

Rule 609

FOR
PROSECUTORS

A BIT Talk Presentation by:
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Impeach defendants
and witnesses without
getting overturned on
appeal!

Rule 609 of the Federal Rules of Evidence allows a party to impeach a witness with his or her prior criminal convictions.

- Fair to say that this rule is the most criticized of all the Rules of Evidence
- Scholars have been calling for its reform or outright abolition for decades.

Qualifying convictions:

- Felonies
- Offenses requiring a “dishonest act or false statement”

What constitutes a “conviction?”

- **Trial** -- Found guilty, sentenced, and post-trial motion time expired
- **Plea** -- Guilty plea and sentenced



REMEMBER

Under common law, a prior conviction could preclude witness from testifying.



Qualifying Convictions

Two types:

- 1) Felonies
- 2) Offenses requiring a “dishonest act or false statement”

Under the common law, a prior criminal conviction could preclude a witness from testifying altogether.

What Constitutes a “Conviction?”

Depends on whether there was a trial or a guilty plea

Felony convictions against DEFENDANT

- MUST be admitted if probative value of evidence outweighs prejudicial effect to defendant
- Burden is on **prosecutor**
- Must establish the FIVE factors adopted in *State v. Banner*, 712 P.2d 1325 (Utah 1986)

Felony convictions against WITNESSES

- MUST be admitted if passes rule 403
- Burden is on **opponent**



REMEMBER

Factors are less applicable if type, timing, or similarity is not mentioned



Felony Convictions Against DEFENDANT

For obvious reasons, the most problematic evidence of a prior conviction is when the prosecution offers a prior conviction of the accused, especially if the prior conviction is for a similar crime for which he is now being prosecuted.

Balancing test is less than and opposite of 403 (“probative value is substantially outweighed by a danger of...”)

- 403 requires “substantially” outweighed
- 403 focuses on the prejudice side of the scale to meet the burden (start with presumption that it is probative)
- 609 focuses on the probative side of the scale to meet the burden (start with presumption that it is prejudicial)

Five factors:

- 1) the nature of the crime, as bearing on the veracity of the witness
- 2) the recentness or remoteness of the prior conviction
- 3) the similarity of the prior crime to the charged crime, insofar as a close resemblance may lead the jury to punish the accused as a bad person
- 4) the importance of credibility issues in determining the truth in a prosecution tried without decisive nontestimonial evidence
- 5) the importance of the accused's testimony, as perhaps warranting the exclusion of convictions probative of the accused's character for veracity
 - Honesty/credibility not really at issue

- “...defendant's testimony was important in that his actions were not contested, only his intentions.” *Salt Lake City v. Holtman*, 806 P.2d 235 (Utah Ct. App. 1991)

Felony Convictions Against WITNESSES

Party using impeachment evidence must satisfy the 403 analysis

Crimen Falsi convictions

- **Crimen Falsi** – Crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth
- Court has NO DISCRETION and must allow

*“Dishonesty and false statement applies to ANY CRIME involving some **element of deceit, untruthfulness, or falsification** bearing on the accused's propensity to testify truthfully. If honesty was involved, evidence of a prior conviction is automatically admissible under 609(a)(2).”*

State v. Larsen, 876 P.2d 391 (Utah Ct. App. 1994)



REMEMBER

It does not matter if the conviction is only for an “attempt”



Crimen Falsi Convictions

Literally means “crimes of falsity”

- Courts have no discretion and must allow because bears on credibility
- However, courts may have discretion about whether the offense qualifies as a crimen falsi offense

Most courts reject the argument that all theft crimes qualify as “dishonesty” crimes for impeachment purposes.

- As a general rule, “theft is not classified as a crime of dishonest or false statement because it is generally not indicative of a witness's inclination to lie.”
- However, where the thief uses deceit to accomplish the theft, Rule 609(a)(2) applies.

