APPEALING EVIDENTIARY RULINGS

I. The Structure of the Texas Rules of Evidence

Thinking about evidence has changed dramatically since the enactment by Congress of the Federal Rules of Evidence (FRE) in 1975, which apply to all civil and criminal actions in federal district court. The enactment of the FRE has led most states (42 at last count), including Texas, to revamp their evidence rules. In November 1982, the Supreme Court of Texas promulgated Rules of Civil Evidence. Three years later, in December 1985, the Court of Criminal Appeals adopted Rules of Criminal Evidence. Both the Rules of Civil and Criminal Evidence were modeled after the FRE. The Court of Criminal Appeals and Supreme Court of Texas subsequently adopted a uniform set of rules of evidence, called the Texas Rules of Evidence (TRE), which were made effective on March 1, 1998.

The FRE and TRE are premised on the belief that a trial is not a game or sporting contest, but a reasoned inquiry into "what really happened." The goal of the trial is both the ascertainment of the truth and the just determination of the proceedings, see Rule 102 of the FRE and TRE. Because determining the truth and assessing the justness of the outcome is extraordinarily difficult, the FRE and TRE give wide latitude to the trial court to determine the evidence the jury will hear. The heart of the FRE and TRE are Rules 401-03, which set forth the standard for determining when evidence is relevant, the standard that only evidence that is relevant is admissible, and the standard for determining whether to exclude admittedly relevant evidence when it may have an unfairly prejudicial effect. This last standard is Rule 403, which states in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." This balancing standard requires the trial court to assess the "amount" of probative value of the evidence, the "amount" of unfair prejudice if admitted, and to exclude that evidence if the amount of unfair prejudice "substantially" outweighs the amount of probative value. This leads to a cliché I use when teaching evidence: "When in doubt, let it in." Many rules in the FRE and TRE are similarly structured: they are not black-letter rules, but are guidelines or signposts.

As noted in *Callaway v. State*, 818 S.W.2d 816, 831 (Tex. App.—Amarillo, 1991), "The Texas Rules of [Civil and] Criminal Evidence are derived from the Federal Rules of Evidence and, in the construction of the Texas rules, persuasive value is accorded the federal decisions interpreting the federal rules." More recently, in *Adams v. State*, 985 S.W.2d 582, 583 (Tex. App.—Eastland, 1998, pet. ref.), the court stated, "[C]ases interpreting federal rules should be consulted for guidance as to their scope and applicability unless the Texas rule departs from the federal rule." Thus, an advocate may draw from both federal as well as Texas law in suggesting particular interpretations of the TRE.

II. Preserving Claims of Evidentiary Error

A. Evidentiary Standard for Preserving Error

TRE 103(a) states the standard for a party who claims error by the trial court:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.
>
> (2) *Offer of proof*. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

If you fail to preserve your claim of error, the appellate court will not rule on your claim. As stated by the authors of a well known evidence law treatise, "No ... rule is more frequently relied on by Texas appellate courts in disposing of cases [than Rule 103]." Hulen D. Wendorf, David A. Schlueter & Robert R. Barton, TEXAS RULES OF EVIDENCE MANUAL I-20 (5th ed. 2000).

B. Elements of Preserving Error

1. "Substantial Right"

TRE 103(a) requires that the evidentiary error affect a "substantial right" of a party, language that tracks identically the language of FRE 103(a). Neither the TRE, nor the Advisory Committee's Note to FRE 103(a) defines the term "substantial right." Courts have offered a definition of substantial right, although the definition is both vague and circular: "[A]n error affecting a substantial right of a party is an error which had a substantial influence on the outcome or [which] leaves one in grave doubt as to whether it had such effect." *United States v. Charley*, 189 F.3d 1251, 1270 (10th Cir.1999) (internal quotations and citations omitted). More often, appellate courts simply affirm a trial court's decision concerning the admission or exclusion of evidence in conclusory fashion (*e.g.*, "The claim of error by appellant did not affect a substantial right. We thus affirm.")

