

IN THE SUPREME COURT OF OHIO

State of Ohio	
Appellant,	Supreme Court Case No. 2014-1844
v.	On Appeal from the Court of Appeals of Ohio, Seventh Appellate District
Stedmund Creech,	
Appellee.	Court of Appeals Case No. 13-JE-41

APPELLANT'S MERIT BRIEF

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STATEMENT OF THE CASE AND FACTS

On July 2, 2012, a great-grandmother stood in her yard playing with her 2-year-old great-grandson in Steubenville, Ohio. (TR 142-144) A car stopped in front of her house. (TR 144) Inside that vehicle were two (2) young women (driver and front seat passenger) and three (3) men, including Stedmund Creech (Appellee), Rolland Owens (who is related to the great-grandmother) and a third unidentified man in the back seat. (TR 121-122, 146, 148, 166, 193-194, 121-122) As soon as the men exited the vehicle, another vehicle pulled onto the street. (TR 149) That vehicle was driven by Antonio Johnson. (TR 149) The two (2) vehicles had passed each other shortly before this encounter on a nearby bridge. (TR 208) Testimony at trial indicated that eye contact was made between the passengers in the vehicle in which Appellee was riding and the driver of the other vehicle. (TR 204, 208) In fact, after the vehicles passed one another, Antonio Johnson immediately turned his vehicle around and began following the car in which Appellee was a passenger. (TR 208) The moment that the three (3) men exited the vehicle in which Appellee was riding, Antonio Johnson (the driver of the other vehicle) opened fire with an assault rifle and fired at least seventeen (17) shots in broad daylight. (TR 100, 149)

As the gunfire erupted, one of the young men in the car in which Appellee was riding took cover at the corner of the yard where the great-grandmother and the toddler were. (TR 149-150) That man was Rolland Owens and the testimony at trial indicated that he pulled out his own gun. (TR 150, 195) The great-grandmother (Stephanie Luke) did not believe that Rolland Owens ever fired his weapon. (TR 154, 162-163)

The unidentified man who was riding in the same car as Appellee fled. (TR 195)

Appellee was known to Stephanie Luke. (TR 147) Ms. Luke testified that there was never any animosity between the two of them. (TR 158) She distinctly recalls seeing Appellee produce a weapon after the shots from the assault rifle began. (TR 151-159) She was unsure whether Appellee fired his weapon, but did see him walking toward the gun fire (as opposed to running away from it). (TR 151-154, 156) Additionally, the police investigation revealed that Antonio Johnson's vehicle had a bullet hole right through the front of the windshield and that a .38 caliber bullet was recovered from that vehicle shortly after this gun fight. (TR 105, 108, 111, 115) Officers also located a gun case found in the middle of the street where Appellee and the other passengers exited the vehicle. (TR 120, 123-124, 135) After the gunfire stopped, Appellee fled. (TR 126)

Jefferson County enlisted the assistance of the United States Federal Marshals to capture Appellee. (TR 126) He remained on the run for eleven (11) months before he was captured.

Appellee was indicted on three (3) separate counts of Having a Weapon While Under a Disability. The first count stemmed from the fact that Appellee had already been indicted for Aggravated Drug Trafficking in the vicinity of a school. (TR 124-125) That indictment was returned by the Jefferson County Grand Jury on June 6, 2012. (TR 124-125)

The second count of Having a Weapon While Under a Disability stemmed from the fact that Appellee had previously been convicted of Felonious Assault with a Firearm (a crime of violence in Ohio) in 2009. (TR 123-124)

The third count of Having a Weapon While Under a Disability stemmed from the fact that Appellee had also been convicted of (felony) Possession of Crack Cocaine in 2009. (TR 123-124)

The indictment contained additional counts for Improper Handling of a Firearm in a Motor Vehicle and Carrying a Concealed Weapon. Those counts were dismissed by the trial court at the close of the State's case. (TR 190)

After a trial by jury, Appellee was convicted of all three (3) counts of Having a Weapon While Under Disability. At sentencing, Appellant elected to have Appellee sentenced on Count Two of the indictment and the trial court sentenced him to serve thirty (30) months in prison.

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.

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 beyond a reasonable doubt. Because the burden rests on the State, it is not mandated 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 possession of a firearm by a convicted felon. He sought to stipulate to his qualifying prior conviction. The prosecutor was unwilling to stipulate, and the district judge ruled that the prosecutor was not

required to accept the defendant's offer. *Id.* at 177. The Supreme Court of the United States 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.

In *Old Chief*, the "stipulation offer" was quite different than what occurred in the instant case. In *Old Chief*, the defendant moved for an order requiring the government "to refrain from mentioning – by reading the indictment, during jury selection, in opening statement, or closing argument – and to refrain from offering into evidence or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, *except* to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year." *Old Chief* at 175.

The *Old Chief* stipulation would ***not*** have sufficed in the instant case, given the peculiarities of the Ohio statute, which require proof of conviction for a felony drug offense or proof of conviction of an offense of violence. In the instant case, Appellee offered no particular stipulation and was primarily trying to prevent the state from proceeding on all three (3) counts in the indictment. Appellee never stated what his stipulation would be.

