

In the  
Supreme Court of Ohio

STATE OF OHIO,

Plaintiff-Appellant,

v.

WILLIAM NUCKLOS

Defendant-Appellee.

Case No.

**07-0754**

On Appeal from the  
Clark County  
Court of Appeals,  
Second Appellate District

Court of Appeals Case  
No. 06-CA-23

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT STATE OF OHIO**

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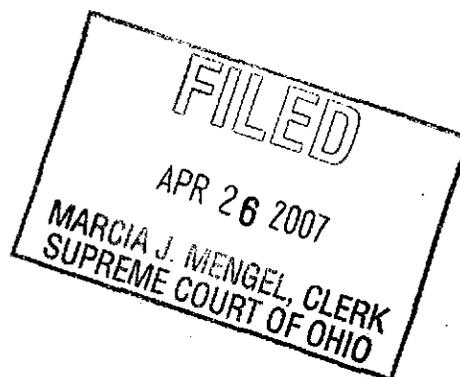
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## INTRODUCTION

The lower court's decision has taken away two of the sharpest arrows in a prosecutor's quiver for convicting doctors who traffic in controlled substances—the treatment of the “doctor's exception” to drug trafficking as an affirmative defense and the admissibility of “other acts” evidence under Rule of Evidence 404(B). This Court should accept this case for review on both of those issues.

First, the decision of the court below shifted the burden of proof on the “doctor's exception” affirmative defense to drug trafficking from the defendant to the prosecution. The Second District's decision results in uncertainty in courts: prosecutors and defense attorneys have conflicting guidance as to who bears the burden of proof. Specifically, it is unclear whether a defendant must prove, by a preponderance of the evidence, the affirmative defense to drug trafficking that his conduct is in accordance with Ohio law, or whether the prosecutor is required to prove the contrary as an element of the offense. Until now, courts in Ohio have treated this “doctor's exception” as an affirmative defense with the burden on the doctor to prove that his conduct is within the exception. See 4-525 OJI § 525.03. The Second District has turned this on its head.

Second, the lower court's decision will force prosecutors to indict for every single count of a multi-count case, rather than only the few best counts. Under the holding below, prosecutors can no longer rely on the Ohio Rules of Evidence and the Revised Code provisions that allow evidence of bad acts, not indicted, to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Ohio Rules of Evidence 404(B); R.C. 2945.59. The only way to get such evidence admitted will be to indict every possible count, resulting in large, unwieldy cases and judicial inefficiency.

## STATEMENT OF THE CASE AND FACTS

William Nucklos was a licensed physician in the state of Ohio who had a long-standing medical practice in Columbus treating workers' compensation and personal injury patients for a variety of complaints, using a wide range of diagnostic and treatment methods. In 2001 Nucklos opened a medical office in Springfield, Ohio serving weight loss patients one day a week. Eventually, the practice became a "pain clinic." The patients in the Nucklos' Springfield practice were mainly poor and had no insurance except state supported Medicaid (T. 1649, 1657, 1665, 1750-51). Nucklos' patients were required to pay \$125.00 to \$200.00 in cash for their first visit and \$75.00 cash for each additional appointment, regardless of whether they had insurance. Each patient saw the doctor every two weeks regardless of their diagnosis or prognosis. Each patient was, with few exceptions, prescribed OxyContin and other dangerous drugs at every visit. In addition to the cash payment for each appointment these patients paid extra cash of \$15.00 to \$25.00 each time they were prescribed more than the standard prescriptions.

After receiving complaints from doctors, pharmacists, the public and law enforcement, the Ohio Pharmacy Board and the Ohio Medical Board conducted a joint investigation into Defendant Nucklos' medical practice in Springfield, Ohio.

During the course of the investigation, patient files were seized from Nucklos' Springfield office and patient files were subpoenaed from the Columbus office. The files from the Columbus office contained a plethora of information including previous medical records, history and physical exams, examination results, referrals for tests and treatment, alternative treatments and reports from consults. In stark contrast, the Springfield files had almost no patient information. A typical patient file consisted of eight to ten pages, whereas a typical patient file in Columbus had hundreds of pages. The Springfield files contained, with minor exceptions, no adequate history and physical exams, no referrals, no testing, no previous medical records, no alternative

treatments and no reports from consults. Despite the large number of patients prescribed OxyContin, few medicine checks were done to determine compliance.

The prosecutor indicted ten counts of drug trafficking and ten counts of illegal processing of drug documents believing that this would be sufficient. The State could have indicted hundreds, if not thousands of counts, but did not for judicial and prosecutorial efficiency.

Nucklos was convicted on all twenty indicted counts. He was sentenced to a total of twenty years and fined.

Nucklos appealed and the Second District Court of Appeals overturned the conviction on two grounds. First, the court below found that the jury instructions were incorrect. Two instructions are at issue: one that the state had to prove, beyond a reasonable doubt, that the drugs were not prescribed in the course of the bona fide treatment of patients; and the other that the defendant could prove, by a preponderance of the evidence, the affirmative defense that his conduct was in accordance with the law. The Second District said that the use of both instructions was confusing for the jury, and that the latter instruction impermissibly shifted the burden of proof from the prosecution to the defense. Second, the Court of Appeals overturned the conviction on the illegal processing of drug documents because the admission of "other acts" evidence did not meet any of the exceptions found in 404(B).

### **THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST**

Overdoses of prescription and over-the-counter drugs are sending more people than ever to emergency rooms, a new government report says. USA Today, 3/13/07, Donna Leinwand

Emergency room visits involving the abuse or misuse of pharmaceuticals — including narcotics such as methadone and OxyContin and the stimulant Ritalin — jumped by 21% from 2004 to 2005. Substance and Mental Health Services Administration (SAMHSA) Report, dated 3/13/07, data collected by the Drug Abuse Warning Network (DAWN). The number of

overdoses involving legal pharmaceuticals is approaching the number involving cocaine and heroin, which has been relatively stable. Emergency rooms tallied 613,053 treatments involving cocaine and heroin overdoses in 2005, compared with 598,542 visits involving misuse of pharmaceuticals. Substance and Mental Health Services Administration (SAMHSA) Report, dated 3/13/07, data collected by the Drug Abuse Warning Network.

Among pharmaceuticals, the most common drugs involved in overdoses were narcotic painkillers, such as oxycodone, hydrocodone and methadone. Overdoses involving such drugs rose 24% overall; methadone overdoses jumped 29%. Substance and Mental Health Services Administration (SAMHSA) Report, dated 3/13/07, data collected by the Drug Abuse Warning Network.

