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Character Evidence

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CHARACTER EVIDENCE

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Ohio Rule 404(A) governs the circumstantial use of character evidence, i.e., the admissibility of evidence of a character trait to prove that a person acted in conformity with that trait on a particular occasion (character-as-proof-of-conduct).

This use of character is sometimes referred to as "propensity" or "disposition" evidence. See State v. Curry, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975) ("propensity or inclination to commit crime"); State v. Hector, 19 Ohio St.2d 167, 174, 249 N.E.2d 912 (1969) (common law prohibited prior conduct evidence if offered "merely" to show "a trait, disposition or propensity toward the commission of crime"). For example, a person's character for honesty may be circumstantially relevant to a theft charge because it could be argued that a person with an honest character tends to act in conformity with that character and thus would be less likely to steal. Similarly, it could be argued that a dishonest person tends to act in conformity with that character and thus is more likely to steal.

Both Rule 404(A) and Rule 404(B) prohibit the circumstantial use of character evidence.

Exceptions. Many of the problems inherent in the use of character disappear, or at least diminish, when an accused offers evidence of her own character or that of a victim. Accordingly, Rule 404(A) recognizes three exceptions: (1) a criminal defendant's character, (2) a victim's character, and (3) a witness's character. With exceptions (1) and (2), it is the accused's or victim's character at the time of the charged offense that is relevant. In contrast, exception (3) involves a witness's character at the time of trial. In prosecutions for rape or gross sexual imposition the Ohio rape shield law, and not Rule 404(A), controls.

Methods of proof. Rule 404(A) specifies the conditions under which character evidence is admissible. The rule does not specify the methods of proof that may be used to establish character. Rule 405(A) governs the methods of proof. Generally, only opinion and reputation evidence (not specific acts) are permitted to prove character.

Other-acts evidence. Rule 404(B) provides that evidence of other crimes, wrongs, or acts, although not admissible to prove character, may be admissible for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This subject will be discussed in the next issue.

POLICY PROHIBITING CHARACTER & OTHER-ACTS EVIDENCE

Although character evidence may be probative in some cases, it is generally excluded because it "usually is laden with the dangerous baggage of prejudice, distraction, and time-consumption." 1 McCormick, Evidence § 188, at 654 (5th ed. 1999). See also Michelson v. United States, 335 US 469, 475-76 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."); Boyd v. United States, 142 U.S. 450, 458 (1892) (Prior robberies "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community.").

The Ohio cases are in accord. In State v. Lytle, 48 Ohio St.2d 391, 402, 358 N.E.2d 623 (1976), vacated on other grounds by 438 U.S. 910 (1978), the Ohio Supreme Court commented: "Although character is not irrelevant, the danger of prejudice outweighs the probative value of such evidence." See also State v. Mann, 19 Ohio St.3d 34, 37, 482 N.E.2d 592 (1985) ("[T]he state was impermissibly allowed to show that appellant had a propensity to commit crimes, i.e., to infer from the fact that he had previously violated a civil injunction that he had likewise committed the crime charged [resisting arrest].").

In State v. Curry, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975)(quoting Whitty v. State, 34 Wis.2d 278, 149 N.W.2d 557 (1967), cert. denied, 390 U.S. 959 (1968), the Court identified the following dangers associated with character evidence:

> (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to

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demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

These dangers have crystallized into a general prohibition against the use of character evidence: "A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime." State v. Curry, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975). See also State v. Jamison, 49 Ohio St.3d 182, 184, 552 N.E.2d 180 (1990) ("Under longstanding principles of Anglo-American jurisprudence, an accused can not be convicted of one crime by proving he committed other crimes or is a bad person."), cert. denied, 498 U.S. 881 (1990).

The accused's character may be improperly introduced in a variety of ways:

Mug shots. E.g., State v. Breedlove, 26 Ohio St.2d 178, 184, 271 N.E.2d 238 (1971) ("Under the circumstances in the case at bar, we believe it unjustifiable for the state, on direct examination, to present police mug shots, bearing police identification numbers, from which a reasonable inference can be drawn that the defendant, at some indefinite time in the past had had trouble with the law."); State v. Wilkinson, 26 Ohio St.2d 185, 271 N.E.2d 242 (1971), cert. denied, 404 U.S. 968 (1971); State v. Yarbrough, 129 Ohio App.3d 437, 440, 717 N.E.2d 1173 (1998) (The prosecution may not use a "mug shot" of the defendant in a photo array because it "suggested to the jury that [the defendant] had prior criminal involvement."); State v. Wills, 120 Ohio App.3d 320, 327, 697 N.E.2d 1072 (1997)("Under the circumstances, we find that the single mention of the term 'mug shot' did not violate Evid.R. 404(B)."), appeal dismissed, 80 Ohio St.3d 1409, 684 N.E.2d 703 (1997); State v. Tolbert, 70 Ohio App.3d 372, 387, 591 N.E.2d 325 (1990)(police identification numbers were obscured), appeal dismissed, 58 Ohio St.3d 701, 569 N.E.2d 504 (1991).

Prior arrests. E.g., State v. Jones, 83 Ohio App.3d 723, 737, 615 N.E.2d 713 (1992)("Generally, reference to prior arrests of the defendant is prohibited.").

Prior indictments. E.g., State v. Hector, 19 Ohio St.2d 167, 178, 249 N.E.2d 912 (1969) (ordinarily the credibility of a witness may not be attacked by "proof of indictment").