Utah specifically held that the following offenses ARE NOT *crimen falsi* crimes under 609:

- **Theft** – *State v. Johnson*, 784 P.2d 1135 (Utah 1989); *Zappe v. Bullock*, 2014 UT App 250; *State v. Brown*, 771 P.2d 1093 (Utah Ct. App. 1989)
- **Retail Theft** – *State v. Bruce*, 779 P.2d 646 (Utah 1989)
- **(Attempted) Burglary** – *State v. Bruce*, 779 P.2d 646 (Utah 1989); *State v. Lanier*, 778 P.2d 9 (Utah 1989)
- **Robbery** – *State v. Lanier*, 778 P.2d 9 (Utah 1989); *State v. Morrell*, 803 P.2d 292 (Utah Ct. App. 1990); *State v. Wight*, 765 P.2d 12 (Utah Ct. App. 1988)

Utah specifically held that the following offenses ARE *crimen falsi* crimes under 609:

- **Theft by Deception** – *State v. Johnson*, 784 P.2d 1135 (Utah 1989)
- **Securities Fraud** – *State v. Larsen*, 876 P.2d 391 (Utah Ct. App. 1994)
- **(Attempted) Forgery** – *State v. Ross*, 782 P.2d 529 Utah Ct. App. 1989)
- **Tampering with Evidence** – *State v. York*, 2018 UT App 90
- **Providing False Information to Police Officer** – *State v. York*, 2018 UT App 90

Some other jurisdictions have interpreted *crimen falsi* offenses MUCH more broadly

- For instance, some courts have held that even drug possession qualifies because it “indicate[s] a disposition to place the advancement of individual self–interest ahead of principle or the interest of society, and such proof might suggest a willingness to do so again on the witness stand”

What details can be disclosed?

- Should be limited to:
 - ✓ the nature of the crime
 - ✓ the date of the conviction
 - ✓ the punishment

"A prosecutor may not parade the details of the prior crime in front of the jury"

"[C]ollateral matters should properly be limited to an effort to discredit him as a witness"



TIP

Check out
State v. Tucker
800 P.2d 819
(Utah Ct. App. 1990)



What Details Can Be Disclosed?

A conviction admissible under Rule 609 is admitted for purposes of credibility alone, and cannot be used "substantively."

- When considering what details of the prior conviction can be admitted you should keep in mind the limited purpose of the admissibility

State v. Tucker, 800 P.2d 819 (Utah Ct. App. 1990)

"A prosecutor may not parade the details of the prior crime in front of the jury The defendant is subject to cross-examination only to test his veracity and credibility and thus collateral matters should properly be limited to an effort to discredit him as a witness, ... and not merely to prejudice the jury against the defendant.... Care must be taken to insure the defendant is not convicted for past rather than present crimes."

Time Limitation

- **Ten years** from the “the date of the conviction or of the release of the witness from confinement imposed for that conviction”
- Unclear whether probation/parole extends time



TIP

Convictions >10 years
can still be used if you
give reasonable
written notice

Pardons, Juveniles, 402 Reductions, & Appeals

- **Pardon** (or similar procedure)
- **Juvenile** (if four requirements met)
- **402 Reduction** (if the reduced conviction still meets 609)
- **Appealed** (pendency also admissible)



Time Limitation

The calculation of time from conviction only applies once there is a “release of the witness from confinement.”

- Because probation does not amount to “confinement” it can be argued that probation does not extend the time period beyond 10 years. (*U.S. v. Rogers*, 542 F.3d 197, 77 Fed. R. Evid. Serv. 494 (7th Cir. 2008) (holding the confinement does not extend to probation or parole)).
- On the other hand, probation is a form of restriction arguably significant enough to extend the time period.

In any event, the rule contemplates and allows for using convictions older than 10 years

- Requires WRITTEN notice, which must be disclosed well in advance of trial (aka “reasonable notice”)
- Although the timing rule does not distinguish between crimes of integrity and other crimes, arguably the courts have enhanced common law authority to extend the 10 year time period under Rule 609(b) if the prior crimes involved dishonesty.

