No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTOINE WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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963 F.3d 309
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff – Appellee,
v.
Alexander CAMPBELL, a/k/a Munch, Defendant – Appellant.
United States of America, Plaintiff – Appellee,
v.
Antonio Shropshire, a/k/a Brill, a/k/a B, a/k/a Tony, Defendant – Appellant.
United States of America, Plaintiff – Appellee,
v.
Glen Kyle Wells, a/k/a Lou, a/k/a Kyle, Defendant – Appellant.
United States of America, Plaintiff – Appellee,
v.
Antoine Washington, a/k/a Twan, Defendant – Appellant.

No. 18-4130, No. 18-4135, No. 18-4148, No. 18-4249
|
Argued: October 31, 2019
|
Decided: June 24, 2020

Synopsis

Background: Defendants were convicted in the United States District Court for the District of Maryland, Catherine C. Blake, J., of participating in heroin-distribution conspiracy and related substantive drug distribution offenses. Defendants appealed.

Holdings: The Court of Appeals, Richardson, Circuit Judge, held that:

expert testimony on victim's cause of death was helpful to jury;

district court did not abuse its discretion by rejecting defendant's proposed jury instructions to expand on but-for causation standard;

evidence of home-invasion robbery was not other-acts evidence;

district court did not abuse its discretion by denying defendant's motion to sever his trial from co-defendant's; and

district court did not abuse its discretion by denying defendant's motion for mistrial.

Affirmed.

***312** Appeals from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (1:16-cr-00051-CCB-2; 1:16-cr-00051-CCB-3; 1:16-cr-00051-CCB-5; 1:16-cr-00051-CCB-1)

Attorneys and Law Firms

ARGUED: David W. Fischer, Sr., LAW OFFICES OF FISCHER & PUTZI, PA, Glen Burnie, Maryland; Richard S. Stolker, UPTOWN LAW LLC, Rockville, Maryland; Jonathan Alan Gladstone, Annapolis, Maryland; Megan Elizabeth Coleman, MARCUSBONSIB, LLC, Greenbelt, Maryland, for Appellants. Leo Joseph Wise, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. ON BRIEF: Robert K. Hur, United States Attorney, Derek E. Hines, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

Before KEENAN, FLOYD, and RICHARDSON, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Keenan and Judge Floyd joined.

RICHARDSON, Circuit Judge:

A jury convicted Defendants Alexander Campbell, Antonio Shropshire, Glen Kyle Wells, and Antoine Washington of participating in a heroin-distribution conspiracy and related substantive-drug-distribution offenses. Among the Defendants with substantive charges, Washington was convicted of distributing heroin that resulted in the death of a young woman. The Defendants each argue that the district court erred in a host of ways. But finding no error, we affirm.

I. Factual background

On December 28, 2011, a nineteen-year-old woman, J.L., died from a heroin overdose. Throughout the day before, J.L. and her acquaintance, Kenneth Diggins, injected themselves with the drug. At some point, Diggins passed out. When he regained consciousness around 4 a.m., he noticed the color had drained from J.L.'s face. Although Diggins called 911, she was beyond saving.

J.L. and Diggins had bought their heroin from Antoine Washington. This was not Washington's first time selling heroin—nor was it his last. After J.L.'s death, Diggins continued to buy heroin, through a friend of his, from Washington. After a few ***313** months, Diggins resumed business directly with Washington. And just a year after J.L.'s death, Washington marketed the quality of the heroin he was selling by touting yet another recent overdose: "[S]omebody OD'd yesterday, and shit was crazy. That's how good the shit is I got. So hit me up." J.A. 931. That same week, Diggins himself overdosed and was hospitalized—only then did he stop purchasing heroin from Washington.

Washington's dealings with J.L. and Diggins were only a small part of a much larger drug business. Alongside Alexander Campbell, Antonio Shropshire, Glen Kyle Wells, and others, Washington sold heroin in and around Baltimore, from at least 2010 until 2016, when law enforcement broke up the operation. The Defendants worked together to sell heroin, sharing phones, sources, and customers.

