IF YOU WANT NOTICE, YOU GOT IT.

Getting (properly) noticed under TEX. R. EVID. 404(b), 609(f), TEX. CODE CRIM. PROC. ANN. arts. 37.07(3)(g) and 38.37

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TEXAS RULES OF EVIDENCE RULE 404(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 therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, ***provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.***

TEXAS CODE OF CRIMINAL PROCEDURE 37.07(3)(g)

On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Criminal Evidence. If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence, notice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

TEXAS CODE OF CRIMINAL PROCEDURE 38.37. § 3

Sec. 3. On timely request by the defendant, the state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 2 in the same manner as the state is required to give notice under Rule 404(b), Texas Rules of Criminal Evidence.

I.
ASK (RIGHT), AND YE SHALL RECEIVE

A. Section 37.07 (3)(g) states that notice is given, "in the same manner required by Rule 404(b), Texas Rules of Evidence." Manner is defined as "a way, mode, method of doing anything, or mode of proceeding in any case or situation." ***Consequently, this portion relates only to the procedure governing a defendant's request and the State's response to that request, and not to the scope of the information to which the section applies.*** *Jaubert v. State*, 65 S.W.3d 73, 84 (Tex. App.—Waco 2000) (op. on pet. for discretionary review), *rev'd on other grounds*, 74 S.W.3d 1 (Tex. Crim. App. 2002) (internal citations omitted).

B. Thus, if you want notice of for each of these provisions, you have to ask specifically for them. *Hitt v. State*, 53 S.W.3d 697, 706 (Tex. App.—Austin 2001, pet. ref'd) (stating that when counsel asked State for notice under 404(b), that request does NOT extend to 38.37).

C. ***But DO NOT*** file a ***Motion*** for Notice under ANY of these rules/statutes. The text of rule 404(b) does not require a motion or a ruling by the court to trigger the State's obligation to provide notice. "All that is required is a timely request by the accused." *Webb v. State*, 36 S.W.3d 164, 176–77 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (op. on reh'g en banc). If you file it as a Motion, unless you get an order for notice, the State is under no obligation to provide notice. *Dade v. State*, 956 S.W.2d 75, 81 (Tex. App.——Tyler 1997, pet. ref'd).

D. IF YOU REQUEST NOTICE, you get:

1. ***Notice of case in chief evidence***. Rule 404(b)'s notice encompasses only case-in-chief evidence, Article 37.07 § 3(g)'s notice requirement appears on its face to encompass only case-in-chief evidence, and not rebuttal evidence. *Jaubert v. State*, 74 S.W.3d 1, 4 (Tex. Crim. App.), *cert. denied*, 537 U.S. 1005 (2002).

2. ***Juvenile bad acts.*** Of course, juvenile adjudications are admissible in punishment. "Additionally, notwithstanding Rule 609(d), Texas Rules of Evidence, and subject to Subsection (h), evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of: a felony; or a misdemeanor punishable by confinement in jail. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon 2011).

   Although this language leaves out unadjudicated juvenile acts, Texas courts have consistently held that unadjudicated crimes or bad acts committed by the defendant as a juvenile are admissible during the punishment phase of an adult criminal trial. *See Strasser v. State*, 81 S.W.3d 468, 469-70 (Tex. App.—Eastland 2002, no pet.); *Rodriguez v. State*, 975 S.W.2d 667, 687 (Tex. App.—Texarkana 1998, pet. ref'd).

3. Acts that meet ***both*** prongs of Article 38.37-- the state of mind of the defendant and the child ***and*** the previous and subsequent relationship between the defendant and the child. *Brantley v. State*, 48 S.W.3d 318, 323 (Tex. App.—Waco 2001, pet. ref'd).[1] In addition, the noticed evidence must be related to "the child who is the victim of the alleged offense." *Pool v. State*, 981 S.W.2d 467, 469 (Tex. App.—Waco 1998).

E. You ***DO NOT*** get "same transaction contextual evidence" under either 404(b) or 38.37(3)(g). *Worthy v. State*, 312 S.W.3d 34, 35 (Tex. Crim. App. 2010).

