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B. Extraneous Misconduct Need Not Amount To A Crime

1. In *Plante v. State*, 692 S.W. 2d 487 (Text Crim. App. 1985), the misconduct in question was unpaid debts. The court of appeals had referred to this as "extraneous transactions." The court of criminal appeals agreed with the terminology. "This terminology reflects the lesser prejudicial effect of non-criminal extraneous conduct . . . but should not be construed to imply a different standard for admissibility of the evidence. The analysis of the admissibility of extraneous conduct is the same whenever the extraneous conduct reflects adversely on the character of the defendant, regardless of whether that conduct might give rise to criminal liability." *Id*. at 490 n. 3. However, when balancing potential for prejudice against probative value, it is true that the noncriminal nature of conduct will tend to reduce its prejudicial effect. *Id.* at 494.

2. "Rule 404(b) "applies equally to evidence of extraneous acts or transactions as it does to evidence of extraneous offenses." *Bishop v. State*, 869 S.W. 2d 342, 345 (Tex. Crim. App. 1993). Evidence that appellant had liked to engage in anal intercourse with his ex-wife, that he had required her to fondle herself, and that he had been capable of extended sexual performance without ejaculation was, at a minimum, evidence of extraneous acts, and therefore subject to analysis under Rule 404(b). *Id*. at 344-45; *accord, Cooper v. State*, 901 S.W. 2d 757 (Tex. App.-Beaumont 1995), pet. dism'd, improvidently granted 933 S.W.2d 495 (Tex. Crim. App. 1996).

3. Although appellant could not be convicted for a bad thought, or a contemplated bad act, such evidence does come within Rule 403, because "the potential for unfair prejudice . . . is quite similar to that of evidence of other crimes, wrongs or acts." Both are objectionable because they "could possibly be used by jurors for the forbidden inference of propensity or character conformity." *Moreno v. State*, 858 S.W. 2d 453, 464 (Text Crim. App.), *cert. denied*, 114 S. Ct. 445 (1993)(trial court erred in admitting evidence that appellant once planned to kidnap another person, but the error was harmless); *but see Massey v. State*, 933 S.W.2d 141, 154 (Tex. Crim. App. 1996)(statements about appellant's thoughts on raping, killing and mutilating women in a very specific manner were not conduct and thus not subject to rule 404(b)).

4. "Obviously, reference by a witness to a defendant's prior incarceration in the penitentiary, formerly known as the Texas Department of Corrections and oftentimes colloquially referred to as 'TDC,' is improper because it violates the longstanding general rule which prohibits the introduction of collateral offenses and transactions." *Fuller v. State*, 827 S.W. 2d 919, 926 (Text Crim. App. 1992), *cert. denied*, 113 S.Ct.3035 (1993); *accord, Ecby v. State*, 840 S.W. 2d 761, 764 (Text App.--Houston [1st Dist.] 1992, pet. ref'd)(trial court erred in admitting unredacted TDC identification card).

5. The trial court errs in admitting a mug shot taken some five months before the instant offense was committed, because this picture tended to show commission of an

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