

2016

**State of Utah, Plaintiff/Appellee v. Thomas J. Vu, Defendant/  
Appellant**

Utah Court of Appeals

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No. 20151075-CA

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**IN THE UTAH COURT OF APPEALS**

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THE STATE OF UTAH,  
*Plaintiff/Appellee*

v.

THOMAS J. VU,  
*Defendant/Appellant.*

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**BRIEF OF APPELLANT**

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Appeal from a judgment of conviction for one count of Possession of a Dangerous Weapon by a Restricted Person, a second degree felony, in violation of Utah Code §76-10-503(2), and one count of Possession of a Controlled Substance with Intent to Distribute, a second degree felony, in violation of Utah Code §58-37-8(1)(a)(iii) in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Douglas Hogan presiding.

Appellant is incarcerated

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UTAH APPELLATE COURTS

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**BRIEF OF APPELLANT**

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under Utah Code §78A-4-103(2)(e). R.233-34.  
*See Addendum A (Sentence, Judgment, Commitment): R.222-23,231-32.*

ISSUE AND STANDARD OF REVIEW

Issue I: Whether Vu was denied his right to a fair trial where the possession of a firearm by a restricted person charge was not bifurcated; instead, prejudicial jury instructions, the prosecutor, and defense counsel all improperly informed the jury that Vu was a “Category I restricted person” for purposes of the firearm charge.

*Standard of Review:* “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law, which [the Court] review[s] for correctness.” *State v. Fowers*, 2011 UT App 383, ¶15, 265 P.3d 832 (internal quotation marks omitted). To support this claim, a defendant must demonstrate,

first, “that counsel’s performance was deficient” and second, “that counsel’s deficient performance was prejudicial.” *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92. And, “[t]o demonstrate plain error, a defendant must establish that “(i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant.” *State v. Dean*, 2004 UT 63, ¶15, 95 P.3d 276 (internal citations and quotations omitted).

*Preservation:* This issue was not preserved but may be reviewed for plain error or ineffective assistance of counsel. *Litherland*, 2000 UT 76, ¶19; *Dean*, 2004 UT 63, ¶15.

Issue II: Whether the trial court erred in allowing irrelevant and prejudicial bad character evidence of controlled buys between Vu and a confidential informant that allegedly occurred during the weeks prior to the issuance of search warrant.

*Standard of Review:* “A trial court’s admission of prior bad acts evidence is reviewed for abuse of discretion, but the evidence ‘must be scrupulously examined by trial judges in the proper exercise of that discretion.’” *State v. Verde*, 2012 UT 60, ¶13, 296 P.3d 673. Moreover, “the district court’s interpretation of [a] rule is reviewed for correctness.” *Supernova Media Inc. v. Pia Anderson Dorius Reynard & Moss, LLC*, 2013 UT 7, ¶14, 297 P.3d 599.

*Preservation:* This issue is preserved by defense counsel's motion and objection argued on the first day of trial. R.255-260,264-266,378. It can also be reviewed for plain error. *Dean*, 2004 UT 63, ¶15.

Issue III: Whether even if the errors are not sufficiently prejudicial to warrant reversal on their own, taken together, they are cumulatively prejudicial.

*Standard of Review:* A claim of cumulative prejudice "requires [this Court] to apply the standard of review applicable to each underlying claim of error."

*Radman v. Flanders Corp.*, 2007 UT App 351, ¶4, 172 P.3d 668.

*Preservation:* Inapplicable.

Issue IV: Whether the State presented sufficient evidence to prove that Vu constructively possessed both a weapon and a controlled substance with the intent to distribute it, where the firearm was found in a concealed location of a vehicle that Vu was not occupying and did not own, where the firearm was not reported stolen and was not registered to Vu, where the contraband was found inside a pouch in a room that was accessed by multiple people, including drug users, and where no contraband was found on Vu.

*Standard of Review:* When the sufficiency of the evidence in a jury trial is challenged, the standard of review requires that the "evidence and the reasonable inferences which may be drawn therefrom must be viewed in the light most favorable to the jury verdict." *State v. Johnson*, 774 P.2d 1141, 1147 (Utah 1989). A jury verdict can be reversed for insufficient evidence where the evidence "is sufficiently inconclusive or inherently improbable that reasonable minds must

have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.” *Id.*; see also *State v. Robbins*, 2009 UT 23, ¶14, 210 P.3d 288. The “trial court’s interpretation of binding case law [presents] a question of law” that is reviewed for correctness. *State v. Stewart*, 2011 UT App 185, ¶16, 257 P.3d 1055.

*Preservation:* This issue is preserved by defense counsel’s motion to dismiss made at the close of the State’s case. R.583-584. It can also be reviewed for plain error. *State v. Mohamed*, 2012 UT App 183, ¶3, 282 P.3d 1066 (stating that “when [reviewing] the sufficiency of the evidence under the plain error doctrine, ‘a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.’” (per curiam) (quoting *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346)).

#### CONSTITUTION AND STATUTORY PROVISIONS

The following is attached hereto in Addendum B: U.S. Const. amend. XIV, Utah Code §58-37-8(1)(a)(iii), Utah Code §76-10-503(2), and Utah Rules of Evidence 401, 402, 403, 404(b).

#### STATEMENT OF THE CASE

The State filed an Information charging Thomas J. Vu with one count of possession or use of a firearm by a restricted person in violation of Utah Code §76-10-503(2), one count of possession of a controlled substance with intent to

distribute in violation of Utah Code §58-37-8(1)(a)(iii), and one count of possession or use of a controlled substance in violation of Utah Code §58-37-8(2)(a)(i) stemming from the evidentiary findings of a search warrant executed on May 8, 2014. R.1-3. At the close of a two-day jury trial, Vu was convicted of possession or use of a firearm by a restricted person and possession of a controlled substance (methamphetamine) with intent to distribute. R.167-76,214-19. Vu was acquitted of the possession of a controlled substance count that accused him of possessing marijuana. *Id.* On December 15, 2015, Vu was sentenced to two concurrent indeterminate prison terms of not less than one year to fifteen years. R.222-23. Vu timely appealed. R.224-25.

#### STATEMENT OF THE FACTS

##### **Officers find methamphetamine in an apartment frequented by multiple drug users**

On May 8, 2014, a SWAT team of twenty officers executed a no knock search warrant on a small two-bedroom apartment in Sandy. R.393-95,398,403-04,424,436,544. The SWAT team's operation was named "Deja Vu" and Vu was their "target." R.430,524,526. Once inside the apartment, officers found and arrested five individuals, including Vu (a.k.a. "TJ"), his cousin Randall, and a woman named Shaley. R.367,438,497,502-03,561,565. Two individuals, Caitlyn and Jose, had just left the apartment. R.438,497,510.

Shaley told officers that she was renting the apartment and that Vu "had been staying with her for a couple of months." R.506. Officers found Vu lying on

the right side of a bed in one of the bedrooms, "Room 5." R.403,406-08,411,508,520. It appeared to officers that Shaley "stayed" in Room 5 since the room had a double bed. R.520.

After officers secured the premises, Detective Daley and other detectives joined in with the investigation. R.404. Officers placed Vu in a chair in the living room, which is where Daley first observed Vu. R.405,413,519,528; *see also* Exhibit 1. Daley noticed that Vu was not fully conscious and was "out of it." R.519,404-405. Vu appeared to be "coming off of" methamphetamine. R.519,538-39. Vu's appearance did not surprise Daley since Vu was found in "a meth house." R.519-520. When Vu was eventually searched, officers discovered cash in his pockets, but no drugs or weapons were found.<sup>1</sup> R.414,535,538; *see also* Exhibit 1.

In Room 5, officers found identifying documents belonging to four women, including Shaley. R.523,565-66,576. Men's clothing was found in the closet. R.565. A piece of mail addressed to Vu was also found in the room, but the address on the envelope did not match the apartment. R.507-08,522. Vu's Wendover player's card was found on a shelf next to the bed.<sup>2</sup> R.522,568. A "black nylon case" or "pouch" containing three baggies of methamphetamine was found next to the bed, either on the floor or on the shelf. R.408-09,521-22,548-49,568. The baggies contained a total of thirty-one grams, or approximately one

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<sup>1</sup> No testimony indicated the amount of money found in Vu's pocket. *See* R.535.

<sup>2</sup> Daley initially testified that Vu's player's card was found inside the 2009 Nissan Ultima, but his subsequent testimony and Ms. Stewart's testimony indicate the card was found in Room 5. R.406,408-09,522,532,548,568.

ounce, of methamphetamine. R.409-410. Daley testified that based upon his experiences, the methamphetamine found in the baggies constituted a distribution amount and not a personal use amount. R.410. The baggies were not tested for fingerprints or subject to DNA analysis. R.558-59. A baggie of marijuana was found in a drawer, either in Room 5, or in another bedroom, "Room 1." R.549-550,523-24.

Officers found a ledger or notebook in a bag on the floor of Room 1. R.569-70. The ledger contained "different amounts, like numbers." R.570. The numbers did not appear to indicate monies or weight amounts and no handwriting analysis was done to determine the author of the ledger. R.570.

A Springfield XD 9 millimeter handgun was found in the couch in the living room. R.406,503,562. Because Randall was sitting on the couch near this gun, Daley confronted Randall about it. R.406,503-04. Randall then asked Daley whether it was "illegal to own a gun or be in possession of a gun," to which Daley replied, "the question [is], is this your gun?" R.504. Randall was arrested on a pre-existing warrant for a felony matter. R.505-506. The prosecutor conceded at trial that the gun found in the couch could not be connected to Vu. R.365,505,528.

During the officers' search, Caitlyn and Jose returned to the apartment. R.497-498,510-511. Both of them had outstanding arrest warrants. R.501-02,511. Jose's warrant was for "drug-related crimes." R.511-12. Jose was arrested and was "extremely uncooperative and defiant." R.510-511. Caitlyn told officers that "she



was a drug user,” and when officers searched her, they found syringes. R.499. Caitlyn, however, was not charged and was released at the scene due to lack of “time [and] manpower...” R.499,500,501-02,524.

**Officers find a concealed firearm in a vehicle not occupied and not owned by Vu**

Pursuant to the search warrant, officers impounded and searched a 2009 Nissan Ultima. R.406,414,512. Officers discovered that the Nissan was not stolen and not registered to Vu, but registered to Kevin. R.406,512-13. Because Kevin was having financial troubles, his girlfriend “kind of subleased” the vehicle to Vu. R.513. The inside of the vehicle was “in disarray” when searched by officers. R.514. Officers located Vu’s driver’s license in the vehicle. R.408; *see also* Exhibit 6. Officers also found an airsoft gun in plain view in the back seat of the vehicle. R.571; *see also* Exhibit D.