2. And Evidence is Excluded

If the proffered evidence is excluded, the party offering the evidence must make an offer of proof, thus providing the trial court notice of the nature of the evidence offered. The failure to make an offer of proof containing a summary of the excluded witness's intended testimony waives any complaint about the exclusion of evidence on appeal. *See Ludlow v. DeBerry*, 959 S.W.2d 265, 270 (Tex.App.—Houston [14th Dist.] 1997, no pet.); *Sims v. Brackett*, 885 S.W.2d 450, 453 (Tex.App.—Corpus Christi 1994, writ denied). An offer of proof may occur through the questioning, outside of the jury's presence, of the proposed witness. It may also occur informally, as long as the summary by counsel to the court clearly describes the nature and

substance of the proposed evidence. *Akin v. Santa Clara Land Co., Ltd.*, 34 S.W.3d 334, 339 (Tex.App.—San Antonio 2000, pet. filed). "To preserve error in the exclusion of evidence, a party must make a record through a bill of exception, formal or informal, of the evidence the party desires admitted." *White v. State*, 2002 WL 440795 (Tex.App.—Amarillo 2002) *citing Richards v. Commission for Lawyer Discipline*, 33 S.W.3d 242, 252 (Tex.App.—Houston [14th Dist.] 2000, no pet.). An informal bill of exception preserves error if 1) an offer of proof is made before the court, the court reporter, and opposing counsel outside the presence of the jury; 2) it is preserved as a part of the reporter's record; and 3) it is made before the charge is read to the jury. *White, citing 4M Linen & Uniform Supply Co., Inc. v. W.P. Ballard & Co., Inc.*, 793 S.W.2d 320, 323 (Tex.App.—Houston [1st Dist.] 1990, writ denied).

3. And Evidence is Admitted

a. Timely Objection

A party claiming error in the admission of evidence must make a timely objection, or any claim of error on appeal will be deemed waived. *See Johnson v. State*, 975 S.W.2d 644, 653-54 (Tex. App.—El Paso 1998, pet. ref.)(holding objection to admission of other acts evidence untimely because made well after it was clear that testimony was objectionable). Although the American legal system continues to operate as an adversary system, some of the "sporting" aspects of that system are no longer countenanced. If a party fails to object, then that party should not be allowed to claim harm after the fact.

b. Specific Objection

An objection to the admission of evidence must be specific in order to preserve the issue for appeal. Specificity is necessary in order to provide notice to the trial court and opposing counsel of the nature of the objecting party's evidentiary concern. Thus, "hiding the ball" (in keeping faith with the theme of this conference, using the old "hidden ball" trick) when making an objection is not only frowned upon, it may cause the appellate court to conclude that the claim of error was not preserved for appeal.

c. Getting It Right

Even if the court incorrectly interprets or applies the evidentiary rule in question, or applies the wrong rule, the court's ruling will be affirmed if it can be sustained on another ground, including a reason not within the trial court's contemplation when making its ruling. *See Marathon Corp. v. Pitzner* ex rel. *Pitzner*, 55 S.W.3d 114, 141-144 (Tex. App.—Corpus Christi 2001, rule 53.7(f) mot. filed).

III. Standard of Review of Evidentiary Claims of Error

As noted above, both the TRE and the FRE are structured to give a great deal of discretion to the trial court to admit or exclude evidence. Because the structure of the Rules is to

give to the trial court the discretion to admit or exclude, Texas appellate courts routinely state that evidentiary decisions are committed to the sound discretion of the trial court. An appeal of a trial court's decision concerning the admission or exclusion of evidence is subject to the abuse of discretion standard. *Prystash v. State*, 3 S.W.3d 522, 527 (Tex.Crim.App.1999). *Texas Dept. of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995); *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989).

A. Defining the Abuse of Discretion Standard

Texas courts have used numerous formulations in summarizing when a trial has abused its discretion. The following are some of those formulations:

- "[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992).
- A trial court abuses it discretion when it acts "without reference to any guiding rules or principles Another way of stating the test is whether the act was arbitrary or unreasonable. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex.1985), *cert. denied* 476 U.S. 1159 (1986).
- "[A] trial judge is given a 'limited right to be wrong,' so long as the result is not reached in an arbitrary or capricious manner." *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App.1990).
- "A trial court abuses its discretion if its decision is arbitrary or unreasonable." *Brown v. State*, 960 S.W.2d 772, 778 (Tex.App.—Dallas 1997, pet. ref'd).
- "Discretion is so abused when the decision falls outside the zone of reasonable disagreement." *Benitez v. State*, 5 S.W.3d 915, 918 (Tex. App.—Amarillo 1992).
- "The appellate court must uphold the trial court's ruling if it was within the zone of reasonable disagreement." *Weatherred v. State,* 15 S.W.3d 540, 542 (Tex.Crim.App.2000).
- "To obtain reversal based upon an erroneous evidentiary ruling, the appellant must show first, that the trial court did in fact commit error, and second, that the error was reasonably calculated to cause and probably did cause the rendition of an improper verdict." *Gainsco County Mutual Insurance Co. v. Martinez*, 27 S.W.3d 97, 104 (Tex. App.—San Antonio 2000), review granted, (Oct. 12, 2000)).
- "The trial court's ruling will not be disturbed absent evidence that it acted unreasonably, arbitrarily, or without reference to any guiding legal principles." *Id.*
- "[A]ppellate courts should show almost total deference to a trial court's findings of fact especially when those findings are based on an evaluation of credibility and demeanor—i.e., in reviewing a trial court's ruling on an 'application of law to fact question,' the appellate courts should view the evidence in the light most favorable to the trial court's ruling. Our decision does not call into question the 'very definition of abuse of discretion.' We merely decide that an abuse of discretion standard does not necessarily apply to 'application of law to fact questions' whose resolution do not turn on evaluation of credibility and demeanor." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)(internal citations omitted).

- "An appellate court's review of a trial court's evidentiary rulings generally does not involve an 'application of law to fact question' or a 'mixed question of law and fact.'" *Id.*

The last two quotes, from *Guzman v. State*, suggest the difficulty in assuming that all evidentiary issues involve an abuse of discretion standard. *Guzman* sets forth a tripartite approach: (1) issues concerning a trial court's determinations of historical facts which have support in the record, when the trial court's determination is based on an evaluation of credibility and demeanor; (2) issues concerning a trial court's application of law to fact questions, often called mixed questions of law and fact, if the ultimate resolution of those questions turns on an evaluation of credibility and demeanor; and (3) issues regarding a trial court's determinations of mixed questions of law and fact where the resolution of the issue does not turn on an evaluation of credibility and demeanor. *Guzman* holds that the first two types of questions require an appellate court to show "almost total deference" to a trial court's determination because of a trial court's exclusive fact- finding role, and because a trial court is in an appreciably better position to decide the issue. *See Guzman*, 955 S.W.2d at 89. When an issue concerns the third type of question, an appellate court is as capable as the trial court to decide the issue, so an appellate court determines that issue independently, or de novo. *See id.* A number of evidentiary issues involve mixed questions of law and fact, such as whether the a hearsay declarant made a statement while "under the stress of excitement caused by the event or condition." (The excited utterances exception of TRE 803(2).) If the declarant is not present in the courtroom, so that the declarant's credibility cannot be assessed by the trial court, does this fit in issue (3) rather than issue (2), or is the presence of some witness (and thus some credibility determination)sufficient to place this in category (2)?

C. When does an Abuse of Discretion Result in a Reversal of the Judgment?

A party requesting reversal of a judgment based on one or more evidentiary errors is not required prove that *but for* the error a different judgment would necessarily have been rendered. The party is required to show that the error probably resulted in an improper judgment. *Brownsville*, 897 S.W.2d at 753; *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex.1992); *King v. Skelly*, 452 S.W.2d 691, 696 (Tex.1970). The appellant usually must show that the judgment turns on the admission or exclusion of the particular evidence at issue on appeal. *Able*, 35 S.W.3d at 617; *Brownsville*, 897 S.W.2d at 753-54. In making the determination whether the case "turns" on the evidence in question, the appellate court reviews the entire record. *Able*, 35 S.W.3d at 617; *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex.1998). *Brownsville*, 897 S.W.2d at 754; *Boothe v. Hausler*, 766 S.W.2d 788, 789 (Tex.1989).

All this makes it unlikely that an appellate court will reverse an evidentiary ruling made by a trial court. *See* Roger Park, David Leonard & Steven Goldberg, EVIDENCE LAW § 12.01, at 540-41 & n.6 (1998) (concluding in discussing the FRE that the prevailing standard of review grants trial courts "a virtual shield from reversal based on error in applying discretionary rules" of evidence). As noted by Professor Eleanor Swift in a study of published appellate opinions concerning hearsay, appellate courts do not reverse trial courts often regarding evidentiary

issues. Swift writes: "The deferential 'abuse of discretion' standard of review produces a low rate of trial court error. Sometimes, appellate courts decline to decide the question of error at all. And, when error is found, the harmless error doctrine reduces even further the rate of actual reversal." Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 Minn. L. Rev. 473, 479 (1992). Swift did find that reversals were more common in civil than in criminal cases. *Id.* at 479-80.

