I am getting ready to try a felony DWI related offense. I successfully moved to have a warrantless blood draw (the admission of which has the potential to be damming) suppressed from evidence. No wreck but an apparently disinterested person called the police and followed client to a gas station where the police contact occurred. Client refused to perform all FSTs and was arrested.

I want to make sure that I do not open the door to the admission of evidence regarding that blood draw. Areas that I am concerned about:

1. Stating affirmatively in opening or close that client was not intoxicated - I worry that doing this would open the door.
2. Cross of officer regarding "signs of intoxication". I intend to make the case that client was nervous. I believe that I can imply this through cross without opening the door, but fear that anything too affirmative may open the door to that blood draw.
3. Client testimony - I believe that if Client chooses to testify and make any statement along the lines that he was not intoxicated, this may open the door.
4. Any other areas I am not thinking of

I have researched the issue and have not found anything on point. I found this language from the 6th Circuit. "Generally, evidence which is otherwise suppressed or excluded becomes admissible when the defendant opens the door to the issue." United States v. Crawford, 86 F. App'x 834, 838 (6th Cir. 2004). I have not found any Texas, or Fifth Circuit, case law specifically regarding suppressed evidence. I would also prefer not to have this case be the source of any future case law on that topic if I can help it.

Any advice, including past experiences or appellate decision case cites, would be very helpful and appreciated.

Thank you in advance for your wisdom.

Sincerely,

Kyle Verret
Opening the door is much more of a concern when dealing with evidence being kept out under 404b or even 403, not based on 4th amendment issues. Short of explicitly saying that there was a test and that it was under .08, it's hard to imagine how you open the door.

- Sent from the phone of David Hardaway

Just don't mention the test at all to be on the safe side.

- Sent from the phone of David Hardaway

I agree with David. I don't think the issues you are talking about will open the door and you have to say them to properly defend the case.

Things you can't say are on the lines of:

1. The State could have offered my client a blood test;
2. The State could have gotten a warrant for a blood test;
3. If we had a blood test we would really know;
4. No blood test equals reasonable doubt;
5. things like that.

my .02 cents

Sharon Curtis
And I think Greg Westfall's "Guerrilla Guide to Evidence" (pdf) has a whole section on "opening the door." it's available on the Web, so just search for it by title / author.

Just a thought, but I don't see an exception under CCP Art. 38.23 for a defendant to open the door. I did a quick search but didn't find any cases on point.

Best Regards,

Bart Craytor

Thank you.

That is a good argument.

What has me concerned is that the DAs witness list has all the blood evidence witnesses listed.

After some thought I know that I can safely contend "no loss of mental or physical faculties" and just not mention the .08 language at all. With intoxication having the loss of facilities and .08 definition, I think that it would be an abuse of discretion on the trial court's part to admit the blood absent at least one warning that he thought I might be opening the door. Then I can argue no 38.23 exception and Fourth Amendment.

Kyle Verret

Found the case in point:

Robbins v. State, 696 S.W.2d 689
HN3 Although the laws of a state may not be less protective than the Constitution, they may be more protective. Brown v. State, 657 S.W.2d 797. Therefore, although, appellant may not have had a valid constitutional challenge to his conviction under Havens, 446 U.S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559, and Jones, 632 S.W.2d 646, we sustain his statutory challenge. HN4 The plain language of article 38.23 states that illegally seized evidence shall not be "admitted into evidence." The statute does not limit itself to the State's case in chief and we are not free to do so.

Kyle Verret

Date: Monday September 15, 2014 - 7:51
From: ltbradt@flash.net

Look at Walder v. U.S., 347 U.S. 62 (1954). Defendant's testimony on direct that he had never possessed any narcotics opened the door to heroin, that had been suppressed, being used solely for impeachment.

If your client testifies that he hadn't had any alcohol to drink, then the blood draw comes in, in my opinion. Testifying that he was not drunk would, in light of the present composition of the CCA, probably open the door too. My $0.02 worth.

Butch Bradt

Date: Monday September 15, 2014 - 11:02
From: bcraytor@gmail.com

Butch,

The Dallas Court of Appeals in Robbins takes the view that the statutory protections are more protective than the Constitutional protections. While I have yet to see a CCA case, I do think it is a viable argument.

