicted felon; the Court of Criminal Appeals could "infer that the trial court did so" based on the record); *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)*; *State v. Gwin, 2017 Tenn. Crim. App. LEXIS 402 (Tenn. Crim. App. 2017)* (where the trial judge has substantially complied with procedural requirements, the standard of review for the admission of bad act evidence is abuse of discretion); *State v. Logan, 2015 Tenn. Crim. App. LEXIS 822 (Tenn. Crim. App. 2015)* (procedural requirements substantially satisfied where trial court conducted a hearing regarding the admissibility of the evidence outside the presence of the jury, and stated the material issue, the ruling, and the reasons for admitting the evidence; although the court did not find proof of the other crimes, wrongs, or acts to be clear and convincing, this requirement was met because the testimony from multiple eyewitnesses overwhelmingly identified defendant as the individual who committed the acts, and defendant never challenged these identifications); *State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997)*; *State v. Jones, 15 S.W.3d 880, 894 (Tenn. Crim. App. 1999)*; *State v. Hodges, 7 S.W.3d 609, 626 (Tenn. Crim. App. 1998)*; *State v. Gilliland, 22 S.W.3d 266, 270 (Tenn. 2000)*; *State v. Osborne, 251 S.W.3d 1, 20 (Tenn. Crim. App. 2007)* (when trial court substantially complies with Rule 404(b), on appeal the decision is reviewed for an abuse of discretion); *State v. Dotson, 450 S.W.3d 1, 76–77 (Tenn. 2014)* (same).

[444.3] *See e.g., State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)*; *State v. Smartt, 2015 Tenn. Crim. App. LEXIS 451 (Tenn. Crim. App. 2015)* (because the trial court did not make an explicit finding that the evidence supporting the prior bad acts was clear and convincing or that the danger of unfair prejudice did not outweigh the probative value of the evidence, its ruling is not given deference on appeal); *State v. Day, 2017 Tenn. Crim. App. LEXIS 656 (Tenn. Crim. App. 2017)* (harmless error, but no deference given where evidence of defendant's drug use was improperly admitted to establish credibility; even if it was admissible, however, the trial court also failed to make the requisite finding that the evidence of defendant's illegal drug use was "clear and convincing" as required by Rule 404(b)(3)); *State v. Greer, 2017 Tenn. Crim. App. LEXIS 406 (Tenn. Crim. App. 2017)* (when a trial court fails to substantially comply with the requirements of *Tenn. R. Evid. 404(b)*, its decision is entitled to no deference, and an appellate court must conduct a de novo review; in considering this review, the appellate court must consider the evidence presented at a pretrial hearing in determining the admissibility of the evidence under Rule 404(b)). See also *State v. Buckingham, 2018 Tenn. Crim. App. LEXIS 637 (Crim. App. Aug. 20, 2018)* (although *Tenn. Code Ann. § 24-7-125* allows evidence of a victim's conduct to be admitted when the requirements of *Tenn. R. Evid. 404(b)* are met, trial court properly applied the procedural requirements of Rule 404(b) and found the evidence relating to victim's burgaries to be less than clear and convicing and, therefore, inadmissible).

[444] Federal Rule 404(b), on the other hand, requires, if requested by the criminal accused, the prosecution to provide reasonable notice in advance of trial (or during trial for good cause shown) of the general nature of any Rule 404(b) evidence it intends to introduce at trial.

If requested by either party, before evidence is admitted under Rule 404(b), the court must hold a hearing outside the presence of the jury, Rule 404(b)(1). This procedure is designed to ensure that the jury does not hear the "other act" evidence about the criminal accused until the judge has had an opportunity to rule on its admissibility. If the evidence is ruled inadmissible, the jury will never hear it. It should be stressed that this hearing is only mandatory *upon request*. A failure to hold the necessary hearing may constitute reversible error.[445] If no request for a jury-out hearing is made, the court is not obligated to provide one, although sound judicial practices may require one in some circumstances despite the absence of a request. The failure to object and request a jury-out hearing may constitute a waiver of the issue.[446] A party may who fails to object and request a jury-out hearing may still move for a mistrial after the witness has testified about the defendant's prior bad acts; on appeal, the trial court's denial of a motion for mistrial will be reviewed for abuse of discretion.[446.1]

[d] Finding of Materiality

The court must also make three decisions before admitting evidence under Rule 404(b). First, under Rule 404(b)(2) "the court must determine that a material issue exists other than conduct conforming with a character trait." This standard means that the court should admit the evidence only if it affirmatively finds that Rule 404(a)'s proscription against character evidence is not violated.

Ordinarily, this decision should be made after considering the evidence presented at trial. If the trial court makes pretrial rulings on this issue, it should not forget that such decisions may need to be reconsidered or revised based on the trial proof.[447] The court must conclude that the "other act" evidence addresses a relevant issue, such as intent or motive, and should clearly identify that issue for the record.

If the trial court violates Rule 404(b)(2) by not adequately stating on the record the reasons for its decision to admit the Rule 404(b) evidence, the reviewing appellate court will consider the evidence presented at the jury-out hearing to assess the court's rationale.[448] This failure to adhere substantially to the procedures in Rule 404(b) means that the Tennessee appellate court will not follow the ordinary abuse-of-discretion standard and will not give deference to the trial court's judgment in admitting the 404(b) evidence.

[e] Balancing Probative Value Against Prejudicial Effect

Second, according to Rule 404(b)(4) "the court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice." This balancing test differs from that established in Rule 403, which requires the evidence to be excluded if the probative value is *substantially* outweighed by several dangers.

The Rule 404(b) test is more restrictive; it should exclude evidence more frequently than the Rule 403 test. To be excluded under Rule 404(b), the danger of unfair prejudice must simply outweigh the probative value.

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[445] *Cf.* State v. Maddox, 957 S.W.2d 547 (Tenn. Crim. App. 1997) (failure to hold "appropriate" hearing on 404(b) evidence is reversible error when mistake is admitting the evidence is not harmless).

[446] State v. Jones, 15 S.W.3d 880 (Tenn. Crim. App. 1999); State v. Carter, 2019 Tenn. Crim. App. LEXIS 188 (Tenn. Crim. App. 2019) (when defense counsel failed to request a jury-out hearing based on a Rule 404(b) objection, the defendant waived the argument under Rule 404(b)).

[446.1] *See* State v. Carter, 2019 Tenn. Crim. App. LEXIS 188 (Tenn. Crim. App. 2019) (where defendant failed to object to the testimony or to request a jury-out hearing on it, but moved for a mistrial the next day; no abuse of discretion in denying motion). In determining whether to grant a mistrial after a witness has testified about a defendant's prior bad acts, the court should consider: (1) whether the improper testimony resulted from questioning by the State, rather than having been a gratuitous declaration; (2) the relative strength or weakness of the state's proof; and (3) whether the trial court promptly gave a curative instruction. *Id.*

[447] State v. Gilley, 173 S.W.3d 1, 6 (Tenn. 2005).

[448] State v. DuBose, 953 S.W.2d 649, 653 (Tenn. 1997).

But to be excluded under Rule 403, the danger of unfair prejudice must *substantially* outweigh the probative value.

This restrictive approach of Rule 404(b) is appropriate because "other act" evidence carries a significant potential for unfairly biasing a jury against the criminal accused.[448.1] The Advisory Commission Comments to Rule 404 implicitly recognize this by noting that the rule was based on a Tennessee Supreme Court decision[449] establishing procedures "to emphasize that evidence of other crimes should usually be excluded."[450] The comments also observe that evidence of another crime is arguably relevant on an issue other than character only "[i]n the exceptional case."[451]

When Balance Decision Made. Ordinarily, the balancing of probative value and prejudicial effect should be made after considering the evidence presented at trial. If the trial court makes pretrial rulings on this issue, it should not forget that such decisions may need to be reconsidered or revised based on the trial proof.[452]

Evaluating Probative Value. In applying this balancing test, the court must assess the evidence's probative value. One factor is the likelihood that the accused actually committed the other act. Another is the need for this evidence. If the issue, such as identity, is not contested, the "other act" proof should not be admitted.[453] Similarly, if there has been an offer to stipulate the issue or if other evidence on this issue has been introduced, the probative value of the other act may be reduced. In *State v. Luellen*,[454] for example, the prosecution attempted to introduce three prior drug acts to prove knowledge of drugs at a later event. While admitting that the three prior incidents involving the accused were relevant, the Tennessee Court of Criminal Appeals held that they should be excluded because the testimony by a police officer and an accomplice about the defendant's knowledge of the nature of the drugs rendered the probative value of the three prior incidents slight, while the prejudicial effect was great.

[448.1] *State v. Jackson, 444 S.W.3d 554, 601 (Tenn. 2014)*. *See also, State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)*; *State v. Carter, 2019 Tenn. Crim. App. LEXIS 188 (Tenn. Crim. App. 2019)*.

[449] *State v. Parton, 694 S.W.2d 299 (Tenn. 1985)*.

[450] *Tenn. R. Evid. 404* Advisory Commission's Comment. One decision seemed to focus on this harm by slightly altering the Rule 404(b) test: "If the unfair prejudice outweighs the probative value *or is dangerously close to tipping the scales*, the court must exclude the evidence despite its relevance to some issue other than character." *State v. Drinkard, 909 S.W.2d 13, 16 (Tenn. Crim. App. 1995)* (emphasis added); *State v. Fleece, 925 S.W.2d 558 (Tenn. Crim. App. 1995)* (same).

[451] *Id.*

[452] *State v. Gilley, 173 S.W.3d 1, 6 (Tenn. 2005)*.

[453] *Bunch v. State, 605 S.W.2d 227, 230 (Tenn. Crim. App. 1980)* ("evidence that the defendant committed another crime is admissible only if the ground for relevance is actually being contested in the case on trial"); *Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439 (Tenn. 1992)* (trial court properly refused to admit evidence of all fifty-one alleged incidents of insurance fraud that defendant insurance company claimed plaintiff had engaged in, for the purpose of showing that insurance fraud was involved in present case); *State v. Electroplating, Inc., 990 S.W.2d 211 (Tenn. Crim. App. 1998)* (should not admit prior acts to prove intent unless the issue of intent is actually being contested; counsel's concession in opening statement is insufficient to remove an issue from a case), overruled in part, on other grounds, by *State v. King, 2013 Tenn. Crim. App. LEXIS 192 (Crim. App. Mar. 4, 2013)*; *State v. McCary, 922 S.W.2d 511, 513 (Tenn. 1996)* (should not have introduced proof of other crimes to establish identity in a sex crimes case because identity was not a material issue; it was "virtually conceded" that each victim knew the defendant and the defendant did not raise the question of identity), superseded by statute as stated in *State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Crim. App. Mar. 13, 2012)*; *State v. Fleece, 925 S.W.2d 558 (Tenn. Crim. App. 1995)* (in DUI trial, trial court erred in admitting evidence of defendant's restricted driver's license that was result of prior DUI conviction when such conviction was not an issue).

[454] *867 S.W.2d 736 (Tenn. Crim. App. 1992)*.

Whether Issue Controverted. The trial court may find it difficult to know whether an issue is really controverted at the time the other act evidence is introduced. The opening statement may resolve the issue. However, some Tennessee courts hold that the opening statement is not evidence and therefore is insufficient to eliminate an issue conceded in the opening statement.[455] The court can also defer admission of the disputed evidence in order to assess the strength of other evidence on the same issue.[456] However, Tennessee courts have been reluctant to preclude other act evidence when it is unclear how probative the remaining evidence is.[457]

How Relevant. A related factor is the strength of the relevance of this evidence on the issue it is intended to prove. The court must assess how probative the proof of the other act is on the issue it is admitted to establish.[458] The trial judge's decision on balancing probative value and prejudice is within the judge's discretion and, if proper procedures are followed by the trial court, will not be disturbed absent an abuse of discretion.[459]

Degree of Danger of Unfair Prejudice. The court must also assess the degree of danger of unfair prejudice if the Rule 404(b) evidence is admitted. The court should consider whether limiting instructions would reduce the prejudicial impact.[460] Another factor is the similarity between the Rule 404(b) act and the act at issue in the trial. If the two are quite similar, the prejudicial effect may be great.[461] On the other hand, similarity may make the probative value quite high as well.

The subject matter of some prior acts raises special concerns about unfair prejudice. For example, the Tennessee Supreme Court has noted that acts of child sex abuse are "especially inflammatory" and generate outrage "as a typical response."[461.1]

[f] Finding Clear and Convincing Evidence of Other Act

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[455] *See* State v. Electroplating, Inc., 990 S.W.2d 211 (Tenn. Crim. App. 1998), overruled in part, on other grounds, by State v. King, 2013 Tenn. Crim. App. LEXIS 192 (Crim. App. Mar. 4, 2013).

[456] *See below* Rule 611. *See also* United States v. Brunson, 549 F.2d 348, 361 n.20 (5th Cir. 1977), *cert. denied*, ***434 U.S. 832 (1977)*** (government should offer other act evidence at end of defense's case rather than at end of own case so court can assess need for the other act evidence).

[457] *See* ***State v. Fisher, 670 S.W.2d 232, 236 (Tenn. Crim. App. 1983)*** (prior rape admitted to prove identity of rapist).

[458] *See* State v. Davis, 706 S.W.2d 96 (Tenn. Crim. App. 1985) (prior rape inadmissible in rape trial; two events so dissimilar that prejudicial effect outweighed probative value); State v. Brewer, 932 S.W.2d 1 (Tenn. Crim. App. 1996) (unique character of fraud cases often requires wide latitude in admitting evidence; more remote evidence under 404(b) is relevant in fraud cases; no error to admit prior injunctions and convictions that were 10 years old).

[459] *See* State v. Brewer, 932 S.W.2d 1, 24 (Tenn. Crim. App. 1996).

[460] The limiting instruction should tell the jury that they are to consider the evidence only on the precise issue, such as identity or motive, and not on the issue of the type of person the defendant is or whether the defendant is the type of person who would commit the act being tried. *See above* § 1.05[2].

[461] State v. Maddox, 957 S.W.2d 547 (Tenn. Crim. App. 1997) (error to admit letter concerning robbery of Dunkin Donuts because this offense was similar to the crime at issue: robbery of restaurant; jury might have believed defendant has propensity to commit robbery); State v. Peterson, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 194 (Tenn. Crim. App. Mar. 15, 2018) (trial court abused its discretion in admitting evidence of other rapes and robberies because the modus operandi of the offenses for which defendant was on trial was not substantially identical to the modus operandi of those crimes; because the State failed to establish the other rapes and robberies as signature crimes, the admission of the evidence of those crimes was extremely prejudicial since the jury could infer defendant committed the other crimes and the offenses for which he was on trial).

[461.1] State v. Sexton, 368 S.W.3d 371, 406 (Tenn. 2012) (no subject elicits a more passionate response than the sexual exploitation of children; society rightfully abhors the victimization of a defenseless child).

Third, Rule 404(b) (3) states that the court must also find that the evidence is *clear and convincing* that the defendant committed the other crime.[462] The use of the "clear and convincing" test is sensible. Evidence offered under Rule 404(b) may have a devastating impact on the case as the trier of fact could easily misuse the evidence as proof of bad character. The trier of fact should not be exposed to this evidence unless there is significant proof that the defendant actually committed the act offered under Rule 404(b).[463] Thus, a mere suspicion that the other act occurred is insufficient.[464] Previously, Tennessee was one of a minority of states that barred evidence of an acquittal; if the offender had been acquitted of the other act, evidence that he or she committed the other crime was not admissible, at least absent clear and convincing proof that the offender actually committed the other acts.[465] In *State v. Jarman*,[465.1] the Tennessee

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[462] *Tenn. R. Evid. 404(b)(3)*. This rule evolved from *State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985)*, and was added to Rule 404(b) in 2003. The *Parton* standard was originally adopted in Tennessee in *Wrather v. State, 179 Tenn. 666, 169 S.W.2d 854 (1943)*. *See also* *State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996)* (trial court must find by clear and convincing evidence that defendant committed the other crimes admitted under Rule 404(b), *citing Parton*), superseded by statute as stated in *State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Crim. App. Mar. 13, 2012)*. Federal courts use the preponderance of evidence test. *Huddleston v. United States, 485 U.S. 681 (1988)*.

[463] "[T]o render evidence of an independent crime admissible, the proof of its commission, and of the connection of the accused on trial therewith, must be not 'vague and uncertain,' but clear and convincing." *Wrather v. State, 179 Tenn. 666, 169 S.W.2d 854, 858 (1943)*.

[464] Peek v. State, 21 Tenn. (2 Humph.) 78, 87 (1840). *See also* *Steppach v. Thomas, 346 S.W.3d 488 (Tenn. Ct. App. 2011)* (insufficient evidence of corruption to satisfy clear and convincing standard).

[465] In *State v. Holman, 611 S.W.2d 411, 413 (Tenn. 1981)* (*overruled by* *State v. Jarman, 2020 Tenn. LEXIS 267 (July 6, 2020)*), the court stated, "the effect of the acquittal is to render less than 'clear and convincing' the proffered evidence that the defendant committed the prior crime." The *Holman* court admitted that other jurisdictions have taken a contrary view, but the court did not want to require the defendant to defend against the other crime a second time. Dictum in *Holman* suggested an argument could be made for use of the other crime if the acquittal was based on something other than insufficient evidence.

See also *State v. Shropshire, 45 S.W.3d 64 (Tenn. Crim. App. 2000)* (*Holman* holds that a crime for which the defendant was acquitted can never be admissible at trial as evidence of a prior crime under Rule 404(b), but it may be admissible at a sentencing proceeding). *State v. Bigoms, 2017 Tenn. Crim. App. LEXIS 476 (Tenn. Crim. App. 2017)* (agreeing with *Holman* that if the acquittal was based on something other than insufficient evidence the evidence of the other crime may be admissible under Rule 404(b); the court found, however, that because defendant's acquittal was based insufficient evidence, namely, reasonable doubt of the defendant's guilt, the *Holman* exception did not apply).

See also *State v. Little, 402 S.W.3d 202, 212 (Tenn. 2013)* (*quoting Holman* rule in *Shropshire*).

An argument can be made that the acquittal (meaning inadequate proof of guilt beyond a reasonable doubt) should not bar evidence under Rule 404(b) if the prosecution presents clear and convincing proof the accused committeed the act at issue. As the United States Supreme Court in *Dowling* (discussed in the next paragraph) noted, an acquittal does not necessarily mean the accused did not commit the crime for which he or she was acquitted.

In *Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)*, the United States Supreme Court held that Federal *Rule of Evidence 404(b)*, double jeopardy, and due process do not prevent the government in a criminal case from introducing evidence of a previous crime for which the present accused was acquitted. *Dowling* involved a bank robbery by a man wearing a ski mask and carrying a small handgun who had, with another man named Delroy Christian, robbed a woman in her house. Dowling was acquitted of the house robbery, but at the bank robbery proceeding, the government used the house robbery testimony to establish that Dowling was the ski mask robber and that Dowling was associated with Mr. Christian, who was also possibly involved with the bank robbery.

The United States Supreme Court held that the house robbery proof was admissible under both the Constitution and Rule 404(b). The *Double Jeopardy Clause*, through the concept of collateral estoppel, was not violated because the house robbery acquittal did not determine an ultimate issue in the bank robbery trial. Moreover, the acquittal simply meant that there was not proof beyond a reasonable doubt that Dowling committed the house robbery. The acquittal did not mean that sufficient proof that

Supreme Court revisited the issue and overruled its prior ruling in *State v. Holman*. Accordingly, Tennessee now allows acts that result in an acquittal to be introduced into evidence, subject to the requirements of Rule 404(b).[465.2] In making the decision to admit or exclude prior acts resulting in acquittal, the Tennessee Supreme Court has instructed trial courts to recognize the limitations of their discretion, and to utilize a "vigorous" analysis when determining the admissibility of such evidence:

> [T]here are limited circumstances in which acquitted-act evidence is both highly probative and not unduly prejudicial to a defendant, and therefore may be admissible … [T]he fact that a defendant was acquitted of the prior crime will often weigh heavily against a finding that the evidence of that crime is "clear and convincing."[465.3]

When acquitted-acts are admitted into evidence, the trial court retains discretion to decide if evidence of the acquittal may also be admitted by the defendant.[465.4] Despite this discretion, trial judges should tread carefully when excluding acquittal evidence: "Although the trial court retains discretion on the issue of whether to admit evidence of the acquittal after admission of acquitted-act evidence, *it would be the rare* case … in which a trial court appropriately could exclude evidence of the acquittal (emphasis added)."[465.5]

Although a limiting instruction is advisable when acts resulting in acquittal are admitted,[465.6] the Tennessee Supreme Court has declined to impose a mandatory requirement on trial court judges that they issue one in

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Dowling committed the house robbery was not available in order to satisfy Rule 404(b)'s requirement that evidence is relevant only if "the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id. at 672*, *quoting* *Huddleston v. United States, 485 U.S. 681, 689, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)*. Admission of the evidence also did not violate the fundamental fairness guarantee of due process.

It must be stressed that *Dowling* does not require a change in Tennessee law. If Tennessee courts read Tennessee Rule 404(b) as excluding evidence of crimes which have resulted in an acquittal, nothing in *Dowling* prevents Tennessee from implementing this more restrictive approach.

[465.1] *State v. Jarman, 2020 Tenn. LEXIS 267 (July 6, 2020)*, *overruling* *State v. Holman, 611 S.W.2d 411, 413 (Tenn. 1981)*.

[465.2] "We explicitly overrule our prior holding in *Holman* to the extent that it can be read to exclude acquitted-act evidence under all circumstances, and we bring Tennessee in line with the majority of states by holding that evidence of a defendant's conduct for which he was acquitted in a previous trial may be introduced in a subsequent trial on a different charge only after the evidence has met the requirements of *Tennessee Rule of Evidence 404(b)*." *Id., *42*.

[465.3] *Id., *41–42*.

[465.4] *State v. Jarman, 2020 Tenn. LEXIS 267, *50 (July 6, 2020)*, *overruling* *State v. Holman, 611 S.W.2d 411, 413 (Tenn. 1981)*.

[465.5] *Id., *50*.

[465.6] *See* *State v. Jarman, 2020 Tenn. LEXIS 267 (July 6, 2020)*, *overruling* *State v. Holman, 611 S.W.2d 411, 413 (Tenn. 1981)*. In *Jarman*, the Tennessee Supreme Court acknowledged that "[t]o minimize the impact of other act evidence and to ensure the jury does not misuse it, the trial court *should* instruct the jury on the proper use of the evidence [emphasis in original]." *Id., *50–51*, *quoting* Neil P. Cohen et al., *Tennessee Law of Evidence, § 4.04*(8)(i) (LexisNexis Matthew Bender 6th ed. 2011). The Court also reiterated its general stance that "limiting instructions are critical in preventing the improper and prejudicial use of proof of other crimes." *Id., *50*. Accordingly, a limiting instruction should be given in most cases where acquittal-act evidence is admitted: "[I]t certainly may be the *best practice* to give both a clear limiting instruction in conjunction with an acquittal instruction *in most cases*, because, in doing so, the trial court lessens the risk of unfair prejudice and ensures that jurors properly utilize the acquitted-act evidence in reaching their ultimate conclusion about the defendant's guilt or innocence (emphasis added)." *Id., *51*.

all cases.[465.7] Thus, a defendant's right to a limiting instruction remains subject to the general requirements governing limiting instructions under *Tenn. R. Evid. 105*.[465.8]

If the offender was acquitted of one crime but convicted of a related one, the latter, including its circumstances, can be used to prove a relevant issue pursuant to Rule 404(b).[466] An arrest alone should be insufficient proof of the underlying acts, however.[467] Similarly, the act cannot be established by inadmissible hearsay.[467.1]

[g] Ruling Before Admitting Other Act Proof

Rule 404(b) establishes the "conditions which must be satisfied before allowing" the other act evidence. (emphasis added) One of the conditions is a ruling on the admissibility of the evidence, Rule 404(b)(2), after a jury-out hearing, Rule 404(b)(1).

The burden of persuasion is on the state as the party seeking to introduce evidence under Rule 404(b).[467.2]

Ordinarily, this decision should be made after considering the evidence presented at trial. If the trial court makes pretrial rulings on this issue, it should not forget that such decisions may need to be reconsidered or revised based on the trial proof.[468]

Accordingly, the trial court should rule on the admissibility of the other act evidence before allowing the jury to hear the proof of other acts. The practice of some courts of allowing the jury to hear the other act evidence but "reserving judgment" on the issue until other proof is tendered is inconsistent with Rule 404(b) and should not be followed. Courts unable to decide whether other act evidence is admissible should defer the other act proof until after the introduction of evidence that would help resolve the issue.

[h] Making Record of Decision

A court resolving a Rule 404(b) issue should do so on the record. Rule 404(b)(2) states that "upon request" the court must "state on the record the material issue, the ruling, and the reasons for admitting the evidence." Presumably, no such reasons are required absent a request by counsel, although clearly the better practice is for a judge to provide his or her reasoning even if counsel does not make a formal request. Appellate review is difficult without an adequate record.

[465.7] *State v. Jarman, 2020 Tenn. LEXIS 267 (July 6, 2020)*, *overruling* *State v. Holman, 611 S.W.2d 411, 413 (Tenn. 1981)*. The Court in *Jarman* explained its refusal to adopt a mandatory requirement as follows: "Acquitted-act evidence is a form of prior act evidence, and an instruction either limiting the scope of the acquitted-act evidence to a particular purpose or informing the jury that the defendant was acquitted of the act must be treated the same … . [R]equiring trial courts to give a limiting instruction or an acquittal instruction, even absent a request, in all cases in which acquitted-act evidence is introduced at trial is inappropriate and would be inconsistent with our body of case law regarding prior act evidence and limiting instructions." *Id., *51–52*.

[465.8] Under Rule 105, the defendant is entitled to an appropriate limiting instruction "upon request"; accordingly, if a defendant fails to request a limiting instruction regarding the prior act, the issue is ordinarily found to be waived on appeal. *State v. Jarman, 2020 Tenn. LEXIS 267, *51 (July 6, 2020)*.

[466] *See* *State v. Turnbill, 640 S.W.2d 40, 46–47 (Tenn. Crim. App. 1982)* (in past, defendant acquitted of robbing same victim but pled to criminal trespass for same incident; proof of latter crime against same victim admissible in homicide case on issue of intent).

[467] See *e.g.*, *United States v. Robinson, 978 F.2d 1554 (10th Cir. 1992)* (in drug case, prior drug arrests were not probative of intent, knowledge, or other permissible purpose under Rule 404(b)).

[467.1] *State v. Sexton, 368 S.W.3d 371, 405 (Tenn. 2012)* (prior accusations of child abuse may not be established by inadmissible hearsay for admission as a prior bad act under Rule 404(b)).

[467.2] *State v. Sexton, 368 S.W.3d 371, 404 (Tenn. 2012)*.

[468] *State v. Gilley, 173 S.W.3d 1, 6 (Tenn. 2005)*.

[i] Jury Instructions

To minimize the impact of other act evidence and to ensure the jury does not misuse it, the trial court should instruct the jury on the proper use of the evidence.[469] Because of the procedural safeguards included in Rule 404(b), the trial court need not hold a bifurcated hearing requiring the jury to find certain other facts before this kind of evidence is permitted.[470]

[j] Prior Bad Acts Brought out First by Party Objecting to Their Admissibility

A lawyer who opposes the introduction of prior bad acts must be careful to avoid eliciting testimony about those acts. In *State v. Jones*[471] the court ruled before trial that the prosecution could prove motive to kill by eliciting testimony that the defendant told the witness that the defendant was going to kill the victim because the victim told the defendant's mother about the defendant's involvement in a car parts ring. The defendant's mother then told the defendant's parole officer about the defendant's illegal activities. The pretrial order also barred testimony about the specifics of the car parts ring and the nature of the convictions for which the defendant was on parole. During trial, *defense counsel* first elicited testimony about the car parts ring and the defendant's prior convictions. Since the evidence, earlier excluded by the pretrial order, was first brought out by defense counsel, the Tennessee Court of Criminal Appeals refused to find error.

[k] Harmless Error

If a trial judge erroneously admits evidence under Rule 404(b), on review appellate courts will conduct a harmless error analysis.[472] The issue is whether the defendant can demonstrate that the error more probably than not affected the trial outcome.[473] The cumulative error doctrine may be invoked when the

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[469] *See e.g.,* ***State v. Fisher, 670 S.W.2d 232 (Tenn. Crim. App. 1983)*** (prior rape admitted to prove identity; at end of state's proof and in written jury instructions trial judge cautioned jury to consider evidence only for limited purpose of establishing identity); *State v. Gilley, 297 S.W.3d 739, 758 (Tenn. Crim. App. 2008)* (defendant's prior violent acts toward the victim were properly admitted under Rule 404(b); limiting instructions given to assist jury in the proper use of the evidence). *See above § 1.05[2]*.

[470] *See State v. Brewer, 932 S.W.2d 1 (Tenn. Crim. App. 1996)* (no bifurcated trial needed in securities fraud case before Rule 404(b) evidence is admitted; defendant had wanted jury to first find that the scheme involved the sale of securities, then for the jury in a separate hearing to hear the 404(b) proof on the issue of intent).

[471] *15 S.W.3d 880 (Tenn. Crim. App. 1999)*.

[472] *See generally* Robert N. Hibbett, *Tennessee Rule of Evidence 404(b): What Constitutes Harmless Error*, ***44 TENN. B.J. 31 (Sept. 2008)***.

[473] *Tenn. R. App. P. 36(b)*; *State v. Rodriguez, 254 S.W.3d 361 (Tenn. 2008)*. *See also Sizemore v. State, 2019 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 20, 2019)* (any error resulting from counsel's failure to request a jury instruction limiting the use of defendant's statement of a prior bad act under *Tenn. R. Evid. 404(b)* was harmless, in light of the substantial evidence of his guilt); *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)* (errors in the admission of evidence are typically considered non-constitutional; as such, Tennessee law places the burden on the defendant who is seeking to invalidate his or her conviction to demonstrate that the error more probably than not affected the judgment or would result in prejudice to the judicial process. *Tenn. R. App. P. 36(b)*); *State v. Clark, 452 S.W.3d 268, 2014 Tenn. LEXIS 913 (Tenn. 2014)* (when a trial court errs by admitting evidence that is forbidden under the Tennessee Rules of Evidence, appellate court evaluates this non-constitutional error using the harmless error analysis of *Tenn. R. App. P. 36(b)*, and the defendant bears the burden of showing that the erroneous evidence more probably than not affected the verdict); *State v. Nowakowski, 2015 Tenn. Crim. App. LEXIS 971 (Tenn. Crim. App. 2015)* (because an erroneous admission of a prior bad act is evidentiary in nature, and not constitutional, the error is subject to a non-constitutional harmless-error analysis; accordingly, the court must consider whether the error in more probably than not affected the judgment or would result in prejudice to the judicial process).

effect of individual errors, when assessed individually, is determined to be harmless but the cumulative effect of multiple errors results in an unfair trial.[473.1]

An excellent illustration is *State v. Rodriguez*[474] involving a defendant convicted of child rape and aggravated sexual battery for abusing two nine-year-old boys. The trial court erroneously permitted, under Rule 404(b), the prosecution to introduce evidence that the defendant possessed pornographic images of children. Assessing whether the error was harmless, the Tennessee Supreme Court noted the pornographic images were "propensity" proof which may be especially harmful in close cases where the witnesses' credibility is key and the character defect engenders public revulsion. In *Rodriguez* the defendant denied guilt and the only evidence of sexual abuse was the testimony of the child victims. The Supreme Court reversed the conviction, finding the error not harmless because it more probably than not affected the jury's assessment of the credibility of the only witnesses who testified that the crimes occurred.

In *State v. Clark*,[474.1] the Supreme Court held that trial court's admission of defendant's use of pornography in his trial for statutory rape and sexual battery was harmless. Although the court determined that the admission of the evidence under Rule 404(b) was error,[474.2] the court cited several factors which distinguished the case from *Rodriguez*, leading it its conclusion of harmlessness:

> Unlike Mr. Rodriguez, [the defendant] Mr. Clark confessed to the molestations. Unlike the *Rodriguez* case, in which the State offered the pornography evidence for the propensity purpose of showing the defendant had "a thing for children," the State in this case offered a non-propensity reason for proffering the evidence. Especially in light of the fact that Mr. Clark made recorded admissions of guilt, there are substantive grounds to distinguish this case from *State v. Rodriguez* … . In *State v. Rodriguez*, the pornography evidence indirectly impugned the defendant's credibility and probably affected the jury's verdict because the case boiled down to the jury's weighing the defendant's testimony against the testimony of his victim … . Mr. Clark's case, however, includes a detailed confession. This confession changes the harmless error calculus. Although the State used the pornography evidence to portray Mr. Clark as a serial liar, the harmfulness of that evidence is blunted by the existence of other evidence that Mr. Clark had not always told the truth … . For this reason, presenting additional evidence that Mr. Clark was capable of lying was unlikely to affect the jury's

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[473.1] *State v. Hester, 324 S.W.3d 1, *76 (Tenn. 2010)* (cumulative error doctrine is a "judicial recognition that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial"). *See also*, *State v. Lane, 2019 Tenn. Crim. App. LEXIS 600 (Crim. App. Sep. 20, 2019)* (the cumulative error doctrine applies only when "more than one actual error" has been committed in the trial proceedings; since the Court of Criminal Appeals found no error as to any of the issues defendant raised, cumulative effect doctrine did not apply).

[474] *254 S.W.3d 361 (Tenn. 2008)*.

[474.1] *State v. Clark, 452 S.W.3d 268 (Tenn. 2014)*.

[474.2] *Id. at 292–293*. The Court cited the following reasons: the state used the evidence to impugn defendant's character for truthfulness—arguing that he lied about using pornography on many occasions, making the evidence that he used it relevant to his truthfulness, but credibility is not a valid basis on which to admit "other acts" evidence under Rule 404(b); the trial court's limiting instruction, which directed the jury to use the pornography evidence to assess the parties' "credibility" was unfair to the defendant, because it encouraged the jury to consider the evidence regarding his use of pornography for an improper purpose under Rule 404(b); and the trial court made an erroneous assessment of the effect of the evidence when it found that the probative value of the pornography evidence was not outweighed by the danger of unfair prejudice, since evidence that a defendant has used pornography "carries a high potential for unfair prejudice—especially in sex crimes cases, and even more so in cases involving sex crimes against children."

> decision-making process … Therefore, the State's evidence in this case was considerably stronger than the State's evidence in *State v. Rodriguez*.[474.3]
>
> In light of the fact that the jury knew the defendant was capable of lying and the fact that the trial court and the prosecution counseled the jury not to use the evidence as propensity evidence for sexual misconduct, the court held that it was "unlikely that the erroneous testimony concerning defendant's pornography use had a 'substantial and injurious' impact on the jury's decision-making process."[474.4]

[9] Motive

Rule 404(b) in criminal cases permits the state to introduce proof of another crime or act to demonstrate motive. While previous Tennessee authorities limited this to the motive of the criminal accused,[475] a 2014 statute expanded the coverage of Rule 404(b) to "any individual, including a deceased victim, the defendant, a witness, or any other third-party."[475.1] This means that it is likely in a criminal case that proof of the motive of anyone, whether the criminal accused or another person, would be governed by Rule 404(b), including its notice and other procedures.

Definition of Motive; Proof. Motive is the reason why someone did a particular act.[475.2] It may provide the driving force that led the accused to commit the crime being tried. Although motive itself is rarely an issue in a case, it is often circumstantial proof of some other important matter, such as identity, intent, or lack of accident.[475.3] For example, someone who needs money, perhaps because he or she lost a fortune gambling, may commit a robbery to obtain the needed funds. Evidence of gambling losses could be introduced in the robbery case to establish a motive for the robbery. By introducing the other act, the prosecution seeks to establish an intermediate inference from which an ultimate fact in issue can be drawn.[476] Since motivation for human behavior is almost infinitely diverse, the general inquiry is whether the circumstances evidenced by the other crime would tend to prompt the criminal act for which the defendant is being tried. Motive must be relevant to prove an act before motive is introduced into evidence.[477]

Categories of Motives. A survey of Tennessee cases indicates that a motive to commit the principal crime suggested by the extrinsic crime generally falls into one of three broad categories: (1) concealing or continuing

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[474.3] *Id. at 293–294, 295*.

[474.4] *Id., at 294*.

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

[475.1] *Tenn. Code Ann. § 24-7-125* (Supp. 2014).

[475.2] *State v. Thacker, 164 S.W.3d 208, 240 (Tenn. 2005)*; *State v. Logan, 2015 Tenn. Crim. App. LEXIS 822 (Tenn. Crim. App. 2015)*.

[475.3] *State v. Thacker, 164 S.W.3d 208 (Tenn. 2005)* (proof of motive is often pertinent as the basis to infer that the act was committed, to prove requisite mental state, or to prove the identity of the actor); *State v. Logan, 2015 Tenn. Crim. App. LEXIS 822 (Tenn. Crim. App. 2015)* (*State v. Logan, 2015 Tenn. Crim. App. LEXIS 822 (Tenn. Crim. App. Oct. 8, 2015)*. *See also, State v. Pruitt, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 212 (Tenn. Crim. App. 2019)* (trial court did not abuse its discretion by admitting defendant's statement "this is for Country" into evidence, because the statement was relevant to show defendant's intent, which was an element of the charged offense of first-degree murder, and the statement was not unfairly prejudicial).

[476] See *e.g.*, *McLean v. State, 527 S.W.2d 76 (Tenn. 1975)* (extrinsic crime shows motive which shows identity of person committing principal crime).

[477] *See State v. Parton, 694 S.W.2d 299, 303 (Tenn. 1985)* (defendant's motive for luring victim into woods was irrelevant when proof showed victim asked to go to woods with defendant); *See State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996)* (in sex abuse case involving multiple victims, motive was not made relevant issue), superseded by statute as stated in *State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Crim. App. Mar. 13, 2012)*.

the prior crime;[478] (2) desire for money, property,[479] or a relationship;[480] or (3) the victim's conduct in injuring or

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[478] *See e.g.*, McLean v. State, 527 S.W.2d 76 (Tenn. 1975) (selling legend drugs and controlled substances; defendant-pharmacist's prior sale to informer was properly admitted to show their continuing relationship from which it could be inferred that the person making the sale for which defendant was being tried was, in fact, the defendant and that the defendant's motive was not duress); Gibbs v. State, 201 Tenn. 491, 300 S.W.2d 890 (1957) (murder; evidence that defendant killed the victim after she discovered her husband's body and that he then proceeded to kill the couple's daughter after the child discovered her mother's body was admissible to show motive, *i.e.*, to conceal the prior killings, as well as to show the components of a completed crime); Lee v. State, 194 Tenn. 652, 254 S.W.2d 747 (1953) (bribing police officer; testimony that officer had been instructed to play along in investigation of defendant's involvement in numbers racket was admitted to show defendant's motive in bribing the officer was to conceal the defendant's numbers activity); State v. Dellinger, 79 S.W.3d 458, 484 (Tenn. Ct. Crim. App. 2002) (earlier fight between defendants and murder victim and earlier burning of victim's trailer was admissible on issue of motive for murder).