A Glock 45 handgun was found on the floor of the vehicle, hiding in front of the middle console, with the “butt of the gun” facing the passenger side. R.415,513,516,552; *see also* Exhibit A. Daley and Cindy Stewart, an investigator for the State, both testified that Exhibit A, a photo depicting the inside of the Nissan showed that a panel that had been covering the console had been removed. R.513. Neither Daley nor Stewart knew if the panel had been removed by officers during their search of the vehicle, but Stewart assumed that it was an officer who had removed the panel. R.513-14,566-68. Stewart also acknowledged

that had the panel not been removed, the gun would not have been in plain view. R.568.

The handgun found in the Nissan was not tested for fingerprints or subject to DNA analysis. R.517-18,536-37,558,569-70. Officers ran the serial number for the gun and found out that it was not reported stolen and was not registered to Vu. R.514,517.

**Over defense counsel's objections, the trial judge allows in evidence of alleged previous controlled buys between Vu and a confidential informant**

The search warrant issued to Daley for the Sandy apartment was based on five controlled buys between Daley's confidential informant, Emily, and Vu that allegedly occurred over the course of six weeks, from March 10 to April 29, 2014. R.375,379,386,390-93,422-23,448,458. In a motion argued the first day of trial, defense counsel argued that the evidence of the controlled buys should be suppressed as violating Rule 404(b)'s prohibition of improper and prejudicial character evidence. R.255-260,264-266,378. The trial judge denied the motion and admitted the evidence. R.264-65.

Emily testified that she started working as an informant for Daley in March 2014, and in return, her felony fraud and forgery charges were not prosecuted. R.375-77,420-421,432,446,453,458. Emily was also incentivized to be an informant because she believed that prison and federal charges were possible outcomes that she otherwise faced. R.452-53. Emily was a drug addict who suffered a relapse while working as an informant. R.379,445,455-56,463. She was

also charged with mail fraud during this time and was eventually convicted.

R.434-35,447,452,454-455,457. In addition, Emily was subsequently convicted of identity fraud and attempted unlawful use of a financial transaction card.

R.434,454,457,460-61.<sup>3</sup>

Emily told Daley that she knew Vu and could help provide “some information” about him. R.377-78,423,458. Vu then became “the target” of police investigations. R.430,447,458,466,526. Emily arranged five controlled drug buys with “TJ” over the phone. R.381,379,381,386,390-392,422,458,466,448. Some of these phone conversations were overheard by Daley. R.380-82,390,393,423-24. At each buy, Emily purchased around an “eight ball” or “3.5 grams of methamphetamine” from Vu. R.390-92,426-27,448. Prior to and after each controlled buy, Daley searched Emily for illegal contraband and unauthorized money to ensure that Emily did not make any “on the side” purchases. R.384-85,389,391.

The first controlled buy occurred at a different apartment in the same complex where the search warrant was executed. R.382-86,390-91,424-27,448,458. The second buy occurred near a gas station. R.386-89. The remaining three controlled buys occurred in the apartment where the warrant was executed. R.391-92,394,530. “[M]ultiple people” were inside both apartments when the controlled buys took place. R.385,392-93,459. At the fourth

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<sup>3</sup> Regarding the relapse, Emily testified that she received drugs from “TJ” and “smoked them with him in his bedroom.” R.463.

controlled buy, Emily saw Vu “smoking meth out of a pipe.” R.392. At the fifth controlled buy, Emily saw Vu with “an abnormal amount of U.S. currency.” R.393.

Emily testified that she saw Vu with a handgun on one occasion when she went to purchase drugs from him. R.448-49. Vu was at his friend’s house and was installing a sound system in a Nissan. *Id.* When Vu went to retrieve drugs for Emily from underneath the vehicle’s console, Emily noticed a handgun placed alongside the drugs. R.449. Vu told Emily that he stored his guns at his friend’s house. *Id.* On a separate occasion, Vu asked Emily if she knew of anyone looking to buy a gun because he had a couple for sale. *Id.* On another occasion, Vu asked Emily if she knew of someone who could get him a gun. R.449-450. Daley testified that it would have been “reasonable” for Emily to believe that “if she didn’t produce... something” in the investigation of Vu, “there could be issues.” R.431,430-31.

Detective Daley drove Emily to and from each buy in an undercover car and was dressed in undercover clothing. R.379,383,386-87,390-392,422. Daley, however, never directly witnessed Vu give drugs to Emily. *See* R.385-86, 389, 391-93. At the second buy, Daley observed a male driver and a female passenger drive up to the gas station in a 2009 Nissan Ultima. R.387-88. Daley was close enough to the driver to “look straight into his car” and he “could have reached out and touched the car as he pulled up.” R.387-388. Emily got into the back seat of the Nissan which then drove to a nearby neighborhood, followed by Daley. R.388.

A few moments later, Emily got out of the Nissan and returned to Daley. R.389. At trial, Daley identified Vu as the driver of the vehicle at the second controlled buy. R.388,406,415,512.

A magnetic GPS tracking device was attached to the Nissan that officers suspected Vu of driving. R.416-17,531. The tracker provided a record of where this vehicle had been, and allowed officers to instantly locate it. R.417,531. In addition, physical surveillance of the vehicle allowed officers to observe Vu driving the vehicle “on numerous occasions[,]” and Vu was seen going to and from the apartment complex to “other addresses that were [under] investigation.” R.417-18,512,530-31.

**The jury is told that Vu is a Category I restricted person for purposes of the Possession of a Firearm Charge**

Regarding the firearm charge, the trial judge did not bifurcate the count but instead submitted an elements jury instruction that told the jury that according to element No. 2, Vu was a “Category I restricted person” on or about May 8, 2014. R.204,601-02; *see also* Instruction 41 in Addendum C. This instruction did not define “Category I restricted person[,]” but told the jury that “Element 2 is a stipulation of Fact. Refer to instruction 40.” *Id.* Instruction 40, titled “Stipulation of Fact” said that “[w]hen lawyers agree that certain facts are true it is called a ‘stipulation of fact.’ You must accept any stipulated facts as having been proven. However, the significance of these facts, as with all facts, is for you to decide.” R.203,601; *see also* Instruction 41 in Addendum C.

Both defense counsel and the prosecutor stipulated to informing the jury that Vu was a Category I restricted person. R.265-267. Before opening arguments, and outside the presence of the jury, the following exchange took place regarding this stipulation:

Prosecutor: ... [Vu's] charged as a category one restricted person with possession of a firearm by a restricted person. So the category one is the prior conviction, so we're stipulating these, as I understand it, he's a category one restricted person so that element of that crime is—is proven.

Judge: And that—that's correct Counsel?

Defense Counsel: Yeah, and—and on the other side of that, [the State prosecutor] will not bring in any evidence that would be necessary to prove that element, we'll just let the jury know that he is a restricted person and we won't go any further down that.

Judge: And—and—we'll locate and include an instruction for the jury on what to do with the stipulated fact.

Defense Counsel: That's—

Prosecutor: That's right. It's—I won't bring out—I mean, [Vu's] got, I think it was a conviction in '03 that was a felony, for example, that—that would make him a restricted person. I'm not going to ask about that on direct examination, I'm — I'm letting my witness know now we're not discussing that prior conviction, because that point has been stipulated...

R.266-67.

The issue of Vu being a Category I restricted person was first brought up before the jury by the State prosecutor in opening arguments. R.364. The prosecutor said the following to the jury:

We also need to talk about the top charge in the count of being a restricted person [inaudible] firearm. You may not have heard that term before. For various reasons why it's not legal to be in possession of a firearm in this state. And you don't need to worry too much about what those reasons are, but *the legislature has decided that there's some people who cannot legally possess firearms. And rather than go into a long proof of why Mr. Vu is a restricted person*, counsel has stipulated that Mr. Vu is a restricted person, and so may not legally possess a firearm.

R.364. (emphasis added).

Defense Counsel again discussed Vu's status as a Category I restricted person during closing arguments, stating:

I want [sic] to know we don't hide the ball from you. We stipulated to a couple of things... We wanted you to know, yes, my client is a restricted person for a firearm charge. There is no reason to hide that from you. So that element in your instruction has been met.

R.624.

#### SUMMARY OF THE ARGUMENT

Vu was denied his fundamental right to a fair trial because the possession of a firearm by a restricted person charge was not bifurcated. Rather than having the jury first determine whether Vu possessed a firearm, and only after such determination, submitting the issue to the jury of whether Vu was a Category I restricted person, along with any stipulation, the trial judge instead submitted prejudicial jury instructions that told the jury that Vu was a Category I restricted person for purposes of the firearm charge. In addition, both the prosecutor and defense counsel improperly informed the jury that Vu was a Category I restricted

person. Because the firearm charge was not properly bifurcated and the jury was informed that Vu was a restricted person before they had first decided that Vu had possessed a firearm, the jury was encouraged to convict Vu because of his bad actions that were unrelated to this case. Moreover, this error requires reversal because had the firearm charge been properly bifurcated, there was a reasonable likelihood of a more favorable verdict for Vu.

In addition, the trial court reversibly erred in admitting improper character evidence of a number of instances where Vu allegedly sold methamphetamine to a confidential informant, including an instance where the confidential informant saw Vu near a gun. The State failed to prove that Vu participated in any of these alleged controlled drug buys because of the inherent unreliability of the confidential informant's testimony. In addition, the alleged controlled drug buys were unnecessary and irrelevant as to whether Vu committed the alleged crimes in this case, and any probative value of the evidence was substantially outweighed by its prejudicial effect.

Alone or together, these errors were prejudicial and require reversal.

Lastly, there was insufficient evidence to show that Vu constructively possessed either a firearm or a controlled substance with the intent to distribute it. In order to establish that a defendant constructively possessed an item where occupancy is not exclusive, the State must show more than mere ownership or occupancy. There must be some other nexus between the defendant and the item that shows the defendant "had the power and intent to exercise dominion and



control over” the item. *State v. Hansen*, 732 P.2d 127, 132 (Utah 1987). This required nexus was absent in this case where the firearm was not reported stolen and was not registered to Vu, where Vu did not own and was not present in the vehicle that officers located the firearm in, where multiple people, including drug users, had recently accessed the apartment where the contraband was found, and where no drugs were found on Vu.

