

No. 2014-1844

---

---

## IN THE SUPREME COURT OF OHIO

---

DISCRETIONARY APPEAL FROM THE  
JEFFERSON COUNTY COURT OF APPEALS,  
SEVENTH APPELLATE DISTRICT,  
CASE No. 13-JE-41

---

STATE OF OHIO,  
*Plaintiff-Appellant,*

v.

STEDMUND CREECH,  
*Defendant-Appellee.*

---

---

### **MERIT BRIEF OF APPELLEE STEDMUND CREECH**

---

---

Jefferson County Prosecutor's Office

Jane M. Hanlin, 0073682  
Jefferson County Prosecuting Attorney

16001 State Route 7  
Steubenville, Ohio 43952  
(740) 283-1966  
(740) 283-3409, fax  
jmkeenan@bruzzeselaw.com

Counsel for Appellant,  
State of Ohio

Office of the Ohio Public Defender

Stephen P. Hardwick, 0062932  
Assistant Public Defender

250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167, fax  
stephen.hardwick@opd.ohio.gov

Counsel for Appellee,  
Stedmund Creech

## Table of Contents

	<u>Page No.</u>	
Table of Contents .....	i	
Table of Authorities .....	iv	
Guiding Principle.....	1	
Summary of Argument .....	2	
Statement of the Case .....	3	
Statement of the Facts.....	3	
Argument .....	5	
Proposition of Law:		
Pursuant to Evid.R. 403, a trial court must accept a defendant’s concession to a firearm disability in the absence of any explanation from the State as to how the concession would prejudice any legitimate State interest. ....		5
I.    The State has waived any argument as to the sufficiency of Mr. Creech’s proposed stipulation.....	5	
II.   The State is correct that <i>Old Chief</i> does not bind this Court.....	5	
A.    Introduction. ....	5	
B.    Ohio’s Evid.R. 403 is more restrictive than its federal counterpart.....	6	
C.    Ohio’s weapon-under-disability statute covers a broad range of offences. ....	7	
III.  Ohio Rule of Evidence 403 balances unfair prejudice against probative value.....	7	
A.    By definition, unfair prejudice comes from evidence that encourages the jury to act contrary to instruction. ....	8	

## Table of Contents

	<u>Page No.</u>
B. Evidence of prior convictions could be admissible despite a defendant’s concession where relevant to proving other elements of an offense. ....	8
C. Curative instructions attempt to cure a mistake, and mistakes should be avoided, not encouraged. ....	10
IV. Other state high courts. ....	11
A. A majority of states high courts that have considered the issue have adopted the <i>Old Chief</i> doctrine. ....	11
B. The few states that have declined to adopt <i>Old Chief</i> either made a fact-specific ruling or interpreted a local version of Rule 403 that gives trial courts discretion to admit unfairly prejudicial evidence. ....	12
V. Remedy. ....	13
A. The State waived the issue of remedy. ....	13
B. This Court should permit defendants to completely relieve the State of its burden of proving an element of an offense. ....	13
C. No statute or rule prohibits a defendant from relieving the State of the burden of proving one of the elements of an offense. ....	15
Conclusion .....	19
Certificate of Service .....	19
Appendix:	
R.C. 2901.01. ....	A-1
R.C. 2901.04. ....	A-6
R.C. 2903.01. ....	A-7

## Table of Contents

	<u>Page No.</u>
Appendix:	
R.C. 2917.31.....	A-8
R.C. 2937.06.....	A-11
R.C. 2937.09.....	A-12
R.C. 2943.03.....	A-13
R.C. 2945.05.....	A-14
R.C. 2945.06.....	A-15
Ohio Crim.R. 1 .....	A-16
Ohio Crim.R. 11 .....	A-17
Ohio Crim.R. 29 .....	A-20
Ohio Evid.R. 403 .....	A-21
Ohio Evid.R. 404 .....	A-22
Fed.R.Evid. 403 .....	A-23
Fed.R.Evid. 404 .....	A-24
La.C.E. Art. 403 .....	A-25
South Carolina Evid.R. 403 .....	A-26

## Table of Authorities

	<u>Page No.</u>
<b>Cases:</b>	
<i>Anderson v. Commonwealth</i> , 281 S.W.3d 761 (Ky.2009).....	11
<i>Brown v. State</i> , 719 So.2d 882 (Fla.1998) .....	11
<i>Carter v. State</i> , 374 Md. 693, 824 A.2d 123 (2003) .....	11
<i>Ex parte Peraita</i> , 897 So.2d 1227 (Ala.2004) .....	12
<i>Ferguson v. State</i> , 362 Ark. 547, 210 S.W.3d 53 (2005).....	11
<i>Hardister v. State</i> , 849 N.E.2d 563 (Ind.2006) .....	11
<i>Hollen v. State</i> , 117 S.W.3d 798 (Tex.Crim.App.2003) .....	12
<i>Lakewood v. Papadelis</i> , 32 Ohio St.3d 1, 511 N.E.2d 1138 (1987) .....	1,19
<i>Oberlin v. Akron Gen. Med. Ctr.</i> , 91 Ohio St.3d 169, 743 N.E.2d 890 (2001) .....	8,10
<i>People v. Walker</i> , 211 Ill.2d 317, 812 N.E.2d 339 (2004) .....	11
<i>Ross v. State</i> , 279 Ga. 365, 614 S.E.2d 31 (Ga. 2005) .....	11
<i>State v. Alexander</i> , 214 Wis. 2d 628, 571 N.W.2d 662 (1997) .....	12
<i>State v. Anderson</i> , 8th Dist. Cuyahoga No. 94218, 2010-Ohio-5593 .....	18
<i>State v. Ball</i> , 756 So.2d 275 (La.1999).....	12
<i>State v. Bell</i> , 303 Conn. 246, 33 A.3d 167 (2011).....	12
<i>State v. Bey</i> , 85 Ohio St.3d 487, 1999-Ohio-283, 709 N.E.2d 484 .....	9
<i>State v. Bibler</i> , 2014-Ohio-3375, 17 N.E.3d 1154 (3d Dist.) .....	15,16
<i>State v. Chappell</i> , 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234 .....	5