Anti-anxiety drugs also had high overdose rates. From 2004 to 2005, overdoses involving benzodiazepine tranquilizers, such as Xanax and Valium, rose 19%. Substance and Mental Health Services Administration (SAMHSA) Report, dated 3/13/07, data collected by the Drug Abuse Warning Network.

Doctors trafficking in drugs have become a national problem that has impacted the role of law enforcement. DEA's Office of Diversion Control has identified diversion and abuse of Oxycontin as a growing problem throughout the nation. Louisville, KY The Courier-Journal, February 8, 2001. It has been described by some local law enforcement officials as a national epidemic in the making. Louisville, KY The Courier-Journal, February 8, 2001. National indicators such as DAWN and STRIDE (System to Retrieve Information from Drug Evidence) show recent increases in oxycodone overdoses and law enforcement encounters. Some jurisdictions report as much as a 75% increase in property and other crimes that they specifically attribute to the abuse of OxyContin. Louisville, KY The Courier-Journal, February 8, 2001

The questions presented here—whether the “doctor exemption” to drug trafficking is an affirmative defense and whether a prosecutor may use “other acts” evidence in a trial of a doctor for trafficking in controlled substances—are worthy of review for a number of reasons. First, the “doctor exception” in R.C. 2925.03(B)(1) is generally interpreted as an affirmative defense, as reflected in Ohio Jury Instructions. See 4-525 OJI § 525.03. However, the court below held that the State must prove, as an element of the drug trafficking offense, that the doctor is not excepted from the statute. The result of this conflict is uncertainty about the elements of the offense of drug trafficking. Defendants need to know whether to prove the affirmative defense, and the State needs to know what elements of the offense to prove.

Second, the lower court’s holding on Rule 404(B) will require prosecutors to indict hundreds of counts instead of only a select few, because that is now the only way the prosecutor can be sure all relevant evidence will be admitted. When faced with a case with multiple potential criminal acts, the prosecutor has to decide how many counts to indict. If he indicts too few, the defendant may argue mistake or inadvertence. If he indicts all possible counts, the trial wastes judicial and prosecutorial resources. Under the ruling below, prosecutors will be prevented from proving motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident through “other acts” evidence, even though both R. 404(B) and RC 2925.03(B)(1) allow such use. If the prosecutor cannot use “other acts” evidence, he will be forced into the inefficient practice of indicting on all counts.

In addition, the Second District’s opinion conflicts with an opinion from the Ninth Appellate District, which allowed the admission of “other acts” evidence in this precise fact situation—a doctor writing prescriptions not in the course of a bona fide treatment. *State v. Parker*, (1995) 1995 Ohio App. LEXIS 4621.

## ARGUMENT

### Appellant's Proposition of Law No. 1:

*The "licensed health professional" exception to drug trafficking in R.C. 2925.03(B)(1) is an affirmative defense.*

R.C. 2925.03 creates an affirmative defense to the crime of drug trafficking for licensed physicians who provide drugs in compliance with the laws regarding prescription of controlled substances. Affirmative defenses are defined in R.C. 2901.05 as a defense expressly designated as affirmative, or a defense involving information either peculiarly within the defendant's knowledge or of such a nature that he can provide supporting evidence:

- (C) As used in this section, an "affirmative defense" is either of the following:
- (1) A defense expressly designated as affirmative;
  - (2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

R.C. 2901.05. Thus, the affirmative defense statute provides a two step test: the defense must be an excuse or a justification, and then "*either 'peculiarly within the knowledge of the accused' or of such nature that the accused 'can fairly be required to adduce supporting evidence.'*" *State v. Doran* (1983), 5 Ohio St. 3d 187, 193 (emphasis in original). R.C. 2925.03 meets both of these elements.

Ohio's drug trafficking statute does not apply to licensed health professionals who are authorized to prescribe drugs and who do so according to law:

- (B) This section does not apply to any of the following:
- (1) . . . licensed health professionals authorized to prescribe drugs . . . whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

R.C. 2925.03. Paragraph (B) excepts licensed physicians from the prohibition on drug trafficking, so long as the prescriptions are made under applicable laws.

The exception to drug trafficking for licensed physicians is an “excuse or justification.” The framework for the exception is, as the *Doran* Court stated, a “classic confession and avoidance.” *Doran*, 5 Ohio St. 3d at 193. That is, the physician, in claiming the defense, first confesses: “Yes, I prescribed those drugs.” Then, the physician asserts the exception as an excuse or justification for avoidance of the penalty: “However, I am licensed to write prescriptions, and the prescriptions that I wrote conformed to the applicable law.” Thus, the accused physician’s conduct is excused or justified by claiming the exception in the law.

The exception to drug trafficking can also be shown to be either “peculiarly within the knowledge of the accused,” or of such a nature that the accused “can fairly be required to adduce supporting evidence.” In this case, it is both. Nucklos is a licensed practitioner, and is charged with knowledge of the minimum acceptable conduct for his profession. In his treatment of patients, Dr. Nucklos is uniquely situated to know whether his treatment conforms to the law. He is the best person to describe the manner of treatment, and what his files reflect regarding that treatment. He performed the examinations and diagnoses, he prescribed the treatments based upon his observations, and he is the custodian of his own patient’s files.

In addition, this Court and the U.S. Supreme Court have both recognized that affirmative defenses with burden-shifting mechanisms do not violate either the Ohio or U.S. Constitutions, so long as the state must still prove every element of the offense. *Martin v. Ohio* (1987), 480 U.S. 228, 234; *State v. Martin* (1986), 21 Ohio St. 3d 91; *Rhodes v. Brigano* (6th Cir. 1996), 91 F.3d 803, 807. The State did so here. Accordingly, giving a jury instruction that allows an affirmative defense does not alleviate the State of its burden, rather it provides the accused with a defense he would not otherwise have. Thus, it is a benefit to the defense to provide for an affirmative defense.

Moreover, any confusion in the jury instructions regarding the affirmative defense would have worked in Nucklos' favor, not the State's. The Second District held that the jury instructions were "confusing" because the jury was told *both* that the prosecution must prove that Dr. Nucklos' conduct was not in accordance with the law beyond a reasonable doubt, *and* that Dr. Nucklos could show, by a preponderance of the evidence that his conduct was in accordance with the law. *State v. Nucklos* (2nd Dist.), 2007-Ohio-1025, ¶¶ 58. However, any confusion would not have changed the conviction. The trial court issued two instructions: one that the prosecution had the burden to prove that the defendant's conduct was not within the "doctor's exception" to drug trafficking; and the other was that the defendant bore the burden of proof of the same affirmative defense. To the extent that the jury was confused, it would have been as to whether Nucklos had to show his defense by preponderance or whether the State had to disprove it beyond a reasonable doubt. As the State's purported burden was higher than Nucklos', and the jury convicted, it would not have changed the outcome if the jury had convicted on the easier to prove preponderance standard. Put plainly, any confusion would have benefited Nucklos, not the State.

