

THE IMPACT OF 911

LEVERAGING 911 CALLS AND
ASSESSING ADMISSIBILITY

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OUR OBJECTIVES



To showcase the common types of 911 calls to...

Collect & Review
Valuable
Evidence

Develop &
Exhaust
Investigative
Leads

Inform Arrest
Decisions

Guide Prosecution
Intake & Case
Filings

Develop
Pre-Trial & Trial
Strategies &
Considerations

Support
Evidence-Based
Prosecution

PEOPLE CALL 911 WHEN...

The event has
escalated or is
escalating.

Their normal
ability to cope is
overwhelmed.

They are scared
for their own
safety or for the
safety of others.

No one asks to be a part of the criminal justice system.

REMEMBER

911 Operators are triaging for the safest response.

They are NOT investigators nor thinking in an investigative mindset.

However, detailed notes can significantly impact the response.



REMEMBER



As officers respond their SOLE focus is and must be safety.

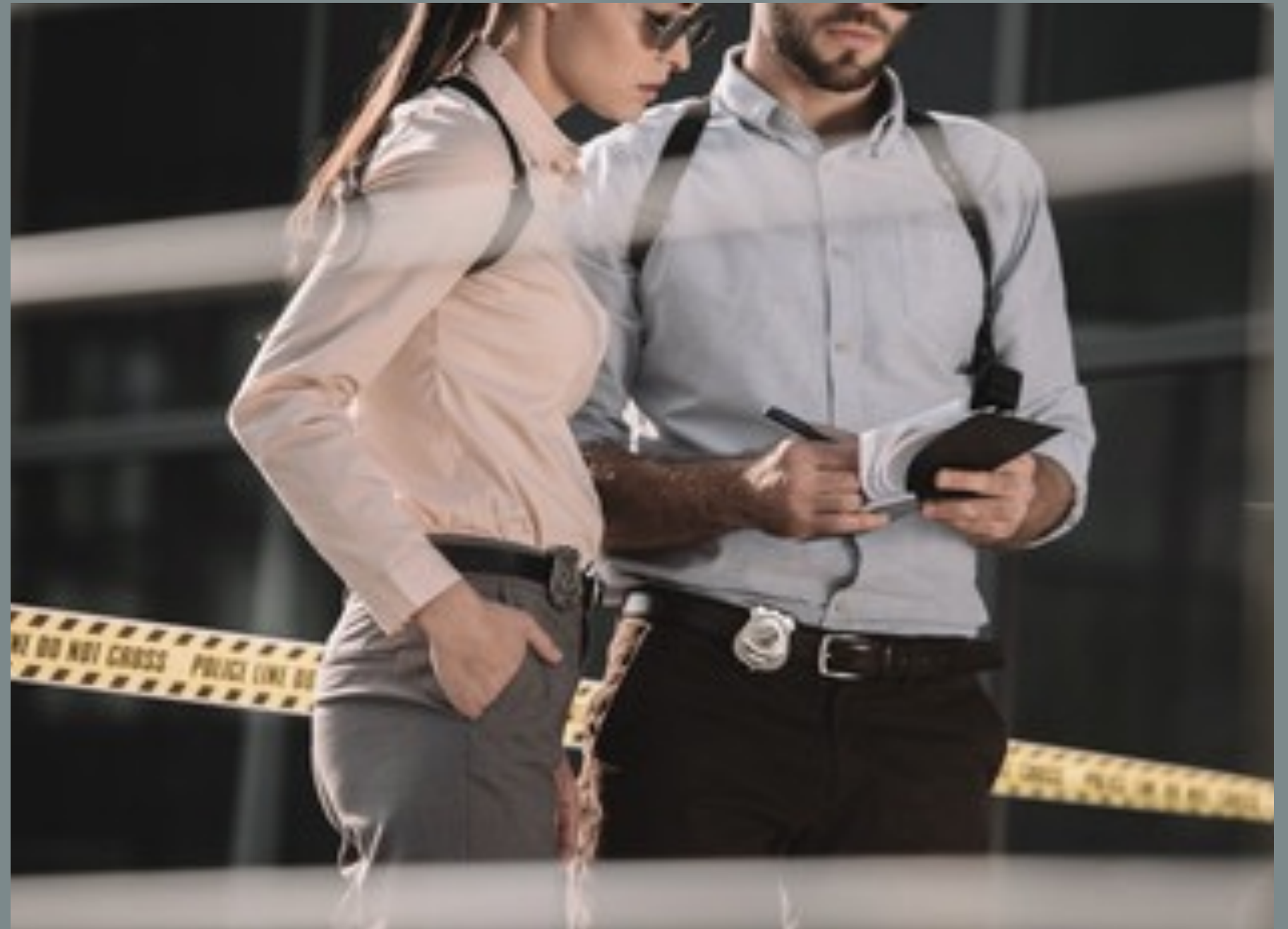
They are NOT thinking in an investigative mindset.

