EVIDENCE OF THE VICTIM'S CHARACTER IN A SELF-DEFENSE CASE

by

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Consider the following factual scenario: a guy walks into a bar (no, not that kind of scenario - this is serious business). The soon-to-be defendant, who knows none of the employees or patrons, walks up to the bar, has a couple of beers, and buys a round for the house. One of the regulars, our soon-to-be victim, suggests a friendly game of pool. More beer is consumed, a little money is put on the line, and the game becomes less friendly. A fight breaks out and it is disputed as to who started the fight; the defendant claims that the victim started the fight, while the friends of the victim claim that the defendant started the fight. In any event, the defendant is roughed up, ejected from the bar, and followed outside by the victim and at least one of his friends. According to the regulars, they just followed the defendant outside to make sure he left; according to the defendant, he was chased outside by men with blood in their eyes. In the course of events, the defendant retrieved his pistol from his jeep in the parking lot, and shoots two men, killing one of them.

No one else was armed with so much as a fingernail file.[7]

As a result of this altercation, the defendant was arrested and charged with First Degree Murder. He claimed self-defense at trial. It turned out that both of the victims had a long history of, and reputation for, violence, especially when drunk. The deceased even had a conviction for Use of a Vehicle to Facilitate Discharge of a Firearm a few years before his death. However, since the defendant knew nobody in the bar, he was entirely unaware of this history. Thus, defense counsel was presented with the issue of whether and how much of this history and reputation could be presented to the jury. This article examines this issue as it is addressed by Oklahoma law.

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[7] The facts of this case are taken from *State v. Trammell*, No. CF-2003-245, in the District Court of Bryan County. For the curious, Mr. Trammell was convicted of First Degree Manslaughter and Shooting with Intent to Kill. He was sentenced to life in prison. The convictions and sentences were affirmed on direct appeal in an unpublished opinion. *See Trammell v. State*, No. F-2007-251 (Okl.Cr., March 3, 2009). The author was trial counsel for Mr. Trammell.

Evidence of the violent tendencies and history of each victim is necessarily evidence of his character. Two different provisions of the Oklahoma Evidence Code provide possible routes of admissibility of this evidence. Both are found in 12 O.S. § 2404, which governs admissibility of character evidence.

Subsection A of that section generally provides that character evidence is not admissible; however, exceptions are provided. The relevant exception here is § 2404(A)(2), which permits admission of "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused." The limitation on evidence introduced under this exception is that it can be in the form of reputation or opinion evidence only, rather than specific instances. *See* 12 O.S. § 2405(A).

The second possibility is found in § 2404(B), which prohibits admission of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." However, such specific acts may be admitted for other purposes, such as proof of motive or intent, which may be relevant in this case. This article will focus on admissibility of evidence under § 2404(A)(2).

In order to meet the admission standard of § 2404(A)(2), the trait of character offered by the defendant must be "pertinent" or relevant.[8] Two permissible purposes (other than showing what a bad guy the victim was) are possible. First, in order to prove self-defense, the defendant must offer proof that he had a reasonable fear for his safety. *Bechtel v. State*, 1992 OK CR 55, ¶ 33, 840 P.2d 1. For this subjective purpose, in the instant case, the evidence is not relevant. The defendant did not know about the victim's violent history and reputation; thus, it could not possibly have impacted his state of mind. However, there is a second possible purpose.

In this case, the defendant had to produce evidence that he was not the aggressor, since the other bar patrons claimed that he was. Self-defense is not available to the person who initiates a conflict. *Dunford v. State*, 1985 OK CR 81, ¶ 16, 702 P.2d 1051. In this case, the defendant sought to prove that the victim, consistent with his character, started the fight which led to his shooting. This purpose does not require that the defendant know the victim's character or history, because the defendant is not proving anything about his own state of mind; instead, he is simply trying to prove that the victim acted in conformity with his character.

This duality of purpose has been recognized by the Committee for Preparation of Uniform Jury Instructions. One uniform instruction advises the jury that it may consider whether the "deceased" was a "quarrelsome, dangerous person" for the purpose of determining whether he was the aggressor.