For the foregoing reasons, this Court should find that R.C. 2925.03 contains an affirmative defense that must be shown by the accused by a preponderance of the evidence.

**Appellant's Proposition of Law No. 2:**

*Evidence of multiple instances of drug trafficking is admissible under Evidence Rule 404(B) and R.C. 2945.59 to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.*

Both R.C. 2945.59 and Rules of Evidence Rule 404(B) allow the admission of "other acts" evidence for the specific purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. R.C. 2945.59 states:

In any criminal case in which the appellant's motive or intent, the absence of

mistake or accident on his part, or the appellant's scheme, plan, or system in doing an act is material, any acts of the appellant which tend to show his motive or intent, the absence of mistake or accident on his part, or the appellant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the appellant.

And Evid. R 404(B) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Thus, as long as the evidence is not being submitted to prove the defendant's character, but instead to show one of the permissible inferences, it is admissible.

R.C. 2945.59 and Evid. R 404(B) are to be strictly construed against the State and the admissibility of "other acts" evidence. However, if the other acts "tend to show" by substantial proof any of those purposes enumerated in Evid. R 404(B) such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, then the evidence of the other acts is admissible for such limited purpose. *State v. Crotts* (2004), 104 Ohio St. 3d 432, 436. The other act or acts offered as probative of the matter must themselves be temporally and circumstantially connected to the operative facts of the offense alleged.

Here, the "other acts" evidence tend to show that Nucklos knew that what he was doing was illegal—the stark difference between the Columbus and Springfield files alone shows that he knew how to keep proper records but did not. And at least one court of appeals agrees that evidence of multiple instances of drug trafficking in a case in which only a few counts were indicted is admissible.

In *State v Parker*, the Ninth Appellate District specifically allowed the introduction of other acts evidence through the testimony of two former patients. *Parker*, 1995 Ohio App. LEXIS

4621. Kenneth Parker was a podiatrist who was working out of his garage. *Parker*, 1995 Ohio App. LEXIS 4621 at \* 1. Law enforcement learned that Dr. Parker was selling prescriptions for percodan and valium and he was arrested and tried. *Parker*, 1995 Ohio App. LEXIS 4621 at \* 1-2. During trial two other persons testified they purchased prescriptions from Dr. Parker and an expert testified to the number of pain relievers prescribed by defendant to one of the "patients." *Parker*, 1995 Ohio App. LEXIS 4621 at \* 6-8. The court found that the determinative issue in the case was whether the defendant issued the prescriptions to the victim as part of a genuine medical treatment and the evidence that the defendant had previously written prescriptions for narcotics not in the course of a bona fide treatment was relevant to show his subjective intent in prescribing the drugs for the victim. *Parker*, 1995 Ohio App. LEXIS 4621 at \* 6-8.

Here, the admission of the other patient files, the testimony of the undercover agents and the testimony of Drs. Davis, Jobalia, and Parran established that the prescribing practice of the defendant was not within the minimal standards of the medical profession in Ohio and was for other than legitimate purposes. Nucklos' defense was that he was legitimately treating his patients in Springfield, though the patients themselves revealed otherwise. To foreclose any ability for Nucklos to say that he made mistakes in the treatment of Billie Jo Booth, Darrin Briggs, and Ramona Swyer, and that all of his other patients received the medically appropriate and adequate care, the other files were presented to show that it was his plan, his scheme, his intent, his knowledge, and that his treatment of Ms Booth, Mr. Briggs, and Ms Swyer was not an accident or mistake. *State v. Levitt* (5th Dist. 2003), 2003 Ohio App. LEXIS 5811.

In short, evidence of other acts of illegally prescribing controlled substances should be admitted in a case where only a few counts were indicted to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The Court should

find that the trial court's admission of evidence under Evidence Rule 404(B) was proper and should overrule the finding of the Second Appellate District.

### CONCLUSION

This Court should grant review and reverse the decision below.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in support of jurisdiction was served by

U.S. mail this 26<sup>th</sup> day of April, 2007, upon the following counsel:

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IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO :  
Plaintiff-Appellee : C.A. CASE NO. 06CA0023  
vs. : T.C. CASE NO. 04CR0790  
WILLIAM NUCKLOS : FINAL ENTRY  
Defendant-Appellant :

Pursuant to the opinion of this court rendered on the  
9th day of March, 2007, the judgment of the trial  
court is Reversed and the matter is Remanded to the trial  
court for further proceedings consistent with the opinion.  
Costs are to be paid as provided in App.R. 24.

*William H. Wolff, Jr.*  
WILLIAM H. WOLFF, JR., PRESIDING JUDGE

*Mike Fain*  
MIKE FAIN, JUDGE

*Thomas J. Grady*  
THOMAS J. GRADY, JUDGE

CLARK COUNTY  
COURT OF APPEALS  
MAR 12 2007  
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RONALD E. VINCENT, CLERK

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*April 25, 2007* Certified a  
*Entry Filed 3/12, 2007*

THE COURT OF APPEALS OF OHIO  
CLERK OF APPELLATE DISTRICT

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Common Pleas Court, Clark County, Ohio  
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[Cite as *State v. Nucklos*, 2007-Ohio-1025.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO :  
 :  
 Plaintiff-Appellee : C.A. CASE NO. 06CA0023  
 vs. : T.C. CASE NO. 04CR0790  
 WILLIAM NUCKLOS : (Criminal Appeal from  
 : Common Pleas Court)  
 Defendant-Appellant :

. . . . .  
O P I N I O N

Rendered on the 9th day of March, 2007.

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GRADY, J.:

{¶ 1} Defendant, William Nucklos, appeals from his  
convictions on ten counts of trafficking in drugs, R.C.  
2925.03(A), and the sentences imposed for those offenses  
pursuant to law.

{¶2} Defendant Nucklos is a licensed physician. In October of 2002, law enforcement officers executed a warrant to search his medical offices in Springfield and seize any evidence relevant to prove that Defendant had prescribed controlled substances illegally. The officers seized Defendant's patient records and a loaded shotgun found under his desk.

{¶3} Defendant was subsequently charged by indictment with ten counts of trafficking in drugs, R.C. 2925.03(A), and ten counts of illegal processing of drug documents, R.C. 2925.23(A). The State's theory was that Defendant illegally prescribed the drug OxyContin and similar controlled substances used to manage intractable pain to three patients on ten occasions, and that in doing so failed to comply with specific diagnosis and treatment protocols required by law when those drugs are prescribed.