IV. The Supreme Court of the United States and Other Federal Court Statements on Appeals of Evidentiary Rulings

Like Texas courts, the Supreme Court has often indicated that all evidentiary rulings are reviewed for "abuse of discretion." *See General Electric Co. v. Joiner*, 522 U.S. 136, 140 (1997) (noting courts of appeals must "give the trial court the deference that is the hallmark of abuse of discretion review.")

However, a court that is interpreting the meaning of a particular provision of the FRE is deciding a "legal" question, to which no deference must be given the trial court. If the issue is the proper interpretation of the FRE, then a more appropriate standard is "a more searching standard such as 'error of law.'" Park, *et al.*, EVIDENCE LAW § 12.01, at 540-41 (1998).

The problem may be that the term "abuse of discretion" is malleable, and thus of little concern to the Supreme Court. In *Koon v. United States*, 518 U.S. 81, 100 (1996), the Court stated, in interpreting a statute other than the FRE, "[l]ittle turns, however, on whether we label review of [a] particular question abuse of discretion or de novo, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction. ... A district court by definition abuses its discretion when it makes an error of law."

A. Evaluating a Hearsay Ruling—An Example in the Federal Circuit Courts

In *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992), Hancock claimed the district court erred in admitting "into evidence Hancock's guilty plea to the misdemeanor of assault and battery because it was hearsay and does not come within the exception to Federal Rules of Evidence 803(22) which permits hearsay evidence of final judgments entered on a plea of guilty." *Id.* at 1371. The language of FRE 803(22) states that "[e]vidence of a final judgment ... adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year ...." is excepted from the ban on hearsay evidence. Hancock's misdemeanor conviction was not a conviction for a crime punishable by imprisonment "in excess of one year."

The Sixth Circuit then stated its understanding of its role in reviewing the district court's admission of the misdemeanor assault and batter conviction pursuant to FRE 803(22).

> A district court's evidentiary determinations are subject to an abuse of discretion standard of review. *See United States v. Rios*, 842 F.2d 868, 872 (6th Cir.1988), *cert. denied*, 488 U.S. 1031, 109 S.Ct. 840, 102 L.Ed.2d 972 (1989). However, a district

> court's conclusions of law, such as whether proffered evidence constitutes hearsay within the meaning of the Federal Rules of Evidence, are reviewed de novo. *United States v. Levy*, 904 F.2d 1026, 1029 (6th Cir.1990), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 974, 112 L.Ed.2d 1060 (1991).

Id. at 1371.

The Sixth Circuit acknowledged that FRE 803(22) was inapplicable, but affirmed the judgment of the trial court on the ground that the guilty plea was admissible either as a personal admission (FRE 801(d)(2(A)), or under the "catch-all" exception to hearsay (then FRE 803(24), now FRE 807—remember, Texas does not have a "catch-all" exception in its rules of evidence).

See also United States v. Lai, 934 F.2d 1414 (9th Cir. 1991), *rev'd on other grounds*, 944 F.2d 1434 (9th Cir. 1991)(noting "we review the district court's rulings for abuse of discretion to the extent that factual determinations are involved. The district court's construction of the Federal Rules of Evidence is a question of law which we review *de novo*. *United States v. Owens*, 789 F.2d 750, 753 (9th Cir.1986), *reversed on other grounds*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988).").

V. Reviewing the Totality of the Evidence

A. Legal Sufficiency of Evidence Review

For a legal sufficiency review, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App.1993). This standard of review applies to cases involving both direct and circumstantial evidence. *King v. State*, 895 S.W.2d 701, 703 (Tex.Crim.App.1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993).

B. Factual Sufficiency of Evidence Review in Criminal Cases

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust; or (2) the adverse finding is against the great weight and preponderance of the available evidence. *Id.* The *Johnson* court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id.* at 9. The jury is the exclusive judge of the credibility of the witnesses and the weight to be given to their

testimony. *See Bonham v. State*, 680 S.W.2d 815, 819 (Tex.Crim.App.1984). The jury is free to accept or reject all or any part of a witness's testimony. *See id.*; *Dumas v. State*, 812 S.W.2d 611, 615 (Tex.App.—Dallas 1991, pet. ref'd). The appellate court merely assesses whether the jury reached a rational conclusion. But due deference to the decision of the fact finder is not absolute deference to the fact finder.

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