### ARGUMENT

**I. Vu was denied a fair trial because the possession of a firearm charge was not bifurcated and the jury was improperly informed that Vu was a Category I restricted person before the jury first determined whether Vu had possessed the firearm.**

Vu was denied his constitutional right to a fair trial because the possession of a firearm charge was not bifurcated, and the jury was instead improperly informed by jury instructions, the prosecutor, and defense counsel that Vu was a Category I restricted person. R.203-04,265-67,364,601-02,624; *see also* Instructions 40 and 41 in Addendum C; *see also* U.S. Const. amend. XIV (stating that a defendant is entitled to due process of law). To be guilty of a second degree felony possession of a firearm charge in Utah, a defendant must intentionally or knowingly possess a firearm, and must do so while being a Category I restricted person. Utah Code §76-10-503(2)(a). Here, had Vu’s firearm charge been properly bifurcated, the jury would have first been instructed to determine whether Vu was in possession of a firearm on the day that the search warrant was executed, and only if the jury concluded that he was, the jury would have then

been asked to determine whether Vu was a Category I restricted person. *See State v. Reed*, 2000 UT 68, ¶20, 8 P.3d 1025, 1029 (explaining that in “a bifurcated trial proceeding... the underlying offense [is] proved first before evidence of the aggravating offenses [is] presented to the jury.”); *see also State v. Bishop*, 753 P.2d 439, 498 (Utah 1988) (Zimmerman, J. concurring and describing the two steps that are required in a bifurcated procedure).

The bifurcation process ensures that a defendant receives a fair trial because it prevents the jury from deciding their verdict based on “the prejudicial effect that may result from introduction of prior [and unrelated] criminal acts... and therefore [alleviates] due process concerns.” *State v. Reed*, 2000 UT 68, ¶31, 8 P.3d 1025; *see also Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245 (Utah 1998) (stating that a trial court must always perform its “fundamental duty to ensure that trial be fair and impartial.”). Thus, this bifurcation procedure is “based on ‘*fundamental notions of fairness*’ deeply embedded in the law’ and on the principle that evidence of ‘bad character’ or unrelated prior crimes is prejudicial because of ‘the tendency of a fact finder to convict the accused because of bad character rather than because he [or she] is shown to be guilty of the offenses charged.’” *Id.* at ¶23 (quoting *State v. Saunders*, 699 P.2d 738, 741 (Utah 1985)) (emphasis added).

Utah courts have addressed both the effectiveness and requirement of the bifurcation process in a number of cases. Our supreme court noted the effectiveness of the bifurcation process as applied to a weapons charge because it

“prevented the jury from ever learning that [the defendant] was a convicted felon.” *State v. Reece*, 2015 UT 45, ¶19, 349 P.3d 712; *see also State v. Wareham*, 772 P.2d 960, 965 (Utah 1989) (stating that the “imposition of a bifurcation requirement... [prevents] the taint of prejudice that comes from the admission of evidence of multiple crimes.”).

In addition, our supreme court held that a bifurcation process was required in a first-degree murder case. *State v. James*, 767 P.2d 549, 556 (Utah 1989). The *James* court noted that only if the jury were to find the defendant “guilty of an intentional and knowing killing, [may it] then be instructed on the prior conviction.” *Id.* at 557. The “jury should then return to deliberate the existence or nonexistence of the prior conviction, which will, in turn, determine whether the homicide is first or second degree murder.” *Id.* *James* also noted that trial courts are “prohibited from reading a habitual criminal charge to a jury before guilt on the substantive offense is determined.” *Id.* at 556. In supporting the bifurcated procedure, *James* emphasized that “[i]t is especially appropriate that we exercise that supervisory power *to require certain procedures when fundamental values are threatened* by other modes of proceeding.” *Id.* at 557. (quoting *Bishop*, 753 P.2d at 449) (emphasis added). *Cf. State v. Bragg*, 2013 UT App 282, ¶34, 317 P.3d 452, 461 (stating that “bifurcation is not required when the aggravating conviction is otherwise admissible” under Rule 404(b) of the Utah Rules of Evidence.).

Here, the trial court and attorneys failed to follow established Utah precedent that mandated the bifurcation of the possession of a firearm by a restricted person charge, thereby depriving Vu of his fundamental right to a fair trial. *See* U.S. Const. amend. XIV; *see also Bishop*, 753 P.2d at 449; *see also James*, 767 P.2d 549, at 556-57; *Reece*, 2015 UT 45, ¶19; *Wareham*, 772 P.2d 960, 965. Instead of bifurcating the firearm charge so that the jury would be told about the stipulation only after and if they first determined that Vu had possessed a firearm, the jury was told that Vu was a Category I restricted person by jury instructions, the prosecutor, and defense counsel in the initial phase of the trial. R.203-04,265-67,364,601-02,624; *see also* Instructions 40 and 41 in Addendum C. Thus, the jury was improperly incentivized to find Vu guilty based upon his prior bad acts as opposed to looking only at the evidence at issue in this case. *See Reed*, 2000 UT 68, ¶31; *see also Wareham*, 772 P.2d 960,965.

Furthermore, even though the jury was not informed about Vu's prior 2003 conviction or given any details about his prior bad acts, the jury was given sufficient, prejudicial information to assume that Vu had committed prior bad acts when the jury was told that Vu was a "restricted person" with a "Category I" designation. R.203-04,265-67,364,601-02,624; *see also* R.364 (where the State prosecutor tells the jury that "the legislature has decided that there's some people who cannot legally possess firearms" and that there is a "*long proof* of why [Vu] is a restricted person") (emphasis added). The cumulative effect of these words and phrases, as well as the inherent derogatory and pejorative plain language

meaning of the terms “restricted person” and “Category I” designation, as determined by “the legislature[,]” would have led the jury to reasonably conclude that Vu previously did bad acts.<sup>4</sup> *Id.* And, because the jury was not fully instructed about the qualifying conviction that made Vu a restricted person, the jury could have reasonably surmised that the prior bad acts were more egregious than they in fact were.

In addition, although it was conveyed to the trial court that the stipulation was some sort of arrangement made by the attorneys to preclude the prosecution from putting on evidence of the pertinent prior felony in its case-in-chief, this stipulation had no upside and all downside to Vu as Utah’s bifurcation requirement indicates that without this stipulation, the prosecution could not have introduced the prior conviction in its case-in-chief anyway. R.266-67; *see Bishop*, 753 P. 2d at 498; *see also Reed*, 2000 UT 68, ¶20. Utah law is clear that without the stipulation, the prosecution could have only put on evidence of the conviction making Vu a restricted person if the jury had first concluded that Vu had possessed the firearm on May 8, 2014. *See id.* Thus, Vu was deprived of his fundamental right to a fair trial because his possession of a firearm charge was not bifurcated.

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<sup>4</sup> *See* <http://www.yourdictionary.com/restricted> (accessed on 8/4/2016), stating that “[t]he definition of restricted is something that is contained or limited in some way.” And, the definition of category is “a class or division in a scheme of classification.” Thus, from hearing only these words, the jury would have reasonably believed that Vu did something wrong in the past that put him in a special class of people that had lost freedoms, rights, or privileges.

A. A plain error analysis requires reversal.

Although defense counsel did not preserve this issue, it can be reviewed for plain error. Plain error requires reversal where “(i) [a]n error exists; (ii) the error should have been obvious to the trial court, and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome...” *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). First, as explained previously, an error exists because the possession of a firearm charge was not properly bifurcated. *See supra* Part I. The jury was therefore improperly informed of highly prejudicial information that impacted its ability to fairly decide the case. *See Reed*, 2000 UT 68, ¶31; *see also Wareham*, 772 P.2d 960, 965.

Second, the error was obvious. The “obviousness requirement poses no rigid and insurmountable barrier to review.” *See State v. Eldredge*, 773 P.2d 29, 35 n.8 (Utah 1989), *cert denied*, *Eldredge v. Utah*, 493 U.S. 814 (1989). Vu need only “show that the law governing the error was clear at the time the alleged error was made.” *State v. Dean*, 2004 63, ¶16, 95 P.3d 276. Here, the error should have been obvious to the trial court as the U.S. Constitution and Utah case law makes clear that Vu had a fundamental right to a fair trial, and that ensuring this right required the firearm charge to be bifurcated. U.S. Const. amend. XIV; *see also Bishop*, 753 P.2d at 449; *James*, 767 P.2d 549, at 556-57; *Reece*, 2015 UT 45, ¶19; *Wareham*, 772 P.2d 960, 965.

The error was also not invited. *See State v. Winfield*, 2006 UT 4, ¶15, 128 P.3d 1171 (stating that under the invited error doctrine, “a party cannot take

advantage of an error committed at trial when that party led the trial court into committing the error.”) (internal quotations omitted); *see also State v. McNeil*, 2013 UT App 134, ¶ 24, 302 P.3d 844, 852 (stating that “where trial counsel *affirmatively* waives an objection, we will not conduct a plain error review of the underlying issue.”) (emphasis added).

Defense counsel did not invite the error because counsel never affirmatively told the judge to not bifurcate the firearm charge, and counsel did not affirmatively lead the judge into informing the jury about Vu being a restricted person in the initial phase of the case before the jury first determined that Vu had possessed the firearm. *See id.* Here, defense counsel told the judge that “we’ll just let the jury know that [Vu] is a restricted person[,]” yet counsel did not inform the judge when or how this was to occur. R.266. In other words, counsel stipulated that the jury would be told that Vu was a restricted person, but counsel did not stipulate that the jury would be told about the stipulation as part of the initial phase of the trial. R.266-67. Counsel’s role regarding the procedural aspect of when the jury was to be given the stipulation was passive, not affirmative or proactive. *See id*; *see also Pratt v. Nelson*, 2007 UT 41, ¶23, 164 P.3d 366 (stating that defense counsel’s passive failure to file a timely response was not an “affirmative representation that led the court into error.”). Because invited error requires affirmative, not passive conduct by trial counsel, there was no invited error where trial counsel did not affirmatively object to a bifurcated proceeding and did not affirmatively seek to have the jury informed that Vu was a

restricted person before an initial jury determination that Vu possessed the firearm. *McNeil*, 2013 UT App 134, ¶24. Moreover, because the judge should have known that Utah law requires that the jury first determine that Vu possessed a firearm before being informed that Vu was a restricted person, defense counsel's statements and stipulation should have persuaded the trial judge to bifurcate the firearm charge rather than to give improper instructions to the jury that prejudiced Vu. *See Bishop*, 753 P.2d at 498; *Reed*, 2000 UT 68, ¶20.