{¶4} At trial, the State offered the testimony of the three patients the charges concerned and the testimony of three undercover police officers who had posed as patients and also been prescribed drugs by Defendant. The State also offered in evidence Defendant's medical records concerning his treatment of those and over two hundred other patients. Expert witnesses testified that those records reflect that

like failures in diagnosis and treatment occurred with respect to Defendant's other patients. The records were admitted as "other act" evidence pursuant to Evid.R. 404(B). On that same basis, the State offered evidence of the shotgun that was seized from Defendant's office as well as evidence showing that he had experienced serious financial difficulties.

{¶5} Defendant Nucklos testified that he believed he complied with all requirements imposed by law for prescribing Oxycontin. The only documentary evidence he introduced was a copy of the Hippocratic oath of physicians.

{¶6} The jury returned guilty verdicts on all ten counts of trafficking in drugs and all ten counts of illegal processing of drug documents. The trial court merged the illegal processing of drug document offenses into Defendant's ten drug trafficking offenses pursuant to R.C. 2941.25, and convicted Defendant of the ten trafficking offenses. The court sentenced Defendant to serve a maximum available term of two years for each offense, to be served consecutively, for an aggregate term of twenty years.

{¶7} Defendant filed a timely notice of appeal. He presents eight separate "arguments," which we shall treat as assignments of error for purposes of App.R. 16(A)(3). By leave of court, an amicus curiae brief was filed by the Ohio

State Medical Association concerning an error in a jury charge that Defendant has assigned. Because we find that the trial court erred in giving the challenged charge, and in admitting certain "other act" evidence, we need address only the assignments pertaining to those errors because our rulings on them render the remaining assignments moot. App.R. 12(A)(1)(c).

ASSIGNMENT OF ERROR "F"

{¶8} "THE COURT FAILED TO INSTRUCT THE JURY CORRECTLY AS TO THE LAW."

{¶9} A jury charge must be a distinct and unambiguous statement of the law as applicable to the facts before the court. In submitting a case to a jury, the court must "separate and definitely state \* \* \* the issues of fact made in the pleadings, accompanied by such instructions as to each issue as the nature of the case may require." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12 quoting *Baltimore & Ohio R.R. v. Lockwood* (1905), 72 Ohio St.586, paragraph one of the syllabus. Reversible error arises if the jury charge is incomplete, misleading, or fails to define legal terms which are essential to the jury's deliberate process. *Marshall*. See also, *Szymczak v. Midwest Premium Finance Co.* (1984), 19 Ohio App.3d 173.

{¶ 10} R.C. 2925.03, trafficking in drugs, provides, in pertinent part:

{¶ 11} "(A) No person shall knowingly do any of the following:

{¶ 12} "(1) Sell or offer to sell a controlled substance;

{¶ 13} "\*" \* \*

{¶ 14} "(B) This section does not apply to any of the following:

{¶ 15} "(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code." (Emphasis supplied).

{¶ 16} R.C. Chapter 3719 governs controlled substances. R.C. 3719.06(A)(1) authorizes licensed health professionals to prescribe controlled substances "if acting in the course of professional practice, in accordance with the law regulating the professional's practice, and in accordance with rules adopted by the state board of pharmacy . . ."

{¶ 17} R.C. Chapter 4731 governs licensed physicians. R.C. 4731.41(A) prohibits the practice of medicine "without the appropriate certificate from the state medical board to engage in the practice." Pursuant to its licensing authority, the

state medical board promulgated O.A.C. 4731-21-02, et seq., governing a physician's utilization of any prescription drug for the treatment of intractable pain on a prolonged basis. The regulation contains extensive provisions governing a physician's initial diagnosis, a medical diagnosis, formulation of an individualized treatment plan, diagnosis of an intractable pain condition and referral of the patient to a specialist in the body part affected, the need to obtain records of the patient's prior treatment, maintaining records detailing those procedures, and similar requirements.

{¶ 18} It is undisputed that Defendant Nucklos acted as a licensed health professional for purposes of R.C. 3719.06(B)(1) when he committed the violations of R.C. 2925.03(A)(1) alleged, and that the drugs he prescribed for the three patients concerned in the ten charges against him, as well as numerous other patients, is a controlled substance for purposes of R.C. 2925.03(A)(1). Defendant argues that the trial court erred in its instruction to the jury regarding the burden of proof that R.C. 2925.03(B)(1) imposes; specifically, that the trial court erred when it instructed the jury that it was Defendant's burden to prove that he acted in accordance with the laws and regulations governing prescription of a controlled substance.

{¶ 19} Criminal liability requires proof that the accused engaged in a voluntary act or omission prohibited by law with the requisite degree of culpability for each element of the offense the law specifies. R.C. 2901.21(A). Further, R.C. 2901.05 provides, in pertinent part:

{¶ 20} "(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

{¶ 21} "(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of 'reasonable doubt' and 'proof beyond a reasonable doubt,' contained in division (D) of this section.

{¶ 22} "(C) As used in this section, an 'affirmative defense' is either of the following:

{¶ 23} "(1) A defense expressly designated as affirmative;

{¶ 24} "(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

{¶ 25} In charging the jury with respect to the drug

trafficking violations alleged, the court instructed the jury that:

{¶ 26} "The defendant is charged in Count 1 with trafficking in OxyContin. Before you can find the defendant guilty of this offense, you must find beyond a reasonable doubt that on or about December 6, 2001, at Clark County, Ohio, he did knowingly sell or offer to sell the Schedule II controlled substance OxyContin to Darrin Briggs; and his conduct was not in accordance with Chapters 3719, 4729, and 4731 of the Ohio Revised Code.

{¶ 27} "A person acts 'knowingly' regardless of his purpose when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

{¶ 28} "'Sale' includes delivery, barter, exchange, transfer, or gift or offer thereof; and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee. The issuing of a prescription for controlled substances constitutes a sale of controlled substances.

{¶ 29} "'Offer' means to present for acceptance or rejection.

{¶ 30} "Typically a physician who prescribes a controlled substance is exempt from the provisions of law dealing with drug trafficking; however, a physician loses that exemption when his conduct is not in accordance with Chapters 3719, 4729 and 4731 of the Ohio Revised Code.

{¶ 31} "If you find that the defendant was not acting as a physician in the course of the bona fide treatment of a patient because he issued a prescription for some reason or reasons other than a legitimate medical purpose, you must find that his conduct was not in accordance with Chapters 3719, 4729, and 4731 of the Ohio Revised Code.

{¶ 32} "Bona fide' means in, or with, good faith, honestly, openly, and sincerely, without deceit or fraud.