## Table of Authorities

	<u>Page No.</u>
<b>Cases:</b>	
<i>State v. Croom</i> , 7th Dist. Mahoning No. 12MA54, 2013-Ohio-5682.....	17,18
<i>State v. Emmund</i> , 698 So.2d 1318 (Fla.3d.App.1997).....	11,12
<i>State v. Howard</i> , 56 Ohio St.2d 328, 383 N.E.2d 912 (1978) .....	1,18
<i>State v. James</i> , 81 S.W.3d 751 (Tenn.2002) .....	11,14
<i>State v. James</i> , 355 S.C. 25, 583 S.E.2d 745 (2003).....	12
<i>State v. Jennison</i> , 98 A.3d 1254 (Penn.2014).....	12
<i>State v. Lee</i> , 266 Kan. 804, 977 P.2d 263 (1999).....	11,14
<i>State v. Long</i> , 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890 .....	5
<i>State v. McCauley</i> , 8th Dist. Cuyahoga No. 80630, 2003-Ohio-3211 .....	18
<i>State v. McCraime</i> , 214 W.Va. 188, 588 S.E.2d 177 (2003).....	11
<i>State v. Murray</i> , 116 Hawaii 3, 169 P.3d 955 (2007) .....	11
<i>State v. Nadock</i> , 11th Dist. Lake No. 2009-L-042, 2010-Ohio-1161 .....	15
<i>State v. Nichols</i> , 208 W.Va. 432, 541 S.E.2d 310.....	11,14
<i>State v. Palmer</i> , 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011 .....	1,19
<i>State v. Pianowski</i> , 2d Dist. Montgomery No. 21069, 2006-Ohio-3372 .....	17
<i>State v. Ricks</i> , 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181.....	10
<i>State v. Runner</i> , 7th Dist. Belmont No. 99-BA-36, 2001-Ohio-3263 .....	15
<i>State v. Sweeney</i> , 131 Ohio App. 3d 765, 723 N.E.2d 655 (2d Dist.1999).....	15

## Table of Authorities

### Page No.

#### Cases:

<i>State v. Webb</i> , 10th Dist. Franklin No. 10AP-289, 2010-Ohio-6122 .....	18
<i>State v. Wilson</i> , 30 Ohio St.2d 312, 285 N.E.2d 38 (1972).....	6
<i>United States v. Old Chief</i> , 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) ... <i>passim</i>	
<i>Williams v. State</i> , 991 So.2d 593 (Miss.2008) .....	11

#### Statutes:

R.C. 2901.01.....	7
R.C. 2901.04.....	18
R.C. 2903.01.....	7
R.C. 2917.31.....	7
R.C. 2923.13.....	14
R.C. 2937.06.....	16
R.C. 2937.09.....	15,16
R.C. 2943.03.....	15,16
R.C. 2945.05.....	17
R.C. 2945.06.....	17

#### Rules:

Ohio Crim.R. 1 .....	18
Ohio Crim.R. 11 .....	16

## Table of Authorities

### Page No.

#### Rules:

Ohio Crim.R. 29 .....	4
Ohio Evid.R. 403 .....	<i>passim</i>
Ohio Evid.R. 404 .....	9
Fed.R.Evid. 403 .....	6,11
Fed.R.Evid. 404 .....	9
La.C.E. Art. 403 .....	12
South Carolina Evid.R. 403 .....	12

#### Other Authority:

Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3 .....	8
---	---

## GUIDING PRINCIPLE

“The philosophy of the Criminal Rules is to remove the element of gamesmanship from a trial.” *State v. Howard*, 56 Ohio St.2d 328, 333, 383 N.E.2d 912 (1978), quoted in *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, ¶18, and *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987).

## SUMMARY OF ARGUMENT

This case is about keeping gamesmanship out of criminal trials. Under the State's theory, a prosecutor can tell the jury about a defendant's past crimes or indictments even when that evidence does not relate to any contested fact. After Stedmund Creech offered to concede that he had a disability preventing him from possessing a firearm, the only purpose the State could have for introducing such evidence is a hope that the jury would disregard a curative instruction and consider Mr. Creech's history as evidence of a propensity to commit crime.

This case is not about whether *United States v. Old Chief*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), binds this Court. It does not. This case is about whether, under Ohio Evid.R. 403, the State may introduce evidence to prove a fact that the defendant has conceded is true. And the State gives no reason why Mr. Creech's specific disability is legitimately relevant to any other argument it made.

Finally, this case is not about whether the concession Mr. Creech offered at trial was adequate. Although the State contested the sufficiency of the proffer in the trial court, the State dropped the argument in both the court of appeals and in its jurisdictional memorandum to this Court. As a result, the issue is not properly before this Court.

## STATEMENT OF THE CASE

The State's statement completely omits the procedural history of the issue before this Court. Mr. Creech argued in the trial court that the State should be required to accept his stipulation to one of the three disabilities alleged by the State. T.p. 6-9. The prosecutor at trial objected both to stipulating to anything and to stipulating to only one count. *Id.* But in both the Seventh District and in its jurisdictional memorandum in this Court, the State made no argument concerning the sufficiency of the proposed stipulation. Instead, the State rested its argument entirely on the premise that the State does not have to accept *any* stipulation to any firearm disability for any reason.

## STATEMENT OF THE FACTS

The State's factual statement is generally correct. This case is about a shooting in Steubenville in which young men shot at each other. Fortunately, no one was killed or injured. But the State's factual recital misses several significant facts.

First, the State's brief omits reference to testimony contrary to its theory of the case. Specifically, one of Mr. Creech's co-defendants, Rolland Owens, testified that Mr. Creech did not have a gun, and the State's key witness could not specify what kind of gun she claimed Mr. Creech was carrying. T.p. 154, 159, 197. Of course, the jury was entitled to disbelieve Mr. Owens or to believe the State's key witness, but there was conflicting testimony about whether Mr. Creech had a gun and, therefore, whether he was guilty of possessing a firearm while under disability. The omission is important

because, as the State conceded in closing argument, the only contested factual issue before the jury was whether Mr. Creech had a gun. T.p. 231 (“Mr. Miller and I would probably not agree on much, but we will agree that the only question for you is did Stedmund have a gun?”).

Second, the State correctly explains that the trial court dismissed charges of carrying a concealed weapon and improper handling of a firearm in a vehicle. But the State omits the reason for the dismissal--the trial court acquitted Mr. Creech of the charges pursuant to Crim.R. 29 because the evidence was insufficient to support a conviction. State’s Brief at 3, T.p. 188-89.

Third, in its opening statement, the State conceded that if it had charged Mr. Creech with trying to shoot the person who started the fire, Mr. Creech “might have a self-defense argument in that he was being fired upon by a man with an assault rifle.” T.p. 85

Finally, the State used Mr. Creech’s disability status in closing argument by rhetorically asking the jury, “Was one convicted felon hunting another convicted felon?” T.p. 227.