Third, the error harmed Vu. Here, there was a reasonable probability of a different result but for the "pervasive" error of not bifurcating the firearm charge. *State v. Cox*, 2012 UT App 234, ¶2. Had the jury not been informed that Vu was a Category I restricted person, it would have properly decided its verdict on the evidence in this case as opposed to deciding its verdict on a need to punish Vu for his prior bad behavior. *See Bishop*, 753 P.2d at 498. Moreover, had the jury been focused only on the evidence in this case, there was a reasonable likelihood of a more favorable verdict for Vu where Vu did not own and was not located in the vehicle where the firearm was found, and where the firearm was not reported stolen, nor registered to Vu, and was found in a concealed location.

R.406,417,512-14,517,530,566-68. In addition, no contraband was found on Vu and the controlled substance was found in a closed pouch in a room that had been accessed by multiple persons, including drug addicts. R.367,385,392-93,414,438,459,497-99,502-03,510-12,519-20,535,538,561,565.



B. An ineffective assistance of counsel analysis requires reversal.

This Court may also review this issue under ineffective assistance of counsel. To prevail on this claim, a defendant must first, “‘identify specific acts or omissions demonstrating that counsel’s representation failed to meet an objective standard of reasonableness.’” *State v. Montoya*, 2004 UT 5, ¶24, 84 P.3d 1183. In evaluating counsel’s performance, “an ineffective assistance claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel’s actions.” *State v. Tennyson*, 850 P.2d 461, 468 (Utah Ct. App. 1993). Second, a defendant must show that “‘but for counsel’s deficient performance there is a reasonable probability that the outcome of the trial would have been different.’” *Montoya*, 2004 UT 5, at ¶23.

Here, counsel’s performance was deficient in failing to ask that the firearm charge be bifurcated, in telling the jury that Vu was a Category I restricted person before the jury had decided that Vu possessed a firearm on the date at issue, and in not objecting and asking for a mistrial when the prosecutor informed the jury that Vu was a Category I restricted person. *See James*, 767 P.2d 549, at 556-57; *Reece*, 2015 UT 45, ¶19; *Wareham*, 772 P.2d 960, 965; *see also State v. Draper-Roberts*, 2016 UT 151, ¶46 (holding that the trial judge should have granted a mistrial because of various discovery violations and prosecutorial misconduct that prejudiced the defendant). No reasonably adequate lawyer would fail to demand a bifurcation of the firearm charge so that the jury would not know about their client’s prior bad acts until they have first found him guilty of possessing the

firearm. In addition, a reasonably adequate lawyer would ensure that the jury was not told about the defendant's prior bad acts by himself, the prosecutor, the trial judge, or by prejudicial jury instructions.

Furthermore, there would be no strategic choice by defense counsel to not require that the firearm charge be bifurcated. *See Tennyson*, 850 P.2d at 468 (a strategic choice must be reasonable). A choice is not strategic if counsel simply fails to perform an important task. *See State v. Moore*, 2012 UT 62, ¶¶7-9, 19, 289 P.3d 487 (counsel performed deficiently when he failed to use important defense evidence that he had access to); *State v. Moritzsky*, 771 P.2d 688, 691-92 (Utah Ct. App. 1989) (counsel performed deficiently when he "overlooked the statutory presumption by failing to check the 'pocket-part' of the Utah Code").

Here, there would be "no tactical explanation for" defense counsel permitting the jury to be informed that the defendant was a Category I restricted person before first requiring the jury to determine that Vu possessed the firearm. *Tennyson*, 850 P.2d at 468. Not only was there a lack of evidence showing that Vu possessed the firearm, but Utah case law emphasizes the prejudicial impact that results when a jury is improperly informed about the prior bad acts of a defendant in lieu of bifurcation. *See Reed*, 2000 UT 68, ¶31; *see also Wareham*, 772 P.2d 960, 965. There was no potential upside to not bifurcating the possession of a firearm charge in this case, only a downside. Creating a scenario that is all downside for one's client is not a legitimate trial strategy. Therefore, because counsel failed to require the bifurcation of the firearm count and

improperly allowed the jury to hear evidence that Vu was a Category I restricted person prior to the jury determining whether Vu possessed the firearm, counsel performed deficiently.

Second, defense counsel's deficient performance prejudiced Vu. There was a reasonable probability of a different outcome but for counsel's deficient performance. *See State v. Ellifritz*, 835 P.2d 170, 174 (Utah Ct. App. 1992) (the prejudice analysis for plain error and ineffective assistance is the same). That is, as argued *supra* Part IA, there is a reasonable probability that the verdict would have been more favorable to Vu if the firearm charge had been properly bifurcated because there was a lack of evidence that connected Vu to the firearm and the controlled substance where Vu was not present in the vehicle where the firearm was found and did not have sole occupancy of the vehicle, and where the contraband was found in a closed pouch in a room that had been accessed by multiple people, including drug addicts. R.367,385,392-93,414,438,459,497-99,502-03,510-12,519-20,535,538,561,565.

**II. The trial court committed reversible error in admitting improper prejudicial character evidence of five controlled buys between Vu and a confidential informant that allegedly took place during the weeks preceding the execution of the search warrant in this case.**

Irrelevant and prejudicial evidence that Vu allegedly sold a confidential informant methamphetamine on various dates prior to the execution of the search warrant should have been excluded under Utah Rule of Evidence 404(b), 402, and 403. *See State v. Reece*, 2015 UT 45, ¶57, 349 P.3d 712 (2015). The

prohibition against the improper use of character evidence works to ensure that a defendant is convicted only because he committed the charged offense, and not because the jury is convinced of his proclivity to commit bad acts or of his cumulative bad behavior. *See Daines v. Vincent*, 2008 UT 51, ¶43, 190 P.3d 1269.

Determining whether bad acts evidence is admissible under Rule 404(b) is a three-step process. *See State v. Reece*, 2015 UT 45, ¶57; *see also State v. Nelson-Waggoner*, 2000 UT 59, ¶¶18-20, 6 P.3d 1120. First, “the trial court must first determine whether the bad acts evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in rule 404(b).” *Nelson-Waggoner*, 2000 UT 59, ¶18. “Second, the court must determine whether the bad acts evidence meets the requirements of rule 402 [of the Utah Rules of Evidence], which permits admission of only relevant evidence.” *Id.* ¶19. Third, Utah Rules of Evidence 403 requires that “the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.” *Reece*, 2015 UT 45, ¶57 (internal quotations and citations omitted); Utah R. Evid. 403. In meeting this three part test, “‘matters of conditional relevance must also meet the preponderance of the evidence standard under’ Rule 104(b).” *Reece*, ¶57 (quoting *State v. Lucero*, 2014 UT 15, ¶13, 328 P.3d 841).

Utah trial courts must “scrupulously examine[]” prior bad acts evidence. *State v. Verde*, 2012 UT 60, ¶13, 296 P.3d 673 (citation omitted). A court, when presented with 404(b) evidence, “should carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might

actually be aimed at sustaining an improper inference of action in conformity with a person's bad character." *Id.* ¶18. And, even where it supports both a "proper and improper inference under rule 404(b), the court should balance the two against each other under rule 403, excluding the bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose." *Id.*; Utah R. Evid. 403.

In this case, the trial court erred in admitting the 404(b) evidence because: A) the evidence of five alleged controlled buys between Vu and a confidential informant was not relevant to a proper, non-character purpose; furthermore, the State did not prove by a preponderance of the evidence that these alleged controlled buys occurred; B) any probative value of the controlled buys evidence was substantially outweighed by its prejudicial effect; C) reversal is required because there was a reasonable likelihood of a more favorable outcome if the controlled buys evidence had not been admitted. Lastly, D) this issue was preserved, but can also be reviewed for plain error.

A. Evidence of five alleged controlled buys between Vu and a confidential informant was not relevant to a proper non-character purpose.

The controlled buys evidence was not admissible under the first two steps of the 404(b) test because it was not relevant to a proper non-character purpose. Although the trial court admitted the evidence for identity purposes, the court erred because the controlled buys evidence did not clearly or uniquely link Vu to

the contraband or firearm that officers discovered. R.264; *see also Salt Lake City v. Alires*, 2000 UT App 244, ¶13, 9 P.3d 769 (allowing admission of other bad acts evidence for identity purposes where “the facts clearly link the two incidents and tend to identify [the] defendant”). In addition, there was not a “degree of similarity” between the alleged prior controlled buys and the facts of this case for the proper noncharacter purpose of identity to be met. *Lucero*, 2014 UT 15, ¶15 (“[A]dmissibility of prior acts for the purpose of identity requires (1) a very high degree of similarity between the charged and uncharged acts, and (2) a unique or singular methodology.”) (internal quotations and citations omitted).

Bad acts evidence in *Shaffer* was admissible to prove a proper noncharacter purpose of identity where it uniquely linked the defendant to the murder weapon. *State v. Shaffer*, 725 P.2d 1301 (Utah 1986). In *Shaffer*, the evidence that defendant had previously stolen a wallet and identification “was relevant to establishing the identity” where the gun used to kill the victim was obtained by the defendant using the stolen identification ten days before the homicide. *Id.* at 1308. Thus, it was reasonable for the jury to infer that defendant still possessed the gun during the murder because the 404(b) evidence uniquely linked him to the gun days before the murder and he had not reported it stolen. *See id.* 1308-09.

Our supreme court also held that evidence of the baby victim’s prior injuries was admissible for the proper purpose of proving identity where the prior injuries were “remarkably similar” to the injuries in the charged conduct. *Lucero*,

2014 UT 15, ¶16. In deciding whether there was a “degree of similarity” between the charged and uncharged conduct, the Court looked at “the time lapse between the crimes, and whether the crimes occurred in the same general locality.” *Id.* ¶15 (internal citation omitted). The “degree of similarity” requirement was met in *Lucero* where the injuries occurred within days of each other and were similarly located along the baby’s spinal column. *Id.* ¶16.

By contrast, this Court held that the similarity requirement for identity evidence was not met in a car theft case where the State sought to introduce prior act evidence that the defendant had previously stolen a car. *State v. Webster*, 2001 UT App 238, 32 P.3d 976. Even though the uncharged and charged conduct both showed “that (1) a car was stolen (2) from a dealership lot[,]” there was insufficient evidence to show that the prior act constituted unique and signature-type evidence for purposes of identity. *Id.* ¶35.