{¶ 33} "If you find that the State proved beyond a reasonable doubt all of the essential elements of trafficking in OxyContin, you will go on to determine whether the defendant has established by a preponderance of the evidence the affirmative defense that he was a physician acting in the course of the bona fide treatment of patients.

{¶ 34} "On the other hand, if you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of trafficking in OxyContin, your verdict on that charge must be not guilty.

{¶ 35} "Counts 2 through 10.

{¶ 36} "All of the instructions and definitions for Count 1, which are set forth above, apply to Counts 2 through 10 as well." (T. pp. 1900-1902) (Emphasis supplied).

{¶ 37} Defendant argues that the instruction the court gave was confusing and inconsistent, and that it improperly transferred the burden of proof on the proposition in R.C. 2925.03(B)(1) to him. We agree.

{¶ 38} Because R.C. 2925.03(B)(1) is not expressly designated as an affirmative defense, an accused may be required to prove the particular facts and circumstances that R.C. 2925.03(B)(1) "concerns, by" a preponderance of the evidence, only if those matters "involv(e) an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." R.C. 2901.05(C)(2). However, because the burden to prove all elements of the offense is on the prosecution, and never shifts, where a particular affirmative defense goes to or negates an element of the offense which the prosecution must prove in order to convict, the burden of its proof does not shift, to the defendant because due process requires the state to prove every element of the crime charged, beyond a reasonable doubt. *In re Winship* (1970), 387 U.S. 358, 90

S.Ct. 1068, 26 L.Ed.2d 368; *Patterson v. New York* (1977), 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281; *State v. Frost* (1979), 57 Ohio St.2d 121.

{¶39} R.C. 2925.03(A)(1) prohibits knowingly selling or offering to sell a controlled substance, and issuing a prescription for a controlled substance is a form of "sale." However, the privilege conferred on licensed physicians by R.C. 3719.06(A)(1) to prescribe controlled substances exempts those licensees from criminal liability for conduct that would otherwise violate R.C. 2925.03(A)(1) when they prescribe a controlled substance, unless in prescribing the drug the physician fails to act in accordance with applicable laws and regulations. R.C. 2925.03(B)(1). Because proof of the failure is necessary to a finding of the physician's criminal liability in that circumstance, that failure is an element of the criminal conduct that R.C. 2925.03(A)(1) prohibits when the accused is a licensed physician and the conduct alleged to create criminal liability involves "sale" of a controlled substance by writing a prescription for it. Being an element of the violation of R.C. 2925.03(A)(1) alleged, proof that the defendant physician did not act in accordance with applicable laws remains the State's burden, on the reasonable doubt standard, and does not shift to the defendant on the theory

that negating that element constitutes an affirmative defense.

*Winship; Patterson; Frost.*

{¶40} That is not to say that R.C. 2925.03(B)(1) does not implicate an affirmative defense. It does, but only to the extent that an accused must prove that he fits within one of the exempted occupations the section identifies. At least with respect to physicians who are "licensed health professionals," that is an insignificant burden, and in the present case was a matter the State conceded and on which the proof that it offered was based. That proof likewise demonstrates the privilege that R.C. 3719.06(A)(1) confers on licensed physicians to prescribe controlled substances. That in exercising the privilege Defendant was not "acting in the course of professional practice, in accordance with law regulating the professional's practice . . .", which deprives him of the privilege in order to create criminal liability, remains a matter on which the State has the burden of proof.

{¶41} The Supreme Court of Ohio has not addressed this issue specifically. However, in *State v. Sway* (1984), 15 Ohio St.3d 112, the Supreme Court held:

{¶42} "A physician who unlawfully issues a prescription for a controlled substance not in the course of the bona fide treatment of a patient is guilty of selling a controlled

substance in violation of R.C. 2925.03." *Id.*, Syllabus by the Court. That positive statement of the law comports with the view that it is the state's burden to prove the basis for criminal liability in R.C. 2925.03(B)(1). Further, in *Sway* the court noted that the bill of particulars the state had filed alleged the defendant physician's failure to conform to the standards of his profession in prescribing the medication concerned. Likewise, in the present case, the indictment charging Defendant with ten violations of R.C. 2925.03(A)(1) alleges, with respect to each of the ten counts charged, that Defendant's "conduct was not in accordance with Chapters 3719, 4729, and 4731 of the Revised Code, in violation of 2925.03 of the Revised Code . . ." The State's charging document thus set up the alleged failure as an element of the offenses with which he was charged.

{¶ 43} The proposed instructions that the State filed (Dkt. No 37) indicates that the State viewed the alleged failure as part of its burden of proof. The proposed instruction states:

{¶ 44} "If you find that the defendant physician authorized prescriptions for a controlled substance not in the course of the legitimate treatment of a patient, and not having a bona fide or good faith intention to practice medicine, you must find that defendant acted outside the scope of Chapters 4729,

4731, and 3719 of the Ohio Revised Code."

{¶ 45} That the State viewed Defendant's alleged failures to act in accordance with applicable laws and regulations as part of the State's burden of proof is also apparent from the transcript of the conference on the instructions the court proposed to give. When the court indicated its intent to give an affirmative defense instruction, Attorney Rowland, who had been assigned by the State Pharmacy Board to assist in the prosecution, expressed his "concern about . . . indicating that (R.C. 2925.03(B)(1) it's an affirmative defense" (T. 1795), and further told the court that "the Court's instructions on what the State must prove, I think, appropriately indicates what the State must prove," adding that "counsel for the defense has indicated that in his proposed instructions . . ." (T. 1796). Defense counsel joined the State in the concerns it expressed, asking that his proposed instruction instead be given. *Id.*

{¶ 46} Responding to these contentions of counsel, the court stated:

{¶ 47} "As far as the issue of whether or not a physician acting in the course of the bona fide treatment of patients, whether or not that's an affirmative defense, the Court would concede that it is kind of duplicative in this case because

one of the elements that the State's required to prove is that the defendant's conduct was not in accordance with certain chapters of the Revised Code; and presumably if the State proves that, then that should be the end of the matter.

{¶ 48} "Because an affirmative defense would be that he did act in accordance with those provisions of the Revised Code, and it is kind of duplicative; but in the Court's reviewing of the Ohio Jury Instructions, it did have acting in the course of the bona fide treatment of patients as an affirmative defense.

{¶ 49} "And, again, even though there's some overlap - and I agree with counsel that it does seem to be an element of the State's case - I think for purposes of just maybe making it a little more clear to the jury that that's the specific element of the offense that the defendant is challenging. I think I'll leave it as an affirmative defense." (T. 1798-1799).