Maryland and federal law enforcement jointly exposed the Defendants' heroin ring and obtained a multi-count federal indictment. During a three-week trial, the Defendants' customers testified about their purchases, the government played recorded calls arranging drug deals and discussing the Defendants' business, and an undercover officer described a controlled buy. The jury also learned that the heroin ring was aided by a now-former Baltimore City Police Officer, Momodu Gondo. Having already pleaded guilty to participating in the drug conspiracy, Gondo testified that he abused his office to help his co-conspirators evade the police. He also described a home-invasion robbery of another drug dealer that he committed at Washington's request. Gondo carried out this robbery alongside Wells and another former police officer, Jemell Rayam (who also testified). They stole money, jewelry, and heroin—most of which Wells sold—and split the spoils with Washington.

After hearing this evidence (and much more), the jury convicted the Defendants. The district court sentenced Washington to 264 months' imprisonment, Shropshire to 300 months' imprisonment, and both Campbell and Wells to 188 months' imprisonment.

II. Analysis

The Defendants individually raise a total of six challenges to their convictions. We reject each and affirm.

A. Expert medical testimony

Washington argues the district court erred by admitting expert testimony on J.L.'s cause of death over his objection. According to Washington, Dr. Southall's statements were inadmissible because they were testimony about an "ultimate issue"—the cause of J.L.'s death—and were not helpful to the jury. *See* Fed. R. Evid. 702, 704(a). First, Dr. Southall testified that "[t]he cause of [J.L.'s] death was heroin intoxication." J.A. 1038. The prosecution then asked, "*but for* the heroin J.L. took, would she have lived?" *Id.* (emphasis added). And the doctor answered, "Yes." *Id*. We review the district court's decision to permit this testimony for abuse of discretion and find none here. *See United States v. Landersman*, 886 F.3d 393, 411 (4th Cir. 2018).

To begin with, we note that expert testimony addressing an ultimate issue is no longer categorically inadmissible. Although the common law barred such testimony, "Rule 704(a) was designed specifically to abolish the 'ultimate issue' rule." *United States v. Barile*, 286 F.3d 749, 759 (4th Cir. 2002). Rule 704(a) provides that otherwise admissible opinion testimony "is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). But while Rule 704(a) removes a common-law ground for *excluding* testimony, it says ***314** nothing about whether an expert opinion *should be admitted* in the first place. *See Barile*, 286 F.3d at 759. For that, courts must look to Rule 702.

To analyze Washington's objection, we start with the text of Rule 702, which provides for the admission of expert witness testimony if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Referring to subsection (a), our Court has explained that whether testimony "assist[s] the trier of fact" is the "touchstone" of Rule 702. *Friendship Heights Associates v. Vlastimil Koubek, A.I.A.*, 785 F.2d 1154, 1159 (4th Cir. 1986) (internal quotations and citation omitted). And if not helpful to the jury's understanding, an expert's opinion is inadmissible. *Kopf v. Skyrm*, 993 F.2d 374, 377–78 (4th Cir. 1993). Washington focuses his argument on this helpfulness requirement of Rule 702.[1]

[1] We note that, even if an expert witness's opinion is admissible under Rule 702, Rule 403 permits the district court to exclude relevant opinion testimony "if its probative value is substantially outweighed by a danger of ... unfair prejudice." While Washington suggested to the district court that the doctor's testimony was "highly prejudicial," he neither explained to the district court why it was "unfairly" so nor why any "unfair prejudice *substantially* outweigh[ed]" the testimony's probative value. *See United States v. Siegel*, 536 F.3d 306, 319 (4th Cir. 2008). In any event, Washington does not rely on Rule 403 on appeal.

Washington argues that, because Dr. Southall testified about the "but-for cause" of death using the same but-for language as the jury instructions, Dr. Southall's opinion was an unhelpful legal conclusion. And we have recognized that "[e]xpert testimony that merely states a legal conclusion is less likely to assist the jury in its determination." *Barile*, 286 F.3d at 760; *see also United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006) (noting that opinion testimony that states a legal standard or draws a legal conclusion is "generally inadmissible"). But this guidance on whether a legal conclusion is "likely to assist" is necessarily general: "The line between a permissible opinion on an ultimate issue and an impermissible legal conclusion is not always easy to discern." *McIver*, 470 F.3d at 562. And drawing that line requires a case-specific inquiry of the charges, the testimony, and the context in which it was made.