## ARGUMENT

### Proposition of Law:

**Pursuant to Evid.R. 403, a trial court must accept a defendant's concession to a firearm disability in the absence of any explanation from the State as to how the concession would prejudice any legitimate State interest.**

#### **I. The State has waived any argument as to the sufficiency of Mr. Creech's proposed stipulation.**

An issue is not properly before this Court when an appellant failed to raise the issue in the court of appeals or in its jurisdictional memorandum to this Court. *State v. Long*, 138 Ohio St.3d 478, 481, 2014-Ohio-849, 8 N.E.3d 890, ¶ 9, citing *State v. Chappell*, 127 Ohio St.3d 376, 2010-Ohio-5991, 939 N.E.2d 1234 ¶ 26 (the appellant "did not raise this issue in the court of appeals or argue it in his memorandum seeking jurisdiction in this court, we will not consider this issue, as it is not properly before the court") (footnote omitted).

Here, the State did not argue in either the court of appeals or in its jurisdictional memorandum that Mr. Creech's proposed concession was inadequate. Accordingly, the only issue properly before this Court is whether *any* concession might be acceptable.

#### **II. The State is correct that *Old Chief* does not bind this Court.**

##### **A. Introduction.**

The State correctly explains that *United States v. Old Chief*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed. 2d 574 (1997), is a federal decision interpreting a federal rule. As a result, it is not binding on this Court. *See, e.g.*, State's Brief at 7, 10-12. But even though

decisions of the United States Supreme Court do not bind this Court, they remain “highly persuasive[.]” *State v. Wilson*, 30 Ohio St.2d 312, 316, 285 N.E.2d 38 (1972).

**B. Ohio’s Evid.R. 403 is more restrictive than its federal counterpart.**

The State’s argument misses that Federal Rule of Evidence 403 gives trial courts *more* leeway to admit unfairly prejudicial evidence than does Ohio’s rule. Specifically, when the probative value of relevant evidence is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury,” the federal rule makes exclusion *discretionary* whereas the Ohio rule makes the exclusion *mandatory*:

<b>Federal Rule of Evidence 403 (1997)</b> <sup>1</sup>	<b>Ohio Rule of Evidence 403(A)</b>
Although relevant, evidence <i>may be excluded</i> if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or misleading the jury[.] (Emphasis added.)	<b>Exclusion mandatory.</b> Although relevant, <i>evidence is not admissible</i> if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. (Bold in original, italics added.)

So, under the federal rule, a trial court *may* exclude unfairly prejudicial evidence. But under Ohio’s rule, a trial court *must* exclude unfairly prejudicial evidence. Accordingly, the case for requiring an Ohio prosecutor to accept a stipulation to a prior conviction is even stronger than under the federal rule at issue in *Old Chief*.

---

<sup>1</sup> This quotation is from the federal rule that was in effect in 1997. In 2011, “stylistic” changes were made to the federal rule, but there was “no intent to change any result in any ruling on evidence admissibility.” Comment Notes, Fed.Evid.R. 403.

**C. Ohio’s weapon-under-disability statute covers a broad range of offences.**

The State also argues that the federal statute at issue in *Old Chief* covers a large range of offenses, while Ohio’s weapon-under-disability statute is more specific in that it applies “only” to felony offenses of violence. State’s Brief at 11. But the federal statute is more narrow, and Ohio’s statute more broad, than the State suggests.

As the United States Supreme Court explained, under the federal statute at issue in *Old Chief*, “‘a crime’ is not an abstract or metaphysical concept. Rather, the Government must prove that the defendant committed a *particular crime*.” (Emphasis sic.) *Old Chief*, 519 U.S. at 194. Further, Ohio’s definition of felony “crime of violence” covers a broad range of offenses, from aggravated murder to attempting to causing “serious public inconvenience or alarm, by” making a false report of an “impending fire, explosion, crime, or other catastrophe” at a college or university. R.C. 2901.01(A)(9), 2903.01, and 2917.31(A)(1) and (C)(5).

**III. Ohio Rule of Evidence 403 balances unfair prejudice against probative value.**

Once a defendant has conceded an element of an offense, evidence proving only that element has no probative value. Therefore even a small amount of prejudice is sufficient to outweigh the probative value.

**A. By definition, unfair prejudice comes from evidence that encourages the jury to act contrary to instruction.**

As this Court has explained, “unfair prejudice” does not mean merely “adverse.”

*Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St.3d 169, 172, 743 N.E.2d 890 (2001). Prejudice is unfair when the evidence encourages the jury to base its verdict on improper factors:

Exclusion on the basis of unfair prejudice involves more than a balance of mere prejudice. If unfair prejudice simply meant prejudice, anything adverse to a litigant's case would be excludable under Rule 403. Emphasis must be placed on the word ‘unfair.’ *Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision.*

Consequently, if the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect. (Emphasis added.)

*Id.*, citing Weissenberger's Ohio Evidence (2000) 85-87, Section 403.3.

Here, given Mr. Creech's concession, the only effect of evidence of his criminal record would be “an improper basis for a jury decision.” This Court should not permit a party to introduce evidence that can only inflame, not inform, the jury.

**B. Evidence of prior convictions could be admissible despite a defendant's concession where relevant to proving other elements of an offense.**

The State also repeatedly claims that it has the right to tell its narrative anyway it wants. But a defense stipulation to a prior conviction does not deprive the State of any legitimate litigation advantage. The fact of a prior conviction has no bearing on the contested issue in the case—whether Mr. Creech had a gun:

This recognition that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has, however, 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.

*Old Chief* at 190.

In fact, the United States Supreme Court expressly held that the Government could introduce evidence of prior convictions where doing so had a legitimate purpose, such as showing "motive, identity, or absence of mistake, or accident" under Fed.R.Evid. 404(b). *Id.* For example, the facts underlying a prior offense might be admissible to show that the defendant acted so similarly to his past actions as to create a "behavioral fingerprint[.]" *State v. Bey*, 85 Ohio St.3d 487, 490, 1999-Ohio-283, 709 N.E.2d 484, interpreting Ohio Evid.R. 404(B). And in a domestic violence case, the conviction itself might be admissible where relevant to show that the victim had tried unsuccessfully to get help.

By contrast, in *Old Chief*, as in this case, proving "status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach." *Old Chief* at 190.

**C. Curative instructions attempt to cure a mistake, and mistakes should be avoided, not encouraged.**

As three members of this Court recently explained, a limiting instruction does not change the fact that unfairly prejudicial evidence is inadmissible under Evid.R. 403.

The fact that a limiting instruction can be given regarding certain relevant evidence, however, does not guarantee its admissibility. When the danger of unfair prejudice substantially outweighs the probative value of the evidence, it is not admissible.

