

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-1844

State of Ohio

Appellant,

v.

Stedmund Creech,

Appellee.

On Appeal from the Court of Appeals of Ohio,
Seventh Appellate District

Court of Appeals
Case No. 13-JE-41

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT STATE OF OHIO

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL
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GRANTED

The State of Ohio's case against Stedmund Creech is one of great public and general interest because the ruling by the Court of Appeals for the Seventh Appellate District differs from the decisions reached by the Appellate Courts in the Second, Sixth, Eighth, Ninth, Tenth, Fifth and Twelfth Appellate Districts.

Stedmund Creech was convicted after a jury trial of three (3) counts of Having Weapons While Under Disability, in violation of Revised Code Section 2923.13. Despite contrary rulings in the seven (7) districts described above, the Court of Appeals for the Seventh Appellate District ruled that the trial court abused its discretion by failing to accept the defendant's stipulation that he was a convicted felon. The State indicted Stedmund Creech for violating Revised Code Section 2923.13 in three (3) separate ways: first, for having a felony conviction for an offense of violence; second, for having a felony drug conviction; and third, for being under indictment for a felony drug offense at the time of the offense in the instant case. The State of Ohio argued that it should be allowed to present its evidence regarding all of the forms of disability and that it was not required to accept a stipulation to any or all of the alleged disabilities. The trial court agreed and ruled that the State was not required to accept the stipulation, nor was the State required to elect which of the counts it would choose for sentencing (in the event that the defendant was convicted of all three (3) counts). The Court of Appeals reversed the conviction and sentence and remanded the matter for a new trial.

Historically, the State has been permitted to prove its case in any manner that it chooses, as long as it does not violate the Rules of Evidence. According to this Court: "We do not believe

that the defendant has the right to limit the production of proper evidence on the part of the prosecution to any greater extent than the prosecution has the right to limit the production of proper evidence on the part of the defense. We are of the opinion that either party has the right to conduct its side of the case in the manner it deems best under the proper supervision of the trial court and the applicable statute and case law of Ohio.” *State v. Eaton*, 19 Ohio St. 2d 145, 153-54, 249 N.E. 2d 897 (1969).

Revised Code Section 2923.13 (Having weapons while under disability) provides as follows:

- (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
 - (1) The person is a fugitive from justice.
 - (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.
 - (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.
 - (4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.
 - (5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to hospitalization by court order" and "patient" have the same meanings as in section 5122.01 of the Revised Code.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.” (Emphasis added)

Ohio courts have traditionally not been required to accept a defendant’s stipulation to a prior conviction for a weapons while under disability charge. These courts recognize the prior conviction as an essential element which the state has the burden to prove. Because the burden rests on the State, it is not mandatory to accept a defendant’s stipulation. *State v. David Allen*, 2d Dist. Nos. 95–CA–38T.C., 95–CR–76, 1996 WL 86231, *5 (Mar. 1, 1996); *State v. Gowdy*, 6th Dist. No. E–45, 1994 WL 506164 (Sept. 16, 1994); *State v. Smith*, 68 Ohio App. 3d 692, 695, 589 N.E.2D 454 (9th Dist. 1990); *State v. Thompson*, 46 Ohio App. 3d 157, 159, 546 N.E.2d 441 (9th Dist. 1988); *State v. Mayle*, 10th Dist. No. 92AP–403, 1992 WL 308655, *4 (Oct. 22, 1992).

In 1997, the Supreme Court of the United States decided *Old Chief v. United States*, 519 U.S. 172 (1997). The Court held, “A district court abuses its discretion under Rule 403 if it spurns a defendant’s offer to concede a prior judgment and admits the full judgment record over the defendant’s objection, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction.” *Id.* at syllabus. Old Chief faced the *federal* charge of weapons while under disability. He sought to stipulate to his qualifying prior conviction. The prosecutor was unwilling to stipulate, and the district judge ruled the prosecutor was not required to accept the defendant’s offer. *Id.* at 177. The Court acknowledged “the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. ... This is unquestionably true as a general matter.” *Id.* at 186–87. Additionally, the Court noted, “In sum, the accepted rule that the prosecution is

entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense." *Id.* at 189. However, the Court created an exception to this general rule, prohibiting the introduction of prior convictions proving a defendant's legal status of disability and held that when the defendant is willing to stipulate to a qualifying conviction, the prosecution must accept the defendant's offer.

While *Old Chief* is controlling in federal courts, it need not be in Ohio. First, *Old Chief's* holding is limited to the application of a federal statute and the Federal Rules of Evidence. Second, Ohio's statute is significantly different from the federal weapons while under disability statute. Finally, a majority of Ohio districts accept the traditional rule that the prosecution can choose the method for proving its case and reject the exception *Old Chief* creates in federal courts. The persuasive authority from these Ohio courts is more compelling, as Ohio courts conduct the analysis based on state law.

In the instant case, the Seventh Appellate District has effectively prohibited the State's ability to prove its case in the manner that it chooses in serious felony cases. In light of the Seventh Appellate District's decision, the law is no longer uniform – despite the fact that this issue was not a matter of first impression. By joining only the Eleventh District, the Seventh District has intensified the intradistrict conflict. Consequently, defendants in Ohio courts will receive different results, based solely on the location of the case. The resolution of this conflict would provide certainty to the State, ensure equal treatment for defendants and provide much needed clarification for attorneys and judges.

STATEMENT OF THE CASE AND FACTS

On July 2, 2012, Stedmund Creech was a passenger in a car with four (4) other people. The car was driven by a young woman named Trystn Hampton. A separate female was in the front passenger seat. Mr. Creech and two of his friends were in the rear seat of the vehicle. As they came across the Lawson Avenue bridge traveling toward the Pleasant Heights section of Steubenville, they passed a white vehicle being driven by a man named Antonio Johnson. Antonio Johnson was a gang member at odds with Stedmund Creech. As the vehicles passed one another, Antonio Johnson turned his vehicle around and began following the vehicle in which Stedmund Creech was a passenger. When the vehicle with Stedmund Creech came to a stop, Mr. Johnson exited his vehicle, pulled out an assault rifle and, in broad daylight, fired no fewer than seventeen (17) rounds from the assault rifle.

A grandmother and her toddler great-grandson were standing in the yard near where the vehicle in which Stedmund Creech was a passenger had stopped. The grandmother recognized Mr. Creech, saw him with a firearm and saw him walking toward the area where Antonio Johnson was firing at him. Evidence collected at the scene showed that Antonio Johnson's vehicle was struck by gun fire and a spent round was located in his vehicle.

