Witness Edmonds credibility: witness character: untruthfulness.

## X. Witness Impeachment

A. Introduction

Who can impeach:

R 607: “the credibility of a witness may be attacked by any party, including the party calling the witness”

Terms:

“target witness”: witness who one is trying to impeach

“character witness” witness who knows target witness’ character for truthfulness, can be adverse or supporting

Methods:

1. Show why the target witness may lie or misstate, misperceive or misremember,

2. show that the target witness said something different before, or contradicts someone or something else in the case.

***4. Bias or Motive to Falsify***

* Rules:
  + **can impeach with bias – i.e., whether witness has motive to falsify** (being pay to testify, have personal relationship with parties, etc.)
  + **bias considered highly probative 🡪 typically allowed in, and allowed to prove with extrinsic evidence under 403.**
* Examples:
  + expert witness: on cross, can inquire into how much money they are being paid for their services.
  + relationships: *Abel* – allowed to inquire into, and prove up, membership in Aryan Brotherhood as gives rise to motive to falsify to protect fellow “brother.”
  + *Olden* **–** not being able to inquire into motive to falsify by “rape shield law” violate right to effective defense.
  + *Davis v. Alaska* – D’s right to effective defense means he must be able to inquire into juvenile crimes (though prohibited by statute) if gives rise to motive to falsify

B. Character for untruthfulness

1. in general

*U.S. v. Lollar* (5th Cir 1979)

F: D tried for transporting stolen property, testifies in own defense. State offers adverse character testimony from former employer: “would you believe D under oath?” “No”

I: permissible Q?

A: bc D testified in own defense, his credibility and character for truthfulness became an issue. Q was permissible.

HYPO: What if Q was “Do you think he lied just now?” Impermissible under 608b. Cannot ask about specific instances on direct, only about general character/reputation for truthfulness.

*U.S. v. Ling* (4th Cir. 1978)

F: D tried for making illegal drugs, trial ct admits guns seized from D, D testifies in own defense: “I was going to sabotage the operation” State on cross-exam. Of Ling asks: “Have you ever fired a gun on a public street?” “No” State then calls Off. McKenny to testify about D’s arrest for firing gun on public street.

I: is officer’s testimony permissible?

R: 608b- specific instances of conduct of a witness, for the purpose of attacking or supporting the w’s character for truthfulness, other than conviction of a crime per 609, may not be proved by extrinsic evidence.

A: Officer’s testimony was extrinsic to Ling and used to show character for truthfulness.

Not allowed.

*U.S. v. White* (5th Cir 1992)

F: D tried for drug charges, state’s key witness is Northcutt. D’s offer testimony from Northcutt’s former lawyer to challege N’s credibility. N’s lawyer: “N offered to perjure himself to get lenient treatment”

I: Proper admission?

A: N’s lawyer’s testimony is being offered to challenge N’s credibility. Testimony is about a specific act. Under 608b can’t use extrinsic evid of specific act for this purpose.

HYPO: N later tried for perjury- admissible bc party-opponent admission

2) attacks on character for truthfulness with other bad acts: §608(b).

* + - **non-conviction prior bad acts are admitted subject to 403.**
      * probative factors: lying act more probative; the importance of the credibility in context; availability of other forms of impeachment
      * prejudice: some acts (eg, sexual abuse) more prejudicial; concern jury will make “birds of a feather” adverse inference to accused.
      * drug use, prostitution, litigiousness (*Hemphill*) typically excluded to impeach character for truthfulness as not probative enough.
    - **§ 608(b): can’t prove up using extrinsic evidence.**
      * Eg, if ask “didn’t you defraud x in the past?” and he says no, that’s it.
      * concern of creating confusing “mini-trials”
      * extrinsic evidence limitation only applies to other bad acts under character for truthfulness (not contradiction, bias, etc.)

