

2001

Utah v. Juan Anthony Portillo : Brief of Appellee

Utah Court of Appeals

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BRIEF

IN THE UTAH COURT OF APPEALS
DOCKET NO. 940387CA

STATE OF UTAH,
:
Plaintiff/Appellee, : Case No. 940387-CA
v. :
JUAN ANTHONY PORTILLO, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR DISTRIBUTION AND/OR
ARRANGING TO DISTRIBUTE MARIJUANA, TWO ENHANCED SECOND
DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. §§ 58-
37-8(1)(a)(ii) and 58-37-8(1)(b) (SUPP. 1995), AND ONE
THIRD DEGREE FELONY FOR THE SAME UNDER SECTION 58-37-
8(1)(a)(ii); POSSESSION WITH INTENT TO DISTRIBUTE
MARIJUANA, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH
CODE ANN. § 58-37-8(1)(a)(iv) SUPP. 1995); FAILURE TO
OBTAIN DRUG TAX STAMPS, A THIRD DEGREE FELONY, IN
VIOLATION OF UTAH CODE ANN. §§ 59-19-103 AND 59-19-104
(1992); AND POSSESSION OF PARAPHERNALIA, A CLASS B
MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-
5(1) (1994), IN AND FOR UTAH COUNTY, STATE OF UTAH, THE
HONORABLE LYNN W. DAVIS, PRESIDING.

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Plaintiff/Appellee,

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 940387-CA
v. :
JUAN ANTHONY PORTILLO, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for distribution and/or arranging to distribute marijuana, two enhanced second degree felonies, in violation of Utah Code Ann. §§ 58-37-8(1)(a)(ii) and 58-37-8(1)(b) (Supp. 1995), and one third degree felony for the same under section 58-37-8(1)(a)(ii); possession with intent to distribute marijuana, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (Supp. 1995); failure to obtain drug tax stamps, a third degree felony, in violation of Utah Code Ann. §§ 59-19-103 and 59-19-104 (1992); and possession of paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1) (1994).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Did the trial court properly voir dire the jury venire concerning the applicable penalties and any potential penalty bias they might have?

Defendant acknowledges that this issue was not raised below; consequently, the issue may not be reviewed on appeal unless defendant can establish plain error. This requires

defendant to demonstrate that (i) the error occurred, (ii) the error was obvious; and (iii) the error was harmful. If any one of these elements is missing, there can be no finding of plain error." State v. Menzies, 889 P.2d 393, 403 (Utah 1994) (citations omitted). Accord State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992).

2. Did the trial court properly instruct the jury that it could not convict defendant for the enhanced drug offenses charged in counts II and III of the information, unless it first determined that those offenses constituted second or subsequent violations of Utah Code Ann. § 58-37-8 (1995)?

Defendant acknowledges that this issue was similarly not raised below; accordingly, the plain error standard applies here as well.

3. Does the claimed cumulative effect of the above alleged errors require reversal?

Whether the cumulative effect of claimed individual errors requires reversal turns on whether the errors as a whole undermine confidence in the outcome. State v. Palmer, 860 P.2d 339, 350 (Utah App.), cert. denied, 868 P.2d 95 (Utah 1993).

4. Was defendant effectively assisted by trial counsel? When reviewed solely upon the trial record, appellate review for counsel effectiveness is necessarily conducted *de novo*; however, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland v. Washington, 466 U.S. 668, 689 (1984). See also State v. Tennyson, 850 P.2d 461, 466 (Utah

App. 1993) ("[d]espite the application of a standard normally bereft of deference, appellate review of counsel's performance must be highly deferential").

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The pertinent portion of the drug statute, Utah Code Ann. § 58-37-8 (Supp. 1995), is contained in Addendum C.

STATEMENT OF THE CASE

Defendant was charged with various felony drug related offenses including several counts of distributing and/or arranging to distribute marijuana and singular counts of possession with intent to distribute marijuana, failure to obtain drug tax stamps, and possession of paraphernalia (R. 1-2).

Following a jury trial held September 20-21, 1993, defendant was convicted as charged (R. 108-07).

The trial court sentenced defendant to two terms of from one to 15 years; three terms of not more than five years; and one six month term (R. 117-14). All terms were to run concurrently and defendant received credit for time served. Id.

STATEMENT OF THE FACTS

On three different dates in October 1991, the Utah County Narcotics Enforcement Task Force set up controlled buys of marijuana from defendant at his Provo, Utah, residence (Tr. Vol. I at 65-86, 103, 122-41, 211, 265-69). The controlled buys were arranged and conducted by then confidential informant, George Quintana, defendant's former roommate, using cash supplied to him by the task force (Tr. Vol. I at 74, 209-14). According to task

force procedure, Quintana's person and vehicle were searched before and after each controlled buy (Tr. Vol. I at 65, 211-212). Following the first and second controlled buys, conducted on October 9th and October 15th, Quintana produced 1/8 ounce baggies of marijuana which he had purchased from defendant for approximately \$40 (Tr. Vol. I at 71-74, 127, 212).

Approximately one hour after the third and last controlled buy, on October 25, 1991, investigating officers obtained and executed a search warrant for defendant's residence (Tr. Vol. I at 86). Defendant was the only person inside the residence at the time the search was conducted. Id. The searching officers seized the money defendant had just received from Quintana in exchange for marijuana (Tr. Vol. I at 113-114, 150), two sets of scales and other paraphernalia, buy-owe sheets, three baggies each containing approximately two grams of crushed marijuana, and a box containing approximately 41 grams of crushed marijuana (Tr. Vol. II at 277-78). The above described controlled buys form the basis for the drug distribution offenses charged in counts I-III.

At trial, defendant claimed that he could not have been involved in any of the controlled buys because he was out of town from September 24, 1991 to October 20, 1991, when he returned briefly before departing again later that day and that he did not return to Provo until approximately 20 minutes before his arrest on October 25, 1991 (Tr. Vol. II at 321-22, 327). Defendant

claimed that he left Quintana in charge of his house and van while he was gone (Tr. Vol. II at 324).

Defendant further claimed that the seized scales and buy-owe sheets related to his business selling fruits and vegetables, particularly, chili peppers (Tr. Vol. II at 379, 386). As for the seized marijuana, defendant claimed that it belonged to Quintana and other individuals that he let stay in his house, and that he had not previously noticed any marijuana inside the house (Tr. Vol. II at 331-33). Finally, defendant claimed that the money seized from his person was rent money, left for him by the above-mentioned individuals (Tr. Vol. II at 332). The jury convicted defendant as charged (R. 108-07).