{¶ 50} The portion of Ohio Jury Instructions ("OJI") to which the court referred is Section 525.03, which contains the following "comment" at paragraph number 12:

{¶ 51} "R.C. 2925.03(B) creates certain exceptions to the prohibitions of R.C. 2925.03(A). The Committee believes these are affirmative defenses under R.C. 2901.05(C)(2) or in the nature of affirmative defenses and must be treated as such.

See *State v. Little* (March 14, 1991), 1991 Ohio App. LEXIS 1053; *State v. Hassell* (May 5, 1993), 1993 Ohio App. LEXIS 2364."

{¶52} Neither decision to which the OJI comment refers, *Little* and *Hassell*, involved alleged violations of R.C. 2925.03(A)(1). Rather, both involved charges of carrying concealed weapons in violation of R.C. 2923.12(A)(2), the weapon being a handgun. Paragraph (C)(1) of R.C. 2923.12 states: "This section does not apply to . . . law enforcement officers, authorized to carry concealed weapons . . . and acting within the scope of their duties."

{¶53} The defendant in *Hassell* was an officer of the Cincinnati Metropolitan Housing Authority who claimed that he was acting in the course of his official duties when he shot a suspect. The defendant in *Little* was a security guard who had been authorized by a local police department to carry a firearm that was discovered in his knapsack. In both cases, the appellate courts held that R.C. 2923.12(C)(1) created an affirmative defense to criminal liability.

{¶54} Both the affirmative defense in R.C. 2923.12(C)(1) pertaining to law enforcement officers and the criminal liability for a violation of R.C. 2923.03(A)(1) imposed on licensed health professionals by R.C. 2925.03(B)(1) depend on

the exercise of a privilege conferred by law. However, the particular exercise of the privilege contemplated by R.C. 2923.12(C)(1), an officer's acting in the course of official duties, involves conduct that is not an element of the offense to which it applies, carrying a concealed weapon in violation of R.C. 2923.12(A). On the other hand, as we explained, the failure to act in accordance with law that R.C. 2925.03(B)(1) contemplates is an element of the conduct prohibited by R.C. 2925.03(A)(1) when it is committed by a licensed physician in the exercise of the privilege conferred on him. Therefore, per *Winship*, the burden of its proof cannot shift to the accused, irrespective of its similarity to other affirmative defenses such as R.C. 2923.12(C)(1).

{¶ 55} The rule of *Winship* prevents the burden of proving the matters that R.C. 2925.03(B)(1) involves from being a defense on which an accused "can fairly be required to adduce supporting evidence," which is a necessary feature of an affirmative defense defined by R.C. 2901.05(C)(2). In addition, per that section, the affirmative defense must "involv(e) an excuse or justification peculiarly within the knowledge of the accused."

{¶ 56} Whether a law enforcement officer was acting within the course of his official duties involves a matter of

subjective intent that is "peculiarly" within the officer's knowledge. Defendant Nucklos's alleged failure to comply with the requirements imposed by O.A.C. 4731-21-02, et seq., would involve matters that are within his knowledge, but not peculiarly (characteristically, distinctly, or exceptionally) so. Those regulations impose extensive record-keeping requirements pertaining to each duty they impose on physicians who prescribe controlled substances for intractable and persistent pain. As it did here, the state may offer evidence proving that a physician's records or lack thereof evidence the violation of law that R.C. 2925.03(A)(1) and (B)(1) involves, without any proof of why the defendant physician acted as he did. They are matters of objective fact for which a physician must, per the regulations, maintain records which reflect that those matters occurred.

{¶ 57} For the foregoing reasons, we believe that the advice in paragraph 12 of Section 525.03 OJI is incorrect and misleading, and, as it did in the present case, has the capacity to lead the trial courts to commit error. OJI is a respected and authoritative source of the law, but it is merely a product of the Ohio Judicial Conference and not binding on the courts. Therefore, adherence to its terms does not insulate a court from reversal when reversible error is

committed. We strongly urge the Editors of OJI to expunge its comment.

{¶ 58} By adhering to OJI as it did, telling the jury that proof of his compliance with applicable laws and regulations is an affirmative defense that Defendant had the burden to prove by a preponderance of the evidence, and that in order to convict the jury must find beyond a reasonable doubt that Defendant's conduct in that same regard was not in accordance with law, the instruction the court gave was internally inconsistent and confusing. By its terms, the instruction also shifted the burden to prove an element of the offense to the Defendant which *Winship* prohibits. The error is reversible.

{¶ 59} As a final matter, the State contends that Defendant acquiesced in the court's error. The record does not support the State's contention.

{¶ 60} Defense counsel's alleged "acquiescence" was to the court's definition of "bona fide" (T. 1796), not to the affirmative defense instruction the court proposed to give. The transcript reflects that both the State and Defendant proffered instructions that were consistent with the rule of *Sway* and set up no affirmative defense, and that Defendant objected to the court's failure to give his requested

instruction. (T. 1796). When Defendant stated that he intended his objection to the court's affirmative defense instruction to be sufficient for purposes of Crim.R. 30, which requires a particularized objection "before the jury retires to consider its verdict," the court twice replied, "Sure." (T. 1797). Therefore, we believe that the error was preserved, not waived.

{¶ 61} Defendant's assignment of error "F" is sustained.

DEFENDANT'S ASSIGNMENT OF ERROR "C"

{¶ 62} "THE PRIOR 'BAD ACT' EVIDENCE, THE SO-CALLED CIVIL JUDGMENT, WAS INADMISSIBLE AND UNDULY PREJUDICED DEFENDANT BEFORE THE JURY; THE COURT SHOULD HAVE DECLARED A MISTRIAL AT THE BEGINNING OF THE TRIAL; NOW, THIS COURT MUST VACATE THE CONVICTION, AND REMAND FOR A NEW TRIAL."

{¶ 63} During his opening statement, the special prosecutor assigned by the State Pharmacy Board told the jury:

{¶ 64} "One of your first witnesses that you're going to hear is a gentleman from the Ohio Bureau of Workman's Compensation. He's going to tell you that there was a civil judgment against the defendant several years ago, a very substantial civil judgment, a civil judgment that tells us an idea of why this doctor would practice the way you're going to hear he did.

{¶ 65} "He needed some money. He needed a lot of money, and he needed it fast; and how did he do that? A doctor who has an office in Columbus decided one day a week, he'll come to this county, this city, and open an office one day a week.

{¶ 66} "You're going to hear that the patients that he saw were only allowed to come in with cash, none of this insurance stuff. Cash. And a substantial sum of cash before you get to see the doctor; and then what the doctor did with you was basically, 'What do you want?' And those patients got the drugs that they wanted as long as they paid the cash.