The same instruction advises the jury that it may consider whether the deceased had such a character and whether that character was known to the defendant for the purpose of determining

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[8] Of course, the evidence must be relevant in any event, or it is not admissible. *See* 12 O.S. § 2402.

whether the defendant reasonably believed he was endangered. OUJI-CR 9-11.[9] Given this authority, it appears plain that the evidence of the victims' violent character is admissible.

However, a series of cases from the Oklahoma Court of Criminal Appeals complicates this analysis because they appear to require proof that the defendant knew about the victim's bad character prior to admitting that evidence. For example, in *Conover v. State*, 1997 OK CR 6, 933 P.2d 904, the Court held that evidence of the victim's character was irrelevant, in part, because the defendant did not know of the victim's bad character. *Id*. at ¶ 27.

Likewise, in *Thompson v. State*, 1961 OK CR 105, 365 P.2d 834, the Court held that evidence regarding the victim's violent character was admissible only if "such fact was known to the accused." *Id.* at ¶ 6. More language in *Thompson* indicates that this character is ***only*** admissible to show the defendant's subjective state of mind. *Id.* Prior cases contain similar broad statements. *See, e.g., Roberson v. State*, 91 Okl.Cr. 217, 221, 218 P.2d 414 (1950) (citing cases) Thus, in the case at bar, the State argued that the defendant had to know about the violent character of the victim before he could offer evidence as to that character.

Cases such as *Thompson* and *Conover* illustrate the dangers of offhand statements in appellate opinions.[10] Both are correct, yet incomplete, statements of the law. As noted, *supra*, it is appropriate to require the defendant to prove his knowledge of the bad character of the victim if he is trying to prove his subjective state of mind. After all, an unknown fact is hardly going to impact a defendant's state of mind. However, there is no sound reason for requiring a defendant to know about a trait of character ***if he is not trying to prove anything about the defendant's state of mind***. Proving that the victim was the aggressor because of his bad character has ***nothing*** to do with what the defendant knew or did not know.

This point has been recognized, to some degree, in Oklahoma cases predating the Evidence Code. In *Harris v. State*, 1965 OK CR 29, 400 P.2d 64, the Court noted that "threats made by the deceased, communicated or uncommunicated to the defendant," were admissible. *Id.* at ¶ 23. This evidence is admissible "for the purpose of showing what the deceased probably did, and not what the defendant probably thought the decased was going to do." *Id.* at ¶ 24. An older case recognized that a victim's prior threats to harm the defendant that were not communicated to the defendant would be admissible solely to prove who was the aggressor, and threats that were communicated to the defendant were admissible for both that purpose and to prove the defendant's state of mind. *Jenkins v. State*, 80 Okl.Cr. 328, 339, 162 P.2d 336 (1945). Cases of this type date back to

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[9] The instruction and all of the relevant cases discuss this issue in the context of homicide cases; hence, the specific language in the instruction is worded in terms of addressing the use of deadly force. However, there is no conceptual reason why this type of character evidence cannot be used in any other type of self-defense case where deadly force is not used. Wigmore also reached this conclusion. *See* 1A WIGMORE, EVIDENCE § 63 (Tillers rev. 1983).

[10] Perhaps the most unfortunate attributes of the statements in *Thompson* and *Conover* are that both are *dicta*. In *Thompson*, the Court held that the evidence was insufficient to even raise self-defense as a defense. *Thompson* at ¶ 5. In *Conover*, self-defense was not even raised at trial. Instead, the defendant argued there that the bad character evidence was admissible to prove his motive for the killing (the tried-and-true "he needed killin'" defense). *Conover* at ¶ 25. Neither case involved a self-defense claim actually supported by evidence.

statehood. *See Saunders v. State*, 4 Okl.Cr. 265, 279-80, 111 P. 965 (1910) (same holding as *Jenkins*); *Price v. United States*, 1 Okl.Cr. 291, 297-99, 97 P. 1056 (1908).