SUMMARY OF THE ARGUMENT

POINT I

Defendant claims that the trial court plainly erred in two instances. First, by informing the jury venire of the potential penalties. This claim fails because it is well established that voir dire examination has as its proper purposes both the detection of actual bias, and the collection of data to permit informed exercise of the peremptory challenge. Thus, the trial court's venire voir dire in this case afforded the parties an opportunity to explore whether any venire member held a particular penalty bias that would interfere with the reaching of an impartial verdict. So viewed, the trial court's voir dire does not constitute error, let alone obvious error. Further, the trial court instructed the subsequently impaneled jury that it

was not to consider the potential penalties in arriving at a verdict, defeating any assertion of prejudice. Defendant's claim can be rejected on any one of the above grounds.

POINT II

Second, defendant claims that elements instructions ##4-5 are plainly erroneous because they require the jury to find that counts II and/or III constitute prior violations of the drug statute instead of prior *convictions* consistent with the precise wording of Utah Code Ann. § 58-37-8(1)(b) (Supp. 1995). He further claims the instructions are plainly erroneous because they require the jury to convict for count I as an element of counts II and/or III. In the first instance, there is no requirement that jury instructions must precisely track the pertinent statutory language; rather, the precise wording and specificity of jury instructions is soundly left to the trial court's discretion. Moreover, State v. Hunt, No. 940267, slip op. at 4 (Utah November 9, 1995), clarifies that the term conviction as used in section 58-37-8(1)(b) means *not a judgment of conviction, but rather a determination of guilt by a verdict or plea*. In light of this clarification, defendant articulates no compelling reason that the term violation cannot be reasonably interchanged for the term conviction as it used in 58-37-8(1)(b).

In the second instance, error, if any, in requiring the jury to convict for count I as an element of counts II and/or count III was favorable error. Indeed, in so requiring, instructions ##4-5 enumerated more elements for conviction than

the drug statute otherwise required and thereby increased the likelihood of acquittal on counts II and/or III if the jury could not determine beyond a reasonable doubt that defendant was also guilty of count I. Without this additional element, the jury was free to convict defendant for counts II and/or III regardless of its determination to convict, or not, for count I. Thus, neither of the above claims demonstrate any instance of prejudicial error.

Point III

Additionally, defendant claims that even if the above alleged errors are not individually harmful, their cumulative prejudicial effect requires reversal. The Court should reject defendant's claim of cumulative error for failure to support it with any meaningful analysis and to establish that any one of the above allegations constitutes error.

Point IV

Finally, as an alternative means for reviewing his allegations of plain error in Points I and II defendant asserts that his trial counsel was ineffective for failing to object to the trial court's venire voir dire and elements instructions. Because the plain error and ineffective assistance standards both require a showing of prejudice which is not made out here, defendant is unable to succeed under his ineffective assistance theory for the same reasons he is unable to succeed under a plain error theory.

ARGUMENT

POINT I

DEFENDANT FAILS TO DEMONSTRATE THAT THE TRIAL COURT PLAINLY ERRED WHEN IT INFORMED THE JURY VENIRE OF THE POTENTIAL PENALTIES FOR THE CHARGED OFFENSES DURING ITS VOIR DIRE OF THE JURY VENIRE; INDEED, THE TRIAL COURT INSTRUCTED THE SUBSEQUENTLY IMPANELED JURY NOT TO CONSIDER THE POTENTIAL PENALTIES IN ARRIVING AT THEIR VERDICT AND THEREBY CURED ANY ARGUABLE PREJUDICE

Defendant complains that the trial court committed plain error during its voir dire of the jury venire by informing the venire of the penalties applicable to the charged offenses. Because defendant fails to demonstrate that the trial court erred, let alone that the alleged error was obvious and prejudicial, the Court should reject his claim. State v. Menzies, 889 P.2d 393, 403 (Utah 1994).

A. Proceedings Below

During the course of venire voir dire the trial court instructed the prospective jurors as follows:

THE COURT: Thank you. I've advised you that this is a drug case. And I will, on the record once again, advise you of the nature of the charges involved.

. . . .

Count 1 is distribution or arranging to distribute a controlled substance. That's a third-degree felony. That's punishable by incarceration in the Utah State Prison for an indeterminate period of time, not to exceed five years, together with up to a \$5,000 fine and/or both--

. . . .

Count 2, ladies and gentlemen, is distribution of or arranging to distribute a controlled substance. That's a second-degree felony. It's also punishable by an indeterminate time at the Utah State Prison, not less than one nor more than 15 years in the Utah State Prison, together with up to a \$10,000 fine and/or both.

Count 3 is distribution of or arranging to distribute a controlled substance, also a second-degree felony. It would carry a maximum, also, for an indeterminate time, not less than one nor more than 15 years in the Utah State Prison together with a fine not to exceed \$10,000 and/or both.

Count 4 is possession of a controlled substance with the intent to distribute. That's a third-degree felony, carrying the possible imposition of an indeterminate time from zero to five years in the Utah State Prison together with a fine up to \$5,000 and/or both.

Count 5 is unlawful possession or use of drug paraphernalia. That's a class-B misdemeanor. It's punishable by incarceration in the Utah County Jail for a period not to exceed six months together with a fine up to \$1,000 and/or both.

And Count 6 is illegal drug tax. That's a third degree felony. That's also punishable by an indeterminate time in the Utah State Prison not to exceed five years together with a fine up to \$5,000 and/or both.

(Tr. Vol. I at 14-17) (the pertinent transcript pages are contained in addendum A).

Additionally, the trial court informed members of the jury venire that they were to be the "exclusive triers of the

fact(s)," and that they would also make the ultimate "determination about credibility of witnesses" (Tr. Vol. I at 17), see addendum A. The court then proceeded to voir dire the venire and specifically inquired if any venire member "believ[ed] that the punishment fixed by law is too severe or too light for the offenses charged?" (Tr. Vol. I at 34), see addendum A. No venire person audibly responded to the court's question and defendant raised no objection. Id.