*State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 50, citing Evid.R. 403 and 1980 Staff Note, Evid.R. 105 (French, J., concurring in judgment only, joined by O'Connor, C.J., and Lanzinger, J.).<sup>2</sup>

Permitting a jury instruction to cure error of unfair prejudice is inconsistent with the purpose of Evid.R. 403. The purpose of the rule is to keep evidence away from the jury when that evidence has a high likelihood of improperly swaying the jury. *Oberlin*, 91 Ohio St.3d at 172. A limiting instruction cannot be effective for evidence that's so prejudicial that it's likely to improperly sway the jury because that's the nature of an improper influence—it tempts jurors to disobey the rules.

---

<sup>2</sup> The majority in *Ricks* found that the evidence was unfairly prejudicial and that the reason the State gave to introduce the evidence “was a pretext for the real reason: connecting [the defendant] to the crime.” *Ricks* at ¶ 34.

#### IV. Other state high courts.

##### A. A majority of states high courts that have considered the issue have adopted the *Old Chief* doctrine.

As the Kentucky Supreme Court noted six years ago, the “overwhelming majority of courts” that have “considered the matter” have adopted the *Old Chief* interpretation of Fed.R.Evid. 403. *Anderson v. Commonwealth*, 281 S.W.3d 761, 765-66 (Ky.2009), quoting *People v. Walker*, 211 Ill.2d 317, 812 N.E.2d 339, 348 (2004); see also, *Williams v. State*, 991 So.2d 593 (Miss.2008); *State v. Murray*, 116 Hawaii 3, 169 P.3d 955 (2007); *Hardister v. State*, 849 N.E.2d 563 (Ind.2006); *Ferguson v. State*, 362 Ark. 547, 210 S.W.3d 53 (2005); *Ross v. State*, 279 Ga. 365, 614 S.E.2d 31 (Ga.2005); *Carter v. State*, 374 Md. 693, 824 A.2d 123 (2003); *State v. James*, 81 S.W.3d 751, 762 (Tenn.2002) (“when the sole purpose of introducing evidence of a defendant's prior convictions is to prove the status element of the offense, and when the defendant offers to stipulate his status as a felon, the probative value of the evidence is, as a matter of law, outweighed by the risk of unfair prejudice”); *State v. Nichols*, 208 W.Va. 432, 541 S.E.2d 310, paragraph three of the syllabus (1999), modified on other grounds by *State v. McCraime*, 214 W.Va. 188, 588 S.E.2d 177 (2003) (“[i]f a defendant makes an offer to stipulate to a prior conviction(s) that is a status element of an offense, the trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s)”; *State v. Lee*, 266 Kan. 804, 815, 977 P.2d 263 (1999); *Brown v. State*, 719 So.2d 882 (Fla.1998), quoting *State v. Emmund*, 698 So.2d 1318, 1320

(Fla.3d.App.1997) (the “focus of the case should remain on the facts that are actually in dispute: whether the defendant possessed the firearm on the date charged”); *State v. Alexander*, 214 Wis.2d 628, 571 N.W.2d 662 (1997).

**B. The few states that have declined to adopt *Old Chief* either made a fact-specific ruling or interpreted a local version of Rule 403 that gives trial courts discretion to admit unfairly prejudicial evidence.**

A few states have declined to adopt *Old Chief*, but at least one did so in a fact-specific context. In *State v. Bell*, 303 Conn. 246, 33 A.3d 167 (2011), the Connecticut Supreme Court declined to apply *Old Chief* to a case in which the “nature and circumstances” of a prior offense were at issue. Other courts simply decided that they did not approve of the reasoning of *Old Chief*. *State v. Jennison*, 98 A.3d 1254, 1262 (Penn.2014); *Ex parte Peraita*, 897 So.2d 1227, 1234 (Ala.2004); *State v. James*, 355 S.C. 25, 583 S.E.2d 745 (2003); *Hollen v. State*, 117 S.W.3d 798, 799 (Tex.Crim.App.2003) (permitting a stipulation but requiring that the jury hear the stipulation); *State v. Ball*, 756 So.2d 275 (La.1999).

One factor that distinguishes decisions from the states that have rejected the *Old Chief* reasoning is that the underlying version of their Rule of Evidence 403 *permitted* to trial court exclude unfairly prejudicial evidence, where Ohio’s Rule 403 *requires* the exclusion of unfairly prejudicial evidence. *Jennison* at 1262; *Ex parte Paraita* at 1233, n.2; S.C.Evid.R. 403; *Hollen* at 801, n.21; La.C.E. Art. 403.

By adopting Ohio Evid.R. 403, this Court, with the approval or acquiescence of the Ohio General Assembly, has taken a strong stand on unfairly prejudicial evidence—it *must* be excluded. The states that have declined to adopt *Old Chief* all give their trial judges discretion to admit unfairly prejudicial evidence. This Court should follow the majority of states and permit criminal defendants to keep unfairly prejudicial evidence from the jury by relieving the State of its burden to prove a prior violent felony conviction.

**V. Remedy.**

**A. The State waived the issue of remedy.**

As noted earlier, in both the court of appeals and its jurisdictional memorandum in this Court, the State failed to contest the sufficiency of Mr. Creech's proffered concession. *See supra* at 5. As a result, the State waived the issue and the issue is not properly before this Court. Mr. Creech briefs the issue in case this Court chooses to address it.

**B. This Court should permit defendants to completely relieve the State of its burden of proving an element of an offense.**

This Court should permit defendants to completely waive the State's burden to prove an element of an offense. Permitting a jury to hear the name of an offense in either a charge or conviction is as damaging as producing the bare entries. As a result, permitting the parties or the court to tell the jury that the defendant has conceded that he has a prior conviction is a remedy that's as bad as the harm. As the United States

Supreme Court explained, “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[.]” *Old Chief*, 519 U.S. at 190-191. The defendant in *Old Chief* offered to tell the jury that, “the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year.” *Id.* at 175. But other state supreme courts have held that the jury should only be told that the defendant had a disability preventing him or her from owning a firearm. *See, e.g., James*, 81 S.W.3d at 762 (Tenn.2002) (“the trial court should have accepted the defendant's stipulation in lieu of disclosing the names or nature of his previous convictions”); *State v. Lee*, 266 Kan. 804, 815, 977 P.2d 263 (1999) (“Unless there is a dispute over the status of the prior conviction (for example, was it or was it not a felony), the admission of the type and nature of the prior crime can only prejudice the jury”); *State v. Nichols*, 208 W.Va. at 444 (“the evidence of the defendant’s prior convictions . . . should be excluded and the status element not submitted to the jury”).