(FYI: "Same transaction contextual evidence" is evidence reflecting the context in which a criminal act occurred. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). It is a recognition that events do not occur in a vacuum, and a jury has a right to hear what occurred immediately before and after the offense in order to realistically evaluate the evidence. *Smith v. State*, 316 S.W.3d 688, 698–99 (Tex. App.—Fort Worth 2010, pet. ref'd). Extraneous offenses may be admissible as same transaction contextual evidence when several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction. *Prible v. State*, 175 S.W.3d 724, 731–32 (Tex. Crim. App.), *cert. denied*, 546 U.S. 962 (2005). This type of evidence results when an extraneous matter is so intertwined with the State's proof of the charged offense that avoiding reference to it would make the State's case incomplete or difficult to understand. *Prible*, 175 S.W.3d at 732.)

II.
REASONABLE NOTICE–OR IN ENGLISH, DID YOU GET THEM ON TIME?

A. Rule 404(b) does not define the term "reasonable." *Roethel v. State*, 80 S.W.3d 276, 279 (Tex. App.—Austin 2002, no pet.). Not surprisingly, courts cannot agree on what constitutes a sufficient amount of time to be "reasonable."

1. The Waco Court of Appeals has stated that notice provided ten days before trial will be presumptively reasonable. *Chimney v. State*, 6 S.W.3d 681, 694 (Tex. App.—Waco 1999, no pet.).

2. Three days' notice over a weekend is presumptively unreasonable. *Neuman v. State*, 951 S.W.2d 538, 540 (Tex. App.—Austin 1997, no pet.); *Hernandez v. State*, 914 S.W.2d 226, 234 (Tex. App.—Waco 1996, no pet.).

3. If notice is not given until jury selection, it is not timely. *Sarringar v. State*, No. 2-02-102-CR, 2003 WL 861698, at *4 (Tex. App.—Fort Worth Mar. 6, 2003, pet. ref'd) (mem. op., not designated for publication).

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[1] Frankly, I have no idea what the language of the statute intends on allowing in, and have found no case that illuminates the meaning(less) of 38.37. "'When I use a word, Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean - neither more nor less.'" LEWIS CARROLL, THROUGH THE LOOKING-GLASS 72 (1872).

4. The timing of the defendant's request, however, can have some bearing on the reasonableness of the timing of the State's notice. For example, five days' notice was determined reasonable when the defendant had made his request only two weeks earlier. *See Self v. State*, 860 S.W.2d 261, 264 (Tex. App.—Fort Worth 1993, pet. ref'd).

5. In reality, "reasonable notice" depends upon the facts and circumstances of each individual case. *Webb v. State*, 36 S.W.3d 164, 178 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Therefore, courts have examined factors other than the actual time frame to determine whether notice was reasonable. Some, like the *Self* court, have focused on the defense. In *Self*, the court held that because defense counsel was able to cross-examine witnesses about the specifics of the extraneous acts, there was no surprise and, therefore, notice of the State's intent to introduce evidence of these acts was adequate. *Self*, 860 S.W.2d at 264.

6. Unlike Rule 404(b), article 37.07, section 3(g) specifies that notice is ***reasonable*** only if the notice includes the date on which and the county in which the alleged crime or bad act occurred. *Compare* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(g) *with* TEX. R. EVID. 404(b). Despite the plain language of the statute, courts have carved out exceptions to the rule so that the notice need not specify exact counties. *See Roman v. State*, 986 S.W.2d 64, 65 (Tex. App.—Austin 1999, pet. ref'd).

7. So, of course, the Government is allowed to get "close enough" for reasonableness–a one month variance on a date of the occurrence of a noticed offense was not "unreasonable." *Wallace v. State*, 135 S.W.3d 114, 120 (Tex. App.—Tyler 2004, no pet.).

II.
ADEQUATE NOTICE–OR IN ENGLISH, DID THEY TELL YOU WHAT YOU NEEDED TO KNOW ABOUT THE ITEMS NOTICED?

A. The purpose of Rule 404(b) notice is to prevent surprise. *Hayden v. State*, 66 S.W.3d 269, 272 (Tex. Crim. App. 2001); *Hernandez*, 914 S.W.2d at 234 ("[T]he purpose of reasonable notice is "to allow the defendant adequate time to prepare for the State's introduction of the extraneous offenses at trial.").

B. The same is true with 37.07(3)(g). The purpose of article 37.07, section 3(g) is to avoid unfair surprise, that is, trial by ambush. Notice that provides substantial compliance with the statutory requirements and does not place a defendant in the position of being unfairly surprised, is sufficient. *Nance v. State*, 946 S.W.2d 490, 493 (Tex. App.—Fort Worth 1997, pet. ref'd); *Roethel*, 80 S.W.3d at 282. Thus, the proper focus is how the deficiency of the notice affected appellant's ability to prepare for the evidence. *Roethel*, 80 S.W.3d at 282.