Finally, in its formal instructions to the ultimately impaneled jury, the trial court cautioned:

In arriving at a verdict in this case, you shall not discuss nor consider the subject of penalty or punishment, as that is a matter which lies with the court, and other court proceedings. The penalty and punishment for the crime charged must not in any way affect your decision as to the guilt or innocence of the defendant.

(R. 78) (a copy of the above instruction is contained in addendum A).

B. Plain Error Standard

As acknowledged by defendant in his brief, he did not object to the trial court's handling of the venire voir dire, nor did he object to the adequacy of the court's instructions to the subsequently impaneled jury. Br. of App. at 14. As further acknowledged by defendant, his failure to object below precludes an appellate challenge unless he is able to demonstrate plain error. Menzies, 889 P.2d at 403. To establish plain error, defendant must show that 1) the trial court erred, 2) the alleged

error should have been obvious, and 3) the alleged error was harmful because it undermines this Court's confidence in the verdict ultimately rendered. Id.; State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992).

C. Proper Venire Voir Dire

Defendant fails to demonstrate that the trial court committed error under the first prong of the plain error analysis. Although a sitting jury is not generally instructed concerning the penalty to be imposed upon a guilty defendant in a non-capital,¹ and/or a non-insanity defense case such as this, State v. Shickles, 760 P.2d 291, 296 (Utah 1988), the trial court's mention of, and inquiry concerning the applicable penalties for purposes of venire voir dire does not constitute error.

Indeed, it is well established that venire "voir dire examination has as its proper purposes both the detection of actual bias, and the collection of data to permit informed exercise of the peremptory challenge." State v. Taylor, 664 P.2d 439, 447 (Utah 1983) (citations omitted). Accord Commonwealth v. White, 531 A.2d 806, 808-09 (Pa.Super. 1987) ("Voir dire questions are asked to determine whether a prospective juror "is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence."), appeal denied, 553 A.2d 967 (Pa. 1988). The trial court's venire voir dire in this

¹ See Utah Code Ann. § 76-3-207 (1995) (in a capital case, the jury may also determine punishment in a bifurcated proceeding).

case properly afforded the parties an opportunity to explore whether any venire member held a particular penalty bias and, consequently, to ensure that the jury impaneled could reach an impartial decision unencumbered by irrelevant concerns over the applicable penalties. Taylor, 664 P.2d at 447. But cf. Salt Lake City v. Tuero, 745 P.2d 1281, 1283 (Utah App. 1987)

(affirming trial court's refusal to allow defendant to voir dire prospective jurors concerning their opinions of the potential sentence on the ground it "may invite confusion on the jury's part as to their proper role in the trial").

Importantly, the trial court did not suggest to the venire that the impaneled jury could potentially effect any aspect of the imposition of penalties upon a guilty verdict. See, e.g., United States v. Davidson, 367 F.2d 60, 63 (6th Cir. 1966) (held error for trial court to instruct *deliberating* jury that it could recommend leniency in order to avoid a mistrial). Rather, the court further informed the venire that the impaneled jury would try the facts only, and that the applicable penalties were "fixed by law" (R. 17, 34), see addendum A. So couched, the trial court's venire voir dire concerning the applicable penalties cannot reasonably be interpreted to have confused the subsequently impaneled jury as to their sole fact-finding role.

Based on the above, the trial court's mention of, and inquiry concerning the potential penalties in this case does not constitute erroneous instruction, but rather proper venire voir dire. Taylor, 664 P.2d at 447. Defendant has thus failed to

establish one of the requirements of the plain error standard and his claim must fail. Menzies, 889 P.2d at 403.

D. No Obvious Error

For the same reasons that the trial court's voir dire of the venire does not amount to error, it cannot constitute obvious error. Menzies, 889 P.2d at 403. Further, defendant's brief is devoid of any controlling authority indicating that a trial court's voir dire concerning the venire's attitudes on the potential penalties is always error. Rather, defendant relies on Davidson (discussed in part C, supra), which relates to the potential problems encountered when a trial court formally instructs an empaneled and/or deliberating jury concerning the applicable punishments. Br. of App. at 15-17. As set forth above, such is not the case here.

Defendant also points to model jury instructions developed by the Utah Chapter of the Federal Bar Association to support his claim of obvious error. Br. of App. at 19. Specifically, defendant relies on Federal Bar Association Criminal Instruction No. 17:

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

Defendant concedes that the instruction "may not be controlling on the trial court," but asserts that the instruction, "with the case law--serve[s] to put the court on notice as to the general

assertion wholly fails to establish how the existence of the federal model instruction suffices to alert a state trial court that it is committing obvious error by informing the jury venire of the prospective penalties, a subject the federal model instruction does not address.

E. Curative Instruction Defeats Claim of Prejudice

More importantly, defendant fails to point out that the trial court did in fact instruct the impaneled jury along the lines of the federal model instruction (R. 78), see addendum A. This failure undermines defendant's claim of prejudice. See, e.g., State v. Koch, 673 P.2d 297, 304 (Ariz. 1983) (erroneous penalty instruction that was accompanied by a proper instruction advising jury that it was not to consider the possible punishment in reaching its verdict held to defeat claim of prejudice); United States v. Calandrella, 605 F.2d 236, 255 (6th Cir. 1979) (curative instruction adequate to eliminate any possible prejudice resulting from court's earlier inadvertent reference to penalty). Defendant wholly fails to demonstrate that the court's subsequent instruction to the impaneled jury that it must ignore the potential punishments was inadequate to cure any alleged error. Thus, in the absence of any indication to the contrary, the Court must presume the jury followed the trial court's instruction and did not consider the potential penalties in arriving at their verdict. See State v. Reay, 810 P.2d 512, 517 n.6 (Wash. App.) ("A jury is presumed to follow the court's

instructions and that presumption will prevail until it is overcome by a showing otherwise."), review denied, 816 P.2d 1225 (Wash. 1991).

In sum, defendant fails to establish that the trial court's voir dire constituted error, that the alleged error was obvious, or that he suffered any unfair prejudice. The Court may reject his claim on any one of these grounds. Menzies, 889 P.2d at 403.