**II. Character Evidence**

**A. In General - § 404, 405**

* Rule:
  + **§ 404: Evidence of a person’s character is *not*** **admissible to show conformity therewith.** Exceptions:
    - (1) accused can bring up own character in defense (criminal cases only)
      * BUT: then “opens the door” for P to rebut on that trait.
    - (2) accused can attack character of victim (criminal cases only)
      * BUT: this opens door for direct rebuttal and rebuttal against same trait of *the D.*
    - (3) character used for impeachment treated under separate rules § 607–09.
  + **Other exceptions:**
    - a) when character “in issue”
    - b) habit is admissible under 406, see infra.
    - c) when proponent can find a “not for character” purpose.
      * “Not for character” purposes:
        + eg, state of mind. See list under prior bad acts
  + rationale of rule: though probative, looking to prior acts/ character of D is prejudicial. Turns trial into popularity contest of whether jury thinks D is a good person or not.
    - exceptions 404(1) and 404(2) justified as “rules of mercy”
  + **§ 405(a): When character is admissible, can only be proven through opinion and reputation.** 
    - **But, on cross, specific acts allowed.**
    - **and (b) if character in issue, then specific acts can be used.**
* Rmks:
  + 1) “character in issue” = character trait is material, consequential fact in determining rights and liabilities of parties. A essential element of claim or defense.
    - eg, defamation case. If D called P a liar, P needs to show he is not a liar to prevail (as truth is a defense). Character in issue, and P can use specific facts.
    - eg2, negligent hiring. To show that D should not have hired a person, will be necessary to prove D should have known that had bad character (eg, was a sex criminal), and so will need to prove this character trait.
    - eg3, child custody. Being a good parent in issue.
  + 2) in civil cases: no circumstantial use of character evidence. Only “in issue” allowed.
  + 3) in criminal cases: govt can’t use character evidence unless D has opened the door.
  + 4) Accused can only bring up character trait of his or victim if “pertinent”
    - “pertinent” = relevant to case. Thus honesty admissible by D in forgery case, but not in assault case,
  + 5) Scope of “opening the door”
    - if D brings up own trait, P can only respond with evidence to disprove that trait.
    - but if D bring up trait of the victim, and expended principle applies: P can retort directly, and bring up same trait of D.
    - sometimes even statements like “I’m devoted to my family” or “he couldn’t have done it’ will be construed so as to open the door.
  + 6) “opinion testimony and reputation”
    - i.e., you call a witness to say “I known him for x years, and he’s an honest person. He has a reputation for honesty” but can’t talk about anything he’s done.
    - But, on cross, can probe specific acts: “So you say he’s honest. Did you know that he [did x dishonest thing]?”
  + 7) Since D can only use opinion and reputation, and it opens a lot of unfavorable doors, most D rarely invoke their rule of mercy.