Antonio Johnson was separately tried and convicted. Stedmund Creech was charged with one count of Having a Weapon While Under Disability because, at the time of this offense, he was under indictment for Aggravated Drug Trafficking. He was indicted on a second count of Having a Weapon While Under Disability because he was convicted of Felonious Assault with a Firearm in 2009. Felonious Assault is considered a crime of violence. He was also indicted on a third count of Having a Weapon While Under Disability because he was convicted of felony

Possession of Crack Cocaine in 2009. The other charges in the indictment are not at issue in this appeal.

After a jury trial, Stedmund Creech was convicted of all three (3) counts of Having a Weapon While Under Disability and sentenced to one (1) thirty (30) month sentence on one count of Having a Weapon While Under Disability. (The other two offenses were agreed to be allied offenses of similar import and were merged.)

The Court of Appeals for the Seventh Appellate District reversed and remanded the matter for a new trial.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The State is not required to accept a stipulation to a defendant's weapons disabilities. *Old Chief's* holding is limited to federal courts.

A. *Old Chief's* holding relies only on the Federal Rules of Evidence and a federal statute.

When prior convictions only serve the purpose of establishing the defendant's legal status, *Old Chief* mandates the prosecution must accept a defendant's stipulation if offered. Yet, the Court bases its holding on the Federal Rules of Evidence and the federal statute for weapons while under disability. In reaching this decision, the Supreme Court asserted, "The principle issue is the scope of a trial judge's discretion under Rule 403." *Id.* at 180. Likewise, *Old Chief's* claim relies on Federal Rule 403 to render the name and nature of the prior offense inadmissible. *Id.* at 176. The Court analyzes the Federal Rules of Evidence and their application to a federal statute. It neither relies upon nor asserts any constitutional issues that bind the states.

Therefore, Appellate Districts in Ohio have refused to rely upon *Old Chief* based on its restricted application to federal law, rendering it merely persuasive authority. According to the

Twelfth District, "... since *Old Chief* only construed federal law and the Federal Rules of Evidence, the holding in *Old Chief* is not controlling authority for the construction of Ohio law and the Ohio Rules of Evidence." *State v. Russell*, 12th Dist. No. CA98-02-018, 1998 WL 778312, *3 (Nov. 9, 1998). See also *State v. Jones*, 12th Dist., No. CA2011-05-044, 2012-Ohio-1480, ¶ 15; *State v. Sturgill*, 12th Dist. No. 2012-CR-00839, 2013-Ohio-4648, ¶ 19. The Eighth District reaches a similar conclusion. "The *Old Chief* court specifically refers only to federal statutes and federal rules of evidence. The court confined its reasoning to the facts of the case. Consequently, this court has previously determined *Old Chief* to be merely persuasive." *State v. Johnson*, 8th Dist. No. 91900, 2009-Ohio-4367, ¶ 22. See also *State v. McGrath*, 8th Dist. No. 77896, 2001 WL 1167152, *5 (Sept. 6, 2001).

Ohio Rule 403 contains similar wording found in the federal version, but state case law dictates its meaning. "Ohio's Evid.R. 403(B) is substantially similar to Fed. Evid.R. 403. However, the Ohio rule has not been construed to apply to the facts involved in *Old Chief*." *State v. Reid*, 2d Dist. No. 23409, 2010-Ohio-1686, ¶ 12. Because the Court based its holding in *Old Chief* on the federal rule, it is not binding on Ohio Courts.

Likewise, the Court in *Old Chief* analyzed a federal statute. "Pursuant to controlling precedent in this District, this Court does not apply the holding of *Old Chief* because that case interpreted a federal statute..." *State v. Peasley*, 9th Dist. No. 25062, 2010-Ohio-4333, ¶ 12. See also *State v. Simmons*, 9th Dist. No. 25275, 2011-Ohio-916, ¶ 21. Furthermore, the language of the statutes is significantly different, necessitating a separate analysis. The Sixth District, rejecting *Old Chief*, writes, "Our analysis confirms that the high court's opinion in *Old Chief* is carefully tailored to the peculiarities of the federal statute." *State v. Robinson*, 6th Dist. No. L-

10–1369, 2012–Ohio–6068, ¶ 43. The Court’s ruling in *Old Chief* does not account for the differences in the Ohio statute.

Thus, *Old Chief* is not binding on state prosecutions. If the Court had decided *Old Chief* because of a constitutional principle, the ruling would be controlling. Yet, the Court only examined the Federal Rules of Evidence and a federal statute, none of which necessarily impacts the states.

B. The Ohio Statute is Significantly Different than the Federal Statute.

In addition to the United States Supreme Court examining only federal authority, the Ohio weapons while under disability statute is significantly narrower than its federal counterpart. According to *Old Chief*, “The issue is not whether concrete details of the prior crime should come to the jurors’ attention but whether the name or general character of that crime is to be disclosed. Congress, however, has made it plain that distinctions among generic felonies do not count for this purpose; the fact of the qualifying conviction is alone what matters under the statute.” *Old Chief*, 519 U.S. at 190. The Court emphasizes the federal statute’s breadth. The statute covers most felonies, ranging from aggravated murder to less egregious crimes like the possession of short lobsters. *Id.* The Court concludes Congress did not intend to distinguish between the qualifying felonies. Thus, it is not vital the jury learn the specific name and nature of the prior conviction to find a defendant guilty of weapons while under disability in a federal court.

Conversely, the Ohio statute is “facially dissimilar” from the federal statute. *State v. Kole*, 9th Dist. No. 98CA007116, 2000 WL 840503, *4 (Jun. 28, 2000). See also *State v. Hilliard*, 9th Dist. No. 22808, 2006–Ohio–3918, ¶ 26. The statute articulates the types of felonies that qualify. In particular, the statute explicitly limits its coverage to felony violence and drug

offenses. R.C. 2923.13(A)(2, 3). While the Ohio statute does not enumerate individual qualifying crimes, the “generic” felonies *Old Chief* references would not suffice, though they would under the federal statute. Under R.C. 2923.13(A), it is not just a prior conviction or indictment for a felony that makes a defendant susceptible to the charge. Rather, the conviction or indictment must relate to a drug or violent offense. *Old Chief* referenced the lack of distinction to conclude Congress intended a general felony to qualify, rendering the name and nature unessential. Ohio, however, includes meaningful particularities, allowing Ohio courts to reach the opposite conclusion from *Old Chief*. “... the language of R.C. 2923.13(A)(3) reflects that the General Assembly envisioned jurors learning the name and basic nature of the defendant’s prior offense.” *State v. Robinson*, 6th Dist. No. L-10-1369, 2012-Ohio-6068, ¶ 50.

