A FEW MORE WORDS ON WITNESS IMPEACHMENT

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A few weeks ago, I addressed the topic of impeaching a witness with a prior inconsistent statement or omission which is but one of many bullets in counsel's revolver to shoot down the credibility of a witness in a criminal trial. Depending on the witness and the circumstances, a witness' believability and the reliability of his/her testimony can be assailed by challenging his/her ability to perceive what he/she says he/she saw or heard, (based, for example, on vantage point, lighting conditions, stressful distractions, state of sobriety); testing his/her ability to recall (based, for example, on passage of time, age or possible infirmity); highlighting the witness' competency (or apparent lack thereof based on present mental or physical state); impugning the witness' character for truthfulness (for example, by confronting him/her with prior convictions, bad acts, evidence of bias, hostility, expectation of some benefit for testifying or evidence of a bad reputation for truthfulness).

The general rule is that the credibility of a witness may be impeached by evidence that has any tendency in reason (and common sense) to discredit the truthfulness or accuracy of the witness' testimony. (People v Walker 83 NY2d 455 [1994]). If the subject of the inquiry serves only to attack credibility with acts of prior misconduct (including uncharged crimes), the cross examiner will be bound by the witness' answer (i.e. denial or equivocation), and therefore, will not be allowed to introduce extrinsic evidence to prove otherwise.

However, impeaching evidence is not considered collateral where it is deemed relevant to prove bias or hostility, challenges the witness' ability to perceive or to understand the nature of an oath, or serves to contradict the witness on a material issue such as his/her identification of the defendant as the perpetrator (e.g. the defense calls a witness who testifies that it was not the defendant or was someone else). (See generally People v Pavao 59 NY2d 282 [1983]; People v Cade 73 NY2d 904 [1989]).

WHEN YOUR WITNESS "GOES SOUTH"

Like most evidentiary matters, the subject and scope of impeaching questions and contradictory evidence is largely within the sound discretion of the trial court. (People v Schwartzman 24 NY2d 241 [1969]). When it comes to impeaching one's own witness, however, the borders of permissible inquiry are pretty narrow. Section 60.35 (1) of the CPL states that when a party's own witness gives testimony ON A MATERIAL ISSUE (e.g. identity, intent, self-defense), which TENDS TO DISPROVE the position of that party, the party may introduce evidence that the witness has previously made a WRITTEN SIGNED STATEMENT or ORAL SWORN STATEMENT (People v Whittington 267 AD2d 486 [2d dep't 1999]), which contradicts the witness' trial testimony on that material point.

It is not enough that the witness soft pedals his/her testimony or testifies that he/she does not recall the matter (in which case, counsel may only try to refresh recollection), or that the subject on which the witness strays (e.g. what color shirt another eyewitness was wearing), is secondary. (See, for example, People v Stewart 295 AD2d 249 [1st dep't 2002]). In order to impeach the witness under this section, the witness must have "gone south" in a big way such that the trial testimony actually TENDS TO DISPROVE the party's position. (See, for example, People v Jones 25 AD3d 724 [2d dep't 2006]: Prosecutor was properly allowed to impeach witness who testified "I didn't see defendant at shooting scene" by confronting him with his prior audiotaped statement identifying the defendant as the shooter. In contrast, see People v Gaston 147 AD3d 1219 [3d dep't 2017]).

It should noted that a prior written or oral sworn statement used to impeach one's own witness is NOT SUBSTANTIVE EVIDENCE in the case, and the court MUST GIVE A CAUTIONARY INSTRUCTION advising the jury that such prior statement may be considered, NOT AS PROOF OF ITS CONTENT, but ONLY INSOFAR AS IT TENDS TO IMPEACH the witness' trial testimony. (CPL 60.35[2]).

PRIOR BAD ACTS AND CONVICTIONS TO IMPEACH

A witness, including the defendant, (subject to the court's ruling pursuant to People v Sandoval 34 NY2d 371 [1974]), may be impeached on cross examination by good-faith inquiry about prior vicious, criminal or immoral acts that bear logically and reasonably on credibility but do not relate to conduct underlying a charge for which the witness was acquitted. (See People v Smith 27 NY3d 652 [2016]; People v Santiago 15 NY3d 640 [2004]).

What kinds of bad acts implicate a witness' credibility, (as opposed to just painting him/her as someone worthy of disapproval or condemnation), is within the trial court's discretion but generally, acts that reveal a mendacious streak (e.g. intentionally misrepresenting one's employment history on a professional resume or inflating one's income on a loan application), or betray a tendency to place one's own interests over those of society, (e.g. contributing to the exploitation of young women by patronizing prostitutes), are more likely than not to be considered fair game for cross examination. (People v Walker 83 NY2d 455 [1994]); People v Coleman 56 Ny2d 269 [1982]).

In Federal Court, by contrast (see FRE 608), inquiry into prior acts of misconduct is limited to conduct that bears directly on honesty and truthfulness. Consequently, asking a witness about a prior uncharged robbery, which may well be permitted in New York State Court, would likely not be allowed in Federal Court inasmuch as the operative element of robbery is theft by forcible compulsion (i.e. violence), not deception (i.e. dishonesty), and one could conceivably be an honest (albeit reprehensible) robber.

