

A defendant is charged with mail fraud. At trial, the defendant has not taken the witness stand, but he has called a witness who has testified that the defendant has a reputation for honesty. On cross-examination of the witness, the prosecutor seeks to ask her, "Didn't you hear that two years ago the defendant was arrested for embezzlement?"

Should the court permit the question?

- A. No, because the defendant has not testified and therefore has not put his character at issue.
- B. No, because the incident was an arrest, not a conviction.
- C. Yes, because it seeks to impeach the credibility of the witness.
- D. Yes, because the earlier arrest for a crime of dishonesty makes the defendant's guilt of the mail fraud more likely.

## Explanation:

The **mercy rule** allows a **criminal defendant** to present evidence of his/her **good character** if that trait is **pertinent to the charged crime**—eg, a defendant's *honesty* is pertinent to a crime of *dishonesty* like mail fraud. But under this rule, the defendant's good character can only be established by calling a witness to provide **reputation or opinion** testimony (as seen here).

Once the defendant's character witness has testified, the prosecution can **impeach that witness**—or later rebut the witness's testimony—by casting doubt on the witness's opinion of the defendant or knowledge of the defendant's reputation by:

**cross-examining** the witness about a **specific instance of conduct (SIC)** by the defendant that relates to the trait in question *or*

calling **another witness** to provide **reputation or opinion testimony** on the defendant's corresponding bad-character trait.

Here, the prosecutor seeks to cross-examine the defendant's character witness about a SIC involving the defendant's arrest for embezzlement—a crime of dishonesty. The court should permit this question since it seeks to impeach the witness's credibility regarding the defendant's reputation for honesty.

**(Choice A)** Although the defendant did not testify, he called a witness to attest to his good character for honesty. This opened the door for the prosecution to impeach that witness's credibility by asking about the defendant's earlier arrest for embezzlement.

**(Choice B)** A SIC that bears on the defendant's pertinent character trait need not have resulted in a conviction to impeach the defendant's character witness. Therefore, the prosecutor's question regarding the defendant's arrest for a crime of dishonesty should not be excluded on this ground.

**(Choice D)** Prior crimes or bad acts are inadmissible to show a person's propensity to commit the charged crime and establish guilt. Therefore, the defendant's arrest for embezzlement cannot be used to show that he likely committed mail fraud.

## Educational Objective

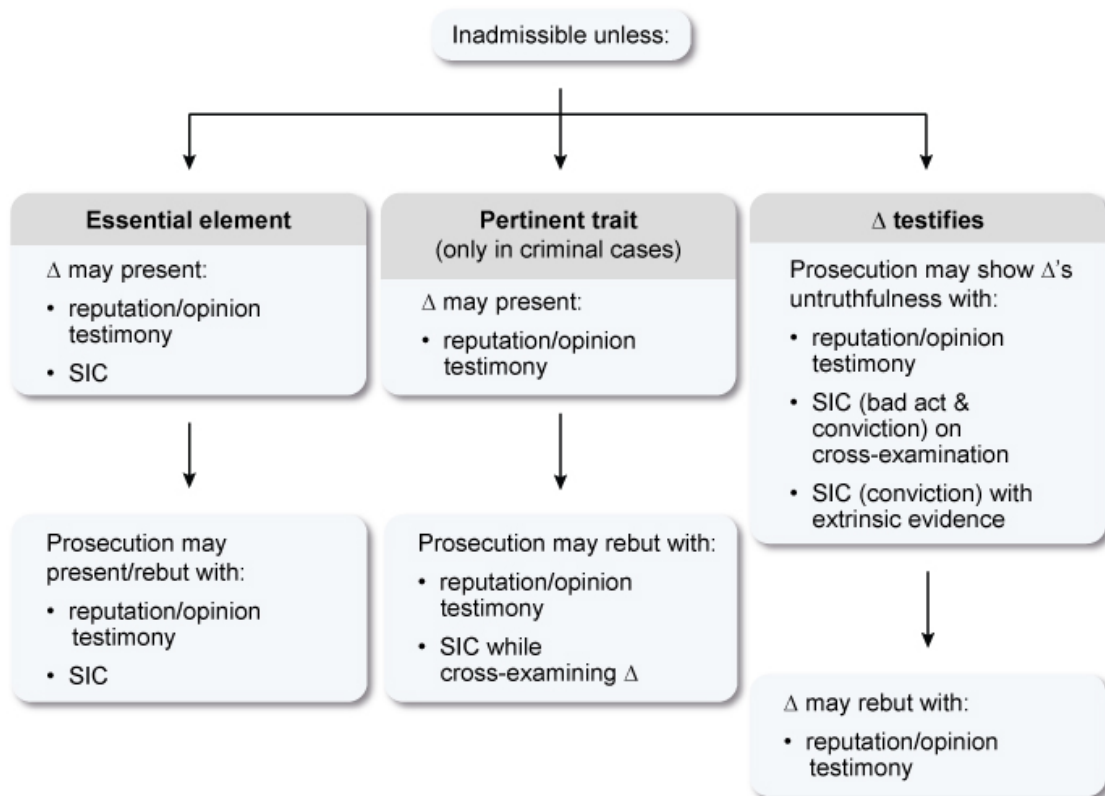
A witness's reputation or opinion testimony about a criminal defendant's good character can be impeached by (1) cross-examining the witness about a specific instance of conduct by the defendant or (2) presenting opposing reputation or opinion testimony by another witness.

## References

Fed. R. Evid. 404(a) (character evidence).

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### Evidence on criminal defendant's character



Δ = defendant; SIC = specific instance of conduct