POINT II

DEFENDANT FAILS TO SUPPORT HIS CLAIM
OF PLAIN ERROR REGARDING THE PRECISE
TERMINOLOGY AND ADDITIONAL ELEMENTS
LISTED IN ELEMENTS INSTRUCTIONS ##4-
5; INDEED, ERROR, IF ANY, WAS
FAVORABLE TO DEFENDANT

Defendant claims that elements instructions ##4-5 constitute prejudicial error because they required the jury to find that counts II and/or III constituted prior violations of Utah Code Ann. § 58-37-8(1)(a) (Supp. 1995), instead of prior convictions of the statute, consistent with the precise terminology of section 58-37-8(1)(b). Br. of App. at 21-25. Defendant further claims the instructions were erroneously prejudicial because the jury was instructed that it could not convict for the drug offenses charged in counts II and/or III, unless it first convicted defendant for the drug offense charged in count I as a prior violation of the drug statute. Br. of App. at 21-25.

As he did in Point I, supra, defendant acknowledges that he did not object to the trial court's elements

instructions, but claims that the issue is nonetheless properly before the Court on grounds of plain error. Br. of App. at 22. Because defendant fails to demonstrate any error, let alone an obvious and prejudicial error in the trial court's elements instructions, his claim should be rejected. State v. Menzies, 889 P.2d 393, 403 (Utah 1994).

**A. The Trial Court Properly
Instructed the Jury Using the Term
Violation in Lieu of the Term
Conviction**

Section 58-37-8(1)(b) provides for enhanced penalties for repeated violations of the subsection (1)(a):

Any person convicted of violating
Subsection (1)(a) with respect to:

(ii) a substance classified in
Schedule III or IV, or marijuana, is
guilty of a third degree felony, and
upon a second or subsequent
conviction punishable under this
subsection is guilty of a second
degree felony.

Accordingly, the trial court instructed the jury that it could not convict defendant for the drug distribution offense alleged in count II unless it determined "beyond a reasonable doubt" that the offense "was a second or subsequent violation occurring after a previous violation of the same statute" (R. 101) (a copy of jury instruction #4 is contained in Addendum B). The court similarly instructed the jury concerning the drug distribution offense alleged in count III, requiring the jury to determine "beyond a reasonable doubt" that that offense also constituted "a second or subsequent violation occurring after a previous

violation of the same statute" (R. 100) (a copy of jury instruction #5 is contained in Addendum B).

1. No Demonstration of Error

While it is sometimes desirable for jury instructions to track the statutory language "as closely as possible," State v. Cloud, 722 P.2d 750, 755 (Utah 1986), trial courts are not required to use exact statutory terminology in their jury instructions. State v. Johnson, 745 P.2d 452, 456 (Utah 1987) (dismissing as frivolous defendant's claim that instruction failed to correctly state statutory presumption because the court used the non-statutory term "fails," instead of the statutory term "no"). Indeed, it is occasionally error to instruct the jury according to the strict statutory language. See, e.g., State v. Chambers, 709 P.2d 321, 327 (Utah 1985) ("a jury instruction using the language of U.C.A., 1953, § 76-6-402(1) is unconstitutional because it directly relates to the issue of guilt and relieves the State of its burden of proof"); State v. Smith, 726 P.2d 1232, 1234 (Utah 1986) (same). Cf. State v. Starks, 627 P.2d 88, 90 (Utah 1981) ("it is not erroneous in all instances to instruct the jury in the language of the statute if the jury is not likely to be confused or misled"). A more appropriate concern than whether the instructions precisely track the use and order of the statutory terminology is whether the given instructions accurately state the law. Accordingly, "beyond the substantive scope, correctness, and clarity of the jury instructions, their precise wording and specificity is left

to the sound discretion of the trial court." State v. Aly, 782 P.2d 549, 550 (Utah App. 1989).

In the present case, defendant's nominal assertion of error fails to demonstrate that the trial court abused its discretion in using the term violation in lieu of the term conviction according to the exact phraseology of section 58-37-8(1)(b), nor has he shown that the instructions did not accurately state the law. Specifically, defendant claims that the term conviction as used in section 58-37-8(1)(b) "has a legally different and more serious--meaning [sic] than does the term 'violation,'" br. of app. at 22-23, but fails to suggest a definition for either term or to otherwise explain the alleged difference between the two terms for purposes of section 58-37-8(1)(b). Defendant further fails to support his claim of error with any authority. See State v. Price, 827 P.2d 247, 249-50 (Utah App. 1992) (declining to reach unsupported argument).

More importantly, the Utah Supreme Court recently clarified that the term conviction as used in section 58-37-8(1)(b) means "the determination of guilt by a verdict or plea *rather than by a judgment of conviction.*" State v. Hunt, No. 940267, slip op. at 4 (Utah November 9, 1995) (emphasis added). Thus, for purposes of section 58-37-8(1)(b), "a conviction on one count in an information can be a legal basis for enhancing other convictions based on counts charged in the same information." Id. To construe the term conviction as used in section 58-37-8(1)(b) according to its other common meaning, denoting "the

final judgment entered on the plea or verdict," would "unnecessarily waste judicial resources." Id. As noted in Hunt, "[t]he prosecution could circumvent the multicount enhancement dilemma simply by charging each count in a separate information," resulting in three trials, "consuming three times the resources." Id. In short, Hunt makes clear that a prior judgment of conviction is not required in order for the penalty enhancement of section 58-37-8(1)(b) to apply. Thus, the instructions are neither incorrect or misleading regarding the requirements of section 58-37-8(1)(b). Cf. State v. Lopez, 789 P.2d 39, 45 (Utah App. 1990) (no error in refusing defendant's requested instruction where instructions given to the jury "directly parallel the statutory language and correctly instruct on the applicable law").

2. No Allegation of Obvious Error

Notwithstanding his failure to demonstrate any error in the trial court's use of the term violation, defendant's brief is devoid of any allegation or explication of obvious error. See Br. of App. at 21-25. This failure by itself constitutes sufficient grounds for the Court to reject defendant's claim of plain error regarding the wording of the elements instructions given. See Menzies, 889 P.2d at 403.

3. No Demonstration of Prejudice

Defendant's claim of plain error regarding the trial court's use of the term violation can also be rejected based on his failure to demonstrate any resultant prejudice. Menzies, 889

P.2d at 403. Defendant's claim of prejudice is based on his conclusory allegation that the evidence supporting counts I and II was thin as compared to the evidence supporting count III. Br. of App. at 24-25. Accordingly, defendant supposes that

the jury was pondering a 'not guilty' verdict for Counts I and II, but were swayed from such a more favorable result by the language of jury instruction[s] 4 and 5 which required a finding of guilt under Count I before a finding of guilt could be made under Count[s] II and III.