Before concluding an investigation, the officer should:

- Review the dispatch notes
- Consider listening to the 911 call

DETECTIVES

Investigators responding to a scene should prioritize listening to the 911 call(s) PRIOR to starting the scene investigation or conducting any interviews.



DETECTIVES



Important details are often left out of the CAD/Dispatch notes.

911 calls should ALWAYS be reviewed and archived as part of the follow up investigation AND investigators should...

- Document the information
- Document the emotions
- Document what's heard beyond the caller's words.

PATROL ARREST

Protocols are needed to designate responsibilities for archiving the 911 recordings for any case not automatically assigned to a detective for follow up.



DISPATCH PROTOCOLS



Be aware of
retention
periods.

Consider
archiving
records for
Domestic
Disturbances /
Non-Criminal
events.

Be aware of
appended call
notations & how
to collect all
information.

Consider searching archives by location & phone number in addition to
known incident numbers.



DISPATCH NOTES



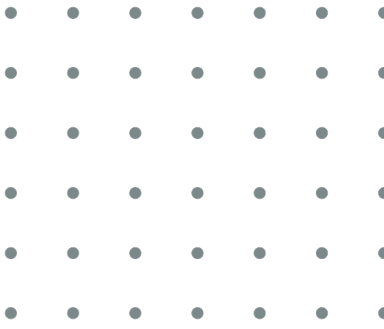
Generated for
safety triage.
Information can
be incomplete.

Notes don't
always represent
emotionality,
urgency or fear.

May contain other
agency reference
numbers &/or are
a source to
request these.



CAUTION NOTES



Extract
TCIC/NCIC or
other noted
safety cautions.

Document in
report & PC
Affidavit.

Relay this
information in
BOLO's &
Requests to
Apprehend.

Consider adding caution notes to an address for high-risk indicators
and/or with other pertinent information

CALL RECORDINGS



Recreate the
experience.

Aid the
investigation.

Help
juries/judges
understand the
crimes.



EMOTIONALITY



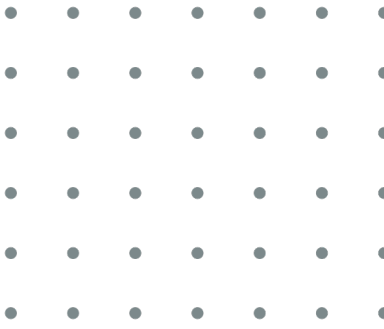
Include these
details in reports
and PC
Affidavits.

Helps to
understand the
significance of
an event for all
who read.

Helps
prosecutors
triage
admissibility.



STATEMENTS



Can be
admissible
evidence at trial.

Can help assess
fear & risk
factors.

Can give insight to
develop interview
and other
investigative
strategies.



STATEMENTS

Can help
develop
investigative
leads.

Can be used in
PC Affidavits.

May place a
subject on scene
and/or provide
evidence of
flight.

EXTRACT

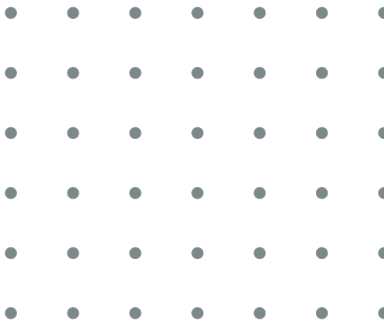
Suspect
descriptions.

Known
locations.

Known
vehicles.