This Court should follow the supreme courts of Tennessee, Kansas, and West Virginia because under Ohio law, a “felony offense of violence” triggers the firearm disability. R.C. 2923.13(A)(3). And telling the jury that a defendant has been convicted of a “felony offense of violence” is a cure at least as bad as the harm.

With that in mind, the remedy in Ohio can be simple. Under R.C. 2923.13(A), a person with a “disability” shall not “knowingly acquire, have, carry, or use any firearm

or dangerous ordnance[.]” A jury need only be told that the defendant has a disability that requires him not to “knowingly acquire, have, carry, or use any firearm or dangerous ordnance[.]” The jury can then decide whether he knowingly acquired, had, carried, or used any firearm or dangerous ordnance.

**C. No statute or rule prohibits a defendant from relieving the State of the burden of proving one of the elements of an offense.**

A number of Ohio intermediate appellate courts have mistakenly held that defendants cannot admit to only one element of an offense. *See, e.g., State v. Nadock*, 11th Dist. Lake No. 2009-L-042, 2010-Ohio-1161, ¶ 38, citing *State v. Sweeney*, 131 Ohio App. 3d 765, 773, 723 N.E.2d 655 (2d Dist.1999); *State v. Runner*, 7th Dist. Belmont No. 99-BA-36, 2001-Ohio-3263, ¶ 19.

The Third District recently provided a thorough analysis on the topic in *State v. Bibler*, 2014-Ohio-3375, 17 N.E.3d 1154, ¶ 17-19 (3d Dist.). That court cited to several provisions of the Ohio Revised Code and Rules of Criminal Procedure that the court held require defendants to plead guilty or not guilty only to complete charges. Specifically, *Bibler* cites to R.C. 2937.09, which states that if a defendant pleads guilty, the court may proceed immediately to sentence. *Bibler* at ¶ 18. Similarly, the Third District cites to R.C. 2943.03, which governs “[p]leas to an indictment or information.” *Bibler* at ¶ 10.

When read literally and in isolation, R.C. 2937.09 or 2943.03 appear to contemplate pleas to an *entire indictment*. But many indictments have multiple counts,

and appellant is unaware of any case in which a court has interpreted those sections to require a defendant to choose between pleading guilty or not guilty to an entire indictment. In practice, R.C. 2937.09 permits trial courts to sentence defendants on any count to which they pled guilty, but not on counts where they the defendants have not. And R.C. 2943.03 simply delineates the pleas that a defendant may make.<sup>3</sup> The section does not require a defendant to make a blanket plea as to all or any counts.

*Bibler* also cites to R.C. 2937.06, which requires a defendant at arraignment to plead to “the charge.” *Bibler* at ¶ 18. Nothing in the statute prohibits a partial admission, but even if a defendant must make a blanket plea at arraignment, nothing binds a defendant to maintain that plea throughout the progress of a case. To the contrary, R.C. 2943.03 specifically permits a court to “allow a change of plea at any time before the commencement of the trial.” And while it’s true that Crim.R. 11 explains how a court should respond to pleas to “offenses,” nothing in that rule prohibits a defendant from

---

<sup>3</sup> Pleas to an indictment or information are:

- (A) Guilty;
- (B) Not guilty;
- (C) A former judgment of conviction or acquittal of the offense;
- (D) Once in jeopardy;
- (E) Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged. The court may, for good cause shown, allow a change of plea at any time before the commencement of the trial.

relieving the State of its burden to prove a single element by way of stipulation or concession.

More importantly, R.C. 2945.05, which the Third District did not cite, places no limit on what issues a defendant may try to a court instead of a jury:

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I . . . . ., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

The following section, R.C. 2945.06, explains the procedure for a bench trial and is equally non-restrictive:

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury.

Even though neither R.C. 2945.05 nor 2945.06 mention waiving a jury for only one count, lower courts routinely permit defendants to try their weapon-under-disability charges to the court while submitting the rest of a case to a jury. *See, e.g., State v. Pianowski*, 2d Dist. Montgomery No. 21069, 2006-Ohio-3372, ¶ 3; *State v. Croom*, 7th

Dist. Mahoning No. 12MA54, 2013-Ohio-5682, ¶ 125-33, citing *State v. Anderson*, 8th Dist. Cuyahoga No. 94218, 2010-Ohio-5593, *State v. Webb*, 10th Dist. Franklin No. 10AP-289, 2010-Ohio-6122, ¶ 3, 21-23; *State v. McCauley*, 8th Dist. Cuyahoga No. 80630, 2003-Ohio-3211, ¶ 3, 5-6. If, in the absence of a specific prohibition or mandate, a trial courts may permit a defendant to waive the right to a jury trial on a count-by-count basis, a defendant may also waive that right as to specific elements.

Finally, Criminal Rule 1(B) states that the rules “are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.” Likewise, the General Assembly has determined that “sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.” R.C. 2901.04(B).

Here, Mr. Creech seeks only to admit to what’s undeniable—he had a disability preventing him from having a firearm. He does so to avoid the unfair taint that the admission would have on the disputed question of whether he possessed a gun. He is attempting to narrow the issues and help the jury efficiently reach a just result. He is also furthering the goal of the criminal rules—“to remove the element of gamesmanship from a trial.” *State v. Howard*, 56 Ohio St.2d 328, 333, 383 N.E.2d 912 (1978), quoted in

*State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, ¶18, and *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3, 511 N.E.2d 1138 (1987).

### CONCLUSION

This Court should interpret the criminal rules to minimize gamesmanship and to help juries decide cases based on untainted evidence. This Court should affirm the decision of the court of appeals.

Respectfully submitted,

Office of the Ohio Public Defender

/s/Stephen P. Hardwick

Stephen P. Hardwick (0062932)

Assistant Public Defender

250 E. Broad Street, Suite 1400

Columbus, Ohio 43215

(614) 466-5394

(614) 752-5167 (fax)

stephen.hardwick@opd.ohio.gov

Counsel for Appellee Stedmund Creech

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via email to Jefferson County Prosecuting Attorney Jane Hanlin, jmkeenan@bruzzeslaw.com, on this 2<sup>nd</sup> day of July, 2015.

/s/Stephen P. Hardwick

Stephen P. Hardwick (0062932)

Assistant Public Defender

#442293

No. 2014-1844

---

---

IN THE SUPREME COURT OF OHIO

---

DISCRETIONARY APPEAL FROM THE  
JEFFERSON COUNTY COURT OF APPEALS,  
SEVENTH APPELLATE DISTRICT,  
CASE No. 13-JE-41

---

STATE OF OHIO,  
*Plaintiff-Appellant,*

v.