Therefore, Ohio’s statute is considerably different than the federal weapons under disability statute. It necessitates a separate analysis, which is distinguishable from *Old Chief*. Ohio’s statute only covers certain kinds of felony offenses, increasing the importance of the underlying conviction or indictment. By listing the types of qualifying felonies, it is likewise arguable the General Assembly envisioned the name and nature of the underlying offense to be an essential element of the prosecution’s case.

While *Old Chief* is controlling authority in federal courts, the Court relies solely on federal rules. Ohio has its own rules of evidence and weapons while under disability statute. Even though the wording is similar between the Federal and Ohio Rules of Evidence, the Supreme Court of the United States’ rulings on the application of the rules, without including a constitutional issue, do not dictate the application of Ohio’s rules. Furthermore, there are obvious differences between the federal and Ohio weapons while under disability statutes that make *Old Chief*’s analysis inapplicable.

Proposition of Law No. II: Controlling and persuasive authority from Ohio courts favor rejecting *Old Chief*'s application in state prosecutions.

Since the Supreme Court of the United State's decision, a majority of Ohio Districts have nonetheless held *Old Chief* does not apply in state prosecutions. *State v. Reid*, 2d Dist. No. 23409, 2010–Ohio–1686, ¶ 12 (having weapons while under disability); *State v. Robinson*, 6th Dist. No. L–10–1369, 2012–Ohio–6068 ¶¶ 41–50 (having weapons while under disability); *State v. Johnson*, 8th Dist. No. 91900, 2009–Ohio–4367, ¶¶ 22–23 (having weapons while under disability); *State v. Peasley*, 9th Dist. No. 25062, 2010–Ohio–4333 ¶¶ 11–12 (having weapons while under disability); *State v. Jackson*, 10th Dist. No. 02AP–468, 2003–Ohio–1653, ¶ 25 (having weapons while under disability); *State v. Chandler*, 5th Dist. No. 98CA15, 1999 WL 770229, *2 (Sept. 1, 1999) (DUI); *State v. Jones*, 12th Dist., No. CA2011–05–044, 2012–Ohio–1480 ¶¶ 10–20 (domestic violence). Before 2014, only the Eleventh District applied *Old Chief*. *State v. Hatfield*, 11th Dist. No. 2006–A–0033, 2007–Ohio–7130, ¶ 148; *State v. Totarella*, 11th Dist. No. 2002–L–147, 2004–Ohio–1175.

Courts rejecting *Old Chief* cite the federal character of the case and the differences between the federal and state statutes. Additionally, regardless of the application of *Old Chief*, Ohio courts have a precedent giving the prosecution wide latitude to prove the case and not mandating the court or state to accept a defendant's stipulation to a prior conviction. *State v. Smith*, 2d Dist. No. 18654, 2001 WL 896778, *6 (Aug. 10, 2001); *State v. Mulhern*, 4th Dist. No. 02–CA–565, 2002–Ohio–5982, ¶ 25; *State v. Johnson*, 8th Dist. No. 94813, 2011–Ohio–1919, ¶ 62.

Here, the Seventh District has concerns regarding the prejudicial effect of Creech's prior convictions. "While that evidence should have been used only to prove he was disabled, the fear is that cumulative evidence of wrongdoing imprinted on the jurors' minds and lured the jury into

concluding that since Creech committed previous crimes and is currently under indictment for another crime, he must have committed this crime.” *State v. Creech*, 7th Dist. No. 13JE41, 2014–Ohio–4004, ¶ 27. Yet, extending *Old Chief* to state prosecutions undermines years of both controlling and persuasive authority.

This Court has acknowledged the inherent risk in introducing prior convictions, but makes an exception when statutes or rules provide for the introduction. *State v. Allen*, 29 Ohio St.3d at 55. Ohio’s statute makes a prior indictment for or conviction of a felony drug or violence offense an essential element of the weapons while under disability charge. R.C. 2923.13(A)(2, 3). Furthermore, according to this Honorable Court, “A presumption exists that the jury has followed the instructions given to it by the trial court.” *State v. Murphy*, 65 Ohio St.3d 554, 584, 605 N.E.2d 884 (1992) (citing *State v. Fox*, 133 Ohio St. 154, 160, 12 N.E.2d 413 (1938); *Browning v. State*, 120 Ohio St. 62, 72, 165 N.E. 566 (1929)). Examining this controlling authority, a majority of Appellate Districts rationally conclude *Old Chief* is unconvincing. The statute makes the prior conviction an essential element of the crime, which this Honorable Court recognizes as a valid reason to introduce it. The prior conviction may be prejudicial, but R.C. 2923.13(A) expressly makes the prior conviction valid for the weapons while under disability charge. Because the prior conviction is not otherwise admissible for other purposes, the judge can (and *did* in this case) give a limiting instruction, which this Honorable Court presumes the jury will follow.

Far more Ohio courts have rejected *Old Chief* than extended the decision, and even when not explicitly ruling on *Old Chief*’s application, Ohio Districts promote the tradition that the prosecution may choose the method for proving its case. The majority notes the prior conviction as an essential element, the validity of using the conviction for this purpose, and the presumption

that the jury will follow the limiting instruction. The controlling and persuasive authority, therefore, more strongly suggest rejecting, rather than applying, *Old Chief* in state prosecutions.

As stated in *State v. McDaniel*, 2005 Ohio 5809, a defendant in a criminal case “had no right to stipulate, nor did the trial court or the State have the duty to accept the stipulation.” (*Id.* at *P14)

In the *McDaniel* case, the appellant wanted to stipulate to a prior drug offense and wanted the State to be prohibited from using his additional conviction for a felony offense of violence.