When the witness under attack is the defendant, he/she has the right to seek a judicial ruling in limine on the permissible scope of cross examination and also bears the burden to demonstrate that the probative value of disclosing the prior bad act on his/her credibility as a witness is substantially outweighed by the prejudice (in portraying him/her as a bad person in the eyes of the jury). If the court allows inquiry into prior bad acts deemed probative of credibility (and not unfairly prejudicial), the jury should be instructed that such conduct (assuming the defendant copped to it on the stand), may only be considered for whatever impeachment value it may have on the defendant's credibility as a witness and

not be viewed as evidence of guilt. Of course, if the defendant denies the prior bad act, "thus endeth the inquiry" and no extrinsic evidence should be allowed to refute the defendant's denial. (The point of the rule is to block off endless detours into sideroads that are mired in matters of credibility).

Such is not the case, however, when counsel is cross examining a witness (including a defendant), about a prior conviction which the witness either denies or responds to in an equivocal manner. In such case, opposing counsel may independently prove the fact of the conviction by introducing a certified copy of the judgment of conviction. (See CPL 60.40[1]). Obviously, if the defendant elects to testify notwithstanding the court's adverse Sandoval ruling, he should be prepared to acknowledge the prior conviction (preferably on direct exam to take the ache out of the cross), especially when he/she knows that the prosecutor has the goods to expose him as a liar with a certified court record that shows him to be the criminal he claims he is not.

Cross examination in criminal cases about prior convictions includes felonies, misdemeanors and criminal violations which are within the definition of "offense" as set forth in PL 10.00{1}. (In civil cases, by contrast, cross exam is limited to felonies and misdemeanors). As with prior bad acts, when the defendant is inclined to testify, he/she should seek to preclude as many of his prior convictions as possible from the adversary's arsenal, pointing out how and why the probative value of the conviction(s), is outweighed by the prejudice.

Courts will typically look to the nature of the conviction, (crime of dishonesty? moral turpitude? violence?) its age, the similarity to the crime charged (though hardly dispositive), and whether the crime was a matter of youthful impulse or misjudgment, addictive behavior or scheming calculation. (See People v Sandoval supra; People v Williams 12 NY3d 726 [2009], People v Smith 18 NY3d 5888 [2012]).

The more revealing the prior conviction is of dishonesty or untruthfulness, the more reflective of self-interest (or disregard for the interests of others), the more recent in time, the more likely the court will be to permit the inquiry about it on cross examination. And, where a particular conviction may be highly prejudicial in its own right (e.g. sex abuse of a child), courts concerned about not letting the defendant come across cleaner than he really is may strike a so-called Sandoval compromise and allow the prosecutor to ask the defendant whether he/she was convicted of "a felony" or "a crime."

Pleas entered pursuant to North Carolina v Alford 400 US 25 (1970) i.e. "Alford Pleas," are also fair game for cross examination even though the defendant did not "allocute" or articulate the facts comprising the elements of the crime. (See People v Miller 91 NY2d 372 [1998]). It would probably be wise for the defendant simply to acknowledge the fact of the conviction rather than quibble ("I didn't commit the crime but pled guilty to avoid a harsher sentence,") since the jury may not be too receptive to an ex post facto equivocator.

Youthful offender adjudications (CPL 720.10 et seq) and Juvenile Delinquency adjudications (Article 3 of the Family Court Act) , by contrast, are not admissible to impeach a witness' credibility. This is so because they are not considered to be convictions. HOWEVER, counsel may be allowed to INQUIRE INTO THE UNDERLYING FACTS (akin to prior bad acts) if the court so determines before the witness testifies. (See People v Duffy 36 NY2d 258 [1975]).

BIAS

Unlike prior bad acts, a witness's bias, hostility, interest for or against any party may, within the court's discretion, be exposed on cross examination or established by extrinsic evidence. (See People v Chin 67 NY2d 22 [1986]). A witness' leanings one way or the other whether out of love, fear, anger, hatred, jealousy, a desire to impress or to save one's own skin (as in the case of an erstwhile co-defendant who flips against his former co-hort and testifies for the People in exchange for a favorable plea or sentence), are considered to be so central to evaluating a witness' credibility that extrinsic evidence of bias may be admitted even though the witness was not confronted about it on cross examination. (People v Michalow 229 NY 325 [1920]).

Consequently, evidence of partiality should generally be admitted unless it is too speculative, remote or redundant. (People v Hudy 73 NY2d 40 [1988]). Courts should also be mindful that unduly curtailing a defendant's efforts to flesh out the full extent of a witness' bias, interest or hostility may deny him his Sixth Amendment right of confrontation. (Davis v Alaska 415 US 308 [1974]; People v Hudy supra, 73 NY2d at 57: Court improperly restricted defendant's cross examination of police officers regarding their interviews of the complaining witnesses which may have revealed possible fabrications by them).

Whether it involves shooting down the messenger or shooting up the message, counsel should make every effort to evaluate each witness well in advance of trial to size up their weaknesses and determine the most effective method of impeachment. Not preparing is tantamount to walking into a gunfight with an unloaded gun at high noon and staring into the sun. You may not see it coming but there will be blood. Better that it not be yours.