Note these in your report.
They can later aid apprehension or future investigations.

EVIDENCE OF THE RELATIONSHIP



He's my husband
or (ex)boyfriend

He lives here /
used to live here.

He's my child's
father.



WITNESSES



ALWAYS
identify &
interview these
callers.

Explore the
relationship to
the parties.

What historical
knowledge do
they have?



WITNESSES



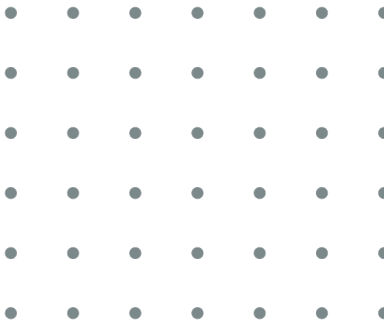
Capture what
they observed
and how they
felt about what
they saw.

May provide
insight to develop
interview and
other
investigative
strategies.

Can hold greater
weight when
they are an
uninvolved third
party.



DELAYED REPORTS



Don't be afraid
to investigate
them!

Often require
more efforts &
have a greater
chance to be
challenged.

Successful
prosecution
relies on the
corroborating
evidence.



ELECTRONIC DATA



Take photos of
call logs and text
messages.

Be sure to get
metadata with
citizen-provided
photos and
videos.

Assess for data
from other types
of electronics.

Consider Search Warrants.



MEDICAL RECORDS



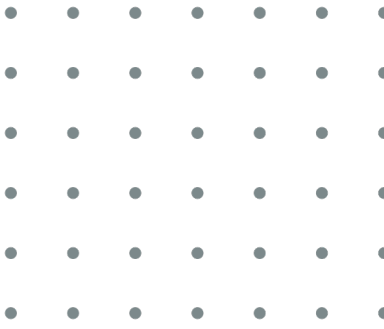
EMS Patient
Care Records

Hospital
Records

Ask about any
other medical
care during
during follow up
interviews.

Consider patient consent, subpoenas, and/or search warrants.

HISTORICALS



“This isn’t the
first time I’ve
had to call the
police.”

“He has an EPO
& a pending
court case.”

“He always hides
when I call the
police.”



HISTORICALS



Can establish
patterns of
domestic
violence.

Help assess risk
factors.

Be sure to notate
and archive with
new cases.



PROSECUTOR COLLABORATION



Probable
Cause and
Charging
Decisions

Relaying new
information
when cases are
pending.

Relaying High
Risk Factors

While Probable Cause is an officer's threshold, they should always investigate from a Beyond a Reasonable Doubt mindset.

When Probable Cause is met, SAFETY of the victim should be the priority!



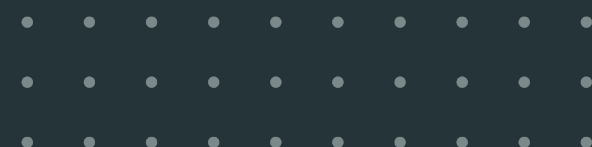
OTHER CONSIDERATIONS

Check with Dispatch for retention periods and recording practices (Admin calls vs. 911 calls).

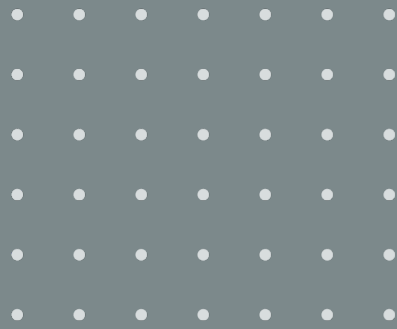
Learn how your Dispatch system documents multiple callers for the same event. (Appended notations)

Consider archiving recordings for Disturbances / Non-Criminal events when there is any suspicion or evidence of domestic violence.

What we archive today can become tomorrow's evidence.



CASE STAFFINGS



Prosecutors and investigators should develop standards on what files are needed when staffing cases.

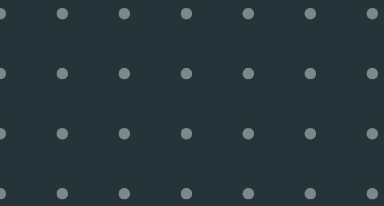
911 calls should always be a part of a staffing.