[479] *See e.g.*, State v. Adams, — S.W.3d — 2018 Tenn. Crim. App. LEXIS 845 (Tenn. Crim. App. Nov. 15, 2018) (evidence of defendant's drug use immediately before and after the robbery was admissible under Rule 404(b), since it established defendant's motive and showed that he intended to benefit, and ultimately did benefit, from the proceeds of the robbery); State v. Wade, 2016 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. 2016) (evidence that defendant planned to rob the victims approximately two weeks before the murders in a scenario similar to the one in which the victims were killed not improper under Rule 404(b), where it showed that defendant knew the victims had money, thereby establishing a motive for the crime); State v. Taylor, 2014 Tenn. Crim. App. LEXIS 920 (Tenn. Crim. App. 2014), *appeal denied*, 2015 Tenn. LEXIS 70 (Tenn. 2015), *cert. denied*, Taylor v. Tennessee 2015 U.S. LEXIS 3523 (U.S. 2015) (testimony by defendant's mother about defendant's jealousy and financial problems was properly admitted as evidence of defendant's motive and intent); State v. Berry, 592 S.W.2d 553 (Tenn. 1980) (in prosecution for murder of affluent father-in-law, impoverished defendant asserted alibi defense; evidence concerning loss of money in bank account of defendant's wife, resulting from misuse of bank card, was properly admitted to show motive—apparently, a need for money—to suggest the inference that defendant was the murderer); Williams v. State, 520 S.W.2d 371 (Tenn. Crim. App. 1974) (triple felony-murder involving robbery; evidence of defendant's prior conviction for unspecified crime, as result of which he was required to reimburse prosecutor for $1600, was admitted in subsequent homicide prosecution to show motive—a need for money, from which the identity of the killer might be inferred); State v. Jones, 623 S.W.2d 129 (Tenn. Crim. App. 1981) (arson prosecution; evidence of prior arson-for-insurance was admitted to prove motive and intent).

[480] *See* State v. Bell, 2014 Tenn. Crim. App. LEXIS 508 (Crim. App. May 30, 2014) (trial court erred by not allowing defendant to introduce evidence that the victim's husband had a motive to kill the victim because the husband was having an affair, but the error was deemed harmless); State v. Rimmer, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019) (trial court did not err by admitting evidence concerning defendant's prior convictions for aggravated assault and rape of the murder victim, because the evidence had high probative value for motive, intent, premeditation, and identity; the relevant convictions were for violent offenses and involved the victim in the present case, the defendant had been incarcerated for the crimes, and other evidence showed that the defendant had made incriminating statements to a fellow inmate about his desire to kill the victim); State v. Copenny, 888 S.W.2d 450 (Tenn. Crim. App. 1993) (defendant fathered child of victim's girlfriend); State v. Johnson, 743 S.W.2d 154, 158 (Tenn. 1987) (affair with another woman admitted to prove motive for killing wife); State v. Moss, 13 S.W.3d 374 (Tenn. Crim. App. 1999) (improper sexual conduct with daughter was admissible to prove that motive to kill wife was to regain access to daughter); State v. Robinson, 73 S.W.3d 136 (Tenn. Crim. App. 2001) (husband's relationship with another woman before wife's death was admissible on issue of husband's motive to kill wife; husband's sexual relationship after wife's death may also be probative of motive to kill wife, but may be excluded by Rule 403 as unfairly prejudicial in facts of case where sex occurred in marital bed); State v. Wilson, 164 S.W.3d 355, 363 (Tenn. Crim. App. 2003) (evidence of earlier protective order admissible to establish that homicide victim desired to obtain custody of defendant's child; provides motive for homicide of victim) (this may be—perhaps better—analyzed under Rule 401 since it involved acts of persons other than the criminal accused)

opposing the defendant.[481] Motive may also arise from a desire to avoid apprehension.[481.1]

Poverty as Motive. Poverty is an issue that arises occasionally on the issue of motive. While some jurisdictions hold that a defendant's poverty is irrelevant as proof of a motive for theft or robbery, the Tennessee rule is more flexible. Evidence that a defendant is poor, without additional evidence, is inadmissible as having little probative value and being likely to amount to unfair prejudice.[482] But evidence that the defendant, though poor, had made unexplained purchases or was found with substantial assets after a theft-related crime is admissible in Tennessee on the issue of motive to commit the crime.[483]

Illustration of Motive. Motive as an avenue for admissibility of another crime is illustrated in *Parks v. State*,[484] a murder case in which the defendant claimed he had shot his friend under the mistaken belief that the friend was an unknown intruder. The prosecution was allowed to introduce evidence that, earlier the same day, the defendant had been arrested for illegally selling whiskey to the victim who had been "cooperating" with the police. According to the state's theory, the defendant's motive for the killing was vengeance for his friend's deception. This motive tended to disprove defendant's claim that he shot his friend by accident.

[10] Intent

Where it must be shown that a criminal defendant had a specific criminal intent, Rule 404(b) permits the court to admit evidence of other crimes or acts of the defendant to show the requisite intent for the crime charged.[485]

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[481] *See e.g.*, State v. Hawkins, 2017 Tenn. LEXIS 272 (Tenn. 2017) (testimony of defendant's sons about defendant breaking the victim's cell phone and slapping the victim was admissible as probative of defendant's motive to kill the victim, as defendant thought the victim was going to tell police he had been sexually abusing their daughter); State v. Ward, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. Apr. 1, 2019) (evidence of prior drug transactions between the victim and the defendant was relevant to show defendant's motive to shoot the victim; the witness's testimony explained the arrangement under which drug transactions took place between her and the victim, how the victim refused to deal directly with the defendant and dealt only with her, and the resulting anger the defendant felt as a result of the victim's refusal to purchase directly from him); State v. Gentry, 881 S.W.2d 1 (Tenn. Crim. App. 1993) (homicide of TVA employee; past friction between defendant and TVA was admissible on motive for homicide); ***McGowen v. State, 221 Tenn. 442, 427 S.W.2d 555 (1968)*** (arson of automobile; evidence of defendant's violent and homosexual acts toward members of car owner's family was admissible to show motive and intent); Hull v. State, 553 S.W.2d 90 (Tenn. Crim. App. 1977) (murder of wife's paramour; evidence that defendant asked alleged assassin to kill another of his wife's paramours is admissible to show motive—revenge for seduction of defendant's wife); State v. Elrod, 721 S.W.2d 820 (Tenn. Crim. App. 1986) (solicitation to kill wife; evidence of bitter divorce was admissible to show motive); ***State v. Coulter, 67 S.W.3d 3, 48 (Tenn. Crim. App. 2001)*** (homicide of defendant's wife; defendant's letters and notes expressing bitter dispute with victim over lack of intimate relations were admissible to establish defendant's motive and premeditation for homicide; wife's plan to leave husband was also admissible on husband's intent, though wife's conduct should be assessed under Rule 401, not 404(b)), overruled in part, on other grounds, by State v. Johnson, 2013 Tenn. Crim. App. LEXIS 1051 (Crim. App. Dec. 3, 2013); State v. Sexton, 368 S.W.3d 371 (Tenn. 2012) (at murder trial, state introduced proof that victim had caused the defendant to be charged with child abuse; was relevant under Rule 404(b) as motive for the homicides).

[481.1] State v. Logan, 2015 Tenn. Crim. App. LEXIS 822 (Tenn. Crim. App. 2015) (evidence of defendant's previous crimes admissible under Rule 404(b), as they related to defendant's motive to assist co-defendant in the crimes charged and avoid apprehension).

[482] State v. Reid, 213 S.W.3d 792, 814–815 (Tenn. 2006) (robbery defendant, who had lost his job without severance pay, had made several substantial cash purchases, sought to invest money, and had over $1000 in coins in his possession at time of his arrest; evidence was relevant circumstantial evidence of his motive to commit the crimes).

[483] State v. Reid, 213 S.W.3d 792, 814–815 (Tenn. 2006).

[484] 543 S.W.2d 855 (Tenn. Crim. App. 1976).

[485] See *e.g.*, State v. Fykes, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 441 (Tenn. Crim. App. July 22, 2019) (defendant's public threat to "kill [the victim] right here in front of everybody," which occurred at a YMCA pool hours before the victim was assaulted during a home burglary, did not constitute a "bad act" under Rule 404(b), since the threat at the pool and the later

The underlying statute or standard must be read carefully to ascertain whether intent is relevant.[486] Often the

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assault were not separate incidents, but were part of a single, continuing plan—i.e., the defendant stated his intention to commit the crime and then carried it out; even if the threat did constitute a separate prior "bad act", it was admissible to show defendant's intent when he entered the victim's house, since a conviction for especially aggravated burglary requires the state to prove that defendant entered the victim's house with intent to commit a felony, theft, or assault); *State v. Long, 2017 Tenn. Crim. App. LEXIS 609 (Tenn. Crim. App. 2017)* (it is well-established that a trial court may admit evidence of prior bad acts by a defendant against a victim to show intent and motive; Tennessee courts have accepted the use of evidence of a defendant's prior violent acts against a victim of a violent crime as a means of allowing the State the opportunity to establish intent, and such evidence is probative of the defendant's mens rea because it reveals a "settled purpose" to harm the victim); *State v. Logan, 2015 Tenn. Crim. App. LEXIS 822 (Tenn. Crim. App. 2015)*, *appeal denied*, *2016 Tenn. LEXIS 160 (Tenn. 2016)* (evidence of crimes committed by defendant and codefendant in Mississippi, before the shooting by codefendant of a police officer in Tennessee at a traffic stop, was admissible because the evidence established defendant's intent and motive to aid codefendant in committing the charged offenses in Tennessee to avoid apprehension, and because it showed a common scheme or plan between the offenses in Mississippi and Tennessee); *State v. Owen, 2015 Tenn. Crim. App. LEXIS 752 (Tenn. Crim. App. 2015)* (trial court properly acted within its discretion in allowing evidence of defendant's prior history of stalking in order to show defendant's intent, common scheme or plan, or motive, and such evidence established that defendant knowingly violated the order of protection, as required under ***T.C.A. § 39-13-113***); *Russell v. State, 556 S.W.2d 92 (Tenn. Crim. App. 1977)* (defendant arrested while fleeing from phone booth; had plastic bag of PCP in one sock and plastic bag of marijuana in other; in prosecution for possession with intent to sell PCP, defendant claimed to have found PCP in phone booth and did not know contents; evidence of marijuana in other sock was admitted to show defendant's intent to sell drugs); *State v. Gentry, 881 S.W.2d 1 (Tenn. Crim. App. 1994)* (prior threats to kill any TVA worker admissible on intent to kill particular TVA employee); *State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994)* (attempts to hire person to kill defendant's wife were admissible on intent to kill wife); *State v. Brown, 823 S.W.2d 576, 585 (Tenn. Crim. App. 1991)* (multiple incidents involving cocaine possession admissible to prove intent to possess cocaine); *State v. Bordis, 905 S.W.2d 214, 228 (Tenn. Crim. App. 1995)* (defendant's concern about going to jail is admissible on issue of intent—why defendant did not take child to doctor—even though the concern was that a previous incident would trigger the return to jail). *Cf; Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)* (prior offenses against child abuse victim and battered child syndrome evidence admissible on issue of intent to commit violent acts at issue in child abuse case; analogy to Federal *Rule of Evidence 404(b)*); *State v. Elkins, 102 S.W.3d 578 (Tenn. 2003)* (permissible to infer intent to rape during first interrupted encounter because of proof of actual rape at second encounter; subsequent acts may be used to prove intent under Rule 404(b)); *State v. Gilley, 297 S.W.3d 739, 758 (Tenn. Crim. App. 2008)* (homicide defendant's prior threats or violent acts toward the homicide victim admitted to prove intent; shows "settled purpose" to harm victim, hostility toward victim, and malice).

"intent" proof actually serves to disprove that the conduct was accidental or inadvertent.[487]

Proof of Intent. Intent is ordinarily inferred from evidence of the defendant's overall plan to commit such crimes[488] or from proof of defendant's motive.[489] A related inference is the inference that a person intended a

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[486] *See e.g.,* State v. Hooten, 735 S.W.2d 823 (Tenn. Crim. App. 1987) (under former statute, intent need not be proven for aggravated rape; hence prosecution could not use prior bad acts to prove this issue); State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996), superseded by statute as stated in State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Crim. App. Mar. 13, 2012) (under former statutes governing sexual battery and rape, intent is not an element of any of the crimes and is not an issue permitting Rule 404(b) proof). These cases held that "other act" evidence was inadmissible because intent was not an element of the charged offenses under the statutes in effect at that time. The Tennessee Code has since been revised to state that, if an offense fails to specify or plainly dispenses with a mental state, then intent, knowledge or recklessness suffices to establish the culpable mental state. *See* Tenn. Code Ann. § 39-11-301. Accordingly, older case law should be reviewed carefully to evaluate whether the current statute governing the charged offense includes a culpable mental state or has plainly dispensed with that requirement, thereby rendering Tenn. Code Ann. § 39-11-301 applicable. To the extent § 39-11-301 applies to the charged offense, evidence relating to intent, knowledge or recklessness is now relevant and may be admissible under Rule 404(b), despite having been ruled inadmissible due to irrelevancy in the past. *See e.g.,* State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. 2012) (since the generic mens rea statute, Tenn. Code Ann. § 39-11-301, applied to the crime of statutory rape, the state could introduce evidence that defendant kissed the victim on the mouth, even though it was a "bad act" within the ambit of Rule 404(b), because it was relevant to whether the defendant acted recklessly, intentionally, or knowingly when she committed the crimes); State v. Clark, 452 S.W.3d 268, 2014 Tenn. LEXIS 913 (Tenn. 2014) (explaining that because the statute for rape of a child, Tenn. Code Ann. § 39-13-522(a), does not contain a specific mental state for the offense, the "generic mens rea statute fills in the gap" and, therefore, evidence of unlawful sexual penetration may now be committed intentionally, knowingly, or recklessly). It should be noted that even when "other act" evidence fails to be probative of intent, knowledge, or recklessness, it may be admitted on other grounds, such as to corroborate a victim's version of the events. *See* State v. McCary, 119 S.W.3d 226, 246, (Tenn. Crim. App. 2003) (commonly ÿeferred to as *McCary II)* (evidence that defendant possessed pornographic material was probative in defendant's trial for statutory rape and sexual battery, as it tended to corroborate each victim's testimony that the defendant used pornography as a means of seduction; accordingly, magazines and videotapes, which were kept in defendant's briefcase and which could be identified by the victims, was relevant and not so prejudicial as to preclude admission into evidence); State v. Holt, 2012 Tenn. Crim. App. LEXIS 147, 40, (Tenn. Crim. App. 2012) (evidence that defendant kissed victim on mouth and sent him a note saying she "wanted to sleep with him this weekend" was revelant to statutory rape charge as evidence of intent and plan to commit the offense, but the court also noted that even if they were not admissible for on these grounds under 404(b), they would still be admissible on other grounds—namely, to corroborate the victim's account that the kiss and note were used as a "means of seduction" to commit the crime).

[487] *See e.g.*, State v. Moss, 13 S.W.3d 374 (Tenn. Crim. App. 1999) (to prove husband killed wife intentionally rather than accidentally, government was permitted to introduce evidence of defendant's prior sexual misconduct with his daughter in order to establish the killing would give defendant better access to his daughter).

[488] *See e.g.,* Harrell v. State, 593 S.W.2d 664 (Tenn. Crim. App. 1979) (prosecution for supermarket robbery; defendant who had been waiting outside supermarket in a car claimed he had not known co-defendant was robbing the market; appellate court approved admission of evidence of defendant's involvement in drugstore robbery the day before to show defendant's intent and guilty knowledge); Thompson v. State, 171 Tenn. 156, 101 S.W.2d 467 (1937) (arson; evidence admitted to prove defendant was not acting innocently and that defendant fire adjuster had previously been involved in fraudulent transactions similar to crime for which he was charged); ***State v. Coulter, 67 S.W.3d 3, 48 (Tenn. Crim. App. 2001)***, overruled in part, on other grounds, by State v. Johnson, 2013 Tenn. Crim. App. LEXIS 1051 (Crim. App. Dec. 3, 2013) (may infer motive from circumstances surrounding killing; facts included defendant's prior stormy relationship with victim as shown by admissible letters and notes from defendant that informed jury of bitterness of dispute between defendant and homicide victim; wife's plan to leave husband also admissible on intent, but better assessed under Rule 401 since it did not involve acts of the criminal accused). *See also* State v. Fykes, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 441 (Tenn. Crim. App. July 22, 2019) (defendant's public threat to kill the victim "right here in front of everybody" at a YMCA pool, which occurred hours before the victim was assaulted was part of the defendant's larger plan to commit burglary and assault; the threat was admissible to show defendant's intent when he later entered the victim's house, since a conviction for especially aggravated burglary required the state to prove that defendant entered the victim's house with intent to commit a felony, theft, or assault).

certain result if he or she had previously acted in the same way and achieved the same result. This inference is stronger if the previous acts and results closely resemble those alleged in the instant case. Although most cases contesting the admissibility of "other acts" under Rule 404(b) involve acts committed prior to the charged crime, Rule 404(b) also permits the introduction of evidence of subsequent acts (such as the defendant's effort to conceal the crime).[489.1]

Pre-crime acts may also be admitted if they relate to defendant's behavior *after* the crime, insofar as the evidence is probative of defendant's intent to commit the crime charged. In *State v. Giles*,[489.2] for example, the state's theory of the case was that defendant had staged the murder scene to look like a rape, in order to deflect suspicion from himself. The trial court admitted internet searches showing that defendant, on the day before the murder, had visited pornographic websites depicting women being raped. Although defendant's counsel argued that the internet searches were unfairly prejudicial and that staging evidence could not be offered to establish intent, because the staging happened after the crime, the appellate court ruled that post-crime staging evidence and pre-crime internet searches was highly probative of defendant's intent to murder the victim and stage it to avoid detection. While the court acknowledged that in sex crime cases, evidence that a defendant used pornography increased the danger that a jury would infer a defendant had the propensity to engage in other morally questionable sexual behaviors, the court noted that this danger was limited in the present case, where defendant was on trial for murder, not rape. The court, therefore, held the admission was not unfairly prejudicial to the defendant.[489.3]

Intent v. Propensity. Sometimes lawyers try to avoid the ban on character or propensity evidence by arguing that evidence is relevant to prove intent. In *State v. Tizard*[490] the defendant, a physician, was charged with

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[489] See *e.g.*, *Parks v. State, 543 S.W.2d 855 (Tenn. Crim. App. 1976)*; ***State v. Coulter, 67 S.W.3d 3, 48 (Tenn. Crim. App. 2001)*** (may infer premeditation from motive), overruled in part, on other grounds, by *State v. Johnson, 2013 Tenn. Crim. App. LEXIS 1051 (Crim. App. Dec. 3, 2013)*; *State v. Ward, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. 2019)* (evidence of prior drug transactions was relevant to defendant's motive to shoot the victim, which in turn was probative of his criminal intent to commit attempted homicide; since State's theory of the case was that defendant was unhappy with two previous drug transactions he had with the victim, evidence of those transactions was necessary to avoid creating a chronological or conceptual void in the State's case); *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)* (text messages from defendant's cell phone did not constitute inadmissible character evidence under Tenn. R. 404(a), but rather, was relevant and admissible under *Tenn. R. Evid. 401*; the messages demonstrated the defendant's intent to remove his GPS monitoring device and commit first-degree premeditated murder); *State v. Olivera, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 447 (Tenn. Crim. App. July 26, 2019)* (three prior incidents of domestic violence involving defendant and the victim were admissible under Rule 404(b), because they were highly probative of defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim; motive was a material issue at trial because it was circumstantial evidence of defendant's intent and his identity as the perpetrator); *State v. Watison, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 552 (Tenn. Crim. App. Aug. 30, 2019)* (in first-degree premeditated murder trial, there was no error in permitting witness to testify about two prior altercations between defendant and the victim, because evidence that the victim and defendant had quarreled on two previous occasions and that defendant held a gun during one of the quarrels was relevant to establish defendant's motive for killing the victim, as well as premeditation). *See also above § 4.04[9]*.

[489.1] *State v. Elkins, 102 S.W.3d 578 (Tenn. 2003)*. *See also State v. Carero, 2020 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 3, 2020)* (in trial for intent to sell or deliver drugs where defendant testified that he only possessed the drugs for personal use, his subsequent convictions for intent to sell or deliver drugs were admissible under Rule 404(b) to rebut defendant's testimony, since (1) they occurred within 18 months of the crime charged, (2) their probative value on the issue of intent outweighed the danger of unfair prejudice, (3) and the trial court gave two separate curative instructions admonishing the jurors that they could not consider defendant's other crimes as propensity evidence to commit the crimes for which he was charged, but rather, could only consider the subsequent crimes for the limited purpose of determining his intent to sell or deliver drugs); *State v. Hector J. Jauregui, 2007 Tenn. Crim. App. LEXIS 720* Tenn. Crim. App. 2007) (evidence of efforts to conceal the crime are highly probative to establish the intent of a perpetrator).

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

[489.3] *Id. at 523*.

sexual battery by fraud for having allegedly fondled a young male patient's genitals during several physical examinations. At trial a prosecution witness was permitted to describe the contents of a sexually explicit booklet and videotapes involving males which were found in defendant's possession. Although the prosecution argued this testimony was relevant on the defendant's intent, the Court of Criminal Appeals correctly found that it was really character proof barred by Rule 404(a). According to the court, the prosecution really sought to prove the defendant was a homosexual from which it could infer that he committed the alleged homosexual acts. The court found no intent element which would be proved by evidence of the booklet and tapes.

Illustration of Other Acts to Prove Intent. The appropriate use of other acts to prove intent[490.1] is illustrated in *Rafferty v. State*,[491] a prosecution for attempting to obtain money under false and fraudulent pretenses. According to the state's theory, the defendant had burned a dwelling house and filed an insurance claim for personal articles that were not in the house when it burned. The insurer was able to show that the defendant had the misfortune to have the same articles destroyed in thirteen previous fires, all covered by insurance. Evidence about these other fires was held to be admissible on the issue of intent to defraud in the case at bar.

A related link is illustrated by *State v. Johnson*[491.1] where the defendant was charged with robbery from a particular store. Defendant walked into the store, took some merchandise, and attempted to leave. When stopped by a store employee, defendant took a knife from his pocket and left with the stolen items. The court of appeals held it permissible for the state to introduce evidence of a prior shoplifting episode in the same store two weeks earlier in order to prove the defendant's intent to take property in the instant case when he entered the store and committed the robbery.

[11] Absence of Mistake or Accident; Guilty Knowledge

Absence of Mistake or Accident. Rule 404(b) may permit evidence of other bad acts to prove an absence of mistake or accident in the case being tried. The underlying theory is that repeated events of a similar nature make it unlikely that the event at issue was the product of chance or error. If accident or mistake is not an issue, then proof under 404(b) should be disallowed to prove it.[492] This category overlaps with use of such acts to prove intent[493] or knowledge. Perhaps the best example of this theory is *Laird v. State*,[494] where a defendant was on trial for escaping from a workhouse. Defendant claimed he had accidentally fallen off the truck carrying him to road work. Evidence of two prior escapes by the defendant was admissible to negative defendant's claim of "accident" and to prove an intent to escape.

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[490] *897 S.W.2d 732 (Tenn. Crim. App. 1994)*.

[490.1] *See, e.g.*, *State v. Carero, 2020 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 3, 2020)* (subsequent convictions were admissible to prove defendant's intent under Rule 404(b).

[491] *91 Tenn. 655, 16 S.W. 728 (1891)*. *See also* *State v. Electroplating, Inc., 990 S.W.2d 211 (Tenn. Crim. App. 1998)* (evidence of prior incidents of improperly releasing contaminants was admissible to prove intent to do so at time at issue in instant case), overruled in part, on other grounds, by *State v. King, 2013 Tenn. Crim. App. LEXIS 192 (Crim. App. Mar. 4, 2013)*; *State v. Brewer, 932 S.W.2d 1, 24 (Tenn. Crim. App. 1996)* (evidence of prior injunctions and criminal judgments was admissible on intent in securities fraud case; proved guilty knowledge that items were securities, that defendants knew of required disclosures and duty to register, and intentionally failed to disclose prior injunctions and convictions).

[491.1] *State v. Johnson, 366 S.W.3d 150 (Tenn. Crim. App. 2011)*.

[492] *State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996)*, superseded by statute as stated in *State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Crim. App. Mar. 13, 2012)*.

[493] *See above § 4.04[10]*.

[494] *565 S.W.2d 38 (Tenn. Crim. App. 1978)* (alternative holding).

Guilty Knowledge. Other crimes are also admitted to prove the guilty knowledge of the accused.[495] If a person is involved in several similar events, it can be inferred that the person learned the true state of events some time in the process. It should be noted that the other crimes could be subsequent to the act in issue as long as they permit an inference that the accused had the requisite knowledge or did not act accidentally. Proof of other acts to prove guilty knowledge is particularly useful in prosecutions for receiving stolen goods, where the common defense is that the accused did not know the goods had been stolen. It is also frequently used in drug possession cases where the defendant claims not to have known that drugs were present,[496] or in counterfeiting cases where the prosecution must prove that the accused knew the money was counterfeit.[497] Knowledge of guilt may also be proven by evidence that an accused has escaped from custody or attempted to escape from custody.[497.1]

[12] Common Scheme or Plan

[a] In General

Other crimes or acts of the defendant may be introduced to prove a design, plan, or scheme to carry out a series of acts, including the one for which the defendant is on trial, from which it may be inferred that the defendant carried through with the plan and committed the act charged. Usually the common scheme or plan is not an element of the crime; it is used to prove identity.[498] This proof does not involve propensity evidence since it helps establish that the defendant actually did the alleged act rather than merely had the propensity to do so.

To Prove Identity. If common scheme or plan proof is admitted to prove identity, obviously identity should be an issue.[498.1] In *State v. Moore*[499] the Tennessee Supreme Court was presented with a case involving a

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[495] See *e.g.*, *Meeks v. State, 519 S.W.2d 410 (Tenn. Crim. App. 1974)*; *State v. Luellen, 867 S.W.2d 736 (Tenn. Crim. App. 1992)* (three prior incidents involving drugs were admissible to prove knowledge of possession of cocaine by accomplice).

[496] *See Russell v. State, 556 S.W.2d 92 (Tenn. Crim. App. 1977)* (proof of possession of marijuana was admitted to prove guilty knowledge of PCP found at same time).

[497] *See* Peek v. State, 21 Tenn. (2 Humph.) 78, 87 (1840).

[497.1] *State v. Burton, 751 S.W.2d 440 (Tenn. 1988)*. *See also State v. Rimmer, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019)* (admitting evidence of defendant's escape attempts after his arrest for first-degree premeditated murder and first-degree felony murder, for the limited purpose of showing consciousness of guilt under Rule 404(b)).

[498] *See below § 4.04[15]*. *See State v. Moore, 6 S.W.3d 235, 239 (Tenn. 1999)* (identity is usually the only relevant issue to admit other offenses when the theory of common scheme or plan is based on a signature crime); *State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996)* (common scheme or plan most often is vehicle for admitting nearly identical crimes when the identity of the defendant is an issue), superseded by statute as stated in *State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Crim. App. Mar. 13, 2012)*.

[498.1] Identity was not an issue in *State v. Lambert, 2020 Tenn. Crim. App. LEXIS 305 (Tenn. Crim. App. Apr. 28, 2020)* (because identity was not a material issue, there was no need to establish a common scheme or plan as a means of proving identity). In that case, defendant was charged with unlawfully photographing the victim in public for the purpose of sexual gratification, in violation of *Tenn. Code Ann. § 39-13-605*. The victim testified that she had been followed by defendant in a public parking lot outside of a Walmart and that the defendant came within arm's length of her, holding a phone extended outward and tilted upwards. She testified, however, that she did not see the defendant's telephone actively capture a photograph or video of her. She was able to identify the defendant as the man with the phone, and surveillance video captured their interaction. No video or photograph of the victim was found on the defendant's phone after his arrest, and defendant did not admit to taking a video or photo of the victim. To prove that a photo or video of the victim had been taken, the State attempted to introduce defendant's general admission to police that he "liked to videotape blond women", had previously taken videos of blonde women at the same Walmart where the victim had been followed, and that he had "about 20 videos of other women" on his phone (which were ultimately found on his phone after his arrest). The State argued that the defendant's admission that he "liked to videotape blond

defendant tried for three counts of child rape. The defendant allegedly raped his stepdaughter one time in August (count three) and twice in November (counts one and two). The Supreme Court held that the August act was inadmissible during trial for the November rapes because identity was not an issue for the November incidents.

Distinguished in Conspiracy Cases. Evidence under Rule 404(b) of a common scheme or plan must be distinguished from proof in a conspiracy case. In the latter, the common scheme is an element the prosecution must prove beyond a reasonable doubt.[500] It is not "other crimes, wrongs, or acts," and Rule 404(b) plays no role in the proof process. For evidence covered by Rule 404(b), however, the proof is used to *infer* that someone did an act rather than to prove the act itself. Sometimes the two approaches may merge. For example, assume that A and B are charged with conspiracy to sell drugs. Both deny involvement in the deal. The government offers evidence that A had lost a lot of money gambling as circumstantial proof of A's motive to join the conspiracy. The gambling proof is covered by Rule 404(b), including its procedural requirements. On the other hand, if the government proves A and B met in a bar to plan the sale, this evidence directly establishes an element in the conspiracy and is not limited by Rule 404(b).

Categories of Common Scheme or Plan. In Tennessee three categories of "common scheme or plan evidence are recognized: (1) distinctive designs or "signature" crimes; (2) a larger, continuing plan or conspiracy; and (3) a common or inseparable plan or transaction, sometimes referred to as the "same transaction."[501]

Limited Admissibility. Perhaps showing a distaste for evidence of common scheme or plan, the Tennessee Supreme Court has stated that "only 'rarely' is such testimony [of prior offenses] admissible for the purpose of establishing a common scheme or plan."[502] The Supreme Court specifically agreed with an earlier decision of the Court of Criminal Appeals which minimized the use of a common scheme or plan, holding that it was not a separate rationale for admitting evidence of other acts:

> [T]he mere existence of a common scheme or plan is not a proper justification for admitting evidence of other crimes. Rather, admission of evidence of other crimes which tends to show a common scheme or plan is proper to show identity, guilty knowledge, intent, motive, to rebut a defense of mistake or accident, or to establish some other relevant issue.[503]

Procedures. When acts are offered for admission under the rubric of "common scheme or plan," the trial court must examine carefully each such act to determine whether it is "relevant to some special issue at

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women" was evidence of a common scheme or plan under Rule 404(b). The defendant objected, arguing that the admission was improper propensity evidence. After a jury-out hearing the trial court admitted the evidence. On appeal, the Court of Criminal Appeals held that since surveillance video captured the interaction of the defendant and victim, and the victim identified the defendant during her testimony, identity was not a material issue in the case; therefore, evidence of a common scheme or plan was unnecessary to prove identity. The Court also held that the State's argument—*i.e.*, that defendant's general admission of having taken videos of women in the past "necessarily meant" that he must have taken a photo or video in the present case—was exactly the kind of inference Rule 404(b) was designed to prevent. Since the evidence of guilt was "not overwhelming", the error was not harmless. The Court accordingly remanded and ordered a new trial. *Id., *17–25*.

[499] *6 S.W.3d 235 (Tenn. 1999)*.

[500] *See* *Tenn. Code Ann. § 39-12-103* (2010).

[501] *See* *State v. Moore, 6 S.W.3d 235, 240 (Tenn. 1999)*; *State v. Osborne, 251 S.W.3d 1, 11 (Tenn. Crim. App. 2007)*; *State v. Edwards, 2015 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. 2015)*; *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)*.

[502] *State v. Rounsaville, 701 S.W.2d 817, 820 (Tenn. 1985)*.

[503] *State v. Moore, 6 S.W.3d 235, 239 n. 5 (Tenn. 1999)*, *quoting* *State v. Hallock, 875 S.W.2d 285, 292 (Tenn. Crim. App. 1993)*.

trial, such as identity."[504] The mere fact that the act is part of the larger plan does not render the act admissible. Similarly, the fact that two or more crimes were committed for the common purpose of sexual gratification does not necessarily mean they were part of a common scheme or plan.[505]

[b] Distinctive Design

Crimes bearing a unique similarity to the crime for which the defendant is on trial are admissible to show defendant's "modus operandi" from which it may be inferred that the defendant is the person who committed the nearly identical crime for which he or she is on trial.[506] More than the repeated performance of the same class of crimes is required.[507] According to the Tennessee Supreme Court, the key concept is not whether the defendant committed both offenses or even whether the two offenses are similar; it is whether a "distinct design or unique method was used in committing the offenses."[508] This means that just because a defendant may have committed a series of crimes, these offenses are not necessarily part of a common scheme or plan.[509]

Distinctive Behavior. It is generally acknowledged that "[t]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature."[510] While the crimes need not be identical, "the

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[504] *State v. Moore, 6 S.W.3d 235, 239 n. 6 (Tenn. 1999)*.

[505] *State v. Osborne, 251 S.W.3d 1, 12 (Tenn. Crim. App. 2007)*.

[506] *State v. Denton, 149 S.W.3d 1, 14 (Tenn. 2004)* (for common scheme or plan grounded on a signature crime, "usually the only reason to allow admission of other offenses is to establish the identity of the defendant").

[507] As the Tennessee Supreme Court explained in *Harris v. State, 189 Tenn. 635, 638, 227 S.W.2d 8, 9–11 (1950)*, a rape prosecution where evidence that defendant had previously raped another woman was held inadmissible: "Vicious instincts are too common and the probability of prejudice too great to justify us in according probative force to the mere fact that a defendant, prior or subsequent to the offense under investigation, has been guilty of a like crime … Such propensity is not considered relevant to identify and the probable prejudicial effect of such evidence lies at the root of the rule excluding it."

[508] *State v. Moore, 6 S.W.3d 235, 241 (Tenn. 1999)*. *See also State v. Stout, 46 S.W.3d 689, 718 (Tenn. 2001)* (adopting opinion of Court of Criminal Appeals); *State v. Denton, 149 S.W.3d 1, 14 (Tenn. 2004)* (test of "signature crime" is whether there was a unique method used in committing the crimes).

[509] *State v. Denton, 149 S.W.3d 1,14 (Tenn. 2004)*. The Tennessee Court of Criminal Appeals recenly explained the distinction between a series of crimes and a common scheme or plan, as follows:

> "A larger, continuing plan or conspiracy relates to crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses. This category encompasses groups or sequences of crimes committed in order to achieve a common ultimate goal or purpose. The evidence sought is of a working plan, operating towards the future with such force as to make probable the crime for which the defendant is on trial. A common scheme or plan is not established through shared motivation for two otherwise unrelated crimes. Each of the consolidated offenses must serve to further the goal or plan in existence at the time of the commission of the first offenses. Where the State has not established evidence of a "working plan" whereby the subsequent offenses are predictable or probable from the defendant's determination to commit the initial offenses (or vice versa), the subsequent offenses cannot constitute parts of a larger, continuing plan [cites omitted]." *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220, at *94–95, (Tenn. Crim. App. 2019)*.

[510] McCormick On Evidence 315 (6th ed. 2006). *See Bunch v. State, 605 S.W.2d 227 (Tenn. Crim. 1980)*; *Young v. State, 566 S.W.2d 895, 898 (Tenn. Crim. App. 1978)* ("The test is not whether there was evidence that a defendant committed both crimes, but whether there was a unique method used in committing the crimes"); *State v. Hoyt, 928 S.W.2d 935 (Tenn. Crim. App. 1995)*, overruled in part, on other grounds, by *Spicer v. State, 12 S.W.3d 438 (Tenn. 2000)* (test of common scheme or plan is whether there was a unique method used in committing the crimes, *citing Young v. State*); *State v. Carter, 714 S.W.2d 241, 245 (Tenn. 1986)*; *State v. Moore, 6 S.W.3d 235, 240 (Tenn. 1999)*; *State v. Edwards, 2015 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. 2015)* (although burglary crime scenes contained several similar characteristics—*i.e.,* the homeowners were out of

methods used in committing the offenses must have 'such unusual particularities that reasonable men can conclude that it would not likely be employed by different persons.' "[511] Stated another way, " 'the modus operandi of the other crime and of the crime on trial must be substantially identical and must be so unique that proof that the defendant committed the other offense fairly tends to establish that he also committed the offense with which he is charged.' "[512] As the Tennessee Supreme Court has eloquently observed, "Many men commit murder, but Jack the Ripper used his knife in a manner so peculiar that when his crimes were viewed together there could be little doubt that they were committed by the same man."[513]

Illustrations. The leading pre-rules Tennessee case admitting evidence of other nearly identical crimes to demonstrate the defendant's criminal design is *Warren v. State*.[514] The defendant, on trial for robbery, denied that he was the man who, "dressed in a black cap and overalls with his face smeared with dark grease or paint, carrying a pistol in one hand and a flash-light in the other," robbed the occupants of a parked car. Testimony was admitted that a few nights later, at approximately the same location and at the same time, a man, apparently identified as the defendant, with blackened face and the like, robbed occupants of another car. The inference that the defendant committed the robbery for which he was on trial was allowed.

The *Warren* decision was described in *Harris v. State*,[515] as marking "the boundaries beyond which this court has not been willing to go in permitting the admission of evidence of one crime to establish the identity of a defendant accused of committing another … ." *Harris*, a rape case, involved the testimony of another rape victim. The only similarity between the two rapes was that both women "thought" a knife had been used, and even then neither could say she had actually seen the knife. The court, concluding that "the methods pursued" in the two rapes, "were not so peculiar as to render it unlikely that lustful men bent upon the crime of rape might not have pursued identical methods," reversed the conviction.[516]

The *Warren* decision has permitted "other act" evidence in some cases where the appellate courts perceive "striking similarities" in criminal events. Sometimes the actual similarities involved routine rather than remarkable actions. For example, describing the modus operandi in three rapes as "almost letter perfect,"

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town, the power was disabled, the phone lines were cut, the perpetrator gained access through the back door, and jewelry and electronics were stolen, and the investigating officer testified that he "rarely saw all five of those factors" during a burglary investigation, similarities were not unusual enough to be admissible as signature crimes).

[511] *State v. Moore, 6 S.W.3d 235, 240 (Tenn. 1999)*, *quoting* *Harris v. State, 189 Tenn. 635, 644, 227 S.W.2d 8, 11 (Tenn. 1950)*. *See also* *State v. Toliver, 117 S.W.3d 216 (Tenn. 2003)* (*quoting Moore*).