On the morning of trial, Appellee's trial counsel sought to allow Appellee to stipulate to a disability in "any one of those counts and would ask that the State of Ohio be precluded from presenting evidence with regard to the other two." (TR p. 5) His trial counsel remarked: "I understand that if this would go to trial and the State would be required to present evidence on each of those counts that, Mr. Creech could be convicted of all three, and they would merge for purposes of sentencing, and he would only be sentenced on one; but since we are willing to stipulate to a disabling act, whichever one the State wants to choose, I think they are required to ... elect and permit us to stipulate to that particular fact in evidence." (TR p. 6)

Appellee never delineated what his proposed stipulation would include. For example, he did not state that he would stipulate that he had been convicted of a felony offense of violence – or that he had been convicted of a felony drug offense – or that he would concede that he was currently under indictment for a felony drug offense. There was nothing more than an offer "to stipulate to a disabling act," without more.

Thus, defense counsel was primarily seeking to dismiss two (2) of the three (3) counts of Having a Weapon While Under Disability before the trial even began. The State's response was as follows:

"Ms. Hanlin: As to the first issue, the indictment does specify three different ways that Mr. Creech violated the code section of having a weapon while under disability. The first by adding a previous conviction for possession of crack cocaine, the second for having a previous conviction for felonious assault with a firearm, and the third, for being under indictment at the time that he committed these offenses." (TR pp. 6-7)

The trial court remarked: "I don't believe the State is required to elect at this point in time or to even accept a stipulation, and therefore, I am going to go forward with the indictment with all of the charges that were presented. You are correct in that if Mr. Creech is convicted with the three Weapons Under Disability or two of the three, I would still have to merge these for

purposes of sentencing. I could only sentence him as if he had been convicted of all three, but he could be convicted on any of those if the evidence so warrants.” (TR p. 8)

Thus, during the trial, the State introduced a certified copy of Appellee’s conviction for Possession of Crack Cocaine and Felonious Assault with a Firearm in Case No. 09CR121 (TR p. 123) and a certified copy of Appellee’s indictment for Trafficking in Cocaine in Case No. 12CR094. (TR pp. 123-125). Absolutely no testimony was elicited regarding the details of any of the prior acts during the trial. The sole purpose was to establish that Appellee was subject to multiple disabilities that prohibited him from having a weapon.

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 in federal prosecutions, *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 Possession of a Firearm by a Convicted Felon. 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 relied on Federal Rule 403 to render the name and nature of the prior offense inadmissible. *Id.* at 176. The Court analyzed the Federal Rules of Evidence and their application to a federal statute. It neither relied upon nor asserted 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).

In *Russell*, *supra*, the Court of Appeals for the Twelfth Appellate District noted that the defendant in that case "offered to stipulate to his prior conviction and moved to exclude from the jury 'any and all evidence' of his prior conviction." *Id.* at [2] In that case, the defendant argued that "evidence of the prior conviction should be excluded under Evid. R. 403 (A) because it was evidence of his bad character that was unfairly prejudicial." *Id.*

The Appellate Court, however, while acknowledging the defendant's reliance on *Old Chief*, noted that in *Old Chief* the defendant was charged with violating a federal statute which prohibited possession of a firearm by anyone who had a prior felony conviction. In *Old Chief*, the defendant offered to stipulate that he had a prior felony conviction and moved that the prosecution be prohibited from revealing the name and the nature of his prior conviction to the jury. The Appellate Court stated:

"Initially, we note that 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. In addition, even if the Supreme Court's decision was controlling, we do not believe the holding in *Old Chief* compelled the exclusion of the evidence concerning the name and nature of appellant's prior conviction for domestic violence." *Id.* at [8]

In the *Russell* case, it was defendant's prior convictions for domestic violence which were at issue because the fact that he had prior convictions for domestic violence raised the level

of his crime from a misdemeanor to a felony. Thus, a stipulation that did not allow evidence regarding the name and nature of his prior conviction prohibited the State from proving an element of the case. The Appellate Court reasoned as follows:

“In a sharply divided 5-4 decision, a majority of the United States Supreme Court found that the trial judge abused his discretion by rejecting the stipulation and admitting the judgment entry of the defendant's prior conviction. *117 S. Ct. at 647*. The majority found that in light of the proposed stipulation, the minimal probative value of the judgment entry was substantially outweighed by the danger of unfair prejudice. *Id. at 655*. Therefore, the majority concluded that the judgment entry should have been excluded pursuant to *Fed.R.Evid. 403*. *Id.* See, also, *State v. Henton (1997)*, *121 Ohio App. 3d 501*, *700 N.E.2d 371*.

Appellant asserts that based upon the holding in *Old Chief*, the trial court erred by allowing the introduction of evidence concerning the name and nature of his prior conviction for domestic violence. Initially, we note that 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. In addition, even if the Supreme Court's decision was controlling, we do not believe that the holding in *Old Chief* compelled the exclusion of the evidence concerning the name and nature of appellant's prior conviction for domestic violence.