Attacks on the character of the defendant's friends. E.g., State v. Keenan, 66 Ohio St.3d 402, 409, 613 N.E.2d 203 (1993) ("By arguing explicitly that the bad character of Keenan's friends reflected on Keenan's character, when that character was wholly irrelevant, the prosecutor ignored the fact that ... 'an accused cannot be convicted ... by proving he ... is a bad person.'") (quoting State v. Jamison, 49 Ohio St.3d 182, 184, 552 N.E.2d 180 (1990), cert. denied, 498 U.S. 881 (1990)).

Cross-examination without a good-faith basis. E.g., State v. Hunt, 97 Ohio App.3d 372, 375, 646 N.E.2d 889 (1994) ("At no time did the prosecutor put forth any extrinsic evidence to establish this fact [taking gasoline to and threatening to blow up a house].").

Profile evidence. E.g., State v. Roquemore, 85 Ohio App.3d 448, 620 N.E.2d 110 (1993) (error to permit criminal profilist's testimony that impermissibly placed accused's character in evidence); State v. Smith, 84 Ohio App.3d 647, 661, 617 N.E.2d 1160 (1992) (evidence suggested that accused was a pedophile and this "aspect of his personality was then offered as a propensity from which the jury was asked to infer that he had acted in accordance with his propensity to commit the crimes alleged"); State v. McMillan, 69 Ohio App.3d 36, 51, 590 N.E.2d 23 (1990), appeal dismissed, 71 Ohio St.3d 1452, 644 N.E.2d 656 (1995) (profile of sex abusers improper "group character evidence").

Syndrome evidence. E.g., State v. Pargeon, 64 Ohio App.3d 679, 681, 582 N.E.2d 665 (1991) (In a domestic violence prosecution, evidence that the accused's wife is a battered woman "really serves as evidence of the prior bad acts ... from which the inference may be drawn that appellant has the propensity to beat his wife and that he beat her on this particular occasion. This is precisely the prohibited inference that is excluded under Evid. R. 404(B).").

ACCUSED'S CHARACTER

Rule 404(A)(1) recognizes an exception to the general prohibition against the admissibility of character evidence. In a criminal case, the accused may offer evidence of a pertinent trait of his character. Once the accused introduces such evidence, the prosecution may cross-examine the defense character witness and offer rebuttal character evidence.

Prior Law

Rule 404(A)(1) did not change Ohio law. It had long been the rule in Ohio that in "a criminal prosecution, until a defendant offers evidence of his general good character or reputation, the state may not offer testimony of his bad character or bad reputation." State v. Cochrane, 151 Ohio St. 128, 84 N.E.2d 742 (1949) (syllabus, para 3). Accord State v. Adams, 53 Ohio St.2d 223, 374 N.E.2d 137 (1978), vacated on other grounds, 439 U.S. 811 (1978); State v. Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), vacated on other grounds, 438 U.S. 910 (1978); State v. Curry, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975); State v. Hector, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969); State v. Markowitz, 138 Ohio St. 106, 33 N.E.2d 1 (1941); Sabo v. State, 119 Ohio St. 231, 163 NE 28 (1928); Hamilton v. State, 34 Ohio St. 82 (1877); Griffin v. State, 14 Ohio St. 55 (1862).

Limitations

There are several important limitations on admissibility in this context. First, it is the defendant's character at the time of the charged offense that is relevant. See Wroe v. State, 20 Ohio St. 460, 472 (1870) ("evidence ... as to the bad character of the defendant subsequent to the commission of the offense ought to have been excluded"); 1 McCormick, Evidence § 191, at 675 (5th ed. 1999) ("confined to reputation at approximately the time of the alleged offense").

Second, Rule 405(A) limits the methods by which the accused may introduce character evidence. Under that provision only opinion and reputation evidence, and not specific instances of conduct, may be used.

Third, in prosecutions for rape and gross sexual imposition the rape shield statute preempts the rule.

Personal History

Typically, an accused introduces evidence of good character through the testimony of character witnesses. Sometimes, however, character evidence or positive aspects of the accused's background is brought out by the defense during the examination of the accused or other defense witness. See 1 McCormick, Evidence § 191, at 676 (5th ed. 1999) ("By relating a personal history supportive of

good character, however, the defendant may achieve the same result.").

This is often a risky tactic. Once the issue is injected into the trial in a significant way, the prosecution's right to rebut may be triggered. E.g., State v. Robinson, 98 Ohio App.3d 560 570, 649 N.E.2d 18 (1994) ("Appellant herein introduced evidence on direct examination pertaining to his peaceful character via his membership in a beneficent branch of the Folks gang. ... [T]he trial court did not abuse its discretion in allowing the state to cross-examine appellant concerning his juvenile adjudication.").

Pertinent Trait

The exception recognized in Rule 404(A)(1) permits the accused to introduce only evidence of a "pertinent trait of his character." In other words, the character trait must be relevant to the crimes charged. 1 McCormick, Evidence § 191, at 673-74 (5th ed. 1999) ("One charged with theft might offer evidence of honesty, while someone accused of murder might show that he is peaceable, but not vice versa."). For example, in Griffin v. State, 14 Ohio St. 55, 63 (1862), the Ohio Supreme Court held that "[t]he general character which is the proper subject of inquiry should also have reference to the nature of the charge against the defendant. Thus, in the present case, the defendant being charged with a crime necessarily importing dishonesty, called witnesses who gave evidence tending to show a general good character for honesty." See also Sabo v. State, 119 Ohio St. 231, 239, 163 NE 28 (1928) ("In a murder case, such reputation must relate to his being a peaceable, law-abiding citizen.").