[512] *State v. Moore, 6 S.W.3d 235, 240 (Tenn. 1999)*, *quoting* *Bunch v. State, 605 S.W.2d 227, 230 (Tenn. 1980)* (emphasis in original).

[513] *Harris v. State, 189 Tenn. 635, 641, 227 S.W.2d 8, 11 (1950)*. In *Bunch v. State, 605 S.W.2d 227 (Tenn. Crim. 1980)*, however, evidence that the defendant had committed a similar robbery was admissible on the issue of identity because of a "unique factor"—common accomplices. The court stated, "To be relevant and, therefore, admissible, it is not necessary that the other crime be identical in every detail to the offense on trial; it is sufficient if evidence of the other crime supports the inference that the perpetrator of it, shown to be the defendant, is the same person who committed the offense on trial." *Id. at 231*.

[514] *178 Tenn. 157, 156 S.W.2d 416 (1941)*.

[515] *189 Tenn. 635, 644, 227 S.W.2d 8, 12 (1950)*.

[516] *Id. at 642, 227 S.W.2d at 11*. *See also* *Shockley v. State, 585 S.W.2d 645 (Tenn. Crim. App. 1978)* (rape; evidence of prior sexual assault on prosecutrix's sister was inadmissible); *Young v. State, 566 S.W.2d 895 (Tenn. Crim. App. 1978)* (armed robbery; evidence of prior burglary was inadmissible); *Jones v. State, 523 S.W.2d 942 (Tenn. Crim. App. 1975)* (burglary; evidence of prior burglary was inadmissible to show defendant did *not* commit crime for which he was on trial); *State v. Dies, 829 S.W.2d 706 (Tenn. Crim. App. 1991)* (proof of sexual abuse of minor child was inadmissible in trial for sexual abuse of another child; the two victims resided at different houses, the incidents occurred four months apart, and the alleged sexual acts were not "particularly similar"; no common scheme or plan).

the court admitted evidence of two prior rapes in *White v. State*.[517] In each instance the rapist, who held a knife, forced the victim from the front seat to the back seat, forced her to disrobe, discussed drugs with her, allowed her to use Kleenex, rode around in the car with her after the rape, and let her out on the street after taking her purse.

Similarly, in *State v. Hoyt*,[518] the Tennessee Court of Criminal Appeals found a distinctive design in the rape of two minor children. The similarities included: the two victims were about the same age and lived in the same household as the defendant, and both crimes involved oral penetration and occurred in the defendant's home when the defendant's grandmother was away and the defendant was the sole caretaker.

State v. Goad,[519] a murder case, also illustrates the unique similarities that should be present under this theory. An unusual .38 caliber two-shot derringer with over-and-under barrels was linked to the defendant in two robberies that occurred prior to the homicide. It was established that the homicide victim was killed by a bullet from the same derringer. Since the distinctive weapon made it more likely that the accused was the murderer, the court admitted evidence of the two prior robberies.

The leading modern case illustrates the need for some unique feature common to the acts. In *State v. Moore,*[520] the defendant was charged with three counts of child rape of his stepdaughter: one involved an August event and two counts were for November acts. The Tennessee Supreme Court held the August act was not sufficiently unique to be admitted in the trial of the November acts. Though there were similarities in the August and November rapes, there were some differences. The court opined that had certain unique features been present, the August acts would have been admissible to establish identity, had identity been an issue. The uniqueness test would have been satisfied had the defendant used a hammer or electrical cord in both (he used them only in the November acts) or had he urinated on the victim (as he did in November).[521]

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[517] *533 S.W.2d 735 (Tenn. Crim. App. 1975)*. *See also* ***Caruthers v. State, 219 Tenn. 21, 406 S.W.2d 159 (1966)*** (armed robbery; robber entered stores on pretext several times, left when other people were present but remained to commit the robbery when customers were not present; threatened to kill store operators unless they followed directions); *Williams v. State, 550 S.W.2d 246 (Tenn. Crim. App. 1976)* (armed robbery and rape; each victim was overtaken on street by rapidly walking man who brandished knife in victim's face and then put knife at her neck; each victim was robbed then raped; rapist asked each victim her age and where she lived and threatened to kill her if she cried out; rapist wanted neither victim to look at him); *Graybeal v. State, 3 Tenn. Crim. App. 466, 463 S.W.2d 159 (1970)* (armed robbery; to rebut alibi defense, testimony that a similarly dressed man in similar car robbed another store shortly after robbery of first store was admitted without discussion of similarities); *Webster v. State, 1 Tenn. Crim. App. 1, 425 S.W.2d 799 (1967)* (performing illegal abortion; each woman instructed to bring rubber catheter, taken to same room, required to remove underwear and lie on couch; metal speculum used to open vagina and insert catheter; $25 fee charged "as was reasonably to be expected in such a business"; each woman referred others to the defendant); *Mothershed v. State, 578 S.W.2d 96 (Tenn. Crim. App. 1978)* (rape prosecution; defendant's modus operandi involved ringing doorbells and asking to use the telephone to call a person whose name could not be located in the phone book; resort to this same approach within a three-hour period on three other occasions was admitted to identify the defendant, who had asserted an alibi defense, as the rapist).

[518] *928 S.W.2d 935 (Tenn. Crim. App. 1995)*, overruled in part, on other grounds, by *Spicer v. State, 12 S.W.3d 438 (Tenn. 2000)*.

[519] *707 S.W.2d 846 (Tenn. 1986)*.

[520] *6 S.W.3d 235 (Tenn. 1999)*. *See also State v. Toliver, 117 S.W.3d 216 (Tenn. 2003)* (*quoting Moore*) (modalities of two aggravated child abuse incidents were not sufficiently similar to be comparable to a signature; though the two had many common facets (punishment for bad grades), there were differences (method of inflicting punishment slightly different, mother witnessed one incident) sufficient for the Tennessee Supreme Court to find inadequate evidence of distinct modus operandi; case illustrates the strong degree of similarity necessary for the signature test to be satisfied); *State v. Denton, 149 S.W.3d 1, 14 (Tenn. 2004)* (only similarity is that a physician sexually assaulted patients; not sufficiently unique).

[521] *6 S.W.3d at 241 n. 9*.

A similar insistence on uniqueness was stressed in *State v. Shirley*,[522] involving a trial of four counts of armed robbery. The Tennessee Supreme Court overturned the conviction because the four robberies should not have been joined since the crimes were not admissible to establish the identity of the person who committed any one of the crimes. Though there were substantial similarities (all four robberies were committed near in time by a person wearing a black ski mask using a black gun who had the cash register put on the counter in three of the four robberies), the Supreme Court downplayed the uniqueness of these similarities and listed many differences in concluding there was insufficient uniqueness to merit admission of the evidence.

[c] Larger Plan

The unifying concept of crimes admitted under this theory is not their high degree of similarity but the common goal or purpose toward which each crime is directed.[523] The proof sought is of a working plan, operating towards the future with such force as to make probable the crime for which the defendant is on trial.[524] According to the Tennessee Supreme Court, "a larger plan or conspiracy in this context contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses."[525]

The question of whether a larger plan exists often arises when the State seeks to consolidate offenses under *Tenn. R. Crim. P. 8*. The defendant may move for severance pursuant to *Tenn. R. Crim. P. 14*, arguing that the offenses do not constitute a "common scheme or plan" as required under Rule 8, and that the offenses should be tried separately.[525.1] In determining whether severance should be granted, the court must determine "whether the evidence of one crime would be admissible in the trial of the other if the two

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[522] *6 S.W.3d 243 (Tenn. 1999)*.

[523] *State v. Denton, 149 S.W.3d 1, 15 (Tenn. 2004)*; *State v. Edwards, 2015 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. 2015)*.

[524] 2 WIGMORE ON EVIDENCE 249 (Chadbourn rev. 1979). *See also* *State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995)*, overruled in part, on other grounds, by *Spicer v. State, 12 S.W.3d 438 (Tenn. 2000)* (proof sought is of a working plan, operating towards the future with such force as to make probable the crime for which the defendant is on trial).

[525] *State v. Denton, 149 S.W.3d 1, 15 (Tenn. 2004)*. *See also* *State v. Osborne, 251 S.W.3d 1, 11 (Tenn. Crim. App. 2007)* (larger continuing plan encompasses groups or sequences of crimes committed in order to achieve a common ultimate goal or purpose)*State v. Jeffries, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Oct. 10, 2019)* (no error in refusing to sever defendant's sexual crimes from the assault crimes, because defendant's physical abuse of the victim was part of his continuing plan to subdue the victim in order to profit from her prostitution, and the offenses were properly admissible under *Tenn. R. Evid. 404(b)* because the elements of the alternative sex trafficking charge explicitly made the assault relevant, and the sex trafficking and promoting prostitution charges were relevant to defendant's motive and intent in the assault offenses); *State v. Edwards, 2015 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. 2015)* (where defendant had a list of over twenty addresses along with notes indicating whether cars were located in the driveway, newspapers were piling up at the mailbox, or mail was left on the front porch, the list was admissible as evidence of a common scheme or plan; it tended to show that the defendant was casing the particular neighborhood to determine when the homes' occupants were out of town in order to break into the houses and steal property, and that the acts for which he was charged were part of a larger working plan to burgle additional unoccupied homes in that neighborhood and that they were not simply "a string of burglaries").

[525.1] *See* *Tenn. R. Crim. P. 8(b)* (two or more offenses may be joined if the offenses constitute parts of a common scheme or plan); *Tenn. R. Crim. P. 14* (the defendant has the right to a severance unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others).

counts of indictment had been severed."[525.2] Accordingly, "any question as to whether offenses should be tried separately … is really a question of evidentiary relevance" requiring Rule 404(b) analysis.[525.3]

In *Stricklin v. State*,[526] the defendant's alleged plan to poison both her in-laws by use of arsenic justified admission of evidence of the defendant's attempted arsenic poisoning of her mother-in-law in a prosecution for murder by arsenic poison of defendant's father-in-law. Somewhat more questionably, in *Ellison v. State*,[527] defendant's alleged "sex escapade" provided an alternative basis for admission of defendant's rape of two young girls following the sexually-oriented murder of his wife. The issue was somewhat clarified in *State v. Denton*,[528] where the court held that sexual gratification alone is not sufficient as a goal to make various sex offenses part of a larger plan.

[13] Same Transaction; Complete Story

Another related category permits other acts to be admitted to provide the trier of fact with the "full story."[529] The same transaction category ordinarily involves crimes that occur within a single transaction.[530] Sometimes the

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[525.2] *State v. Jeffries, 2019 Tenn. Crim. App. LEXIS 637, *33 (Tenn. Crim. App. Oct. 10, 2019)*.

[525.3] *Id., *39* on relying on *Spicer v. State, 12 S.W.3d 438, 445 (Tenn. 2000)*. In *Jeffries*, the defendant was charged with assault and various offenses related to that assault. After learning that the victim and her friend were engaging in prostitution for the benefit of the defendant, the State added charges of promoting prostitution and trafficking for a commercial sex act. The defendant moved to sever, arguing that all of the offenses should be charged separately, and appealed the trial court's decision to allow consolidation. On appeal, the court held that the charges were properly joined, because (1) defendant's physical abuse of the victim was part of his "continuing plan" to subdue the victim in order to profit from her prostitution; (2) the offenses were properly admissible under *Tenn. R. Evid. 404(b)* since the elements of the alternative sex trafficking charge explicitly made the assault relevant; and (3) the sex trafficking and promoting prostitution charges were relevant to defendant's motive and intent in the assault offenses. *State v. Jeffries, 2019 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Oct. 10, 2019)*.

[526] *497 S.W.2d 755 (Tenn. Crim. App. 1973)*. *See also* *State v. Brown, 823 S.W.2d 576 (Tenn. Crim. App. 1991)* (multiple cocaine possession and sales incidents admissible to prove intent and existence of continuing plan to possess cocaine for sale); *Hull v. State, 553 S.W.2d 90 (Tenn. Crim. App. 1977)* (scheme to hire assassin to kill wife's paramour justified admission of defendant's prior attempt to have another of his wife's lovers killed); *Birdsell v. State, 205 Tenn. 631, 330 S.W.2d 1 (1959)* (contributing to delinquency of a minor by having her pose for photographs in the nude; acts in other cities committed with victim "leading on up to the final act" were admissible "to make the whole picture"); *Jones v. State, 200 Tenn. 553, 292 S.W.2d 767 (1956)* (conspiracy to commit series of burglaries); *Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843 (1931)* (conspiracy to rob and kill; identity not in issue; prior robberies "competent to be considered in fixing the punishment of all persons criminally responsible" for the murder for which defendants were on trial); *Sartin v. State, 75 Tenn. 679 (1881)* (in trial for horse-stealing, prior theft of a mule was admissible—along with defendants' flight, sale of the animals, pursuit and recovery of the property, and defendants' subsequent capture—to show "whole scheme was carried out in pursuance of some previous plot or conspiracy for the purpose"; identity apparently not in issue); *Dykes v. State, 589 S.W.2d 384, 389 n.5 (Tenn. Crim. App. 1979)*; *Shell v. State, 584 S.W.2d 231 (Tenn. Crim. App. 1979)*; *Hicks v. State, 571 S.W.2d 849 (Tenn. Crim. App. 1978)*. *Cf.* *Sims v. State, 208 Tenn. 615, 348 S.W.2d 293 (1961)* (defendant's statement that he intended to rob a truck and kill the driver was admissible in prosecution for felony-murder committed on following day as tending to prove a plan or scheme to obtain money by murder; fact that first murder and robbery were not committed "does not detract from the force of the argument that it was part of the plan" but the opinion fails to note that intent to commit a crime is not itself a crime; defendant's statement, however, included admission of stealing a pistol which would be a prior crime admissible under the "larger plan" theory).

[527] *549 S.W.2d 691 (Tenn. Crim. App. 1976)*. *See also* *State v. Hallock, 875 S.W.2d 285 (Tenn. Crim. App. 1993)* (defendant was charged with many counts of sex offenses involving his two young daughters over several years; there was no larger plan united by a common purpose).

[528] *149 S.W.3d 1,15 (Tenn. 2004)*.

[529] *State v. Hoyt, 928 S.W.2d 935 (Tenn. Crim. App. 1995)*, overruled in part, on other grounds, by *Spicer v. State, 12 S.W.3d 438 (Tenn. 2000)*. *See also* *State v. Gilliland, 22 S.W.3d 266 (Tenn. 2000)* (evidence of prior event may be admissible to "paint a

phrase "*res gestae*" is used for this concept. A special instruction may be given directing the jury how to assess the contextual proof.[531]

Helpful in Understanding and Evaluating Other Evidence. In general terms, this evidence may be admissible because it helps the trier of fact understand or evaluate the evidence at trial.[532] In *State v. Gilliland*[533] the Tennessee Supreme Court clarified the standard for admitting such potentially damaging proof in a criminal case:

> [W]hen the state seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the state must establish, and the trial court must find, that (1) the absence of the evidence would create a chronological or conceptual void in the state's presentation of its 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; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice.

Acts Before or After Event at Issue. This category allows proof of acts occurring before and after the event at issue. Prior acts done in preparation of the act at issue can be introduced to show the preparatory measures taken or the events leading up to the event at issue. For example, prior sexual relations between an adult and a minor were introduced to "explain the circumstances surrounding the acts charged in the indictment."[534]

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picture" or show the "contextual background" of the incident at issue). *See generally* Donald Paine, *Other Acts as Contextual Background Evidence*, 45 TENN. B.J. 13 (July 2009).

[530] State v. Osborne, 251 S.W.3d 1, 12 (Tenn. Crim. App. 2007) (sexual misconduct with two minors occurring at same time is the same transaction). *See also* State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Crim. App. Apr. 8, 2019) (quoting State v. Johnson, 342 S.W.3d 468, 474–75 (Tenn. 2011), defining "same transaction" as follows: "Offenses within a 'single criminal episode' are generated by separate physical actions. The actions may be committed by separate defendants. In other respects, however, they are similar to same conduct offenses: they occur simultaneously or in close sequence, and they occur in the same place or in closely situated places. A critical characteristic of single episode offenses, particularly in cases involving otherwise unrelated offenses or offenders, is the fact that proof of one offense necessarily involves proof of the others."

[531] State v. Leach, 148 S.W.3d 42, 57 (Tenn. 2004).

[532] State v. Gilliland, 22 S.W.3d 266 (Tenn. 2000); State v. Smith, 2011 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. 2011) (evidence of two armed bank robberies committed by the defendant provided significant contextual background, were relevant to the defendant's motive, and the absence of the evidence would have created a large void in the state's presentation of its case and likely would have resulted in significant jury confusion).

See also State v. Turner, 352 S.W.3d 425, 428 (Tenn. 2011) (evidence of other crimes, wrongs or acts may be relevant to provide a contextual background; in homicide case, evidence that others were acquitted of the homicide is not relevant to establish context, citing *Gilliland*); State v. Little, 402 S.W.3d 202, 210 (Tenn. 2013) (Rule 404(b) evidence may be admissible to provide a "contextual background" to "paint a picture" of the events leading up to the charged offense, *citing Gilliland*).

[533] 22 S.W.3d at 272. *See also* State v. Montgomery, 350 S.W.3d 573, 584 (Tenn. Crim. App. 2011) (following *Gilliland*'s three factors in rejecting proof of non-charged sexual encounters when indictment alleged specific sexual assaults on specific dates; jury would not be confused if non-charged sexual acts were excluded). *Gilliland's* test only applies when the State introduces evidence for the sole purpose of establishing contextual background. State v. Mendenhall, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020). But contextual evidence may be proffered under multiple evidentiary theories, such as intent, motive, or identity. In such instances, *Gilliland's* test does not apply. *Id.* Thus, in *Mendenhall*, the court allowed evidence of defendant's other murders because they helped provide background context for defendant's motive. All of the murder victims were prostitutes and the method of committing the crimes was quite similar, including a distinct signature. Because motive was a material issue in the case, the other murders were admissible to provide contextual evidence of defendant's larger plan to "kill prostitutes like this victim, and by extension, to provide contextual background to the jury." *Id., *87 and *96*. Explaining the interdependence of motive and contextual background evidence, the court in *Mendenhall* noted that motive "necessarily serves the purpose of completing the story of a crime." *Id., *85*.

[534] State v. Gann, 733 S.W.2d 113, 115 (Tenn. Crim. App. 1987).

Just as the trier of fact is permitted to hear about acts done in preparation for the event at issue, it can also be presented with evidence of subsequent events that complete the story of the event. This category permits proof of acts contemporaneous with or subsequent to the act at issue. For example, if a bank robber ran from the crime scene and stole a car, the car theft would be admissible in the robbery trial to inform the trier of fact of the whole event.

Limited Admissibility. The easy elasticity of this label invariably seems to swallow the rule prohibiting other crimes evidence that shows criminal propensity. Crimes introduced to tell the "complete story" will rarely be probative of a fact in issue in the trial of the crime charged and, therefore, rarely justify the prejudice created by their admission. For this reason, crimes admitted as part of the "same transaction" should be limited to those so inextricably connected in time, place, or manner that the jury would be unable to comprehend the essential nature of the charged crime without hearing evidence of the "other" crime.[535]

A good illustration of this limiting approach is *United States v. Heidebur,*[536] involving a defendant charged with possession of sexually explicit photographs of his minor stepdaughter. The government sought to introduce evidence the defendant had sexually abused this child. The theory was that the molestation was "inextricably

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[535] *State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 2019)*. *See also* *State v. Mendenhall, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020)* (other murders were admitted to provide contextual background in defendant's first-degree premeditated murder trial, since they were necessary to explain defendant's larger plan, his intent, and his motive); *State v. Dillard, 2020 Tenn. Crim. App. LEXIS 259 (Tenn. Crim. App. Apr. 16, 2020)* (testimony concerning uncharged theft of a vehicle did not unfairly prejudice the defendant, since it was relevant as contextual background evidence and the court provided a limiting instruction); *State v. Davenport, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 513 (Tenn. Crim. App. Aug. 23, 2019)* (in murder trial, evidence of defendant's prior assault on his girlfriend was admissible under *Tenn. R. Evid. 404* to tell the "complete story" of the crime, defendant's intent, and the victim's state of mind; without the evidence, there would have been a "chronological or conceptual void" in the State's presentation of the case, since the jury would be left to wonder why the victim started a physical altercation with the defendant several minutes before he was shot); *State v. Cox, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 141 (Tenn. Crim. App. Mar. 6, 2019)* (circuit court erred by admitting evidence of defendant's other crimes, because the evidence did not satisfy the requirements of "complete story" evidence and it was not relevant to a material issue other than defendant's character; the prejudicial effect of defendant's involvement in subsequent burglaries also blurred the jury's view of the weak evidence of his identity, and thus, the error was not harmless); *Claiborne v. State, 555 S.W.2d 414 (Tenn. Crim. App. 1977)* (murder of policeman and attempted robbery; evidence admitted of robbery of service station one hour previously; "[w]here the previously committed crime is so closely related to the crime under investigation at trial, in point of time and place, and so intimately associated with it that they both form one continuous transaction, the whole transaction may be shown. The reason is that all such acts are admissible as necessary parts of the proof of the entire deed." *Id. at 417*). *See also* *Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)* (housebreaking and sexual assaults) (alternative holding); *Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856 (1956)* (in trial for theft of men's suits from store *A*, evidence of theft of suits from store *B* was admissible when all suits were discovered in back seat of defendants' car); *Arnold v. State, 563 S.W.2d 792 (Tenn. Crim. App. 1977)* (concealing stolen property; evidence of concealing other stolen property not charged in indictment was admitted); *Craig v. State, 524 S.W.2d 504 (Tenn. Crim. App. 1974)* (robbery of "Ma and Pa" grocery; testimony that defendant fired gun in proprietor's direction, prompting proprietor to run from store for help held admissible although money was not taken from proprietor's wife until after her husband had left); *Russell v. State, 489 S.W.2d 535 (Tenn. Crim. App. 1972)* (larceny of a billfold; attempt to open purses of other persons in store was admissible as "*res gestae*"); *Simmons v. State, 483 S.W.2d 590 (Tenn. Crim. App. 1972)* ("mass slaughter;" evidence of related homicide admitted); *Coffman v. State, 3 Tenn. Crim. App. 634, 466 S.W.2d 241 (1970)* (robberies of pharmacy and post office located in same building); *Evans v. State, 557 S.W.2d 927 (Tenn. Crim. App. 1977)* (murder during armed robbery; testimony of doctor who treated victim prior to death regarding injury to victim's little finger of left hand was admissible to corroborate that valuable ring had been forcibly taken from victim's hand and to show malice); *Couch v. State, 566 S.W.2d 288 (Tenn. Crim. App. 1978)* (rape and armed robbery; victim's testimony that defendant referred to his rape of another woman during attacks was admitted because "it was germane to the court's inquiry to hear testimony as to everything that was said that would shed light upon the state of mind of the parties"); *State v. Payne, 791 S.W.2d 10, 16 (Tenn. 1990)* (defendant's possession of drug paraphernalia and cocaine was admissible in homicide trial to prove that defendant was under influence of cocaine at time of murder). *But see* *State v. Hallock, 875 S.W.2d 285 (Tenn. Crim. App. 1993)* (chronic sexual abuse of defendant's children over a period of years did not constitute a single criminal episode).

[536] *122 F.3d 577 (8th Cir. 1997)*.

intertwined" with the crime of possessing the photos since the child's mother, who found the nude photos, looked for the photos because of her knowledge of the earlier molestation. The Eighth Circuit correctly held that the mother's reason for searching for the photos was irrelevant to the defendant's possession crime and was not necessary to provide the jury with a coherent picture of the facts.

Another illustration is *State v. Gilliland*,[537] a homicide case for murder during a robbery where the state sought to introduce evidence of a prior shooting by the defendant in order to provide background information as to why the defendant displayed a shotgun and why the victim displayed a wad of money shortly before the robbery-murder. The Tennessee Supreme Court held that the prior shooting was inadmissible under Rule 404(b) because the probative value was greatly exceeded by the danger of unfair prejudice. The Court found that other witnesses could have proven that the defendant possessed a loaded shotgun and that the reason why the victim displayed the money was inconsequential. The important fact was that the defendant knew the victim possessed the money. The exclusion of evidence of the prior shooting was characterized as not likely to create a conceptual void that would have significantly impaired the jury's understanding of the evidence or issues in the case.

[14] Opportunity

Closely related to, and sometimes indistinguishable from, the category of common scheme or plan is the category of opportunity. Other acts are admitted to prove the accused had access to the necessary equipment,[538] people or location, or the necessary skills to carry out the act at issue. For example, in *State v. Gann*[539] prior sexual activities between the accused and young boys were admitted to prove the "state of intimacy" between the three people. This, in turn, permitted an inference that the defendant had the opportunity to commit the sex acts at issue.

Evidence offered under the category of "opportunity" must be scrutinized to make sure opportunity is actually a probative fact rather than an excuse to admit proof of bad acts. An excellent illustration is *United States v. Heidebur*,[540] in which the defendant was charged with possession of nude photographs of his young stepdaughter. At trial the government introduced testimony that the defendant had sexually molested the same child some time before the nude photos were discovered. Among the Rule 404(b) theories the government advanced to support the proof of molestation was "opportunity to commit the crime" of possessing the photos. The Eighth Circuit correctly held that the proof of molestation should not have been admitted under this theory since opportunity was not a real issue in the case. The accused lived in the same house as the victim and provided care for her while the child's mother worked. Accordingly, the probative value on opportunity was marginal while the danger of misuse of this prejudicial evidence was high.

While ordinarily this rationale for introducing proof of prior bad acts is designed to show that a criminal accused's prior behavior established that he or she had the opportunity to commit the act in issue, the opposite side of "opportunity" was raised in *State v. Wyrick*,[541] where the defendant sought to introduce the rape victim's

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[537] *22 S.W.3d 266 (Tenn. 2000)*.

See also *State v. Turner, 352 S.W.3d 425, 428 (Tenn. 2011)* (evidence of other crimes, wrongs or acts may be relevant to provide a contextual background; in homicide case, evidence that others were acquitted of the homicide is not relevant to establish context, citing *Gilliland*).

[538] See *e.g.*, *State v. Goad, 707 S.W.2d 846, 850 (Tenn. 1986)* (murder case; court admitted proof of defendant's two other robberies with unusual derringer to prove defendant possessed this unusual weapon that was used in the homicide).

[539] *733 S.W.2d 113 (Tenn. Crim. App. 1987)*. *See also* *State v. Shropshire, 45 S.W.3d 64, 75 (Tenn. Crim. App. 2000)* (proof defendant committed uncharged sexual crimes with the same victim is admissible to show the relationship between the defendant and the victim, and the defendant's opportunity to commit the charged crimes).

[540] *122 F.3d 577 (8th Cir. 1997)*.

prior accusations of rape as proof that she had the ability to fabricate a rape allegation. In a comprehensive opinion by Judge Joseph Tipton, the Court of Criminal Appeals suggested that such proof may be admissible if there was sufficient similarity between the prior and instant acts. In *Wyrick* the two incidents were sufficiently dissimilar that the prejudice of introducing the prior incident outweighed the probative value it had.

Not Admissible on Actions of Third Party. While opportunity is a common category for evidence to be considered under Rule 404(b), that rule is not used for proof that a third party had an opportunity to commit the crime.[541.1]

Likely Covers Actions of Third Party. While previous Tennessee authority held that Rule 404(b) only applies to acts of the criminal accused,[542] a 2014 statute expanded coverage to any individual, including a deceased victim.[543] This appears to mean that Rule 404(b) now will be used to assess the opportunity of a third party in a criminal case, at least when the proof involves character-type evidence.[544] In a civil case, Rule 401 may be used since the 2014 statute expands the reach of Rule 404(b) only in criminal cases; it does not apply to civil cases.

[15] Identity

While ordinarily proof of the identity of the accused as the person who committed the crime is accomplished by eyewitness testimony, other methods of identification, such as fingerprinting and handwriting analysis, are also used. When the charged criminal conduct is denied and the direct identity evidence is nonexistent or weak, identity may be proved circumstantially by introducing evidence of a common scheme or plan,[545] motive,[546] or of another crime committed by the defendant.[547] The evidence of the other crime is used to permit an inference

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[541] ***62 S.W.3d 751, 779 (Tenn. Crim. App. 2001)***. Note that *Wyrick* involved the actions of an alleged rape *victim*. Under *State v. Stevens, 78 S.W.3d 817 (Tenn. 2002)*, Rule 404(b) now applies only to acts of the criminal accused, not of the victim. Accordingly, today *Wyrick* would be assessed under Rule 401 rather than 404(b).

[541.1] *See State v. Stevens, 78 S.W.3d 817 (Tenn. 2002)* (Rule 404(b) applies only to acts of the criminal accused; not to acts of third persons). *See above § 4.04 [7]*.

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

[543] *Tenn. Code Ann. § 24-7-125* (Supp. 2014).

[544] This could reverse the result in *State v. Powers, 101 S.W.3d 383 (Tenn. 2003)*, where the Tennessee Supreme Court held that Rule 404(b) did not apply to proof of the opportunity of a third party; Rule 401 and its ordinary test of relevance was the guiding evidence rule. Under the 2014 statute, however, Rule 404(b) specifically applies to the actions of third parties in criminal cases. *See also State v. Buckingham, 2018 Tenn. Crim. App. LEXIS 637 (Crim. App. Aug. 20, 2018)* (although evidence relating to a victim's prior crimes is admissible under *Tenn. Code Ann. § 24-7-125* when the requirements of *Tenn. R. Evid. 404(b)* are met, the trial court did not find the proof of the victim's burglaries to be clear and convincing and properly held the evidence inadmissible). *See also State v. Pinegar, 2016 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Oct. 28, 2016)* (Court of Appeals found no plain error in defendant's trial for facilitation of the delivery of cocaine within a school zone, where defense counsel attempted to cross examine a confidential informant by introducing evidence that she had previously been caught concealing drugs under Rule 404(b), arguing that the evidence was relevant to opportunity—*i.e.*, to show that the witness had the "necessary skills and ability" to conceal drugs; the trial court excluded the evidence based on relevance, since the informant had already testified that she had not been subjected to a strip search or a pat-down of her pelvic area before she conducted defendant's drug buy, and she also admitted that she "could have" concealed drugs prior to the transaction), *reconsidered and vacated* on other grounds by *State v. Pinegar, 2017 Tenn. Crim. App. LEXIS 386 (Tenn. Crim. App. May 16, 2017)*.

[545] *See above § 4.04[12]*.

[546] *See above § 4.04[9]*.

[547] *See Bunch v. State, 605 S.W.2d 227, 230 (Tenn. Crim. App. 1980)*; ***State v. Fisher, 670 S.W.2d 232, 236 (Tenn. Crim. App. 1983)*** (identity); *State v. Dellinger, 79 S.W.3d 458, 484 (Tenn. Crim. App. 2001)* (previous altercation, murder, and burning of

that the defendant committed the crime for which he or she is being tried. Ordinarily the two offenses must be quite similar.[548] Where identity is not a contested issue in the case, however, a trial court may properly exclude evidence of other crimes.[548.1]

This rule is illustrated by *State v. Fisher,*[549] a rape case where evidence of a prior rape against another woman was admitted to prove identity. The victim of the first rape and other evidence clearly established defendant as the rapist in the first incident. The court in the second case admitted the earlier rape because the two events were so similar that the jury could infer that the same person committed both offenses.

Another illustration is *State v. Electroplating, Inc.,*[550] where the defendant was charged with illegal discharge of a chemical into a sewer system. The defendant denied being the source of the contaminant. The trial court was properly held to have admitted proof of defendant's past unlawful discharges at the same site to establish his identity as the source of the discharge in the instant case. The Tennessee Court of Criminal Appeals noted that an inference of identity arises when the elements of the prior offense and the charged offense are sufficiently distinctive to permit a conclusion that the person who committed the earlier act is the same person who committed the instant offense.

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trailer were admissible on identity of killers). The admissibility of crimes, wrongs, or other acts to show identity is a commonly contested issue. *See, e.g.*, State v. Carmody, 2020 Tenn. Crim. App. LEXIS 386 (Tenn. Crim. App. June 3, 2020) (in defendant's trial for first-degree felony murder and especially aggravated robbery, the State could introduce evidence about defendant's alleged ownership of a gun within two months of the crime, since it was relevant to defendant's identify as the person who possessed the gun in the victim's bedroom during the crime; although possessing a gun is not a crime, the State asked the trial court to assess admissibility under Rule 404(b) because evidence of the defendant's convicted status could be elicited during cross-examination, as defendant was a convicted felon at the time he allegedly possessed the gun); State v. Rimmer, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019) (trial court did not err by admitting evidence related to defendant's prior convictions for aggravated assault and rape of the murder victim, because (1) the evidence had high probative value for showing intent, premeditation, motive and identity; and (2) the probative value of the evidence outweighed the danger of unfair prejudice, because the relevant convictions were for violent offenses and involved the victim, the defendant had been incarcerated for the crimes, and other evidence showed he had made incriminating statements to a fellow inmate about his desire to kill the victim); State v. Cox, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 141 (Tenn. Crim. App. Mar. 6, 2019) (circuit court erred in admitting evidence of defendant's other burglaries in his trial for burglary, because (1) the evidence of his identity, while legally sufficient, was not insurmountable where the photographic lineups were less than 100 percent conclusive, and only one witness was 100 percent sure of her identification at trial; (2) the "other crimes" evidence was not relevant to a material issue other than defendant's character, since the only evidence that was relevant was the physical evidence recovered—a check—not the circumstances surrounding its recovery; and (3) the prejudicial effect of defendant's involvement in subsequent burglaries blurred the jury's view of the weak evidence of his identity).

[548] See *e.g.*, State v. Mendenhall, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020) (where defendant's other murder involved a "signature", it was relevant to prove his identity in his trial for first-degree premeditated murder; the defendant placed his murder victims' bodies in a manner that was so unusual and distinct "that reasonable people would conclude that the same person committed both offenses"; the signature, combined with other similarities between the two crimes, such as their location, the type of victim chosen, and the manner in which the murders were committed, gave the trial court discretion to admit the evidence);State v. Bobo, 724 S.W.2d 760, 764 (Tenn. Crim. App. 1981) (not sufficiently similar to admit prior robbery).

[548.1] *See e.g.,* State v. Thirkill, 2017 Tenn. Crim. App. LEXIS 663 (Tenn. Crim. App. 2017) (where a defendant in trial for robbery wanted to admit evidence of another robbery committed co-defendant, for the purpose of disproving his identity as one of the participants in the robbery of the victim, trial court propertly excluded evidence of the other crime; the trial court found this evidence not to be probative because defendant's identity had not been disputed and the danger of unfair prejudice to the co-defendant outweighed any probative value).

[549] ***670 S.W.2d 232 (Tenn. Crim. App. 1983)***. *See also* State v. Cazes, 875 S.W.2d 253 (Tenn. 1994) (testimony by two of defendant's previous sex partners about his propensity to bite his partner was admissible to prove identity of person who raped and murdered the victim).

[550] 990 S.W.2d 211 (Tenn. Crim. App. 1998), overruled in part, on other grounds, by State v. King, 2013 Tenn. Crim. App. LEXIS 192 (Crim. App. Mar. 4, 2013).

By way of contrast, in *State v. Davis*,[551] also a rape case, the Court of Criminal Appeals reversed because of the erroneous admission of evidence of a prior rape to prove identity. Since the two rapes were not sufficiently similar in detail, the probative value of the prior rape evidence was outweighed by the prejudicial effect.

Interlocking Physical Evidence. Interlocking physical evidence may also permit identity to be established by proof of a crime other than the crime for which the defendant is on trial. For example, in a trial for burglary of an automobile from which a pistol was taken, the court admitted evidence of a subsequent armed robbery where the defendant used the stolen gun.[552] Similarly, in a trial for robbery of a grocery story where a certain pistol was used, evidence was admitted showing that the defendant had previously stolen the pistol in a liquor store robbery.[553] Evidence of possession of items similar to those used in the crime also may be admitted to establish identity.[554]

Mistaken Identity. Just as other crimes may be used to prove identity, on rare occasions they can also be used to prove a mistaken identity. If acts, similar to those at issue, have been committed at the relevant time by others, the accused can prove the other acts to support a claim that the perpetrator of the other acts also committed the act at issue. Because of a statutory amendment to coverage of Rule 404(b),[555] the acts of third parties to prove mistaken identity may be governed by Rule 404(b), reversing previous Tennessee authority.[555.1]

Identity Not Contested Issue. Although Rule 404(b) does permit bad acts to be used to prove identity, such acts may not be used on identity when identity is not a contested issue in the case. In *State v. Johnson*,[555.2] for example, the defendant was charged with robbery from a particular store. The appellate court held that the state could not introduce proof of identity by proof of a prior indictment for shoplifting from the same store on another occasion. Although the state must prove identity to convict the accused of the robbery, it could not use proof of the earlier shoplifting event under Rule 404(b) to do so when identity is not a serious issue. Eyewitnesses clearly identified the defendant as the robber whom they had known prior to the robbery.

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[551] *706 S.W.2d 96 (Tenn. Crim. App. 1985)*. *See also* *State v. Roberson, 846 S.W.2d 278 (Tenn. Crim. App. 1992)* (concerning a DUI charge, even though identity was an issue because defendant claimed to be a passenger rather than the driver of a vehicle that was followed and stopped, evidence of defendant's behavior at a prior DUI stop and conviction was improper; there was nothing sufficiently unique in the similar actions of the perpetrators of both crimes to justify admitting evidence of the prior event).

[552] *Pruitt v. State, 3 Tenn. Crim. App. 256, 460 S.W.2d 385 (1970)*. *See also* *State v. Howell, 868 S.W.2d 238 (Tenn. 1993)* (since truck and gun were used in two homicides, evidence of one homicide was admissible on the identity of the killer in the other). *Cf.* *Mothershed v. State, 578 S.W.2d 96 (Tenn. Crim. App. 1978)* (evidence of prior attempted rape which included the theft of a pistol was admissible in trial for rape which, according to the prosecutor, was perpetrated with the stolen pistol; evidence of the prior attempt and theft of the pistol were admitted to show defendant's possession and guilty use of the weapon as well as defendant's identity as the perpetrator of the charged rape).

[553] *Campbell v. State, 469 S.W.2d 506 (Tenn. Crim. App. 1971)*. *Accord* *State v. McKinney, 603 S.W.2d 755 (Tenn. Crim. App. 1980)* (court properly admitted testimony that murder defendant was arrested a week after the shooting and charged with illegal possession of a weapon, which was the same gun used in the earlier homicide); *Gammon v. State, 506 S.W.2d 188 (Tenn. Crim. App. 1973)* (evidence that murder defendant obtained the murder weapon "in an encounter with" two named people).

[554] *State v. Reid, 213 S.W.3d 792, 815 (Tenn. 2006)* (defendant possessed small caliber handgun and double-bladed knife similar to those used in crime; admissible on identity).

