

A man has sued a police officer, alleging that the officer violated the man's civil rights by using excessive force while arresting him. At trial, the officer admits having hit the man in the head with the butt of his gun but contends that the force was necessary, because the man was resisting arrest. In support of his contention, the officer seeks to introduce evidence that the man had resisted arrest on three prior occasions during the last 10 years.

Is this testimony regarding the man's conduct during the three prior arrests admissible?

- A. No, because evidence of the prior incidents constitutes impermissible character evidence.
- B. No, because the officer has not shown that the man was convicted in connection with the prior incidents.
- C. Yes, because the incidents in question are relevant evidence of the man's propensity for violence.
- D. Yes, because the incidents in question are sufficient to constitute a habit.

## Explanation:

### Admissibility of previous criminal conviction or bad act

(FRE 404, 608 & 609)

#### Impeach witness's

Impeach witness with either:

#### character

conviction for crime of dishonesty or any felony through examination & extrinsic evidence *or*

(FRE 608(b), 609)

bad act (no conviction) elicited only on examination

#### Relevant noncharacter purpose

Examination & extrinsic evidence to show **MIMIC**:

(FRE 404(b))

**Motive/opportunity**

**Intent**

**Mistake (absence of)**

**Identity**

**Common scheme/plan**

**FRE** = Federal Rules of Evidence

**Character evidence** is evidence of a person's general traits or propensities. Such evidence is generally **inadmissible** when used to prove that a person acted in conformity with a particular trait or propensity on the occasion at issue. That is because of the risk that a jury could punish a person for his/her bad character instead of what actually happened. Therefore, evidence of a person's **previous crimes or other acts** can only be **used for impeachment or noncharacter** purposes.

Here, the officer seeks to testify that the man had resisted arrest on three prior occasions. This testimony would support the officer's contention that the man resisted arrest on the occasion leading to this lawsuit because he has a propensity for doing so. As a result, this testimony constitutes character evidence and is *not* admissible.

**(Choice B)** The man's prior incidents cannot be used to prove that he resisted arrest on the occasion in question—regardless of whether the officer shows that those incidents resulted in convictions. But proof of a **criminal conviction** may have been necessary had the man testified and the officer introduced the man's prior incidents for impeachment purposes.

**(Choice C)** The prior incidents of resisting arrest are relevant since they tend to make it more probable that the man resisted arrest in this instance. But relevant evidence can still be excluded by a constitutional provision, law, or rule—eg, the rule prohibiting the use of character evidence.

**(Choice D)** Evidence of a person's habit is admissible to prove that the person acted in accordance with that habit on a particular occasion. Habit differs from character in that it

focuses on a person's regular response to a repeated specific situation (eg, regularly using a turn signal) instead of a general trait (eg, carefulness). And since the man's three prior incidents do not prove that he *regularly* resists arrest, they do not constitute a habit.

**Educational objective:**

Prior crimes and other acts cannot be used to prove a person's character—ie, one's propensity to behave in a certain manner.

**References**

Fed. R. Evid. 404(b) (crimes, wrongs, or other acts).

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