Here, the prior act evidence did not clearly or uniquely link Vu to the contraband or firearm that was found by officers in the apartment. *See Webster*, 2001 UT App 238, ¶35; *Shaffer*, 725 P.2d 1301,1308-09. First, there was no clear or unique link connecting the contraband that was allegedly sold in the controlled buys to the contraband that was recovered in this case. R.382-86,393,375,379,390-93,422-23,408-410,521-22,548-49,568. *Cf. Shaffer*, 725 P.2d 1301,1308-09. Unlike in *Shaffer*, it is not reasonable to infer that Vu still possessed the methamphetamine that he allegedly sold in the controlled buys because Vu would no longer possess the drugs he is accused of selling. *See id.*

Simply put, the methamphetamine found in the apartment is not the same methamphetamine that was allegedly sold. Moreover, because the methamphetamine at issue in the controlled buys and the methamphetamine discovered in the apartment all lacked any signature-type elements, there is no clear or unique link connecting the controlled buys to the facts of this case.

R.375,379,382-86,390-93,408-410,422-23,521-22,548-49,568. *Cf. Webster*, 2001 UT App 238, ¶35.

Likewise, there was no clear or unique link connecting the firearm that was discovered by officers in the Nissan with the gun that was allegedly seen by Emily during one of the controlled buys. R.415,448-49,513,516,552. Emily failed to give a sufficient description of the gun that she saw that would allow for a proper inference that she saw the firearm that was recovered by officers pursuant in the search. *See* R.448-49; *see also* R.462 (where Emily concedes that she could not identify a weapon after seeing one.). Without this description, it is possible that the gun that Emily saw was the airsoft gun and not the Glock 45 firearm, and Vu can only be convicted of the crime charged if he possessed the latter on the day of the search R.448-49,571; *see also* Exhibit D; *see also* Utah Code § 76-10-503(2)(a) (stating that it is a second degree felony for a Category I restricted person to be in possession of “a firearm”). *See also State ex rel. T.V.*, 2008 UT App 345, ¶17, 194 P.3d 973, 976 (where this Court held that there was sufficient evidence to establish that the gun was a firearm and not an airsoft gun.). Thus, because Emily did not provide a sufficient description that indicates that the gun



she saw at one of the controlled buys was a firearm, and because officers found an airsoft gun in the Nissan, there is no clear and unique link connecting the gun that she saw to the firearm that officers recovered.

Also, unlike in *Lucero*, the controlled buys incidents were highly dissimilar to the facts surrounding this case. 2014 UT 15, ¶16. The act of purposefully selling drugs for money is substantially different from the act of lying on a bed in the same room where contraband is located nearby in a closed container. R.403-08,411,508,520; *Cf. id.* In the controlled buys, Vu was allegedly planning drug deals over the telephone and personally hand-delivering drugs to the confidential informant. R.375,379-81,386,390-93,422-23,448,458. Yet, in this case, no one had been planning or attempting to buy methamphetamine from Vu on the day search warrant was executed. Thus, the facts of this case are highly dissimilar from those facts surrounding the alleged controlled buys. *Cf. Lucero*, 2014 UT 15, ¶16.

In addition, the admission of the bad acts evidence alleging that Vu sold methamphetamine to a confidential informant on various occasions was unnecessary and irrelevant. *See State v. Reece*, 2015 UT 45, ¶64. To be relevant, the evidence must make “the existence of [a material, consequential] fact . . . more probable or less probable than it would be without the evidence.” *Lucero*, 2014 UT 15, ¶17 (citation omitted); Utah R. Evid. 401. Because selling methamphetamine is a substantially different act from being in a room where contraband is found in a closed container, allegedly selling drugs in the past does

not make it more probable that Vu possessed the drugs or firearm found pursuant to the issuance of the search warrant. Thus, the previous controlled buys were irrelevant to any fact of consequence in this matter.

Further, the State did not prove by a preponderance that the controlled buys occurred. *See Reece*, 2015 UT 45, ¶64; *Lucero*, 2014 UT 15, ¶19 (“In the context of rule 404(b), ‘similar act evidence is relevant only if the jury can reasonably conclude [by a preponderance of the evidence] that [1] the act occurred and that [2] the defendant was the actor.’”) (citation omitted); *see also Lucero*, ¶19 (citing Rule 104).

Here, the evidence of Vu’s participation in the controlled buys was based upon the testimony of Emily, the confidential informant. R.375-79,382-86,390-93,420-27,432,446-48,458-59. Emily’s testimony, however, was unreliable as she was a drug addict who had been charged and/or convicted of numerous crimes that involved her acting with deception, including fraud, forgery, mail fraud, identity fraud, and attempted use of a financial transaction card. R.379,434-35,445-47,452-57,460-63. These various charges and convictions occurred both prior to and after her work as an informant. *Id.* In addition, Emily was incentivized to be dishonest and incriminate Vu because she believed that she would face prison time and federal charges if she couldn’t “produce... something” about the officer’s “target” in the “Deja Vu investigation.” R.430-31,452-53,525-26.

Any one of the “multiple people” inside of the apartments could have sold the controlled substances to Emily at the controlled buys. R.385,392-93,459. In addition, even though Daley believed that he saw Vu at the second controlled buy near the gas station, Daley did not see Vu give Emily drugs, and there was a second person in the vehicle who could have given the drugs to Emily. R.386-89. There was no testimony that Daley or any other officer saw Vu give Emily drugs at any of the controlled buys. *See* R.385-86,389,391-93. Thus, because the evidence that Vu participated in the controlled buys was based on the unreliable testimony of Emily, the bad act evidence was not proven by a preponderance of the evidence and was improperly allowed in at trial. *Cf. Lucero*, 2014 UT 15, ¶13.

Ultimately, the controlled buys incidents involving Vu and a confidential informant were used to show “that [Vu] has a reprehensible character, that he probably acted in conformity with it, and that he should be punished for his immoral character in any event.” *Verde*, 2012 UT 60, ¶29. Because the uncharged conduct was irrelevant and lacked any legitimate purpose under 404(b), the judge abused his discretion in admitting it.

B. Any probative value of the controlled buys evidence was substantially outweighed by its prejudicial effect.

Although the evidence of the controlled buys incidents was not relevant, even if it was, it should not have been admitted because the little to no probative value was substantially outweighed by its prejudicial effect. *See Reece*, 2015 UT 45, ¶169. Under the third step, the trial court must evaluate whether admission of

the prior bad act evidence violates Utah Rule of Evidence 403, which excludes relevant evidence where “its probative value is substantially outweighed by the danger of one of the following: unfair prejudice, confusing the issues, [or] misleading the jury....” Utah R. Evid. 403. Furthermore, in assessing admissibility under Rule 403, a multi-factor test has been applied to ensure that matters of “scant or cumulative probative force” are not “dragged in by the heels for the sake of [their] prejudicial effect.” *State v. Bartley*, 784 P.2d 1231, 1237 (Utah Ct. App. 1989) (quotations and citations omitted). Some of the factors a court may consider include:

[T]he strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

*State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988) (quotations marks omitted); *see also Lucero*, 2014 UT 15, ¶32 (stating courts “are bound by the text of rule 403, not the limited list of considerations outlined in *Shickles*.”)

Here, contrary to the trial court’s conclusion, substantial prejudice resulted from the admission of the controlled buys evidence. *See* R. 265 (where the trial court states that “I don’t think that this [evidence] is unfairly prejudicial.”); *see also* Utah R. Evid. 403; *see also Shickles*, 760 P.2d, 295-96 (Utah 1988). First, “the strength of the evidence” is weak because as stated *supra* Part IIA, no evidence substantiated these allegations by a preponderance; the only evidence of Vu participating in these controlled buys was provided by a confidential

informant whose testimony was inherently unreliable because of her criminal history, admitted drug use, and incentives to lie and incriminate Vu. R.379,430-35,445-47,452-57,460-63,525-26. Moreover, Detective Daley never saw Vu give Emily drugs at any of the controlled buys, and although Daley testified that he saw Vu in the Nissan at the second controlled buy, he did not see any sort of drug exchanged between Vu and Emily, and there was a passenger in the vehicle who could have given the controlled substance to Emily. R.385-86,389,391-93.

Second, there is a lack of similarities between the controlled buys and the facts of this case. As stated *supra* Part IIA, there is a substantial difference between planning and selling a controlled substance, and lying on a bed in a room that is frequented by multiple people, including drug users, where a controlled substance is found nearby in a closed container. R.385,392-93,403,406-08,411,459,508,520.

Finally, evidence that Vu engaged in the alleged controlled buys but was not criminally charged would unfairly appeal to jurors' sympathies, arouse their sense of horror, provoke their instinct to punish, and create confusion to Vu's detriment. *State v. Troyer*, 910 P.2d 1182, 1191 (Utah 1995). Here, the prior uncharged conduct "strongly suggest[ed] to the jury the likelihood that [Vu] may have acted in conformity with the bad character implied by his [alleged drug selling] acts." *Verde*, 2012 UT 60, ¶41. The admission of this evidence "pose[d] an untenable risk of confusing jurors as to the real purpose for which the evidence

was offered and of swaying jurors to base a verdict on the strong inference of action in conformity with bad character. *Id.*

Thus, because the above factors weighed in favor of Vu, the evidence of the controlled buys was unduly prejudicial and inadmissible. Utah R. Evid. 403; see also *Shickles*, 760 P.2d, 295-96 (Utah 1988).

C. Admission of the evidence requires reversal.

The trial court committed reversible error in admitting the alleged controlled buys evidence because in the “absence of the evidentiary errors, there [was] a reasonable likelihood of a more favorable outcome for [Vu].” *State v. Bujan*, 2006 UT App 322, ¶15, 142 P.3d 581 (internal citation omitted). The admission of the 404(b) evidence undermined confidence in the outcome because the improper conduct evidence was unduly prejudicial, overpowered the case, and diverted the jury’s attention from the issues. On the day the search warrant was executed, Vu did not own and was not located in the vehicle where officers found the firearm. R.406,414,512. In addition, the firearm was not reported stolen and was not registered to Vu. R.514,517. Although there was evidence that Vu had been seen driving the Nissan on previous days, the evidence also showed that the firearm had been concealed by a panel that had likely been removed by officers during their search of the car. R.417-18,512-14,530,566-68. Thus, even if Vu was driving the vehicle, he would not have seen nor possessed the firearm.