In Booker v. State, 33 App 338 341-42, 169 NE 588 (1929), an appellate court observed:

> In showing his character, however, [the defendant] is confined to that trait of character that is inconsistent with guilt of the offense charged in the indictment. The accused in this case attempted to qualify a witness to testify to the general reputation of the accused for truth and veracity. ... Such a reputation might properly be shown in a case of perjury, but it is not a trait involved in unlawful possession of liquor. He then attempted to qualify a witness as to the "general reputation ... for being a peaceable, quiet, law-abiding citizen." Objection was made. ... The court sustained this objection, observing that the crime charged was not one of violence, and in this the court was right, for it is of course true that bootlegging may be both peaceable and quiet.

Both *Sabo* and *Booker* permit the introduction of the general character trait of being a "law-abiding" person. Such general character may not be encompassed by Rule 404(A) since it is arguably not sufficiently "pertinent" to the crime charged, but the federal cases go the other way. E.g., United States v. Angelini, 678 F.2d 380 (1st Cir. 1982) (accused's character as law-abiding citizen always admissible); United States v. Hewitt, 634 F.2d 277 (5th Cir. 1981)(same).

This is probably the best interpretation. See1 McCormick, Evidence § 191, at 674 (5th ed. 1999) ("A few general traits, like being law-abiding, seem sufficiently relevant to almost any accusation."). It, however, is a two-edged sword. The prosecution rebuttal evidence for the character trait of honesty should be limited to dishonesty; the accused's character for violence is not relevant. See 1 McCormick, Evidence § 191, at 676 (5th ed. 1999) ("[O]nce the defendant gives evidence of pertinent character traits to show that he is not guilty, his claim of possession of these traits – but only these traits – is open to rebuttal by cross-examination or direct testimony of prosecution witnesses."). But if the accused introduces evidence of law-abiding character, the prosecution may rebut with any evidence of unlawful conduct – e.g., convictions for assault or possession of drugs. E.g., United States v. Diaz, 961 F.2d 1417, 1419-20 (9th Cir. 1992) (being prone to criminal activity).

Jury instructions

In some cases, evidence of good character offered by the accused may have a significant impact. As the United States Supreme Court has noted: "The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing." Edgington v. United States, 164 U.S. 361, 366 (1896). Accord Michelson v. United States, 335 U.S. 469, 476 (1948) ("[S]uch testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt.").

Most federal courts hold that the "standing alone-reasonable doubt" instruction need not be given. E.g., United States v. Pujana-Mena, 949 F.2d 24, 28 n. 2 (2d Cir. 1991). Some courts, however, take a different view – at least under certain circumstances. E.g., United States v. Foley, 598 F.2d 1323, 1336-37 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); United States v. Lewis, 482 F.2d 632, 637 (D.C. Cir. 1973) (whenever the accused offers character evidence); Oertle v. United States, 370 F.2d 719, 726-27 (10th Cir. 1966), cert. denied, 387 U.S. 943 (1967).

Prosecution Rebuttal

Once the accused has introduced evidence of a pertinent character trait, the prosecution may offer character evidence in rebuttal. In State v. Grubb, 111 Ohio App.3d 277, 675 N.E.2d 1353 (1996), a domestic violence case, the court of appeals discussed the requirement that the defendant introduce evidence of a pertinent character trait before the prosecution is permitted to introduce rebuttal evidence:

> [D]efendant did not put his good character in issue in this case. Defendant did not testify on direct examination that he is a peaceful person or that he has never assaulted any woman, including his former wife. Rather, it was the state that elicited that testimony from defendant on cross-examination by the use of specific questions designed for just that purpose. The defense objected, unsuccessfully, to that questioning. Because defendant made no claim at trial regarding his own good character, i.e., did not put his character in issue, the testimony of defendant's former wife ... was not admissible pursuant to Evid.R. 404(A)(1) to rebut same. The prosecution cannot circumvent the limited nature of the exception provided in Evid.R. 404(A)(1) by putting the character of an accused in issue via its own questions, and then present evidence to rebut the answers. Id. at 281.

In State v. Austin, 115 Ohio App.3d 761, 765, 686 N.E.2d 324 (1996), the court of appeals held that the defendant does not raise the issue of his own character when he introduces evidence of the victim's character:

> Evid.R. 404(A)(1) and (2) are mutually exclusive. When an accused injects the issue of the victim's character into the case, either by offering character evidence in accordance with Evid.R. 405 or by coupling self-defense with evidence of first aggression of the victim in a homicide case, the accused does not by virtue of these elections open the issue of the accused's own character. The

issue of the accused's character is only introduced in accordance with the provisions of Evid.R. 404(A)(1) when the accused offers positive character evidence as prescribed by the procedures delineated in Evid.R. 405.