{¶ 67} "Now, the State doesn't have to show motive, doesn't have to prove motive; and the Judge will tell you that. But we've all got to wonder why would somebody do these things? Why would a doctor traffic in drugs? Why would a doctor sell drugs when he could be treating legitimate patients? So you'll hear some of that testimony as to why." (T. 28-30).

{¶ 68} Defendant didn't object to the prosecutor's statement when it was made. Instead, after the conclusion of the prosecutor's opening statement, Defendant moved for a mistrial, arguing that by mentioning the civil judgment against Defendant the prosecutor had "poisoned the minds of these jurors in an inappropriate way." (T. 36).

{¶ 69} The trial court overruled the Defendant's motion on

a finding that evidence of the civil judgment was admissible pursuant to Evid.R. 404(B) to show motive. (T. 37). The court also found that the probative value of the evidence is not outweighed by the danger of prejudice or confusion or misleading the jury. (T. 38). The court went on to give the jury a cautionary instruction that it could consider any evidence of a civil judgment only to show Defendant's "motive for why he may or may not have committed the crimes with which he is charged" and not for any other purpose, including "bad character," or that Defendant "would have acted in conformity with that bad character with respect to the charges with which he's charged today." (T. 38-39). The court repeated the cautionary instruction after the evidence was admitted. (T. 175).

{¶ 70} We find no error in the trial court's ruling. The evidence that the prosecutor told the jury it would hear concerning a civil judgment against Defendant was admissible per Evid.R. 404(B) to prove his motive for committing the crimes alleged: a need for money. No mistrial was warranted, and the court's cautionary instructions avoided any undue prejudice.

{¶ 71} Defendant changes his tack on appeal. He argues that the prosecutor's statement was objectionable because the

evidence the State subsequently introduced through testimony of an employee of the Bureau of Worker's Compensation failed to show that a civil judgment had been granted against Defendant when the alleged offenses took place. Rather, the witness testified that an audit performed in 2000 found that Defendant substantially overbilled the Bureau for services, and that Defendant owed the Bureau approximately \$623,000 in reimbursement. (T. 152-162).

{¶ 72} The fact that the State's evidence failed to support the particulars of the prosecutor's opening statement concerning the existence of a civil judgment does not render the statement "objectionable" or justify a mistrial. The variance was available for Defendant's exploitation in cross-examination. Defendant made no attempt to do that with respect to the alleged civil judgment, and instead challenged the witness's testimony concerning the findings the audit produced and Defendant's knowledge of them. (T. 162-171).

{¶ 73} Defendant's contention at trial was that he had been "severely prejudiced by this testimony" (T. 172) of alleged overbilling. No doubt, the evidence not only showed an alleged motive for the crimes with which Defendant was charged, but it also implied dishonesty. However, it was not so unfairly prejudicial that it should have been excluded

pursuant to Evid.R. 403. *State v. Geasley* (1993), 85 Ohio App.3d 360.

{¶ 74} We find no abuse of discretion on the error assigned. The cautionary instructions the trial court gave avoided any undue prejudice. Defendant's assignment of error "C" is overruled.

DEFENDANT'S ASSIGNMENT OF ERROR "D":

{¶ 75} "THE STATE'S CHARACTER ASSASSINATION CONTINUED WITH OTHER 'BAD ACTS' EVIDENCE INCLUDING A SEIZED SHOTGUN BRANDISHED BEFORE THE JURY, IRRELEVANT PATIENT MEDICAL RECORDS, SLANDEROUS EXPERT TESTIMONY ON THE INADMISSIBLE RECORDS, FAUX PAIN PATIENTS (THE UNDERCOVER AGENTS), AND OBJECTIONABLE HEARSAY ALLEGATIONS."

{¶ 76} In this assignment of error, Defendant contends that the trial court erred when it admitted certain evidence pursuant to Evid.R. 404(B): a loaded shotgun found in the search of Defendant's office and seized by law enforcement officers, and medical records of over two hundred other patients concerning which the State's expert witness testified, as well as the testimony of three undercover police officers that the State also offered.

{¶ 77} The State responds that the loaded shotgun was

admissible to show Defendant's "state of mind"; that because his practice was run on a cash-payment basis, "the shotgun was to protect himself from the drug dealers he was supplying with Oxycontin." (Brief, p.42). The State made that same contention at trial.

{¶ 78} Evid.R. 404(B) and its companion statutory provision, R.C. 2945.59, are concerned with extrinsic acts. "An extrinsic act is simply any act which is not part of the operative facts or episode of the case; i.e., it is 'extrinsic' usually because of a separation of time, space, or both." Weissenberger's Ohio Evidence Treatise (2006 Ed.) §402.21. "Generally, extrinsic acts may not be used to suggest that the accused has the propensity to act in a certain manner." *State v. Crotts*, 104 Ohio St.3d 432, 435, 2004-Ohio-432, ¶18.

{¶ 79} Obviously, Defendant did not use the loaded shotgun to write the prescriptions for the three patients whose diagnosis and treatment by him the indictment concerns. Its presence in his office is remote from the operative facts of the criminal conduct alleged. Nevertheless, insofar as the shotgun was in Defendant's office while those patients were examined and treated there, which is a reasonable implication, the shotgun and its presence are not matters separated by time

and space from the criminal offenses in which Defendant is alleged to have engaged. Therefore, evidence that the loaded shotgun was found in Defendant's office is not "extrinsic" to the criminal conduct alleged, and Evid.R. 404(B) is not implicated.

{¶ 80} The evidence the State offered concerning Defendant's treatment of other patients, the three undercover officers and over two hundred others whose medical records were introduced through the State's expert witnesses, is more problematic.

{¶ 81} R.C. 2901.21(A) conditions criminal liability on findings that an accused committed an act or omission prohibited by law, with the requisite degree of mental culpability. R.C. 2925.03(A)(1), the drug trafficking statute Defendant was accused of violating, requires proof that the accused acted "knowingly." R.C. 2901.22(B) provides:

{¶ 82} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 83} Because a culpable mental state involves an accused's state of mind, it typically must be proved by

circumstantial evidence: evidence of one thing from which another may be inferred. Evidence of the conduct prohibited by law ordinarily permits an inference that the accused acted knowingly when he engaged in the conduct. Evidence of matters extrinsic to that prohibited conduct in which the accused also engaged may also be offered for that purpose pursuant to Evid.R. 404(B), subject to two limitations.

{¶84} Per the first sentence of the rule, "[e]vidence of the other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The provision extends the exclusionary principle of Evid.R. 404(A) to extrinsic evidence offered for a purpose that Evid.R. 404(A) prohibits. Thus, "[g]enerally, extrinsic acts may not be used to suggest that the accused has the propensity to act in a certain manner." *State v. Crotts*, 104 Ohio St.3d 432, 435, 2004-Ohio-6650.