[555] *Tenn. Code Ann. § 24-7-125* (Supp. 2014).

[555.1] *State v. Stevens, 78 S.W.3d 817, 837 (Tenn. 2002)* (Rule 404(b) applies only to actions of the criminal accused, not to those of third parties).

[555.2] *State v. Johnson, 366 S.W.3d 150 (Tenn. Crim. App. 2011)*.

Identity was also held to not be an issue in *State v. Lambert*,[555.3] where the defendant was charged with illegally photographing a woman for sexual gratification in violation of Tenn. Code Ann. § 39-13-605. In that case, the defendant had made a statement to police after his arrest admitting that he "liked to videotape" women, had done so many times before, and that he had a preference for blonds. The State argued that the statement was admissible to establish the defendant's common scheme or plan, in order to prove his identity in the crime charged. The defendant argued it was improper propensity evidence under Rule 404(b). The trial court admitted the evidence, but the Court of Criminal Appeals reversed, holding that identity was not a contested issue since the victim was able to identify the defendant as the man who had allegedly videotaped her, and the incident had been captured on surveillance cameras. The Court also held that the error was not harmless; accordingly, the conviction was reversed.[555.4]

[16] Sex Crimes

No Sex Crimes Exception. Some older Tennessee cases have suggested that evidence of other sexual offenses is admissible to prove a propensity for sexual misconduct.[556] In *State v. Burchfield*,[557] however, the Tennessee Supreme Court specifically refused to adopt a sex crimes exception to the general rule that evidence of independent crimes is inadmissible.

Other Uses. This does not mean that such crimes are not admissible in any case, however. They could be admitted to prove such issues as identity,[558] motive,[559] or intent.[560] They may also be admissible when an

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[555.3] State v. Lambert, 2020 Tenn. Crim. App. LEXIS 305 (Tenn. Crim. App. Apr. 28, 2020).

[555.4] *Id.* The State also offered the statement on the issue of motive, but the Court of Criminal Appeals rejected this argument.

[556] *Cf.* Sykes v. State, 112 Tenn. 572, 576, 82 S.W. 185 (1903).

[557] ***664 S.W.2d 284 (Tenn. 1984)***. *See also* State v. Rickman, 876 S.W.2d 824 (Tenn. 1994) (following *Burchfield* in refusing to adopt sex crimes exception to rule barring evidence of prior crimes); State v. Dutton, 896 S.W.2d 114 (Tenn. 1995) (following *Rickman*); State v. Tizard, 897 S.W.2d 732 (Tenn. Crim. App. 1994) (following *Rickman*); State v. Hodge, 989 S.W.2d 717 (Tenn. Crim. App. 1998) (following *Rickman* in allowing evidence of uncharged crimes allegedly committed within the time frame of events described in an open-dated indictment); State v. Woodcock, 922 S.W.2d 904 (Tenn. Crim. App. 1995) (following *Rickman*); State v. McCary, 922 S.W.2d 511, 514 (Tenn. 1996) (following *Rickman*), superseded by statute as stated in State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Crim. App. Mar. 13, 2012); State v. Shropshire, 45 S.W.3d 64, 75 (Tenn. Crim. App. 2000) (following *Rickman*); State v. McCary, 119 S.W.3d 226 (Tenn. Crim. App. 2003) (following *Rickman*).

[558] *See above* § 4.04[15].

[559] *See above* § 4.04[9]. *See, e.g.*, State v. Ledbetter, 2020 Tenn. Crim. App. LEXIS 106 (Tenn. Crim. App. Feb. 20, 2020) (evidence of defendant's numerous sexual offenses against the victim, which occurred over three years and largely conformed to his sexual fetishes, were admissible to show motive, *i.e.*, sexual gratification).

[560] *See* above § 4.04[10]. State v. Holt, 2012 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. 2012) (note sent by the defendant-teacher to student-victim saying she "wanted to spend the night with" him, and evidence that defendant kissed the victim on the mouth, were properly admissible as a "bad acts" evidencing the intent and plan to commit statutory rape, where the statute required the State to prove the defendant acted recklessy; they establishing defendant's means of seducing the victim and accomplishing the unlawful sexual penetration, and they also corroborated the victim's version of events); State v. McCary, 119 S.W.3d 226 (Tenn. Crim. App. 2003) (in prosecution for statutory rape and aggravated sexual batter, pornographic magazines and videotapes found in the defendant's possession were probative, because they tended to corroborate the account provided by each victim that the defendant used pornography as a means of seduction). *See also,* State v. Norton, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. 2019) (trial court properly admitted testimony of defendant's internet search history because the search terms "young amateur sex" and "nude teen sex" were suggestive of someone interested in finding sexually explicit images of minors, was relevant and probative to the issue of defendant's intent and knowledge, and was not outweighed by the danger of unfair prejudice); State v. Broadrick, 2018 Tenn. Crim. App. LEXIS 678 (Tenn. Crim. App. 2018) (defendant's internet search history from phone, showing that he visited multiple websites advertising pornography of teenage girls, was "certainly

indictment charges that a number of sex offenses occurred within a certain time frame. The government may introduce evidence of unlawful sexual behavior between the defendant and the victim during that period.[561] However, if the indictment alleges specific sexual acts occurring on specific dates, evidence of sexual acts at other times may be inadmissible under Rule 404(b).[561.1]

Evidence that a person accused of a child rape had watched pornography is scrutinized especially carefully and is usually found to be inadmissible propensity proof.[561.2]

Some Tennessee decisions have also permitted proof of prior sexual encounters between an accused and the victim to establish the "state of intimacy" between the victim and the accused.[562] It is not clear whether such a ruling would always be appropriate; courts should clearly indicate how the state of intimacy between the parties is relevant to the issue being tried.

The admissibility of certain criminal convictions also may be permitted by a statute discussed below.[563]

[17] Rebutting Entrapment Defense

Under Tennessee criminal law, a criminal defendant may raise the defense of entrapment and establish improper government inducement.[564] Since the defense applies only if the accused was "otherwise unwilling" and not "predisposed" to commit the crime, it may appear that the prosecution becomes entitled to use Rule 404(b) to prove the defendant was predisposed to commit it.[565] However, the better approach is to offer the

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suggestive of someone who has interests in minor children" and was, therefore, relevant in sentencing court's decision requiring him to register as a sex offender; when making a decision to place a defendant on the sex offender registry, trial courts must consider the facts and circumstances surrounding the offense and may consider any additional relevant factors under *Tenn. Code Ann. § 39-13-506(d)(2)(B)*).

[561] *State v. Rickman, 876 S.W.2d 824, 827–29 (Tenn. 1994)*. Sometimes these cases are characterized as "generic evidence" cases where the victim—usually a child—or some other qualified witness testifies to the commission of multiple instances of a similar type of abuse, but cannot or does not specifically differentiate the events. *See State v. Qualls, 482 S.W.3d 1, 11 (Tenn. 2016)*. An example would be a child who was sexually abused on many Saturday nights over several years. Evidence Rule 404 permits proof of unlawful sexual contact between the defendant and the victim during the time period stated in the indictment. *Id. at 9*. *See also*, *State v. Ledbetter, 2020 Tenn. Crim. App. LEXIS 106 (Tenn. Crim. App. Feb. 20, 2020)* (where the victim was abused by the defendant over a period of time, evidence of the numerous sexual offenses and their similarities was highly probative of defendant's concerted effort to abuse the victim over a period of years, thereby establishing a common scheme or plan that made the offenses admissible under *Tenn. R. Evid. 404(b)*; since the evidence was admissible for each count of the indictment, severance was not required under *Tenn. R. Crim. P. 14(b)(1)*).

[561.1] *State v. Montgomery, 350 S.W.3d 573, 583–584 (Tenn. Crim. App. 2011)*.

[561.2] *See e.g.*, *State v. Clark, 452 S.W.3d 268 (Tenn. 2014)*. *See also, State v. Ledbetter, 2020 Tenn. Crim. App. LEXIS 106 (Tenn. Crim. App. Feb. 20, 2020)* (defendant's internet searches of anime pornography were properly held relevant and not unduly prejudicial in trial for rape of a child, since the search content corroborated victim's statements in forensic interview that defendant "showed him something like Pokeman" and a website "of people drawing with … animals and stuff … without their clothes on"; but the probative value of more general search terms involving pornography, including searches for bestiality, were substantially outweighed by the danger of unfair prejudice and, therefore, were inadmissible); *State v. McCary, 119 S.W.3d 226 (Tenn. Crim. App. 2003)* (covers of pornographic magazines have limited probative value but substantial prejudice; however, the fact that the police discovered various pornographic media in the defendant's possession was probative to the offenses charged—statutory rape and aggravated battery, since it tended to corroborate the account provided by each victim that the defendant used pornography as a "means of seduction).

[562] See *e.g.*, *State v. Williams, 768 S.W.2d 714, 716 (Tenn. Crim. App. 1988)* (citing Tennessee cases). *See* Rule 412 (rape shield).

[563] *See Tenn. Code Ann. § 40-17-124* (2006), discussed *below § 4.04 [19]*.

[564] *Tenn. Code Ann. § 39-11-505* (2010).

proof under Rule 405 since the defendant's predisposition to commit the crime is an essential element which the jury must resolve.[566] This government proof can take the form of specific acts (including other crimes), reputation, or even opinion testimony.

Of course the predisposition evidence must relate to the relevant propensity. In *De Jong v. United States*,[567] for example, the defendant was charged with several marijuana offenses and raised an entrapment defense. The Court of Appeals held that the government should not have been permitted to cross-examine him about a previous arrest for burglary and intoxication since neither was probative of his predisposition to commit a drug crime.

In an entrapment case the accused may offer character proof, including the lack of arrests or convictions,[568] to establish lack of predisposition.

If the accused opens the door to his or her character, the government may counter with its own relevant character proof.[569]

[18] Other Grounds

The flexibility in Rule 404(b) has produced other theories for admitting evidence. One unusual case permitted proof that a rape defendant had been arrested for trespass to explain why the defendant was in a police car when identified by a woman he had previously raped nine days earlier.[570] There are many other illustrations.[571]

[19] Child Sex Crimes Exception

Tennessee law specifically provides for the admissibility of evidence of the defendant's prior conviction for certain sex crimes against a child less than age thirteen when the defendant is on trial for the same or a similar charge. Contrary to settled evidence law, and in particular Rule 404(b), *Tennessee Code Annotated § 40-17-124* provides that:

> Notwithstanding the provisions of any rule or statute to the contrary, in a criminal case [for the crimes listed] … evidence of the defendant's prior conviction is admissible and may be considered for its bearing

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[565] *See e.g.*, *Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932)* (in entrapment case, government may launch searching inquiry into defendant's conduct and predisposition).

[566] *See below § 4.05 [5]*.

[567] *381 F.2d 725 (9th Cir. 1967)*.

[568] See *e.g.*, *United States v. Thomas, 134 F.3d 975 (9th Cir. 1998)* (in entrapment case, defendant should have been permitted to testify that he had no arrests or convictions).

[569] In this situation, the government's character evidence may well satisfy three Rules: 404(b), 405(a), and 405(b). *Cf*. *United States v. Roper, 135 F.3d 430 (6th Cir. 1998)* (considering federal Rules 404(a) and 404(b)).

[570] *State v. Drinkard, 909 S.W.2d 13, 16 (Tenn. Crim. App. 1995)*.

[571] *See e.g., State v. McCary, 119 S.W.3d 226 (Tenn. Crim. App. 2003)* (possession of pornographic magazines and videos admissible if sex crime victim identified them as ones defendant possessed; defendant used pornographic materials as means of seduction; the pornographic materials that were not identified by victims were inadmissible because they were propensity evidence); *State v. Johnson, 366 S.W.3d 150 (Tenn. Crim. App. 2011)* (to show why store manager called police when defendant entered store, state was permitted to prove the defendant had shoplifted from the same store two weeks earlier; prior shoplifting was "contextual background evidence"); *State v. Dotson, 450 S.W.3d 1 (Tenn. 2014)* (fact defendant had been in prison was admissible to show familiarity with criminal justice system so jury could better evaluate "the integrity" of defendant's confession; witness who testified about prior incarceration did not mention crime for which defendant was incarcerated, length of defendant's prior incarceration, or when defendant was released from prison).

> on any matter to which it is relevant, subject to the provisions of *Rule 403 of the Tennessee Rules of Evidence.*[572]

Thus, the defendant's prior convictions for sex crimes against children are admissible to show his or her bad character trait of pedophilia and the conforming conduct against the present victim in the case on trial. This law is rather startling when compared to the general rule, that evidence of a person's character or trait of character is not admissible to prove that the person acted in accordance with that character trait on this occasion.[573] The general rule exists to avoid a defendant's prior conviction in an unrelated matter from being used as substantive evidence of his guilt in the later trial. *Tennessee Code Annotated § 40-17-124* is intended to permit precisely that result. The implicit underlying theory is apparently "once a child molester, always a child molester." While the crimes at issue are atrocious and have a devastating effect on the victim, there are serious questions about the validity of this statute. It appears that the intent, as well as the effect, of this law is to ease the prosecution's burden of persuasion. Unfortunately, it may also jeopardize the defendant's chance at a fair trial.

Rule 403 Balance. While the statute contains a balancing test to be used by the court in determining whether to admit the prior conviction, it is the test set forth in Rule 403, which is heavily weighted in favor of admissibility and excludes evidence only if its probative value is *substantially outweighed* by the danger of unfair prejudice.[574] The balancing test that is contained in Rule 404(b) is much more restrictive, mandating exclusion of the evidence if the danger of unfair prejudice merely outweighs the probative value.[575]

A significant concern exists about the constitutionality of the statute. Its provisions, which clearly conflict with Rule 404(b), specifically state that they apply "notwithstanding the provisions of any rule or statute to the contrary."[576] The Tennessee Supreme Court has previously determined that the legislature's attempt to circumvent rules of evidence is an unconstitutional violation of the doctrine of separation of powers. In *State v. Mallard*,[577] the court found that:

> Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state. Furthermore, because the power to control the practice and procedure of the courts is inherent in the judiciary and necessary "to engage in the complete performance of the judicial function," […] this power cannot be constitutionally exercised by any other branch of government.[578]

In light of *Mallard*, it would not be surprising if courts invalidate the legislature's clear effort to sidestep Rule 404(b).

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[572] *Tenn. Code Ann. § 40-17-124* (2006) (applies in any trial in which the defendant is charged with "any sex offense specified in §§ 39-13-502; 503; 504; 505; 506; 511 (provided that the offense of public indecency or indecent exposure constitutes a Class A misdemeanor or Class E felony violation); 513; 514; 515; 516; 522; 527; 528 or 39-15-302, or "is charged with the offense of attempting, soliciting or conspiring to commit any sex offense;" the defendant has a conviction for any of the foregoing, and the victim is under age thirteen).

[573] *See above § 4.04[3]*.

[574] *Tenn. R. Evid. 403*.

[575] *Tenn. R. Evid. 404(b)(3)*; *see above § 4.04[8][e]*.

[576] *Tenn. Code Ann. § 40-17-124* (Supp. 2006).

[577] *40 S.W.3d 473 (Tenn. 2001)*.

[578] *Id. at 480–481*, *citing* TENN. CONST. ART. II, § 2.

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§ 4.05 Rule 405. Methods of Proving Character

[1] Text of Rule

Rule 405 Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. After application to the court, inquiry on cross-examination is allowable into relevant specific instances of conduct. The conditions which must be satisfied before allowing inquiry on cross-examination about specific instances of conduct are:

(1) The court upon request must hold a hearing outside the jury's presence,

(2) The court must determine that a reasonable factual basis exists for the inquiry, and

(3) The court must determine that the probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues.

(b) Specific instances of conduct.In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Advisory Commission Comment:

This proposed rule changes Tennessee law, which does not permit character to be proved by personal opinion.

Cross-examination of character witnesses for the accused raises a delicate problem. The examining lawyer can ask the witness about rumored arrests and charges concerning the defendant, because the witness's knowledge of the rumors might impeach the witness in the eyes of the jurors. If the witness admits having heard unfavorable rumors, the jury may decide that the witness's reputation or opinion testimony is entitled to little weight. If the witness has not heard the rumors, the witness's testimony may likewise be taken with a grain of salt because the witness is unfamiliar with the accused or the accused's community.

The indirect effect of such a cross-examination may be the more damaging to the accused. While the jury will be instructed to consider the rumors only as affecting the character witness's credibility, the practical danger is that such rumors—even if untrue—place the defendant's character in a bad light with the jurors. In an effort to alleviate the problem, the proposed rule sets out detailed procedural safeguards. The cross-examiner must apply to the court for permission to inquire into specific instances of conduct, the jury must be excused, and the court must determine both that a factual basis exists and that probative value for impeachment outweighs prejudicial effect on the accused's character.

Part (b) allows substantive proof of specific acts where the character is an element of a cause of action or a defense. For instance, the defendant who called a defamed plaintiff a "crook" can prove the plaintiff embezzled funds.

[2] Methods of Proving Character: In General

When character evidence is admissible as circumstantial evidence under Rule 404(a) or as an element of a claim or defense, Rule 405 provides specific guidelines for the types of proof that can be offered. In general terms, there are three types of proof that can be introduced as evidence of a person's character: reputation, opinion, and specific instances of conduct. Usually character witnesses present reputation and opinion evidence, although an expert may also present opinion evidence. Specific instances are usually raised on cross-examination, but sometimes can be brought out on direct exam of a character witness. Character proof that does not fit any of the three categories is often disallowed.[579]

[3] Reputation and Opinion

[a] In General

Opinion and Reputation Admissible. When character is admissible as circumstantial evidence under Rule 404(a), evidence in the form of opinion or reputation is permissible pursuant to Rule 405(a). The reputation or opinion must be helpful in assessing the relevant[580] character at the time of the act in question, not at the time of the trial, unless used for impeachment.

This distinction is well illustrated by *Hemby v. State*.[581] The defendant, convicted of involuntary manslaughter for accidentally suffocating his infant son, sought to testify about his religious experiences while in jail. The Court of Criminal Appeals held that such evidence was not admissible as substantive evidence of innocence because the character testimony did not deal with character prior to the alleged offense. According to *Hemby*, it could have been admissible, however, if credibility were an issue since it shed light on his truthfulness at the time of the trial.[582]

Timing of Reputation. Although the opinion or reputation testimony must help determine the accused's character at the time of the event at issue, a perfect match is not required. Reputation before or after the event may shed light on character at the time of the event. As the Tennessee Supreme Court has said, "Good character is a flower of the slow growth of years and does not change overnight."[583] However, if the testimony assesses character too far from the event at issue, it may be inadmissible as irrelevant.[584]

Rule 405(a) is noteworthy in several respects. First, it departs from prior Tennessee law which did not permit opinion proof of character. Second, it is an exception to the rule limiting lay opinion evidence.[585] Third, since reputation evidence can be used under this rule and reputation is arguably hearsay, Rule 803(21) establishes a hearsay exception to permit the evidence to be introduced.

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[579] See *e.g.*, *United States v. Candelaria-Silva, 166 F.3d 19, 35 (1st Cir. 1999)* (certificate of good conduct, which is a police certification of a negative criminal record, is not admissible under Rule 405 since it is not opinion, reputation, or specific act evidence).

[580] If the character or reputation is to be admitted under Rule 404(a)(1) or (2), the character trait must be "pertinent." If admitted to impeach under Rule 404(a)(3), 607, 608, or 609, character for "truthfulness" or "untruthfulness" is relevant.

[581] *589 S.W.2d 922 (Tenn. Crim. App. 1978)*.

[582] This conclusion is no longer accurate under Tennessee law since Rule 610 now makes religious beliefs inadmissible on credibility in most situations.

[583] *Strader v. State, 208 Tenn. 192, 344 S.W.2d 546, 548 (1961)*.

[584] See *e.g.*, *Fry v. State, 96 Tenn. 467, 35 S.W. 883 (1896)* (reputation for character six years before event was not too remote).

[585] *See below § 7.01[4]*.

[b] Foundation

Before either reputation or opinion evidence of character is introduced, the witness must lay a proper foundation. An opinion witness must establish that, through personal experience, he or she is sufficiently familiar with the person whose character is being discussed to have been able to form an opinion of that person's character. The opinion witness can be either a layperson or an expert, such as a psychologist. A reputation witness, on the other hand, must show, in order to satisfy the hearsay rule, familiarity with the person's "reputation among associates or in the community."[586] Reputation, of course, refers to the collective assessment of a group of people. Often it is difficult if not impossible to trace the origins of a person's reputation, although it may stem from one or more events that are, themselves, inadmissible, at least on direct examination.

This testimony may require the witness to convince the court of two things. First, the witness must establish that he or she has been a member of the relevant community,[587] an associate[588] of the relevant person long enough to learn of the reputation of the person whose character is at issue, or has somehow been placed in a situation so as to be able to acquire the necessary information about reputation among the person's associates or community. Second, the witness must convince the court that he or she has actually taken sufficient steps to become familiar with the person's reputation in that community. For example, the witness may testify that the witness has spoken to many people in the community about the person's character.

When reputation or opinion testimony is offered by one side, the other side can rebut by offering its own character witnesses who present their personal opinion or their knowledge of the person's reputation. As discussed in the next section, specific acts can also be used on cross-examination to test the credibility of the character witness.

[4] Specific Instances of Conduct: Character as Circumstantial Evidence

[a] In General

Rule 405 permits specific instances of conduct to be used in two situations: when character is an essential element[589] and when character is used circumstantially to prove conduct in conformity with character for the exceptions listed in Rule 404(a). Rule 405 does not affect methods of proving "other acts" under Rule 404(b) to establish motive, identity, and the like.[590]

Circumstantial Evidence. When character is used as circumstantial evidence under Rule 404(a), Rule 405(a) permits specific instances of conduct to be used to test the credibility of the character witness. Rule 405(a) states that "relevant specific instances of conduct" may be used on cross-examination. For example, if the criminal defendant charged with embezzlement "opens the door" by calling a character witness who testifies that the defendant has the reputation of being an honest person, the prosecution can, on cross-

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[586] *Tenn. R. Evid. 803(21)*.

[587] It is clearly correct to assess the reputation in the community in which the person lives whose character is being assessed.

[588] One is an associate who meets in a business or other continued relationship. *See* McCormick On Evidence 279 (6th ed. 2006)("[t]the courts generally agree that proof [of reputation] may be made … of his established repute in any substantial group of people among whom he is well known, such as the persons with whom he works, does business, or goes to school"). This rule rejects older Tennessee authorities that were hesitant to permit evidence of a person's reputation among business associates. *See* *Arterburn v. State, 216 Tenn. 240, 391 S.W.2d 648 (1965)*.

[589] *See below § 4.05[5]*.

[590] *See above §§ 4.04[7]-4.04[15]*.

examination after following the procedures described below, ask the witness about specific instances of conduct that suggest the defendant may be dishonest. There are many case examples.[591]

Theory. Specific instances of conduct are permissible on cross-examination for several reasons. First, they test the credibility of the character witness by providing information on the underlying data upon which the opinion or reputation was formed. If an opinion witness, who testifies that the defendant was an honest person at the critical time, did not know that the defendant had a prior embezzlement conviction, the opinion may have been formed on the basis of inadequate information or a careless (and therefore suspect) approach to assessing a person's reputation. Second, the specific acts help the trier of fact assess the standards used by the character witness. For example, if a witness who gave the opinion that the defendant is an honest person also knew that the defendant had ten shoplifting convictions, the trier of fact may choose to discount the opinion evidence because of the character witness's low standards for measuring honesty.

[b] Form of Question

The form of the question used to cross-examine a character witness about a specific act has been extensively liberalized in many jurisdictions. While at one time reputation witnesses could only be asked, "Have you heard … ," and opinion witnesses could be asked, "Have you heard …" or "Do you know … ," the legislative history of Federal Rule 405(a) suggests that either formulation is permissible for either type of witness.[592] Thus, under Federal Rule 405(a), a character or reputation witness, on cross-examination about specific acts, can be asked such questions as, "Have you heard," "Do you know," "Are you familiar with," and "Are you aware."

In TennesSee on the other hand, a case decided before the adoption of the Tennessee Rules of Evidence suggested that the traditional form of the question was still preferred.[593] Thus, a reputation character witness should be asked, "Have you heard … ?" It is not clear whether this traditional format will be mandated under the rules. However, since the rules permit the witness to serve as both an opinion and a reputation witness, and since the jury is unlikely to appreciate the slight difference between "Have you heard" and "Do you know," the federal approach is preferable.

[c] Relevance

The specific act must be relevant to the character trait about which the witness has testified. In *State v. Sims*,[594] a shoplifting case, character witnesses testified that the accused had a good reputation for truthfulness in the community in which she lived and was entitled to be believed under oath. The court permitted the character witness to be cross-examined about arrests for bad checks and shoplifting, which reflected truthfulness, but barred questions about arrests for assault and battery.

In another illustrative case, *State v. Nesbit*,[595] in which the issue was whether the capital defendant killed the victim accidentally or with premeditation, a prosecution witness, during cross examination, actually

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[591] See *e.g.*, *State v. Ray, 880 S.W.2d 700 (Tenn. Crim. App. 1993)* (specific acts of victim's violence toward third persons excluded on issue of first aggression because the acts were not asked about on cross-examination).

[592] Advisory Committee's Note to Rule 405, 56 F.R.D. 222 (1973) ("these distinctions [between 'have you heard' and 'did you know'] are of slight if any practical significance, and the second sentence of subdivision (a) [of Rule 405] eliminates them as a factor in formulating questions").

[593] *State v. Sims, 746 S.W.2d 191, 198 (Tenn. 1988)*.

[594] *746 S.W.2d 191 (Tenn. 1988)*. *Sims*, a pre-rules decision, was characterized as providing "an accurate interpretation of the language of Rule 405." *State v. Nesbit, 978 S.W.2d 872, 882 (Tenn. 1998)*.

served as a defense character witness. After this witness testified that, in essence, the defendant did not bother anyone and seemed always to try to stay out of trouble, the prosecutor on redirect was permitted to ask the witness whether the witness had heard that the defendant worshiped Satan and had to kill two people to get power. The Tennessee Supreme Court held that the question was relevant to the issue the character witness had addressed: the defendant's reputation for peacefulness and quietude.

The specific act must also relate to the time period assessed by the opinion or reputation proof. For example, if a defense character witness testifies that at the time of an assault the victim had a reputation as a violent person, the prosecution can inquire about an instance when the victim avoided violence by withdrawing from an explosive situation during that same time period. The prosecution can also use opinion and reputation witnesses to rebut the defendant's proof of the victim's violent nature.

[d] Types of Acts

Many varieties of specific acts can be raised on cross-examination of character witnesses. These include acts resulting in criminal convictions[596] or even arrests.[597] Inquiry about juvenile charges is also permitted.[598]

Expungement. Expungement creates a complex set of rules concerning impeachments. Distinctions are based on the type of evidence and the particular expungement statutes involved.[599] In general terms, an expungement does not affect the admissibility of the *acts* that were the basis of the expunged charges.[600]

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[595] *978 S.W.2d 872, 884 (Tenn. 1998)*. *See also* *State v. McKinney, 74 S.W.3d 291, 316 (Tenn. Crim. App. 2002)* (character witness testified about defendant's non-violent childhood; prosecution allowed to ask about defendant's juvenile conviction for a violent crime in order to demonstrate the fallibility of character witness's opinion).

[596] See *e.g.*, *Correll v. State, 4 Tenn. Crim. App. 676, 475 S.W.2d 209 (1971)* (prior convictions of accused can be used on cross-examination of defense character witness).

[597] The leading case is *State v. Sims, 746 S.W.2d 191 (Tenn. 1988)*.

[598] *Stepheny v. State, 570 S.W.2d 356 (Tenn. Crim. App. 1978)*. *See also* *State v. McKinney, 74 S.W.3d 291, 316 (Tenn. Crim. App. 2002)* (character witness testified about defendant's non-violent childhood; prosecution allowed to ask about defendant's juvenile conviction for a violent crime in order to demonstrate the fallibility of character witness's opinion).

[599] There are three categories of expungement laws in Tennessee. Pretrial diversion, authorized by *Tenn. Code Ann. § 40-15-105* (Supp. 2010), permits a defendant in a criminal case to enter a Memorandum of Understanding with the prosecutor. This document includes a statement of the defendant's version of the facts. The court ordinarily must approve the Memorandum. If the defendant complies with the terms of the Memorandum, criminal charges are dismissed with prejudice. There is no finding of guilt.

The second set of expungement laws, *Tenn. Code Ann. § 40-32-101* (Supp. 2010), authorizes the destruction of various public records after charges are dismissed or a not guilty verdict. The third variety, called "judicial diversion", is accorded by a trial court after a guilty plea or verdict. *Tenn. Code Ann. § 40-35-313* (2010). The trial court does not enter judgement and may dismiss the case after a period of time and in compliance with certain conditions. The court may then order the expungement of most public records of the charges.

[600] *See e.g.*, *State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995)* (Rule 608(b) permits use of prior bad acts that were the subject of expunged public records); *State v. Williams, 645 S.W.2d 258, 260 (Tenn. Crim. App. 1982)* (permissible to impeach a government witness by asking about a larceny, which was the subject of a diversion order; right of confrontation violated if accused not permitted to ask about the larceny).

However, depending on the applicable statute and the exact evidence at issue, the expungement may bar the use of an event (such as an arrest or conviction) or the record of such event for impeachment.[601]

Non-Criminal Acts. Acts that are not crimes but shed light on the relevant character trait may be explored.[602] Questions should not assume guilt of the very crime at issue in the instant case.[603]

[e] Extrinsic Evidence

Although questions on specific acts are permitted, extrinsic evidence of specific acts is barred.[603.1] The cross-examiner must accept the answer that is given. This rule is designed to prevent undue emphasis on a tangential matter and to save court time by precluding extensive testimony from countless new witnesses, each subject to full impeachment.

[f] Procedures

Before specific instances of conduct may be questioned on cross-examination to prove that a person acted in conformity with character under Rule 404(a), several procedures must be followed. These methods are designed to ensure that the jury is protected from hearing inadmissible, damaging questions and that the evidence has a factual basis and is not inappropriately prejudicial.

Application to Court. According to Tennessee evidence law, the first prerequisite to the use of specific act questions of a character witness is for the cross-examining attorney to make "application to the court," Rule 405(a). This means that the lawyer must notify both the judge and opposing counsel of an intent to use specific acts on cross-examination of a character witness. Since no time limit is provided in Rule 405(a), application can be made anytime before a question about the specific act is asked on cross-examination. But if the application is made just before the question is asked and if the other side is unable to respond because of the surprise, a continuance may be appropriate to facilitate an adequate response to the specific act proof.[604] The laudable procedure of requiring an application to the court before use of Rule 405(a) specific act evidence is designed to prevent surprise and to enable the court to decide the admissibility of the specific act questions before the jury hears the questions.

Jury-Out Hearing on Request. Second, Rule 405(a)(1) mandates that upon request the court must hold a hearing outside the jury's presence to ascertain the admissibility of cross-examination questions about specific instances of conduct. This procedure will prevent the jury from hearing questions ruled

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[601] *See e.g.,* State v. Sims, 746 S.W.2d 191, 199 (Tenn 1988) (barring questioning about a shoplifting arrest which had been expunged; public policy of expungement statute is to restore the person to the pre-arrest status); Pizzillo v. Pizzillo, 884 S.W.2d 749 (Tenn. Ct. App. 1994) (same as *Sims*).

[602] *See* State v. Chestnut, 643 S.W.2d 343, 348 (Tenn. Crim. App. 1982) (bankruptcy filing does not prove bad character; cannot be used to test credibility of character witness, unless bankruptcy filing fraudulent); State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998) (defendant's worship of Satan and belief that defendant had to kill two people to have power are admissible under Rule 405 to question character witness's knowledge after witness had testified that defendant was peaceful person).

[603] *See* United States v. Guzman, 167 F.3d 1350 (11th Cir. 1999) (error to permit prosecutor to ask defense character witness whether witness's opinion of the defendant as a law-abiding person would be changed if witness learned that the defendant was guilty as charged; question violated presumption of innocence); United States v. Shwayder, 312 F.3d 1109 (9th Cir. 2002) (cross-examination with guilt-assuming hypotheticals undermines the presumption of innocence and violates due process).

[603.1] *See, e.g.*, State v. Land, 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020) (after defendant denied threatening to kill a detective, the trial court improperly permitted extrinsic evidence to prove this took place; error held harmless).

[604] *See* State v. Nesbit, 978 S.W.2d 872, 881–82 (Tenn. 1998) (if, because of the timing of the application, opposing counsel is unable to respond to application to use specific act evidence, "a recess may be appropriate").

inadmissible. Counsel opposing such questions must make the necessary request. A motion in limine may be wise.

Factual Basis. Third, during this jury-out hearing, the court must make two determinations. Initially, under Rule 405(a)(2), the court must determine that a "reasonable factual basis" exists for the question.[604.1] No specific procedures or standards are given. It is submitted that at a minimum, the court should require counsel to state for the record the source of the information underlying the question about a specific instance of conduct. For example, counsel may indicate that a specific court record supports the question or that Mr. John Jones told counsel what Jones had observed a month before. The court, in turn, must determine whether the factual basis is "reasonable."

The Tennessee Supreme Court has suggested that "whenever possible, extrinsic proof should be offered at the jury-out hearing to establish the "reasonable factual basis."[605]

Moreover, the Tennessee Supreme Court has held that in assessing the "reasonable factual basis" of reported specific acts under Rule 405(a), the timing of the report is crucial: it must have been reported before the crime at issue was committed. In *State v. Nesbit*, the court urged trial courts to "be mindful that the purpose of this [reasonable factual basis] requirement … is to ensure that such questions are proposed in good faith, rather than in an effort to place before the jury unfairly prejudicial information supported only by unreliable rumors."[606] To help ensure the reliability of the information, the *Nesbit* court held:

> Because of the potential for evidence manufacturing, and because a person accused of a crime is more likely to be the subject of rumor and innuendo, reports of specific instances of conduct which do not arise until after a crime has been committed are inherently suspect and may not form the basis for inquiry under Rule 405. In addition, a trial court should exercise caution in permitting inquiry under Rule 405 if the character witness subject to impeachment first heard reports of the specific instance of conduct after the crime occurred. Under those circumstances, to establish a reasonable factual basis, the prosecution must offer some proof at the jury-out hearing that the specific instance of conduct had been reported before the crime occurred.[607]

Balance Probative Value v. Prejudicial Effect. The second determination the court must make under Rule 405(a)(3) is whether the "probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues." This balancing test differs from that in Rule 403 because under Rule 405, the probative value must outweigh the prejudicial effect before the specific instances are admissible. If the prejudicial effect on substantive issues outweighs the probative value, or if the two are of equal weight, Rule 405(a) requires the evidence to be excluded.[607.1] By way of contrast,

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[604.1] *See, e.g.,* State v. Mendez, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. Jan. 7, 2019) (trial court erred by allowing defendant's wife to be cross examined about another alleged rape during defendant's trial for rape of a child, because the State failed to present proof that the other accuser had reported her allegation prior to the victim's allegations, and the trial court failed to give a limiting instruction; the error was not harmless, because the only evidence of defendant's guilt was the victim's testimony); State v. Land, 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020) (although defendant "opened the door" under Tenn. R. Evid. 404(a)(1) by testifying about various instances of violence by the victim to show that the victim was the first aggressor, the trial court erred by failing to determine that a reasonable factual basis existed before allowing the State to cross-examine the defendant about his own specific instances of violent conduct; the error was held harmless).

[605] State v. Nesbit, 978 S.W.2d 872, 882 (Tenn. 1998).

[606] *Id*.

[607] *Id at 883*. *See also* Powers v. State, 117 Tenn. 363, 97 S.W. 815 (1906); State v. Mendez, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. Jan. 7, 2019) (applying *Nesbitt* and finding the trial court erred by allowing defendant's wife to be cross examined about another alleged rape during defendant's trial for rape of a child, since the State failed to present proof that the other accuser had reported her allegation prior to the victim's allegations).

under Rule 403 evidence is excluded only if its probative value is substantially outweighed by the listed dangers. This difference is intentional and is consistent with the common law's traditional hesitation to admit character evidence. The balance in Rule 405(a)(3) is designed to make it easier to exclude character evidence because of the potential harm such proof may cause.

[g] Jury Instructions

Since the specific acts admissible on cross-examination under Rule 405(a) are used only to test the credibility of the character witness, there is a real danger they will be misused by the jury. The jury may view these acts as substantive evidence, similar to Rule 404(b) bad acts, rather than as admissible only in evaluating the weight to be given the character witness's testimony. To minimize this danger, Tennessee law requires the trial judge to instruct the jury on the proper use of this evidence.[608] Failure to give this instruction has been held to be error, but not necessarily reversible error.[609] Counsel should request this instruction under Rule 105.

[5] Specific Instances of Conduct: Character as Essential Element

On those rare occasions when a character trait is an essential element of a charge, claim, or defense, and therefore the trait may alter a party's rights or liabilities, Rule 405(b) permits proof by all three methods. Thus, on direct and cross-examination, character can be established by opinion, reputation, or specific acts. Extrinsic proof of specific acts is permissible. This liberal approach to the admission of character evidence is not inconsistent with Rule 404(a), because character is not used as circumstantial evidence of action in conformity with character. Rather, character is itself an element to be proven.

When *Character is Essential Element.* Tennessee law today contains only a few causes of action where character is an element of a seduction charge, claim, or defense. However, some now defunct Tennessee laws made character an essential element.[610] One obvious illustration where character is still an essential element is

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[607.1] *State v. Land, 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020)* (although the trial court failed to determine that the probative value of the specific instances of conduct outweighed the prejudicial effect on substantive issues, as required under *Tenn. R. Evid. 405*, the error was harmless).

[608] *See State v. Sims, 746 S.W.2d 191 (Tenn. 1988)*; *State v. Nesbit, 978 S.W.2d 872, 883 (Tenn. 1998)* (if specific act evidence is admitted under Rule 405, Tennessee law requires the trial court to instruct the jury that the specific acts of conduct were admitted for the limited purpose of evaluating the credibility of the character witness). *See also State v. Mendez, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. Jan. 7, 2019)* (trial court erred by allowing the prosecutor to cross examine defendant's wife about "another allegation" of rape, and the error was compounded by the court's failure to issue a limiting instruction; the Court of Criminal Appeals held that the combination of errors was not harmless, but noted that the failure to give a limiting instruction alone would likely have been harmless, since defense counsel never requested the instruction in accord with *Tenn. R. Evid. 105*).

[609] ***Taylor v. State, 212 Tenn. 187, 369 S.W.2d 385 (1963)***; *State v. McKinney, 74 S.W.3d 291, 316 (Tenn. Crim. App. 2002)* (failure to give limiting instructions on use of specific act evidence to impeach under Rule 405 was harmless error).