In appropriate circumstances, an expert may offer an opinion that applies the facts to a legal standard. And applying medical expertise to form an opinion on the cause of death is often the type of specialized knowledge that can help a jury. *See, e.g.*, *United States v. Chikvashvili*, 859 F.3d 285, 292–94 (4th Cir. 2017) (affirming the admission of a doctor's "expert opinion on causation" of death); *United States v. Alvarado*, 816 F.3d 242, 246 (4th Cir. 2016) (affirming the district court's admission of an expert witness' testimony that "without the heroin, [Thomas] doesn't die"); *United States v. Krieger*, 628 F.3d 857, 870–71 (7th Cir. 2010) (affirming "death results" conviction based on expert testimony identifying which drug, out of multiple, was the but-for cause of death); *see also* ***315** *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices & Products Liability Litigation (No II) MDL 2502*, 892 F.3d 624, 646–47 (4th Cir. 2018) (discussing the frequent need for expert testimony to establish that a drug was the cause of death). Indeed, medical testimony about drug toxicity in the body and a cause of death as determined during an autopsy are generally well beyond the jury's common knowledge.

As a result, Washington argues that Dr. Southall's testimony was impermissible because she embraced the legal term of art "but-for." Indeed, difficult questions often emerge when the expert's opinion relies on terms with "separate, distinct and specialized meaning in the law different from that present in the vernacular." *Barile*, 286 F.3d at 760 (cleaned up); *see also United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011) (recognizing that expert testimony giving a legal conclusion was properly admitted given the technical legal issues involved with federal securities laws).

But we need not address those questions here because, contrary to Washington's assertion, Dr. Southall's opinion that heroin caused J.L.'s death employed commonly used vernacular. *See* J.A. 1038 (testifying that "[t]he cause of death was heroin intoxication" and answering "Yes" in response to counsel's question "[B]ut for the heroin J.L took, would she have lived?"). As the Supreme Court has explained, the "but-for requirement is part of the common understanding of cause." *Burrage v. United States*, 571 U.S. 204, 211, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). That phrase, like "results from," is a common way to express "that one event is the outcome or consequence of another." *Id.* at 212, 134 S.Ct. 881. To

illustrate the point, the Supreme Court turned to America's pastime: If a team wins 1-0 after a batter hits a home run, then "every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. ... [I]t is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter." *Id.* at 211–12, 134 S.Ct. 881.

The commonly understood meaning of "but for" and "results from" do not diverge from their legal meaning. So we have no trouble finding that the jury would understand those terms and that the expert could apply the facts to that understanding. The district judge thus acted well within its discretion in permitting the doctor to testify that "[t]he cause of death was heroin intoxication" and that "but for the heroin J.L took [she would] have lived." J.A. 1038.

B. Jury instructions

Washington also challenges the jury instructions that described the government's burden of proof for the offense of distributing heroin resulting in death. As with the district court's evidentiary rulings, we review the district court's decision to reject a proposed jury instruction for abuse of discretion. *United States v. Sonmez*, 777 F.3d 684, 688 (4th Cir. 2015). In this circumstance, we will find an abuse of discretion only if the proffered instruction was:

(1) A correct statement of the law;

(2) Not substantially covered by the instructions given by the district court; and

(3) Involved some point so important that the failure to give the instruction seriously impaired the defendant's defense.

United States v. Hager, 721 F.3d 167, 184 (4th Cir. 2013). And even if these factors are satisfied, we will not find reversible error unless the defendant can show that the entire record shows prejudice. *Id.*

***316** Washington requested three special jury instructions to expand on the but-for causation standard: (1) that if there were "multiple sufficient causes independently, but concurrently, that could have" caused the death, then the jury must be convinced that "but for heroin" J.L. would not have died; (2) that it was the government's burden to show that there were no "other concurring sufficient causes" beyond the heroin; and (3) that the government must prove the heroin was not "merely a contributing or a significant" factor in J.L.'s death. J.A. 1505. The district court already included instructions that the government had to prove that "but for the use of the drugs" J.L. would not have died and that "in the absence of the heroin" she would not have died. J.A. 1549–50.