STEDMUND CREECH,  
*Defendant-Appellee.*

---

---

**APPENDIX TO**

**MERIT BRIEF OF APPELLEE STEDMUND CREECH**

---

---

Page's Ohio Revised Code Annotated  
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2901: General Provisions  
In General

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2901.01 (2015)*

**§ 2901.01 Definitions.**

(A) As used in the Revised Code:

(1) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

(2) "Deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person.

(3) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

(4) "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.

(5) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

(6) "Serious physical harm to property" means any physical harm to property that does either of the following:

(a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;

(b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.

(7) "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

(8) "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

(9) "Offense of violence" means any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2905.32, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of *section 2919.22 of the Revised Code* or felonious sexual penetration in violation of former *section 2907.12 of the Revised Code*;

(b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A)(9)(a) of this section;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

(10) (a) "Property" means any property, real or personal, tangible or intangible, and any interest or license in that property. "Property" includes, but is not limited to, cable television service, other telecommunications service, telecommunications devices, information service, computers, data, computer software, financial instruments associated with computers, other documents associated with computers, or copies of the documents, whether in machine or human readable form, trade secrets, trademarks, copyrights, patents, and property protected by a trademark, copyright, or patent. "Financial instruments associated with computers" include, but are not limited to, checks, drafts, warrants, money orders, notes of indebtedness, certificates of deposit, letters of credit, bills of credit or debit cards, financial transaction authorization mechanisms, marketable securities, or any computer system representations of any of them.

(b) As used in division (A)(10) of this section, "trade secret" has the same meaning as in *section 1333.61 of the Revised Code*, and "telecommunications service" and "information service" have the same meanings as in *section 2913.01 of the Revised Code*.

(c) As used in divisions (A)(10) and (13) of this section, "cable television service," "computer," "computer software," "computer system," "computer network," "data," and "telecommunications device" have the same meanings as in *section 2913.01 of the Revised Code*.

(11) "Law enforcement officer" means any of the following:

(a) A sheriff, deputy sheriff, constable, police officer of a township or joint police district, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing authority under division (D) of *section 3735.31 of the Revised Code*, or state highway patrol trooper;

(b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority;

(c) A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation;

(d) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission;

(e) A person lawfully called pursuant to *section 311.07 of the Revised Code* to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called;

(f) A person appointed by a mayor pursuant to *section 737.01 of the Revised Code* as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed;

(g) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;

(h) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor;

(i) A veterans' home police officer appointed under *section 5907.02 of the Revised Code*;

(j) A member of a police force employed by a regional transit authority under division (Y) of *section 306.35 of the Revised Code*;

(k) A special police officer employed by a port authority under *section 4582.04 or 4582.28 of the Revised Code*;

(l) The house of representatives sergeant at arms if the house of representatives sergeant at arms has arrest authority pursuant to division (E)(1) of *section 101.311 of the Revised Code* and an assistant house of representatives sergeant at arms;

(m) The senate sergeant at arms and an assistant senate sergeant at arms;

(n) A special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in section 119.3 of Title 14 of the Code of Federal Regulations, 14 C.F.R. 119.3, as amended, and that is required to be under a security program and is governed by aviation security rules of the transportation security administration of the United States department of transportation as provided in Parts 1542. and 1544. of Title 49 of the Code of Federal Regulations, as amended.

**(12)** "Privilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.

**(13)** "Contraband" means any property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense. "Contraband" includes, but is not limited to, all of the following:

**(a)** Any controlled substance, as defined in *section 3719.01 of the Revised Code*, or any device or paraphernalia;

**(b)** Any unlawful gambling device or paraphernalia;

**(c)** Any dangerous ordnance or obscene material.

**(14)** A person is "not guilty by reason of insanity" relative to a charge of an offense only if the person proves, in the manner specified in *section 2901.05 of the Revised Code*, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.

**(B) (1) (a)** Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, "person" includes all of the following:

**(i)** An individual, corporation, business trust, estate, trust, partnership, and association;

**(ii)** An unborn human who is viable.

**(b)** As used in any section contained in Title XXIX of the Revised Code that does not set forth a criminal offense, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association.

**(c)** As used in division (B)(1)(a) of this section:

**(i)** "Unborn human" means an individual organism of the species *Homo sapiens* from fertilization until live birth.

**(ii)** "Viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.

**(2)** Notwithstanding division (B)(1)(a) of this section, in no case shall the portion of the definition of the term "person" that is set forth in division (B)(1)(a)(ii) of this section be applied or construed in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense in any of the following manners:

**(a)** Except as otherwise provided in division (B)(2)(a) of this section, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman. An abortion that violates the conditions described in the immediately preceding sentence may be punished as a violation of *section 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13,*

2903.14, 2903.21, or 2903.22 of the Revised Code, as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence, but that does violate section 2919.12, division (B) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code, may be punished as a violation of section 2919.12, division (B) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code, as applicable. Consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with section 2919.12 of the Revised Code.

(b) In a manner so that the offense is applied or is construed as applying to a woman based on an act or omission of the woman that occurs while she is or was pregnant and that results in any of the following:

(i) Her delivery of a stillborn baby;

(ii) Her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying;

(iii) Her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human;

(iv) Her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human;

(v) Her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity, or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn human that she is carrying.

(C) As used in Title XXIX of the Revised Code:

(1) "School safety zone" consists of a school, school building, school premises, school activity, and school bus.

(2) "School," "school building," and "school premises" have the same meanings as in section 2925.01 of the Revised Code.

(3) "School activity" means any activity held under the auspices of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district; a governing authority of a community school established under Chapter 3314. of the Revised Code; a governing board of an educational service center, or the governing body of a school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code.

(4) "School bus" has the same meaning as in section 4511.01 of the Revised Code.

**HISTORY:** 142 v H 708 (Eff 4-19-88); 143 v S 24 (Eff 7-24-90); 144 v H 77 (Eff 9-17-91); 144 v S 144 (Eff 8-8-91); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 445 (Eff 9-3-96); 146 v S 239 (Eff 9-6-96); 146 v S 277 (Eff 3-31-97); 147 v H 565 (Eff 3-30-99); 148 v S 1 (Eff 8-6-99); 148 v H 162 (Eff 8-25-99); 148 v S 107 (Eff 3-23-2000); 148 v S 137 (Eff 5-17-2000); 148 v H 351 (Eff 8-18-2000); 148 v S 317 (Eff 3-22-2001); 149 v S 184 (Eff 5-15-2002); 149 v H 675 (Eff 3-14-2003); 149 v H 545 (Eff 3-19-2003); 149 v H 364. Eff 4-8-2003; 151 v H 241, § 1, eff. 7-1-07; 153 v S 235, § 1, eff. 3-24-11; 2011 HB 153, § 101.01, eff. Sept. 29, 2011; 2012 HB 487, § 101.01, eff. Sept. 10, 2012.