[610] The former tort of seduction permitted evidence of the female's character to be used to mitigate damages, which could be awarded for disgrace and dishonor. This tort was authorized by *Tenn. Code Ann. § 20-1-106* (1980), repealed by 1990 Tenn. Pub. Acts 1056. *See Thompson v. Clendening, 38 Tenn. 287 (1858)* (general reputation for chastity admissible); *Reed v. Williams, 37 Tenn. 580 (1858)* (general character of female for chastity is involved in mitigation of damages; proof of sexual acts with others is admissible); *Love v. Masoner, 65 Tenn. 24 (1873)* (same; extensive discussion).

The now-rejected tort of alienation of affections was similar. *See Justice v. Clinard, 142 Tenn. 208, 217 S.W. 663 (1919)* (plaintiff-husband's character relevant to damages in alienation of affections suit). The tort of alienation of affections has now been abolished. *Tenn. Code Ann. § 36-3-701* (2001).

the defamation case, which puts character in issue in several ways. If the defendant has defamed the plaintiff's character but pleads truth as a defense, the defendant will be allowed to prove the particular immoral act or character trait charged in the allegedly defamatory publication.[611] In addition, on the issue of damages, the defendant could prove in mitigation the plaintiff's poor reputation for the trait in question[612] (therefore suggesting little or no loss in reputation because of the defamation) or possibly specific acts tending to prove truth.[613]

Another significant situation in which character is an essential matter to prove is a suit against a car owner on the theory that he or she knowingly entrusted the owner's vehicle to an incompetent driver. The Tennessee Court of Appeals has stated that:

> [S]pecific acts of carelessness, recklessness, intoxication, and other acts of incompetency, may be shown on the issue of the incompetency of the driver of an automobile; and … it is competent to show the entruster knew of the such specific acts at the time of the entrustment of the vehicle to the entrustee on the issue of whether the entruster had knowledge of the incompetency of the entrustee.[614]

Another example is provided by the defense of entrapment in a criminal case.[615] Since entrapment can be defeated if the defendant were predisposed to commit an offense, evidence of the defendant's character is relevant in assessing the defendant's attitude toward criminality.[616] Procedurally, a defendant intending to rely on a defense of entrapment is required to give notice to the prosecution.[616.1] The trial court must then make a

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Another former Tennessee statute, TENN. CODE ANN. . § 29-3-109 (1980), repealed by 1991 Tenn. Pub. Acts 273, allowed evidence of reputation on the issue of public nuisance. The reputation of either the defendant or the place creating the nuisance was admissible to prove the existence of the nuisance.

[611] MCCORMICK ON EVIDENCE 312 (6TH ED. 2006).

[612] Bell v. Farnsworth, 30 Tenn. 608 (1850). A good illustration is *Schafer v. Time, Inc., 142 F.3d 1361 (11th Cir. 1998)*, a libel case seeking damages for the erroneous publication of plaintiff's photo in connection with a terrorist bombing of an airliner. Since plaintiff sought damages for harm to his reputation, the defense was allowed to question plaintiff about a felony conviction, a possible parole violation, a drunk driving conviction, a bad check arrest, failure to file a tax return, failure to pay alimony and child support, and efforts to change his name and social security number.

[613] *See Lackey v. Metropolitan Life Ins. Co., 26 Tenn. App. 564, 174 S.W.2d 575 (1943)* (slander case in which defendant called plaintiff "crazy," defendant may prove specific acts committed by plaintiff to establish the truth of the words).

[614] *Kennedy v. Crumley, 51 Tenn. App. 359, 371, 367 S.W.2d 797, 803 (1962)* (on the strength of the quoted standard, convictions for traffic offenses in sessions court were not proved to be known to the car owner, and the convictions were too remote in time in that the three convictions ranged from three and one-half to five years old). *See also Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 907 (Tenn. 1996)* (in negligent entrustment case, plaintiff was required to prove auto driver's prior incompetence and defendant's knowledge of it; since driver's prior driving record was essential to proving the claim, prior specific acts were a requisite element of the cause of action and were admissible, citing Rule 405(b)).

The entrustee need not be a party defendant. ***Courtesy Cab Co. v. Keck, 59 Tenn. App. 309, 440 S.W.2d 610 (1968)***.

[615] *State v. Jones, 598 S.W.2d 209 (Tenn. 1980)*. *See above*, *§ 4.04[17]*.

[616] In *State v. Jones, 598 S.W.2d 209, 220 (Tenn. 1980)*, the Tennessee Supreme Court said that predisposition could be established by prior similar crimes within a certain time period, "or by evidence, direct or circumstantial, that the accused was ready and willing to engage in the illegal conduct in question." Reputation "bears upon the issue." *See also State v. Rainey, 2014 Tenn. Crim. App. LEXIS 210 (Tenn. Crim. App. 2014)* (factors relevant to determining a defendant's predisposition include the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by law enforcement officials; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense which was overcome only by repeated inducement or persuasion by law enforcement officials or agents; the nature of inducement or persuasion engaged in by law enforcement officials; and any other direct or circumstantial evidence that the accused was ready and willing to engage in the illegal conduct in question).*See above § 4.04[17]*.

[616.1] *Tenn. Code Ann. § 39-11-505*.

threshold determination regarding whether the defense has been fairly raised by the proof and ought to be submitted to the jury.[616.2]

Character may also be proved in a child custody case where fitness to parent is a critical factor. Thus, a person's violent or loving character may be established to support or reject a petition to be awarded child custody.

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616.2 *State v. Rainey, 2014 Tenn. Crim. App. LEXIS 210 (Tenn. Crim. App. 2014)*; *State v. Latham, 910 S.W.2d 892, 896 (Tenn. Crim. App. 1995)*.

§ 4.06 Rule 406. Habit; Routine Practice

[1] Text of Rule

Rule 406 Habit; Routine Practice

(a) Evidence of the habit of a person, an animal, or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eye-witnesses, is relevant to prove that the conduct of the person, animal, or organization on a particular occasion was in conformity with the habit or routine practice.

(b) A habit is a regular response to a repeated specific situation. A routine practice is a regular course of conduct of an organization.

Advisory Commission Comment:

Tennessee has long admitted animal habit. *Copley v. State, 153 Tenn. 189, 281 S.W. 460 (1925)*, is the leading case. Authorities supporting admissibility of human habit and business custom are collected in *Tennessee Law of Evidence* § 30.

The second paragraph defines habit and routine practice, emphasizing the need for a "regular response" when a person, animal, or organization is faced with a given situation.

[2] Habit and Routine Practice: In General

Rule 406 authorizes admission of evidence that a person or animal had a certain habit or an organization had a certain practice in order to prove that the person, animal, or organization acted in conformity with that habit or practice on a particular occasion. For example, this rule permits a defendant to testify that she left home each weekday at 7:30 a.m. to prove that on a certain Thursday she left home at that time. Habit and routine practice evidence can be introduced in a civil or criminal case. This evidence should be considered, as any other evidence, for its worth under the circumstances.[617] Since Rule 406 admits evidence that would probably be admitted anyway under the general relevance principles embraced in Rule 401, it is arguable that Rule 406 adds little new to modern evidence law.

Character and Habit Distinguished. Character evidence, governed by Rules 404–405 and 608–609, must be distinguished from habit evidence, governed by Rule 406. According to the Federal Advisory Commission's Note to Federal Rule 406:

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[617] *See* ***Meyer v. United States, 638 F.2d 155 (10th Cir. 1980)*** (rejecting argument that direct evidence that event did not occur is invariably superior to habit proof that event did occur; habit evidence to be weighed and considered by trier of fact in same manner as any other type of direct or circumstantial evidence).

Rule 406 is inconsistent with language in some older pre-rule Tennessee cases suggesting that business custom evidence is not viewed with favor. See *e.g.*, *Middle Tennessee Elec. Membership Corp. v. Barrett, 56 Tenn. App. 660, 410 S.W.2d 914 (1966)*. Rule 406 clearly includes business practices as an admissible custom. There is nothing in the legislative history of Rule 406 to suggest that habit or custom evidence should be treated differently than other types of evidence.

> Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.[618]

One commentator has stated:

> [T]he more particular and the more regular the performance of an act, the more likely it is to be regarded as habit. In other words, the easier it is to describe with particularity what it is that someone does and the more routine the action, the more likely a Court is to hold the activity to be a habit.[619]

Acts that have ripened to habits have many common features. They tend to be reflexive rather than pondered in advance, simple rather than complex, and done alone rather than with a large group of people who are in a position to interfere with the ritualized act.

The distinction between character and habit evidence is reflected in their reception under modern evidence rules. As noted elsewhere,[620] character evidence is viewed with suspicion and is admitted only in limited circumstances and often after satisfying rigorous procedural rules. Habit evidence, on the other hand, is admitted easily with no unique procedural safeguards.

Rationales for Distinguishing Character and Habit. There are several reasons for these differences. First, habit evidence is generally viewed as more reliable than character evidence. People act inconsistent with their character more than they replace habits with new behavioral patterns. Second, habit proof is more probative than character evidence. Since habit evidence points directly at specific conduct while character evidence only indirectly suggests that a person did a certain act, the former is entitled to more weight.

Third, character evidence is more prejudicial than habit evidence. Too many people are quick to generalize from their understanding of a person's character. Once it is believed that someone is a dishonest person, there are few limits on the willingness to attribute dishonest acts to that individual. Habit evidence, on the other hand, presents fewer opportunities for abuse. People tend to think that someone acts in accordance with his or her habits, but less frequently do people generalize from their knowledge of a person's habit in one area to assume actions in another.

The rule banning much character evidence but admitting habit proof has caused some lawyers to blur the distinctions between the two concepts. If the lawyer wants to admit the evidence, he or she may characterize it as habit proof. On the other hand, if the lawyer wants to exclude it, the evidence may be called character evidence. An example may be the "habit of care." If someone is always careful when crossing streets, he or she may be characterized as having a "habit of care." Yet, this may well be the same as calling the person a "careful person." The former approach emphasizes habit, the latter stresses character. In cases where the difference between habit and character is important, a trial court should, under Rule 104, decide which category is appropriate for the evidence at issue. Rule 403 can be invoked in close cases if the jury is likely to be unable to refrain from viewing the habit evidence as an indication of character.

Repeated Acts Not Rising to Level of Habit. If evidence is not sufficiently routine to be recognized as a "habit," it must be stressed that the proof may still be admissible under the relatively low standards of relevance under Rule 401. For example, assume a person begins a daily exercise regimen at 6:00 A.M. and starts on January first. Assume further that she follows it each day for six months. Can she prove that she was exercising at 6:00

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[618] *56 F.R.D. 223 (1973)* (*quoting* McCormick On Evidence 340–41 (1st ed. 1954)).

[619] Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, 2 Federal Rules Of Evidence Manual 406-3 (9th ed. 2006).

[620] *See above § 4.04[2]*

A.M. on January second that year? The second day of exercise may well be too novel to constitute a habit, but surely she could relate the course of her six-month exercise program as some evidence under the normal relevance principles of Rule 401 that she did indeed exercise at 6:00 A.M. on January second.

[3] Habit: Person

Rule 406(a) admits evidence of a person's habit to prove the person acted in conformity with that habit.[620.1] Rule 406(a), substantially identical with Federal Rule 406, represents the traditional common-law view and is in accordance with the few Tennessee pre-rules authorities on point. For example, in *State v. Elder*,[621] a pre-rules sexual assault case, a retarded resident of a developmental center was allegedly raped by an employee. The state sought to prove that the victim's undergarments, found piled on the floor near her bed, had been removed by the defendant. Another employee was permitted to testify that when the victim undressed herself she always threw her clothes into the hallway or someone else's room. The trial court permitted this testimony as proof of the victim's habit.

Definition of Habit. Unlike Federal Rule 406, which contains no definition of "habit," Tennessee Rule 406(b) defines habit as a person's "regular response to a specific situation." Proof of habit is discussed in subsequent sections.[622]

Under this approach, Tennessee authorities have held that a deceased's drinking habits are admissible in a wrongful death action based on excessive drinking.[623] It should be stressed, however, that this rule should not be considered absolute; evidence should be assessed on a case-by-case basis after full consideration of Rules 401 and 403.

An excellent illustration of Rule 406 is *Taylor v. State*.[624] A prisoner filed a post-conviction petition alleging, among other things, that his guilty plea was involuntary because the trial judge did not inform him of all his constitutional rights before accepting the plea. Apparently the trial judge did not remember details of the petitioner's plea and there was no record of the guilty plea proceedings. To prove that the petitioner was properly informed about his rights, the trial judge, pursuant to Rule 406, was permitted to testify that his habit was to inform a criminal accused of all the constitutional rights mandated by case law.

[620.1] *See, e.g.*, State v. Hall, 2017 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. 2017) (victim's testimony about her morning routine was admissible as relevant habit evidence because during cross-examination of defendant the State asked if he was used to the way that the household operated, implying that he was familiar with the victim's morning routine and therefore knew of an opportunity to record her changing clothes). The Court of Appeals has held that evidence under Rule 406 generally may not be introduced to prove that on a particular occasion a person *did not conform* to his or her normal habit, since this is the inverse of what the rule provides. *See* In re Estate of Atkins, 2020 Tenn. App. LEXIS 112 (Tenn. Ct. App. Mar. 19, 2020) (where will contestants attempted to introduce habit evidence to prove the opposite of Rule 406: instead of presenting evidence to demonstrate that the decedent had included his middle initial in his signature on a particular occasion because that was his habit, they introduced evidence of his signature on various documents to demonstrate that he *never would have* signed a document without including his middle initial; the Court of Appeals held the evidence inadmissible under Rule 406, particularly since the contestants cited no precedent supporting the use of Rule 406 to prove lack of conformity).

[621] 697 S.W.2d 359 (Tenn. Crim. App. 1985). *See also* Cable v. Russell, 2 Tenn. Crim. App. 363, 454 S.W.2d 163 (1970) (in an ineffective assistance of counsel case, lawyer was permitted to testify that he always explained sentence to be served, but could not remember anything about instant case; testimony admitted, as lawyer's habit, to prove lawyer explained the sentence in this case). *Cf.* Bryan v. Hubbard, 32 Tenn. App. 648, 225 S.W.2d 282 (1949) ("custom" of people in city to cross street only at corners, not in middle of block).

[622] *See below* § 4.06[6].

[623] Kirksey v. Overton Pub, Inc., 804 S.W.2d 68, 74 (Tenn. Ct. App. 1990).

[624] 814 S.W.2d 374 (Tenn. Crim. App. 1991).

[4] Habit: Animal

[a] In General

Habits of an animal, like those of a human being, are admitted under Rule 406(a) to prove the animal acted in conformity with the habit. Habit is defined, according to Rule 406(b), as a "regular response to a repeated specific situation." The inclusion of animals in Rule 406 is a departure from Federal Rule 406, which deals only with the habits of a "person."

Animal habit is illustrated by *Turnpike Company v. Hearn*,[625] involving the question of whether the accident, in which the plaintiff was injured after being thrown from a buggy while crossing a bridge, was caused by the misconduct of plaintiff's horse or by a defect in the bridge. As proof that the horse was unmanageable, the defendant introduced evidence that before and after the accident, the horse was "restive and unmanageable." This evidence was proof of a "fixed habit at the time of the accident."

[b] Tracking Dogs

Tennessee law has long recognized the abilities of certain tracking dogs and has admitted the results of the dogs' efforts.[626] The leading pre-rules case, *State v. Barger*,[627] involved four burglary suspects who were arrested and taken to jail. A shirt and shoe were obtained from each suspect and taken to the burglarized house where a trained bloodhound smelled the items and led the police to a cache behind the house. Several items taken in the burglary were discovered in the cache. In a thorough examination of the legal issues, Judge Daughtrey upheld the use of the bloodhound evidence. She found no confrontation violation since the dog's trainer was thoroughly cross-examined. She also discussed the foundation to be laid before bloodhound evidence is admitted. Five factors must be found: the dog must be pure bred and "of a stock characterized by acuteness of scent and power of discrimination," the dog must actually possess acuteness of scent and power of distinction and must have been trained to track human scents, the dog must have been shown in actual cases to be reliable in tracking humans, the animal must have been placed on the trail at a spot where the suspect was known to have been, and the dog must have been used within its "period of efficiency." No storms or passage of time can have weakened the scent to the point that it became unreliable.[628] In addition, according to *Barger*, the jury should be instructed that a "dog's performances are not infallible, should not be given undue weight, and that such evidence alone is not sufficient to convict."[629]

[5] Routine Practice: Organizations

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[625] *87 Tenn. 291, 10 S.W. 510 (1889)*.

[626] See *e.g.*, *Copley v. State, 153 Tenn. 189, 281 S.W. 460 (1926)*, *noted in* 5 TENN. L. REV. 248 (1927); *State v. Jones, 735 S.W.2d 803, 811 (Tenn. Crim. App. 1987)* (German shepherd tracked defendant's presence around deceased's residence, at schoolhouse on defendant's property, and around deceased's vehicle).

[627] *612 S.W.2d 485, 492 (Tenn. Crim. App. 1981)*. The *Barger* factors have also been used under the Tennessee Rules of Evidence. *See e.g.*, *State v. Brewer, 875 S.W.2d 298 (Tenn. Crim. App. 1993)* (applying *Barger* factors to purebred Belgian Malinois doing its first actual crime tracking of a human scent); *State v. Shepherd, 902 S.W.2d 895, 904–05 (Tenn. 1995)* (following *Barger* factors).

[628] In *State v. Jones, 735 S.W.2d 803 (Tenn. Crim. App. 1987)*, a German shepherd tracked the defendant's presence at the homicide victim's residence and vehicle. Although the tracking occurred 60 days after the victim disappeared, the court found that the tracking occurred within the dog's "period of efficiency." The dog's handler testified that the dog had been reliable in over 100 cases where the tracks were 60–70 days old.

[629] *Barger, 612 S.W.2d 485 at 492*.

An organization, through its members or employees, can regularly engage in repeated practices. If the organization were a person, these would be called habits. Some older cases referred to them as "customs."[630] Rule 406 attaches a special label to these repetitive acts of an organization, referring to them as a "routine practice." Routine practices, like human and animal habits, are admitted under Rule 406(a) to prove the organization on a particular occasion acted in conformity with its routine practice.[631] Under the general rules of relevance, other uses for business practices have also been found.[632]

The term "routine practice" is defined by Rule 406(b) as "a regular course of conduct of an organization." The key concept is regularity. No corroboration is required, a rule contrary to that of some jurisdictions. Proof of routine practice is discussed below.[633]

An excellent example of routine practice proof is provided by *Wetherill v. University of Chicago,*[634] in which two children sued for prenatal injuries resulting from a medical experiment involving their mothers. One of their claims was that a battery was committed on their mothers when the defendant university did not obtain the mothers' informed consent to the experiment. To prove that the mothers were adequately informed and did consent, the defendant, under Rule 406, was permitted to introduce evidence of its routine procedure of obtaining the consent of all participants after full disclosure of the experiment.

[6] Proof of Habit or Routine Practice

[a] Regularity

The key element of proof of either habit or routine practice is extreme regularity.[635] The habit or practice must have been repeated sufficiently and frequently enough to have become routine. Accordingly, an act done a few times should not be viewed as a habit or routine practice.[636] Greater regularity is required. Many

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[630] Sometimes the concept of "business custom" arises in the context of a contractual dispute. The "business custom" may affect the terms of the contract or the parties' responsibilities under it. See *e.g.*, Beaty Chevrolet v. Complete Auto Transit, 586 S.W.2d 122 (Tenn. Ct. App. 1979) (in case seeking to determine whether common carrier remains liable for delivered goods until consignee has had chance to accept goods, court looked at business custom to determine when delivery accomplished; parties had followed business custom of parking vehicles on consignee's lot when consignee closed).

[631] *Cf.* Southern Reg. Indus. Realty v. Chattanooga Whse. & Cold Storage Co., 612 S.W.2d 162 (Tenn. Ct. App. 1980) (presumption that letter was mailed was recognized from testimony of a corporate officer that officer dictated and signed the letter and placed it in regular course for mailing).

[632] One common use is to establish the standard of reasonable care in a negligence action and to determine whether the defendant exercised reasonable care. See *e.g.*, Farrell-Calhoun v. Union Chevrolet, 21 Tenn. App. 554, 113 S.W.2d 419 (1938) (in negligence case involving auto stolen from repair shop, court admitted evidence on question of negligence and reasonable standard of care, that there was the general custom for auto repair shops to leave keys in car while car in the shop); Nashville, Chattanooga & St. Louis Ry. v. Washington Wade, 127 Tenn. 154, 153 S.W. 1120 (1913) (negligence action against railroad for injury to worker loading railroad car; customary way of doing this work was admissible, but not dispositive, on issue of whether ordinary care exercised); Standard Oil Co. v. Swan, 89 Tenn. 434, 15 S.W. 1068 (1890) (negligence action for fire loss spreading from defendant's business; custom and usage of well-managed similar businesses were admissible on standard of care, but here witness was unfamiliar with such businesses). Another use of business custom is to determine the contents of a contract; Insurance Co. of N. Am. v. Banker, 9 Tenn. App. 622 (1929) (business custom relevant on issue whether insurance agent could issue oral insurance policy binding insurance company).

[633] *See below* § 4.06[6].

[634] 570 F. Supp. 1124 (N.D. Ill. 1983). *See also* Meyer v. United States, 464 F. Supp. 317 (D. Colo. 1979), *aff' d*, ***638 F.2d 155 (10th Cir. 1980)***.

[635] *See* MICHAEL H. GRAHAM, 1 HANDBOOK OF FEDERAL EVIDENCE 931 (6th ed. 2006) ("[i]t is the notion of extreme regularity that gives both habit and routine practice evidence its probative force").

courts use the phrase "semi-automatic" to describe the kind of conduct rising to the level of habit. Conduct becomes habit when it is unreflective, almost to the point of being a reflex. Thus, in *United States v. Troutman*,[637] an extortion case involving coerced political donations, the defendant sought to introduce testimony from several firms that he never conditioned the award of state business on a political contribution. The testimony was found inadmissible as habit proof because "[e]xtortion or refraining from extortion is not a semi-automatic act and does not constitute habit."

[b] Corroboration

Rule 406(a), contrary to the rule in some jurisdictions, provides specifically that habit and routine practice can be proven without corroboration. This means that a person can testify that he or she has a particular habit, perhaps observed by and known by no one else, as proof that the person acted in accordance with that habit on a stated day. The presence or absence of corroboration may affect the weight, but not the admissibility, of the evidence.

[c] Eyewitness

Rule 406(a) also states specifically that habit and routine practice can be proven without an eyewitness.

[d] Types of Proof

Neither the Tennessee nor the federal version of Rule 406 describes the types of evidence that can be used to prove habit or routine practice. However, an earlier draft version of Federal Rule 406 contained a subsection (b) that permitted proof "in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."[638] This subsection was deleted by a congressional committee because "the method of proof of habit and routine practice should be left to the courts to deal with on a case-by-case basis. At the same time, the Committee does not intend that its action be construed as sanctioning a general authorization of opinion evidence in this area."[639]

This legislative history, which produced a federal rule that is virtually identical with part of the Tennessee rule, has influenced federal courts in interpreting the federal rule. Federal courts admit this evidence on a case-by-case basis. Courts have admitted specific acts to prove habit or routine practice. Perhaps the best witness would be someone who personally observed the habit or practice on many occasions. One witness may be sufficient.[640] Of course, the person whose actions are at issue may testify about his or her habits. In *Taylor v. State*,[641] in order to prove whether a criminal defendant received proper warnings during a guilty plea proceeding, the judge who presided at the proceeding was permitted to testify about his routine

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[636] See *e.g.*, *United States Football League v. National Football League, 842 F.2d 1335, 1373, 1988-1 Trade Cas. (CCH) P67930 (2d Cir. 1988)* (three or four episodes over 20-year period insufficient to constitute habit); *United States v. Holman, 680 F.2d 1340 (11th Cir. 1982)* (one instance of coerced drug smuggling insufficient to establish habit of such coercion); *Reyes v. Missouri Pac. Ry., 589 F.2d 791, 794–95 (5th Cir. 1979)* (four convictions for public intoxication, occurring over three-year period, inadequate to establish habit); *Woodson v. Porter Brown Limestone Company, 916 S.W.2d 896, 908 (Tenn. 1996)* (avoiding an accident minutes before an actual accident was not habit evidence; was no proof of regularity; only one accident avoidance proffered).

[637] *814 F.2d 1428, 1455 (10th Cir. 1987)*.

[638] Advisory Committee Note to Rule 406, 56 F.R.D. 225 (1973).

[639] Report of House Judiciary Committee, 93rd Congress, 1st Session, No. 93-650, p.5 (1973), *quoted in* 2 WEINSTEIN'S FEDERAL EVIDENCE § 406 App. 01[4] (McLaughlin 2d ed. 2000).

[640] See *e.g.*, *Maynard v. Sayles, 817 F.2d 50 (8th Cir. 1987)*, *vacated without opinion*, *831 F.2d 173 (1987)* (one witness adequate to prove there was "code of silence" among police officers).

[641] *814 S.W.2d 374 (Tenn. Crim. App. 1991)*.

practice of informing defendants of their constitutional rights before accepting their guilty pleas. Transcripts of three other cases were also admitted to corroborate the judge's statements about his judicial practices.

If more than one habit witness is used, the court has the discretion to place reasonable limits on the number of witnesses. Sometimes these limits should be employed to minimize unfair prejudice caused by numerous witnesses.[642]

Similarly, opinion evidence about habit is admissible as long as it conforms with Rule 701's limits on lay opinion testimony and on Rule 602's personal knowledge requirements. There is also no reason that reputation evidence about habit could not be used in unusual situations.

Since Rule 403 applies to habit and routine practice evidence, the court can exclude such proof if there is the danger of unfair prejudice and the like[643] or trial inefficiency.[644] For example, the Advisory Committee Note to Federal Rule 406 suggests:

> [T]he possibility of admitting testimony by W that on numerous occasions he had been with X when X crossed a railroad track and that on each occasion X had first stopped and looked in both directions, but discretion to exclude offers of 10 witnesses, each testifying to a different occasion.[645]

Since Rule 406 contains no special weighing process, evidence under this rule is to be evaluated the same as other kinds of evidence. There should be no abnormal reluctance to admit the proof. Language to the contrary in pre-rules Tennessee cases should not be followed.[646]

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[642] See *e.g.*, *Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986)* (to reduce prejudice to plaintiff, court limited defense to four witnesses describing the plaintiff's violent acts against police officers; defense made offer of proof that eight officers would so testify).

[643] *See above §§ 4.03[3]-4.03[6]*.

[644] *See above § 4.03[7]*.

[645] Advisory Committee Note to Rule 406, 56 F.R.D. 225 (1973).

[646] See *e.g.*, *Maddux v. Cargill, Inc., 777 S.W.2d 687, 694 (Tenn. Ct. App. 1989)* ("such evidence [of business custom] is not looked upon favorably by the law, and to be admissible, the relevancy and probative value of the proffered evidence must clearly appear").

§ 4.07 Rule 407. Subsequent Remedial Measures

[1] Text of Rule

Rule 407 Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove strict liability, negligence, or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving controverted ownership, control, or feasibility of precautionary measures, or impeachment.

Advisory Commission Comment:

The rule and current Tennessee law exclude subsequent measures to remedy defects to prove negligence or culpable conduct. *Illinois Central Railroad Co. v. Wyatt, 104 Tenn. 432, 58 S.W. 308 (1900)*. The rule adds, however, a specific exclusion in strict liability actions as well. Such is the majority federal view, including that of the Sixth Circuit. See *Hall v. American Steamship Co., 688 F.2d 1062 (6th Cir. 1982)* (admiralty). Manufacturers should be encouraged to improve product designs without fear of encountering damaging evidence.

A defendant who controverts ownership, control, or feasibility opens the door for the plaintiff to introduce subsequent remedial measures. Similarly, an expert who opines that a design could not be improved upon invites attack by the impeachment exception to this otherwise exclusionary rule.

[2] Subsequent Remedial Measures: In General

If relevance were the only evidence rule, subsequent remedial measures taken after an accident or other event would often be admissible on the question of negligence at the time of the event. For example, if a theater owner erected a handrail next to the balcony steps the day after a customer fell down those steps during a movie, the erection of the handrail could rationally be used to infer that the owner was negligent in failing to install a handrail earlier. While this result may satisfy the logic of the concept of relevance, it has the undesirable social consequence of discouraging such repairs and thereby compromising public safety. Our theater owner, for example, may, perhaps on the advice of counsel, defer installation of the handrail until after liability is assessed for the accidental fall. The theater owner may prefer to avoid creating evidence (the new handrail) that would assist the plaintiff during the tort trial.

Tennessee Rule 407 attempts to remove this disincentive by making subsequent remedial measures inadmissible to prove "strict liability, negligence or culpable conduct in connection with the event." The generally accepted purpose of Rule 407 is to encourage remedial measures in order to serve the public's interest in a safe environment.[646.1] A related rationale is that the probative value of the proof of subsequent measures is

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[646.1] *Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76 (Tenn. 2008)*. The policy underlying Rule 407 also applies in criminal cases. *See State v. Miller, 2020 Tenn. Crim. App. LEXIS 58 (Tenn. Crim. App. Feb. 3, 2020)*. In *Miller*, the defendant was charged with reckless endangerment under *Tenn. Code Ann. § 39-13-103(a)* when he drove his truck on the highway after police officers

often slight, yet the jury may well give it too much weight in assessing liability. According to a Tennessee decision, "This type of evidence has little relevance to the issue of fault, and permitting its introduction deters defendants from making post-accident repairs."[647]

Although Rule 407 disallows subsequent remedial measures to prove "strict liability, negligence, or culpable conduct," it specifically does not bar such proof for other purposes, like proof of ownership, control, feasibility of precautionary measures, or for impeachment.[648] Thus, Rule 407 should be viewed as a compromise. It limits the use of subsequent remedial measures but does not impose a total ban on such proof in Tennessee courts.

[3] General Rule: Subsequent Remedial Measures Inadmissible

[a] In General

Tennessee Rule 407 follows traditional national and Tennessee law by excluding subsequent remedial measures as proof of negligence or culpable conduct. In the leading case, *Railroad Co. v. Wyatt*,[649] the plaintiff stepped on a railroad loading platform and a loose plank caused him to fall. Thereafter, the railroad made extensive repairs to its platform. The court held the evidence of the repairs was inadmissible. Similarly, in *Thompson v. Thompson*,[650] the court refused to permit evidence that a dog owner destroyed a certain dog as proof that the destroyed animal was the dog that bit the plaintiff. The dog's destruction was characterized as a subsequent remedial measure.

Just as Tennessee Rule 407 bars subsequent repairs to prove negligence or culpable conduct, it also bars such evidence to prove strict liability.[651] Thus, in products liability cases based on strict liability, evidence of subsequent repairs is not admissible to prove liability. As discussed in the next section, however, subsequent remedial measures may be admissible for other purposes.[652]

[b] Subsequent Remedial Measures

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informed him that the truck's trailer brakes were inoperable and he continued to drive on the highway. The prosecution offered an invoice to show defendant's subsequent repair to show knowledge; the defendant then moved to exclude under Rule 407. The Court of Criminal Appeals held that Rule 407 did not bar the invoice because a statute, Tenn. Code Ann. § 55-9-204(c)(1), mandated the repair. Since the statute served the same purpose as Rule 407—i.e., to incentivize remedial safety measures and thereby protect the public—application of Rule 407 was unnecessary. The court explained: "Rule 407 does not operate to exclude evidence of subsequent remedial measures *that were mandated by a statute designed to alleviate the danger posed by the unsafe condition* because … the statute alone is sufficient to encourage a defendant to remedy any danger." Id., *22–23. The Court ultimately held that the invoice should have been excluded under Rule 402, however, since the State offered no evidence that the services noted on the invoice related specifically to the defective trailer brakes. Id., *24.

[647] Thompson v. Thompson, 749 S.W.2d 468, 470 (Tenn. Ct. App. 1988) (excluding evidence that dog, which had allegedly bitten plaintiff, was destroyed). *See also* Advisory Committee Note to Federal Rule 407, 56 F.R.D. 225 (1973):

> The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence … . (2) The other, more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discourage them from taking, steps in furtherance of added safety.

[648] *See below* § 4.07[4].

[649] 104 Tenn. 432, 58 S.W. 308 (1900). *See also* Belote v. Memphis Dev. Co., 51 Tenn. App. 423, 369 S.W.2d 97 (1962).

[650] 749 S.W.2d 468 (Tenn. Ct. App. 1988).

[651] Federal Rule 407 now specifically applies to product liability cases, covering proof of a defect in a product or a product's design, or a need for a warning or instruction. FED. R. Evid. 407.

[652] *See below* § 4.07[4].

Subsequent. The term "subsequent remedial measures" in Rule 407 is both specific and vague. The word "subsequent" suggests that it only bars measures taken *after* the incident triggering the lawsuit.[653] Thus, remedial measures taken after the sale or manufacture of an item but before it caused an injury are not barred by Rule 407.[654]

Remedial Measures. The term "remedial measures" is less clear. According to Rule 407, it is a "measure … taken which, if taken previously, would have made the event less likely to occur." Thus, a change designed to return the situation or property to the same condition it was before the accident does not constitute a "remedial measure" and would not be rendered inadmissible by Rule 407.[655] This result is consistent with the policy underlying Rule 407. Admitting evidence of a return to the status quo would not discourage improvements that went beyond the status quo and increased safety. Indeed, the rule barring evidence of improvements may actually encourage people to do more than return a situation to the pre-accident status.

Another illustration is provided by *Rothstein v. Orange Grove Center*,[656] a medical malpractice case in which a nurse's telephone slips memorialized conversations the nurse had with the defendant physician. The notes contained directions for persons exposed to bacterial meningitis, the disease that killed the victim and, according to plaintiff, was not properly diagnosed by defendant physician. The notes were admitted to establish that the physician knew some of the symptoms of that disease. Rejecting plaintiff's claims that the nurse's notes were barred as subsequent remedial measures under Rule 407, the Tennessee Supreme Court held that the notes were not "remedial" because they were a warning to those exposed to the bacteria. According to the Court, " '[r]emedial' action contemplates changing a situation, usually an unsafe property or product, to prevent the situation from causing further injury."[657] The warnings in the nurse's notes would not have made the victim's death less probable. Rather, since the claim was a failure to diagnose the disease, there was no allegation of a failure to warn the victim or others that certain symptoms could cause the disease. Accordingly, according to the *Rothstein* Court, the warning would not necessarily have produced an appropriate diagnosis.

On the other hand, the phrase "subsequent remedial measures" includes physical repairs to a premises or a design change in a product. According to one court, "Rule [407] prohibits evidence of post-accident changes that make things different or better than they were at the time of the accident."[658] Another authority states that Rule 407 embraces "any kind of change, repair, or precaution."[659] This includes the addition of new safety devices, new procedures, personnel changes, and any other changes that "would have made

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[653] *See* Chase v. General Motors Corp., 856 F.2d 17 (4th Cir. 1988) (design change made before accident did not constitute *subsequent* remedial measure barred by Rule 407). A related sequence occurred in Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055 (7th Cir. 1987), where the court held that Rule 407 bars evidence of remedial measures ordered before an accident but implemented after the accident.

[654] See *e.g.*, Cates v. Sears, Roebuck & Co., 928 F.2d 679 (5th Cir. 1991) (Rule 407 does not bar proof of changes in warnings on radial saw made before accident but after manufacture of the saw).

[655] *See* Patrick v. South Cent. Bell Tel. Co., 641 F.2d 1192 (6th Cir. 1980).

[656] 60 S.W.3d 807, 812 (Tenn. 2001).

[657] Id. at 813.

[658] Patrick v. South Cent. Bell Tel. Co., 641 F.2d 1192, 1196 (6th Cir. 1980) (quoting from unpublished District Court opinion).

[659] 2 WEINSTEIN'S FEDERAL EVIDENCE 407-7 (McLaughlin 2d ed. 2000).

the event less likely to occur."[660] It also embraces design changes, removal of a dangerous condition, new labels or signs, and revised or new regulations and instructions.[661]

[4] Exceptions

[a] In General

While Rule 407 makes subsequent remedial measures inadmissible to prove strict liability, negligence, or culpable conduct, these repairs are nevertheless admitted for many other purposes. The last sentence of Rule 407 states that subsequent repairs are admissible for proving such issues as "controverted ownership, control, or feasibility of precautionary measures, or impeachment." This list, of course, is illustrative rather than exclusive. It can be argued that these exceptions are so common that they destroy much of the impact of Rule 407. Accordingly, some federal decisions interpreting language identical with Tennessee Rule 407 have urged caution in the creation of new exceptions.[662]

[b] Controverted

Before subsequent remedial measures are introduced to prove some issue other than negligence, strict liability, or culpable conduct, the issue that the evidence is to prove must be controverted. This means that the issue must actually be in dispute. If the issue is not in dispute, introduction of subsequent remedial measures is unnecessary.[663] The issue is not in dispute if stipulated,[664] therefore allowing the parties to alter the admissibility of such evidence by removing certain issues from the case. Similarly, the party opposing introduction of the evidence can "lay the groundwork for exclusion by making an admission."[665]

[c] Ownership, Control, Feasibility, Etc.

If issues such as ownership, control, feasibility of changes,[666] and the like are controverted, Rule 407 permits evidence of subsequent repairs to be introduced to prove the appropriate issue. For example, if the

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[660] See *e.g.*, *Maddox v. City of Los Angeles, 792 F.2d 1408 (9th Cir. 1986)* (police disciplinary proceeding is subsequent remedial measure, inadmissible in police brutality civil rights case). *Compare* *Alimenta (U.S.A.) v. Stauffer, 598 F. Supp. 934 (N.D. Ga. 1984)* (conspiracy to defraud commodities firm; court excluded as subsequent remedial measure a report on firm's business practices by an outside consultant), *with* *Brazos River Authority v. GE Ionics, Inc., 469 F.3d 416* (5th Cir. 2006) (Rule 407 does not bar evidence of post-accident tests or reports; admitted reports of investigations and recognition of component problems in the product).

[661] *See e.g.*, *Martin v. Norfolk Southern Ry. Co., 271 S.W.3d 76 (Tenn. 2008)* (clearing of vegetation by railroad company at railroad crossing 31 months after accident involving train colliding with car was inadmissible subsequent remedial measure).

[662] *See* *Werner v. Upjohn Co., 628 F.2d 848, 856 (4th Cir. 1980)* ("[W]e should not be too quick to read new exceptions into the rule because by doing so there is a danger of subverting the policy underlying the rule").