The same limitations that apply to character evidence offered by the defense apply to the prosecution. First, the character trait that is the subject of rebuttal must be "pertinent" to the crime charged. E.g., State v. Manning, 74 Ohio App.3d 19, 28, 598 N.E.2d 25 (1991) (prosecution permitted to call rebuttal witnesses after defense witnesses testified that the accused was quiet, timid, and nonviolent), cert. denied, 504 U.S. 918 (1992). For example, in a theft case the defense character witnesses should testify about the defendant's character for honesty. Similarly, the rebuttal witnesses' testimony should be limited to the same trait, i.e., dishonesty. See 1 McCormick, Evidence § 191, at 676 (5th ed. 1999) ("[O]nce the defendant gives evidence of pertinent character traits to show that he is not guilty, his claim of possession of these traits – but only these traits – is open to rebuttal by cross-examination or direct testimony of prosecution witnesses.").

Second, Rule 405(A) specifies the methods of proof which are available for the presentation of rebuttal evidence. Thus, the prosecution, like the accused, is limited to opinion or reputation evidence.

Cross-Examination

The prosecution also may challenge defense character evidence through cross-examination of the character witnesses. Once the accused calls a defense character witness, Rule 405(A) permits the use of specific acts during cross-examination. Thus, a reputation or opinion witness may be asked on cross-examination "if she has heard" or "if she knows" of specific acts that reflect upon the character trait addressed by that witness. The cross-examiner, however, "must take the witness's answer"; that is, extrinsic evidence of the specific act is not admissible. In State v. Elliott, 25 Ohio St.2d 249, 267 N.E.2d 806 (1971)(syllabus, para. 2), vacated, 408 U.S. 939 (1972), the Ohio Supreme Court explained:

> A character witness may be cross-examined as to the existence of reports of particular acts, vices, or associations of the person concerning whom he has testified which are inconsistent with the reputation attributed to him by the witness – not to establish the truth of the facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given his testimony. Such inconsistent testimony tends to show either that the witness is unfamiliar with the reputation concerning which he has testified, or that his standards of what constitutes good repute are unsound.

The Court cited Michelson v. United States, 335 U.S. 469 (1948), the leading case on this subject. Michelson, charged with bribery of an IRS agent, called witnesses who testified about his good character for truth and honesty. The United States Supreme Court upheld the prosecutor's right to ask these witnesses whether they "had heard" about Michelson's 20-year-old conviction for a trademark violation and 27-year-old arrest for receiving stolen property.

The justification for this type of examination is that the prosecution has the right to test the basis for the character witness's testimony. A character witness who is unaware of a defendant's prior arrests and convictions would not appear to be very informed about the defendant's reputation. Id. at 483 ("The inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation.").

If the witness is knows of negative information but ignores it, the witness's standards for assessing reputation are drawn into question. In *Michelson* Justice Jackson used the following illustration:

> A classic example in the books is a character witness in a trial for murder. She testified she grew up with defendant, knew his reputation for peace and quiet, and that it was good. On cross-examination she was asked if she had heard that the defendant had shot anybody and, if so, how many. She answered, "Three or four," and gave the names of two but could not recall the names of the others. She still insisted, however, that he was of "good character." The jury seems to have valued her information more highly than her judgment [and convicted]." Id at 479 n. 16.

Cases decided under the Rules are in accord. In State v. Jackson, 57 Ohio St.3d 29, 39, 565 N.E.2d 549 (1991), cert denied, 502 U.S. 835 86 (1991), a defense character witness testified in the penalty phase of a capital case that the defendant was peaceful. On cross-examination, the prosecutor asked if the witness knew that the accused had assaulted and robbed three older women in 1983 and assaulted another woman in 1985. The Ohio Supreme Court upheld this line of questioning: "[The witness's] characterization of Jackson as sweet, gentle, and nonviolent opened the door for cross-examination about specific instances of conduct sharply at variance with her opinion testimony." See also State v. Miller, 122 Ohio App.3d 111, 122, 701 N.E.2d 390 1997) ("The fact that Miller was arrested for a drug-related offense could affect his reputation as a person who does not deal narcotics. This instance of Miller's misconduct was relevant to the testimony of the character witness, and was admissible to impeach [that witness's] statement that Miller had a reputation as a person who does not deal narcotics."); State v. Collins, 97 Ohio App.3d 438, 448-50, 646 N.E.2d 1142 (1994)(After a defense character witness testified that the accused did not fight and was not a troublemaker, prosecutor cross-examined on prior arrests for carrying a concealed weapon, resisting arrest, and two misdemeanor theft convictions.), appeal dismissed, 70 Ohio St.3d 1440, 638 N.E.2d 1044 (1994).

Good faith basis-in-fact requirement. The risk that the jury will use this information for an improper purpose – to show character – is great notwithstanding a limiting instruction. Moreover, the practice possesses the potential for abuse. As Wigmore observed: "This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation." 3A Wigmore, Evidence § 988, at 921 (Chadbourn rev. 1970).

Consequently, courts have required that this type of cross-examination be conducted in good faith, i.e., that the prosecutor have a basis in fact for asking the question. See 1 McCormick, Evidence § 191, at 677 (5th ed. 1999) ("This power of the cross-examiner to reopen old wounds is replete with possibilities for prejudice. ... As a precondition to

cross-examination about other wrongs, the prosecutor should reveal, outside the hearing of the jury, what his basis is for believing in the rumors or incidents he proposes to ask about. The court should then determine whether there is a substantial basis for the cross-examination.").