Washington claims his proposed instructions are required by the Supreme Court's decision in *Burrage*. Not so. Though *Burrage* held that but-for causation was generally required to prove that death resulted, the Supreme Court acknowledged that but-for causation might *not* be required in the special circumstance where evidence establishes that multiple sufficient causes independently, but concurrently, caused death. 571 U.S. at 214, 134 S.Ct. 881. To illustrate, the Court described a victim who was simultaneously stabbed and shot by different assailants. *Id.* at 215, 134 S.Ct. 881. In that situation, the conduct of neither the stabber nor the shooter was the but-for cause of the victim's death. *Id.* Even so, the stabber would generally be liable for homicide. *Id.* Although the Supreme Court determined that this special circumstance did not apply in Burrage's case, it made clear that the special circumstance would permit a jury to find causation when two sufficient causes independently and concurrently caused death. *Id.* at 214–15, 134 S.Ct. 881.

Washington's first two proposed instructions seek to turn this special rule on its head. For example, his second proposed instruction suggests that, where two sufficient causes independently and concurrently cause death, a jury could *not* find causation is established: "It is the government's burden to prove beyond a reasonable doubt that there were not other concurring sufficient causes." J.A. 1505. But this misreads *Burrage*. The special rule identified by *Burrage* would only lessen the government's burden, permitting a finding of causation absent but-for cause where multiple, independent causes concurrently cause death. *See Burrage*, 571 U.S. at 218–19, 134 S.Ct. 881. Yet the government here did not seek such an instruction nor did the jury instructions give the government the benefit of this special rule. *Compare id.* at 211, 134 S.Ct. 881 (explaining that but-for causation is established "if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back"), *with* J.A. 1550 ("The Government is not required to prove that the drugs distributed by the defendant to J.L. did not combine with other factors to produce death *so long as the other factors alone would not have done so*.") (emphasis added).

The district court's instructions made clear that the government had to prove that "but for the use of the drugs that the defendant distributed, J.L. would not have died." J.A. 1550. To the extent that Washington sought to reiterate that the heroin must be the but-for cause in his somewhat confusing proposed instructions, the district court's instructions more than adequately addressed that central idea. *See United States v. Savage*, 885 F.3d 212, 223 (4th Cir. 2018) (finding no abuse of discretion where the instructions given "substantially covered [the defendant's] requested ***317** instruction"). So we find the district court acted within its discretion in rejecting Washington's proposed instructions.

C. The home-invasion robbery

We turn next to Wells's claim that the district court should have excluded evidence of a home-invasion robbery. We also review that ruling for an abuse of discretion. *United States v. Basham*, 561 F.3d 302, 325–26 (4th Cir. 2009).[2]

2 While Washington also raises this claim on appeal, it does not appear that he objected before the district court. We need not separately address plain error review for Washington on this claim because we find that the evidence was properly admitted.

Wells argues that evidence of the home-invasion robbery was impermissible propensity evidence. We disagree. Federal Rule of Evidence 404(b) bars the admission of "[e]vidence of a crime, wrong, or other act" to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1); *see also United States v. Lespier*, 725 F.3d 437, 448 (4th Cir. 2013). Rule 404(b) is limited to evidence of *other* crimes or wrongs—not evidence of the charged offenses. *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007) ("Rule 404(b) only applies, however, to evidence relating to acts extrinsic to the conduct being prosecuted."). As a result, acts committed in furtherance of a charged conspiracy are not "other acts" evidence governed by Rule 404(b). *See United States v. Palacios*, 677 F.3d 234, 244–45 (4th Cir. 2012) (holding that a robbery and firing of a gun were "acts committed in furtherance of the conspiracy" and not "prior bad acts" governed by Rule 404(b)); *see also United States v. Lipford*, 203 F.3d 259, 269 (4th Cir. 2000) (holding that evidence of a shooting was relevant to the charged drug conspiracy and not limited by Rule 404(b)).

The robbery here was committed in furtherance of the charged conspiracy, so evidence of that robbery was not limited by Rule 404(b). At Washington's instigation, Wells joined with Officers Gondo and Rayam to rob a known drug dealer, Aaron Anderson, who had sold Washington heroin since 2010. Wells and Rayam went into Anderson's apartment while Gondo served as a look-out. Wells and Rayam left with around 800 grams of heroin, money, jewelry, and a firearm. Wells then sold much of the stolen heroin. And Gondo, Rayam, and Wells all split the money and gave Washington his cut.