**B. Prior Bad Acts - § 404(b)**

* Setup: P attempts to admit prior bad acts for not-for-character purpose. Two battles:
  + 1) opponent will argue that it’s not really for the proper purpose.
  + 2) If loses 1), opponent will make motion that it should be excluded under 403.
  + this is the mot litigated rule of evidence.
* Rule:
  + **§404(b) – evidence of prior crimes, wrongs, or other bad acts are not admissible to show conformity therewith. BUT: they are admissible if for other “not for character” purpose.**
    - even if admitted under 404(b) as proponent can find a not-for-character purpose, the opponent can still make a 403 objection whether it should be admitted.
  + **“Not For Character” purposes:**
    - **1) State of Mind** – if claim duress, ignorance, accident, can use specific acts to refute.
    - **2) Intent –** to show D had requisite intent.
    - **2) “Completing the Narrative”** – to provide contest and prevent speculation
    - **3) Motive** – to understand reasons why D would want to commit crime.
    - **4) Identity** – to show it was D and not another who committed the crime. Must be a unique “signature”-type M.O.
  + **The *Huddleston* requirement** – if D claims he didn’t do the bad act in question, treated as an issue of conditional relevance under 104(b).
    - **P must make showing to judge, by a preponderance of the evidence, that some reasonable juror could find that D had committed the act.**
    - A low standard: Ds rarely contest this after *Huddleston*.
  + **Notice requirement: P must let D know if intend to use prior bad acts under 404(b).**
    - reasoning: let D prepare response, let issue be decided out of earshot of jury.
    - D, however, need not inform P.
* Rmks and Examples:
  + 1) State of Mind examples:
    - duress defense: *Hearst* – D claims robbery excused by duress. P can bring up prior bad act, where she was clearly not under duress, to show that she is not under duress in the instant case.
    - accident defense: *Woods* - D claims baby’s death an accident. P allowed to admit prior cases where babies D watched turned blue, to negative defense of accident. Similar bad acts often found admissible in accident cases.
    - ignorance: “I didn’t know it was cocaine.” P can show prior cocaine dealing to rebut defense.
  + 2) Intent cases:
    - *Beechum* – postman claims he didn’t mean to steal mail. Govt wants to admit also found other pieces of stolen mail, to prove he did have intent.
    - possession with intent to distribute cases: close call.
      * P wants to introduce prior convictions to prove intent to distribute. Seems awfully close to propensity inference, but courts have allowed it. Other courts reject under 403.
        + ***Crowder*** – P doesn’t have to accept a stipulation of intent in these cases. Limits *Old Chief* to its facts.
  + 3) Completing the Narrative cases:
    - *Steinberg* – murder of child case – he beat he and left, and she dies hours later. Govt wants to introduce he beat mother as well, so won’t speculate she should have intervened (goes to causation). Allowed.
  + 4) Motive cases:
    - *Potter* – D charged with distributing prescription drugs. To prove motive, P wants to introduce he was trading them for sex. Allowed.
      * but: can’t stretch this too far. Eg, in theft case, show he was drug dealer so that’s why he needed money. Should only be used when motive unclear – here, everyone needs money.
  + 5) Identity cases:
    - must be committed in a “signature” way – eg, D kills business partner with mixture of Drano and urine injection.
      * can’t be something completely generic, like it this robbery a ski mask was worn, as well as a prior robbery D was convicted of.
    - eg, D defrauds elderly couples. Fact that he took them to the same address each time sufficiently unique enough to be a signature.
    - *Jones v. Clinton* – Jones seeks to admit Lewinsky scandal, under “signature” theory. Not admitted as cases very different, one consensual, one not.
  + 6) Given all these not-for-character purposes, does 404(b) have any teeth?
    - some – a proper purpose can’t be found in all cases.
    - plus, in 403 battle, probative value will be limited to proper purpose.
  + 7) The 403 balancing if 404(b) battle lost:
    - a) D normally loses, since test weighed toward admissibility.
    - b) the older the act, the less probative
    - c) probative value limited to the ostensible proper purpose.
    - d) court will consider the availability of alternative evidence that is equally probative.

**C. Habit - § 406**

* Rmk: character v. habit – character is a personality trait, whereas habit a routine practice of a particular activity.
  + the more specific, unthinking, routine, reflexive/ the less volitional 🡪 more likely a habit
  + example: putting on a seatbelt a habit. Being a cautious person is a character trait.
* Rule:
  + **§ 406: Evidence of habit is admissible to show conformity with the habit.**
  + Two steps:
    - **1) show activity in question relevant to case, and fits definition of a habit**
    - **2) establish a foundation (more likely than not) that person had the habit.**
* Rmks and Examples
  + 1) Basic examples:
    - insurer claims fire caused by smoking in bed. Can introduce P had a habit of this.
    - P argues D had a “habit” of breaking and entering as theory to introduce prior bad acts. Not admitted as not a habit.
  + 2) Foundation sufficient?:
    - *Perrin* – 12 violent reactions to police held sufficient to show habit of violent responses.
    - undue force case – P wants to show officer had a habit of breaking wrists when handcuffing. Has done it five times. Held an insufficient foundation, as officer handcuffs innumerable number of times.
      * P can admit to show knowledge - shows officer knew own strength.