[663] See *e.g.*, *Nolan v. Memphis City Schools, 589 F.3d 257 (6th Cir. 2009)*(evidence that a school reassigned two employees accused of causing plaintiff's injury was inadmissible to prove the employee's pattern of failing to report improper conduct); *Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230 (6th Cir. 1980)* (error to admit, on issue of feasibility, subsequent design changes in products liability case concerning car door latch; feasibility not contested); *Hull v. Chevron U.S.A., 812 F.2d 584 (10th Cir. 1987)* (evidence that forklift company fired forklift operator and changed operations procedures was inadmissible under Rule 407 to prove control of forklift since control was undisputed fact).

[664] See *e.g.*, *Albrecht v. Baltimore & Ohio R.R., 808 F.2d 329 (4th Cir. 1987)* (improvements near accident inadmissible to prove feasibility of repairs when feasibility stipulated by defendant).

[665] Advisory Committee Note to Federal Rule 407, 56 F.R.D. 226 (1973).

defendant maintains that additional safety measures were not feasible, the plaintiff can prove that new safety devices were added shortly after the accident and were, therefore, feasible. Lack of feasibility may be based on unreasonable expense or technical impossibility. Since plaintiff's evidence that changes were feasible ordinarily is presented only after the defendant suggests they were not feasible, the defense can eliminate such proof by conceding that the changes were feasible or, at the least, avoiding the allegation that they were not feasible.

Ownership or control is an issue if a party contends that he or she had no responsibility to maintain an item or place. Proof that the party made a post-accident repair may be relevant on that issue.

Another exception arises when photographs are taken of an accident scene after remedial repairs have been made. Often the photos are admitted as evidence, despite the repairs, if there is some reason, other than the repairs, to admit the pictures.[667] For example, the photos could be used to show the location of a retaining wall, now redesigned and rebuilt, that collapsed after a landslide.

Tennessee cases have also admitted evidence of subsequent repairs as circumstantial evidence of the source of a problem. In one Tennessee case, repairs were admitted to prove that the alleged defect was a possible cause of the injury.[668] In another case, *General Motors Corp. v. Dodson*,[669] the court allowed introduction of evidence that, subsequent to the accident in question, the owner sold a vehicle to another person who then replaced the master cylinder on the brakes. As a result of the repair, there were no further problems with the brakes. The evidence was admitted to identify the cause of the problem.

[d] Impeachment

While subsequent remedial measures cannot be used to prove strict liability, negligence, or culpable conduct, they can be used as evidence to impeach a witness, according to the last sentence of Rule 407. This variety of impeachment is really a cousin of impeachment by contradiction.[670] It is triggered by plaintiff's testimony that can be impeached by proof of subsequent remedial measures. Lawyers who do not want subsequent remedial measures introduced for impeachment purposes must use extreme caution in their direct examination. In *Kenny v. Southeastern Pennsylvania Transportation Authority*,[671] a rape victim sued a transit authority for negligently maintaining the station where the rape occurred. The defendant's witness testified that all reasonable care was being exercised at the time. To impeach this testimony, the plaintiff was permitted to prove that a few days after her rape the defendant installed new lighting on the platform where the rape occurred. In another case, subsequent remedial measures were permitted to impeach testimony that a cable met a statutory standard.[672]

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[666] See *e.g.*, *Whitehead v. St. Joe Lead Co., 729 F.2d 238 (3d Cir. 1984)* (plaintiff sued for being exposed to lead on job; court admitted warnings included with products manufactured after plaintiff's exposure, on issue of whether adequate warnings were feasible at reasonable cost).

[667] *See Gasteiger v. Gillenwater, 57 Tenn. App. 206, 417 S.W.2d 568 (1966)* (photo of accident scene after repairs have been made admissible when they accurately depict relevant particulars of the scene). *Cf. Belote v. Memphis Dev. Co., 51 Tenn. App. 423, 369 S.W.2d 97 (1962)*.

[668] *Quaker Oats Co. v. Davis, 33 Tenn. App. 373, 232 S.W.2d 282 (1949)* (to show chickens died from their physical environment rather than from ingesting the wrong feed, the defendant was allowed to prove that no chickens died after plaintiff ceased washing the chicken house floors with water).

[669] ***47 Tenn. App. 438, 338 S.W.2d 655 (1960)***.

[670] *See below § 6.07[4]*.

[671] *581 F.2d 351 (3d Cir. 1978)*.

[672] *Patrick v. South Cent. Bell Co., 641 F.2d 1192 (6th Cir. 1980)*.

This exception in Rule 407 runs the risk of opening the door to vast amounts of evidence about subsequent remedial measures. If such proof were admissible to counter testimony that a location or process or item was "safe" or, as in the case cited above, that "all reasonable care was being exercised," subsequent remedial measures would become admissible in countless cases. The difficulty of keeping out subsequent remedial measures for impeachment purposes has induced one authority to urge that courts should "exercise special care when applying this exception to Rule 407, because there is a danger that needless inquiry and concern over credibility may result in unnecessarily undercutting the policy objective of the basic exclusionary rule, causing the exception to swallow the rule."[673] Accordingly, many courts now permit impeachment by proof of subsequent remedial measures only to counter specific rather than general claims of safety, care, and the like.[674] Rule 403 may be applied in these cases since the impeaching evidence may have little probative value on the issue.

[e] Repairs by Non-party

While the language of Rule 407 does not so suggest, cases interpreting the equivalent federal rule have held that Rule 407 only bars subsequent remedial measures by a party. If the remedial measures were taken by someone other than a party, Rule 407 is inapplicable.[675] A good illustration is *Pau v. Yosemite Park & Curry Co.*,[676] a wrongful death action against a bicycle rental company for an injury in a national park. The court held that Rule 407 does not bar proof that after the accident the National Park Service erected warning signs at the accident site. The National Park Service was a non-party whose subsequent remedial measures were not covered by Rule 407. The result is consistent with the policy of encouraging remedial activity. Since the non-party is not harmed legally by proof of the remedial measures, admitting evidence of the repairs would not discourage such improvements.

[f] Repairs Mandated by Law

Similarly, if a subsequent repair was mandated by law, Rule 407 is inapplicable.[677] This exception is based on the theory that a person would not hesitate to make a subsequent remedial measure required by law, even if those measures were admissible in court. The legal consequences of not complying with the law are sufficient incentive, in theory at least, to induce the remedial action.[677.1]

The Tennessee Supreme Court refined this exception in *Martin v. Norfolk Southern Railway Company*[678] involving a collision between a train and a vehicle. Thirty-one months after the collision, the railroad cleared vegetation at the crossing where the accident occurred. A Tennessee statute required the railroad to clear

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[673] 2 WEINSTEIN'S FEDERAL EVIDENCE 407-31 (McLaughlin 2d ed. 2000).

[674] *See e.g.,* Kelly v. Crown Equipment Co., 970 F.2d 1273 (3d Cir. 1992) (cannot use subsequent remedial measure to impeach witness who testifies that product design was excellent and proper).

[675] *See e.g.,* Koonce v. Quaker Safety Prods. & Mfg. Co., 798 F.2d 700 (5th Cir. 1986) (in suit against manufacturer and supplier of safety suit, memorandum written after accident by employer of deceased was not barred by Rule 407 since employer not a party); Diehl v. Blaw-Knox, 360 F.3d 426, 430 (3d Cir. 2004), (Rule 407 does not bar evidence of a non-party's subsequent remedial measures to equipment).

[676] 928 F.2d 880 (9th Cir. 1991).

[677] *See* Farner v. Paccar, Inc., 562 F.2d 518, 527 (8th Cir. 1977) (recall letter). *See generally* 84 A.L.R.3d 1220 (1978).

[677.1] *See, e.g.*, State v. Miller, 2020 Tenn. Crim. App. LEXIS 58 (Tenn. Crim. App. Feb. 3, 2020) (since a statute, Tenn. Code Ann. § 55-9-204(c)(1), mandated the repairs defendant made, Rule 407 did not apply to bar admission of the repair invoice in his criminal trial for reckless endangerment).

[678] Martin v. Norfolk Southern Ry. Co., 271 S.W.3d 76 (Tenn. 2008).

trees that were at least six inches in diameter and two feet tall. The plaintiff sought to introduce the clearing of vegetation, arguing it was admissible (*i.e.* not a subsequent remedial measure) because it was required by law. The Tennessee Supreme Court rejected the argument and excluded the evidence as a subsequent remedial measure. The Court noted that the applicable statute was designed to prevent trees from falling on railroad tracks, not to improve visibility. Hence, according to the Court, compliance with the statute alone did not encourage railroads to remedy dangerous crossings since trees not covered by the statute could obscure the vision of motorists at the crossing. The Court refused to extend the law-mandated-remediation exception to the particular statute in the case.

[g] Minimizing Misuse

Since the subsequent remedial measures are being used to prove something other than negligence, strict liability, or culpable conduct, the jury may find it difficult to separate the issues and use the evidence for the proper purpose. To prevent the jury from being misled, jury instructions should be given under Rule 105 to inform the jury of the correct use of the evidence. Other options are also available to a resourceful judge. For example, photographs showing a subsequent repair could be retouched to restore the scene to its pre-repair state, a scale model or map could be used in lieu of the photos that show the new repair, or, under Rule 403, the evidence could be excluded if its prejudicial value is too high.[679]

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[679] *See e.g.,* Stallworth v. Illinois Cent. Gulf R.R., 690 F.2d 858 (11th Cir. 1982) (excluding under Rule 403 evidence that defendant railroad placed flares at railroad crossing immediately after accident; plaintiff argued evidence admissible to prove feasibility and to impeach).

§ 4.08 Rule 408. Compromise and Offers to Compromise

[1] Text of Rule

Rule 408 Compromise and Offers to Compromise

Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence actually obtained during discovery merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution; however, a party may not be impeached by a prior inconsistent statement made in compromise negotiations.

Advisory Commission Comment:

The rule would work only slight changes in Tennessee evidence law. One difference is that statements of fact during settlement negotiations become inadmissible, but that is an improvement over the present practice admitting the fact statements.

Also salutary is the provision excluding compromise and settlement offers in "related litigation." The drafted language would change the suggestion to the contrary in *Tennessee Coach Co. v. Young, 18 Tenn. App. 592, 80 S.W.2d 107 (1934)*. Consistent with the proposal is *T.C.A. § 29-11-105(b)*, excluding evidence of settlement by one tortfeasor where another goes to trial.

Tennessee courts exclude settlements and settlement offers only in civil trials, admitting them in criminal prosecutions. *Carter v. State, 161 Tenn. 698, 34 S.W.2d 208 (1931)*. The proposed rule excludes such evidence in both civil and criminal trials.

1993 Advisory Commission Comment:

Where punitive damages are at issue, compromise offers become relevant and admissible despite Rule 408. *See* *Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992)* (this decision has been superseded by statute, as stated in *Strong v. HMA Fentress Cnty. Gen. Hosp., LLC, 194 F. Supp. 3d 685 (M.D. Tenn. July 12, 2016)*, but the decision remains valid insofar as it discusses Rule 408).

[2] Encouraging Settlements: Rules 408–410

Modern evidence rules clearly reflect the policy of encouraging out-of-court settlements in both civil and criminal cases. Without this encouragement, our court dockets could be even more crowded and the antagonisms often

generated by litigation could be fueled unnecessarily. The Tennessee Rules of Evidence, like their federal counterparts, include several provisions that are designed to facilitate settlements. Rules 408, 409, 409.1, and 410 are the most obvious.

Rule 408 encourages settlements in civil cases by excluding some evidence generated in negotiations. Rule 410 accomplishes the same objective in criminal cases by excluding certain evidence arising in criminal plea negotiations and proceedings. Rule 409 also encourages settlements by barring proof of the payment of certain medical and related expenses and Rule 409.1 permits a person to express sympathy to people harmed by an accident, perhaps smoothing the way for a settlement of legal issues.

[3] Evidence from Civil Compromise Negotiations Inadmissible

[a] In General

Rule 408 is a broad rule, generally consistent with pre-rules Tennessee law and Federal Rule 408, that makes many aspects of civil settlements inadmissible in a civil or criminal case. Similar results are required in specific areas by other laws.[680] As described above,[681] the primary purpose of this rule is the "promotion of the public policy favoring the compromise and settlement of disputes."[682] A secondary policy is that such offers may not reflect an admission of responsibility as much as a desire for peace. An older Tennessee case stated:

> It is against the policy of the law that parties should be prejudiced by their "bids for peace," or overtures, or agreements, made with a view to stop litigation. These overtures of pacification are protected in the law as confidential and privileged matter, which are to be encouraged and promoted … . It must be permitted to men … to buy their peace without prejudice to them, if the offer should not succeed; and such offers are made to stop litigation without regard to the question whether anything is due or not.[683]

[b] Offers and Acceptances

Rule 408 excludes several types of evidence. It bans evidence of furnishing, offering to furnish, accepting, or offering to accept a valuable consideration in specified settlements. Thus, this rule reaches both parties to a settlement, even barring proof that the proponent of the evidence made an offer during negotiations. It also applies to people negotiating on behalf of parties and embraces negotiations with non-parties.

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[680] *See e.g.,* Tenn. Sup. Ct. R. 31, § 7 (providing that evidence of statements made in the course of mediation are inadmissible to the same extent as conduct or statements are inadmissible under ***Tennessee Rule of Evidence 408***); Tenn. Sup. Ct. R. 31, § 10(d) (prohibits the mediator from disclosing information obtained during the mediation without the consent of the parties); *Tenn. R. Civ. P. 68* (forbidding evidence of an unaccepted offer of judgment, which is to be treated as if it were withdrawn).

[681] *See above § 4.08[2]*.

[682] Advisory Committee Note to Federal Rule 408, 56 F.R.D. 227 (1973).

[683] *Strong v. Sewart & Bros., 56 Tenn. 137, 143 (1872)* (in a suit over commercial losses, excluding a letter signed by the defendant indicating that the defendant could settle within four days for a specified sum or go through with litigation).

Moreover, it reaches negotiations that succeed and those that do not and bans evidence of the actual settlement, performance of the agreement, and of offers and counteroffers, whether accepted or not.[683.1]

[c] Conduct or Statements

Just as Rule 408 bars proof of offers and acceptances, it also excludes evidence of conduct or statements made in such negotiations.[683.2] This includes documents drafted to facilitate the negotiations or to memorialize the results. For example, if a party, during a negotiation session, admits that he or she may have been driving too fast at the time of the accident, this statement is inadmissible pursuant to Rule 408 because it was a statement made during compromise negotiations.

Rule 408's general exclusion of statements made during compromise negotiations is a beneficent change from prior Tennessee law[684] and serves the policy of encouraging settlements. It enables lawyers to engage in candid negotiations without fear of prejudicing the client if the negotiations fail. Thus, contrary to traditional practice, counsel can engage in settlement negotiations without labeling the discussions "hypothetical" or "without prejudice," and statements made during the settlement conferences will be inadmissible under Rule 408.

[d] Valuable Consideration

This rule bars evidence of negotiations involving a valuable consideration. Anything with a dollar value would qualify, but what about cases where non-monetary stakes are involved? For example, does Rule 408 apply if the negotiations are over the wording of an apology that has no monetary value? In order to encourage peaceful settlements of disputes and because the parties themselves consider the apology to be an issue of sufficient significance to merit negotiations, it is submitted that Rule 408 should be read liberally to include the apology and many other difficult-to-evaluate items to be an issue of sufficient significance to be included as a "valuable consideration."[685]

[e] Disputed Claim

683.1 For an example of where the evidence did not constitute an offer to compromise within the meaning of Rule 408, *see* *Purifoy v. Mafa, 556 S.W.3d 170 (Tenn. Ct. App. 2017)* (where defendant sent the plaintiff an email demanding that she "voluntarily nonsuit" her claim against him or be reported to the Board of Professional Responsibility, the email was not a confidential settlement communication, nor did it constitute an offer to compromise in the context of a settlement negotiation within the meaning of ***Tenn. R. Evid. 408***). *See also* *Pickens v. Underwood, ___S.W.3d___, 2018 Tenn. App. LEXIS 322 (Tenn. Ct. App. June 12, 2018)*, appeal denied, *___S.W.3d___, 2018 Tenn. LEXIS 556 (Tenn. Sept. 14, 2018)* (letter was not an offer to settle, but instead, was a unilateral declaration of final payment by the homeowners). By contrast, the trial court properly excluded a proposed agreed order and parenting plan in *Nelson v. Justice,* because the order occurred at a time when numerous issues remained to be settled and the parties were engaged in settlement negotiations. *Nelson v. Justice, ___S.W.3d___, 2019 Tenn. App. LEXIS 35 (Tenn. Ct. App. 2019)*.

683.2 *Ledbetter v. Ledbetter, 163 S.W.3d 681 (Tenn. 2005)* (based on the language in Tenn. Sup. Ct. R. 31, a mediator may not present evidence of an oral mediation agreement and, under ***Tenn. R. Evid. 408***, evidence of conduct or statements made in compromised negotiations was not admissible; therefore, the marital dissolution agreement, made during the mediation and not reduced to a signed writing, was not an enforceable contract).

684 Prior law is illustrated by *Sullivan v. Morrow, 504 S.W.2d 767 (Tenn. Ct. App. 1973)*, a civil assault case, in which the plaintiff's lawyer sent the defendant a letter identifying himself as the plaintiff's lawyer and suggesting the two get together to settle the matter without having to go to trial. The Court of Appeals held that the letter was not excludable because it was not an offer of settlement; it was a suggestion that the parties meet to discuss the possibility of a settlement. Had the case arisen under Rule 408, the letter should have been excluded as a statement made in compromise negotiations.

685 *See* 2 WEINSTEIN'S FEDERAL EVIDENCE 408–12 (McLaughlin 2d ed. 2000). *See also* *Tenn. R. Evid. 409.1*, which renders inadmissible expressions of sympathy or benevolence. *See below* § 409.1[2].

Disputed as to Validity or Amount. Rule 408 does not reach every negotiation. Consistent with its underlying policy of encouraging out-of-court settlements, this rule applies only to negotiations involving claims that are "disputed or … reasonably expected to be disputed as to either validity or amount." If neither is an issue, Rule 408 does not apply. For example, if X admits that she has entered a valid contract with Y, owes Y $1000, and is obligated to pay it off at $100 per week, negotiations to reduce the payments to $50 per week for twice as many weeks are not covered by Rule 408. There is no disputed claim as to either validity or amount. Similarly, two bankers negotiating a loan to a new business may not be protected by Rule 408 because their negotiations do not involve a disputed claim. Statements made during those negotiations are not rendered inadmissible by this rule.

On the other hand, if the loan agreement is signed and there is a disagreement over the amount of the loan described in the contract, Rule 408 would bar evidence arising in the post-contract settlement negotiations over this issue. For example, in *United States v. Hooper*,[686] an employee, who was charged criminally with making false statements on a government document, gave $1,010 to repay amounts taken in the scheme. During the criminal trial the court properly admitted evidence of the payment. Rule 408 was not violated because there was no dispute as to the fact or amount of the claim.[687] The defendant admitted his fault and paid back the money he had taken.

Another illustration is the Tennessee case of *Simmons v. O'Charley's, Inc.*,[688] involving a suit for breach of contract and unlawful detainer. A letter directed a tenant where to pay rent in the future and informed the tenant how long he could remain in the building. The appellate court held that the letter was not barred by Rule 408 because nothing in the letter involved a compromise negotiation.

Present and Related Litigation. It should be noted that Rule 408, unlike Federal Rule 408, extends to settlement negotiations in both the "present" and "related" litigation. This is designed to encourage compromise discussions to resolve all facets of a dispute. The use of the word "litigation" in Tennessee Rule 408 should not be read as requiring that litigation have been initiated or even contemplated when the negotiations occurred. Rule 408's underlying policy of encouraging out-of-court resolutions would be disserved if the protection of the rule is not extended to negotiations occurring long before litigation is considered.

[f] Proof of Liability for Civil Claim or Criminal Charge or Punishment

Rule 408 bars evidence of certain negotiations from being introduced in civil and criminal cases for certain purposes. In civil cases, the rule only bars evidence to prove liability for or invalidity of a civil claim; it does not affect the admissibility of evidence for other purposes.[689] For criminal cases, Rule 408 bars evidence of civil negotiations to prove a "criminal charge or its punishment."[690] For example, in a bank embezzlement this rule would make a civil settlement of the matter inadmissible as proof of guilt in a subsequent criminal embezzlement case. Rule 408 does not apply to a confession made to a police officer and not qualifying for

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[686] *596 F.2d 219 (7th Cir. 1979)*.

[687] *See also* *Cassino v. Reichhold Chem., 817 F.2d 1338 (9th Cir. 1987)*, *cert. denied,* ***484 U.S. 1047 (1988)*** (in age discrimination case, court admitted settlement agreement offered to employee at time of termination; there was no disputed claim at time severance pay offered).

[688] *914 S.W.2d 895 (Tenn. Ct. App. 1995)*.

[689] *See below § 4.08[4]*.

[690] Federal Rule 408, unlike the Tennessee counterpart, does not specifically make civil compromise evidence inadmissible in a criminal case.

exclusion under Rule 410. This is because Rule 408 only limits use of statements made involving a civil claim.[690.1]

[g] Same or Related Litigation

Tennessee Rule 408, unlike the similar federal rule, specifically bars evidence from being introduced in the present or related litigation. This rule, consistent with the Tennessee Uniform Contribution Among Tort-Feasors Act[691] but inconsistent with some older Tennessee authority,[692] permits anyone possibly liable in a matter to enter into negotiations to settle the dispute, without providing evidence to be used against that party or others possibly liable for the same injury.

[h] Impeachment

To a limited extent, Tennessee Rule 408 is specifically made applicable to impeachment, unlike the Federal Rule 408, which is silent on the issue. The last sentence of the Tennessee Rule states that "a party may not be impeached by a prior inconsistent statement made in compromise negotiation." This is designed to prevent such evidence from being brought in through the back door. Thus, to avoid the back door admission of prior inconsistent statements made during compromise negotiations the court should also ban the use of this type of prior inconsistent statement as substantive evidence under Rule 803(26).[693] It must be noted that Rule 408 apparently only bans prior *inconsistent* statements. Evidence other than inconsistent statements is presumably not barred for use in impeachment by Rule 408. It may be admissible to show a witness's bias[694] or, on rare occasions, lack of bias[695] or to rebut a statement made during testimony.[696]

[i] Evidence Discoverable Through Other Means

[690.1] *State v. March, 395 S.W.3d 738, 772 (Tenn. Crim. App. 2011)*. *See also, State v. Dunn, 2018 Tenn. Crim. App. LEXIS 547 (Tenn. Crim. App. 2018)* (interview between the defendant and law enforcement officers, during which the defendant asked for a bond reduction in exchange for information in solving additional burglaries, was not a negotiation or compromise of a civil claim; therefore, ***Tenn. R. Evid. 408*** did not apply to the interview, and the trial court did not err in admitting statements made by the defendant during the interview).

[691] *Tenn. Code Ann. § 29-11-105(b)* (2000) (barring introduction of release or covenant not to sue by another tortfeasor in the trial of defendant, but permitting the evidence to be introduced after the judgment is entered to reduce the amount of the judgment). The scope of the Uniform Act was modified in *Bervoets v. Harde Ralls Pontiac-Olds, Inc., 891 S.W.2d 905 (Tenn. 1994)*.

[692] *See Tennessee Coach Co. v. Young, 18 Tenn. App. 592, 80 S.W.2d 107 (1934)* (permitting evidence that defendant paid others for injuries in same incident; payments were implied admission); *Manus v. Turner, 510 S.W.2d 514 (Tenn. Ct. App. 1972)* (permitting evidence that defendant settled with passenger in same car plaintiff riding in when injured; reluctantly following *Tennessee Coach Company*).

[693] *See below § 8.31*.

[694] *See e.g., Hudspeth v. Commissioner, 914 F.2d 1207 (9th Cir. 1990)* (IRS expert's evaluation of lumber, in similar, settled case was admissible on expert's bias).

[695] *See e.g., United States Aviation Underwriters v. Olympia Wings, 896 F.2d 949 (5th Cir. 1990)* (insurance company's (plaintiff) settlement of claim against mechanic-witness was admissible on witness's lack of bias).

[696] *See e.g., Freidus v. First National Bank of Council Bluffs, 928 F.2d 793 (8th Cir. 1991)* (letters sent by both sides during settlement negotiations were admissible to rebut plaintiff's trial testimony that defendant bank never gave reasons for certain decisions).

Rule 408 bars evidence from being introduced if it was obtained in compromise negotiations. The rule does not bar evidence obtained through other means, even if the evidence was also used in negotiations. If a statement is made during negotiations, that statement cannot be introduced into evidence if its source is the compromise negotiations. However, the same statement can be used if it is obtained in other ways, such as in a deposition, interrogatory answer, or request for admission. For example, if a party makes a damaging statement during a deposition and repeats the same statement during settlement negotiations, the deposition statement is not barred by Rule 408. Similarly, statements, whether oral or written, made before or after negotiations are not barred by Rule 408.

[4] Exceptions

[a] In General

While Rule 408 renders settlement negotiations inadmissible in many contexts, it contains a number of exceptions that greatly reduce its impact. Rule 408 only bars proof of negotiations as evidence to prove liability for or invalidity of a civil claim, or to prove guilt or punishment in a criminal case. It does not bar other uses of this evidence. The last sentence of Rule 408 expressly states that the rule is inapplicable to prove "another purpose" such as a witness's bias or prejudice, negativing a contention of undue delay,[697] or proving an effort to obstruct a criminal investigation or prosecution.[698] Another exception, stemming from an older Tennessee decision,[699] is evidence used to establish bad faith, deceit, or the purchasing of influence.[699.1] Perhaps the rationale for the latter exception is that the exclusionary rule is only designed to promote good faith negotiations.

Another exception, appearing frequently in the decisions interpreting the substantially identical Federal Rule 408, permits evidence of statements made during compromise negotiations to be introduced to prove the meaning of language drafted and adopted during the negotiations.[700] This exception does not violate the policy of Rule 408 because it does not discourage settlements. Indeed, by ensuring that settlements enforced by courts truly reflect the intent of the parties, this exception may encourage out-of-court resolutions. A related exception permits the actual settlement and its surrounding circumstances to be admitted on the issue of compliance with the settlement.[701]

Common sense is the basis for another exception to Rule 408. On rare occasions a jury would be confused if it were not apprised of a settlement between a party and someone else.[702] In such cases, the court has

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[697] *Cf.* Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082 (5th Cir.), *modified on other grounds,* 829 F.2d 1343 (5th Cir. 1987) (evidence of settlement negotiations admitted to prove efforts to mitigate damages), *but see* Stockman v. Oakcrest Dental Center, P.C., 480 F.3d 791 (6th Cir. 2007) (holding that evidence demonstrating a failure to mitigate damages goes to the amount of the claim and thus is barred under Rule 408).

[698] *See e.g.,* Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987) (proof of settlement in another police brutality case admitted to prove city had notice of arrest quotas and that it fostered aggressive atmosphere); Purifoy v. Mafa, 556 S.W.3d 170, 2017 Tenn. App. LEXIS 644 (Tenn. Ct. App. Sept. 28, 2017) (defendant's demand that plaintiff drop the matter or else be reported to the Board of Professional Responsibility was not a confidential settlement communication and was introduced to demonstrate continued harassment and intimidation of plaintiff).

[699] *See* Hager v. Hager, 13 Tenn. App. 23, 28 (1930). *See also* Draper v. Draper, 2015 Tenn. App. LEXIS 905 (Tenn. Ct. App. 2015) (following *Hager*).

[699.1] *See* Draper v. Draper, 2015 Tenn. App. LEXIS 905 (Tenn. Ct. App. 2015) (where husband sought to establish that wife's demands for ownership of certain marital property amounted to undue influence, bad faith, deceit, trickery, and fraud; under these circumstances, we hold that the trial court did not abuse its discretion in admitting the recorded conversation).

[700] *See e.g.,* Catullo v. Metzner, 834 F.2d 1075 (1st Cir. 1987).

[701] *See e.g.,* Catullo v. Metzner, 834 F.2d 1075 (1st Cir. 1987) (settlement admissible on issue of breach of fiduciary duty violating terms of settlement).

the discretion to inform the jury of the settlement. Another option may be to grant a mistrial so that a new trial could be held where the confusion was avoided.

[b] Judicial Caution

Because a finding that evidence fits an exception to Rule 408 may disserve the policy of encouraging out-of-court settlements, courts faced with arguments that an exception applies should be cautious. They must carefully examine whether the evidence is really being used to prove liability. In *Sullins v. Farragut Tire & Battery Company*,[703] a careful Tennessee Supreme Court properly analyzed the case consistent with the policy of Rule 408, yet long before the Tennessee Rules of Evidence were adopted. Plaintiff was injured by an automobile allegedly driven by defendant's agent. To prove that the driver was in fact defendant's agent, the plaintiff sought to prove that the defendant offered to settle the case with the plaintiff. The Tennessee Supreme Court rejected the argument that the settlement was offered only to prove agency, not liability. The court correctly noted that since proving agency was a prerequisite to establishing liability, the evidence was offered to prove liability and was, therefore, barred.

Courts can also use Rule 403 to exclude evidence fitting within an exception to Rule 408. If, for example, the probative value of the evidence is slight and the prejudicial value is high, the evidence should be excluded.[704] Courts can also consider a limiting instruction under Rule 105 to assist the jury in the proper usage of evidence admitted under an exception to Rule 408. A severance can be granted if a settlement could be used against only one of multiple parties. Finally, in egregious cases where settlement evidence is erroneously heard by a jury, a mistrial may be ordered.

[702] *See* Kennon v. Slipstreamer, Inc., 794 F.2d 1067 (5th Cir. 1986) (where absence of defendants previously in court might confuse jury, trial court has discretion to tell jury that settlement occurred, but should not disclose amount of the settlement).

[703] 144 Tenn. 491, 234 S.W. 330 (1921).

[704] For an example of a court carefully analyzing whether Rule 403 should exclude evidence otherwise admissible under Rule 408, *see* United States v. Hooper, 596 F.2d 219 (7th Cir. 1979) (evidence admitted).

§ 4.09 Rule 409. Payment of Medical and Similar Expenses

[1] Text of Rule

Rule 409 Payment of Medical and Similar Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Advisory Commission Comment:

The rule and the Tennessee case law are the same. *Meegal v. Memphis Street Railway Co., 33 Tenn. App. 247, 238 S.W.2d 519 (1950)*. The rule applies to civil, not criminal, trials.

[2] Evidence of Payment of Medical and Similar Expenses Inadmissible

[a] In General

Rule 409, a verbatim adoption of Federal Rule 409 and a restatement of pre-rules Tennessee law,[705] excludes, as proof of liability, evidence that a party, virtually always the defendant, furnished, offered or promised to pay medical expenses occasioned by an injury. This rule, like Rules 408 and 410, is designed to encourage out-of-court settlements. It may also facilitate recovery from injuries by enabling some people to have the financial resources to get prompt, complete medical attention. Rule 409 also recognizes that the payment or offer to pay such expenses may not be an admission of liability. It may simply reflect a charitable impulse to help someone in need, yet easily be misunderstood by a jury charged with assessing fault. Finally, this rule benefits hospitals and other medical providers by facilitating prompt payment of medical bills by insurance companies who have determined that they are probably responsible for such bills. Rule 409 allows them to pay without admitting liability and creating evidence that could be harmful in an unresolved or potential lawsuit.

[b] Type of Payments

Rule 409 is actually a narrow rule that must be read carefully. It bars evidence of payments or offers or promises to pay medical, hospital, or similar expenses occasioned by an injury. The focus on medical and "similar" expenses suggests that Rule 409 does not apply to payments to repair damage to property. In addition, it only bars evidence of payments for medical and related expenses "occasioned by an injury." Payment of such expenses not occasioned by an injury is not barred by Rule 409.

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[705] *See* *Meegal v. Memphis St. Ry., 33 Tenn. App. 247, 238 S.W.2d 519, 521 (1950)* ("A willingness to assist another in distress should not, we think, be accompanied by such a hazard. It is not in the interest of society that humanitarian or benevolent instincts be so hobbled. Nor is it in keeping with the mores of the community"). *Cf.* *Howard v. Abernathy, 751 S.W.2d 432 (Tenn. Ct. App. 1988)* (court should fashion method of proof such that defendant can obtain credit for medical expenses paid victim without having to introduce proof of insurance coverage).

Unlike Rule 408, this rule does not require a dispute or negotiations of any kind. Rule 409 bars proof of medical and similar payments irrespective of the existence of any disagreement on amount or fault or anything else.

[c] Statements Not Barred

Rule 409 excludes evidence of payments or offers or promises to pay certain expenses; it does not ban most[706] statements and other kinds of conduct made in conjunction with those payments. Such payments and offers should be tendered only after assuring that damaging statements are not made in the process.

Such statements and conduct are excluded, however, under Rule 408 if they were made in conjunction with compromise negotiations covered by that provision. However, since Rule 408 is only applicable if there is a dispute as to amount or liability, it is possible that the statements accompanying payments covered by Rule 409 were made before there was a dispute.

[d] Civil Cases Only

Rule 409 makes certain evidence inadmissible "to prove liability for the injury." This means that Rule 409 applies only in civil cases.[707] It does not exclude evidence in a criminal case.

[e] Procedures

In tort cases the defendant may be entitled to credit for amounts already paid toward the plaintiff's medical expenses. Since the jury sets the amount of damages, it may have to be told of the defendant's payments in order to correctly set the amounts owed. However, this would violate the defendant's right to have insurance coverage play no role on the issue of liability.[708] One Tennessee case wisely suggested that a pre-trial order could permit the plaintiff to prove the amount of damages with an understanding that the amount of payments already made for medical expenses would be deducted from any recovery. Another suggested procedure was for the court to subtract the payments already made from the final judgment amount.[709]

[3] Exceptions

Rule 409 applies only to bar certain payments "to prove liability for the injury." Other uses of this information are permissible. For example, such payments could be used as proof that a witness was biased in favor of or against a party. A pre-rules Tennessee case suggested that the evidence could be used to prove control or identity of the apparatus causing an injury, but not to prove negligence.[710] And it would be appropriate to admit the evidence to prove the existence of an injury if such is denied.

When an exception to Rule 409 is applicable and the evidence is not barred by that rule, the proof can still be excluded by other rules. For example, Rule 401 requires that evidence be relevant. Certain statements

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[706] The Advisory Committee Note to Federal Rule 409 (which is identical to Tennessee Rule 409), suggests that statements that are a "part of the act of furnishing or offering or promising to pay" are barred by the rule. *56 F.R.D. 228 (1973)*. It is not clear what statements are so inextricably bound to the payment or offer to pay that they are excluded under Rule 409. Pre-rule cases may have to be consulted. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 2 FEDERAL RULES OF EVIDENCE MANUAL 409-2 (9th ed. 2006).

[707] *See Tenn. R. Evid. 409* Advisory Commission Comment ("The rule applies to civil, not criminal, trials").

[708] *See Tenn. R. Evid. 411*.

[709] *Howard v. Abernathy, 751 S.W.2d 432, 435–36 (Tenn. Ct. App. 1988)*.

[710] *Meegal v. Memphis St. Ry., 33 Tenn. App. 247, 238 S.W.2d 519, 520 (1950)* (dictum). *But see* Christopher B. Mueller & Laird C. Kirkpatrick, 2 Federal Evidence 114 (2d ed. 1994) (policy of Rule 409 suggests it should bar evidence of payment of medical expenses to prove ownership or control of instrumentality in question).

accompanying an offer to pay medical expenses may be irrelevant because they do not assist the trier of fact in resolving an appropriate issue. Rule 403 can also be invoked, particularly when the probative value of the statement is slight and the jury may well misuse it or give it too much weight.

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§ 4.09.1 Rule 409.1. Expressions of Sympathy or Benevolence

[1] Text of Rule

Rule 409.1 Expressions of Sympathy or Benevolence

(a) That portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this Rule.

(b) For purposes of this Rule:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means an injured party's spouse, parent, grandparent, stepparent, child, grandchild, sibling, half sibling, adopted sibling, or parent-in-law.

2003 Advisory Commission Comment:

Rule 409.1 renders inadmissible certain statements and actions reflecting sympathy for persons injured in accidents. This Rule, like Evidence Rules 408, 409, and 410, is designed to encourage the settlement of lawsuits. It complements Evidence Rule 409, which makes inadmissible payment of medical and related expenses on the issue of liability. The underlying theory of Rule 409.1 is that a settlement of a lawsuit is more likely if the defendant is free to express sympathy for the plaintiff's injuries without making a statement that would be admissible as an admission of a party opponent. Without this rule, a defendant's statement such is "I am sorry that you have suffered so much from the accident" might well be admissible as an admission of a party opponent. Accordingly, defense counsel may advise against making such statements in order to avoid the creation of harmful evidence. Yet a simple apology may go a long way toward making an injured party feel more comfortable with a nonjudicial settlement of the matter. This process is consistent with the modern focus on mediation and other methods of dispute resolution that seek to avoid a trial by facilitating a resolution acceptable to all parties.

The rule is similar to that enacted in Massachusetts (Mass. Ann. Laws ch. 233, § 23D) and California (Cal. Evid. Code § 1160). A Texas provision is also consistent with Rule 409.1. See Vernon's Tex. Stat. & Code Ann., Civ. Prac. & Remedies Code § 18.061.

Rule 409.1 embraces only civil cases involving an "accident." It is inapplicable in criminal cases. It also extends only to "benevolent gestures"; it does not exclude statements of fault.

[2] In General

Rule 409.1 was added to the Tennessee Rules of Evidence in order to further the goal of encouraging parties involved in accidents to resolve their civil disputes without going to trial. The theory is that an amicable settlement is more likely if the potential defendant is not discouraged from expressing sympathy for the plaintiff's harm. In general terms, the rule permits parties in accidents to express their sympathy for the pain, suffering or death stemming from the accident, without being "penalized" for the sympathetic expressions by having them admitted at trial as an admission of a party opponent. From this perspective, Rule 409.1 can be characterized as an exception to the admissions exception to the hearsay rule.

[3] Limited to Accidents

Rule 409.1 is a rather narrow rule. By its own terms it only applies to expressions of sympathy concerning pain, suffering or death of a person involved in an accident. Rule 409(b)(1) defines accident as "an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party." This means that Rule 409.1 does not apply in criminal cases or in any civil case other than those involving accidents. Thus, it would not apply in a contract dispute, a case involving an intentional tort, or a business-related case. The admissibility of statements of benevolence in such cases would be governed by the ordinary rules of evidence, such as that for admissions of a party opponent, rather than by Rule 409.1.

[4] Excluded Only on Issue of Liability

Rule 409.1 applies only in civil cases to exclude evidence that would be an "admission of liability." Thus it would bar the defendant's statement, "I am sorry you had to have surgery after our accident" on the issue of defendant's liability for that accident, but would not bar that statement for another purpose. For example, assume that defendant claims that he was also injured in the accident which caused him to be unable to speak immediately after the accident, but shortly after the event the defendant went over to the injured plaintiff and expressed sympathy for the plaintiff's plight. The defendant's statement to the victim would be inadmissible under Rule 409.1 on the issue of the defendant's liability for the accident but would not be excluded on the issue of whether the defendant could speak at the time the statement was made.