The Appellate Court rejected that argument and noted as follows:

“In order to prove the offense of having a weapon while under disability, the State was required to prove Appellant's prior felony conviction beyond a reasonable doubt. If the State and/or trial court had refused to accept a stipulation proposed by Appellant, the State would have then introduced evidence of these convictions in order to prove, beyond a reasonable doubt, that Appellant was under a disability at the time of the incident. Because the State could introduce evidence regarding any of Appellant's prior felony offenses that would establish that he was under a disability, as defined in *R.C. 2923.13*, the trier of fact would have inevitably heard evidence regarding Appellant's prior offense of violence.” (*Id.* at *P13)

As noted in the *McDaniel* case, the only limitation would be Evidence Rule 403 and, in the instant case, the trial court provided the jury with the proper instructions regarding the limited use of the prior convictions. Specifically, the trial court stated:

“Now, as to other acts or prior convictions, Evidence was received about the commission of the crimes, wrongs, or acts, other than the offenses with which the defendant is charged in this trial. That evidence was received only for a limited purpose. It was not received, and you may not consider it, to prove the character of the defendant in order to show that he acted in conformity or accordance with that character. If you find that the evidence of other crime, wrongs or acts is true and that the defendant committed them, you may consider that evidence only for the purpose of deciding whether it proves that the defendant was under Indictment at the time of the alleged offense and/or the defendant had a prior conviction as specified in the Indictment.” (TR p. 249-250)

Similar results have been reached in *State v. Smith*, 68 Ohio App. 3d 692, 1990 Ohio App. LEXIS 3073 (“the use of defendant’s prior armed robbery conviction to support a charge of having a weapon while under disability was not unduly prejudicial even though the State could have used another conviction of carrying a concealed weapon.” “Neither the State nor the trial court is required to accept a defendant’s stipulation as to the existence of a conviction.”); *State v. Richardson*, 2007 Ohio 115, 2007 Ohio App. LEXIS 114 (“the State must provide sufficient proof necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of an offense. When a previous conviction is an element of an offense, the State must prove the prior offense beyond a reasonable doubt. Neither the State nor the trial court is required to accept a defendant’s stipulation as to the existence of the conviction.”)

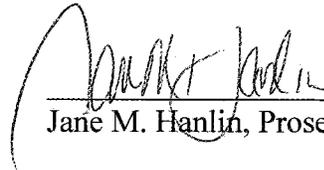
CONCLUSION

Old Chief Is controlling precedent in the federal courts. However, the decision relies entirely on federal law. While the wording of the Federal Rules of Evidence is similar to the Ohio Rules of Evidence, case law interpreting the former does not automatically control in state prosecutions. Furthermore, *Old Chief* contains no overarching constitutional arguments that make it mandatory. Instead, *Old Chief* is persuasive authority that is further weakened by the differences in the federal and Ohio weapons while under disability statutes. The current majority view among Ohio Districts rejects *Old Chief* and allows the prosecution or the court to deny a defendant’s stipulation regarding a prior conviction. This majority view accounts for the specificity present in Ohio’s statute, which the broad federal statute lacks. Additionally, it recognizes Ohio’s long tradition of granting the prosecution the discretion to accept or deny a

defendant's stipulation to an essential part of the offense. Therefore, *Old Chief* should not apply in state prosecutions.

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee, Timothy Young, Ohio Public Defender, Stephen Hardwick (COUNSEL OF RECORD), Assistant Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43210 on October 23, 2014.



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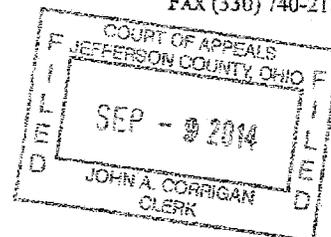
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September 9th, 2014



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Re: **STATE OF OHIO, PLAINTIFF-APPELLEE, VS.
STEDMUND CREECH, DEFENDANT-APPELLANT.
CASE NO. 13 JE 41**

TO THE CLERK:

By direction of the court, you are hereby authorized to enter on the docket (not journal) of the Court of Appeals the decision of this court in the above-captioned case as evidenced by the following entry:

"September 9, 2014. Judgment of the Common Pleas Court, Jefferson County, Ohio is reversed and the matter is remanded for a new trial. Upon remand the court is instructed to accept the stipulation to all three disabilities. Costs taxed against appellee. See Opinion and Judgment Entry."

You are hereby authorized to file and spread upon the journal of this court the enclosed journal entry in the above-captioned case.

Very truly yours,

A handwritten signature in cursive script that reads "Renee A. Rockwood-Suri".

Renee A. Rockwood-Suri,
Judicial Secretary

Enclosures

cc (w/encl.): Judge David Henderson



STATE OF OHIO)
JEFFERSON COUNTY)

IN THE COURT OF APPEALS OF OHIO

SS: SEVENTH DISTRICT

COURT OF APPEALS
JEFFERSON COUNTY, OHIO
SEP - 9 2014
JOHN A. CORRIGAN
CLERK

STATE OF OHIO,)
PLAINTIFF-APPELLEE,)
VS.)
STEDMUND CREECH,)
DEFENDANT-APPELLANT.)

CASE NO. 13 JE 41

JUDGMENT ENTRY

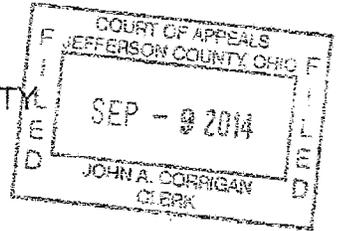
For the reasons stated in the Opinion rendered herein, the first assignment of error is with merit and is sustained. The second assignment of error is without merit and is overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Jefferson County, Ohio, is reversed and the matter is remanded for a new trial. Upon remand the court is instructed to accept the stipulation to all three disabilities. Costs taxed against appellee.

Joseph M. Venturini

Yvonne T. Corbett

Cliff L. White
JUDGES.

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT



STATE OF OHIO,)
)
 PLAINTIFF-APPELLEE,)
)
 VS.)
)
 STEDMUND CREECH,)
)
 DEFENDANT-APPELLANT.)

CASE NO. 13 JE 41

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Common Pleas Court, Case No. 12CR117.

JUDGMENT:

Reversed and Remanded.

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 9, 2014

VUKOVICH, J.

{¶1} Defendant-appellant Stedmund Creech appeals his conviction and sentence from the Jefferson County Common Pleas Court for three counts of having weapons while under disability in violation of R.C. 2923.13. Two issues are raised in this appeal. The first is whether the trial court erred when it denied his motion to stipulate that he is under disability for the purposes of the having weapons while under disability charges. The second issue is whether the trial court erred when it failed to provide a specific curative instruction after Creech was led past the prospective jury in handcuffs and shackles.

{¶2} For the reasons expressed in depth below, we hold that the trial court erred in failing to accept the stipulation. Thus, the conviction and sentence are hereby reversed and the matter is remanded for a new trial.