In *Old Chief*, the majority found that while evidence concerning the name and nature of appellant's prior conviction carried a risk of unfair prejudice in the form of ‘bad character reasoning,’ such evidence had minimal probative value. *117 S. Ct. at 652, 655*. The majority reasoned:

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. "A defendant falls within the category simply by virtue of past conviction for any [qualifying] crime ranging from possession of short lobsters, [citation omitted], to the most aggravated murder." [Citation omitted]. The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun ***. *Id.*

The majority also found that the defendant's stipulation provided the trial court with an evidentiary alternative that ‘would, in fact, have been not merely relevant but seemingly conclusive evidence of the [prior conviction] element.’ *117 S. Ct. at 653*. Accordingly, the majority concluded:

Given these peculiarities of the element of felony-convict status and of admissions and the like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence. For purposes of the *Rule 403* weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. *Id. at 655.*

In the present case, we find that evidence concerning the name and nature of appellant's prior conviction had substantial probative value. Pursuant to R.C. 2919.25(D), the prosecution was required to prove beyond a reasonable doubt that appellant had a prior conviction for domestic violence or one of the other specific crimes set forth therein.

Thus, unlike the federal statute in *Old Chief*, evidence concerning the name and nature of appellant's prior conviction was necessary in order for the jury to find appellant guilty of the offense.

Appellant also failed to provide the trial court with an evidentiary alternative that had the same probative value as the evidence presented by the prosecution. Appellant sought to exclude 'any and all evidence' of his prior conviction from the jury and his **stipulation did not include the name of the offense**. Thus, appellant's stipulation would not have been sufficient to support a finding that appellant had a prior conviction for domestic violence or another crime specified in *R.C. 2919.25(D)*. **Therefore, unlike *Old Chief*, the trial court was not presented with an evidentiary alternative that would have satisfied the prior conviction element.**

The evidence of appellant's prior conviction created a risk that the jury would find him guilty of the underlying offense because of his bad acts in the past. See *Old Chief at 650*; *State v. Allen (1987)*, 29 Ohio St. 3d 53, 55, 506 N.E.2d 199. **However, this danger of unfair prejudice directly results from the definition of the offense set forth in R.C. 2919.25(D)**. See *State v. Adams (1995)*, 106 Ohio App. 3d 139, 143, 665 N.E.2d 700. Moreover, while the trial court admitted evidence that appellant had previously been convicted of domestic violence against Lafayette on July 2, 1997, the trial court **would not allow evidence concerning the details** of the prior offense. Thus, the trial court attempted to limit the scope of the evidence concerning appellant's prior conviction in order to minimize the danger of unfair prejudice." (Emphasis added)

The same analysis applies here. Pursuant to Ohio statutes, the State of Ohio is required to prove **not just** that a defendant has been convicted of any crime, but that the defendant either is

(1) under indictment for an offense that is an **offense of violence** or a **felony drug offense**; or,
(2) the defendant has been convicted of **an offense of violence** or a **felony drug offense**. Thus, there is no substantive difference between the stipulation and the introduction of physical evidence that shows the pending indictment or prior conviction because, in either case, the State is required to prove specifically *why* a defendant is prohibited from having a weapon.

In *Old Chief*, the Supreme Court of the United States stated:

“Old Chief’s proffered admission would, in fact, have been not merely relevant but seemingly conclusive evidence of the element. The statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies, and Old Chief clearly meant to admit that his felony did qualify, by stipulating “that the Government has proven one of the essential elements of the offense.” App. 7. As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission. Logic, then, seems to side with Old Chief.” *Old Chief* at 591.

In the instant case, a proffered admission such as the one in *Old Chief* would not have been “seemingly conclusive evidence” because, in Ohio, the state is required to prove exactly what kind of prior criminal offense was present in a defendant’s prior conviction. Thus, the name of the offense is much more than “technically relevant” – it is an element of the offense of Having a Weapon While Under Disability.

In *Johnson, supra*, the Court of Appeals for the Eighth Appellate District specifically considered a proposed stipulation and the crime of Having a Weapon While Under Disability.

The appellate court’s consideration included the following:

“Appellant primarily relies on *Old Chief v. United States (1997)*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574, for the proposition that a defendant is entitled to stipulate to a prior conviction. In *Old Chief*, the defendant was charged with assault with a dangerous weapon and violation of 18 U.S.C. 922(g)(1). Pursuant to 18 U.S.C. 922(g)(1), it is a crime for an individual who has previously been convicted of a crime punishable by a term of imprisonment exceeding one year to possess a firearm.

The *Old Chief* defendant had been previously convicted of assault resulting in serious bodily injury, and attempted to stipulate to that fact to prevent the jury from hearing the nature of the previous crime. The government refused to do so, and the trial court allowed evidence of the previous crime to be introduced.

In *Old Chief*, the United States Supreme Court ultimately concluded that the trial court abused its discretion under *Fed.R.Evid. 403*, which allows a trial judge to exclude relevant evidence if the trial court determines its probative value is substantially outweighed by the danger of unfair prejudice.

Old Chief is clearly distinguishable from the present case. 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. McGrath* (Sept. 6, 2001), *Cuyahoga App. No. 77896, at P15, 2001 Ohio App. LEXIS 3964*. We have previously held that **HN3** it is not an abuse of discretion for a court to deny a defendant's request to stipulate to a prior conviction where a prior conviction is an essential element of the underlying charge. *State v. Tisdell, Cuyahoga App. No. 87516, 2006 Ohio 6763, at P41*.

Appellant was charged with having a weapon while under disability in violation of *R.C. 2923.13*. **As appellant's prior convictions were an essential element of the charge, the State was under no duty to stipulate pursuant to appellant's request. Tisdell at P41. HN4** When a previous conviction is an essential element of the offense, the State must produce a certified entry of the conviction and sufficient evidence to demonstrate the defendant named in the entry is in fact the individual currently on trial. *State v. Galloway, Richland App. No. 2003-CA-0086, 2004 Ohio 2273, at P31.*” (Emphasis added)

As stated, 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.” (Emphasis added) *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.