In response, Wells contends that the home invasion was an entirely separate conspiracy. He characterizes the robbery as a "freelance" operation whose target objective was to steal cash, not drugs. Appellants' Br. 67. But the robbery of a drug dealer by members of an active drug conspiracy—who then sell the stolen heroin and split the proceeds—is evidence of the charged drug conspiracy. *Cf. United States v. Kennedy*, 32 F.3d 876, 884 (4th Cir. 1994) (holding that a multiple conspiracy instruction is not required unless the evidence shows that the defendants were involved only in "separate conspiracies *unrelated* to the overall conspiracy charged in the indictment") (internal quotations and citation omitted). And this 2015 robbery occurred *during* the charged drug conspiracy. *See Cooper*, 482 F.3d at 663 (citing *Kennedy*, 32 F.3d at 885).

Because evidence of the robbery was evidence of the drug conspiracy, it does not fall within the scope of Rule 404(b). And so the evidence of the home-invasion robbery was properly admitted by the district court.[3]

3 We note that the briefing in the district court on this issue was filed under seal. We cannot divine precisely why this material was sealed, or even if the district court granted the motion to seal this material. Given the heavy burden to seal criminal filings, *see Doe v. Public Citizen*, 749 F.3d 246, 265–69 (4th Cir. 2014), we direct the unredacted briefing and Volume V of the Joint Appendix be unsealed thirty days after this opinion is issued. If a valid justification remains for sealing—perhaps for J.A. 1808–09—we invite the parties to file a motion addressing the issue within the thirty-day period.

***318** D. Joinder and severance

Another Defendant, Shropshire, challenges the district court's denial of his motion to sever his trial from Washington's. Shropshire contends that, since Washington was the only Defendant charged with distribution of heroin resulting in death, Shropshire should have been tried separately because

evidence about J.L.'s death infected the jury's determination of his guilt.

Whether defendants are properly joined under Rule 8 of the Federal Rules of Criminal Procedure is a legal question we review de novo. *United States v. Mackins*, 315 F.3d 399, 412 (4th Cir. 2003). If defendants are improperly joined, severance is "mandatory and not a matter of discretion within the trial court." *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978). But if joinder is proper under Rule 8, we review a district court's discretionary severance decision under Rule 14 for abuse of discretion. *United States v. Montgomery*, 262 F.3d 233, 244 (4th Cir. 2001).

Under Rule 8(b), defendants may be joined when they "are alleged to have participated in the same act or transaction, or in the same series of acts or transactions." This requirement is satisfied here. These Defendants were all charged with participating in a drug conspiracy and with substantive counts arising from that same conspiracy. As alleged co-conspirators, Washington and Shropshire were properly indicted together, even though they were charged with separate substantive drug offenses. *See Santoni*, 585 F.2d at 673–74; *see also* Fed. R. Crim. P. 8(b) ("[D]efendants *may* be charged in one or more counts together or separately"; they "need not be charged in each count.") (emphasis added).

Even so, Rule 14(a) gives district courts the discretion to sever properly joined defendants where actual prejudice would result from a joint trial. *See* Fed. R. Crim. P. 14(a). But generally "we adhere to the rule that defendants charged with participation in the same conspiracy are to be tried jointly." *United States v. Akinkoye*, 185 F.3d 192, 197 (4th Cir. 1999). And the mere fact that evidence against one or more co-conspirator is stronger or more inflammatory than the evidence against others does not necessarily require severance. *See United States v. Hall*, 93 F.3d 126, 131–32 (4th Cir. 1996) (rejecting defendant's argument that severance was required where a co-defendant co-conspirator was charged with murder because it may have inflamed the passions of the jury), *abrogated on other grounds by Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). Indeed, a conspirator is liable for all acts and all declarations in furtherance of the conspiracy. *See, e.g.*, *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 393, 68 S.Ct. 525, 92 L.Ed. 746 (1948). Rather, severance under Rule 14(a) is limited to those "rare" cases in which "there is a serious risk" that joinder would compromise a specific trial right or "prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Blair*, 661 F.3d 755, 768 (4th Cir. 2011) (internal quotations and citation omitted). And the defendant bears the "burden of ***319** demonstrating a strong showing of prejudice." *United States v. Goldman*, 750 F.2d 1221, 1225 (4th Cir. 1984).