[5] Limited to Certain Benevolent Expressions

Rule 409.1 does not bar evidence of all kindly expressions and therefore may create a trap for the careless. By its terms Rule 409.1 excludes "statements, writings, or benevolent gestures" that express "sympathy or a general sense of benevolence" concerning "pain, suffering, or death" caused by an accident. Thus, it renders inadmissible such statements as, "I am sorry for your pain," "I feel horrible that you have suffered so much," "I am sorry that your husband was killed in the accident," and "I hope you are out of the hospital soon." But it should be noted that this rule does not bar statements of fault, as noted specifically in the Advisory Commission Comment. For example, while it would bar, "I am so sorry you were hurt in the accident," it would not prevent the admission of "It was my fault" or "I should not have been drinking" or "I must have run the red light."

[6] Not Limited to Benevolent Expressions to Injured Person

Though Rule 409.1 is a rather narrow rule in some respects, it is broad enough to embrace statements made to the injured person's family as well as to the injured person. Rule 409(b)(3) defines family broadly, including the normal categories as well as grandparent, stepparent, half and adopted siblings, and parents-in-law. Remarks to members of the injured person's extended family may be especially prevalent when the accident resulted in death. The rule does not exclude statements to non-family members, such as friends, lovers, neighbors, or business associates.

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§ 4.10 Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

[1] Text of Rule

Rule 410 Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the party who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere;

(3) Any statement made in the course of any proceedings under *Rule 11 of the Tennessee Rules of Criminal Procedure* regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. Such a statement is admissible, however, in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Advisory Commission Comment:

This rule is cross-referenced in *Tenn. R. Crim. P. 11(d)*.

1994 Advisory Commission Comment:

***Williams v. Brown, 860 S.W.2d 854 (Tenn. 1993)*, held misdemeanor traffic fine payments without court appearance inadmissible by analogy to Rule 410.**

2013 Advisory Commission Comment:

The original Advisory Commission Comment was revised to correct an obsolete cross-reference to a now nonexistent subparagraph of *Tenn. R. Crim. P. 11*.

[2] General Rule: Evidence of Certain Criminal Pleas and of Criminal Plea Negotiations Inadmissible

Rule 410—like Rules 408, 409, and 409.1—is designed to encourage out-of-court settlements by reducing the possible adverse consequences of participating in negotiations. Rule 410 differs from the other rules by applying to negotiations in *criminal cases*. In general terms, Rule 410 excludes, in any criminal or civil case: proof that a party entered a guilty plea later withdrawn or a *nolo contendere* plea, and statements made in plea negotiations which result in a withdrawn guilty plea or not guilty plea where no deal is struck. Rule 410 must be read in conjunction with *Rule 11(d) of the Tennessee Rules of Criminal Procedure*, which provides that the admissibility of a plea, plea discussion, or any related statement is governed by *Tennessee Rule of Evidence 410*.

Rule 410 actually takes several approaches toward encouraging plea bargaining in criminal cases. First, it reduces the risks of engaging in plea bargaining by eliminating some of the costs of entering plea negotiations. If negotiations fail, the defendant has not produced admissible evidence that can be used at the subsequent trial. Similarly, if the offender enters a *nolo contendere* plea, the plea itself cannot be introduced against the offender at a civil or criminal trial, though the conviction resulting from the *nolo* plea may be admissible in Tennessee courts.[711] Second, Rule 410 encourages candor during plea negotiations by permitting defense counsel to discuss freely the case without producing admissible evidence against the client. This candor should facilitate out-of-court settlements. Third, Rule 410 recognizes the unfairness inherent in permitting the government to engage in plea bargaining for the purpose of generating evidence to be used later at trial. If this were permissible, there would be little plea bargaining.

Since Rule 410 only bars proof "against the party" who made the plea or participated in plea negotiations, it does not restrict evidence of pleas or negotiations involving non-parties. Thus, it would not bar such evidence to impeach a non-party witness if the evidence were otherwise admissible.[712] Moreover, Rule 410 does not stop a party from using the party's own pleas and related evidence to help that party in a civil or criminal case.[713]

Another significant limitation on Rule 410 is that it does not apply to *accepted* guilty pleas. Nothing in the rule excludes evidence of plea negotiations (and accompanying statements) involving accepted guilty pleas or of the unwithdrawn and accepted guilty plea itself or the judgment entered after the plea.[714] Since by far most criminal cases actually involve an accepted guilty plea, this means that Rule 410 is simply inapplicable in the large majority of criminal cases.

[3] Withdrawn Guilty Pleas

Rule 410(1), consistent with pre-rules Tennessee law,[715] bars evidence that a party entered a guilty plea that was later withdrawn. On the other hand, it does not limit proof of a guilty plea that was accepted by the court. This rule furthers the policy of encouraging such pleas by reducing the costs associated with unsuccessful plea bargaining. It also prevents the trial from becoming the one-sided proceeding that would occur if the jury were apprised that the defendant had pleaded guilty and admitted responsibility, then withdrew the plea.

Under , the trial court under some circumstances can permit the offender to withdraw a guilty plea. When this occurs, Rule 410(1) renders the plea inadmissible if the party who withdrew the plea is a party to the instant litigation. It does not matter whether the initial plea was voluntary or not. Although Rule 410(1) does not so state, one authority suggests this rule would also apply if a guilty plea were vacated after appellate or collateral review.[716]

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[711] *Tenn. R. Evid. 803(22)*. *See below § 8.27*.

[712] *See Tenn. R. Evid. 608*–609.

[713] An important treatise argues that there are two exceptions: (1) the accused should not be permitted to use a withdrawn plea or an offer to plea to prove that the prosecutor was unsure about guilt; (2) at joint trials one defendant should not be able to use evidence that will unfairly prejudice another defendant by using harmful evidence not admissible against the latter. 2 WEINSTEIN'S FEDERAL EVIDENCE 410-13 to 410-14 (June 2003 Supp.) (McLaughlin 2d ed. 2000). It can be argued that a criminal defendant cannot use an unsuccessful plea offer by the state as proof against the state, which was a participant in the plea discussions. *Cf.* ***State v. Wright, 756 S.W.2d 669 (Tenn. 1988)*** (pre-rules decision; capital defendant barred from proving at sentencing hearing that state had offered to accept a life sentence if the defendant would plead guilty). Such use would violate the spirit of Rule 410 by discouraging prosecutors from entering plea negotiations.

[714] *See Tenn. R. Evid. 803(22)* (hearsay exception for criminal conviction).

[715] *See Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7 (1948)* (defendant pleaded guilty but went to trial anyway, apparently because the trial judge was unaware of the plea; the prosecutor erroneously cross-examined the defendant about the plea). *See also Tenn. R. Crim. P. 11(e)(6)*.

[716] STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 2 FEDERAL RULES OF VIDENCE MANUAL 410-4 (9th ed. 2006).

[4] *Nolo Contendere* Plea

Rule 410(2) bars evidence that a party entered a plea of *nolo contendere*. Rule 11(b) of the Tennessee Rules of Criminal Procedure authorizes a trial court to accept a plea of *nolo contendere*. This plea subjects the offender to the same punishment that could be given had a guilty plea been entered, but it does not involve an admission of guilt. When the plea is entered, Rule 410 renders it inadmissible in a later civil or criminal case against the defendant who made the plea. This result is especially useful in white collar and vehicular homicide cases where both civil and criminal proceedings are pending. Rule 410(2) permits the offender to plead to the criminal charges without providing evidence harmful to the subsequent civil case.

It must be noted, however, that Rule 410(2) only bars proof of the *nolo contendere* plea and, under Rule 410(3), statements made during plea negotiations with the prosecutor prior to that plea. Rule 410 does not exclude evidence of the underlying act for which the *nolo contendere* plea was entered. Those acts may be admissible through some other evidence rule.[717] Similarly, a conviction based on a *nolo contendere* plea may be admissible to impeach under Rule 609 or as substantive evidence under Rule 803(22).[718]

By analogy to Rule 410, evidence that an individual mailed in the fine for a misdemeanor traffic offense is not admissible in a separate civil suit. In a personal injury case arising from an automobile accident, the plaintiff unsuccessfully attempted to prove that the defendant had been cited for improper passing and had admitted culpability by mailing the traffic fine. The Tennessee Supreme Court found the mere submission of the fine to be akin to a plea *of nolo contendere* and therefore inadmissible under Rule 410.[719]

[5] Statements in Certain Plea Proceedings

Rule 410 not only bars evidence that a person made a guilty plea that was later withdrawn or made a *nolo contendere* plea, but also excludes statements made in proceedings under Tennessee Rules of Criminal Procedure 11 concerning either of the above pleas. Thus, Rule 410(3) would exclude from evidence testimony that a party to the present litigation made an admission while entering a *nolo contendere* plea in an earlier criminal case. The statements cannot be used as direct evidence or for impeachment.[720]

[6] Statements in Plea Discussions with Prosecuting Attorney

[a] In General

Rule 410(4) excludes from evidence statements made during plea negotiations with the prosecuting attorney which do not result in a guilty plea or which result in a guilty plea that is later withdrawn.[720.1] This

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[717] *See e.g.,* United States v. Wyatt, 762 F.2d 908 (11th Cir. 1985) (Rule 404(b) permits proof of acts for which a *nolo contendere* plea was entered).

[718] *See below* § 8.27[2]. This result may differ from that in federal court. Federal and Tennessee Rules 410(2) exclude evidence of "a plea of *nolo contendere*." Neither mentions a *conviction* flowing from that plea. Rule 803(22), on the other hand, creates a hearsay exception for certain criminal convictions. Federal Rule 803(22) specifically excludes a hearsay exception for a conviction based on a *nolo* plea. Tennessee Rule 803(22) on the other hand, omits the federal exclusion and simply provides a hearsay exception for many felony convictions to prove a fact essential to sustain the judgment. Convictions based on *nolo* pleas under the Tennessee rule are treated the same as any other conviction. It should be noted, however, that making this distinction between a *nolo* plea and the conviction based on that plea will thwart Tennessee Rule 410's efforts to facilitate *nolo contendere* pleas.

[719] Williams v. Brown, 860 S.W.2d 854 (Tenn. 1993) (distinguishing mailing in fine from making appearance and pleading guilty or other express acknowledgment of guilt; court reserved question of admissibility of evidence of personal appearance and entry of guilty plea).

[720] *See* United States v. Lawson, 683 F.2d 688 (2d Cir. 1982), *aff'd,* 736 F.2d 835 (2d Cir. 1984).

important rule permits some degree of candor during plea discussions. For example, an admission made during a plea negotiation session is inadmissible if the discussions do not produce a guilty plea or if they produce a *nolo contendere* plea. This rule would exclude such routine practices as an offer to plead guilty in exchange for leniency. By implication, it should also exclude statements resulting in a *nolo contendence* plea since this plea is not a guilty plea and the discussion failed to result in either an entered or withdrawn guilty plea. This result is consistent with the policy of encouraging criminal defendants to enter *nolo* pleas to resolve criminal cases.

[b] Statement to Prosecuting Attorney or Authorized Representatives

Rule 410's exclusion of statements during plea negotiations applies only to statements to "an attorney for the prosecuting authority."[721] On its face, the rule does not bar statements to other people, such as law enforcement officers. However, if the prosecuting attorney utilizes others as the prosecutor's representative during plea negotiations, Rule 410 would extend its exclusionary rule to statements made to these people. For example, in *United States v. Serna*,[722] the defendant in a major drug case entered plea negotiations with an Assistant United States Attorney, who, conditioned on the defendant's total cooperation, agreed to tell the sentencing judge that the defendant cooperated with the authorities. To determine whether the defendant was cooperating, a federal drug agent interviewed the defendant, concluding that the defendant was not cooperating fully despite the fact that the defendant made incriminating statements during the interview. The Court of Appeals held that the incriminating statements to the drug agent were not admissible under Rule 410, even though made to a drug agent with no prosecuting lawyer present. As long as the prosecuting attorney was participating in the plea negotiations, the court reasoned that Rule 410 bars the evidence from being admitted if the proof arose during actual plea negotiations with a nonlawyer acting on behalf of the prosecuting attorney. This result is sound and is consistent with Rule 410's purpose of facilitating full, candid plea negotiations.

Another illustration is *State v. Hinton*,[723] where the murder defendant confessed during a police interview. The Court of Criminal Appeals held that the statement was barred by Rule 410. Even though the district attorney was ill and not present during the police interview, the officer conducting it was characterized as the agent of the prosecuting attorney. The appellate court noted that the interview was "arranged at the behest of the prosecutor" and the detective had the prosecutor's "express authority."

Statements to Non-Lawyer. A lawyer need not even be involved to trigger Rule 410. In *United States v. Swidan*,[724] a drug defendant talked twice with a federal drug agent who promised to tell the prosecutor of the defendant's offer but who also stated that the agent disclaimed any authority to plea bargain. Since the promise to relay the information to the prosecutor encouraged the offer, the court held Rule 410 excluded

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[720.1] *See* *State v. Buckner, ___ S.W.3d ___, 2017 Tenn. Crim. App. LEXIS 716 (Tenn. Crim. App. Aug. 14, 2017)*, *appeal denied*, *___ S.W.3d ___, 2017 Tenn. LEXIS 875 (Tenn. Dec. 6, 2017)* (*Tenn. R. Evid. 410* was inapplicable, because the memorandum at issue did not include statements by defendant in response to the plea offer, only that the plea offer included a term that would require defendant to plead guilty as a Range III offender; moreover, the trial court did not rely upon the purported plea offer in determining the adequacy of the State's notice of intent to seek enhanced punishment, and defendant was unable to establish prejudice).

[721] Rule 11 of the Tennessee Rules of Criminal Procedure is not limited to statements to prosecuting attorneys and extends to any "plea, plea discussion, or any related statement." *Tenn. R. Crim. P. 11(d)*.

[722] *799 F.2d 842, 849 (2d Cir. 1986)*, *cert. denied,* ***481 U.S. 1013, 107 S. Ct. 1887, 95 L. Ed. 2d 494 (1987)***, *abrogated on other grounds* by *United States v. Di Napoli, 8 F.3d 909 (2d. Cir. 1993)*.

[723] *42 S.W.3d 113 (Tenn. Crim. App. 2000)*.

[724] *689 F. Supp. 726 (E.D. Mich. 1988)*.

statements to the drug agent. Under the unique circumstances of the case, the defendant's belief was both reasonable and actual that he was engaging in plea negotiations with a prosecutor.

[c] Statement During Negotiations

It is clear that some confessions to a prosecutor are not covered by Rule 410. To be excluded, the statements or conduct must have been given as part of plea negotiations rather than during the preliminary investigatory process. For example, if a prosecutor participates in a custodial interrogation at a police station and the accused confesses during the questioning, Rule 410 would probably not bar the confession.[725] The key is whether the accused had an actual and reasonable expectation that plea negotiations had begun.[726] Often courts will require the offender to have somehow indicated that he or she was seeking an exchange or concessions.[727] The negotiations can be for concessions for the defendant or others.[728]

A good illustration is *State v. Hinton*,[729] a murder case where the defense counsel and prosecutor discussed a possible plea to a twenty-year sentence. Almost a month later the defendant was interviewed by a detective and gave an incriminating statement. The Court of Criminal Appeals held that the statement was inadmissible under Rule 410 because it was made during the course of plea negotiations. The prosecutor had used the police interview to determine what the defendant knew in order to assess whether a plea bargain should be entered. A detective had testified that the interview with the defendant was arranged by the prosecutor in order to attempt to arrange a plea bargain.

Rule 410 applies to statements of people, such as defense counsel, other than the accused. Indeed, usually the accused does not personally participate in plea discussions. Rule 410 does not apply to statements made after negotiations are completed if the statements were not required as a part of the negotiations.[730]

[7] Exceptions

Rule 410 paints with a broad brush but allows a few exceptions that depart from the general ban on statements made during unsuccessful plea negotiations. Rule 410(4) specifically permits evidence of statements during plea negotiations to be admitted in a criminal proceeding for perjury or false statement "if the statement was made by the defendant under oath, on the record, and in the presence of counsel." The requirements of counsel, oath, and official record make this exception quite narrow. It will rarely apply outside of guilty plea proceedings in court.

Federal Rule 410 contains another exception that has been omitted from Tennessee Rule 410. The federal rule grants an exception to Rule 410's exclusionary rule when "another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." Although Tennessee Rule 410 does not contain this language, it is unclear whether

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[725] *See* State v. Hinton, 42 S.W.3d 113, 121 (Tenn. Crim. App. 2000) (Rule 410 does not encompass statements made during the preliminary investigation process, citing unpublished opinion holding that Rule 410 does not cover a defendant's statements made before the defendant was charged with a criminal offense).

[726] See *e.g.*, United States v. Castillo, 615 F.2d 878, 885 (9th Cir. 1980) (defendant's discussion with counselor did not satisfy test that expectation of negotiations be reasonable).

[727] United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978).

[728] United States v. Tursi, 576 F.2d 396 (1st Cir. 1978), superseded by statute as stated in United States v. Stein, 2005 U.S. Dist. LEXIS 11141 (E.D. Pa. June 8, 2005).

[729] State v. Hinton, 42 S.W.3d 113 (Tenn. Crim. App. 2000).

[730] *See* Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976).

the omission will lead to a different result. The trial court may have the discretion to admit the other evidence anyway to prevent the jury from being misled or confused.[731]

[8] Waiver

Rule 410 specifically excludes evidence of certain pleas and plea discussions. In *United States v. Mezzanatto*[732] the United States Supreme Court held that a criminal accused may knowingly and intelligently waive the protections of Federal Rule 410. The accused and his attorney agreed to the prosecutor's condition that plea discussions would be held only if any statements made during the session could be used at trial to impeach the defendant's contradictory trial testimony. When plea negotiations failed, the accused was tried as charged. His remarks made during the plea discussions were used as inconsistent statements during the government's cross-examination. In upholding the waiver, the Supreme Court noted that there is a presumption that legal rights (including evidence rules) may be waived by voluntary agreement of the parties. The waiver may be invalid if it was obtained by fraud or coercion.

It is not clear whether Tennessee Rule 410 will be interpreted in the same way as the federal counterpart. However, since the guilty plea procedure in essence is designed to facilitate the waiver of such rights as jury trial, confrontation, and self-incrimination, it would not be surprising if Tennessee courts also permitted a waiver of Rule 410's limits on the use of statements made during plea discussions.

Under Tennessee law, any such waiver must be knowing and voluntary.[733] In *State v. Hinton*,[734] the Tennessee Court of Criminal Appeals held that *Miranda* warnings alone are inadequate to provide the defendant with enough information about Rule 410 to make the *Miranda* waiver also constitute a "knowing" waiver of Rule 410 rights.

[731] Rule 106 provides a "rule of completeness" for written and recorded statements. If one party introduces part of a written or recorded statement, the other side is entitled to require the introduction at that time of any other part or writing that in fairness ought to be considered with it. Of course Rule 106 does not on its face apply to oral statements.

[732] *513 U.S. 196, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995)*.

[733] *See State v. Hinton, 42 S.W.3d 113, 124 (Tenn. Crim. App. 2000)*.

[734] *State v. Hinton, 42 S.W.3d 113 (Tenn. Crim. App. 2000)*.

§ 4.11 Rule 411. Liability Insurance

[1] Text of Rule

Rule 411 Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon issues of negligence or other wrongful conduct. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Advisory Commission Comment:

The rule restates Tennessee common law.

[2] Liability Insurance Inadmissible on Issue of Fault

The Tennessee common law,[735] Federal Rule 411,[736] and Tennessee Rule 411 exclude evidence that a person did or did not have liability insurance as proof that the person was negligent or otherwise acted wrongfully. One reason for this rule is that the presence or absence of liability insurance may have no or little relevance on the issue of fault or wrongful conduct. Some insured people are careful, others are careless; but the presence or absence of liability insurance does not help determine which category a particular person falls in.

A second reason for Rule 411's ban on evidence of insurance is a fear that the jury will misuse the insurance evidence in assessing both fault and damages. If a plaintiff is seriously injured, some jurors may be inclined to find the insured defendant at fault so that the plaintiff (at no personal cost to the insured defendant) will be compensated, even though the defendant's negligence may not have been proven by the other evidence.[737]

The ban on this evidence applies whether the proof is offered by the plaintiff or the defendant. Thus, a defendant may not prove that he or she lacked insurance in order to rebut the common assumption of modern juries that most people are insured.[738] Similarly, a defendant may not prove that the plaintiff is insured in order to prove that the plaintiff was negligent at the time of the incident.

Just as evidence of liability insurance is not generally admissible, it is also not generally discoverable in Tennessee unless the party seeking discovery can show that the evidence of insurance is reasonably

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[735] See *e.g.*, *Prewitt-Spurr Mfg. Co. v. Woodall, 115 Tenn. 605, 90 S.W. 623 (1905)*; *Howard v. Abernathy, 751 S.W.2d 432, 435 (Tenn. Ct. App. 1988)* (evidence that defendant was protected by liability insurance was inadmissible in tort case).

[736] The Federal Rule 411 differs only slightly from the Tennessee Rule 411. The different language in the two rules reflects disagreements over grammar rather than substance.

[737] This actually occurred in *Marshall v. North Branch Transfer Co., 166 Tenn. 96, 59 S.W.2d 520 (1933)*, where the jury in a bus-car collision case discussed the fact that the defendant was insured and apparently decided for the plaintiff because the judgment would be paid by the insurance company at no cost to the defendant.

[738] *Marshall v. North Branch Transfer Co., 166 Tenn. 96, 59 S.W.2d 520 (1933)* (defendant not permitted to prove lack of insurance; not entitled to favorable consideration because had no insurance, or to prejudice if had insurance).

calculated to lead to the discovery of admissible evidence through one of the exceptions of Tennessee Evidence Rule 411.[739]

[3] Exceptions

Rule 411 bars evidence that a person was or was not insured against liability as proof of negligence or wrongful conduct, but it does not exclude this evidence on other issues. The last sentence of Rule 411 states that evidence of liability insurance is not banned by the rule when offered for a purpose "such as proof of agency,[740] ownership, or control, or bias or prejudice of a witness." Other illustrations of exceptions involve proof that someone is an employee of a certain employer, that a person was involved in another person's business affairs,[741] and that certain medical bills were paid as evidence of the extent of injuries.[742]

A good illustration is *Phillips v. Pitts*[743] in which a tenant sued a landlord for negligently maintaining a stairway. During the trial the defendant used an insurance adjuster as a witness to impeach a plaintiff's witness. On cross-examination of the adjuster, the plaintiff was permitted to ask the name of the adjuster's employer. Noting that the right to cross-examine for bias should be limited only in extraordinary circumstances, the court permitted the question to be asked to probe the bias or prejudice of the witness.

Another illustration is *Patton v. Rose*,[744] a medical malpractice action, in which the plaintiff wanted to prove that each of the defense experts was a member of the State Volunteer Insurance Company. This mutual company insured the defendant doctors. All members of it, including all defense experts, shared in any profits left after payment of malpractice claims. This means that the defense experts had a financial stake in a defense verdict. Despite this obvious source of bias, the Court of Appeals upheld the trial court's use of Rule 403 to exclude proof of the expert's membership in the mutual insurance company. Apparently the trial court found the probative value of the proof was substantially outweighed by the danger of unfair prejudice.

Just as evidence of insurance may be used to impeach a witness, it may also be admissible when part of an admission of fault.[745] Another use is to rebut testimony that the insured defendant would not be able to pay any judgment.[746]

Of course, the admission of insurance proof, like most other issues under the Tennessee Rules of Evidence, is subject to exclusion under Rule 403. If the probative value of the insurance proof is slight and the prejudicial

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[739] *Thomas v. Oldfield, 279 S.W.3d 259, 264 n.10 (Tenn. 2009)*.

[740] *Olson v. Sharpe, 36 Tenn. App. 557, 259 S.W.2d 867 (1953)* (indemnity insurance certificate introduced to prove agency); *Grace v. Louisville & Nashville R.R., 19 Tenn. App. 382, 89 S.W.2d 354 (1935)* (liability insurance contract admitted on issue of whether a person is an independent contractor or employee).

[741] *Pinkham v. Burgess, 933 F.2d 1066 (1st Cir. 1991)* (defendant attorney in legal malpractice case discussed insurance with plaintiff's husband).

[742] *See Hannah v. Haskins, 612 F.2d 373 (8th Cir. 1980)* (unusual factual situation).

[743] *602 S.W.2d 246 (Tenn. App. 1980)*. *See also* ***Conde v. Starlight I, Inc., 103 F.3d 210 (1st Cir. 1997)*** (permissible to refer to defense witness as insurance adjuster).

[744] *892 S.W.2d 410 (Tenn. Ct. App. 1994)*.

[745] *Cf. Seals v. Sharp, 31 Tenn. App. 75, 212 S.W.2d 620 (1948)* (defendant made admission to plaintiff which included acknowledgment that plaintiff was not at fault and which mentioned insurance; not reversible error).

[746] *See e.g., Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998)* (indemnification statute admissible to counter plaintiffs' testimony about their limited financial resources); *Weiss v. La Suisse Societe D'Assurances Sur La Vie, 293 F. Supp.2d 397 (S.D.N.Y. 2003)*.

value is great, the court may find exclusion is appropriate under Rule 403.[747] Sometimes exclusion can take the form of a simple omission of the reference to insurance.[748]

[4] Jury Voir Dire About Insurance

Although evidence of liability insurance may be excluded from trial under Rule 411, counsel may attempt to get the idea of insurance before the jury by asking questions about insurance during the jury selection interrogation. The permissible scope of such questions is left to the trial judge's discretion. Since plaintiff may want to exercise its peremptory challenges to exclude jurors who have a significant relationship with an insurance company, some Tennessee courts will allow counsel to ask such questions on voir dire.[749] The question must be asked in good faith and not simply to inject the issue of insurance. The court has the discretion to determine whether such questions would be asked potential jurors in groups or individually.[750]

[5] Effect of Erroneous Introduction of Liability Insurance

Occasionally evidence of liability insurance is erroneously admitted by the court or, even if not admitted into evidence, heard by the jury. For example, a defense witness may blurt out that the defendant's insurance company questioned all employees. Often defense counsel will immediately move for a mistrial. Whether a mistrial will be granted depends on a number of factors.[750.1]

Harmless Error Applied. When evidence of liability insurance is inadvertently mentioned by a witness, a long line of Tennessee cases has held that a mistrial is ordinarily unnecessary. A cautionary instruction to the jury will suffice,[751] and a few cases have upheld the trial court even without such a jury instruction.[752] The doctrine of harmless error is frequently used in such cases. The prevalence of liability insurance is often mentioned as a

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[747] See *e.g.*, Charter v. Chleborad, 551 F.2d 246 (8th Cir. 1977), *cert. denied*, ***434 U.S. 856 (1977)***; Patton v. Rose, 892 S.W.2d 410 (Tenn. Ct. App. 1994).

[748] See *e.g.*, Koppinger v. Cullen-Schiltz & Associates, 513 F.2d 901 (8th Cir. 1975) (obligation to insure omitted from contracts admitted in wrongful death case involving various construction and related businesses).

[749] The leading case is Lunn v. Ealy, 176 Tenn. 374, 141 S.W.2d 893 (1940) (trial court permitted *voir dire* question whether potential juror was stockholder, shareholder, director, official, employee, or in any manner interested in insurance company issuing liability policies in Tennessee). *See also* Schenk v. Gwaltney, 43 Tenn. App. 459, 309 S.W.2d 424 (1957) (on *voir dire* plaintiff's attorney was permitted to ask whether any juror owned any stock in Hawkeye Security Insurance Company; court has discretion to permit good faith questions on insurance).

[750] *See* ***Graham v. Cloar, 30 Tenn. App. 306, 205 S.W.2d 764 (1947)***.

[750.1] Generally speaking, modern cases will require reversal only when there has been a showing that the injection of liability insurance into the case was an "error involving a substantial right [that] more probably than not affected the judgment or would result in prejudice to the judicial process." Monypeny v. Kheiv, 2015 Tenn. App. LEXIS 187, 39, (Tenn. Ct. App. 2015) (*quoting* Terry v. Plateau Electric Coop., 825 S.W.2d 418, 422–23 (Tenn. Ct. App. 1991). *See also* Tenn. R. App. P. 36(b). Tennessee cases have also emphasized that a party's deliberate attempt to interject such evidence, especially if persistently pursued, is more apt to lead to reversal than is an inadvertent reference to insurance. *See* Id. at 43. *See also* Stroud v. Seaton, 1998 Tenn. App. LEXIS 625, (Tenn. Ct. App. 1998).

[751] *See e.g.,* Goff v. Elmo Greer & Sons Const. Co., 297 S.W.3d 175, 198 (Tenn. 2009); Colwell v. Jones, 48 Tenn. App. 353, 346 S.W.2d 450 (1960); Stearns v. Williams & Price, 12 Tenn. App. 427 (1930).

[752] See *e.g.*, Goodall v. Doss, 44 Tenn. App. 145, 312 S.W.2d 875 (1958) (plaintiff inadvertently testified that two insurance adjusters were present when his statement was given; mention of insurance was harmless error since there was no request for jury instruction, plaintiff's response was in answer to defendant's question, and insurance was not referred to again).

major factor in the harmless error reasoning.[753] Today it is assumed that jurors know liability insurance is widespread and are not unduly prejudiced by the mere mention of it.

Intentional Reference to Insurance. On the other hand, when counsel intentionally and wrongfully injects liability insurance into a case, Tennessee courts have been much more willing to grant a mistrial.[754] In such cases, the courts tend to minimize the efficacy of curative instructions. Perhaps the real reason for the reversal, however, is punitive. Courts are willing to penalize counsel for intentional misconduct.

[6] Jury Instructions to Ignore Issue of Insurance

In tort cases, some judges counter jurors' speculation about insurance by giving jury instructions that insurance is not an issue in the case and that an insurance company is not a party. This approach has been approved in Tennessee.[755]

[753] See *e.g.*, *Lasater Lumber Co. v. Harding, 28 Tenn. App. 296, 189 S.W.2d 583 (1944)* (on cross-examination by plaintiff's counsel as to what happened after learning about accident, defendant's employee stated that he had called insurance company and turned matter over to them; judgment upheld; jurors assumed to be cognizant of fact that auto owners customarily are insured against loss).

[754] *See e.g.,* *Monypeny v. Kheiv, 2015 Tenn. App. LEXIS 187 (Tenn. Ct. App. 2015)* (where counsel's statement did not specifically mention or overtly allude to insurance, and counsel did not go so far as to indicate that the payment would come from insurance proceeds, the statement was not sufficiently egregious to require retrial); *Prewitt-Spurr Mfg. Co. v. Woodall, 115 Tenn. 605, 90 S.W. 623 (1905)* (after court three times barred questions about insurance, plaintiff's closing argument suggested defendant would have been more careful if it had not had insurance; despite jury instructions to ignore the evidence, Tennessee Supreme Court reversed because the jury was already prejudiced beyond redemption); *Potts v. Leigh, 15 Tenn. App. 1 (1931)* (in dictum, court stated that it was reversible error for plaintiff to deliberately seek to introduce or persist in introducing evidence that defendant had liability insurance); *Goff v. Elmo Greer & Sons. Const. Co., 297 S.W.3d 175, 198–99 (Tenn. 2009)* (in absence of proof that insurance was willfully injected for the purpose of influencing the jury, curative jury instructions are adequate remedy; trial judge erroneously mentioned insurance then gave curative instruction).

[755] *Davis v. Hall, 920 S.W.2d 213, 218 (Tenn. Ct. App. 1995)* (jury was told "in this case no insurance company is a party to this action. You must refrain from inferences, speculation or discussion about insurance;" Court of Appeals found this instruction to be "correct in every respect").

§ 4.12 Rule 412. Sexual Assault Victim's Prior Consensual Sexual Activity

[1] Text of Rule

Rule 412 Sexual Assault Victim's Prior Consensual Sexual Activity

Notwithstanding any other provision of law, in a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of an offense under *T.C.A. §§ 39-13-502* [aggravated rape], 39-13-503 [rape], 39-13-504 [aggravated sexual battery], 39-13-505 [sexual battery], 39-13-507 [spousal sexual offenses], 39-13-522 [rape of a child], 39-15-302 [incest], 39-13-506 [statutory rape], 39-13-527 [sexual battery by an authority figure], 39-13-528 [solicitation of minors for sexual acts], or the attempt to commit any such offense, the following rules apply:

(a) Definition of sexual behavior.In this rule "sexual behavior" means sexual activity of the alleged victim other than the sexual act at issue in the case.

(b) Reputation or opinion. Reputation or opinion evidence of the sexual behavior of an alleged victim of such offense is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this Rule and required by the Tennessee or United States Constitution.

(c) Specific instances of conduct.Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of the Rule, and the evidence is:

(1) Required by the Tennessee or United States Constitution, or

(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused on the issue of consent, or

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

(d) Procedures. If a person accused of an offense covered by this Rule intends to offer under subdivision (b) reputation or opinion evidence or under subdivision (c) specific instances of conduct of the victim, the following procedures apply:

(1) the person must file a written motion to offer such evidence.

(i) The motion shall be filed no later than ten days before the date on which the trial is scheduled to begin, except the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.

(ii) The motion shall be served on all parties, the prosecuting attorney, and the victim; service on the victim shall be made through the prosecuting attorney's office.

(iii) The motion shall be accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it.

(2) When a motion required by subdivision (d)(1) is filed and found by the court to comply with the requirements of this rule, the court shall hold a hearing in chambers or otherwise out of the hearing of the public and the jury to determine whether evidence described in the motion is admissible. The hearing shall be on the record, but the record shall be sealed except for the limited purposes of facilitating appellate review, assisting the court or parties in their preparation of the case, and to impeach under subdivision (d)(3)(iii).

(3) At this hearing:

(i) The victim may attend in person,

(ii) The parties may call witnesses, including the alleged victim, and offer relevant evidence, and

(iii) The accused may testify but the testimony during this hearing may not be used against the accused in the preliminary hearing, trial, or other proceeding, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify at the preliminary hearing, trial, or other proceeding.

(4) If the court determines that the evidence which the defendant seeks to offer satisfies subdivisions (b) and (c) and that the probative value of the evidence outweighs its unfair prejudice to the victim, the evidence shall be admissible in the proceeding to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

1991 Advisory Commission Comment:

This rule governs the admissibility of evidence of a sex crime victim's sexual history in cases involving the sex crimes specified in the first sentence of the rule. It replaces the current rape-shield statute, *Tenn. Code Ann. § 40-17-119* [repealed], and is to be applied in lieu of *Tennessee Rule of Evidence 404(a)(2)* (character of crime victim) for the specified sex crimes. Like *Tenn. Code Ann. § 40-17-119* [repealed] and Federal *Rule of Evidence 412*, this rule strikes a balance between the paramount interests of the accused in a fair trial and the important interests of the sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy. Rule 412 recognizes the important interests of all involved—the victim, the public, and the criminal accused—and provides standards and procedures to assist courts in determining when such evidence is admissible. It specifically recognizes that, despite the embarrassing nature of the proof, sometimes the accused can only have a fair trial if permitted to introduce evidence of the alleged victim's sexual history. On the other hand, the rule also

takes into account that the public's interest in prosecuting and convicting people guilty of various sexual offenses is frustrated when sexual assault victims refuse to report the offenses or to testify about them at trial because of the possible admission of evidence of their sexual history. Moreover, the rule seeks to minimize the likelihood that evidence of the alleged victim's sexual history may cause the jury to be unfairly prejudiced against the victim.

This rule is much more comprehensive than *T.C.A. § 40-17-119* [repealed], which deals only with proof of specific instances of a sexual assault victim's sexual behavior with third persons and only when that evidence is to be used on the issue of consent. *T.C.A. § 40-17-119* [repealed] does not address difficult questions of the admissibility of reputation and opinion evidence, of evidence of prior sexual activity with the accused, or of proof in sexual assault cases on issues other than consent. The narrow focus of this statute has resulted in Tennessee case law questioning its constitutionality in certain applications. *See* *Shockley v. State, 585 S.W.2d 645 (Tenn. Crim. App. 1978)*.

Rule 412 deals with three types of proof: reputation, opinion, and specific acts. Subdivision (b) limits the use of reputation and opinion evidence about the victim's sexual behavior. Because such evidence is embarrassing and seldom probative, it is admissible only in those unusual cases where the United States or Tennessee Constitution mandates admissibility. *Cf.* *Doe v. United States, 666 F.2d 43 (4th Cir. 1981)* (recognizes possibility that constitution could require admission of reputation and opinion evidence in extraordinary circumstances). When such evidence is admissible, the procedures outlined in subdivision (d) must be followed.

Subdivision (c) tells when specific acts of the victim's sexual history may be admissible if the procedures in subdivision (d) are satisfied. Because of the infinite variety of factual situations that can arise in sex crime cases, no evidence rule can detail all the possible situations where evidence of sexual history is required by the accused's Due Process rights. Subdivision (c)(1) recognizes this and provides that specific acts are admissible when required by the United States or Tennessee Constitution. *Cf.* *State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976)* (criminal accused's confrontation rights entitle him to prove that rape victim charged him with crime to retaliate for his discovery of her sexual relations with his son); *Commonwealth v. Black, 337 Pa. Super. 548, 487 A.2d 396 (1985)* (*confrontation clause* permits criminal accused to prove sex crime victim's bias; she allegedly reported crime so she could remove him from house in order to continue sexual relations with another house member and to punish him for interfering with this sexual relationship).

Subdivision (c)(2) provides that specific instances of the victim's sexual behavior may also be admissible to rebut evidence presented by the prosecution about the victim's sexual behavior. This exception is narrow, however. It only permits the defendant to prove specific acts when needed to rebut the specific evidence presented by the prosecution's proof. It does not open the door to the victim's entire sexual history.

Subdivision (c)(3) indicates that the victim's sexual behavior with the accused may be admissible on the issue of consent. If consent is not an issue, this subdivision does not apply.

Subdivision (c)(4) lists three situations where the victim's sexual behavior with persons other than the accused may be admissible. First, the proof may be used to rebut or explain scientific or medical evidence. Second, it may be used to prove or explain the source of semen, injury, or disease. For example, the defendant may prove that the victim, who testified that he or she contracted the AIDS virus from the defendant, actually contracted it from a named third party. Similarly, if it is alleged that the defendant's illegal sexual activity caused the victim to become pregnant, the defendant may prove that the victim had sexual relations with a third party who fathered the child. *See* *Shockley v. State, 585 S.W.2d 645 (Tenn. Crim. App. 1978)* (rape defendant entitled to prove someone else caused victim's pregnancy). This provision also permits proof of the source of knowledge of sexual matters. It will most frequently be used in cases where the victim is a young child who testifies in detail about sexual activity. To disprove

any suggestion that the child acquired the detailed information about sexual matters from the encounter with the accused, the defense may want to prove that the child learned the terminology as the result of sexual activity with third parties. Third, the defendant may prove acts with third parties in the so-called "signature" cases to prove consent. These acts are so similar to the defendant's version of the offense that they corroborate the defendant's story.