Statement of the Case

{¶3} On the afternoon of July 2, 2012, Antonio Johnson, driving a white car, followed a car being driven by Trystn Hampton. De'Lesha Thom was sitting in the front passenger seat of Hampton's vehicle and Creech, Rolland "Buster" Owens and another man that goes by the name "J" were in the backseat. Hampton stopped the car on Orchard Street, a residential street, to let the three men out of the car. At that point, Johnson exited his car and shot 17 rounds from an AK-47 at Creech, J and/or Owens. Creech, J and/or Owens allegedly returned fire. Bullets penetrated two different houses and the car that was driven by Johnson, however, no one was harmed during this midday shooting.¹

{¶4} As a result of that shooting, Creech, who was a convicted felon, was indicted on two counts of having weapons while under disability in violation of R.C. 2923.13(A)(3), third-degree felonies; one count of having weapons while under

¹Johnson was indicted and convicted of attempted murder, felonious assault, having weapons while under disability, improper handling of a firearm in a motor vehicle and attendant firearm, criminal gang and discharging a firearm from a vehicle specifications. We affirmed all of those convictions except the discharging a firearm from a vehicle specification. *State v. Johnson*, 7th Dist. No. 13JE5, 2014-Ohio-1226.

disability in violation of R.C. 2923.13(A)(2), a third-degree felony; one count of improper handling a firearm in a vehicle in violation of R.C. 2923.16(B), a fourth-degree felony; and one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2), (F)(1), a fourth-degree felony.

{¶15} Following discovery, the case proceeded to trial. The state produced testimony from officers and BCI investigators that established that 17 AK-47 casings were found at the scene and one .38 caliber bullet was removed from the backseat/trunk area of Johnson's car. Tr. 105, 108, 175. One eyewitness, Stephanie Luke, testified that Creech, Owens and J each had a gun during the shoot-out. Tr. 152. She stated that Creech and J were walking toward where the gunfire came from. Tr. 151. However, she stated that she could not see if Creech, J, or Owens fired their weapons. Tr. 154.

{¶16} After the state's case-in-chief, Creech moved for a Crim.R. 29 judgment of acquittal. The trial court granted the motion on the improper handling of a firearm in a vehicle and the carrying a concealed weapon charges, but denied the motion on the having weapons while under disability charges. Tr. 186, 188.

{¶17} The defense then presented its case. Rolland "Buster" Owens testified on Creech's behalf. He indicated that while he had a gun that day, Creech did not. Tr. 197. He claimed that Creech got back in the car and drove away with Hampton. Tr. 195.

{¶18} Despite the conflicting testimony, the jury found Creech guilty of all weapons while under disability charges. The trial court found that the offenses were allied offenses of similar import and merged them. Thus, Creech received one 30-month sentence for the conviction.

{¶19} Creech timely appeals from that conviction and sentence.

First Assignment of Error

{¶110} "The trial court erred when it did not require the State to stipulate to Mr. Creech's indictment and prior convictions."

{¶111} Immediately prior to trial, Creech orally moved to stipulate to the disability in any one of the three having weapons while under disability counts. Tr. 5.

Creech agreed to such stipulation because there was only one weapon and one event, and therefore the weapons under disability charges would merge and he could only be sentenced on one of the charges. Thus, this action was taken to prevent the state from presenting evidence of both previous convictions that rendered him disabled and the indictment for the yet to be tried felony that also prohibited him from possessing a firearm. These previous two convictions and the untried indicted offense would not be admissible for any other reason than to show his status as disabled. No case law was cited in support of his position that the state should accept his invitation of stipulation.

{¶12} The state opposed his motion. It argued that the state should be allowed to present its evidence regarding all of the forms of disability and then, after any guilty verdicts, it would elect which having weapons while under disability charge it was pursuing for sentencing. It further added that the instruction at the end of the case advised the jury to only consider the fact of his previous conviction or the fact that he was under indictment for the purposes of determining whether the status element of the having weapons while under disability was proven, and that the previous conviction/indictment should not be used for any other purpose. Tr. 7.

{¶13} The trial court denied Creech's motion and stated that the state is not required to elect at the start of the trial and it is not required to accept the stipulation. Tr. 8.

{¶14} On appeal, Creech asserts that the trial court erred when it failed to accept the stipulations.

{¶15} In 1997, the United States Supreme Court was asked to decide whether a district court abuses its discretion if it "spurns an offer to stipulate to a prior conviction" that holds the penalty that the offender cannot possess a firearm and instead allow the admittance of "the full record of a prior judgment, when the name or nature of the prior offense raises the risk of verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction." *Old Chief v. U.S.*, 519 U.S. 172, 117 S.Ct. 644 (1997).

{¶16} In *Old Chief*, the defendant was charged with possession of a firearm while under disability in violation of 18 U.S.C. 922(g)(1), and assault with a dangerous

weapon. The federal statute, 18 U.S.C. 922(g)(1) prohibits the possession of a firearm by anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Because Old Chief had previously been convicted of assault with serious bodily injury he offered to stipulate that he had been "convicted of crime punishable by imprisonment for a term exceeding one year" and proposed a jury instruction to the same effect. The district court rejected that stipulation and allowed the government to introduce the judgment entry of his prior conviction for assault. The Ninth Circuit Court of Appeals affirmed that conviction.

{¶17} The High Court, however, disagreed and reversed. In a 5-4 decision, the Court found that the judgment entry that revealed the name and character of Old Chief's prior offense should have been excluded under Federal Rule of Evidence 403. The Court found that there was "no cognizable difference between the evidentiary significance of the admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence." *Id.* at 191. However, for purposes of Rule 403 weighing of the probative against the prejudicial, the prejudicial effect of admitting the judgment entry outweighed the probative value. This was because the risk inherent in the admission of the judgment entry "will lure the jury into a sequence of bad character reasoning." *Id.* at 185. The stipulation, however, does not have this risk. Thus, the Court stated, "[i]n this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available." *Id.* at 191.

{¶18} In reaching this conclusion, the Court acknowledged that it was creating an exception to the general rule. The general rule is that the prosecution is entitled to prove its case by evidence of its own choice; a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. *Id.* at 186-187. The reason for this general rule "is to permit the party to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and

legitimate weight.” *Id.* at 187. “Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman’s motive and intent.” *Id.* However, the general rule, which is a “recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story” has “virtually no application when the point at issue is a defendant’s legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him.” *Id.* at 190.