Br. of App. at 25-26. Defendant's supposition is based on the fact that the deliberating jury submitted the following written question to the trial court:

The 3rd charge, instruction #5, element #7 refers to this charge as a subsequent violation. If count one and count two are 'not guilty,' can a guilty verdict be given for count 3[?]

(R. 106) (a copy is contained in Addendum B). The trial court responded by writing, "No" on the same piece of paper as the jury's question and returning it to the deliberating jurors. Id.

Defendant's claim of prejudice cannot succeed unless it is presumed that the jury wholly disregarded the trial court's considerable instructions regarding the reasonable doubt standard. Indeed, as noted previously, elements instruction #4 instructed the jury that in order to find defendant guilty for the offense charged in count I, it "must" find that each of the essential elements was established beyond a reasonable doubt (R. 102), see addendum B. Elements instruction #5 similarly instructed that in order to find defendant guilty of count II, the jury "must" find that the essential elements, including the

fact that count II constituted "a second or subsequent violation occurring after a previous violation of the same statute" were established beyond a reasonable doubt (R. 101-02), see addendum B. Further, each of the elements instructions for counts I-III concluded as follows:

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the above essential elements of the crime charged, you should find the defendant not guilty. On the other hand, if the State has proved beyond a reasonable doubt all of the essential elements of the offense as above set forth, then you should find the defendant guilty of the charge.

(R. 102-100), see addendum B.

In addition to the foregoing elements instructions, the trial court explained the significance of circumstantial evidence, reiterating that "each fact which is essential to complete a set of circumstance [sic] necessary to establish the defendant's guilt must be proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt" (R. 85) (a copy is contained in Addendum B). Finally, the trial court instructed the jury as to the definition of reasonable doubt (R. 92) (a copy is contained in Addendum B). Defendant does not dispute the adequacy of the above instructions to inform the jury of the reasonable doubt standard and/or its duty to hold the State to that standard in proving each element of its case against defendant. Br. of App. at 21-26. Where, as here, a jury is

correctly instructed, the Court must presume the jury followed those instructions. State v. Enno, 807 P.2d 610, 623 (Idaho 1991) ("Where the jury instructions taken as a whole, correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge contained in all the instructions and was not misled by any isolated portion thereof."); State v. Reay, 810 P.2d 512, 517 n.6 (Wash. App.) ("A jury is presumed to follow the court's instructions and that presumption will prevail until it is overcome by a showing otherwise."), review denied, 816 P.2d 1225 (Wash. 1991); Jones v. State, 764 P.2d 914 (Okla. Cr. App. 1988) ("The presumption is that jurors are true to their oaths and conscientiously observe their instructions and admonitions"); State v. Schad, 633 P.2d 366, 377 (Ariz. 1981) ("[T]here is no presumption that jurors will disobey instructions given them by the court"), cert. denied, 455 U.S. 983 (1982). Cf. State v. Carter, 776 P.2d 886, 896 (Utah 1989) ("Given the erroneous instruction, it is impossible for us to determine or presume that the jury properly performed its weighing function."), cert. denied, ___ U.S. ___, 116 S.Ct. 163 (1995). Defendant makes no contrary argument.

Based on the above, defendant fails to demonstrate either error or obvious error with reference to the trial court's use of the term violation in elements instructions ##4-5. Because he cannot demonstrate that the jury failed to heed the trial court's instructions concerning the reasonable doubt

standard, he further fails to demonstrate any unfair prejudice.

The Court may reject his claim on any one of these grounds.

Menzies, 889 P.2d at 403., 850 P.2d at 1208-09.

**B. Error, if Any, in Requiring Jury
to Find That Counts II and/or III
Constituted Second or Subsequent
Offenses Was Favorable to Defendant**

Defendant's remaining allegation of plain error regarding instructions ##4-5 rests on the fact that the trial court instructed the jury that it could not convict defendant for counts II and III unless it first determined that those offenses constituted second or subsequent violations of section 58-37-8(1)(b). Br. of App. at 23-24. Defendant suggests that this determination was a sentencing enhancement to be determined by the court, not the jury. Br. of App. at 23. While it may be more desirable to leave for the trial court the question of whether a violation constitutes a second or subsequent conviction for purposes of section 58-37-8(1)(b), the failure to do so does not constitute grounds for reversal.

1. No Allegation of Obvious Error

In support of his claim of error, defendant cites case law interpreting the firearm enhancement statute and holding that there is no requirement that the jury make a specific finding that a firearm was used in the commission of a crime before the sentence can be enhanced under that statute. In State v. Angus, the Utah Supreme Court noted that the defendant had made no such request and that on the facts of that case, such a requirement would have been "nonsensical." 581 P.2d 992, 995 (Utah 1978).

Defendant also points to State v. Labrum, wherein this Court similarly ruled that any error in not requiring the jury to specifically find that a firearm was used prior to enhancing defendant's sentence was "harmless indeed." 881 P.2d 900, 905 (Utah App. 1994). cert. granted on other grounds, 892 P.2d 13 (Utah 1995).

There is nothing in either of the above firearm enhancement cases that would have suggested to the instant trial court that its instructions requiring the jury to find that counts II and III constituted second or subsequent offenses under section 58-37-8(1)(b) before it could convict for either offense was obviously erroneous. Defendant makes no contrary argument. See Br. of App. at 21-25. Defendant's failure to allege that the claimed error should have been obvious to the trial court is, as noted previously, sufficient reason to reject his claim of plain error. Menzies, 889 P.2d at 403.

Moreover, in holding that the failure to require a special jury finding was not error, Angus, 581 P.2d at 995, or at the most, harmless error, Labrum, 881 P.2d at 905, both cases suggest that there are circumstances when such a requirement is proper, e.g., when requested by defendant. Angus, 581 P.2d at 995. Significantly, while defendant did not request the instant elements instructions, he did not object either (R. 161 at T. 424). For reasons set forth below, defendant's failure to object below may well have been based on the fact that any error in instructions ##4-5 was favorable.