In *Peasley, supra*, the Court of Appeals for the Ninth Appellate District considered a case involving a defendant charged with Having Weapons While Under Disability. At trial, the defendant offered to stipulate that he had prior convictions related to drugs and an offense of violence to establish his disability "in an attempt to prevent the jury from hearing the details of those convictions or receiving the judgment entries of conviction as evidence." The trial court permitted the judgment entries to be admitted. On appeal, the appellate court noted:

"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. Williams, 9th Dist. No. 22877, 2006 Ohio 4720, at P21; State v. Kole (June 28, 2000), 9th Dist. No. 98CA007116, at *4, 2000 Ohio App. LEXIS 2834, overruled on other grounds by State v. Kole (2001), 92 Ohio St.3d 303, 2001 Ohio 191, 750 N.E.2d 148. But, see, State v. Baker, 9th Dist. No. 23713, 2009 Ohio 2340, at P23 (Belfance, J., concurring in judgment only). Instead, this Court applies the rule that HN3 "[n]either the [S]tate nor the trial court is required to accept a defendant's stipulation as to the existence of the conviction." *State v. Smith (1990), 68 Ohio App.3d 692, 695, 589 N.E.2d 454.*"*

In *Simmons, supra*, the Ninth District was even more emphatic and noted: "This court has found *Old Chief* completely inapplicable to State prosecutions, concluding that it was not binding precedent as it involved interpretation of a federal statute." *Id.* at P21

In *Robinson, supra*, a defendant filed a motion in limine to prevent the State from disclosing the name and nature of his prior conviction. The defendant offered to stipulate that he "was under a disability as defined by R.C. 2929.13(A)" and proposed a jury instruction to the same effect. The State opposed the motion and the motion was overruled by the trial court, which noted that the State is not required to accept or enter into such a stipulation. *Id.* at P3 The trial court permitted four (4) separate witnesses to testify regarding their awareness of the defendant's

prior conviction for possession of crack cocaine. It also gave a limiting instruction as to the proper use of the prior conviction.

On appeal, the Court of Appeals for the Sixth Appellate District addressed the issue as follows:

“Robinson contends that in light of his proffered stipulation to being under a disability for purposes of *R.C. 2923.13(A)*, the trial court should have excluded the judgment entry of his prior conviction for possession of crack cocaine on the authority of *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). He argues that although ‘*Old Chief* has not been uniformly followed by the Ohio courts, at least three justices of the Ohio Supreme Court have recently indicated that Ohio should adopt the holding in *Old Chief*.’ Specifically, in *State v. Baker*, 126 Ohio St.3d 1215, 2010 Ohio 3235, 931 N.E.2d 122, ¶ 6, three members of the Ohio Supreme Court (two current and one former), in their dissent from the majority’s decision to dismiss the certified appeal for want of conflict, stated that they ‘would adopt the holdings in *Old Chief* and apply the reasoning in *Old Chief* to the Ohio statute.’ (Lundberg Stratton, J., dissenting, joined by Brown, C.J., and Pfeifer, J.)

We note initially that while two current members of the Ohio Supreme Court have expressed their opinion on this issue, the other five have not. We also note that the Ohio Supreme Court has recently granted a motion for leave to file a delayed appeal from the Twelfth District’s decision in *State v. Jones*, 12th Dist. No. CA2011-05-044, 2012 Ohio 1480 (132 Ohio St.3d 1530, 2012 Ohio 4381, 974 N.E.2d 1208), which declined to extend the reasoning in *Old Chief* to the prior-conviction element under *R.C. 2919.25(D)(2)* and (3). However, until the Supreme Court of Ohio decides the issue, the application of *Old Chief* to *R.C. 2923.13(A)* remains an open question in Ohio.

The Eighth, Ninth, and Twelfth Appellate Districts have declined to adopt the reasoning of *Old Chief* finding it clearly inapposite to Ohio’s statute. See *Jones* at ¶ 17-18; *State v. Peasley*, 9th Dist. No. 25062, 2010 Ohio 4333, ¶ 12; *State v. Johnson*, 8th Dist. No. 91900, 2009 Ohio 4367, ¶ 22-23; *State v. Russell*, 12th Dist. No. CA-98-02-018, 1998 Ohio App. LEXIS 5374, 1998 WL 778312, *3-4 (Nov. 9, 1998). Our analysis confirms that the high court’s opinion in *Old Chief* is carefully tailored to the peculiarities of the federal statute.

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), as well as assault with a dangerous weapon. Excepting certain misdemeanors and business-related offenses, 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.’ The defendant, who had been convicted of assault with serious bodily injury, filed a motion in limine to exclude any evidence disclosing the name and nature of his prior

offense. As an evidentiary alternative, the defendant offered to stipulate that he ‘has been convicted of a crime punishable by imprisonment for a term exceeding one year,’ and proposed a jury instruction to the same effect. The district court rejected the stipulation and allowed the government to introduce the judgment entry of defendant's prior conviction for assault.

In a sharply divided 5-4 decision, the high court held that the judgment entry, to the extent it revealed the name and character of defendant's prior offense, should have been excluded pursuant to *Fed.R.Evid. 403*. The court essentially concluded that for purposes of proving the prior-conviction element of *section 922(g)(1)*, the name and nature of defendant's prior offense had no more probative value than defendant's stipulation, but carried a substantially higher danger of unfair prejudice.