In addition, although Vu was found lying on a bed near the pouch where the contraband was located, no contraband was found on him. R.408-09,414,521-

22,548-49,535,538,568. The evidence also showed that “multiple people,” including drug addicts, had access to this this room on the day and during the weeks preceding the issuance of the search warrant (i.e. Shaley, Caitlyn, Jose, etc.). R.385,367,392-93,438,459,497-503,510-512,561,565. Thus, had the jury not been improperly apprised of the alleged controlled buys between Vu and the confidential informant, there is a strong likelihood that the jury would have acquitted. *Bujan*, 2006 UT App 322, ¶15.

The jury verdict in this case also indicates that without the evidence of the controlled buys, there was a reasonable likelihood that the jury would have acquitted Vu. R.167-76,214-19. The jury found Vu not guilty of the possession of marijuana charge in this case. Yet, the marijuana that officers discovered was closer to Vu than was the firearm. R.167-76,214-19,549-550,523-24. Thus, in finding Vu guilty of possessing the firearm, but not the marijuana, the jury’s verdict was likely based not on the proximity of the pertinent items to Vu, but on the impact of the irrelevant and prejudicial bad act evidence that Vu previously sold drugs, and that on one of these occasions, he was near a gun. Thus, without this harmful bad act evidence, there was a reasonable likelihood of a more favorable outcome for Vu. *Bujan*, 2006 UT App 322, ¶15.

D. This issue can also be reviewed for plain error.

This issue was preserved by a motions and an objection made by defense counsel on the first day of trial, R.255-260,264-266,378, but it can also be reviewed for plain error. *See State v. Powell*, 2007 UT 9, ¶18, 154 P.3d 788. First,

the court committed error under Rules 104, 402, 403, and 404(b) in admitting the alleged controlled buys evidence where it was irrelevant and improper 404(b) character evidence, where the court did not require the State to prove by a preponderance that Vu was the person who sold methamphetamine to the confidential informant at the controlled buys, and where the evidence was more prejudicial than probative. *See supra*, Part II; *Reece*, 2015 UT 45, ¶157; *Lucero*, 2014 UT 15, ¶13. Second, this error was obvious because the law regarding the test to be applied for admitting proposed Rule 404(b) is well settled. *See Powell*, ¶18; *Lucero*, ¶13. Lastly, this error prejudiced Vu because admission of the alleged controlled buys evidence undermined confidence in the outcome. *See Powell*, ¶18. That is, there was a likelihood of a more favorable outcome for Vu had the controlled buys incidents been excluded where the methamphetamine was found in a closed pouch in a room frequented by multiple people, including drug users, where Vu was found lying on a bed, and where no drugs were found on Vu. R.367,385,392-93,408-09,414,438,459,497-503,510-512,521-22,548-49,561,565; *See also supra*, Part IIA.

### **III. The cumulative errors require reversal.**

Considering “all the identified errors” addressed above, “as well as any other errors [this Court] assume[s] may have occurred,” this Court should reverse because ““the cumulative effect of the several errors undermines [] confidence ... that a fair trial was had.”” *State v. Kohl*, 2000 UT 35, ¶25, 999 P.2d 7 (final alteration in original)(citations omitted). Here, the court erroneously



failed to bifurcate the possession of a weapon by a restricted person charge, and because the jury heard that Vu was a Category I restricted person, the jury could have easily surmised that Vu did something really bad so as to lose his right to possess a gun. *See supra* Part I. The court also erred in admitting irrelevant and prejudicial character evidence that Vu had allegedly sold methamphetamine to a confidential informant, and that Vu was seen near a gun on one of those occasions. *See supra* Part II.

The cumulative effect of these prejudicial errors improperly suggested to the jury that it was perhaps Vu's participation in the controlled buys that resulted in him being a restricted person, or that Vu routinely did all sorts of bad things for which the jury needed to find him guilty. Moreover, the cumulative effect of these prejudicial errors undermines confidence in the outcome where the evidence showed that multiple drug users frequented the room and apartment where the methamphetamine was found, where no contraband was found on Vu, where Vu was not located in and did not own the vehicle containing the concealed firearm, where the firearm was not reported stolen and was not registered to Vu, and where there was no fingerprint or DNA evidence to prove that Vu had possessed the contraband or the firearm. R.367,385,392-93,406,414,438,459,497-99,502-03,510-14,517-23,535,538,561-65,576.

**IV. The evidence was insufficient to support that Vu constructively possessed either a controlled substance with the intent to distribute it or a firearm on the day the search warrant was executed.**

The State failed to prove beyond all reasonable doubt that the Vu possessed either a controlled substance or a firearm on May 8, 2014. *See* Utah Code §58-37-8(1)(a)(iii), Utah Code §76-10-503(2) (where both crimes require, in part, that the accused be in possession of the requisite item). While the State did not need to prove that Vu had actual possession of these items in order to convict, the State nevertheless had to introduce sufficient evidence to establish constructive possession, which is a “nexus between the accused and the drug [and firearm]” sufficient enough to allow “an inference that the accused had both the power and the intent to exercise dominion and control over [these items].” *State v. Fox*, 709 P.2d 316, 319 (Utah 1985)); *see also State v. Hansen*, 732 P.2d 127, 131-32 (Utah 1987); *Spanish Fork City v. Bryan*, 1999 UT App 61, ¶7, 975 P.2d 501; *State v. Gonzalez-Camargo*, 2012 UT App 366, 293 P.3d 1121. Whether there is a sufficient “nexus between [a] defendant and the [pertinent items] depends upon the facts and circumstances of [each] case,” *State v. Salas*, 820 P.2d 1386, 1388 (Utah Ct. App. 1991) (citation omitted), and “[t]here must be facts which show that the accused intended to use the [items] as his own.” *State v. Layman*, 1999 UT 79, ¶13, 985 P.2d 911, 913.

In order to establish constructive possession, the State must do more than establish “mere occupancy of a portion of the premises where the drug [or

firearm] is found.” *Hansen*, 732 P.2d at 132; *Gonzalez-Camargo*, 2012 UT App 366, ¶17. Knowledge of the existence of the contraband and/or the firearm “and their potential for illegal use” is also not sufficient to establish constructive possession. *Bryan*, 1999 UT App 61, ¶7. Thus, “[k]nowledge and ability to possess do not equal possession where there is no evidence of intent to make use of that knowledge and ability.” *Fox*, 709 P.2d at 319.

Our supreme court’s decision in *Fox* illustrates the level of evidence necessary to establish the requisite nexus that must exist between the defendant and contraband to establish constructive possession. *Id.* *Fox* held that the State failed to establish that Clive Fox constructively possessed the contraband found in a house he shared with his brother, Gary, while also holding that the evidence was sufficient to establish constructive possession by Gary. *Fox* recognized that some of the factors “which might combine to show a sufficient nexus between the accused and the drug are:” incriminating statements or behavior, “presence of drugs in a specific area over which the accused had control, such as a closet or drawer containing the accused’s clothing or other personal effects,” or “presence of drug paraphernalia among the accused’s personal effects or in a place over which the accused has special control.” *Id.* The *Fox* court concluded that the evidence established a sufficient nexus between Gary Fox and the marijuana plants because (1) he owned the house, (2) his personal effects were in the same room as contraband and a book on growing marijuana, and (3) greenhouses containing contraband were built onto his house, giving rise to a “reasonable

inference that he not only knew of the greenhouses and their contents but also had the power and intent to exercise dominion and control over the marijuana located in them.” *Id.* at 320.

By contrast, the evidence did not establish constructive possession by Clive Fox. *Id.* While *Fox* concluded that Clive knew marijuana was being grown in the house, more than mere knowledge was required to prove that he intended to exercise dominion and control over the contraband. *Id.* In fact, “evidence supporting the theory of ‘constructive possession’ must raise a reasonable inference that the defendant was engaged in a criminal enterprise and was not simply a bystander.” *Id.* Although Clive lived in the house where marijuana was being grown, the room where he slept had no marijuana or paraphernalia. Accordingly, *Fox* concluded that the evidence was insufficient to establish that Clive constructively possessed the marijuana being grown in the house where he lived. *Id.*

Our supreme court likewise concluded that the evidence was insufficient to establish constructive possession in *Layman*. 1999 UT 79, ¶16. In *Layman*, the contraband was found in a waistband pouch of a woman who was in the car defendant was driving. *Id.* ¶8. Although Layman knew the drugs were in the pouch and “shook his head in a negative fashion” after the woman looked at him when the officer asked to search the pouch, the evidence failed to establish that he “had such control over [the woman’s] person that one could reasonably infer beyond a reasonable doubt that he knowingly and intentionally possessed the

drugs and paraphernalia in her pouch.” *Id.* ¶16. *Layman* clarified that “[n]either her presence in his vehicle, his erratic behavior after the traffic stop, *nor his use of drugs at some earlier time*” were sufficient to establish the required nexus. *Id.* (emphasis added).

This Court concluded that the evidence was insufficient to establish constructive possession where officers received a tip that the defendant would be driving a certain vehicle and was in possession of cocaine. *Salas*, 820 P.2d at 1387. In *Salas*, officers stopped a vehicle which was co-owned and being driven by the defendant, and was occupied by a “passenger in the frontseat and one in the backseat.” *Id.* Officers searched the car and found cocaine “in the crack of the backseat on the driver’s side, where the bottom of the cushion fits the back.” *Id.* The passenger in the backseat was seated behind the front seat passenger, but had been seated behind the driver and moved when the car was stopped. *Id.* *Salas* concluded that constructive possession was not proven where “[the passenger’s] furtive movement, coupled with the fact that the cocaine was found under the backseat where a passenger had been sitting, renders the remaining evidence sufficiently inconclusive as to whether defendant knew of the presence of the cocaine or had the intent to exercise dominion and control over the cocaine.” *Id.* at 1388. This Court reiterated that mere presence in the premises or vehicle where contraband is located is not enough to establish constructive possession where occupancy is not exclusive. *Id.* Where a defendant is not the

sole occupant and does not have sole access to contraband, additional evidence is required in order to establish constructive possession. *Id.*

This Court also held that the State failed to prove that a defendant constructively possessed contraband found in a metal box in a shared bedroom of a house that was occupied by a number of other people. *Gonzalez-Camargo*, 2012 UT App 366, ¶26. This Court again recognized that in circumstances where a defendant does not have exclusive control of the area where the contraband was found, “it cannot be inferred that he knew of the presence of such drugs and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference.” *Id.*, ¶22 (quoting *State v. Anderton*, 668 P.2d 1258, 1264 (Utah 1983) (Durham, J., concurring)). In fact, “the defendant’s joint occupancy of the premises where the controlled substance is discovered must be combined with other evidence sufficient to establish the defendant’s knowing and intentional control over it.” *Gonzalez-Camargo*, 2012 UT App 366, ¶17 (citation omitted).