2. Favorable Error

Indeed, by requiring the jury to find that counts II and III constituted second or subsequent violations of the drug statute before it could convict on either count, the trial court essentially required the jury to find more elements than actually required by section 58-37-8(1)(a)(ii)². That any error in so requiring was favorable to defendant is highlighted by the jury's question as to whether it could convict for count III if it did not first convict for counts I and II (R. 106), see addendum B. In responding negatively to the jury's question, the trial court essentially instructed the jury to acquit defendant of all three counts if it could not find beyond a reasonable doubt that defendant was guilty as charged in count I. Id. If, on the other hand, the jury had been instructed as now requested by defendant, excluding any requirement that counts II and III must constitute second or subsequent violations of section 58-37-8(1)(a), defendant ran the risk of being convicted for counts II and III, regardless of the jury's decision to convict or not for count I. In short, such an instruction would have made it even more likely that defendant would be convicted on all three

² Section 58-37-8(1)(a)(ii) provides:

Except as authorized by this chapter,
it is unlawful for any person to
knowingly and intentionally: . . .
distribute a controlled or
counterfeit substance, or to agree,
consent, offer, or arrange to
distribute a controlled or
counterfeit substance.

(Utah 1980) (no ground for reversal where any prejudice caused by erroneous jury instruction was favorable to the defendant).

Notably, defendant did not object to counts I-III being tried together, thus requiring the jury to refer back to and convict defendant for count I before it could convict him for count II and/or count III did not require the jury to consider any uncharged conduct that it would not otherwise be entitled to consider. See, e.g., State v. James, 767 P.2d 549, 557 (Utah 1989) (interpreting homicide statute as requiring a bifurcated proceeding when underlying homicide charge is subject to sentence enhancement based on *separately* charged crimes or bad acts). See also Hunt, No. 940267, slip op. at 4 (holding that a conviction on the first count of an information under drug statute may serve as the basis for enhancing the penalty on subsequent counts "irrespective of the timing of the offenses or the employment of a separate or multicount information").

Based on the above, defendant demonstrates no obvious nor unfavorable error regarding the requirement in elements instructions ##4-5 that the offenses charged in counts II and III must constitute second or subsequent violations of the drug statute. He thus fails to demonstrate plain error and his claim should be rejected. Menzies, 889 P.2d at 403.

POINT III

THERE IS NO CUMULATIVE ERROR REQUIRING REVERSAL

Even though errors may not individually warrant reversal, this Court may still reverse where the errors cumulatively undermine confidence in the outcome. State v. Palmer, 860 P.2d 339, 350 (Utah App.), cert. denied, 868 P.2d 95 (Utah 1993). Defendant claims that the trial court's alleged errors in the voir dire of the jury venire, and the wording of elements instructions ##4-5, including the added element that counts II-III must constitute second or subsequent violations of section 58-37-8(1)(a), together constitute cumulative error. Defendant's claim fails for two reasons.

First, defendant fails to adequately support his claim of cumulative error. He merely asserts that if the individual errors do not warrant reversal, then the cumulative effect of them does, but he provides no meaningful explanation of why this is so. Utah R. App. P. 24(a)(9); State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984) (declining to reach the merits of the defendant's state constitutional challenge because defendant failed to provide any supporting legal authority or analysis). Rather, defendant reasserts the individual claims of error and merely speculates as to the possible cumulative prejudicial effect.

Second, for the reasons argued above, no unfavorable error exists in this case. Indeed, defendant's assertion of cumulative error cannot succeed unless he first establishes that

some error occurred. Palmer, 860 P.2d at 350. For reasons detailed in Point I, supra, defendant fails to establish any error in the trial court's venire voir dire. Nor has he established any error in the trial court's use of the term violation in elements instructions ##4-5. See Point II(A), supra. To the extent there was any error in the number of elements listed in instructions ##4-5, that error is not reversible either alone or cumulatively because it was favorable to defendant. See Point II(B), supra. Because the actions about which defendant complains, if erroneous, were favorably so, the Court need not consider whether the cumulative effect of these actions undermines confidence in the outcome. Palmer, 860 P.2d at 350 (finding that the trial record contained numerous individually harmless errors before concluding that the cumulative effect undermined confidence in the outcome).³

POINT IV

DEFENDANT WAS EFFECTIVELY ASSISTED BY TRIAL COUNSEL

As an alternative means for reviewing on appeal the above claimed errors concerning the trial court's venire voir dire and elements instructions ##4-5, defendant asserts that he was denied the effective assistance of trial counsel. Br. of

³ Defendant has withdrawn his former Point III, see Supp. Br. of App. filed on November 1, 1995, including his claim that the alleged cumulative prejudicial effect of the above claimed errors would have been "obvious" if the non-presiding judge who responded to the jury's written question had notified the parties before responding to the question. Compare Br. of App. at 34 and Supp. Br. of App. at 2-3. See also (Supp. R. 173-180).

App. at 35-38. In reviewing a claim of counsel ineffectiveness, this Court indulges a "strong presumption" that counsel's conduct fell within the "wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." State v. Brooks, 868 P.2d 818, 822 (Utah App. 1994) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1955)), cert. granted, 883 P.2d 1359 (Utah 1994). To succeed under this alternative theory, defendant must demonstrate that trial counsel performed deficiently, or that counsel's performance "fell below an objective standard of reasonableness," and that counsel's deficient performance prejudiced the trial outcome. Id.

This Court has recognized that "plain error" and "ineffective assistance" claims, raised for the first time on appeal, share "a common standard." State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992) (quoting State v. Verde, 770 P.2d 116, 124 n.15 (Utah 1989)). Indeed, to be successful under either theory defendant must demonstrate prejudice or a substantial likelihood of a more favorable outcome absent the plain error and/or the deficient performance of trial counsel. Id. A defendant who fails to meet the plain error requirement of prejudice likewise fails to meet the required showing under the ineffective assistance of counsel standard. Id. Because the plain error and counsel effectiveness tests so closely resemble one another, and for brevity's sake, the State's plain error

analysis' of the issues raised in Points I-II of defendant's brief apply here. Indeed, this Court "may choose not to consider the adequacy of counsel's performance" if it determines that the claimed errors in Points I-II of defendant's brief were not harmful. State v. Dunn, 850 P.2d 1201, 1227 (Utah 1993).