The *Michelson* Court recognized that this type of cross-examination placed a "heavy responsibility on trial courts to protect the practice from any misuse." Michelson v. United States, 335 U.S. 469, 480 (1948). The Court went on to point out that the trial judge in that case took pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box. Id. at 481. Similarly, the Ohio Supreme Court in *Elliott* remarked: "If the defendant had never been convicted of a felonious assault, such question by the prosecutor, being made in bad faith, would be the predicate for error." State v. Elliott, 25 Ohio St.2d 249, 253, 267 N.E.2d 806 (1971), vacated, 408 U.S. 939 (1972). See also State v. Hart, 72 Ohio App.3d 92, 98, 593 N.E.2d 463 (1991), appeal dismissed, 61 Ohio St.3d 1418, 574 N.E.2d 1089 (1991) (recognizing the good faith requirement).

Pertinent trait. Only acts which bear some relationship to the particular character trait offered by the defendant can properly be raised on cross-examination. For example, if the character witness testifies about the defendant's character for honesty, the witness cannot be cross-examined about violent acts. See Michelson v. United States, 335 U.S. 469, 483-84 (1948); State v. Krout, 6 Ohio App.3d 5, 7, 451 N.E.2d 515 (1982) (witnesses who testify about truthful character cannot be cross-examined about drug crimes).

Remoteness. Acts which are too remote are not the proper subject of cross-examination. The question concerning the 27-year-old arrest was permitted in *Michelson* only because "two of [the character] witnesses dated their acquaintance with defendant as commencing thirty years before the trial." Michelson v. United States, 335 U.S. 469, 484 (1948).

Effect of current charge. Cross-examination of defense character witnesses concerning the effect of the current charges on the defendant's reputation or on the witness's opinion are improper because the question asks the witness "to indulge in a hypothetical assumption of the defendant's guilt." 1McCormick, Evidence § 191, at 677 (5th ed. 1999). See also United States v. Mason, 993 F.2d 406, 409 (4th Cir. 1993) (question improper; citing numerous cases).

VICTIM'S CHARACTER

A second exception to the general prohibition against the admissibility of character evidence is recognized in Rule 404(A)(2), which permits an accused to present evidence of a pertinent character trait of the alleged victim of the charged offense. 1 McCormick, Evidence § 193, at 681 (5th ed. 1999) ("There is, however, a risk of a different form of prejudice. Learning of the victim's bad character could lead the jury to think that the victim merely 'got what he deserved' and to acquit for that reason.").

Once the accused has introduced such evidence, the prosecution may offer rebuttal evidence. The prosecution, however, is prohibited from introducing evidence of the victim's character until the defense "opens the door." See State v. White, 15 Ohio St.2d 146, 150-51, 239 N.E.2d 65 (1968); Reed v. State, 98 Ohio St. 279, 120 NE 701(1918); Upthegrove v. State, 37 Ohio St. 662 (1882); State v. Schmidt, 65 Ohio App.2d 239, 417 N.E.2d 1264 (1979).

The Ohio Supreme Court has noted that character evidence about a victim "is admissible when it relates directly to the circumstances of the crime and is not offered to elicit sympathy from the jury." State v. Allen, 73 Ohio St.3d 626 633, 653 N.E.2d 675 (1995), cert. denied, 516 U.S. 1178 (1996). In *Allen*, the Court upheld the admission of what might be characterized as evidence of the victim's good character in the prosecution's case-in-chief because this evidence was relevant to the circumstances of the crime:

> Testimony that [the victim] did not drink or smoke was relevant, because a wine bottle and cigarette butts were found in her house. Evidence showing [the victim's] religious devotion was also relevant for noncharacter purposes. The "praying hands" design on the wallet identified it as hers. Her dedication to helping sinners "straighten ... out" explained her friendship with [the defendant]. Her habit of baking things for people was relevant to her spending habits .... [The victim's] friend ... testified that [the victim] rose early for morning devotions. This evidence of [the victim's] habit was relevant because [she] had not put out her garbage on the morning [her body was discovered]. [The victim's] habitual early rising explained why this nonoccurrence was unusual, narrowing the time of death. Id. at 633-34.

See also State v. Lundgren, 73 Ohio St.3d 474, 486, 653 N.E.2d 304 (1995) ("Lundgren objected to the admission of two diplomas, an engraved silver dish, a charm necklace, and a family photograph. He argues that this evidence constituted improper victim character evidence. These items were introduced to support the identity of the bodies buried in the barn."), cert. denied, 516 U.S. 1178 (1996).

SELF-DEFENSE

At common law, a victim's character was considered relevant in two types of prosecutions: (1) on the issue of self-defense in homicide and assault cases, and (2) on the issue of consent in rape cases. In the latter cases, the rape-shield statute rather than Rule 404 controls. The statute is discussed infra. Consequently, Rule 404(A)(2) will be applicable principally on the self-defense issue.

First aggressor issue

In a homicide or assault case, the defendant may introduce evidence of the victim's violent and aggressive character to show that the victim was the first aggressor, thereby establishing one element of self-defense. See State v. Hirsch, 129 Ohio App.3d 294, 717 N.E.2d 789 (1998), appeal dismissed, 84 Ohio St.3d 1436, 702 N.E.2d 1213 (1998). In *Hirsch*, the prosecution introduced evidence that the victim got along with everyone and had no enemies. The court stated: "Pursuant to Evid.R. 404(A), evidence of the character of the victim as a quiet and peaceable person is inadmissible except to rebut a defense claim that the victim was the first aggressor. ... There was no such claim in this case, and we therefore conclude that the trial court erred in admitting evidence regarding the victim's character." Id. at 311.