{¶19} Numerous Ohio Appellate Districts have been asked to apply the *Old Chief* reasoning to Ohio statutes. The majority of the districts have declined to do so. *State v. Robinson III*, 6th Dist. No. L-10-1369, 2012-Ohio-6068, ¶ 41-50 (having weapons while under disability - R.C. 2923.13); *State v. Jones*, 12th Dist. No. CA2011-05-044, 2012-Ohio-1480, ¶ 10-20 (domestic violence); *State v. Reid*, 2d Dist. No. 23409, 2010-Ohio-1686, ¶ 12 (having weapons while under disability - R.C. 2923.13); *State v. Peasley*, 9th Dist. No. 25062, 2010-Ohio-4333, ¶ 11-12 (having weapons while under disability - R.C. 2923.13); *State v. Johnson*, 8th Dist. No. 2009-Ohio-4367, ¶ 22-23 (having weapons while under disability - R.C. 2923.13); *State v. Baker*, 9th Dist. No. 23840, 2008-Ohio-1909 (having weapons while under disability - R.C. 2923.13); *State v. Chandler*, 5th Dist. No. 98CA15, 1999 WL 770229 (DUI).

{¶20} In declining to follow the *Old Chief* reasoning, these courts first acknowledge that *Old Chief* is not grounded in any constitutional principle. Rather, the decision is based on the language in 18 U.S.C. 922(g)(1) and on Federal Rule of Evidence 403. This means *Old Chief* is not binding on the state courts. Rather, it is persuasive authority.

{¶21} These appellate districts then explain that *Old Chief* is distinguishable because of the differences between the Ohio statute and the Federal statute. The Ohio statute for having weapons while under disability, R.C. 2923.13, unlike the federal counterpart, 18 U.S.C. 922(g)(1) is not a broad encompassing statute. As

aforementioned the federal statute prohibits the possession of a firearm by anyone "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). This is a very broad statute; "a defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, see 16 U.S.C. § 3372, to the most aggravated murder." *Old Chief*, 519 U.S. at 190. Conversely, the Ohio statute only prohibits two classes of felons from possessing a firearm – persons under indictment for or convicted of any felony offense of violence and persons under indictment for or convicted of any felony offense involving the illegal possession, use, sale, administration, distribution or trafficking in any drug of abuse. R.C. 2923.13(A)(2), (3). According to the Sixth Appellate District "the language and structure of R.C. 2923.13(A), manifests a legislative concern with the specific name and nature of the prior offense. * * * Thus, in direct contrast to the prior-conviction language in 18 U.S.C. 922(g)(1), the language of R.C. 2923.13(A)(3) reflects that the General Assembly envisioned jurors learning the name and basic nature of the defendant's prior offense." *Robinson III*, 2012-Ohio-6068, ¶ 49-50.

{¶22} That said, the Eleventh Appellate District has applied the *Old Chief* exception. *State v. Hatfield*, 11th Dist. No. 2006-A-0033, 2007-Ohio-7130, ¶ 141-148 (DUI). See also *State v. Melton*, 11th Dist. No. 2009-L-078, 2010-Ohio-1278, ¶ 60-72 (Trial court accepted stipulation for prior conviction for having weapons while under disability charge and gave limiting instruction about purpose of stipulation. Appellate court affirmed that action was in compliance with *Old Chief*). In *Hatfield*, the defendant was convicted of vehicular homicide and aggravated vehicular homicide. The defense admitted by stipulation that Hatfield was driving with a suspended license at the time of the offense. Evidence of Hatfield's suspensions were not relevant to prove the elements of the offenses, however, it was necessary and relevant to increase the severity of the aggravated vehicular homicide charge from a felony three to a felony two. *Hatfield* at ¶ 139. The trial court, however, rejected the stipulation and allowed evidence of his seven license suspensions to go to the jury. The appellate court found that the trial court erred:

The admission of appellant's history of convictions for driving under suspension serves as a textbook instance of the problem *Old Chief* was designed to prohibit. * * * Put another way, the history was admitted to illustrate appellant had a propensity to behave in defiance of the law which, in the court's view, would allow for an inference of "heedless indifference" or recklessness. Admitting the record for the purpose articulated by the trial court allowed the jury to generalize appellant's earlier bad acts into evidence of appellant's bad character which raised the likelihood that the jury will convict appellant for crimes other than those charged or, perhaps even worse, convict because appellant is a "bad person" deserving punishment. *Id.* at 181.

Id. at ¶ 146.

{¶23} Given the differing views of the Appellate Districts² as to the application of *Old Chief*, the Ohio Supreme Court, at one point, accepted the following certified question:

Does the holding of *Old Chief v. United States* (1997), 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574, granting a right to a Defendant to stipulate to prior criminal convictions apply to state law prosecutions, or is it limited solely to the prosecutions under federal law?

State v. Baker, 123 Ohio St.3d 1516, 2009-Ohio-6486, 918 N.E.2d 161 (appeal of the Ninth Appellate District's *Baker* decision, 2008-Ohio-1909 (weapons case) was

²The highest courts of the states also have differing views on whether the reasoning of *Old Chief* should be adopted to require the government to accept a stipulation as to defendant's status when the status is an element of the offense (especially in having weapons while under disability cases). Some states have adopted the *Old Chief* exception. *Anderson v. Commonwealth*, 281 S.W.3d 761 (Ky.2009) (weapons); *Williams v. State*, 991 So.2d 593 (Miss.2008) (weapons); *State v. Murray*, 116 Hawaii 3, 169 P.3d 955 (2007) (domestic violence); *Hardister v. State*, 849 N.E.2d 563 (Ind.2006) (weapons); *Ferguson v. State*, 362 Ark. 547, 210 S.W.3d 53 (2005) (weapons); *Ross v. State*, 279 Ga. 365, 614 S.E.2d 41 (2005) (weapons); *People v. Walker*, 211 Ill.2d 317, 812 N.E.2d 339 (2004) (weapon); *State v. James*, 81 S.W.3d 751 (Tenn.2002) (escape); *State v. Dews*, 209 W.Va. 500, 549 S.E.2d 694 (2001) (DUI); *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999) (weapons); *Brown v. State*, 719 So.2d 882 (Fla.1998) (weapons). Other states have not and have distinguished *Old Chief* in a manner similar to that of the Ohio Appellate Sixth District and other districts of this state. *State v. Bell*, 303 Conn. 246, 33 A.3d 167 (2011); *State v. Ball*, 756 So.2d 275, (La.1999).

certified as a conflict with the Eleventh Appellate District's *Hatfield* decision 2007-Ohio-7130 (DUI case)).

