

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20070844-CA
v.)	
)	F I L E D
Christopher Manuel R. Tapia,)	(October 30, 2008)
)	
Defendant and Appellant.)	2008 UT App 387

Second District, Ogden Department, 071900496
The Honorable Scott M. Hadley

Attorneys: Dee W. Smith, Ogden, for Appellant
 Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake
 City, for Appellee

Before Judges Bench, Davis, and Orme.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Because Defendant asserts both plain error and ineffective assistance of counsel, we apply a common standard of review. See State v. Litherland, 2000 UT 76, ¶ 31 n.14, 12 P.3d 92; State v. Ellifritz, 835 P.2d 170, 174 (Utah Ct. App. 1992). A common standard of review is appropriate since--under both his ineffective assistance of counsel and plain error arguments--Defendant must prove prejudice, i.e., that there is a reasonable probability that he would have received a more favorable outcome absent the malfeasance or error claimed. See Ellifritz, 835 P.2d at 174. Compare Strickland v. Washington, 466 U.S. 668, 694 (1984) (stating that under the prejudice prong of the ineffective assistance of counsel standard, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and defining reasonable probability as "a probability sufficient to undermine confidence in the outcome"),

with State v. Dunn, 850 P.2d 1201, 1208-09 (Utah 1993) ("[T]o establish the existence of plain error . . . the appellant must show . . . the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined."). See also State v. Knight, 734 P.2d 913, 920 & n.8 (Utah 1987) (indicating that the terms "reasonable probability" and "reasonable likelihood" are synonymous). "Because the defendant must show prejudice to prevail under either argument, the 'common standard' merely functions as an analytical shortcut that avoids treatment of the other prongs of the ineffective assistance and plain error standards," Litherland, 2000 UT 76, ¶ 31 n.14, and allows appellate courts to combine the prejudice analysis for both issues.

Defendant argues that when considering the totality of the circumstances, the prior bad act evidence was "highly prejudicial" because other evidence suggested that the victim and Defendant had "some type of relationship," that Defendant had previously had a key to the apartment, and that Defendant was only going to hold the items in question for his half-brother. He further contends that "the 'taint' caused by [the] inadmissible evidence" was not curable by other admissible evidence. Cf. State v. Mitchell, 779 P.2d 1116, 1121-22 (Utah 1989) (determining that the defendant was harmed when the trial court admitted hypnotically enhanced testimony, even though other evidence supported a first degree murder verdict, because there was a chance the jury would have returned a guilty verdict for a lesser offense if it had not considered the tainted evidence).

Defendant's arguments do not undermine our confidence in the verdict. See generally Strickland, 466 U.S. at 694; Dunn, 850 P.2d at 1208-09. At trial, the State asked the victim why she possessed a certain knife. The victim replied, "It was for protection from [Defendant]. I'll just leave it at that. Because of past instances[.]" As explained by the State, "[t]o also know that the victim felt she needed protection from [D]efendant adds nothing new or prejudicial to the jury's knowledge base." Other evidence indicated that the victim had "kicked" Defendant out of her home "a few times" and called the police complaining about Defendant on "numerous" occasions. From this evidence, the jury could easily infer that the victim felt she needed protection from Defendant to such an extent that she frequently called upon law enforcement to protect her from Defendant. Knowledge that she kept a knife on hand for the same general purpose adds little.

Moreover, there was overwhelming evidence that Defendant committed burglary. See Utah Code Ann. § 76-6-202(1)(b) (2003) ("An actor is guilty of burglary if he enters or remains

unlawfully in a building or any portion of a building with intent to commit . . . theft[.]); id. § 76-6-404 ("A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof."). The responding police officer testified that Defendant admitted he entered the victim's apartment without permission, and the victim also testified that Defendant entered her apartment without permission. The victim further testified that to prevent their dispute from escalating, she called the police to remove Defendant when he continued to remain despite her demands that he leave.

Additional evidence indicated that many of the items in question belonged to the victim, that the victim had a joint interest in the items with her fiancé, or that her fiancé left the items in her care while he was incarcerated. Finally, there was strong evidence that Defendant did not have authorization to take the items in question and that he intended to deprive the victim of the items, some of which he admitted to the officer belonged to the victim.

Affirmed.

Gregory K. Orme, Judge

WE CONCUR:

Russell W. Bench, Judge

James Z. Davis, Judge