It is clear, however, that the court's conclusion hinged on the singularly broad definition of the prior-conviction element contained in the federal statute. At the threshold, the court found that even if no evidentiary alternative was available, evidence of the name and nature of the prior conviction had only minimal relevance in placing the defendant within the statute's broad class of disqualified offenders. Thus, the court explained that while ‘its demonstration was a step on one evidentiary route to the ultimate fact,’ the name of defendant's prior conviction ‘was not itself an ultimate fact, as if the statute had specifically required proof of injurious assault.’ *Old Chief*, 519 U.S. at 178, 117 S.Ct. 644, 136 L.Ed.2d 574.

The court then compared the evidentiary alternatives offered by the government and the defendant and found them to have equivalent probative value in proving the prior-conviction element of the statute. In so doing, the court again laid stress on the **particularly broad category of offenses covered by the statute:**

The statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of qualifying felonies * * *. As a consequence, although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission." *Id.* at 186.

Further emphasizing the point, the court observed that the prior-conviction element of statute does not make ‘distinctions among generic felonies,’ but covers crimes ‘ranging from possession of short lobsters * * * to the most aggravated murder.’ (Citation omitted.) *Id.* at 190. The court then concluded:

Given these peculiarities of the element of felony-convict status * * *, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the

official record the prosecution would prefer to place in evidence. (Emphasis added.) *Id.* at 191.

Unlike the federal statute at issue in *Old Chief*, the Ohio statute does not contain a single and practically all-encompassing definition of the prior-conviction element. While 18 U.S.C. 922(g)(1) prohibits firearm possession by all but two narrow classes of felons, *HN12 R.C. 2923.13(A)* does just the opposite—it prohibits only two narrow classes of felons from possessing a firearm, and delimits these classes under separate subdivisions. Thus, *subsection (A)(2)* specifies that no person indicted or convicted of a ‘felony offense of violence’ shall knowingly possess a firearm; and *subsection (A)(3)*, at issue here, specifies that no person indicted or convicted of a ‘felony offense involving the illegal possession * * * or trafficking in any drug of abuse’ shall knowingly possess a firearm.

Clearly, the language and structure of *R.C. 2923.13(A)* manifests a legislative concern with the specific name and nature of the prior offense. The fact that Robinson’s prior conviction involved the possession of crack cocaine is an ultimate fact to be proved under the Ohio statute. 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.” (Emphasis added)

Thus, *Old Chief* is not and should not be 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 dissimilar federal statute, none of which necessarily impacts the states.

B. A limiting instruction properly resolved any concerns regarding the issue of undue prejudice.

In the instant case, the trial court also gave the following **limiting instruction** to protect Appellee:

“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 that the defendant had a prior conviction as specified in the indictment.” (TR pp. 249-250)

A limiting instruction’s effect was addressed by the *Sturgill* court when it considered the effect of defense counsel’s failure to seek a stipulation in a case where the defendant had been charged with OVI and his prior OVI convictions enhanced the level of his crime. In *Sturgill*, the State was required to prove beyond a reasonable doubt that appellant had previously been convicted of five (5) OVI offenses within the past twenty (20) years, one of which was a felony OVI, before he could be convicted of a third degree felony OVI. The court noted “admittedly, the admission of evidence regarding appellant’s prior OVI convictions created a potential risk that a jury would find him guilty of the charge of felony OVI in the underlying case on the basis of his past convictions, but this potential risk of unfair prejudice arises from the wording of the statute itself.” *Id.* at P19 In *Sturgill*, the appellate court also noted that the trial court gave virtually the same limiting instruction that was presented in this case and noted: “We must presume that the jury followed the instructions given to it by the trial court.” *Id.*

Ohio Rule 403 contains wording similar to that 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. Additionally, as noted by the *Reid* court: “We have found that such limiting instructions play an important role in offsetting undue prejudice arising from proof of a prior conviction. *State v. Scott*, Montgomery App. No. 20836, 2005 Ohio 6262; *State v. Kisseberth*, Montgomery App. No. 20500, 2005 Ohio 3059.” *Id.* at P17 The limiting instruction given in the *Reid* case was substantially similar to the limiting instruction given in the instant case.

As the dissent in *Old Chief* noted:

“Any incremental harm resulting from proving the name or basic nature of the prior felony can be properly mitigated by limiting jury instructions. Federal Rule of Evidence 105 provides that when evidence is admissible for one purpose, but not another, “the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” Indeed, on petitioner’s own motion in this case, the District Court instructed the jury that it was not to “consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.” Brief for United States 32. The jury is presumed to have followed this cautionary instruction, see *Shannon v. United States*, 512 U.S. 573, 585, 129 L. Ed. 2d 459, 114 S. Ct. 2419 (1994), and the instruction offset whatever prejudice might have arisen from the introduction of petitioner’s prior conviction.”

Ohio Evidence Rule 403(A) prohibits the admission of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading a jury.” The limiting instruction removes that risk. And, inasmuch as the Ohio’s statute requires proof of the name and identity of the crime that creates the weapons disability, the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

C. 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 emphasized the federal statute’s breadth. The federal statute covers most felonies, ranging from aggravated murder to less egregious crimes like the possession of short lobsters. *Id.* The Court concluded that 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 State statute articulates the types of felonies that qualify. In particular, the statute explicitly limits its coverage to offenses of violence and felony 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 felony drug or violent offense. *Old Chief* referenced this 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.