Methods of Proof

Rule 405(A) limits the methods of proof that the accused and the prosecution may use to show or to rebut the character of a victim; only reputation or opinion evidence is permit-

ted. E.g., State v. Cuttiford, 93 Ohio App.3d 546, 554, 639 N.E.2d 472 (1994) ("In conformity with Evid. R. 405(A) 405(A), the trial court permitted two witnesses called by defendant to testify that Banks had a reputation for violent behavior. ... [H]owever, the trial court refused to permit witnesses other than defendant to testify regarding specific instances of Banks's violent behavior.").

Homicide cases

There is a special rule in homicide prosecutions. *Any* evidence that the victim was the first aggressor in a homicide (but not an assault) case triggers the prosecution's right to introduce rebuttal evidence of the victim's peaceful character. For example, if the accused testifies that the victim was the first aggressor, but does not introduce character evidence on this issue, the prosecution may nevertheless introduce evidence of the victim's peaceful character in rebuttal See 1 McCormick, Evidence § 193, at 681 (5th ed. 1999) ("Since a dead victim cannot attest to his peaceable behavior during the fatal encounter, the last clause of Rule 404(a)(2) provides that whenever the accused claims self-defense and offers *any* type of evidence that the deceased was the first aggressor, the government may reply with evidence of the peaceable character of the deceased.").

Accused's mental state: communicated character

There is a second use of the victim's violent character that is also relevant to self-defense; that is, to show its effect on the accused's state of mind. E.g., State v. Baker, 88 Ohio App.3d 204, 208, 623 N.E.2d 672 (1993) ("Whether evidence concerning the victim is admissible to prove self-defense depends upon the type of evidence being offered. Typically, such evidence falls into two general categories: (1) testimony concerning the victim offered to demonstrate the defendant's state of mind at the time of the incident, and (2) testimony about the victim's character offered to prove that the victim was more likely the aggressor.").

Because this use does not involve character-as-proof-of-conduct, neither Rule 404(A) nor Rule 405(A), limiting the methods of proof to reputation and opinion, apply. Instead, this issue falls under the general relevance rules, Rules 401 and 403 .

This use obviously depends on whether the accused knew of the victim's character. See State v. Austin, 115 Ohio App.3d 761, 764, 686 N.E.2d 324 (1996) ("A defendant arguing self-defense may testify about specific instances of the victim's prior conduct in order to establish the defendant's state of mind. ... 'These events are admissible in evidence, not because they establish something about the victim's character, but because they tend to show why the defendant believed the victim would kill or severely injure him.'") (quoting State v. Carlson, 31 Ohio App.3d 72, 508 N.E.2d 999 (1986); State v. Marsh, 71 Ohio App.3d 64 70, 593 N.E.2d 35 (1990)("[A] defendant may not introduce evidence of a victim's prior specific instances of conduct to show the defendant's state of mind unless the defendant had knowledge of that conduct. If the defendant was not aware of the victim's prior conduct, that conduct is irrelevant as it could not have affected the defendant's state of mind at the time of the incident."), appeal dismissed, 60 Ohio St.3d 708, 573 N.E.2d 667 (1991). This includes the accused's knowledge of the victim's reputation or specific acts of violence; this type of evidence is not hearsay because it is not offered for the truth (i.e., that the victim was a violent person) but rather to show its effect on the accused.

In contrast, if character evidence is introduced to show that the victim acted in conformity with that character and was therefore the first aggressor, the accused's awareness of the victim's character is not relevant. See 1A Wigmore, Evidence § 63, at 1369 (Tillers rev. 1983) ("[The] additional element of communication is unnecessary, for the question is what the deceased probably did, not what the accused probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief.").

RAPE SHIED LAW

The exceptions for evidence of the accused's character and the victim's character are both subject to the following limitation: "however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable." Evid. R. 404(A)(1) & (2). This passage refers to the "rape shield law" (R.C. 2907.02(D)(rape); R.C. 2907.05(D)(gross sexual imposition) and a statute on prostitution. [R.C. 2907.26 (prostitution).

The reference to statutes enacted by the General Assembly was added in 1980, the year in which the Rules took effect. This reference did not appear in the earlier proposals that were rejected by the General Assembly. See 51 Ohio Bar 186 (1978); 50 Ohio Bar 236 (1977). These statutes were considered "substantive" provisions and thus could not be superseded by the Rules. Giannelli, The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking, 29 CWRU L Rev 16, 53-55 (1978).

Under the common law, an accused charged with rape was permitted to introduce evidence of the victim's unchaste character as circumstantial evidence of consent. E.g., McDermott v. State, 13 Ohio St. 332 (1862); McCombs v. State, 8 Ohio St. 643 (1858). This rule rested on the assumption that a woman who has consented to premarital or extramarital intercourse was more likely to consent than a woman who had not consented to such past intercourse. In recent years, this dubious assumption, along with other aspects of rape prosecutions, has been severely criticized. Most states have responded by enacting "shield" laws which limit the admissibility of evidence of the victim's character. See 1 McCormick, Evidence § 193, at 682 (5th ed. 1999) ("In the 1970s, however, nearly all jurisdictions enacted 'rape shield' laws ....").

