IN THE UTAH COURT OF APPEALS

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| Markell Harrison,<br><br>Petitioner and Appellant,<br><br>v.<br><br>Blake Nielson,<br><br>Respondent and Appellee. | MEMORANDUM DECISION<br>(Not For Official Publication)<br><br>Case No. 20070442-CA<br><br>F I L E D<br>(May 30, 2008)<br><br>2008 UT App 196 |

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Second District, Ogden Department, 060906781
The Honorable Pamela G. Heffernan

Attorneys: Markell Harrison, Draper, Appellant Pro Se
Mark L. Shurtleff, Brett J. DelPorto, and Christopher D. Ballard, Salt Lake City, for Appellee

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Before Judges Bench, Billings, and Orme.

BILLINGS, Judge:

Markell Harrison was convicted of one count of robbery, a second degree felony, see Utah Code Ann. §§ 76-3-203.1, 76-6-301 (2003), and one count of attempted burglary, a class A misdemeanor, see id. §§ 76-4-101, 76-6-202. Harrison appealed his convictions and this court affirmed. See State v. Harrison, 2005 UT App 525U, para. 1 (mem.). Harrison then filed a timely petition for post-conviction relief pursuant to the Utah Post-Conviction Remedies Act, see Utah Code Ann. § 78-35a-101 to -304 (2002 and Supp. 2007). The State filed a motion for summary judgment, which the post-conviction court granted. Harrison appeals.

Harrison raises claims that the trial court erred in granting summary judgment and that his counsel was ineffective at trial because counsel failed to move to suppress the police report. However, these claims are procedurally barred at this stage of the proceeding. Utah Code section 78-35a-106(1)(c) of the Post-Conviction Remedies Act states that "[a] person is not eligible for relief under this chapter upon any ground that . . . could have been but was not raised at trial or on appeal." Id. § 78-35a-106(1)(c). "'[I]ssues that could and should have been raised on direct appeal, but were not, may not properly be raised

in a habeas corpus proceeding, absent unusual circumstances.'" Carter v. Galetka, 2001 UT 96, ¶ 14, 44 P.3d 626 (quoting Gardner v. Holden, 888 P.2d 608, 613 (Utah 1994)); see also Cramer v. State, 2006 UT App 492, ¶ 9, 153 P.3d 782.

Harrison next asserts that he was denied the effective assistance of counsel on appeal. Harrison puts forth several arguments that were not raised by counsel that he insists would have been "dead-bang winners" on appeal. See generally Cramer, 2006 UT App 492, ¶ 10, ("To demonstrate that appellate counsel was ineffective, [Petitioner] must show that appellate counsel omitted a dead-bang winner. A dead-bang winner is an issue which is obvious from the trial record and one which probably would have resulted in reversal on appeal." (citation and internal quotation marks omitted)). Harrison directs us to an exchange at trial between the prosecutor and Detective Reaves. The prosecutor asked Detective Reaves if co-defendant Bailiwick Adolphus Rushing admitted to knowing any of the people in the case. Detective Reaves responded, "He did. Told me that at the house that night was a guy named Chicago." Harrison's counsel objected to this statement. The trial court sustained the objection and instructed the jury to disregard it. Harrison now argues that the prosecutor erred in asking the question, that the trial court's curative instructions did not cure the error, and that Harrison's appellate counsel erred by not appealing this issue. Harrison's argument before us fails because, even if it had been raised, it would not have been successful on appeal. See id. The statement in question is innocuous; Harrison had already admitted that he knew Rushing and that they were both at the laundromat. Thus, we conclude that there was no error by counsel in failing to raise the issue on appeal.

In sum, we affirm.

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Judith M. Billings, Judge

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WE CONCUR:

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Russell W. Bench, Judge

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Gregory K. Orme, Judge