Urgent cases can be handled on a case-by-case basis.

Prosecutors should review 911 calls as a part of their case staffing.

Considerations should extend beyond whether there is probable cause.

When probable cause is sufficient, safety should be a priority consideration.



ADMISSIBILITY



A 911 call is a **BUSINESS RECORD**.

Texas Rules of Evidence 803(6)
Porter v. State, 623 S.W.2d 374
(Tex. Crim. App. 1981).

The State is **NOT** required to present the 911 caller or the 911 call taker (or both) as witnesses to admit the records...

Texas Rules of Evidence 803 and 902(10)

911 callers and 911 call takers are impactful witnesses and should be called to testify anytime they are available to do so.



REQUIREMENTS



Two Hurdles to Overcome to Make a 911 Call Admissible:

1. The call is authentic
2. The contents of the call are admissible



REQUIREMENTS: AUTHENTICATION



1. The call must be authenticated as a record kept in the ordinary course of business.

Texas Rules of Evidence
803(6)(A-C)

This can be done with:

- a) A properly and timely served Record and Business Records Affidavit.
- b) The Custodian of Records can testify to the same information that would be provided in the Affidavit.

Texas Rules of Evidence
803(6)(D) and 902(10)



REQUIREMENTS: CONTENTS

2. The contents of the call must also meet the applicable rules for admissibility.

Typical content objections are for

- Confrontation
- Hearsay
- Hearsay within hearsay

Most of the time, the majority of the content will be NON-TESTIMONIAL and will also have hearsay exceptions.

Texas Rules of Evidence

U.S. Const. amend. VI

Tex. Const. Art. I, §10

Tex. Code Crim. Proc §1.05

DEFENDANT'S CONFRONTATION RIGHTS

A defendant has a 6th Amendment right to confront the witnesses against him.

However, a Defendant does not have a right to confront the witness if the statements made by the witness are considered **NON-TESTIMONIAL**.

Crawford v. Washington, 541 U.S. 36 (2004)

Davis v. Washington, 547 U.S. 813 (2006)

CASE LAW



Crawford is the Supreme Court case that distinguishes out-of-court statements as either:

- Testimonial – subject to Confrontation Clause;
- Non-Testimonial – **NOT** subject to Confrontation Clause.

Davis came after *Crawford* to clarify the rules for non-testimonial statements.

Through *Crawford* and *Davis* (and lots of additional progeny) it is abundantly clear that any non-testimonial statements are completely outside the scope of the Confrontation Clause.

TESTIMONIAL

Testimonial statements include those in which “State actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial”

However, the degree of “formality” of the statement is not controlling.

Michigan v. Bryant, 562 U.S. 344, 358 (2011) *citing Crawford*, at 43–44.

More important are the State actors (police, prosecutors, etc.)

AND

an objective expectation on the part of the declarant that the statements would be used in subsequent prosecution.

TESTIMONIAL



Additional types of statements considered
testimonial:

- Affidavits
- Certifications
- Lab reports prepared for evidentiary purposes
- Testimony at court proceedings
- Plea allocutions

Crawford v. Washington, 541 U.S.
36 (2004)

Wall v. State, 184 S.W.3d 730
(Tex. Crim. App. 2006)

Davis v. Washington, 547 U.S. 813
(2006)



NON-TESTIMONIAL



NON-Testimonial statements are out-of-court statements that are generally less formal and are not intended to establish past events for a future prosecution.



NON-TESTIMONIAL



Statements made to a 911 dispatcher or police officer at the scene of a crime in progress are NON-testimonial because the primary purpose is to address the **ongoing emergency** and are seen as a “cry for help.”

Davis held a victim’s statements to a 911 operator were “speaking about events as they were actually happening rather than describing past events.”

Sometimes, non-testimonial statements can evolve into testimonial statements so you may have to redact out that portion.

Davis v. Washington, 547 U.S. 813 (2006)



NON-TESTIMONIAL



The key factor is determining if there was an **ongoing emergency**.

Davis established a “primary purpose test” an objective standard where the court evaluates:

The purpose that reasonable participants would have had, as ascertained from the parties’ own statements and actions, and the circumstances in which the encounter occurred.