This duality of purpose has also been recognized by other courts and commentators. For example, in *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972), the Court noted the dual nature of proof of character evidence. *Id.* at 434-35. As the Court noted, "as to the issue of who was the aggressor it is irrelevant that the defendant did not know about the deceased's character." *Id.* at 434 n.4. This is because, as noted by the Court in *Harris*, when dealing with the question of who was the first aggressor, the issue is one of what objectively occurred, rather than what the defendant subjectively believed. *Id.*

Another example is *State v. Penkaty*, 708 N.W.2d 185 (Minn. 2006). *Penkaty* reversed the defendant's conviction for killing a victim who had a reputation in the law enforcement community for violence. The defendant had not introduced any evidence that he knew of this reputation. However, the Minnesota Supreme Court noted that "a defendant need not have been aware of a victim's reputation for violence to admit the reputation evidence for the purpose of showing that the victim was the aggressor." *Id.* at 201.

Finally, in *Torres v. State*, 71 S.W.3d 758 (Tex. Crim. App. 2002), the Texas Court of Criminal Appeals, in interpreting Texas evidentiary rules identical to Oklahoma's Evidence Code, noted that for the purpose of proving that the victim was the first aggressor, there was no need to prove that the defendant knew about the victim's violent character in order to prove that character. *Id.* at 760-61. As noted by the Court, this approach was consistent with commentators on the Federal Rules of Evidence (from which the Oklahoma Evidence Code, as well as the Texas Rules of Evidence, were drawn). *Id.* at 761 n.5.

Commentators agree that this rule applied under the common law as well as under the more modern evidentiary rules. For example, Wigmore concluded that the victim's "uncommunicated" violent character is admissible to show that the victim was the aggressor, but his "communicated" character may be used to also prove that the defendant reasonably feared harm. WIGMORE, *supra*. The "frequent failure" to distinguish between these two purposes is a source of "much confusion" as to the admissibility of such evidence. *Id.*

McCormick reached a similar conclusion, applying both the common law and the Federal Rules of Evidence. *See* 1 MCCORMICK ON EVIDENCE § 193, n.1 and n.2 (6th Ed. 2006). Limiting the evidence to what the defendant knew, and thus his state of mind, is described as the "minority view." *Id.* at n.2.

Finally, Oklahoma's leading commentator on evidence law tersely opines that "[i]n a homicide case where self-defense is an issue an accused may introduce *any type of evidence* that the victim was a violent and dangerous person." LEO H. WHINERY, OKLAHOMA EVIDENCE § 15.09 (2d ed. 2000) (emphasis in original).

As was noted *supra*, in the case from which this example was drawn, the State used the erroneous statements in *Thompson* and *Conover* and sought to exclude the victims' violent character

from evidence. It should be noted that this effort was initially successful. At the commencement of trial, the trial judge entered an order *in limine* barring the victims' character from evidence. Only after being pressed to reconsider this ruling did the trial court finally admit their character into evidence. Quite simply, the trial court was afflicted with the same confusion noted by Wigmore, resulting from a lack of careful reasoning by the Oklahoma Court of Criminal Appeals. Once it came around, however, the trial court correctly limited the evidence for this purpose to opinion and reputation evidence, pursuant to 12 O.S. § 2405(A).[11]

Victim's character evidence does not come without risks. When you attack a victim's character, you open the door to evidence of his good character, evidence which is generally inadmissible until the defendant opens the door. *See* 12 O.S. § 2404(A)(2) (prosecution may rebut bad victim character evidence with good victim character evidence); *Smith v. State*, 1982 OK CR 89, ¶ 25, 656 P.2d 277 (error to admit good character evidence of victim during prosecution's case in chief).

It is a rare case where, as in our example, the victim's own mother will not come and offer good character evidence for her son (a point made by the author in closing arguments, for all the good it did). However, when such a rare case occurs, evidence of a victim's character should not be ignored any more than any other evidentiary tool in the defense attorneys' toolbox. But just like any other tool, you want to make sure you don't wind up hitting your thumb instead of the nail you've targeted.

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[11] Prior to the Evidence Code, Oklahoma cases commonly held that specific acts could be offered for this purpose. *See*, *e.g.*, *Harris*, *supra* at ¶ 23 (affirming admission of uncommunicated threats for purpose of proving victim's aggressive character). Notwithstanding Professor Whinery's broad statement to the contrary, both under the common law, Federal Rules, and the Evidence Code, the proper approach as dictated by the black letter of the Rules and Code, is to permit reputation and opinion evidence only when the character evidence is offered to show action in conformity therewith. MCCORMICK, *supra* at n.3.