Shropshire claims that the emotionally charged nature of Washington's heroin distribution that led to J.L.'s death rendered the jury unable to compartmentalize that offense and Shropshire's own drug charges. The evidence showed that Shopshire and Washington conspired with others to distribute heroin from 2010 through 2017. And the indictment charged that one overt act of the conspiracy was Washington's heroin distribution in December 2011 that caused J.L.'s death. Along with conspiracy, the indictment charged Washington individually with the substantive offense of distributing heroin resulting in death.[4]

4 While the government might have charged Washington's co-Defendants with conspiracy to distribute heroin resulting in death, the government only charged Washington with the substantive offense, which imposes a longer statutory minimum period of imprisonment "if death or serious bodily injury results." 21 U.S.C. § 841(b)(1)(C).

We find the district court acted well within its discretion in denying the motion for a severance. The district court found that much of the evidence would be admissible in separate trials, "greatly diminish[ing]" any prejudice. J.A. 102 (citing *United States v. Cole*, 857 F.2d 971, 974 (4th Cir. 1988)). Additional mitigating factors were readily apparent from the record: the evidence at trial surrounding J.L.'s death only mentioned Washington, and each Defendant engaged in the same general conduct—distributing heroin—though Washington's distribution to J.L. led to more severe consequences. And any concerns of prejudicial spillover were also mitigated by the district court's explicit instruction that the jury must consider each Defendant and each count separately, while also emphasizing that it would be improper to permit the jury's feelings about the nature of the crimes to interfere with the decision-making process. *See Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) ("[L]ess drastic measures [than severance], such as limiting instructions, often will suffice to cure any risk of prejudice."); *see also Blair*, 661 F.3d at 769–70 (noting that cautionary language "substantially mitigated ... any possible spillover of prejudicial evidence") (internal quotations and citation omitted).

Rule 14 leaves the risk-of-prejudice determination to the sound discretion of the district court. Because Shropshire fails to show that clear prejudice resulted from the joint trial, we conclude that the district court did not abuse its discretion.

E. Ineffective assistance of counsel

Shropshire also seeks to raise an ineffective-assistance-of-counsel claim. He contends that his counsel failed to protect his Sixth Amendment rights after documents were allegedly taken during a search of his jail cell. As Shropshire concedes in his brief, however, "[t]he matter of the removed documents remained unresolved and was never again discussed, evaluated[,] or questioned during the trial. ... [T]he issue never was considered, much less resolved, by the trial court." Appellants' Br. 79–80. Since this record fails to "conclusively" show ineffective assistance, we decline to address it. *United States v. Faulls*, 821 F.3d 502, 507 (4th Cir. 2016); *see also United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997).

F. Mug shots

Lastly, another Defendant, Campbell, contends that the district court abused its discretion in denying his motion for a mistrial after mug shots were displayed ***320** to the jury. A "denial of a defendant's motion for a mistrial is within the sound discretion of the district court." *United States v. Dorlouis*, 107 F.3d 248, 257 (4th Cir. 1997). As a reviewing court, we disrupt this discretion "only under the most extraordinary of circumstances." *Id.* "[I]f the jury could make [the] guilt determination[ ] by following the court's cautionary instructions" as to the potentially prejudicial material, then "no prejudice exists." *United States v. Wallace*, 515 F.3d 327, 330 (4th Cir. 2008) (cleaned up).

During trial, Campbell's counsel suggested through questioning that a witness misidentified Campbell "as a black male with short dreads." J.A. 485. Campbell's counsel then pressed the witness to confirm that the witness had not encountered Campbell with short dreads. On redirect, the government tried to show arrest photos from during the conspiracy that showed Campbell with dreadlocks. *See United States v. Johnson*, 495 F.2d 378, 384 (4th Cir. 1974). After the page was displayed for no more than three or four seconds, Campbell's counsel objected, and the exhibit was taken down. At sidebar, the district court agreed to exclude the photographs but refused to grant a mistrial because the images were not displayed long enough for anyone to draw any prejudicial inference about Campbell. The district court then instructed the jury to "completely disregard" the images. J.A. 547.

Given the limited time the photographs were displayed and the steps taken by the district court, we find that the court acted within its discretion in denying the motion for a mistrial after mitigating any risk of prejudice with a cautionary instruction.