The Ohio shield law applies only in rape and gross sexual imposition prosecutions. See State v. Cotton, 113 Ohio App.3d 125, 134, 680 N.E.2d 657 (1996) ("the rape-shield statutes apply only to ... rape and gross sexual imposition" and not to felonious sexual penetration); State v. Black, 85 Ohio App.3d 771, 778, 621 N.E.2d 484 (1993)("The charges against the defendant consist of three counts of contributing to the unruliness of a minor with no accompanying charge of rape. Therefore, the rape-shield doctrine does not apply."), appeal dismissed, 67 Ohio St.3d 1451, 619 N.E.2d 420 (1993).

The law is designed to protect several interests:

First, by guarding the complainant's sexual privacy and protecting her from undue harassment, the law discourages the tendency in rape cases to try the victim rather than the defendant. In line with this, the law may encourage the reporting of rape, thus aiding crime prevention. Finally, by excluding evidence that is unduly inflammatory and prejudicial, while being only marginally probative, the statute is intended to aid in the truth-finding process.

State v. Gardner, 59 Ohio St.2d 14, 17-18, 391 N.E.2d 337 (1979).

The rape shield law excludes reputation, opinion, and specific acts evidence concerning the victim's past sexual history.

Exceptions

There are several exceptions. The first involves the (1) the origin of semen, pregnancy, or disease. In State v. Trummer, 114 Ohio App.3d 456, 683 N.E.2d 392 (1996), appeal dismissed, 78 Ohio St.3d 1409, 675 N.E.2d 1249 (1997), the court of appeals held that expert testimony offered by the defendant to the effect that the defendant could not have been the source of semen found on the victim's clothing was inadmissible because the state offered no evidence on the semen. The court noted that the defendant had admitted that he had sexual relations with the victim on the night in question, but that the victim had consented. The court concluded that "there was no fact at issue relative to the semen in question and, very obviously, the proffered evidence was to be presented simply to impeach the credibility of the victim." Id. at 466.

The second involves the victim's past sexual activity with the accused.

Other Requirements

The statute differs in two respects from the general treatment of character evidence under the Rules of Evidence. First, the statute allows consideration of character evidence only insofar as it relates to sexual activity between the victim and defendant; Rule 404(A)(2) contains no such limitation. Second, the statute permits specific instances of conduct to be introduced; Rule 405(A) limits the methods of proof to reputation and opinion evidence.

In addition, this evidence is admissible only to the extent that a material fact is at issue and only if its inflammatory or prejudicial nature does not outweigh its probative value. See State v. Cotton, 113 Ohio App.3d 125, 131, 680 N.E.2d 657 (1996) ("Unlike the test provided in Evid.R. 403, requiring that evidence must be excluded where its probative value is substantially outweighed by its prejudicial effect, R.C. 2907.02(D) and 2907.05(D) provide simply for weighing the probative value of the evidence against its prejudicial effect.").

Procedure

The statute also provides for a pretrial in-chambers resolution of these issues. R.C. 2907.02(E) (court shall resolve admissibility issue in a hearing in chambers). See State v. Cotton, 113 Ohio App.3d 125 130, 680 N.E.2d 657 (1996) ("These statutes clearly dictate that a trial court shall resolve the admissibility of testimony involving prior sexual acts of the defendant in chambers. ... [A] sidebar conference does not satisfy the requirements of an in-chambers hearing.").

Prior false accusations

In State v. Boggs, 63 Ohio St.3d 418, 421, 588 N.E.2d 813 (1992), the trial judge, based on the rape shield law, precluded the defense from cross-examining the alleged victim about a prior false accusation of rape. The Ohio Supreme Court disagreed, ruling that "[f]alse accusations, where no sexual activity is involved, do not fall within the rape shield statute." A rape accusation could be false in two different ways: (1) where there has never been sexual intercourse, and (2) where there has been intercourse but it was consensual.

This line of questioning involves impeachment by prior acts that reflect untruthful character, a credibility issue. Rule 608(B), which governs this issue, permits inquiry on cross-examination but prohibits extrinsic evidence. The defense, of course, has to establish that the accusation was false.

If, however, the prior accusation involved sexual activity, the rape shield law prohibits this line of questioning. The Court summarized its holding as follows:

> [B]efore cross-examination of a rape victim as to prior false rape accusations may proceed, the trial judge shall hold an in camera hearing to ascertain whether such testimony involves sexual activity and thus is inadmissible under R.C. 2907.02(D), or is totally unfounded and admissible for impeachment of the victim. It is within the sound discretion of the trial court, pursuant to Evid. R. 608(B), whether to allow such cross-examination. Id. at 424.

See also State v. Black, 85 Ohio App.3d 771, 778, 621 N.E.2d 484 (1993) ("[B]ecause prior false accusations of rape do not constitute sexual activity of the victim, the rape-shield doctrine does not exclude such evidence."), appeal dismissed, 67 Ohio St.3d 1451, 619 N.E.2d 420 (1993).

Accused's Conduct

The rape shield law also applies to past sexual activity of the accused. The statute excludes reputation, opinion, or specific acts evidence concerning the accused's past sexual history unless it involves evidence of (1) the origin of semen, pregnancy, or disease, (2) the accused's past sexual activity with the victim, or (3) other-acts evidence admissible under R.C. 2945.59. Further, this evidence is admissible only to the extent it relates to a material issue and "its inflammatory or prejudicial nature does not outweigh its probative value." R.C. 2907.02(D) (rape); R.C. 2907.05(D) (gross sexual imposition).