C. Since the Texas Rules of Evidence were patterned after the Federal Rules of Evidence, a court may rely on Committee Notes to interpret the Texas rules. *Fairow v. State*, 943 S.W.2d 895, 902 n.3 (Tex. Crim. App. 1997) (citing *Campbell v. State*, 718 S.W.2d 712 (Tex. Crim. App. 1986)).

1. Federal Rule of Evidence 404(b) regulates the use of evidence of other crimes, wrongs, or acts. The rule, regarding the materials requested by the Defendants, requires the prosecution in a criminal case to "provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." FED. R. EVID. 404(b).[2]

2. Adequate notice requires that the Government give such sufficient notice "to apprize the defense of the general nature of the evidence of extrinsic acts." FED. R. EVID. 404 advisory committee's note. The federal courts have in a rather circular definition, have interpreted this to mean that Government must provide the defendant with information sufficient to "fairly apprize" the defense of the evidence. *United States v. Long*, 814 F. Supp. 72, 74 (D. Kan. 1993); *United States v. Williams*, 792 F. Supp. 1120, 1134 (S.D. Ind. 1992). Adequate notice has further been defined as "sufficiently clear so as to permit pretrial resolution of the issue of its admissibility." *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995).

3. Nothing in the rule indicates that the defendant is entitled to receive documents or other evidence from which the Government derives the prior bad act evidence. *Williams*, 792 F. Supp. at 1134; *see also United States v. Stoecker*, 920 F. Supp. 876 (N.D. Ill. 1996) (denying the defendant's request to order the government to turn over evidence pursuant to 404(b), including: "the dates, times, places and persons involved in such acts; the statements of each participant; any documents that contain evidence of such other crimes or acts; copies of audio and video recordings of those crimes, wrongs, or acts; and a statement of the issue or issues to which the government believes such other crimes or acts of evidence may relate.").

4. However, vague assertions in response to a request, such as the potential "offer [of] prior and subsequent conduct" that involving alleged criminal activity are too vague as to comply with the rule. *United States v. Singleton*, 922 F. Supp. 1522, 1533 (D. Kan. 1996).

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[2] This rule, as amended and effective December 1, 1991, states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." FED. R. EVID. 404(b).

D. However, Texas courts have interpreted "adequate notice" to mean that the defense can prepare any potential defense from the information given.

1. The notice must adequately describe the allegations to allow the defense to identify and investigate them. *James v. State*, 47 S.W.3d 710, 714 (Tex. App.—Texarkana 2001, no pet.) ("Lacking even a general statement about the time the acts occurred, the notice was not adequate for James to identify and investigate them.").

   a. The better practice is for the prosecutor to state explicitly the intent to introduce extraneous offense evidence. *Hayden* , 66 S.W.3d at 273; *see also Sebalt v. State*, 28 S.W.3d 819, 822 (Tex. App.—Corpus Christi 2000, no pet.) (holding that the defendant was given adequate notice when the State referred to the cause number of the indictments sought to be admitted in the punishment phase of a trial). The court reasoned, from the documentation given, "the additional information appellant sought was available to him prior to trial." *Sebalt*, 28 S.W.3d at 822.

   c. The Government is not required to make a written response concerning its intent, although this is certainly the recommended procedure. *Hayden*, 66 S.W.3d at 273; *see also Barnstein v. State*, No. 2-04-442-CR, 2006 WL 59400, at *7 (Tex. App.–Fort Worth Jan. 12, 2006, pet. ref'd) (stating that oral notice, supplemented with written notice, was sufficient for notice purposes).

2. The notice requirement found in Texas Rule of Evidence 404(b) is satisfied when the State gives to the defense copies of witness statements that describe the extraneous offenses later admitted into evidence at trial. *Hayden*, 66 S.W.3d at 273.

   (Whether the delivery of witness statements constitutes ***reasonable notice*** depends in part on the timing of that delivery. If the State gave the statements to the defense shortly after receiving the request for notice, the implicit statement is: "These are the extraneous offenses that we intend to offer in the case-in-chief." The longer the time lapse between the receipt of the notice and the delivery of the witness statements, the less likely that the recipient will conclude, "This is the evidence that responds to my request." Because a reasonable conclusion to be drawn when delivery of witness statements follows upon the heels of a timely request for notice, is that the State intends to use the evidence, "reasonable" notice is implicit in the delivery. *Hayden v. State*, 66 S.W.3d at 272).