{¶24} That appeal, however, was later dismissed as improvidently certified. *State v. Baker*, 126 Ohio St.3d 1215, 2010-Ohio-3235, 931 N.E.2d 122, ¶ 1. Three of the justices dissented to that dismissal. *Id.* at ¶ 2-6 (Lundberg Stratton, J., Brown, J., and Pfeifer, J.). Those three justices asserted that the case should not have been dismissed and further stated that they would have adopted the holdings of *Old Chief* and applied "the reasoning of *Old Chief* to the Ohio statute." *Id.* at ¶ 6 (dissent).

{¶25} The issue of whether the *Old Chief* reasoning applies to R.C. 2923.13 is an issue of first impression in our district. After considering the language of *Old Chief*, the language of Ohio's statute regarding having weapons while under disability, and the opposing views of our sister districts, we hold that the trial court, in this situation, abused its discretion when it failed to accept the stipulation. In reaching this conclusion, we acknowledge that there are differences between the federal and state statutes addressing the possession of weapons while under disability. Those distinctions, however, do not lead us to the conclusion that the *Old Chief* reasoning should not be applied, given the facts at issue, when the stipulation proposed was in regards to defendant's legal status as disabled under R.C. 2923.13. Evidence of the name or nature of a prior offense typically carries the risk of unfair prejudice. *Old Chief*, 519 U.S. at 185.

{¶26} Here, it is undisputed that Creech is disabled for purposes of R.C. 2923.13 for three reasons – he was previously convicted of felony possession of crack cocaine and felonious assault with a firearm, and at the time of the current incident he was under indictment for felony trafficking of cocaine within 1,000 feet of a school. An officer testified as to these three disabilities. Tr. 123-125. The judgment of conviction and sentence for felony possession of crack cocaine and felonious assault and the indictment for felony trafficking of cocaine within 1,000 feet of a school were admitted into evidence. State's exhibit 5 and 6; Tr. 137. A limiting instruction was given in this case that advised the jurors the other acts and prior convictions is only raised for the limited purpose of showing Creech was disabled and that the jury could not consider

that evidence to prove Creech's character or that he acted in conformity with that character. Tr. 249-250. However, that did not equalize the risk of unfair prejudice that evidence of the name or nature of the prior offenses typically causes. This case presents a prime example where "the official record offered by the government would be arresting enough to lure a juror into a sequence of bad character reasoning." *Old Chief*, 519 U.S. a 185.

{¶27} In proving the admitted legal status his disability, the state introduced three instances of bad conduct by Creech – felonious assault with a firearm, possession of crack cocaine and trafficking cocaine near a school. While that evidence should have been used only to prove he was disabled, the fear is that cumulative evidence of wrongdoing imprinted on the jurors' minds and lured the jury into concluding that since Creech committed previous crimes and is currently under indictment for another crime, he must have committed this crime. Thus, the prejudicial effect of admitting the governmental record to show the legal status of his disability is clear.

{¶28} The state, however, asserts that the prejudicial effect of the government records did not outweigh the probative value. At oral argument it explained that the term "disability" as used in the weapons while under disability statute is foreign to the average juror. It contended that it helped the jury understand what a disability was by presenting the disabilities to the jury. While it may be true that the average layman does not know what disability means in this context, we disagree with the state's proposition that accepting a stipulation to a disability would make it more difficult for the court to explain the concept and/or for the jury to understand it. If a stipulation is accepted, a simple definition of disability could be provided, the jury would be instructed that the element of disability in the having weapons while under disability is met and that it must decide whether the remaining elements are met, which are did the defendant knowingly acquire, have, carry or use any firearm or dangerous ordnance and was the firearm or dangerous ordnance operable.

{¶29} Therefore, although the prosecution has great latitude in general to prove its case, in cases involving a stipulation as to legal status the prosecution must

establish sufficient reason for the court to reject the proposed stipulation. In this case, the state did not establish sufficient justification for denying the proposed stipulation. Consequently, since there is "no cognizable difference between the evidentiary significance of the admission and the official record's legitimately probative component" and since the record's prejudicial effect outweighed its probative value, the trial court abused its discretion by failing to accept the stipulation. *Old Chief* at 191.

{¶30} This, however, does not mean that the matter must necessarily be remanded for a new trial; if the error is deemed to be harmless the result of the trial may stand. See *Old Chief* at 192 (remanding for a harmless error review). Pursuant to the harmless error doctrine, "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(B).

{¶31} In order to find a person guilty of R.C. 2923.13(A)(2) or (3) the state must prove that Creech was not permitted to have a firearm, that he had a firearm, and that it was operable or readily capable of being rendered operable. *State v. Mays*, 6th Dist. No. L-12-1173, 2013-Ohio-3553, ¶ 16 (definition of "firearm," as used in R.C. 2923.13 requires the firearm to be operable or readily capable of being rendered operable); *State v. Stodgel*, 12th Dist. No. CA2012-04-010, 2013-Ohio-1109, ¶ 40 (same); *State v. Jones*, 4th Dist. No. 09CA1, 2010-Ohio-865, ¶ 14 (same); *State v. Whiteside*, 10th Dist. No. 07AP-951, 2008-Ohio-3951, ¶ 13 (same); *State v. Richardson*, 3d Dist. No. 13-06-21, 2007-Ohio-115, ¶ 38; *State v. Hicks*, 2d Dist. No. 2186, 1987 WL 7872 (Mar. 16, 1987) (same).

{¶32} Creech acknowledges that he is under disability and is not permitted to possess a firearm. Thus, the only elements at issue are whether he had a gun and if it was operable.

{¶33} At trial, two eye witnesses testified. The first, Stephanie Luke, testified that Creech had a gun, but that she did not see him fire it. She stated that Creech and J walked up the street toward the area where Johnson was shooting. Tr. 151. The second eye witness was Owens. He testified that Creech did not have a gun and that

Creech was not walking with J up the street, but instead got back into the car with Hampton and left the scene. Tr. 195, 197.

{¶34} The state asserted at trial that Luke's testimony shows that Creech was walking up the street towards the place Johnson was firing his gun. Creech's gun was visible to Luke. Thus, it can be concluded that his gun was drawn during this act. R.C. 2923.11(B)(2) permits the trier of fact to rely on circumstantial evidence to determine if a firearm is operable. The state claimed that it could be inferred that Creech's gun was operable because what person would walk to an area where shots had just been fired with an inoperable gun. Thus, there is some evidence to support the conviction.

