

ASSOCIATION OF BUSINESS TRIAL LAWYERS

abt1

REPORT

LOS ANGELES

SPRING 2021

FROM THE TRENCHES: USING EVIDENCE OF A FELONY CONVICTION



Robert Glassman

As we masked up and filled our briefcases with Purell and other disinfectants for a recent jury trial in Bakersfield in the midst of the ongoing pandemic, we had a lot on our minds. We were mostly preoccupied with the logistics of how we were going to try our case in a safe and socially distanced courtroom. But, just as before COVID-19, we also were consumed

with thoughts of what we had to do to win the case for our client, who suffered serious injuries when the defendant rear-ended the car she was riding in.

There were irreconcilable versions of how the accident occurred. The defendant claimed that our client's car cut in front of him from another lane and he had no time to stop. Our client said the car she was in was stopped at an intersection. There were no independent witnesses. It was a classic "he said, she said" credibility battle.

But we had something to tip the balance: the defendant's background. It was enough to force him to admit full liability on the eve of trial.

Here is how it unfolded:

During discovery, we learned that in 2008 the defendant had been found guilty of the felony of aggravated sexual assault with a 5-year-old child. He spent 3 years in state prison and had to register as a lifetime sex offender. He was released from prison in 2011, four years before the collision.

Although the Evidence Code permits evidence of a felony conviction "[f]or the purpose of attacking the credibility of a witness" (Evid. Code, § 788), "upon proper objection to the admission of a prior felony conviction for purposes of impeachment in a civil case, a trial court is bound to perform the weighing function prescribed by [Evidence Code] section 352" (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274). Courts often consider whether the prior conviction involved "moral turpitude," which the Supreme Court has defined "as a "general readiness to do evil"" which may, but does not necessarily, involve dishonesty." (*People v. Gray* (2007) 158 Cal.App.4th 635, 640; see *People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24 ["[T]he law provides that any criminal act or other misconduct involving moral turpitude suggests a willingness to lie and is not necessarily irrelevant or inadmissible for impeachment purposes. [Citations.] However, to the extent such misconduct amounts to a misdemeanor or is not criminal in nature, it carries less weight in proving lax moral character and dishonesty than does either an act or conviction involving a felony"].)

Did our defendant's conviction qualify? It did. Committing a lewd act with a child, such as what the defendant did in our case, is a crime of moral turpitude and moral depravity that has some tendency in reason to undermine witness credibility. So, the trial court had discretion to permit evidence of the conviction. (See *People v. Gray, supra*, 158 Cal.App.4th at p. 640 ["whether the conviction proposed as impeachment involves moral turpitude is for the trial court to decide, not the jury"].)

Next, we anticipated the pushback we would get from the other side that the defendant's conviction should not be admitted since it occurred more than 10 years ago. When determining whether to admit a prior conviction, a judge should consider how recently it occurred, but courts have often approved admission of evidence of convictions that were relatively remote in time.

(E.g., *People v. Carter* (2014) 227 Cal.App.4th 322, 329-330 [trial court properly admitted evidence of witness's 11-year-old conviction for theft and burglary; weight of this evidence was for jury to decide in light of witness's explanations]; *People v. Aguilar* (2016) 245 Cal.App.4th 1010, 1020 [trial court properly admitted evidence of eight-year-old prior conviction]; *Robbins v. Wong, supra*, 27 Cal.App.4th at pp. 268, 274 [trial court properly admitted evidence of the plaintiff's 15-year-old prior conviction of a drug-related felony to attack the plaintiff's credibility in a personal injury action]; *Holley v. J & S Sweeping Co.* (1983) 143 Cal.App.3d 588, 594-595 [trial court properly admitted evidence of the plaintiff's 13-year-old prior felony conviction for the crime of receiving stolen property to attack the plaintiff's credibility in a negligence action; "[a]lthough the factor of remoteness is an important part of the balancing process in assessing the probative value of a prior felony conviction [citations], nonetheless it is only one factor to be considered in the exercise of the court's discretion".])

Accordingly, we argued that under prevailing California law, the defendant's felony conviction in 2008—7 years before the collision—was not too remote. And because his felony conviction was a crime of moral turpitude that was not remote in time, evidence of it should be admissible. This was especially true, we argued, in this "he said vs. she said" case where witness credibility was of utmost importance.

There was an additional helpful fact. In deposition, the defendant testified that he disclosed his felony conviction to his boss—for whom he was driving at the time of the accident—before being hired. But the boss testified in his deposition that the defendant did not, in fact, disclose the conviction.

In sum, we argued that evidence of the defendant's felony conviction, and of the fact that he falsely claimed under oath that he had disclosed it to his boss, was extremely relevant to help the jury decide whether they should believe him as a witness. Indeed, we argued, CACI Jury Instruction No. 211 regarding "Prior Conviction of a Felony" was designed for just this kind of scenario. It states: "You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction to help you decide whether you should believe the witness"

In our case, the defendant's felony conviction involving moral turpitude certainly suggested that he had a willingness to lie, lacked moral character and was dishonest. Accordingly, we argued, the jury should be allowed to consider this fact when

assessing his credibility as a witness.

We raised the issue by way of an in limine motion. When the judge indicated in his tentative ruling that he was going to admit the evidence of the prior conviction, the defense admitted liability and stipulated that the defendant would not testify. This would not have happened had we not conducted discovery on the defendant's background and learned of his prior felony conviction involving moral turpitude. Once we had that information and convinced the court and the defense that it was coming in at trial under California law, we were able to turn a "he said, she said" disputed-liability case into one in which the jury only had to decide causation and damages. After two exhausting weeks in a courtroom retrofitted with plexiglass COVID dividers separating the jurors from the lawyers and the lawyers from the witnesses, the jury found for our client.

So, make sure you know your adversary's background before you try your next case. It just may make all the difference between winning and losing.

Robert Glassman is an attorney at Panish Shea & Boyle LLP and is co-chair of the ABTL's Young Lawyers Division.