Circumstances “tending to buttress” an inference of constructive possession can include commingling of the contraband with the defendant’s property, incriminating statements or behavior, the defendant’s proximity to the drugs, evidence that the defendant participated in the use of the item, evidence directly linking the defendant to the contraband, or other evidence that the defendant had the ability and intention to exercise dominion and control over the contraband. *Id.*, ¶22. But, “[t]aken alone, it is not likely that any one, or even a

small group, of these factors would be enough to establish a sufficient nexus;” instead, the cumulative effect of a number of factors is required to sufficiently establish the requisite nexus between the defendant and the contraband. *Id.* (quoting *State v. Workman*, 2005 UT 66, ¶35, 122 P.3d 639).

In *Lucero*, there was an insufficient nexus between the defendant and the contraband to establish constructive possession when it was “within [defendant’s] reach and that [defendant] denied owning it.” 2015 UT App 120, ¶22, 350 P.3d 237. In *Lucero*, officers found a backpack containing a digital scale, drugs, a stolen handgun, and a packet of thank-you notes behind the passenger seat of the defendant’s car. *Id.* ¶3. A search of the passenger’s purse and person uncovered more contraband and drug paraphernalia. *Id.* ¶3. The *Lucero* court explained that in joint occupancy cases, “the quantum of ‘other evidence’ needed to support an inference of power and intent to exercise dominion and control equals the quantum of evidence sufficient to eliminate reasonable doubt.” *Id.* ¶13. Sufficient “other evidence” described by the *Lucero* court included “[defendant’s] personal items were intermingled with [the contraband],” defendant’s incriminating statements, defendant’s admitted previous drug use, and defendant’s repeated presence in an area “known for drug activity.” *Id.* ¶¶13, 14. *Lucero* held that the defendant’s co-occupancy of the vehicle, the location of the contraband, and his denial of ownership were insufficient “other evidence” to eliminate reasonable doubt that he constructively possessed the contraband. *Id.* ¶22.

By contrast, our supreme court held that evidence supported constructive possession where contraband was found in a truck that the defendant was seen repeatedly driving in an “area known for drug activity during late night and early morning hours, while carrying a large amount of cash.” *State v. Ashcraft*, 2015 UT 5, ¶21, 349 P.3d 664, 671. The *Ashcraft* court also pointed out that the contraband was in close proximity to the defendant, that the defendant immediately accused the arresting officer of planting the contraband in the truck when asked about it, and that heroin was discovered on a pocketknife that the defendant was carrying. *Id.* *Ashcraft* emphasized that “[e]ach of these pieces of evidence would, taken on its own, be a slim basis for inferring possession...[b]ut cumulatively [,] this evidence is sufficient to sustain a reasonable jury verdict.” *Id.* ¶22.

A. The marshaled evidence fails to establish constructive possession of both the contraband and firearm.

The evidence, in the light best to the verdict, is even less compelling than the evidence linking defendants to the contraband in *Salas*, *Fox*, *Layman*, *Gonzalez-Camargo*, and *Lucero* where Utah appellate courts have held that the State’s evidence failed to prove a sufficient nexus between the defendant and the contraband. Applying these cases, the evidence failed to establish beyond a reasonable doubt that Vu constructively possessed the contraband found in Room 5, or the firearm found in the 2009 Nissan. *Cf. Ashcraft*, 2015 UT 5, ¶22.



The marshaled evidence supporting Vu's convictions is the following: <sup>5</sup>

1. Emily testified that before the search warrant was executed, she had planned and completed five controlled drug buys with Vu in which she received approximately an "eight ball" of methamphetamine. R.379,381,386,390-393,422,448,458,466. At the last controlled buy, Emily noted that Vu had an "abnormal" amount of U.S. Currency. R.393.
2. When Vu was arrested, officers found cash in his pockets. R.414,534-535,538.
3. Officers found a firearm in a Nissan that Vu had been "kind of subleas[ing]. R.512-513. Officers also found Vu's driver's license in the vehicle. R.408.
4. GPS monitoring and physical surveillance showed that Vu had been driving the Nissan on multiple occasions between the apartment complex and other locations that were a part of the officer's investigation. R.416-18,512,531.
5. Detective Daley observed Vu driving the Nissan during the second controlled buy. R.387-88,406,415,512.
6. Emily saw Vu with a handgun on one occasion when she went to purchase drugs from him. R.448-49. She saw the handgun when Vu lifted the console in the Nissan in order to retrieve her drugs. *Id.* Emily also testified that Vu previously asked her if she knew of someone who could get a gun for him, and on another occasion, Vu asked Emily if she knew of anyone that was looking to buy a gun because he had a couple guns for sale. R.449.
7. A black pouch containing three "baggies" of methamphetamine was found in Room 5, next to the bed where Vu was found lying. R.408-09,521-22,548-49,568. Vu's Wendover player's card was found in this same room. R.522,568. Men's clothing was found in the closet in this room. R.565.
8. Daley testified that based upon his experiences, the amount of methamphetamine found in the baggies was a distribution amount and not a personal use amount. R.410.
9. Shaley told officers that Vu had been staying in her apartment for "a couple of months." R.408,409,506.
10. Daley testified that when he saw Vu, Vu was "out of it" and appeared to be "coming off of" methamphetamine. R.519,538-39.

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<sup>5</sup> See Utah R. App. P. 24 (a)(9); *State v. Nielsen*, 2014 UT 10, ¶¶40-44, 326 P.3d 645.

11. Emily testified that at the fourth controlled buy, she saw Vu “smoking meth out of a pipe.” R.392.
12. A ledger or notebook containing “different amounts” and a bag of marijuana was found in Room 1. R.570.

1. The marshalled evidence failed to prove that Vu possessed the controlled substance.

The State failed to prove beyond all reasonable doubt that Vu possessed the methamphetamine that officers found in a closed pouch because it is just as possible that this drug belonged to any one the occupants of the apartment who were present when the search warrant was issued, or to any one of the “multiple people” who were in this “meth house” when Emily went to the apartment to buy drugs in the weeks prior to the search. R.385,392-93,459,519-520; *see also Salas*, 820 P.2d at 1387. When the warrant was executed, there were four individuals, besides Vu, who were located in the apartment. R.367,438,497,502-03,561,565. And it was Shaley, not Vu, who was renting the apartment. R.506; *see also Fox*, 709 P.2d at 320. In addition, Caitlyn and Jose, both of whom had outstanding warrants and a history of using drugs, had just left the apartment prior to the officer’s entry. R.438,497,510. When Caitlyn returned to the apartment, she not only admitted to being a “drug user[,]” but she was also in possession of syringes. R.499. Like in *Salas* and unlike in *Ashcraft*, Vu “did not have drugs or drug paraphernalia on his person at the time of the arrest.” *Salas*, 820 P. 2d at 1389; *cf. Ashcraft*, 2015 UT 5, ¶21. R.414,535,538.

Here, there was not as much evidence as there was in *Ashcraft* in connecting Vu to the controlled substance where Vu was found lying on a bed in Room 5 near his Wendover card and an envelope addressed to him that did not match the apartment. R.403,406-08,411,507-08,520-22,568; *see also Ashcraft*, 2015 UT 5, ¶21. In addition, the contraband in Room 5 was not in plain view, but was in baggies inside a closed pouch. R.408-09,521-22,548-49,568. Neither the pouch nor the baggies containing drugs were tested for fingerprints nor subjected to DNA analysis. R.558-59. Moreover, the contraband was not found “in a place over which [Vu] ha[d] special control,” *Fox*, 709 P.2d at 319, as the room had been accessed by many people as indicated by the identifying documents belonging to various people that were found in the room, as well as the double bed which made officers believe that Shaley routinely “stayed” in the room. R.520,523,565-66,576. Although men’s clothing was found in the room, no evidence was presented that it belonged to Vu. R.565. There was also no evidence of Vu making incriminating statements, furtive movements, or accusations related to the contraband while officers conducted their search. *See Salas*, 820 P. 2d at 1388 (indicating that a defendant’s incriminating behavior can support constructive possession); *see also Gonzalez-Camargo*, 2012 UT App 366, ¶22; *Ashcraft*, 2015 UT 5, ¶21. And, the fact that Vu appeared to be “out of it” and “coming off of” prior methamphetamine use was not sufficient to show that he was in possession of the drugs in the room. *See Layman*, 1999 UT 79, ¶16.

For argument's sake, even assuming that the evidence was sufficient to show that Vu possessed the methamphetamine in the apartment, the evidence was still insufficient to show that Vu had the intent to distribute this drug. The ledger containing numbers, but not monies or weight amounts, was found in a bag in a room not occupied by Vu, and officers never determined who authored it. R.569-70. In addition, the cash found on Vu did not indicate intent to sell the drug, as this cash, along with Vu's Wendover player's card, more likely indicated Vu's gambling winnings. R.522,568; *see also* R.535 (where Daley testifies that the Wendover casinos usually "pay out in cash."). Moreover, as argued *supra* Part IIA, the evidence of the prior controlled buys involving Vu was not reliable, but even if it was, it did not establish that Vu had the intent to sell the methamphetamine found on May 8, 2014 where Vu was merely found lying on a bed in a room that had been frequented by multiple people, including drug users. R.385,392-93,403,406-08,411,438,459,487,508-10,520. Thus, the evidence failed to support that Vu possessed, let alone possessed with the intent to sell, the contraband found by officers in this case.

2. The marshalled evidence failed to prove that Vu possessed the firearm.

The State also failed to prove beyond all reasonable doubt that Vu possessed the firearm in this case that was discovered in the Nissan. R.406,414-15,512-16,552. First, Vu was not in the vehicle when it was searched and the firearm was found. R.403,406-08,411. In addition, Vu was not the owner of this

vehicle, and although Vu was “kind of subleas[ing]” the vehicle, and Vu had been seen driving the vehicle on previous days, the evidence did not establish that Vu had exclusive occupancy of the vehicle. R.513,406,417-18,512,530; *see also* R.387-88 (where Daley testifies that he observed Vu and a passenger in the vehicle, which indicates that at least one other person had access to this vehicle.); *see also Lucero*, 2015 UT App 120, ¶22. During the times that Vu was inside the vehicle, he would not have seen the firearm because it had been most likely been concealed by a panel that was assumed to have been removed by the officers who searched the car. R.513-14,566-68. Ultimately, Vu’s use of the Nissan does not establish that he constructively possessed the firearm in the vehicle. *See Hansen*, 732 P.2d at 131-32; *Gonzalez-Camargo*, 2012 UT App 366, ¶17 (requiring more than mere ownership or occupancy to establish constructive possession).