{¶35} However, given that there is conflicting evidence as to whether Creech had a gun and given the prejudicial effect of the admission of his prior bad acts to prove the element of disability, we cannot conclude that the error in this case is harmless error.

{¶36} Consequently, for those reasons, this assignment of error has merit.

Second Assignment of Error

{¶37} "The trial court erred by failing to provide a specific curative instruction after the jury was led past Stedmund Creech while he was in handcuffs and shackles."

{¶38} Although our resolution of the first assignment of error renders this assignment of error meritless, in the interests of justice, it is still addressed.

{¶39} Prior to trial, Creech was led through the hallway of the courthouse handcuffed and shackled. It is claimed that potential jurors were sitting in the hallway and saw him. Thus, prior to trial, Creech orally requested a corrective instruction with particular regard to the presumption of innocence. Tr. 6.

{¶40} The state contended that there is always an instruction on the presumption of innocence starting at the "beginning of the trial and all the way through the end." Tr. 7-8. It was the state's position that no other instruction was needed.

{¶41} The trial court denied the request. Tr. 8-9. It stated that the "instruction of presumption of innocence and things of that nature will adequately cover that." Tr. 9.

{¶42} A criminal defendant's right to be free from shackles in the presence of the jury is squarely grounded in the Fourteenth and Fifth Amendments to the United States Constitution. *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007 (2005). The law is clear that no one should be tried while shackled, absent unusual circumstances. *Illinois v. Allen* (1970), 397 U.S. 337, 344, 90 S.Ct. 1057. Imposing the indicia of guilt upon a defendant is an "inherently prejudicial" practice that "should be permitted only where justified by an essential state interest specific to each trial." *Ruimveld v. Birkett*, 404 F.3d 1006, 1013 (6th Cir.2005), citing *Holbrook v. Flynn*, 475 U.S. 560, 568-569, 106 S.Ct. 1340 (1986).

{¶43} Creech, however, was not shackled and handcuffed during trial. Rather, the potential jury saw him for a brief period of time in the hallway outside the courtroom. "The inadvertent sighting by jurors of a handcuffed accused outside of the courtroom does not create a per se mistrial." *State v. Linkous*, 5th Dist. No. 08CA51, 2009-Ohio-1896, ¶ 67. The accused must present evidence that the jury was tainted by the sighting. *Id.*; *State v. Payton* (Aug. 8, 1994), 12th Dist. No. 93-12-028, 1994 WL 409621 (Aug. 8, 1994). Thus, in order to prevail on this issue, Creech must demonstrate prejudice. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 219.

{¶44} In this instance, the potential jurors' view of Creech in handcuffs and shackles, was brief, inadvertent and outside the courtroom. Consequently, the danger of prejudice is slight. *State v. Kidder*, 32 Ohio St.3d 279, 285-286, 513 N.E.2d 311 (1987) ("The danger of prejudice to defendants is slight where a juror's view of defendants in custody is brief, inadvertent and outside the courtroom."); *McKnight* at ¶ 220 (appellant was not deprived of a fair trial when jury was given curative instruction and only observed appellant in handcuffs on one occasion); *State v. Tate*, 9th Dist. No. 21943, 2005-Ohio-2156, ¶ 9, citing *Kennedy v. Cardwell*, 487 F.2d 101, 109 (6 Cir.1973) (where the defendant is seen in shackles for a short period of time in the courtroom, the degree of prejudice to the defendant in this situation is certainly much less than in the situation where the accused sits throughout his trial before the jury in

shackles). This is especially the case here where the viewing occurred during transportation:

There is no merit to the contention that the court should have granted a mistrial because some of the jurors saw the defendants in handcuffs as they passed through the hall. * * * It is normal and regular as well as a highly desirable and necessary practice to handcuff prisoners when they are being taken from one place to another, and the jury is aware of this. This is necessary to prevent an escape and possible injury to others in an escape attempt. No prejudice was shown and the court did not err in refusing to grant a mistrial.

State v. Morris, 4th Dist. No. 1097, 1982 WL 3380 (Feb. 18, 1982) (prejudicial error could have been discovered and corrected during the voir dire of the jury panel, but appellant made no attempt to discover whether members of the jury panel noticed him in custody in the hallway outside the courtroom), quoting *U.S. v. Leach* (8th Cir. 1970) 429 F. 2d 956 (8th Cir. 1970).

{¶45} Furthermore, the allegation is that **potential** jurors saw him in handcuffs. It is not clear that any actual juror saw him in handcuffs and shackles.

{¶46} Moreover, the trial court did give presumption of innocence instructions twice. The first one was given during voir dire:

Okay. Now, as I said, this is a criminal case. The burden of proof will be upon the State of Ohio to prove each element of the offense beyond a reasonable doubt. Later on I will give you some instructions as to how you are to assess that, but you need to be aware that at this time the defendant is presumed innocent, and he is continued with that presumption of innocence until there has been evidence introduced which would convince you beyond a reasonable doubt that he would be guilty.

Tr. 24-25.

{¶47} The second presumption of innocence instruction was given at the end of the trial as part of the instructions on the law:

As to burden of proof: The defendant is presumed innocent until his guilt is established beyond a reasonable doubt. The defendant must be acquitted unless the State produced evidence which convinces you beyond a reasonable doubt of every essential element of the offense charged in the indictment.

Tr. 239.

{¶48} Jurors are presumed to follow the trial court's instructions. *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), paragraph four of the syllabus.

{¶49} Consequently, considering all the above, the trial court did not err in failing to give a specific curative instruction about the shackles and handcuffs (which the jurors might not have seen). There is no basis for granting a new trial under this assignment of error. This assignment of error lacks merit.

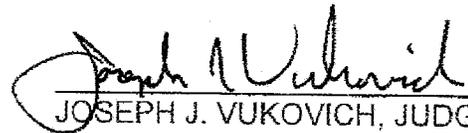
Conclusion

{¶50} In conclusion, the second assignment of error lack merits. However, the first assignment of error has merit. The trial court abused its discretion when it failed to accept the stipulation. This error was not harmless. Thus, the conviction and sentence are hereby reversed and the matter is remanded for a new trial. Upon remand the court is instructed to accept the stipulation to all three disabilities.

Donofrio, J., concurs.

Waite, J., concurs.

APPROVED:


JOSEPH J. VUKOVICH, JUDGE