3. "Open file" policy does not constitute sufficient notice under Rule 404(b). *Buchanan v. State*, 911 S.W.2d 11, 15 (Tex. Crim. App. 1995).

4. A defendant is not required to make inferences about the State's intent from a subpoena list or other documents in the file. *Webb*, 36 S.W.3d at 178. There, the

State argued that the defendant had sufficient notice from the State's subpoena list of the intent to call the witness to introduce extraneous offenses. The Court held that "[t]he State's argument both overlooks and exemplifies the primary purpose of [the] notice provision--to inform the defendant of the State's intent to use extraneous evidence so that the defendant can prepare his defense." *Webb*, 36 S.W.3d at 178-79.

a. A notice's reference to other written material available to defense counsel is adequate notice, if it is reasonably calculated to draw defense counsel's attention to an extraneous offense described in the referenced material. *Splawn v. State*, 160 S.W.3d 103, 112 (Tex. App.—Texarkana 2005, pet. ref'd).

b. But beware of *Price v. State*, 245 S.W.3d 532, 539 (Tex. App.—Houston [1st Dist.] 2007, no pet.), where that court held that defendant should have inferred that a protective order (not part of the noticed offenses from the State), issued as the result of noticed family violence offenses would be admitted into trial.

c. Also be aware of *Hayden*, 66 S.W.3d at 272 (Tex. Crim. App. 2001) Apparently, the defense attorney is to deduce the meaning of the delivery of witness statements, contrary to other cases as set forth herein.

5. The lack of surprise is a valid and important consideration in assessing the reasonableness of notice. *Webb,* 36 S.W.3d at 178. However, notice is not deemed reasonable merely because the defense is not surprised. *Webb*, 36 S.W.3d at 178. If lack of surprise were the only consideration, the State could routinely lay behind the log, making last minute disclosures of its intent to use extraneous offenses in those cases where the defendant arguably would not be surprised by the State's intent to use such evidence at trial. *Webb*, 36 S.W.3d at 178. Tactics of this sort would undermine the letter as well as the spirit of the rule. *Webb*, 36 S.W.3d at 178.[3]

6. Courts also have given the State leeway in specificity regarding dates, perhaps because children (and adults victimized as children) may not always be able to recall specific dates of offenses. *See Splawn v. State*, 949 S.W.2d 867, 870-71 (Tex. App.—Dallas 1997, no pet.); *Hohn v. State*, 951 S.W.2d 535, 537 (Tex. App.—Beaumont 1997, no pet.);

However, the Austin Court of Appeals has a different stance. *Roethel v. State*, 80 S.W.3d 276, 280 (Tex. App.—Austin 2002, no pet.):

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[3] *But see Cole v. State*, 987 S.W.2d 893 (Tex. App.—Fort Worth 1998, pet. ref'd) (holding that because the defendant was not surprised by the testimony, notice was sufficient) and *Self*, 860 S.W.2d at 264 (holding that because the defendant was not surprised by the testimony, notice was sufficient).

"The State provided virtually no notice of the county and date of the offenses. The notice states that appellant "committed the act of Aggravated Sexual Assault of his sister [name omitted] when she was a child." The only indication of a county in the notice arises from an implication that the brother and sister involved lived together during their childhood; the notice, however, does not exclude the possibility that the offense occurred away from their home. We need not decide whether the notice is sufficient as to the place of the offense because it provides insufficient notice of the date of the offense. The notice limits the span of time during which the offense occurred only to the victim's childhood. Even discounting the years of infancy and early childhood of appellant and his sister, the notice narrows the period to a range of about eight years. Although courts have allowed some range of time to satisfy the requirement of a specific date, we conclude that an implication of a roughly eight-year span is too general to satisfy even those relaxed standards. Courts cannot completely ignore the Legislature's determination that notice lacking a specific date is unreasonable. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3. Under these facts, we must conclude that the notice was unreasonable as a matter of law and that the evidence accordingly was inadmissible. The district court abused its discretion by concluding otherwise."