Page's Ohio Revised Code Annotated  
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2901: General Provisions  
In General

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2901.04 (2015)*

**§ 2901.04 Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense.**

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

**HISTORY:** 134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

Page's Ohio Revised Code Annotated  
 Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
 All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
 Chapter 2903: Homicide and Assault  
 Homicide

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2903.01 (2015)*

**§ 2903.01 Aggravated murder.**

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in *section 2929.02 of the Revised Code*.

(G) As used in this section:

(1) "Detention" has the same meaning as in *section 2921.01 of the Revised Code*.

(2) "Law enforcement officer" has the same meaning as in *section 2911.01 of the Revised Code*.

**HISTORY:** 134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 239 (Eff 9-6-96); 147 v S 32 (Eff 8-6-97); 147 v H 5 (Eff 6-30-98); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002; 2011 HB 86, § 1, eff. Sept. 30, 2011.

Page's Ohio Revised Code Annotated  
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2917: Offenses Against the Public Peace  
False Alarms

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2917.31 (2015)*

**§ 2917.31 Inducing panic.**

(A) No person shall cause the evacuation of any public place, or otherwise cause serious public inconvenience or alarm, by doing any of the following:

(1) Initiating or circulating a report or warning of an alleged or impending fire, explosion, crime, or other catastrophe, knowing that such report or warning is false;

(2) Threatening to commit any offense of violence;

(3) Committing any offense, with reckless disregard of the likelihood that its commission will cause serious public inconvenience or alarm.

(B) Division (A)(1) of this section does not apply to any person conducting an authorized fire or emergency drill.

(C) (1) Whoever violates this section is guilty of inducing panic.

(2) Except as otherwise provided in division (C)(3), (4), (5), (6), (7), or (8) of this section, inducing panic is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (C)(4), (5), (6), (7), or (8) of this section, if a violation of this section results in physical harm to any person, inducing panic is a felony of the fourth degree.

(4) Except as otherwise provided in division (C)(5), (6), (7), or (8) of this section, if a violation of this section results in economic harm, the penalty shall be determined as follows:

(a) If the violation results in economic harm of one thousand dollars or more but less than seven thousand five hundred dollars and if division (C)(3) of this section does not apply, inducing panic is a felony of the fifth degree.

(b) If the violation results in economic harm of seven thousand five hundred dollars or more but less than one hundred fifty thousand dollars, inducing panic is a felony of the fourth degree.

(c) If the violation results in economic harm of one hundred fifty thousand dollars or more, inducing panic is a felony of the third degree.

(5) If the public place involved in a violation of division (A)(1) of this section is a school or an institution of higher education, inducing panic is a felony of the second degree.

(6) If the violation pertains to a purported, threatened, or actual use of a weapon of mass destruction, and except as otherwise provided in division (C)(5), (7), or (8) of this section, inducing panic is a felony of the fourth degree.

(7) If the violation pertains to a purported, threatened, or actual use of a weapon of mass destruction, and except as otherwise provided in division (C)(5) of this section, if a violation of this section results in physical harm to any person, inducing panic is a felony of the third degree.

(8) If the violation pertains to a purported, threatened, or actual use of a weapon of mass destruction, and except as otherwise provided in division (C)(5) of this section, if a violation of this section results in economic harm of one hundred thousand dollars or more, inducing panic is a felony of the third degree.

(D) (1) It is not a defense to a charge under this section that pertains to a purported or threatened use of a weapon of mass destruction that the offender did not possess or have the ability to use a weapon of mass destruction or that what was represented to be a weapon of mass destruction was not a weapon of mass destruction.

(2) Any act that is a violation of this section and any other section of the Revised Code may be prosecuted under this section, the other section, or both sections.

(E) As used in this section:

(1) "Economic harm" means any of the following:

(a) All direct, incidental, and consequential pecuniary harm suffered by a victim as a result of criminal conduct. "Economic harm" as described in this division includes, but is not limited to, all of the following:

(i) All wages, salaries, or other compensation lost as a result of the criminal conduct;

(ii) The cost of all wages, salaries, or other compensation paid to employees for time those employees are prevented from working as a result of the criminal conduct;

(iii) The overhead costs incurred for the time that a business is shut down as a result of the criminal conduct;

(iv) The loss of value to tangible or intangible property that was damaged as a result of the criminal conduct.

(b) All costs incurred by the state or any political subdivision as a result of, or in making any response to, the criminal conduct that constituted the violation of this section or *section 2917.32 of the Revised Code*, including, but not limited to, all costs so incurred by any law enforcement officers, firefighters, rescue personnel, or emergency medical services personnel of the state or the political subdivision.

(2) "School" means any school operated by a board of education or any school for which the state board of education prescribes minimum standards under *section 3301.07 of the Revised Code*, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted at the time a violation of this section is committed.

(3) "Weapon of mass destruction" means any of the following:

(a) Any weapon that is designed or intended to cause death or serious physical harm through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors;

(b) Any weapon involving a disease organism or biological agent;

(c) Any weapon that is designed to release radiation or radioactivity at a level dangerous to human life;

(d) Any of the following, except to the extent that the item or device in question is expressly excepted from the definition of "destructive device" pursuant to *18 U.S.C. 921(a)(4)* and regulations issued under that section:

(i) Any explosive, incendiary, or poison gas bomb, grenade, rocket having a propellant charge of more than four ounces, missile having an explosive or incendiary charge of more than one-quarter ounce, mine, or similar device;

(ii) Any combination of parts either designed or intended for use in converting any item or device into any item or device described in division (E)(3)(d)(i) of this section and from which an item or device described in that division may be readily assembled.

(4) "Biological agent" has the same meaning as in *section 2917.33 of the Revised Code*.

(5) "Emergency medical services personnel" has the same meaning as in *section 2133.21 of the Revised Code*.

(6) "Institution of higher education" means any of the following:

(a) A state university or college as defined in division (A)(1) of *section 3345.12 of the Revised Code*, community college, state community college, university branch, or technical college;

(b) A private, nonprofit college, university or other post-secondary institution located in this state that possesses a certificate of authorization issued by the Ohio board of regents pursuant to Chapter 1713. of the Revised Code;

(c) A post-secondary institution with a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code.