{¶85} "Rule 404(B) creates a forbidden two-step causal relationship, where an extrinsic act inferentially indicates a character trait or general propensity, which in turn inferentially indicates the commission of the act which is part of the operative facts of the case. . . .The rule, in essence, prohibits the argument which would suggest that because a person acted in a particular way on a distinct,

specific occasion, that person likely acted in the same way with regard to the operative facts of the instant litigation."

Weissenberger, § 404.21.

{¶ 86} After stating the basic rule of exclusion, the second sentence of Evid.R. 404(B) indicates that evidence of other crimes, wrongs, or acts may be admissible to prove consequential facts other than conforming conduct. The list of purposes set out is not exclusive or exhaustive. Neither do they constitute exceptions to the prohibitions in the prior sentence. They are merely illustrative of purposes for which extrinsic evidence may otherwise be offered to prove a fact other than propensity and conforming conduct when that fact is probative of the actor's mental state and relevant to the particular degree of culpability an offense involves. The burden is on the proponent of extrinsic act evidence to demonstrate that the relevancy of the extrinsic act does not pertain to character and conforming conduct. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391.

{¶ 87} Relying on Evid.R. 404(B), the State argues that evidence concerning Defendant's treatment of other patients in a way similar to his treatment of the three whose treatment is the subject of Defendant's alleged ten violations of R.C. 2925.03(A)(1) was admissible to show "intent, preparation,

plan, knowledge and absence of mistake or accident." (Brief, pp. 42-43). In support of its argument, the State contends that the evidence of Defendant's treatment of other patients shows that the conduct alleged in the indictment was not a mistake because Defendant's treatment of these other patients was the same, that he never obtained records of prior medical treatment for any of his patients, and made no referrals of any of them. The State further contends that the testimony of its three experts was admissible in order to make those showings. (Brief, pp. 43-44).

{¶ 88} The State's argument relies on the very inferential pattern that Evid.R. 404(B) prohibits: proof of an extrinsic act which inferentially indicates a propensity that, in turn, inferentially indicates commission of an act which is part of the operative facts of the offenses alleged. Weissenberger, § 404.21. Stated more simply; because he did it once, it is reasonable to find that he did it again. We necessarily reject the State's arguments, therefore. Nevertheless, we will consider the State's contentions that the other act evidence concerned was admissible per Evid.R. 404(B) because it was probative of Defendant's intent, preparation, plan, knowledge and absence of mistake or accident.

{¶ 89} It is fundamental to any of the matters in Evid.R.

404(B) and R.C. 2945.59 that in order for other act evidence to be admissible to prove it, the matter must be relevant to a question "at issue" in the litigation. *State v. Smith* (1992), 84 Ohio App.3d 647. Because both the rule and statute codify an exception to the common law, they must be strictly construed against admissibility of other act evidence. *State v. Burson* (1974), 38 Ohio St.3d 157.

{¶90} To be admissible, the other act evidence must tend to show by substantial proof one or more of the things the rule or statute enumerate. *State v. Broom* (1988), 40 Ohio St.3d 277. Such evidence is never admissible when its sole purpose is to establish that the defendant committed the act alleged in the indictment. *State v. Flonory* (1972), 31 Ohio St.2d 164. Rather, the evidence must tend to prove one or more of the matters in Evid.R. 404(B), which in turn is itself relevant to prove the criminal offenses alleged. *State v. Crofts*.

{¶91} Defendant testified that he believed that he complied with all applicable regulations when prescribing Oxycontin to his patients. That is evidence concerning Defendant' state of mind, and extrinsic evidence is admissible to rebut it, if the evidence might tend to prove that Defendant understood the wrongful nature of his acts. For

example, evidence that a prior, similar wrongful act on a defendant's part has been the subject of his arrest or conviction or prior law enforcement encounters would be probative of his knowledge that his conduct was wrongful. *State v. Greer* (1981), 66 Ohio St.2d 139.

{¶ 92} Evidence that Defendant engaged in the same wrongful conduct when he treated other patients does not demonstrate that when he treated the patients the charges in the indictment involve, Defendant acted in the knowledge that his conduct was wrongful. It merely proves prior, conforming conduct, and in that regard is inadmissible per Evid.R. 404(B).

{¶ 93} Defendant did not claim that his alleged failure to act in accordance with applicable law was accidental, that is, a fortuitous event. To the extent that his claim was one of a mistaken belief, which likewise involves his intent, evidence of the Defendant's extrinsic acts is admissible to prove that Defendant had on prior, similar occasions acted in accordance with law. Evidence that Defendant had likewise failed to act in accordance with law on other, similar occasions is not probative that his alleged criminal conduct was the product of a mistake. It is merely proof of conforming conduct and prohibited by Evid.R. 404(B).

{¶ 94} Defendant's identity was not in issue with respect to the charges alleged. His motive was in issue, and extrinsic act evidence concerning his financial difficulties was admissible to prove that he had a specific reason to commit the criminal acts charged. Evidence of his treatment of other patients was not probative of his motive.

{¶ 95} Extrinsic evidence is admissible to prove a defendant's scheme, plan, or system when they are probative of a sequence of events leading up to the crime charged or preparatory of the crime charged. Weissenberger, § 404.28. Defendant's diagnosis and treatment of other patients preceded the crimes charged, or were contemporaneous with those crimes. However, they were not a part of a sequence of events constituting a scheme, plan, or system to commit the crimes alleged. They were merely more of the same.

{¶ 96} Nothing that the evidence concerning Defendant's treatment of his other patients which the State offered is probative of whether he failed to act in accordance with law when he committed the crimes alleged in the indictment, except that as evidence it demonstrates a propensity to commit the crimes charged because it portrays conforming conduct. Evidence is inadmissible for that purpose. Evid.R. 404(B).

{¶ 97} The trial court abused its discretion when it

admitted evidence of Defendant's extrinsic acts in treating patients other than the three whose treatment forms the charges against Defendant in the indictment. Unlike the issue of the affirmative defense instruction, which is confined to Defendant's conviction for drug trafficking, R.C. 2925.03(A)(1), this error also goes to the charges for Defendant's violation of R.C. 2925.23(A), illegal processing of drug documents precluding conviction on the R.C. 2925.23(A) violations alleged.

{¶ 98} Defendant's assignment of error "D" is sustained. Having sustained Defendant's assignments of error "F" and "D," we will order Defendant's convictions reversed and the case remanded for further proceedings consistent with this opinion.

WOLFF, P.J. And FAIN, J., concur.

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