Second, the evidence linking Vu directly to the firearm was also lacking. The firearm was not registered to Vu and had not been reported stolen. R.514,517. And, the firearm was not tested for fingerprints or DNA evidence. R.517-18,536-37,558,569-70. Officers obtained a name and address for the gun’s registered owner, but were unable to contact the owner. R.514-15. In addition, the fact that Emily said that on one occasion, she saw Vu near a gun when installing a stereo system in the vehicle did not sufficiently link Vu to the firearm that officers discovered because as stated *supra* Part IIA, Emily did not provide a sufficient description of the gun she saw that indicates that this gun was the pertinent

firearm and not the airsoft gun that officers also found in the Nissan. R.415,448-49,513,516,552,571; *see also* Exhibit D.

In all, the State failed to introduce sufficient evidence to prove beyond a reasonable doubt that Vu intended to exercise dominion and control over the contraband or the firearm, or that a sufficient nexus existed between Vu and the contraband or the firearm so as to prove that Vu constructively possessed these items. *See Fox*, 709 P.2d at 319. Where it is just as likely that someone other than Vu possessed the black pouch and its contents and the firearm found in the vehicle, the convictions for the two possessory crimes should be overturned. *See Salas*, 820 P.2d at 1387.

This issue was preserved by Vu's motion to dismiss at the close of the State's case. R.583-584. Counsel argued that the evidence was insufficient to show that Vu had constructive possession over the contraband in the bedroom, or that the firearm found in the vehicle was his. R.583-84,587; *see also* R.584 (where counsel says that the evidence "doesn't even reach the level of [showing] that [the contraband] was his.").

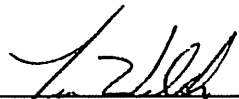
This Court can also review the issue for plain error. *See Mohamed*, 2012 UT App 183, ¶3; *see also State v. Holgate*, 2000 UT 74, ¶17 (stating that "the trial court plainly errs if it submits the case to the jury and thus fails to discharge a defendant when the insufficiency of the evidence is apparent to the court."). First, as outlined *supra* Part IV, Utah's constructive possession case law shows that there was insufficient evidence to support the convictions because there was no

evidence establishing a nexus between Vu and the contraband or the firearm. And, because this error requires nothing more than a straightforward application of Utah's constructive possession case law, it was obvious. *See supra*, Part IV. Moreover, it was prejudicial since the convictions should be overturned. Hence, the convictions can be reversed for plain error. *See Holgate*, 2000 UT 74, ¶17.

#### CONCLUSION

Based on the foregoing, Vu respectfully requests that this Court reverse and remand with an order of dismissal because the evidence was insufficient. Alternatively, Vu asks this Court to reverse and remand for a new trial because the jury was improperly informed that he was a Category I restricted person, and because of the admission of the improper Rule 404(b) character evidence of the alleged controlled buys between him and a confidential informant.

SUBMITTED this 30<sup>th</sup> day of August, 2016.

  
\_\_\_\_\_  
TERESA L. WELCH  
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains less than 14,000 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

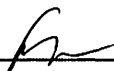
  
\_\_\_\_\_  
TERESA L. WELCH

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 30<sup>th</sup> day of August, 2016.

  
\_\_\_\_\_  
TERESA L. WELCH

DELIVERED this 30 day of August, 2016.

  
\_\_\_\_\_



Tab A

The Order of the Court is stated below:

Dated: December 30, 2015  
09:20:09 AM

At the direction of:  
L Douglas Hogan  
District Court Judge

by  
/s/ Salome Tukufu  
District Court Clerk

3RD DIST. COURT - WEST JORDAN  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 141400723 FS
THOMAS J VU,	:	Judge: L DOUGLAS HOGAN
Defendant.	:	Date: December 15, 2015
Custody: Salt Lake County Jail		

---

PRESENT

Clerk: salomet

Prosecutor: WAYMENT, DAVID H T

Defendant

Defendant's Attorney(s): NISH, JONATHAN T

DEFENDANT INFORMATION

Date of birth: October 8, 1979

Sheriff Office#: 217939

Audio

Tape Number: 31 Tape Count: 8:54

CHARGES

1. POSSESSION OF A DNGR WEAP BY RESTRICTED - 2nd Degree Felony  
- Disposition: 10/02/2015 Guilty
2. POSS W/ INTENT TO DIST C/SUBSTANCE - 2nd Degree Felony  
- Disposition: 10/02/2015 Guilty

SENTENCE PRISON

Based on the defendant's conviction of POSSESSION OF A DNGR WEAP BY RESTRICTED a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/SUBSTANCE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Case No: 141400723 Date: Dec 15, 2015

---

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE  
Count 1 and 2 is to run concurrent to each other.

ALSO KNOWN AS (AKA) NOTE  
TJ  
TJ VU  
TOMMY VU

Credit is granted for time served.  
Credit for time served of 490 days that was previously served.

CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

End Of Order - Signature at the Top of the First Page

Tab B

## **U. S. Constitution Amendment XIV**

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## Utah Code § 58-37-8

### (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 or counterfeit substance with intent to distribute; or
- (iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct which results in any violation of any provision of Title 58, Chapters 37, 37a, 37b, 37c, or 37d that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Title 58, Chapters 37, 37a, 37b, 37c, or 37d on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

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

(i) a substance or a counterfeit of a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance or a counterfeit of a substance classified in Schedule III or IV, or marijuana, or a substance listed in Section 58-37-4.2 is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance or a counterfeit of a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) Any person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on his person or in his immediate possession during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) Any person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.



(2) Prohibited acts B--Penalties:

(a) It is unlawful:

- (i) for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the person's professional practice, or as otherwise authorized by this chapter;
- (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; or
- (iii) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

- (i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;
- (ii) a substance classified in Schedule I or II, marijuana, if the amount is more than 16 ounces, but less than 100 pounds, or a controlled substance analog, is guilty of a third degree felony; or
- (iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including a substance listed in Section 58-37-4.2, or less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction the person is guilty of a third degree felony.

(e) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) Any person convicted of violating Subsection (2)(a)(ii) or (iii) is:

- (i) on a first conviction, guilty of a class B misdemeanor;
- (ii) on a second conviction, guilty of a class A misdemeanor; and
- (iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in the person's body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in the person's body:

(i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;

(ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4 (2)(a)(iii)(S) or (AA), or a substance listed in Section 58-37-4.2 is guilty of a third degree felony; or

(iii) any controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(i) A person is guilty of a separate offense for each victim suffering serious bodily injury or death as a result of the person's negligent driving in violation of Subsection 58-37-8 (2)(g) whether or not the injuries arise from the same episode of driving.

### (3) Prohibited acts C--Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent oneself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.



(b) Any person convicted of violating Subsection (3)(a) is guilty of a third degree felony.

(4) Prohibited acts D--Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (4)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in or on the grounds of a library;

(ix) within any area that is within 1,000 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iv), (vi), and (vii);

(x) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or

(xi) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of any correctional facility as defined in Section 76-8-311.3.

(b)(i) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this Subsection (4) would have been a first degree felony.

(ii) Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d)(i) If the violation is of Subsection (4)(a)(xi):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not

concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to any person who, acting with the mental state required for the commission of an offense, directly or indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(xi).

(e) It is not a defense to a prosecution under this Subsection (4) that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6) For purposes of penalty enhancement under Subsections (1)(b) and (2)(c), a plea of guilty or no contest to a violation of this section which is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

(7) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

(8)(a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(10) This section does not prohibit a veterinarian, in good faith and in the course of the veterinarian's professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under the veterinarian's direction and supervision.

(11) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under this chapter who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or

research; or

(b) any law enforcement officer acting in the course and legitimate scope of the officer's employment.

(12)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Subsection 58-37-2(1)(v), who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Subsection 58-37-2(1)(w).

(b) In a prosecution alleging violation of this section regarding peyote as defined in Subsection 58-37-4(2)(a)(iii)(V), it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c)(i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (12) as soon as practicable, but not later than 10 days prior to trial.

(ii) The notice shall include the specific claims of the affirmative defense.

(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(d) The defendant shall establish the affirmative defense under this Subsection (12) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(13)(a) It is an affirmative defense that the person produced, possessed, or administered a controlled substance listed in Section 58-37-4.2 if the person:

(i) was engaged in medical research; and

(ii) was a holder of a valid license to possess controlled substances under Section 58-37-6.

(b) It is not a defense under Subsection (13)(a) that the person prescribed or dispensed a controlled substance listed in Section 58-37-4.2.

(14) It is an affirmative defense that the person possessed, in the person's body, a controlled substance listed in Section 58-37-4.2 if:

(a) the person was the subject of medical research conducted by a holder of a valid license to possess controlled substances under Section 58-37-6; and

(b) the substance was administered to the person by the medical researcher.

(15) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

(16) A legislative body of a political subdivision may not enact an ordinance that is less restrictive than any provision of this chapter.

## **Utah R. Evid. 401**

### **Rule 401. Test for Relevant Evidence**

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

## **Utah R. Evid. 402**

### **Rule 402. General Admissibility of Relevant Evidence**

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Utah Constitution;
- a statute; or
- rules applicable in courts of this state.

Irrelevant evidence is not admissible.

## Utah R. Evid. 403

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

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

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

#### ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also *Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977)(surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

## Utah R. Evid. 404

### **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

Advisory Committee Note B Rule 404 is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of *State v. Doporto*, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

Tab C



INSTRUCTION NO. 40

**Stipulation of Fact**

When lawyers agree that certain facts are true it is called a "stipulation of fact." You must accept any stipulated facts as having been proven. However, the significance of these facts, as with all facts, is for you to decide.

INSTRUCTION NO. 41

**Elements**

The defendant, THOMAS J. VU, is charged in count I of the information that on or about May 8, 2014, he committed the offense of Purchase, Transfer, Possession or Use of a Firearm by a Restricted Person. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That the defendant, THOMAS J. VU,
2. did, then being a Category I restricted person,
3. intentionally, or knowingly agree, consent, offer or arrange to purchase, transfer, posses, use or have under the person's custody or control, or;
4. intentionally or knowingly purchased, transferred, possessed, used or had under the person's custody or control,
5. any firearm.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

Element 2 is a stipulation of fact. Refer to instruction no. 40