**HISTORY:** 134 v H 511 (Eff 1-1-74); 147 v H 182 (Eff 10-1-97); 147 v H 382 (Eff 7-22-98); 149 v H 411. Eff 9-27-2002; 152 v H 142, § 1, eff. 3-24-08; 2011 HB 86, § 1, eff. Sept. 30, 2011.

Page's Ohio Revised Code Annotated  
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2937: Preliminary Examination; Bail  
Preliminary Examination

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2937.06 (2015)*

**§ 2937.06 Pleas.**

(A) After all motions are disposed of or if no motion is presented, the court or magistrate shall require the accused to plead to the charge.

(1) In cases of felony, only a plea of not guilty or a written plea of guilty shall be received and if the defendant declines to plead, a plea of not guilty shall be entered for the defendant and further proceedings had as set forth in *sections 2937.09 to 2937.12 of the Revised Code*.

(2) In cases of misdemeanor, the following pleas may be received:

(a) Guilty;

(b) Not guilty;

(c) No contest;

(d) Once in jeopardy, which includes the defenses of former conviction or former acquittal.

(B) Prior to accepting a plea of guilty or a plea of no contest under division (A) of this section, the court shall comply with *sections 2943.031 and 2943.032 of the Revised Code*.

(C) Entry of any plea pursuant to this section shall constitute a waiver of any objection that could be taken advantage of by motion pursuant to *section 2937.04 of the Revised Code*.

**HISTORY:** 128 v 97 (Eff 1-1-60); 143 v S 95 (Eff 10-2-89); 146 v S 2. Eff 7-1-96.

Page's Ohio Revised Code Annotated  
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2937: Preliminary Examination; Bail  
Preliminary Examination

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2937.09 (2015)*

**§ 2937.09 Procedure in felony cases.**

If the charge is a felony, the court or magistrate shall, before receiving a plea of guilty, advise the accused that such plea constitutes an admission which may be used against him at a later trial. If the defendant enters a written plea of guilty or, pleading not guilty, affirmatively waives the right to have the court or magistrate take evidence concerning the offense, the court or magistrate forthwith and without taking evidence may find that the crime has been committed and that there is probable and reasonable cause to hold the defendant for trial pursuant to indictment by the grand jury, and, if the offense is bailable, require the accused to enter into recognizance in such amount as it determines to appear before the court of common pleas pursuant to indictment, otherwise to be confined until the grand jury has considered and reported the matter.

**HISTORY:** 128 v 97 (Eff 1-1-60); 129 v 582(750); Eff 1-10-61.

Page's Ohio Revised Code Annotated  
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2943: Arraignment; Pleas

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2943.03 (2015)*

**§ 2943.03 Pleas to indictment.**

Pleas to an indictment or information are:

- (A) Guilty;
- (B) Not guilty;
- (C) A former judgment of conviction or acquittal of the offense;
- (D) Once in jeopardy;
- (E) Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged. The court may, for good cause shown, allow a change of plea at any time before the commencement of the trial.

**HISTORY:** GC § 13440-2; 113 v 123(175), ch 19, § 2; Bureau of Code Revision. Eff 10-1-53.

Page's Ohio Revised Code Annotated  
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2945: Trial  
Trial by Court

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2945.05 (2015)*

**§ 2945.05 Defendant may waive jury trial.**

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I ..... , defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

**HISTORY:** GC § 13442-4; 113 v 123(179), ch 21, § 4; Bureau of Code Revision. Eff 10-1-53.

Page's Ohio Revised Code Annotated  
Copyright © 2015 Matthew Bender & Company, Inc., a member of the LexisNexis Group.  
All rights reserved.

\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 6 (SB 38) \*\*\*

Title 29: Crimes -- Procedure  
Chapter 2945: Trial  
Trial by Court

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2945.06 (2015)*

**§ 2945.06 Jurisdiction of judge when jury trial is waived; three-judge court.**

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under *section 2945.05 of the Revised Code*, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in *sections 2929.03 and 2929.04 of the Revised Code* in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by *section 141.07 of the Revised Code*.

**HISTORY:** GC § 13442-5; 113 v 123(179), ch 21, § 5; 115 v 531; Bureau of Code Revision, 10-1-53; 139 v S 1. Eff 10-19-81.

## Ohio Crim.R. 1

### **Rule 1. Scope of rules: Applicability; Construction; Exceptions**

#### **(A) Applicability.**

These rules prescribe the procedure to be followed in all courts of this state in the exercise of criminal jurisdiction, with the exceptions stated in division (C) of this rule.

#### **(B) Purpose and construction.**

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay.

#### **(C) Exceptions.**

These rules, to the extent that specific procedure is provided by other rules of the Supreme Court or to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) upon extradition and rendition of fugitives, (3) in cases covered by the Uniform Traffic Rules, (4) upon the application and enforcement of peace bonds, (5) in juvenile proceedings against a child as defined in Rule 2(D) of the Rules of Juvenile Procedure, (6) upon forfeiture of property for violation of a statute of this state, or (7) upon the collection of fines and penalties. Where any statute or rule provides for procedure by a general or specific reference to the statutes governing procedure in criminal actions, the procedure shall be in accordance with these rules.

## Ohio Crim.R. 11

### Rule 11. Pleas, rights upon plea

#### (A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

#### (B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim.R. 32.

#### (C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

**(D) Misdemeanor cases involving serious offenses.**

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

**(E) Misdemeanor cases involving petty offenses.**

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Crim.R. 44(B) and (C) apply to division (E) of this rule.

**(F) Negotiated plea in felony cases.**

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

**(G) Refusal of court to accept plea.**

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

**(H) Defense of insanity.**

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

## Ohio Crim.R. 29

### **Rule 29. Motion for acquittal**

#### **(A) Motion for judgment of acquittal.**

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

#### **(B) Reservation of decision on motion.**

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

#### **(C) Motion after verdict or discharge of jury.**

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

## Ohio Evid. R. 403

**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.

## Ohio Evid. R. 404

### **Rule 404. Character evidence not admissible to prove conduct; Exceptions; Other crimes**

- (A) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:
- (1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.
  - (2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.
  - (3) **Character of witness.** Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.
- (B) **Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

## **USCS Fed Rules Evid R 403**

Current through changes received June 23, 2015

### **Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

## USCS Fed Rules Evid R 404

Current through changes received June 23, 2015

### Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

- (1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- (2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:
  - (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
  - (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
    - (i) offer evidence to rebut it; and
    - (ii) offer evidence of the defendant's same trait; and
  - (C) **in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.**
- (3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

- (1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
  - (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
  - (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

## La. C.E. Art. 403

### **Art. 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

## **S.C. Evid.R. 403**

### **Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.