Unlike Rule 403, this weighing process does not include the term "substantially." See State v. Clemons, 94 Ohio App.3d 701, 711, 641 N.E.2d 778 (1994) (accused's "problem" with masturbation improperly admitted in rape case; "The connection is simply too tenuous."), appeal dismissed, 70 Ohio St.3d 1454, 639 N.E.2d 793 (1994). Moreover, a defendant who testifies that he had "never in my entire life ever had sex with any child" waives the statutory limitations regarding specific instances of sexual activity. State v. Banks, 71 Ohio App.3d 214, 220, 593 N.E.2d 346 (1991).

Waiver

Ohio courts have recognized that the protections of the statute may be waived. If, for example, the victim asserted that she had never engaged in sexual activity, the defense may be permitted to present evidence of the victim's sexual activity with persons other than the defendant. See State v. Malin, 1999 WL 1775, No. 97CA006898 (9th Dist. Ct. App., Lorain, 12-30-98). In that case, the victim was a mentally retarded 25-year-old woman. Her mother testified about her limited grasp of sexual matters and her disinterest in sex. The court of appeals held that the mother's testimony did not "constitute a waiver of the protections of the rape shield statute" because the mother "did not expressly state that her daughter had never engaged in sexual activity, nor did she state that her daughter had no knowledge of what would constitute sexual activity." Id.

Sanctions

In Michigan v. Lucas, 500 U.S. 145 (1991), the United States Supreme Court ruled that the exclusion of defense

evidence for failing to comply with the notice provision of a rape shield statute was not per se unconstitutional. The Court indicated, however, that exclusion in a particular case may be unconstitutional.

Constitutionality

Because rape shield laws preclude evidence that is arguably exculpatory, their constitutionality has been questioned. See generally Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 Minn. L. Rev. 763 (1986); Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544 (1980); Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1977).

Two United States Supreme Court cases, Davis v. Alaska, 415 U.S. 308 (1974), and Chambers v. Mississippi, 410 U.S. 284 (1973), are usually cited in support of the defendant's right to introduce evidence of the victim's character, at least in some circumstances. Congress recognized the force of the constitutional argument in enacting a federal shield law. Federal Rule 412 recognizes an exception where exclusion "would violate the constitutional rights of the defendant."

In *Davis* the Court held that a state statute excluding evidence of a juvenile adjudication (a type of shield law) violated the defendant's Sixth Amendment right of confrontation. In *Chambers* the Court held that the application of state evidentiary rules that excluded critical and reliable defense evidence violated due process. Nevertheless, the shield laws have survived constitutional attacks, at least when the attacks are facial. See 1 McCormick, Evidence § 193, at 685 (5th ed. 1999). Simply put, evidence of past sexual history lacks probative value in most cases. Individual cases, however, are a different matter. For example, in State v. Jalo, 27 Ore. App. 845, 850-51, 557 P.2d 1359 (1976), the defendant denied that he had sexual intercourse with the complainant. The appellate court held it error to exclude evidence that the complainant had had sexual relations with the defendant's son and others, which facts had become known to the defendant and he had informed the complainant that he would notify her parents. Application of the shield law in this case precluded the defendant from establishing the complainant's motive to accuse him falsely, the core of his defense.

In State v. Gardner, 59 Ohio St.2d 14, 19 n. 5, 391 N.E.2d 337 (1979), the Ohio Supreme Court upheld the constitutionality of the Ohio statute as applied in that case, leaving open, however, the possibility that different facts might produce a different result.

In State v. Williams, 21 Ohio St.3d 33, 487 N.E.2d 560 (1986), the Court again considered the issue. The alleged victim testified that she was "gay" and thus would not have consented to sex with a man. The defendant claimed consent and attempted to call a witness to testify about the victim's reputation as a prostitute and another male who claimed to have had sex with the victim. The trial court excluded, based on the shield law, the testimony of both witnesses. The Supreme Court agreed that the evidence was inadmissible under the rape shield law, but also found that "the rape shield law as applied in this case violates appellee's Sixth Amendment right of confrontation." Id. at 36.

In In re Michael, 119 Ohio App.3d 112, 118, 694 N.E.2d 538 (1997), the court of appeals noted that "there may be circumstances in which a defendant's confrontation right requires that evidence of a complainant's prior sexual conduct be admitted, notwithstanding the fact that the evidence would otherwise be excluded by the rape shield law." The court found in *Michael* that evidence that the child victim had been abused before in the same manner he alleged he was abused by the defendant was "essential" to the defense that the defendant was innocent and that the prior abuse explained the child's sexual knowledge. Id.

WITNESS'S CHARACTER

The third exception to the general prohibition against the use of character evidence concerns a witness's character. This exception, recognized in Rule 404(A)(3), involves the use of character evidence for impeachment and is therefore limited to the character trait of untruthfulness. Unlike the other exceptions of Rule 404(A), this exception applies in civil as well as in criminal cases. It applies whenever a witness, including a criminal defendant, takes the stand to testify.

Rule 404(A)(3) does not specify the conditions under which character evidence may be used to impeach a witness. Instead, the rule contains a cross-reference to the rules regulating the impeachment use of character evidence. Rule 608(A) permits the use of reputation and opinion evidence to impeach for untruthful character. Rule 608(B) permits the use of specific instances of conduct that did not result in conviction to be used for impeachment under specified circumstances. Rule 609 governs impeachment by evidence of prior convictions.