Pardons, Juveniles, 403 Reductions, & Appeals

- **Pardons** – Never admissible under 609
- **Juvenile Adjudications** – Admissible if:
 - 1) it is offered in a criminal case;
 - 2) the adjudication was of a witness other than the defendant;

- 3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
 - 4) admitting the evidence is necessary to fairly determine guilt or innocence.
- **402 Reductions** – Admissible if:
 - Offense is still a felony after the reduction and meets 609 balancing test
 - It is a crimen falsi offense (in which case the 402 reduction is irrelevant)
 - **Conviction is Appealed** – Offense is still admissible (but so is the fact that it is on appeal)

Laying Foundation

- If witness will **ADMIT**, elicit testimony that:
 - ✓ Felony / Crimen Falsi crime
 - ✓ Within 10 years
- If witness **DENIES** conviction or foundational elements:
 - ✓ Use a certified copy of conviction or testimony
 - ✓ Read admissible part of conviction to the jury



WARNING

Do NOT bring up evidence of a mere arrest or criminal charge



Laying Foundation

If the witness ADMITS to the prior conviction:

1. The witness admits he or she has suffered either
 - a. A prior felony conviction, or the number of prior felony convictions if more than one; and/or,
 - b. Any crime involving dishonesty or false statement.
2. The witness admits that not more than ten years have elapsed since the most recent date of either the conviction or the release from confinement (or the proponent has given notice to the adverse party of an intent to introduce an older conviction and has given the opponent an opportunity to contest the use of the older conviction).
3. If the conviction is on appeal, the fact that the conviction has been appealed is offered by either party.
4. If the witness being impeached is not the accused, then the opponent must establish that the unfair prejudicial effect does not substantially outweigh the probative value; if the witness being impeached is the accused, then the proponent must establish that the probative value outweighs the unfair prejudicial effect.

(Mangrum & Benson On Best Evidence, Utah Practice Series, November 2019 Update)

If the witness DENIES the prior conviction or ANY of the foundational elements:

1. Mark for identification purposes an attested copy of the judgment of conviction.
2. Offer the attested conviction record into evidence (if properly attested, the copy will be self-authenticating under Rule 902(4)).
3. Read the admissible part of the conviction to the jury (ordinarily the fact of and date of

the conviction as well as the nature of the crime and the relevant details of the crime or the confinement, but the scope of the admissible details may vary by local practice rules).

(Mangrum & Benson On Best Evidence, Utah Practice Series, November 2019 Update)

If the witness denies the conviction, then an authentication issue is raised

- The most reliable proof of the prior conviction would be a certified copy of the conviction
- Otherwise you should have available someone who has firsthand knowledge of the conviction
- If you are not prepared to prove a conviction if denied, then the question should not be asked

If you merely have evidence of an arrest or a criminal charge, without supporting evidence of a certified conviction record for the crime charged:

- You cannot display to the jury the arrest document and ask the witness about past “legal problems”
- Results in a fishing expedition of a possible conviction
- Wafts into inappropriate innuendo

Removing the Sting

- Preemptively bringing up prior conviction
 - Is NOT ineffective assistance of counsel
 - Does NOT open the door to more extensive cross-examination

Opening the Door

- Details may be admissible if defendant attempts to:
 - Minimize a conviction
 - Excuse a conviction



REMEMBER

Even if pretrial ruling excludes, defense can inadvertently open the door



Removing the Sting

The accused waives review of a pretrial ruling permitting the admission of prior conviction testimony if he chooses to testify and seeks to remove the sting of the conviction by revealing it on direct examination (*Ohler v. United States*, 529 U.S. 753 (2000))

- If the defense asks about the details of the crime, then they can hardly complain if the prosecution follows up on cross-examination on the same subject.

Opening the Door

The details of the prior conviction may occur if the defendant opens the door by attempting to minimize or excuse the convictions

- “When a defendant on direct examination attempts to explain away the effect of the conviction or to minimize his guilt, a defendant may then be cross-examined on any facts which are relevant to the direct examination.” (*State v. Tucker*, 800 P.2d 819, 822 (Utah App. 1990))

Raising the Issue

- Generally, the defendant should file a motion to suppress evidence

Requesting a Rule 104 Hearing

- If concerned about:
 - Time limitation
 - Qualification as *crimen falsi* misdemeanor
 - Ability to meet balancing test



WARNING

To preserve for appeal, make an offer of proof showing requirements met.



Raising the Issue

- If there are concerns, it is the defendant's responsibility to raise the issue
- Done by filing a motion to suppress the evidence

Requesting a Rule 104 Hearing

- Even though it generally the defendant's responsibility to raise the issue, it's better to be safe than sorry

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