III.
WHEN TO OBJECT

A. The notice statute ***does not require*** that defendants complain about the adequacy of notice before trial. *Roethel*, 80 S.W.3d at 279; TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3. Although a pretrial objection would let the State correct deficiencies while still giving defendants time to prepare for trial, there is no such requirement imposed on defendants. *See James v. State*, 47 S.W.3d 710, 714 (Tex. App.— Texarkana 2001, no pet.) (noting that defendant "is not required to complain about the adequacy of the notice, but that the State is required by statute to provide specific information"). However, watch what they say, and not what is meant by this clear language:

1. "Although Scott's request for notice was filed with the court more than a year before trial, the record indicates that the State was not aware of Scott's request until shortly before the pretrial hearing. When Scott brought this to the court's attention at the pretrial hearing, he announced that the State had agreed to provide him with notice within four days. ***Counsel made no complaint regarding inadequate notice at that time."*** *Scott v. State*, 57 S.W.3d 476 (Tex. App.—Waco 2001, pet. ref'd).

2. ***A request for continuance necessary?*** Potentially–when you are complaining about the **REASONABLENESS** on the notice. After complaining about the "reasonableness of the State's notice of extraneous offenses, the Fort Worth court found that "nothing in the record indicate[d] that Martin requested a continuance. Having failed to do so, Martin has waived any complaint that he was surprised by the

State's notice." *Martin v. State*, 176 S.W.3d 887, 900 (Tex. App.—Fort Worth 2005, no pet.).

IV.
REMEDY

A. ***404(b) evidence not timely turned over is inadmissible.*** "The notice requirement is a prerequisite to admissibility of the Rule 404(b) evidence. Hence the offered evidence is inadmissible if the court determines that the notice requirement has not been met. *Long*, 814 F. Supp. at 73.

B. The language of section 3(g) is mandatory; it states that the State "must" give notice upon timely request and deems the notice a "requirement." *Roethel*, 80 S.W.3d at 279; TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3. ***The logical and proper consequence of violations of section 3(g) is that the evidence is inadmissible.*** If the evidence is admissible despite the State's failure to comply with the notice requirement, the requirement is a nullity. *Roethel*, 80 S.W.3d at 279; TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3. ***Pursuant to this evaluation, this Court should examine whether the prosecutor has acted in bad faith and whether the defendant reasonably could have anticipated the witness's testimony.*** *Roethel*, 80 S.W.3d at 282.

1. What is "bad faith?"

For instance, the Supreme Court has found that bad faith could arise when there is a "showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *United States v. Marion*, 404 U.S. 307, 325 (1971). In civil law standards, "bad faith" can imply an intention to deprive a person of something "lawfully due." *Wilson v. O'Connor*, 555 S.W.2d 776, 780 (Tex. Civ. App.—Dallas 1977, writ dism'd) (applying statutory landlord/tenant law). Along the same line, long term knowledge without disclosure is considered to be "bad faith." *Franks v. State*, 2002 WL 1592443, *31-*32 (Tex. App.—Fort Worth July 18, 2002) (mem. op., not designated for publication) (holding that in the context of failing to disclose witnesses, the State's recent discovery and "surprise" about the evidence weighed against a finding of bad faith.). In the context of this statute, the Austin Court examined the concept of bad faith in reference to whether "the generality was intended to mislead appellant and prevent him from preparing a defense." *Roethel*, 80 S.W.3d at 282.

Thus, after examining this case law, several questions arise to assist this Court in determine "bad faith" in this context:

- Was Appellant "lawfully due" the notice?
- Was the lack of notice due to "surprise" or recent discovery, or an attempt to obfuscate the available evidence?

- Was there a showing of that the State intentionally delayed to gain some tactical advantage, *i.e.,* mislead appellant and prevent him from preparing a defense?

In a strongly worded rebuke[4] to the State, the Austin Court wrote:

Blatant disregard of the notice requirement would be strong evidence of bad faith on the prosecutor's part and would in most cases impair the defendant's ability to prepare for trial--either of which would require reversal of the sentence imposed. Such inaction by the State would be a senseless and gross waste of the time and resources of the State, the defendant, and the judicial system. The better practice is for the State to give notice with the specificity the Legislature has mandated. *Roethel*, 80 S.W.3d at 283.