In *Kole*, *supra*, the Court of Appeals for the Ninth Appellate District noted as follows:

“Kole’s reliance on *Old Chief* is misplaced for three reasons. First, *Old Chief* construed a federal statute and, therefore, is not binding upon this Court’s interpretation of an Ohio statute. Second, unlike *Kole*, the defendant in *Old Chief* timely objected to the prosecution’s introduction of his prior conviction into evidence. Third, the federal statute construed in *Old Chief* is facially dissimilar to the Ohio statute in the case at bar. In *Old Chief* the charge was assault with a dangerous weapon in violation of 18 U.S.C. 922(g)(1) which makes it unlawful for any person “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year [to] possess *** any firearm.” *Old Chief*, 519 U.S. at 174. In the instant case, **HN9** an essential element of the indicted offense of having a

weapon while under disability is whether the individual possessing the weapon was previously convicted of a felony offense of violence. *R.C. 2923.13(A)(2)*. **Unlike the federal statute in *Old Chief*, evidence concerning the name or nature of Kole's prior conviction was necessary in order for the jury to find Kole guilty of the charged offense.** In order to prove the offense of having a weapon while under a disability the state was required to prove the prior conviction beyond a reasonable doubt. *State v. Jordan*, 1999 Ohio App. LEXIS 1956 (Apr. 29, 1999), Cuyahoga App. No. 73453, unreported, appeal not allowed (1999), 86 Ohio St. 3d 1488, 716 N.E.2d 721 (distinguishing *Old Chief* and affirming the introduction of a prior drug trafficking conviction as an essential element of having a weapon under a disability). See, also, *State v. Payne*, 1999 Ohio App. LEXIS 1433 (Mar. 31, 1999), Lake App. No. 97-L-284, unreported (distinguishing *Old Chief* and affirming the introduction of prior driving under the influence misdemeanor convictions to prove a felony DUI charge); *State v. Russell*, 1998 Ohio App. LEXIS 5374 (Nov. 9, 1998), Butler App. No. CA98-02-018, unreported (distinguishing *Old Chief* and affirming the introduction of prior misdemeanor convictions for domestic violence in order to prove a felony domestic violence charge). Accordingly, this Court finds no plain error.”

In *Hilliard*, *supra*, the Ninth District noted: “Accordingly, under Ohio law, “[n]either the State nor the trial court is required to accept a defendant’s stipulation as to the existence of the conviction. *State v. Smith* (1990), 68 Ohio App. 3d 692, 695, 598 N.E. 2d 454. Hilliard’s counsel’s decision not to seek the stipulation, therefore, falls within the range of debatable trial tactics and does not constitute ineffective assistance of counsel.” (Citation omitted)

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 clear the General Assembly envisioned the name and nature of the underlying offense to be an essential element of the prosecution’s case.

Since the Supreme Court of the United State’s decision, a majority of Ohio Districts have 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.

In *Jackson*, *supra*, the Court of Appeals for the Tenth Appellate District reviewed a case where the defendant agreed to “concede to the trial judge that he had a prior conviction that would satisfy the prior conviction element of the weapons under disability offense; appellant requested that the court submit the weapons under disability charge solely on the issue of whether he had a firearm.” *Id.* at P18 The State refused to enter into the stipulation. In distinguishing the federal statute from the State statute, the Appellate Court noted: “In the instant case, the prior possession of drugs conviction is an essential element of the indicted offense of having a weapon while under disability pursuant to R.C. 2923.13, ... [statutory language omitted].” The Court continued:

“The state was required to prove the prior conviction beyond a reasonable doubt in order to prove the offense itself. See *State v. Berger* (Feb. 19, 1998), *Cuyahoga App. No. 71618*, 1998 *Ohio App. LEXIS 596* ; *State v. Adams* (1995), 106 *Ohio App. 3d 139*, 665 *N.E.2d 700*. In this case, appellant asked that the jury not hear the name and nature of his prior convictions. If the trial court had accepted appellant's stipulation, the jury would not have known that appellant had a conviction for possession of drugs. **Unlike the federal statute in *Old Chief*, evidence concerning appellant's prior conviction of possession of drugs was necessary in order for the jury to find appellant guilty of having a weapon under disability as charged.**” *Id.* at P25 (Emphasis added)

In a number of cases, appellate courts have found error when trial courts forced the State to accept a proposed stipulation. In *State v. Morgan*, 2001 Ohio App. LEXIS 4996, 2001 WL 1387637, the Court of Appeals for the Eighth Appellate District ruled:

“Defendant contends that, in light of his willingness to stipulate to the prior convictions, the State need not prove this element. We do not agree. Pursuant to *R.C. 4511.99(A)(4)(a)*, the State is required to prove beyond a reasonable doubt that defendant has three or more prior driving while under the influence convictions. Even if a stipulation is submitted on the matter, the jury must make the factual finding concerning the existence of the prior conviction when such a finding will enhance the degree of the offense. *State v. Furlow* (1993), 90 Ohio App. 3d 699, 630 N.E.2d 413; *State v. Smith* (1990), 68 Ohio App. 3d 692, 695, 589 N.E.2d 454; *State v. Mitchell*, 1996 Ohio App. LEXIS 5454 (Dec. 5, 1996) Cuyahoga App. No. 67490 and 67491, unreported; *State v. Ball*, 1994 Ohio App. LEXIS 600 (Feb. 17, 1994) Cuyahoga App. No. 64668, unreported; *State v. Fatica*, 1999 Ohio App. LEXIS 4878 (Oct.15, 1999) Geauga App. No. 93-G-1799, unreported. Specifically, evidence of defendant's three prior DUI convictions are necessary in order for the jury to find defendant guilty of the charged offense. **Accordingly, the trial court erred in refusing to allow the State to submit defendant's prior convictions to the jury.**” *Id.* at 5-6 (Emphasis added)

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 violent 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 state 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 evidence of the prior conviction necessary 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. These decisions, therefore, more strongly suggest rejecting, rather than applying, *Old Chief* in state prosecutions.

In *State v. McDaniel*, 2005 Ohio 5809, 2005 Ohio App. LEXIS 5228, the Court of Appeals for the Ninth Appellate District considered a case where the defendant argued that the trial court erred in rejecting his offer to stipulate to only one of his prior felony offenses. In that case (factually similar to the instant case), the defendant was indicted on two (2) separate counts of having weapons under disability – one because he had a prior offense of violence and one because he had a conviction for felony drug abuse. The defendant offered to stipulate that he “was under a disability at the time of the alleged incident.” The trial court advised the defendant that it would only accept a stipulation which included his prior felony offense of violence and a prior drug offense. The defendant then countered that he should only have to stipulate to one of the offenses and offered to stipulate to the drug abuse offense. This case is most factually in line

with the instant case, inasmuch as Appellee's trial counsel sought to force the State to elect which of the three (3) pending disability counts it wished to pursue prior to trial.

The *McDaniel* Court considered the issue as follows:

“Appellant was indicted, in the alternative, under both *R.C. 2923.13(A)(2)* and *(3)*. Appellant claims that the court abused its discretion in requiring him to stipulate to both an offense of violence and a drug abuse offense instead of allowing him to stipulate to one of these offenses. More specifically, Appellant contends that the stipulation to the prior offense of violence was overly prejudicial and unnecessary given his willingness to stipulate to the prior drug abuse offense, ‘especially in a case where the jury had to find that the defendant was in possession of a firearm and the indictment carried numerous firearm specifications.’

‘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’ and ‘when a previous conviction is an element of an offense, the state must prove the prior offense beyond a reasonable doubt.’ *State v. Smith (1990)*, 68 Ohio App.3d 692, 695, 589 N.E.2d 454. We are mindful that ‘neither the state nor the trial court is required to accept a defendant's stipulation as to the existence of the conviction.’ *Id.*

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.

By stipulating to his prior offenses, Appellant avoided the State's introduction of the specific nature of his prior felony convictions and arguably avoided the jury's consideration of more prejudicial evidence. However, as set forth above, Appellant had no right to stipulate, nor did the trial court or the State have a duty to accept a stipulation. We find no abuse of discretion in the trial court's decision to offer this stipulation. Appellant's first and second assignments of error are overruled. *Id.* at P11-P14

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.”)

The majority in *Old Chief* concedes:

“But there is something even more to the prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. "If [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." Saltzburg, A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence, 66 Calif. L. Rev. 1011, 1019 (1978) (footnotes omitted).

Expectations may also arise in jurors' minds simply from the experience of a trial itself. The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing. A party seemingly responsible for cloaking something has reason for apprehension, and the prosecution with its burden of proof may prudently demur at a defense request to interrupt the flow of evidence telling the story in the usual way.” *Old Chief* at 592, 593.

That is particularly true in state prosecutions, where the name and identity of the prior criminal offense is an essential element of the crime. The prohibition that prevents the State from

providing evidence of that essential element robs the State of its ability to persuasively provide evidence to the jury. As noted in the *Old Chief* Dissent:

“On its own terms, the [majority’s] argument does not hold together. A jury is as likely to be puzzled by the "missing chapter" resulting from a defendant's stipulation to his prior felony conviction as it would be by the defendant's conceding any other element of the crime. The jury may wonder why it has not been told the name of the crime, or it may question why the defendant's firearm possession was illegal, given the tradition of lawful gun ownership in this country, see *Staples v. United States*, 511 U.S. 600, 610-612, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994). “Doubt as to the criminality of [the defendant's] conduct may influence the jury when it considers the possession element.” *United States v. Barker*, 1 F.3d 957, 960 (1993) (quoting *United States v. Collamore*, 868 F.2d 24, 28 (CA1 1989)), modified, 20 F.3d 365 (CA9 1994).