Bart Craytor

Date: Monday September 15, 2014 - 11:09
From: GVelasquez@epcounty.com

Look at the following case:

Coutta v. State, 385 S.W.3d
Aggravated promotion of prostitution and three counts of engaging in organized criminal activity from the 243rd District Court, El Paso Count. Affirmed.

1. Opening the Door -- Opening Statement

Defense Counsel said in his opening statement that if the dancers were engaging in prostitution in the private rooms, they were doing so on their own and that the Defendants did not get any money from prostitution because the dancers were receiving the money directly from the patrons. He made the same claim during cross-examination of the club's managers. The trial judge had previously granted a motion in limine excluding the video recordings of the private rooms. The State argued that Counsel "opened the door" to admission of these recordings to rebut Counsel's claims that the dancers were receiving money directly from the patrons - the recordings showed that no exchange of money occurred between the dancer's and the patrons.

Evidence that is otherwise inadmissible may become admissible if a party "opens the door" to such evidence. Williams v. State, 301 S.W.3d 675, 687 (Tex.Crim.App. 2009), cert. denied, ___ U.S. ___, 130 S.Ct. 3411, 177 L.Ed.2d 326 (2010).

The Court of Appeals held: (1) Appellant opened the door to the admission of Cisneros' video by her opening statement, in which she proffered a defensive theory that if the dancers were committing prostitution, Appellant and the Naked Harem did not realize profits from that activity because the dancers were receiving the money directly from the patrons. See Bass v. State, 270 S.W.3d 557, 563 (Tex.Crim.App. 2008) (defendant's opening statement may open the door to otherwise inadmissible evidence to rebut a defensive theory presented in that opening statement); see also Gaytan v. State, 331 S.W.3d 218, 225 (Tex.App.-Austin 2011, pet. ref'd) (if opening statement presents a defensive theory, it opens the door to rebuttal evidence). The video recordings show that no exchange of money occurred between the dancers and patrons in the private room in addition to the patron's up-front payment of the fee to the club to gain admission to the private room, and was directly relevant in rebutting Appellant's defensive theory proffered during her opening statement.

See also Stewart v. State, 129 S.W.3d 93, 96 (Tex.Crim.App. 2004) (evidence need only provide small nudge toward proving or disproving a fact)

2. Opening the Door -- Cross-Examination

The Court of Appeals held: Appellant also opened the door to the admission of Cisneros' video recordings through her cross-examination of the State's witnesses by suggesting that
the dancers were negotiating their own price for sex in the private room in addition to the Naked Harem's fee for the "private dance," and by suggesting that the used condoms and semen in the private room were the result of patrons masturbating in the private room. See Wells v. State, 319 S.W.3d 82, 94 (Tex.App.-San Antonio 2010, pet. ref'd); Houston v. State, 208 S.W.3d 585, 591 (Tex.App.-Austin 2006, no pet.) (defense counsel's cross-examination of a State's witness that leaves a false impression as to some fact may open the door to admission of otherwise inadmissible evidence to correct the false impression). Appellant's cross-examination created the impression that sex was not the norm when a dancer and a patron entered a private room, that any dancers who were committing acts of prostitution were negotiating and charging extra fees for the activity, and that used condoms and semen that were present in the private rooms were the result of patrons masturbating. Such implications authorized the State to reply by seeking the admission of Cisneros' video recordings which showed no exchange of money between the dancers and patrons in the private room either before, during, or after they had sex, rather than patrons merely masturbating. Appellant's cross-examination of the State's witnesses also elicited speculation about what may have been occurring within the private rooms and opened the door to admit the video recordings for the purpose of showing exactly what was happening between dancers and patrons therein. See Cameron v. State, 988 S.W.2d 835, 847 (Tex.App.-San Antonio 1999, pet. ref') (defendant's testimony regarding events regarding car bombing opened the door to admission of video recording showing the car bombing, even though the trial court had previously ruled the recording to be inadmissible). Consequently, Appellant has failed to show that the trial court erred or abused its discretion by determining that she opened the door to the admission of the Cisneros video recordings.