2. Standard of review:

37.07(3)(g): The record is examined to determine whether the deficient notice resulted from prosecutorial bad faith or prevented the defendant from preparing for trial. In determining the latter, the court looks at whether the defendant was surprised by the substance of the testimony and whether that affected his ability to prepare cross-examination or mitigating evidence. *Roethel*, 80 S.W.3d at 279; *Scott v. State*, 57 S.W.3d 476 (Tex. App.—Waco 2001, pet. ref'd); *but see Flowers v. State*, No. 10-01-00005-CR, slip op. at 7 (Tex. App.—Waco August 7, 2002, pet. ref'd) (mem. op., not designated for publication). In the absence of reasonable notice, however, a trial court's decision to admit evidence of an extraneous offense constitutes an abuse of discretion. *See Webb*, 36 S.W.3d at 179; *Henderson v. State*, 29 S.W.3d 616, 625 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

404(b): A reviewing court must ascertain the probable effect admitting evidence has on the jury's verdict and should not overturn a criminal conviction if, after examining the record as whole, the court "has fair assurance that the error did not influence the jury, or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *see also Scott v. State*, 57 S.W.3d 476, 481 (Tex. App.—Waco 2001, pet. ref'd) ("[T]he trial court's decision to admit extraneous offense evidence during the punishment phase of a trial is reviewed under the abuse of discretion standard. In determining the threshold issue of admissibility of this evidence, the trial court must consider the reasonableness of the State's notice. Ultimately, the determination of reasonableness of the notice is committed to the sound discretion of the court. A determination that is within the zone of reasonable disagreement does not constitute an abuse of discretion. In the absence of reasonable notice, however, a trial court's decision to admit evidence of an extraneous offense constitutes an abuse of discretion.").

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[4] A term of art.

TEXAS RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(f) Notice. ***Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.***

A. Rule 609(f) precludes the use of prior convictions against a witness if the proponent of such evidence fails to give advance written notice of intent to use such evidence upon a timely written request. *Bryant v. State*, 997 S.W.2d 673, 676 (Tex. App.—Texarkana 1999, no pet.) ("The language of Rule 609(f) is plain; the failure to give the required notice makes the prior conviction 'not admissible' for impeachment purposes.").

B. Be aware of *Cream v. State*, 768 S.W.2d 323, 326 (Tex. App.—Houston [14th Dist.] 1989, no pet.) and *Johnson v. State*, 885 S.W.2d 578 (Tex. App.—Dallas 1994 no pet.). In *Cream*, the court held that failure to notify the defendant that the State intended to use prior convictions was harmless where the defendant was aware of the convictions. In *Johnson*, the court relied on *Cream* and held that the convictions were admissible without notice where the court held a hearing and the defendant had an opportunity to contest the convictions.

The ruling in *Cream* has been criticized. In *Brown v. State*, 880 S.W.2d 249, 251 (Tex. App.—El Paso 1994, no pet.), the court said:

We find the reasoning presented in *Cream* unpersuasive. Rule 609(f) precludes the use of prior convictions against a witness if the proponent of such evidence fails to give advance written notice of intent to use such evidence upon a timely written request . . . If we were to read Rule 609(f) as did *the Cream* Court, the notice requirement would never apply unless a witness could show complete unawareness of his or her own prior convictions. Such an interpretation would render Rule 609(f) meaningless.

NO. ***

STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
v.	§	***TH JUDICIAL DISTRICT
	§	
***	§	*** COUNTY, TEXAS

DEFENDANT'S REQUEST FOR THE STATE TO PROVIDE NOTICE AND EVIDENCE PURSUANT TO TEX. R. EVID. 404(b) AND 609(f) AND TEX. CRIM. PROC. CODE ANN. ARTS. 37.07 AND 38.37

TO THE * COUNTY DISTRICT ATTORNEY:**

COMES NOW Defendant by and through his counsel of record and respectfully submits the following:

I.

Defendant, pursuant to TEX. R. EVID. 404(b) hereby puts the State on notice that he is requesting any and all evidence pursuant to that rule that the State intends to use pursuant to this rule.

II.

Defendant, pursuant to TEX. R. EVID. 609(f) hereby puts the State on notice that he is requesting any and all evidence pursuant to that rule that the State intends to use during the trial of this matter concerning the Defendant (and anyone else you want to include).

III.

Defendant, pursuant to TEX. CRIM. PROC. CODE ANN. art. 37.07 § 3(g) hereby puts the State on notice that he is requesting any and all evidence pursuant to that rule that the State intends to use during the trial of this matter.

IV.

Defendant, pursuant to TEX. CRIM. PROC. CODE ANN. art. 38.37, § 3 hereby puts the State on notice that he is requesting any and all evidence pursuant to that rule that the State intends to use during the trial of this matter.