* * *

Despite the many claims of error, we find that the district court admirably handled this case. For the reasons given above, the judgment of the district court is

AFFIRMED.

All Citations

963 F.3d 309, 112 Fed. R. Evid. Serv. 1520

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FILED: July 22, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4249
(1:16-cr-00051-CCB-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ANTOINE WASHINGTON, a/k/a Twan

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

going to ask you to do the same thing. But what did you rely on in this report to conclude that heroin intoxication was the cause of J.L.'s death?

A. The morphine in combination with metabolite in the urine, 6-Monoacetylmorphine.

Q. And what does the -- what does that combination tell you?

A. That combination tells me that it's heroin in her body.

Q. And how does the results from your autopsy and this toxicology report lead you to conclude or how did it lead you to conclude that the cause of death for J.L. was heroin intoxication?

A. The presence of heroin in her body, in her bloodstream in the absence of any other finding, any other cause of death.

Q. And what would -- would the other finding have been in the absence of trauma or natural diseases, the -- what you said you didn't find in the autopsy?

A. Correct.

Q. So is it your opinion, Dr. Southall, that the but-for cause of J.L.'s death was heroin?

MR. BONSIB: Objection. May we approach?

THE COURT: Do you want to come up? All right.

(Bench conference on the record:

MR. BONSIB: Your Honor, Mr. Wise is using the specific term that is found in the jury instructions and in the case law that has legal-conclusion significance.

The test -- the instructions will say in some measure that the jury has got to find a but-for.

This witness can testify as to the cause of death in her opinion; but to put the language of the jury instructions and the legal conclusion in that question I believe is highly prejudicial, not necessary, and seeks to have this witness opine as to the ultimate issue as to whether or not the heroin in this case is, as the instruction -- proposed instructions, anyhow, says was the but-for cause of death. I don't know what "but-for" means in terms of a Medical Examiner. I know what it means in terms of what the Government's going to try to say a proper jury instruction is.

MR. WISE: Your Honor, the Supreme Court in Burrage specifically said that a Medical Examiner has to testify that the cause of death was -- that the substance charged was the but-for cause of death.

The ultimate issue is whether the defendant distributed the heroin, but, I mean, the Supreme Court's opinion requires that.

MR. BONSIB: I think it requires proof of that. It doesn't permit the Medical Examiner to use that language, I don't think.

THE COURT: Well, what's your authority for not permitting the Medical Examiner to use that phrase?

MR. BONSIB: Because it's basically asking her to

opine on a legal conclusion. She can say what the cause of death is and there's other ways of getting her to opine without using that language.

MR. WISE: She testified she's a forensic pathologist, which where they specifically come into court and they testify that things are homicides; they're suicides. Those all have legal implications.

That's what the field of forensic -- that may not be the precise section that I highlighted, Your Honor, but this is the -- the issue that was before the Supreme Court in Burrage is whether Medical Examiners had to testify that the charged substance was the but-for cause or proximate cause or whether they could testify it was a contributing factor alone in combination with other substances or alcohol.

And the Supreme Court said they specifically had to find that it was the but-for cause or the proximate cause.

THE COURT: Apparently they were looking for an expert who was prepared to say that the person would have died from the heroin use alone.

MR. WISE: And the other way -- the other way that I'm going to ask this is: Would J.L. have lived if not for the heroin?

And that's the other way the Supreme Court talks about the legal standard that we have to meet and what the expert has to testify to.

THE COURT: Okay. I'm going to overrule the objection. You may ask the question.

MR. WISE: Thank you, Your Honor.)

(Bench conference concluded.)

BY MR. WISE:

Q. Dr. Southall, I'll ask my question again because you probably don't remember it at this point.

What was the but-for cause of J.L.'s death?

A. The cause of death was heroin intoxication.

Q. And put another way, but for the heroin J.L. took, would she have lived?

A. Yes. My opinion is yes.

Q. And, Dr. Southall, what is heroin intoxication?

A. Heroin intoxication is basically narcotic intoxication. It -- heroin in particular, any narcotic will cause an extreme respiratory depression where a person will slow down, become lethargic, become sleepy. Sometimes they're described as snoring to the point where everything slows down. The heart rate and the breathing slow down to the point where they don't get enough oxygen, pass out, and subsequently die.