In any event, for the same reasons that the trial court's venire voir dire did not constitute error, trial counsel did not perform deficiently by not raising an objection. See Point I(C), supra. Additionally, for the same reasons that elements instructions ##4-5 did not constitute either incorrect or misleading instruction, trial counsel did not perform deficiently when he did not object thereto. See, Point II(A), supra. Finally, for reasons set forth in Point II(B), supra, any error resulting from the additional requirements in instructions ##4-5 that the jury could not convict for counts II and/or III without first convicting for count I was favorable to defendant. Consequently, trial counsel exercised sound trial strategy by not objecting to the above claimed errors. Dunn, 850 P.2d at 1225.

In short, defendant fails to make out ineffective assistance of counsel for the same reasons he failed to establish plain error. His claims of ineffective assistance should be rejected.

CONCLUSION

Based on the above, this case presents no grounds for reversal and the Court should affirm defendant's convictions.

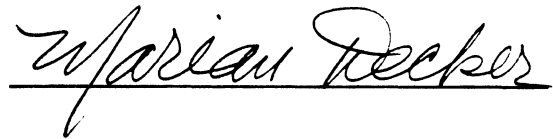
RESPECTFULLY SUBMITTED this 8th day of December, 1995.

JAN GRAHAM
Attorney General


MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to MARGARET P. LINDSAY, UTAH COUNTY PUBLIC DEFENDERS ASSOCIATION, attorney for appellant, 40 South 100 West, Suite 200, Provo, Utah 84601, this 8th day of December, 1995.



ADDENDA

ADDENDUM A

1 you stand again, raise your right hand. And the
2 clerk of the court is going to administer a
3 second oath to you for that purpose. If you'll
4 all stand, please.

5 THE CLERK: Raise your right hands,
6 please.

7 You and each of you do solemnly swear that
8 you will true answers make to such questions as
9 shall be put to you touching your qualifications
10 to serve as jurors in the case now pending
11 before the Court so help you God.

12 (Whereupon, the trial jurors nodded and/or
13 spoke in the affirmative.)

14 THE COURT: Thank you. I've advised
15 you that this is a drug case. And I will, on
16 the record once again, advise you of the nature
17 of the charges involved.

18 Counsel, have there been any amended
19 criminal informations filed since the initial
20 information?

21 MR. TAYLOR: I don't believe so, Your
22 Honor.

23 MR. ZABRISKIE: No, Your Honor.

24 THE COURT: Then it's the State of
25 Utah V Juan Anthony Portillo.

1 Count 1 is distribution or arranging to
2 distribute a controlled substance. That's a
3 third-degree felony. That's punishable by
4 incarceration in the Utah State Prison for an
5 indeterminate period of time, not to exceed five
6 years, together with up to a \$5,000 fine and/or
7 both--

8 MR. TAYLOR: Your Honor, may we
9 approach the bench briefly?

10 THE COURT: Yes.

11 (Off the record at the bench, not
12 reported.)

13 MR. TAYLOR: For the record, the State
14 moves to amend the information in Count 4. It
15 is charged as a second-degree felony, which
16 should have been charged as a third-degree
17 felony. It's not a substantive change, merely
18 changes that one number.

19 MR. ZABRISKIE: No objections, Your
20 Honor.

21 THE COURT: Very well.

22 Back to the criminal charge. Count 2,
23 ladies and gentlemen, is distribution of or
24 arranging to distribute a controlled substance.
25 That's a second-degree felony. It's also

1 punishable by an indeterminate time at the Utah
2 State Prison, not less than one nor more than 15
3 years in the Utah State Prison, together with up
4 to a \$10,000 fine and/or both.

5 Count 3 is distribution of or arranging to
6 distribute a controlled substance, also a
7 second-degree felony. It would carry a maximum,
8 also, for an indeterminate time, not less than
9 one nor more than 15 years in the Utah State
10 Prison together with a fine not to exceed
11 \$10,000 and/or both.

12 Count 4 is possession of a controlled
13 substance with the intent to distribute. That's
14 a third-degree felony, carrying the possible
15 imposition of an indeterminate time from zero to
16 five years in the Utah State Prison together
17 with a fine up to \$5,000 and/or both.

18 Count 5 is unlawful possession or use of
19 drug paraphernalia. That's a class-B
20 misdemeanor. It's punishable by incarceration
21 in the Utah County Jail for a period not to
22 exceed six months together with a fine up to
23 \$1,000 and/or both.

24 And Count 6 is illegal drug tax. That's a
25 third-degree felony. That's also punishable by

1 an indeterminate time in the Utah State Prison
2 not to exceed five years together with a fine up
3 to \$5,000 and/or both.

4 You, as jurors, will be the triers of the
5 fact-- its sole and exclusive triers of the fact
6 and make a determination in this case what the
7 facts are. Ultimately this Court will advise you
8 what the law is and the proper application of
9 that a law. But the facts are your sole and
10 exclusive domain.

11 You'll be required to listen very closely
12 and listen to evidence that is presented and
13 testimony that's given, and make, ultimately, a
14 determination about credibility of witnesses and
15 who is to believe-- be believed in this case.

16 We'll conduct what we call now voir dire.
17 It's the opportunity for the Court to make some
18 inquiry.

19 And, first of all, I believe what I will do
20 is I'll have each of you stand, advise the Court
21 of your name, the city of your residence-- not
22 your street address-- and then advise, for the
23 record, where you work, if you do work, whether
24 or not you're married or not, and whether your
25 spouse works. And then we'll follow up with

1 had any other basis upon which you might have
2 some knowledge of this case, any notoriety
3 whatsoever?

4 (No audible response.)

5 THE COURT: Has anyone ever been an
6 adverse party to the defendant in a civil case
7 or any proceeding? Is there anyone that
8 believes that the punishment fixed by law is too
9 severe or too light for the offenses charged?

10 (No audible response.)

11 THE COURT: Is there any reason best
12 known to yourself why you could not try the case
13 fairly and impartially upon the evidence and
14 without any bias or prejudice for or against
15 either party?

16 (No audible response.)

17 THE COURT: If you were a party to this
18 action-- either the plaintiff, the State of
19 Utah, or the defendant, Mr. Portillo-- would you
20 be fully satisfied to have your cause tried by a
21 person of your present attitude and frame of
22 mind towards this case?

23 (No audible response.)

