

A defendant testified at a grand jury investigation regarding his employer's alleged tax evasion. The grand jury investigation later uncovered a large bank deposit in the employer's financial records that contradicted the defendant's testimony. The defendant was subsequently charged with obstruction of a grand jury investigation. At trial, the defendant testified that the bank deposit was an accounting discrepancy. On cross-examination, the prosecutor seeks to introduce evidence of the defendant's prior conviction for wire fraud that is currently on appeal.

Is the evidence admissible?

- A. No, because evidence of a prior crime cannot be used as character evidence.
- B. No, because the pendency of an appeal renders the conviction inadmissible.
- C. Yes, because the evidence is probative of the defendant's character for truthfulness.
- D. Yes, because the evidence shows absence of mistake.

## 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

A witness's credibility is always relevant—regardless of the substance of the testimony or the witness's role in the case. So when a party (here, the defendant) decides to testify, that party may be impeached in the same manner as any other witness.

For example, a witness can be **impeached** through **reputation or opinion** testimony OR a **specific instance of conduct** (SIC) that is probative of the **witness's character for truthfulness** (or lack thereof). Two types of SICs are admissible for this purpose:

**Convictions** involving a felony or **crime of dishonesty** (eg, wire fraud)

Other bad acts

Such convictions are **admissible** for impeachment purposes **even if an appeal is pending**. Therefore, the defendant's wire-fraud conviction that is currently on appeal *is* admissible to impeach the defendant's character for truthfulness (**Choice B**). However, evidence of the **pending appeal** is **also admissible** to allow the fact finder to decide whether to believe the witness.

**(Choices A & D)** Evidence of a person's character is generally inadmissible to prove that the person acted in conformity with his/her character on the particular occasion being litigated.\* However, evidence of a person's prior crime or bad act can be used for impeachment purposes (as seen here) or noncharacter purposes (eg, to show absence of mistake). But here, the defendant's unrelated wire fraud has no bearing on whether he mistakenly obstructed the current grand jury investigation.

\*Character evidence is admissible only when (1) character is an **essential element** of a criminal charge, civil claim, or asserted defense or (2) a defendant introduces evidence of his/her pertinent trait in a criminal case.

**Educational objective:**

Any witness, including a party-witness, may be impeached by introducing evidence of a conviction for a felony or crime of dishonesty—even if the conviction is currently on appeal.

**References**

Fed. R. Evid. 608–09 (impeaching witness's character for truthfulness with criminal conviction on appeal).

United States v. Mitchell, 886 F.2d 667, 671 (4th Cir.1989) (stating that the pendency of an appeal does not render evidence of a conviction inadmissible).

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