NON-TESTIMONIAL



Factors the Court should consider are:

Location – Crime scene vs. police station, etc.

Time – During/immediately after the emergency vs. delayed report– has there been time for reflection on the events.

Existence of a necessity to “end a threatening situation.”

Necessity to end threat:

- A threat to the public.
- Involvement of a weapon.
- A victim’s medical condition.
- The need for first responders to judge the existence and magnitude of a continuing threat to the victim/witness and the public, by questioning the victim/witness.
- Informality of the encounter.



NON-TESTIMONIAL



If the emergency event has stopped, it **COULD** impact whether the statement is non-testimonial.

If the emergency event could continue or start again, the statement should still be considered non-testimonial.

- Could the assailant start hitting the victim again?
- Could the assailant return and start hitting the victim again?
- Are there ongoing medical concerns?



NON-TESTIMONIAL

Preliminary statements to police on scene are generally considered non-testimonial because they are necessary for responders to assess the situation and determine if an emergency situation was ongoing.

Wilson v. State, 296 S.W.3d 140
(Tex. App.—Houston [14th Dist.]
2009, pet. ref'd)

Clark v. State, 282 S.W.3d 924
(Tex. App.—Beaumont 2009, pet.
ref'd)

Avant v. State, 499 S.W.3d 123
(Tex. App.—San Antonio 2016, no
pet.)

NON-TESTIMONIAL



Helpful caselaw for 911 calls:

Statements made during 911 calls are typically nontestimonial because they are a cry for help.

Though statements on 911 call described assault that happened 10–15 minutes before, victim was facing ongoing emergency because she was injured and feared defendant would return.

Spontaneous statements to the police are not testimonial. Case also provides a thorough discussion about statements in 911 calls and Texas caselaw.

Kinnett v. State, 623 S.W.3d 876
(Tex. App.—Houston [1st Dist.]
2020, pet. ref’d)

Santacruz v. State, 237 S.W.3d 822
(Tex. App.—Houston [14th Dist.]
2007, pet. ref’d)

Ruth v. State, 167 S.W.3d 560
(Tex. App.—Houston [14th Dist.]
2005, pet. ref’d)

HEARSAY

Once you've overcome the Confrontation Objection you **STILL** need to prepare to overcome Hearsay objections.

If the 911 call is non-testimonial because it is an ongoing emergency, most likely you also have hearsay exceptions:

Present sense impressions

Excited utterances

Then-existing mental, emotional, or physical condition

And more...

Texas Rules of Evidence
803

OTHER OBJECTIONS



Any other objection a defense attorney may raise should **go to the weight of the evidence, not the admissibility.**

The court must decide any preliminary question about whether evidence is admissible

This is a threshold question, and the court should merely decide whether the proponent of the evidence has supplied facts that are sufficient to support a reasonable jury determination that the evidence proffered is authentic.

“The factfinder exclusively determines the weight and credibility of evidence.”

Wise v. State, 364 S.W.3d 900,
(Tex. Crim. App. 2012)

**Texas Rules of Evidence
404**

Tienda v. State, 358 S.W.3d 633
(Tex. Crim. App. 2012)

FORFEITURE BY WRONGDOING

Under the doctrine of forfeiture by wrongdoing, a defendant is barred from asserting either Confrontation Clause or hearsay objections to the admission of an out-of-court witness's statements where the defendant wrongfully procured the unavailability of the witness.

Giles v. California, 554 U.S. 353
(2008)

Tex. Code Crim. Proc. §38.49

FORFEITURE BY WRONGDOING

Prosecutors must show by a preponderance of the evidence:

The witness is unavailable (despite due diligence);

The defendant engaged in wrongful conduct that made the witness unavailable;

The defendant intended to make the witness unavailable through that conduct;

Giles v. California, 554 U.S. 353
(2008)

Brown v. State, 618 S.W.3d 352
(Tex. Crim. App. 2021)

Tex. Code Crim. Proc. §38.49

FORFEITURE BY WRONGDOING

Evidence that helps prosecutors show the defendant threatened or coaxed the victim to prevent her from testifying:

- Promises to change
- Appeals to emotions
- Bribes
- Threats of further violence
- Violations of protective orders/bond conditions
- Pressure from family members
- Prior acts of violence
- Prior threats of abuse
- Ongoing patterns of abuse

See Giles,

Mohsin v. State, 691 S.W.3d 193
(Tex. App.—Austin 2024, pet.
ref'd)

Brown v. State, 618 S.W.3d 352
(Tex. Crim. App. 2021)

FORFEITURE BY WRONGDOING



Prosecutors find this type of evidence in:

- Jail calls
- Involvements
- Assault Victim Statements
- Lethality Assessments
- Protective Order applications
- Testimony from friends, family, neighbors, coworkers
- Medical records
- VAC notes



CHARACTER EVIDENCE



Generally, character evidence is not permissible to prove that on a particular occasion the person acted in accordance with the character or trait; but may be admissible to prove:

- Motive
- Opportunity
- Intent
- Preparation
- Plan
- Knowledge
- Identity
- Absence of mistake
- Lack of accident

Texas Rules of Evidence
404



38.371



Each party may offer testimony or other evidence of all relevant facts and circumstances that would assist the trier of fact in determining whether the actor committed the offense, including testimony or evidence regarding the nature of the relationship between the actor and the victim.

Does NOT permit character evidence that would otherwise be inadmissible under TRE or other applicable law.

38.371 IS automatically one of the contemplated and non-exhaustive relevant facts and circumstances under statute governing the admissibility of evidence that would assist in determining whether defendant committed certain family-violence offenses.

Fernandez v. State, 597 S.W.3d 546, 566 (Tex. App.—El Paso 2020, pet. ref'd)



38.371



Includes evidence that:

Explains why a victim is unwilling to cooperate with prosecution

Confirms the victim’s initial—and later recanted—statements to police

Contextualizes the nature of the relationship between the victim and assailant

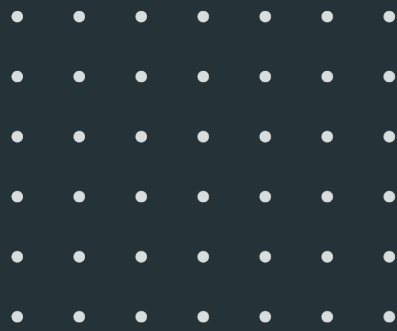
Fernandez v. State, 597 S.W.3d 546, 566 (Tex. App.—El Paso 2020, pet. ref’d)

McDonnell v. State, 674 S.W.3d 694 (Tex. App.—Houston [1st Dist.] 2023, no pet.)

Brickley v. State, 623 S.W.3d 68 (Tex. App.—Austin 2021, pet. ref’d)



WHY DOES ALL OF THIS MATTER?



Knowing the admissibility of the information collected helps focus on conducting evidence-based investigations.

Information becomes evidence when it holds legal admissibility.

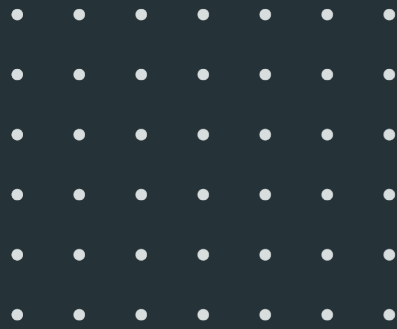
Just like in a homicide case, prosecutors can seek justice even when a victim is unable to participate.

EVIDENCE
BASED
INVESTIGATION

=

EVIDENCE
BASED
PROSECUTION

WHY DOES ALL OF THIS MATTER?



911 callers don't want to be a part of the Criminal Justice System.

They only want the bad things to STOP.

Even if a survivor chooses not to participate, it doesn't mean we can't investigate, charge & prosecute a crime against them.

911 calls help gain insight into the dynamics of the relationship.

911 calls can help develop investigative leads.

Information can be extracted from 911 calls to aid apprehension.

911 calls can aid case triage.

911 calls can hold evidentiary value.

Knowing when & how to admit them in court is invaluable.

911 calls shouldn't be overlooked.

Ultimately, 911 calls can hold abusers accountable.



We owe it to survivors, past, current, & future, to give our best efforts
to help keep them safe.