Second, the Court misapprehends why ‘it has never been seriously suggested that [a defendant] can . . . compel the Government to try the case by stipulation.’ *Singer v. United States*, 380 U.S. 24, 35, 13 L. Ed. 2d 630, 85 S. Ct. 783 (1965). It may well be that the prosecution needs ‘evidentiary depth to tell a continuous story’ in order to prove its case in a way a jury will accept. *Ante*, 519 U.S. at 190. But that is by no means the only or the most important reason that a defendant may not oblige the Government to accept his concession to an element of the charged offense. The Constitution requires a criminal conviction to rest upon a jury determination that the defendant is guilty of every element of the crime of which he is charged beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993)); see also *Court of Ulster Cty. v. Allen*, 442 U.S. 140, 156, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979) (‘In criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt’). ‘A simple plea of not guilty, Fed. Rule Crim. Proc. 11, puts the prosecution to its proof as to all elements of the crime charged ?.’ *Mathews v. United States*, 485 U.S. 58, 64-65, 99 L. Ed. 2d 54, 108 S. Ct. 883 (1988). Further, a defendant's tactical decision not to contest an essential element of the crime does not remove the prosecution's burden to prove that element. *Estelle v. McGuire*, 502 U.S. 62, 69, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991). At trial, a defendant may thus choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element.”

In the instant case, the State was required to prove each and every element of the crime beyond a reasonable doubt and one of those elements required the State to prove the name of the

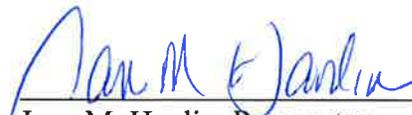
crime for which Appellee had previously been indicted and/or convicted. Appellant respectfully suggests that using a certified copy of said conviction or indictment is the appropriate way to prove that element.

CONCLUSION

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).

For all of the above reasons, Appellant respectfully seeks a reversal of the decision issued by the Court of Appeals for the Seventh Appellate District.

Respectfully submitted,
Jane M. Hanlin, Jefferson County, Ohio
Prosecuting Attorney, Counsel of Record



Jane M. Hanlin, Prosecutor

COUNSEL FOR APPELLANT, STATE OF
OHIO

Certificate of Service

I certify that a copy of this Brief 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 May 15, 2015.



Jane M. Hanlin, Prosecutor

APPENDIX

1. October 24, 2014 Notice of Appeal of Appellant State of Ohio
2. September 9, 2014 Judgment Entry of the Court of Appeals of Ohio, Seventh Appellate District
3. September 9, 2014 Court of Appeals of Ohio, Seventh Appellate District, Opinion
4. Ohio Revised Code 2923.13
5. Ohio Evidence Rule 403

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

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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CREECH

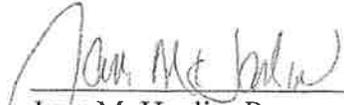


Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals, Seventh Appellant District, entered in Court of Appeals case No. 13-JE-41 on September 9, 2014.

This case is one of public or great general interest and this case involves a felony.

Respectfully submitted,
Jane M. Hanlin, Jefferson County, Ohio
Prosecuting Attorney, Counsel of Record



Jane M. Hanlin, Prosecutor

COUNSEL FOR APPELLANT, STATE OF
OHIO

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.



Jane M. Hanlin, Prosecutor

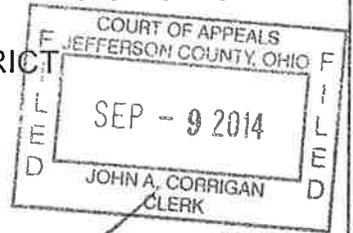
COUNSEL FOR APPELLANT, STATE OF
OHIO

STATE OF OHIO)
)
JEFFERSON COUNTY)

IN THE COURT OF APPEALS OF OHIO

SS:

SEVENTH DISTRICT



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. Ueber

Yvonne Corbett

John A. White
JUDGES.



The State of Ohio SS
County of Jefferson
I, John A. Corrigan, Clerk of Courts
do hereby certify that the annexed writ is
a true copy of the original
John A. Corrigan, Clerk of Courts
By *Tim Carroll* Deputy

JK 8 FG 515

P

[Cite as *State v. Creech*, 2014-Ohio-4004.]

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

STATE OF OHIO,)	
)	CASE NO. 13 JE 41
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
STEDMUND CREECH,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 12CR117.

JUDGMENT: Reversed and Remanded.

APPEARANCES:

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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 Thorn 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 disability in violation of R.C. 2923.13(A)(2), a third-degree felony; one count of

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.

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

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

{¶11} 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.

{¶148} 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.

{¶149} 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

{¶150} 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.

Document: ORC Ann. 2923.13

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Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 4 (SB 1) with a gap of file 2 (HB 53).

**Page's Ohio Revised Code Annotated Title 29: Crimes —
Procedure Chapter 2923: Conspiracy, Attempt, and Complicity; Weapons
Control; Corrupt Activity Miscellaneous**

§ 2923.13 Having weapons while under disability.

(A) Unless relieved from disability under operation of law or legal process, 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 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 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.

(C) For the purposes of this section, "under operation of law or legal process" shall not itself include mere completion, termination, or expiration of a sentence imposed as a result of a criminal conviction.

History

134 v H 511 (Eff 1-1-74); [146 v S 2](#). Eff 7-1-96; [150 v H 12](#), § 1, eff. 4-8-04; 2011 HB 54, § 1, eff. Sept. 30, 2011; 2014 SB 43, § 1, eff. Sept. 17, 2014; 2014 HB 234, § 1, effective March 23, 2015.

► Annotations

Page's Ohio Revised Code Annotated

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Rules current through rule amendments received through March 23, 2015

[Ohio Court Rules](#) [Ohio Rules Of Evidence](#) [Article IV. Relevancy and its limits](#)

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or undue delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

History

Amended, eff 7-1-96.

▶ [Annotations](#)

OHIO RULES OF COURT SERVICE

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