24 THE COURT: Is there anyone that
25 because of medical or mental or emotional

INSTRUCTION NO. 24

In arriving at a verdict in this case, you shall not discuss nor consider the subject of penalty or punishment, as that is a matter which lies with the court, and other court proceedings. The penalty and punishment for the crime charged must not in any way affect your decision as to the guilty or innocence of the defendant.

not

ADDENDUM B

INSTRUCTION NO. 3

In order for you to find the defendant guilty of the offense of Count I: Distribution of or Arranging to Distribute a Controlled Substance you must find that each of the following essential elements of the crime charged in the Information have been established beyond a reasonable doubt:

1. That the defendant,
2. On or about October 9, 1991,
3. In Utah County, Utah,
4. Did knowingly and intentionally,
5. Distribute or agree, consent, offer, or arrange to distribute,
6. Marijuana.

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the above essential elements of the crime charged, you should find the defendant not guilty. On the other hand, if the State has proved beyond a reasonable doubt all of the essential elements of the offense as above set forth, then you should find the defendant guilty of the charge.

INSTRUCTION NO. 4 _____

In order for you to find the defendant guilty of the offense of Count II: Distribution of or Arranging to Distribute a Controlled Substance you must find that each of the following essential elements of the crime charged in the Information have been established beyond a reasonable doubt:

1. That the defendant,
2. On or about October 15, 1991,
3. In Utah County, Utah,
4. Did knowingly and intentionally,
5. Distribute or agree, consent, offer, or arrange to distribute,
6. Marijuana,
7. That this distribution was a second or subsequent violation occurring after a previous violation of the same statute.

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the above essential elements of the crime charged, you should find the defendant not guilty. On the other hand, if the State has proved beyond a reasonable doubt all of the essential elements of the offense as above set forth, then you should find the defendant guilty of the charge.

INSTRUCTION NO. 5

In order for you to find the defendant guilty of the offense of Count III: Distribution of or Arranging to Distribute a Controlled Substance you must find that each of the following essential elements of the crime charged in the Information have been established beyond a reasonable doubt:

1. That the defendant,
2. On or about October 25, 1991,
3. In Utah County, Utah,
4. Knowingly and intentionally,
5. Distribute or agree, consent, offer, or arrange to distribute,
6. Marijuana,
7. That this distribution was a second or subsequent violation occurring after a previous violation of the same statute.

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the above essential elements of the crime charged, you should find the defendant not guilty. On the other hand, if the State has proved beyond a reasonable doubt all of the essential elements of the offense as above set forth, then you should find the defendant guilty of the charge.

INSTRUCTION 13

The burden of proof described as "beyond a reasonable doubt" is used and/or referred to in several places in these Instructions. Proof beyond a reasonable doubt does not require proof to be an absolute certainty. A reasonable doubt is based on reason and common sense and not on speculation or imagination. It is a doubt that is reasonable in view of all the evidence. Proof beyond a reasonable doubt must satisfy the mind and convince those who are bound to act conscientiously upon such proof. A reasonable doubt is a doubt that reasonable men and women would hold after consideration of the evidence or lack of evidence in the case.

INSTRUCTION NO. 20

However, a finding of a guilty as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstance necessary to establish the defendant's guilt must be proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the other hand one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

9/20/03

FILED Clerk

10:00 PM

The 3rd charge, instruction
#5, element #7 refers
to this charge as a
subsequent violation.

If count one and count
two are "not guilty," can
a guilty verdict be given
for count 3.

No -
Judge [Signature] Foreperson

ADDENDUM C

(10) Any person who obtains or attempts to obtain information from the database by misrepresentation or fraud is guilty of a third degree felony.

(11) (a) A person may not knowingly and intentionally use, release, publish, or otherwise make available to any other person or entity any information obtained from the database for any purpose other than those specified in Subsection (8). Each separate violation of this subsection is a third degree felony and is also subject to a civil penalty not to exceed \$5,000.

(b) The procedure for determining a civil violation of this subsection shall be in accordance with Section 58-1-108, regarding adjudicative proceedings within the division.

(c) Civil penalties assessed under this subsection shall be deposited in the General Fund.

(12) (a) The failure of a pharmacist in charge to submit information to the database as required under this section after the division has submitted a specific written request for the information or when the division determines the individual has a demonstrable pattern of failing to submit the information as required is grounds for the division to take the following actions in accordance with Section 58-1-401:

(i) refuse to issue a license to the individual;

(ii) refuse to renew the individual's license;

(iii) revoke, suspend, restrict, or place on probation the license;

(iv) issue a public or private reprimand to the individual;

(v) issue a cease and desist order; and

(vi) impose a civil penalty of not more than \$1,000 for each dispensed prescription regarding which the required information is not submitted.

(b) Civil penalties assessed under Subsection (a)(vi) shall be deposited in the General Fund.

(c) The procedure for determining a civil violation of this subsection shall be in accordance with Section 58-1-108, regarding adjudicative proceedings within the division.

(13) An individual who has submitted information to the database in accordance with this section may not be held civilly liable for having submitted the information.

(14) (a) All department and the division costs necessary to establish and operate the database shall be funded by appropriations from the General Fund.

(b) Funding for this section shall be appropriated without the use of any resources within the Commerce Service Fund.

(15) All costs associated with recording and submitting data as required in this section shall be assumed by the submitting drug outlet.

History: C. 1963, 58-37-7.5, enacted by L. 1995, ch. 333, § 2.

Effective Dates. — Laws 1995, ch. 333, § 4 makes the act effective on July 1, 1995.

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

- (ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;
 - (iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except that he may possess such controlled substances when they are prescribed to him by a licensed practitioner; or
 - (iv) possess a controlled or counterfeit substance with intent to distribute.
- (b) Any person convicted of violating Subsection (1)(a) with respect to:
- (i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;
 - (ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or
 - (iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.
- (2) Prohibited acts B — Penalties:
- (a) It is unlawful:
- (i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;
 - (ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;
 - (iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this chapter and the use or possession is open, obvious, apparent, and not concealed from those present; however, a person may not be convicted under this subsection if the evidence shows that he did not use the substance himself or advise, encourage, or assist anyone else to do so; any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense;
 - (iv) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance;
 - (v) for a practitioner licensed under this chapter knowingly and intentionally to prescribe, administer, or dispense a controlled substance to a juvenile, without first obtaining the consent required in Section 78-14-5 of a parent, guardian, or person standing in loco parentis of the juvenile except in cases of an emergency; for purposes of this subsection, a juvenile means a "child" as defined in Section 78-3a-2, and "emergency" means any physical condition requiring the administration of a controlled substance for immediate relief of pain or suffering;