**VIII. Character Evidence**

Rule 404

A. Basic Rule and its Exceptions: evidence of a character trait cannot be admitted

If it is offered to prove conduct in conformity with the trait (circumstantial)

Can be admitted if character is at issue (is the legal issue in the case)

Exceptions to circumstantial character evidence:

1. character of the criminal defendant- if D brings it up first (404 a2)
2. “” alleged victim of a criminal offense- if D brings it first (404 a1)
3. character of a witness

404 – Character Evidence Not Admissable to Prove Conduct

* **404(a) – Character Evidence Generally**. Evidence of a person’s character... is *not* admissible for the purpose of proving action in conformity therewith on a particular occasion, *except*:
  + **(1) Character of accused**– evidence of a pertinent trait of character offered by the accused, or by prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution
    - character evidence must be relevant & pertinent (i.e. offering evidence of peacefulness if charged w/ violent crime)
    - D can offer evidence to support his own character, or to attack character of other witness
      * In response, prosecutor can cross, and offer his own evidence to rebut D’s claim about his own character
      * Where D intro character evidence to attack character of victim – then prosecutor is allowed to offer evidence of same character trait in D (i.e. if D argues that victim is belligerent, then P can offer evidence that D is belligerent too) (most often used/occurs where D claims self-defense)
    - **405(a)** – testimony about reputation or in form of opinion both allowed; specific incidents are *only* allowable in cross
      * Rationale: though specific incidents are most telling, also have most capacity to arouse prejudice, to confuse, to surprise....” (Comm Notes to FRE)
    - *Michelson v US* (SCt 1948)
      * convicted of bribing an IRS agent; offered 5 witnesses to testify about his character; 2 of them testify they’ve known him 30 years
        + P brings up 20 yr old conviction, and 30yr old arrest – is this allowable?
        + Yes, b/c they’ve testified about knowing him for 30 years
        + Judge gives limiting instruction that they’re not to take suggestion of conviction & arrest as true, only to be used as proof that witnesses didn’t know (important?) stuff about D

limiting inst is very confusing (p210)

* + - * + You can object on 403 grounds
      * important to remember that D “opens the door”
        + *except* part of 404(a)(2) where P, in homicide cases only, is allowed to intro evidence about victim’s peacefulness if D offers evidence suggesting victim was first aggressor
    - **405(b)** – evidence of specific instances of conduct allowed where character or character trait is essential element of charge, claim or defense (for ex., child custody hearing, rebutting entrapment def, or rebutting a def of truth in libel or slander claim)
      * applies to crim and civil cases per word “claim”
  + **404(a)(2) Character of alleged victim** – Evidence of a pertinent trait of character of the alleged victim of crime offered by accused, or by prosecution to rebut the same, or evidence of a character trait of peacefulness of alleged victim offered by pros in homicide case to rebut evidence that alleged victim was first aggressor
  + **404(a)(3) Character of witness** – per rules 607, 608 & 609
  + ***only criminal D’s can “open the door” using 404(a)(1) & (2)!!***
* **Six exceptions to 404(a):**
  + 404(a)(1), (2) *and* (3) (as elaborated by FRE 607, 608 & 609)
  + 413
  + 414
  + 415
* 404(a) applies to all cases, not just criminal cases; the exceptions in 404(a)(1) & (2) only apply to criminal cases
* Also, doesn’t just apply to D’s character, it applies to all witness’ character
* **SEE COPY OF “CHARACTER EVIDENCE” FLOWCHART ON p140**
* **404(b) – Other crimes, wrongs, or acts. (aka “Prior Bad Acts”)**Evidence of other crimes or acts *not* admissible to prove the character of a person in order to show action in conformity therewith. May 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 accused, prosecution in criminal case shall provide reasonable notice in advance of trial... of general nature of any such evidence it intends to introduce at trial.
  + “other...acts” – any act that isn’t at issue in the case, including those that happen after the “crime” is alleged to have taken place
  + 404(b) is totally superfluous – merely restating 404(a)
  + list of 404(b) “exceptions” is illustrative, not exhaustive – many more apply; in fact “exceptions” is a misnomer b/c nothing is prohibited except using the evidence to prove propensity
  + 404(b) includes “may” – the trial judge doesn’t have to allow the evidence even if its not used to show “action in conformity therewith”; admission is at judge’s discretion
    - basically 403 gives the judge an out (i.e. its more unfairly prejudicial than probative)
  + there are exceptions to 404(a), but they are contained in other rules – see sex molestation crimes, etc.