MR. WISE: Nothing further, Your Honor.

THE COURT: Okay. All right, Mr. Bonsib.

CROSS-EXAMINATION

BY MR. BONSIB:

Q. Good afternoon, Doctor. How are you?

instruction does not do that.

So for -- so in summary, we reject -- we object to the inclusion of the portion in the instructions that we noted and are asking the Court to include the additional three instructions that we have requested for the reasons stated.

We also, specifically with respect to Number 3 in our requested instructions, believe it is important that the jury be told that the -- they be told that the heroin, if they find the heroin was simply a contributing or significant factor in producing the death of J.L., that that is not sufficient and the Government must prove beyond a reasonable doubt that it was something more than merely a contributing or significant factor.

Thank you, Your Honor.

THE COURT: Okay. Does the Government -- do you have anything you want to put on the record regarding that?

MR. WISE: We filed our motion on this instruction. We believe the instruction the Court is giving is an accurate state of the law. We believe the instruction the defense has submitted does not accurately reflect the law, and so we are on totally separate pages.

THE COURT: All right. And I'm going to deny the request to give the additional three instructions proposed by Mr. Bonsib. I believe that in total, they are either inaccurate, confusing, or adequately covered by the instruction

that I am giving. The instruction I am giving is based on Burrage, B-U-R-R-A-G-E, and also on the Fourth Circuit's opinion in Alvarado, A-L-V-A-R-A-D-O, which, indeed, specifically uses the "straw that broke the camel's back" language.

In any event, I think that the instruction I've given is appropriate, particularly in light of statements and evidence relating to other possible contributing causes of J.L.'s death. I think this makes clear to the jury what the Government's burden is, which is to prove that the heroin was the but-for cause.

Okay. Anything else?

MR. HENSLEE: Your Honor, just for the record, I wanted to state that I did want to join in Mr. Bonsib's first motion that he made.

THE COURT: I joined you all in the first one.

MR. HENSLEE: Okay. Thank you.

THE COURT: I understood that to be the case from the conference in chambers.

Okay. Anything else?

MR. WISE: Can we have a couple minutes before, just to make sure the technology is working?

THE COURT: I'll take a break.

MR. WISE: Thank you, Your Honor.

THE COURT: Thanks.)

United States Code Annotated
Title 21. Food and Drugs (Refs & Annos)
Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)
Subchapter I. Control and Enforcement
Part D. Offenses and Penalties

21 U.S.C.A. § 841

§ 841. Prohibited acts A

Effective: December 21, 2018
Currentness

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of

at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definition

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other heath[1] professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally--

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of Title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally--

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(f) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections[2] 823(f) or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to--

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to--

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of Title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of Title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

CREDIT(S)

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2)(A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub.L. 104-237, Title II, § 206(a), Title III, § 302(a), Oct. 3, 1996, 110 Stat. 3103, 3105; Pub.L. 104-305, § 2(a), (b)(1), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(a), Oct. 21, 1998, 112 Stat. 2681-759; Pub.L. 106-172, §§ 3(b)(1), 5(b), 9, Feb. 18, 2000, 114 Stat. 9, 10, 13; Pub.L. 107-273, Div. B, Title III, § 3005(a), Title IV, § 4002(d)(2)(A), Nov. 2, 2002, 116 Stat. 1805, 1809; Pub.L. 109-177, Title VII, §§ 711(f)(1)(B), 732, Mar. 9, 2006, 120 Stat. 262, 270; Pub.L. 109-248, Title II, § 201, July 27, 2006, 120 Stat. 611; Pub.L. 110-425, § 3(e), (f), Oct. 15, 2008, 122 Stat. 4828, 4829; Pub.L. 111-220, §§ 2(a), 4(a), Aug. 3, 2010, 124 Stat. 2372; Pub.L. 115-391, Title IV, § 401(a)(2), Dec. 21, 2018, 132 Stat. 5220.)

Notes of Decisions (8146)

Footnotes

1 So in original. Probably should be “health”.

2 So in original. Probably should be “section”.

21 U.S.C.A. § 841, 21 USCA § 841

Current through P.L. 116-164. Some statute sections may be more current, see credits for details.

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