In order to ensure that the victim's privacy is not inappropriately compromised when the court assesses whether a given item of evidence is admissible under the rule, subdivision (d), like *T.C.A. § 40-17-119* [repealed], provides specific procedures that must be followed before evidence is admitted under this rule. First, subdivision (d)(1) requires the defendant to file a written motion of an intent to offer evidence covered by the rule. The motion shall be filed 10 days before the trial unless the exceptions mentioned in the rule apply. The ten day rule is designed to provide the prosecution and the victim an opportunity to investigate the proposed proof and to contest the issue. The motion is to be served on all parties, the prosecuting attorney, and the victim. To facilitate preparation, the motion must describe both the evidence to be offered and the purpose for offering it.

If a motion is filed and the court determines that the evidence is the kind of evidence possibly covered by the rule, it should hold a hearing, pursuant to subdivision (d)(2). The victim's privacy is somewhat protected since the proceeding must be held outside the hearing of the public. The rule specifically provides that the hearing may be held in chambers. The hearing must be on the record to permit appellate review, but the record of the hearing is sealed.

Subdivision (d)(3) indicates that the victim has a right to attend the hearing and that all parties may call witnesses and offer evidence on the issue whether the proof of the victim's sexual behavior should be introduced.

In order to protect the defendant's right to remain silent, the defendant may testify at his hearing without producing evidence admissible as substantive evidence at the trial. The defendant's testimony at the hearing may, however, be used to impeach the defendant at the later trial.

After the hearing the court must balance the evidence's probative value against the harm that disclosure will cause to the victim. This balance includes consideration of the harmful effect the proof may have on the victim. If the probative value outweighs the listed factors and the evidence is admitted, the court should issue an order specifying exactly which proof will be received and which issues may be explored during questioning.

1996 Advisory Commission Comment:

While Rule 412 applies only to criminal prosecutions, a statute shields the civil plaintiff's sexual behavior in actions for sexual misconduct of therapists against patients. *T.C.A. § 29-26-207* states that "the victim's sexual history is not admissible as evidence except to prove that the sexual behavior occurred with the therapist prior to the provision of therapy to the patient by the therapist."

1999 Advisory Commission Comment:

The [1999] amendment adds other sex offenses.

Compiler's Notes. The enactment of this rule, as promulgated and adopted by the supreme court in its order dated January 25, 1991, was ratified and approved by 1991 House Resolution No. 9 and Senate Resolution No. 14. The order enacting this rule provided that it was applicable to all cases tried on and after July 1, 1991.

[2] Policy

It has been said that the victim of a sexual assault is actually assaulted twice: once by the offender and once by the criminal justice system. This unfortunate reality has led to some efforts to reduce the criminal justice system's mistreatment of these victims. One effort, represented by Rule 412, involves restricting the information about the victim's sexual history that can be introduced at the criminal trial.

Often in sexual assault cases the defense counsel would like to "put the victim on trial." Sometimes this is designed to make the jury less sympathetic to the victim and less hostile to the offender. At other times the victim is attacked in an effort to prove the defense of consent. For some sexual assault crimes the defendant is entitled to an acquittal if the state cannot prove beyond a reasonable doubt that the sexual event was without consent. Usually, the victim will testify that no consent was given. On cross-examination and later in its own proof, the defense may try to prove that there was consent. One approach is to suggest that there was consent because the victim had sexual relations with the defendant or other people on other occasions.

Of course, the victim (and the victim's partners) will find this evidence of past sexual conduct to be embarrassing and an invasion of privacy. The prosecution may view it as an effort to change the trial focus from the defendant's actions to the victim's personal history.

In an effort to limit this proof, a large number of states, including Tennessee (through *Tennessee Rule of Evidence 412*), and the federal government (through Federal *Rule of Evidence 412*), have placed restrictions on the admissibility of evidence of the victim's sexual history. These "rape-shield" laws create various substantive and procedural hurdles designed to minimize the use of such evidence. While these laws serve noble purposes and may reduce the incidence of unfair legal proceedings, they are not without costs. By limiting the evidence available to the criminal defendant, the rape shield laws could, in unusual cases, unconstitutionally hamper the criminal defendant's efforts to offer a full defense.

[3] Overview and Definitions

[a] Overview

Rule 412 specifically applies only in criminal proceedings involving various specifically named sex-related crimes and attempts to commit those crimes including aggravated rape, rape, aggravated sexual battery, sexual battery, spousal sexual offenses,[756] rape of a child, incest, statutory rape, sexual battery by an authority figure, and solicitation of a minor for sexual acts. The rule deals with two categories of evidence (reputation and opinion, and specific acts) and limits the admissibility of both as evidence of past sexual behavior of the victim. Reputation and opinion evidence is virtually never admissible,[757] while proof of specific acts is admitted more freely but still only in several narrowly described situations.[758] In addition, to assure that the victim's privacy interests are protected, Rule 412 contains some unusual and strict procedures that must be followed if evidence of the victim's sexual past is to be admitted in the cases covered by Rule 412.

Since Rule 412 does not apply to any crimes other than those specifically listed, the rules for admitting evidence of the victim's sexual history in crimes and other cases not covered by Rule 412 are provided by Rule 404(a)(2), other pertinent sections of the Tennessee Rules of Evidence, and Tennessee statutes. There is a statute similar in purpose to Rule 412, which deals with the discovery of and admissibility of the plaintiff victim's sexual history in a malpractice case against a mental health therapist guilty of sexual misconduct towards a patient.[759]

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[756] Federal Rule 412 is broader, reaching civil cases and a broader array of criminal proceedings that involve "alleged sexual misconduct."

[757] *See below § 4.12[4]*.

[758] *See below § 4.12[5]*.

[759] *Tenn. Code Ann. § 29-26-207* (2000). *See above § 4.04[5]*.

[b] Definition of Sexual Behavior

Rule 412 limits reputation, opinion, and specific act proof of a victim's sexual behavior. The rule defines sexual behavior as the "sexual activity of the alleged victim other than the sexual act at issue in the case." This definition is quite broad in recognition of the important privacy interests and variety in our citizens' sexual lives.

The term sexual behavior embraces all types of sexual conduct, including heterosexual and homosexual behavior. It also deals with sexual intercourse as well as every other variety of sexual expression. It may include fetishes as well as pre- and post-intercourse behavior. A conversation about sex is also sexual behavior.[759.1] However, "sexual behavior" does not include prior false allegations of rape.[760] This information does not involve sexual expression, which is the essence of "sexual behavior" under Rule 412.

[4] Sexual Behavior Proof: Reputation and Opinion Evidence

As noted, Rule 412 provides that reputation and opinion evidence of a sex-crime victim's sexual behavior is inadmissible unless required by the Tennessee or United States Constitution and unless certain procedures are followed.[761] This severe limitation on the admissibility of reputation and opinion evidence recognizes that such proof has little probative value on either credibility or likelihood of consent, and could be embarrassing to the victim. It must be stressed, however, that Rule 412 is not a total ban of such proof.

Constitutional Exception. Counsel seeking to use such proof must successfully argue that the Tennessee or United States Constitution would be violated unless the reputation or opinion proof were admitted into evidence. Ordinarily, the argument would be that the due process clause's guarantee of a fair trial would be offended if reputation or opinion proof were excluded. Although the rape-shield laws of many jurisdictions also severely limit reputation and opinion evidence in such cases, there are virtually no cases holding that the United States Constitution mandates the admissibility of the evidence. In *Doe v. United States*,[762] the Fourth Circuit indicated, without discussion in detail, that there may be some circumstances where due process mandates the admissibility of reputation and opinion evidence about a sexual assault victim's sexual history. But *Doe* did not indicate when such evidence would be pertinent.

In Saltzburg, Martin and Capra's scholarly treatise on the Federal Rules of Evidence, the authors suggest a situation where a ban on reputation and opinion evidence may raise serious constitutional questions:

> In a sex offense case, the government must allege that the defendant acted intentionally. To challenge the proof on intent, the defendant wants to offer evidence that a victim's reputation was brought to his attention prior to a sexual encounter in order to support a claim that he either acted without knowingly using force or that he acted under a reasonable mistake of fact concerning the attitude of the victim toward the sexual encounter. In such a case, a serious constitutional question would be presented if the defendant were denied an opportunity to present a defense that, based on what he knew about the victim, he interpreted her behavior in a reasonable way.[763]

[5] Sexual Behavior Proof: Specific Instances of Conduct

[759.1] *State v. Nance, 393 S.W.3d 212, 225 (Tenn. Crim. App. 2012)* (*citing* *State v. Davenport, 2008 Tenn. Crim. App. LEXIS 495 (Tenn. Crim. App. June 10, 2008)* (MySpace entries discussing sexual matters are covered by Rule 412 as sexual expression).

[760] ***State v. Wyrick, 62 S.W.3d 751, 771 (Tenn. Crim. App. 2001)***; *State v. Nance, 393 S.W.3d 212 (Tenn. Crim. App. 2012)* (same).

[761] *Tenn. R. Evid. 412(b)*.

[762] *666 F.2d 43, 48 (4th Cir. 1981)*.

[763] STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 2 FEDERAL RULES OF EVIDENCE MANUAL 412-6 (9th ed. 2006).

[a] In General

One example of evidence that may be admissible in some situations Rule 412 is proof that the victim has engaged in specific instances of sexual behavior, *e.g.*, that the victim had sexual relations with a certain person prior to the sex offense at issue.[764] Because of the variety of situations where the defendant's constitutional rights would be compromised if specific act proof were excluded, it is difficult to generalize about the admissibility of such evidence.

[b] Required by Constitution

There are well recognized examples of situations where the United States Constitution requires that specific act proof be admitted into evidence to prove that a key government witness had a motive to lie. *State v. Jalo*[765] held that a defendant in a rape-sodomy case involving a ten-year-old victim had a constitutional right to prove that the victim had sexual relations with several other people. The defendant claimed that the victim falsely accused him of rape in order to obtain sympathy for herself after the defendant threatened to tell the victim's parents about her active sexual life. The court found that the defendant's confrontation rights were violated when Oregon's rape-shield statute barred him from proving the victim's motive to lie about her sexual activity with the defendant.

Another case, *Commonwealth v. Black*,[766] involved a defendant charged with various rape and incest crimes resulting from alleged sexual relations with his thirteen-year-old daughter. The victim reported the crimes three months after they occurred and at the same time the victim's fifteen-year-old brother moved from the home because of violent arguments between the brother and the defendant. The defendant maintained that sexual relations had never occurred and that the victim lied in order to punish the defendant for the confrontation with her brother and to remove the defendant from the house so the thirteen-year-old victim could resume sexual relations with her brother. The defendant's ability to prove these theories was impeded when the Pennsylvania rape-shield law was read as barring proof that victim had sexual relations with her fifteen-year-old brother. The Pennsylvania appellate court reversed the conviction, holding that the defendant's *sixth amendment* right to confront adverse witnesses was violated when the defendant was prevented from establishing the victim's sexual relationship with her older brother. The court stated:

> We therefore hold that insofar as the Rape Shield Law purports to prohibit the admission of evidence which may logically demonstrate a witness' bias, interest, or prejudice or which properly attacks the witness' credibility, it unconstitutionally infringes upon the accused's right of confrontation under the *Sixth Amendment to the United States Constitution* and Article I, Section 9 of the Pennsylvania Constitution.[767]

In a most relevant Tennessee authority, *Shockley v. State*,[768] the court in a rape case held that the now-repealed Tennessee rape-shield statute, *Tennessee Code Annotated § 40-17-119*, violated the defendant's *Sixth Amendment* right to confront witnesses and the due process right to a fair trial. The trial court cited that statute as preventing the defendant from proving that the alleged victim's pregnancy was caused by a third party rather than by the defendant as the result of the alleged rape. The pregnancy was introduced as some proof that the rape had occurred. The defendant denied that he had sexual relations with the victim. The court held:

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[764] The procedures in Rule 412(d), discussed *below* in § 4.12[6], must be followed before such evidence is admissible.

[765] *27 Or. App. 845, 557 P.2d 1359 (1976)*, *citing* *Davis v. Alaska, 415 U.S. 308 (1974)*.

[766] *337 Pa. Super. 548, 487 A.2d 396 (1985)*.

[767] *487 A.2d at 401–92*.

[768] *585 S.W.2d 645 (Tenn. Crim. App. 1978)*.

> Any embarrassment such testimony [about the victim's sexual activity with another person] might cause the prosecutrix is far outweighed by the injustice to the appellant if he is denied fair and adequate confrontation rights in presenting his defense against the rape charge.[769]

It should be noted that Rule 412 complies with *Shockley* by specifically permitting the defendant to prove that a third party was the source of semen.[770]

Although not a sexual assault case, the leading decision, *Chambers v. Mississippi*,[771] holds that due process requires the admissibility of some evidence irrespective of the rules of evidence in order to provide the defendant with a fair trial. The Tennessee Supreme Court cited *Chambers* for the proposition that the constitutional right to present a defense means that a court reviewing a decision to exclude evidence should consider whether the excluded evidence is critical to the defense, bears sufficient indicia of reliability, and the interest supporting the exclusion is substantially important.[772] Many cases interpreting rape-shield statutes use *Chambers* as a starting point for discussion.

There are also a number of decisions exploring whether the due process or *confrontation clause* requires evidence to be admitted despite the jurisdiction's rape-shield law. In *State v. Herndon*,[773] the court reviewed many decisions from various American jurisdictions and observed:

> On the other hand, courts have also universally held that both cross-examination and witnesses brought on behalf of the defendant may show prior consensual sex if that evidence shows a complainant's unique pattern of conduct similar to the pattern of the case at hand or shows that the complainant may be biased or have a motive to fabricate the charges. In such cases, the issues of a witness' bias and credibility are not collateral, and the rape shield laws must give way to the defendant's *Sixth Amendment* rights.[774]

In *State v. Sheline*,[775] the Tennessee Supreme Court upheld the constitutionality of Rule 412 in a case where two defense witnesses were not allowed to testify on the issue of consent. The witnesses' proffer of the testimony did not establish either a pattern of sexual conduct or distinctive behavior. The Tennessee

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[769] *Id. at 651*.

[770] *Tenn. R. Evid. 412(c)(4)(ii)*.

[771] *410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1972)*. *See also State v. Powers, 101 S.W.3d 383 (Tenn. 2003)* (using *Chambers* factors to assess constitutionality of excluding homicide defendant's proof that another person had a motive and opportunity to commit the homicide).

[772] *State v. Rogers, 188 S.W.3d 593, 614 (Tenn. 2006)*. *See also Holmes v. South Carolina, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)* (reversing for trial court's exclusion of evidence that third party committed the crime; evidence rules may not be arbitrary in excluding defense evidence).

[773] *145 Wis. 2d 91, 426 N.W.2d 347 (Wis. Ct. App. 1988)*, *overruled by State v. Pulizzano, 456 N.W.2d 325 (Wis. 1990)*. *See also United States v. Bear Stops, 997 F.2d 451, 455 (8th Cir. 1993)* (on issue of causation of victim's symptoms of being sexually abused, is constitutional error to exclude proof that 3 other boys abused the child victim around the same time); *United States v. Platero, 72 F.3d 806, 814 (10th Cir. 1995)* (defendant has constitutional right to prove sexual relationship between alleged rape victim and a third person to establish a motive to fabricate the rape charge).

[774] *Id. at 361*. *See also State v. La Clair, 121 N.H. 743, 433 A.2d 1326 (N.H. 1981)* (in some cases due process mandates that accused sex offender be able to introduce evidence of victim's prior sexual activity with third persons) (case involved victim's conflicting statements about whether she was a virgin at time of crime, and evidence of source of semen found in victim shortly after crime); *Commonwealth v. Bohannon, 378 N.E.2d 987 (Mass. Sup. Jud. Ct. 1978)* (due process requires rape defendant be permitted to prove victim had made many unsubstantiated allegations of rape in the past, citing *Chambers*).

[775] *955 S.W.2d 42 (Tenn. 1997)*.

Supreme Court found that neither the Tennessee nor United States Constitution was violated since the proffered testimony was not relevant on the issue of consent.

The Constitution may be implicated even if Rule 412 is otherwise satisfied. In *State v. Brown*,[776] the Tennessee Supreme Court correctly noted that evidence that is admissible under an exception in Rule 412 may also be admissible for constitutional reasons despite the fact that the evidence would be inadmissible under some other evidence rule. *State v. Brown*[777] involved a rape prosecution in which the defendant was permitted under Rule 412(c)(4)(i) to introduce hearsay evidence that the victim had had sexual relations with another person in order to explain medical evidence about a tear in her hymen. The problem was that since there was no applicable hearsay exception, the evidence, though not barred by Rule 412, was nevertheless excluded by the hearsay rule. Justice Birch in *Brown* held that the accused's *Sixth*

[776] *29 S.W.3d 427 (Tenn. 2000)*, *cert. denied*, ***531 U.S. 916 (2000)***.

[777] Id.

Amendment and due process rights to present a defense were violated when the evidence was excluded. The rules of evidence were "trumped" by the constitutional guarantee.[777.1]

Another illustration, reaching the opposing conclusion, is *State v. Flood*.[778] The defendant, charged with child rape, unsuccessfully offered two pieces of evidence. The first was evidence that the victim had told her father that defendant had made the victim "touch" his penis. During her direct testimony the victim alleged that the defendant had penetrated her mouth with his penis. The defense argued that the defendant had a right to introduce the first statement to rebut the in-court one. The second piece of excluded proof was the victim's question whether the defendant would still go to jail if someone else were caught. The Tennessee Supreme Court rejected both arguments, citing *Brown* for the proposition that the excluded statements were not "critical" to the defense. The first, involving the victim's claim that the defendant only "touched" the victim, was characterized as not really rebutting the victim's in-court statement since the victim was only eight years old and was describing "in her own words" what the defendant had done to her. Rejection of the second statement, involving the question about what would happen if someone else were

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[777.1] *See also* *Arnold v. State, 2020 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. Feb. 5, 2020)*, another sex abuse case where the Court of Appeals held that defendant's constitutional right to present a defense had been violated. The Court of Appeals held that the trial court improperly denied petitioner post-conviction and error coram nobis relief based on ineffective assistance of counsel, after he was convicted of aggravated sexual battery and three counts of rape of a child. The Court determined that the defense attorneys were ineffective in failing to renew their motion under *Tenn. R. Evid. 412* after it became clear that the prosecution was going to present evidence that all of the victim's sexual knowledge was gained as a result of the inmate's abuse, despite evidence that the victim had a sexual relationship with another person before and during the time the charged incidents occurred. At trial, the defense theory was that the defendant did not commit the acts, but that the victim had been in a sexual relationship with another person during the charged time period and, in order to disguise and protect the other sexual relationship, the victim had accused the defendant of sex abuse.

During the Rule 412 hearing, the defense argued that extrinsic evidence of the other sexual relationship was admissible for impeachment purposes to cross examine the victim, and that the evidence should also be admitted as extrinsic evidence related to his constitutional right to present a defense—*i.e.*, that he did not commit the crime but that another person did. The prosecution argued that the "extraordinary circumstances" where a constitutional argument trumps the rape shied did not exist, and the evidence should be excluded. The trial agreed with the prosecution and excluded all extrinsic evidence relating to the other sexual relationship. Although the trial court allowed the defense to ask the victim during cross examination about the other sexual relationship as impeachment evidence under Rule 608, it held that once the victim denied the relationship no extrinsic evidence of the relationship could be presented.

On appeal, the Court of Appeals held that the trial court's Rule 412 order failed to properly distinguish between the defendant's right to present impeachment evidence to attack the credibility of witnesses and his right to present substantive rebuttal evidence in order to mount a defense, citing *Brown*. *Id., *118–119*. The Court also faulted the defense for failing to renew the Rule 412 motion after learning that the prosecution planned to present evidence that the victim was sexually innocent at the time of the alleged incidents: Since the "trial court erroneously limited its ruling to whether the proffered evidence was admissible as impeachment evidence, in violation of *Brown*, we conclude that the defense attorneys were deficient in failing to renew the Rule 412 motion in an effort to have the proffered evidence admitted as substantive rebuttal evidence pursuant to the Petitioner's right to present a defense … . In light of the extremely unfavorable and problematic Rule 412 ruling, which unduly limited the Petitioner's defense, the defense attorneys' failure to renew the Rule 412 motion was prejudicial. [B]ut for the defense attorneys' unprofessional errors regarding this Rule 412 motion, the result of both the Rule 412 hearing and his trial would have been different." *Id., *119*.

The Court concluded: "Because the record shows that the prosecution repeatedly presented evidence and argument that all of the victim's sexual knowledge came from the Petitioner's abuse, we conclude that it was deficient for the defense attorneys not to object and renew the Rule 412 motion in an effort to get this proof of the victim's prior sexual knowledge before the jury. We also conclude that the defense's failure to object and renew its Rule 412 motion when presented with this evidence and argument was prejudicial because it allowed the jury to infer that the twelve-year-old victim was sexually innocent prior to the Petitioner's abuse, a finding that was at odds with evidence available in this case and fatal to the Petitioner's success at trial." *Id., *121*.

[778] *State v. Flood, 219 S.W.3d 307 (Tenn. 2007)*.

caught, was held not to violate the defendant's rights because it was not clear enough to make it critical to the defense under the unique facts of the case.

The Due Process argument was also rejected in another case in which the defendant complained that excluding a tape recording and handwritten memorandum violated his right to present a case. In *State v. Kiser*[779] the Tennessee Supreme Court rejected the Due Process argument because the two pieces of evidence did not bear "sufficient indicia of reliability" to satisfy *Brown* since the author of neither was known.

Another non-Rule 412 case involved evidence in a child rape case. Defendant wanted to introduce evidence that the victims told a defense witness that no one "hurt" them. The trial court excluded this testimony. Defense claimed a due process right to offer it. The Tennessee Court of Criminal Appeals held the exclusion did not violate the defendant's substantial rights because the statements had little probative value since their meaning was unclear, the victims could have been cross-examined at trial about the statements, and the statements had some reliability but were hearsay.[779.1]

[c] On Issue of Victim's Credibility

In a specific situation, Rule 412(c)(2) permits proof of the victim's sexual acts to be used as rebuttal evidence on the issue of the victim's credibility, but only to the extent necessary to rebut evidence presented by the prosecution or victim as to the victim's sexual behavior. Thus, this rebuttal evidence is admissible only after the government has offered proof that specific sexual conduct, other than that at issue in the case, did or did not happen. For example, if a rape victim testifies that she had never had sexual relations before the alleged rape, the defendant could offer proof that the victim had relations with a particular person.[779.2] The defense proof would rebut the witness's trial testimony and would be used to assist the trier of fact in assessing the victim's credibility. Similarly, if the victim testified that she had never had sexual relations with the defendant prior to the alleged rape, the defendant could testify that the two had sexual relations on four previous occasions. The defendant could not, however, testify that the victim had relations with a third party, since the victim's behavior with the third party does not rebut her statement that she had not had relations with the defendant.

Although this exception, like the other Rule 412 exceptions, can be used only if the procedures of Rule 412(d) are followed, one such procedure will often not have to be pursued strictly. Rule 412(d)(1)(i) states that a motion to admit sexual behavior evidence must ordinarily be filed ten days before trial. Since the instant exception applies only to evidence used as rebuttal proof, the defense may not be aware of the need to offer the evidence until after the trial begins and the victim testifies. Accordingly, when the need to offer the rebuttal proof arises, the defense should immediately file a written motion indicating an intent to offer the proof. The trial court should hold a hearing and issue an order stating precisely what evidence can be used as rebuttal proof. Although it may seem inappropriate to require a motion and hearing in such cases, both are sensible so that the trial court can carefully review the proposed evidence and prevent the defense from bringing in irrelevant information that would violate the important policies underlying Rule 412.

[d] Issue of Consent

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[779] *284 S.W.3d 227, 267 (Tenn. 2009)*.

[779.1] *State v. Howard, 2015 Tenn. Crim. App. LEXIS 627 (Aug. 4, 2015)*, *reversed, in part, on other grounds*, *State v. Howard, 504 S.W.3d 260, 2016 Tenn. LEXIS 725 (Tenn. Oct. 12, 2016)*.

[779.2] *See also Arnold v. State, 2020 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. Feb. 5, 2020)* (in sex abuse case, the trial court erred by preventing the defense from presenting extrinsic evidence of the victim's sexual relationship with another person before and during the relevant time period, after the victim testified that he obtained all of his "sexual knowledge" from defendant's abuse).

If consent is relevant, Rule 412(c)(3) permits relevant proof that the alleged victim had engaged in sexual behavior with the defendant. This avenue of admissibility does not include evidence of relations with third parties or proof of issues other than consent.

[e] Rebut or Explain Scientific or Medical Evidence

Rule 412(c)(4)(i) permits proof of a victim's sexual behavior with persons other than the defendant to rebut or explain scientific or medical evidence. For example, if the victim alleged that she was impregnated as a result of the alleged rape, the defendant could prove that the victim had become pregnant through sexual relations with a specific third party. Similarly, if blood were found at the scene of a crime covered by Rule 412, the defendant could prove that the blood resulted from sexual activity with a third person. And a sexual assault victim's sexual relations with a third party were admissible to explain the source of a tear of the victim's hymen.[780]

[f] Prove or Explain Source of Semen, Injury, Disease, or Knowledge of Sexual Matters

Rule 412(c)(4)(ii) specifically authorizes proof that the victim of a covered sexual offense engaged in sexual behavior with someone other than the defendant in order to prove or explain the source of semen, injury, disease, or knowledge of sexual matters. Overlapping with the previous exception, and probably required by due process, this rule permits the criminal defendant to defend against proof, usually scientific, suggesting guilt.

The first three categories—source of semen, injury, or disease—would be used in a case where semen was found on the victim or at the scene of the event, or where the crime caused the victim to be injured or inflicted with a disease.[781] Both AIDS and venereal diseases are examples of the last category. The defendant could prove that the victim had sexual activity with a third person to establish that the third person was the source of the semen, injury, or disease.

The last category—knowledge of sexual matters—would most likely be used in a child sex abuse case. If the prosecution's proof suggested that the child victim was familiar with sexual behavior only because of the incident involving the defendant, the defendant can prove that the child acquired the information from sexual activity with third persons.[782]

[g] Prove Pattern of Distinctive and Virtually Identical Activity Relevant to Consent

Rule 412(c)(4)(iii) permits proof of the victim's sexual behavior with persons other than the defendant to prove that the victim consented to the sexual activity at issue in the case. This behavior with third persons must fit into a pattern of sexual behavior that was so distinctive and so closely resembled the defendant's version of the facts that the victim's behavior tends to prove that he or she consented to the act or led the defendant reasonably to believe that the victim consented. Obviously this exception, which provides proof corroborating the defendant's theory of the event, will be used rarely. If consent is not an issue, the

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[780] State v. Brown, 29 S.W.3d 427 (Tenn. 2000), *cert. denied*, ***531 U.S. 916 (2000)*** (it is submitted the proof was also admissible under Rule 412(c)(4)(ii) to explain the source of injury).

[781] *See e.g.,* Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997) (in suit for transmitting herpes, plaintiff's prior sexual history is admissible on the source of her herpes).

[782] *See* State v. Edwards, 2012 Tenn. Crim. App. LEXIS 332 (Tenn. Crim. App. 2012), *overruled, in part, on other grounds*, State v. Thorpe, 463 S.W.3d 851, 2015 Tenn. LEXIS 283 (Tenn. 2015) (where defendant established that there were repeated allegations that the victim had been sexually assaulted in the past and that she had numerous conversations about these allegations with her mother and her counselor, the trial court abused its discretion by ruling that Rule 412 barred admission of all evidence regarding the victim's prior knowledge of sexual matters); Summitt v. State, 697 P.2d 1374 (Nev. 1985) (due process may require admission of evidence that six-year-old victim acquired knowledge of sexual behavior from other incident); State v. Nance, 393 S.W.3d 212, 227 (Tenn. Crim. App. 2012) (sexual assault by another person, the victim's father, to explain her knowledge of sexual matters).

exception does not apply. Since this exception only applies to a pattern of behavior, isolated instances will not be admissible under this exception. Moreover, even if a pattern is established, the behavior must fit a distinctive pattern. Finally, the proof of the pattern of the victim's behavior must closely resemble the defendant's version of the facts. This exception is often said to involve "signature" cases.

For example, in an actual Tennessee rape case the defendant said that he was riding a motorcycle when a young woman standing on a street corner waved for him to stop. He claimed that he stopped, she got on the motorcycle, and at her suggestion the two went to a local park where they had consensual sexual relations at a spot on the top of a hill. He also said that she fondled him as he drove with her sitting behind him on the cycle. The victim alleged that the defendant picked her up, took her to the park against her will, and forcibly had sexual relations with her. Investigation turned up two other young men who did not know the defendant or one another but reported that the same young woman had done the same thing with them. On separate occasions each said the young woman, on the same corner as the defendant reported, flagged him down as he rode by on a motorcycle, asked for a ride, then directed him to the same spot on the park hill for sexual relations. Each said the young woman fondled him as he drove. Under Rule 412(c)(4)(iii) the defendant may be permitted to call the other two young men as defense witnesses to testify about their escapades with the alleged victim. The unique facts (motorcycle, locations where young woman flagged boys and where intercourse occurred, and fondling) corroborate the defendant's version of the facts and would probably be admissible to prove consent.

Another illustration is *State v. Sheline*,[783] in which the rape victim and defendant met at a bar. The victim drove the defendant to her apartment after he told her he was between apartments and needed a place to sleep. While at the apartment, the defendant and the victim had sexual intercourse. The victim claimed she was forced to have sex. The defendant alleged it was consensual. At trial, the defendant sought to introduce two witnesses who had known the victim before the alleged rape. Witness A's testimony would have been that he and the victim were friends and had engaged in sexual intercourse two times. The first occasion was after the two were drinking at a bar. The second was when they went to a basketball game, then a fraternity party before going to the victim's apartment where they had sex. Witness B would have testified that he and the victim talked in the bar on the same evening the victim met the defendant. After Witness B and the victim met at the bar, the victim put her arm around Witness B and asked him to go home with her. Witness B declined her offer. The Tennessee Supreme Court in *Sheline* held that the testimony of the two witnesses was barred by Rule 412. A pattern of sexual conduct, according to *Sheline*, requires more than one act of sexual conduct. There must be repetitive or multiple acts, not just an isolated occurrence. In *Sheline,* the Court found there was no pattern of prior sexual behavior. Witness B never had sexual intercourse with the victim; accordingly, the necessary pattern of sexual conduct was missing. The *Sheline* Court also found that the necessary distinctive element was missing. There was nothing like a signature case in either the defendant's version or that of his two witnesses.

[6] Procedures

[a] In General

In order to ensure maximum protection for the victim's privacy interests, Rule 412(d) establishes a unique set of procedures that must be followed before the court admits evidence of the victim's sexual activity other than the sexual act at issue in the instant case. These procedures apply whether the evidence is of

[783] *955 S.W.2d 42 (Tenn. 1997)*.

the victim' s reputation or opinion,[784] or specific instances of conduct.[785] The trial court's decision, viewed as a ruling on relevance, will be overturned on appeal only for an abuse of discretion.[785.1]

[b] Written Motion

Rule 412(d)(1) states that evidence is admissible only if the person seeking to introduce it first files a written motion to offer the evidence. An oral motion is inadequate.

Timing and Service. Ordinarily the motion must be filed no later than ten days before the date the trial is scheduled to begin. The rule does permit courts to accept a late motion because of newly discovered evidence that due diligence could not have discovered, or because the evidence relates to an issue that arose late in the case. The motion must be served on all parties, the prosecuting attorney and the victim.[786] To protect the victim from harassment, service on the victim is made through the office of the prosecuting attorney, *i.e.*, the victim's copy of the motion should be sent or delivered to the prosecutor's office rather than to the victim's home or job.

Content of Motion. Since the purpose of the motion is to permit the prosecutor and victim to prepare to counter the proposed proof, the motion should be accompanied by an offer of proof that describes two things.[787] First, it must indicate the specific evidence that the movant would like to introduce. This should identify the witness and state what the witness will say. The latter should be quite detailed. Second, the motion must indicate the purpose the proposed evidence will serve. Ideally, it would indicate what exception in Rule 412(b) or (c) authorizes the admission of the sexual activity proof.

[c] Initial Screening

After the motion is filed, Rule 412(d)(2) indicates that the trial court is to screen the motion to determine whether it "complies with the requirements of this rule." The court should inspect the motion to ensure that it was properly served and that it contains the necessary offer of proof. If the motion on its face does not satisfy Rule 412, the court can dismiss the motion.

[d] Hearing

Privacy and Record. The next step is for the court to hold a hearing to determine the admissibility of the proposed proof. Rule 412(d)(2) provides several procedures to protect the victim's privacy during the hearing process. First, the hearing is to be held "in chambers or otherwise out of the hearing of the public and the jury." Thus, it could be conducted in the courtroom if the public were excluded. Second, the hearing is to be on the record, "but the record shall be sealed except for the limited purpose of facilitating appellate review, assisting the court or parties in their preparation of the case, and to impeach" the credibility of a defendant who chooses to testify at a preliminary hearing, trial, or other proceeding. The press and the public should not have access to the record.

Victim's Attendance. The victim's obvious interests in the outcome of the hearing are reflected in Rule 412(d)(3)(i), which permits the victim to attend the hearing in person.

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[784] *Tenn. R. Evid. 12(b)*.

[785] *Tenn. R. Evid. 12(c)*.

[785.1] *State v. Nance, 393 S.W.3d 212 (Tenn. Crim. App. 2012)*.

[786] *Tenn. R. Evid. 12(d)(1)(ii)*.

[787] *Tenn. R. Evid. 412(d)(1)(iii)*. *See also* *State v. Whitehair, 2016 Tenn. Crim. App. LEXIS 171 (Tenn. Crim. App. 2016)* (where defense counsel failed to make an offer of proof concerning other sexual acts of the victim, which defendant claimed would impact the victim's credibility, the defendant could not demonstrate prejudice on appeal).

Witnesses. At the hearing the parties may call witnesses and offer other relevant evidence. The alleged victim may be one of the witnesses.[788] If the defendant chooses to testify at this hearing, the testimony may not be used against the defendant at a later proceeding for any purpose other than to impeach the defendant's credibility.[789]

[e] Finding and Order

After this hearing, the trial judge must make two findings.[790] First, the court must determine whether the evidence satisfies Rule 412(b) or (c), *i.e.*, one of the exceptions in those provisions must apply.

Second, if an exception applies and the evidence is otherwise admissible, the court must determine whether "the probative value of the evidence outweighs its unfair prejudice to the victim." This will require the judge to consider the importance and weight of the proposed proof. Against this the court must assess the impact that disclosure will have on the victim. The key consideration is the unfair prejudice, since all such evidence will be an invasion of the victim's privacy.

If the court is satisfied that the evidence should be admitted, the judge should enter an order specifying "the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined." The purposes of Rule 412 are best served if the order is quite specific. It should indicate exactly what information witness X can be asked about and the content of witness X's response. The order should indicate how detailed the testimony can be.

Since Rule 412 limits the evidence the criminal defendant can introduce, it may be argued that Rule 412 is constitutionally suspect, possibly violating the *Sixth* and *Fourteenth amendments*. These arguments may fail for several reasons. First, by definition, Rule 412 does not exclude proof of either reputation and opinion evidence[791] or specific acts[792] if admissibility is required by either the Tennessee or United States Constitution. Second, the procedural hurdles, including notice, and the balancing test, are probably valid limits. In*Michigan v. Lucas*,[793] the United States Supreme Court held that a Michigan rape-shield statute, somewhat similar to Tennessee Rule 412, does not automatically offend the *Sixth Amendment* by permitting a trial court to exclude evidence of a rape victim's prior sexual activity with the defendant. The defendant in *Lucas* failed to comply with the Michigan rule requiring that notice of an intent to use such evidence be filed ten days before arraignment. In language that is as relevant to the Tennessee rule as it is to the Michigan provision, the Supreme Court in *Lucas* noted:

> The [Michigan] notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion.[794]

Lucas also said:

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[788] *Tenn. R. Evid. 412(d)(3)(ii)*.

[789] *Tenn. R. Evid. 412(d)(3)(iii)*.

[790] *Tenn. R. Evid. 412(d)(4)*.

[791] *Tenn. R. Evid. 412(b)*.

[792] *Tenn. R. Evid. 412(c)(1)*.

[793] *Michigan v. Lucas, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991)*. *See also State v. Nance, 393 S.W.3d 212, 229 (Tenn. Crim. App. 2012)* (no violation of *Confrontation Clause* when trial court refused to let sexual assault defendant introduce extrinsic evidence of victim's statements concerning other sexual encounters).

[794] *Id. at 152–53*.

> [T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *Rock v. Arkansas, 483 U.S. 44, 55, 107 S. Ct. 2704, 2711, 97 L. Ed. 2d 37 (1987)*, quoting *Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 1045, 35 L. Ed. 2d 297 (1973)*.[795]

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[795] *Id. at 149*. *See also* *Nevada v. Jackson, 569 U.S. 505, 133 S. Ct. 1990, 186 L. Ed. 2d 62 (2013)* (upholding rape conviction even though defendant was not permitted to introduce extrinsic evidence that the victim had made several prior complaints that the defendant had raped or assaulted her, that police were unable to corroborate the prior complaints, and that the police were skeptical of the validity of her claims; defendant failed to file required notice of intent to use extrinsic evidence and the victim testified and was cross-examined about the prior complaints; Supreme Court has never ruled that barring such extrinsic evidence offends the Constitution). While acknowledging the right to present witnesses is not absolute, the U.S. Supreme Court has also recognized that the procedural and evidentiary rules that limit this right may not be applied to "defeat the ends of justice". *United States v. Scheffer, 523 U.S. 303, 118 S. Ct. 1261, 1264, 140 L.Ed.2d 413 (1998)*. Thus, where the defendant's constitutional rights to impeach witnesses and present a defense were violated by the trial court's Rule 412 ruling, which excluded extrinsic evidence of the victim's sexual relationship with another person during the time period in which the defendant allegedly assaulted him, this error combined with defense counsel's failure to renew its Rule 412 motion, was sufficiently prejudicial to grant defendant post-conviction relief. *Arnold v. State, 2020 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. Feb. 5, 2020)* (extrinsic evidence of the victim's sexual relationship with a third party was admissible (1) as impeachment evidence to rebut the victim's testimony that he was sexually innocent when defendant abused him, and (2) as substantive evidence related to the defendant's defense, which was that the defendant did not commit the crimes and that the victim made up the sex abuse to hide his other relationship).